
Newfoundland & Labrador

BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

**REASONS FOR DECISION:
ORDER NO. P. U. 8(2010)**

IN THE MATTER OF the *Electrical Power Control Act, 1994*, SNL 1994, Chapter E-5.1 and regulations thereunder;

AND IN THE MATTER OF an application by Nalcor Energy for an order to establish the terms of a water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited with respect to the Churchill River, Labrador.

BEFORE:

Andy Wells
Chair and Chief Executive Officer

Darlene Whalen, P.Eng.
Vice-Chair

Dwanda Newman, LL.B.
Commissioner

James Oxford
Commissioner

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1 **I. THE PROCEEDING**

2
3 **1. The Application**

4
5 Nalcor Energy (“Nalcor”) filed an application with the Board of Commissioners of Public Utilities
6 (the “Board”) on November 10, 2009 for an order of the Board establishing the terms of a water
7 management agreement between Nalcor and Churchill Falls (Labrador) Corporation Limited
8 (“CF(L)Co”) with respect to the Churchill River (the “Application”). The Application was filed in
9 accordance with section 5.5 of the *Electrical Power Control Act, 1994* (the “EPCA”) and sought an
10 order of the Board:

- 11
12 “a) *establishing the terms of a water management agreement pursuant to section 5.5 of the*
13 *EPCA;*
14
15 b) *such other or alternate orders or directions which may upon the hearing of this Application*
16 *appear just and reasonable in the circumstances.”*
17

18 In support of the Application Nalcor submitted a proposed water management agreement (the
19 “Agreement”) as well as pre-filed evidence.

20
21 Notice of the Application was published in newspapers throughout the Province and was given
22 directly beginning on November 21, 2009.

23
24 Pursuant to section 6 of the *Water Management Regulations, Newfoundland and Labrador*
25 *Regulation 4/09* under the *EPCA* (the “Regulations”), on December 10, 2009 CF(L)Co filed a
26 written submission proposing the same water management agreement as proposed by Nalcor. On
27 December 11, 2009 Nalcor also filed a written submission as required pursuant to section 6 of the
28 *Regulations*.

29
30 **2. Interventions**

31
32 On December 15, 2009 the Board received a letter from Hydro-Québec, a party to an existing power
33 contract with CF(L)Co, advising that it would not intervene in the Application.

34
35 On December 16, 2009 the Board received an intervenor submission from the Conseil des Innus de
36 Ekuanitshit (the “Innus of Ekuanitshit”) claiming the use of the air, lands, water, plant and animal
37 life of the territory which they say may be affected by the Agreement and seeking:

38
39 *“AN ORDER refusing to approve the agreement or, in the alternative, suspending Nalcor’s*
40 *application and setting aside for future examination the duty to consult and accommodate the Innu of*
41 *Ekuanitshit; and*

42
43 *AN ORDER*

44 *that on an interim basis and in any event of the cause, Nalcor pay all expenses incurred by the*
45 *Conseil des Innus de Ekuanitshit in connection with Nalcor’s application to the board, including costs*
46 *of counsel, engineers, valuers, stenographers, accountants and other experts or assistants retained*
47 *by or for the Conseil des Innus de Ekuanitshit in and about the inquiry; and*

1
2 *that Nalcor and the Conseil des Innus de Ekuanitshit are to attempt to agree on a procedure whereby,*
3 *upon incurring costs and disbursements from time to time up to the end of the inquiry, trial, the*
4 *intervenor will so advise the applicant and the applicant shall pay them within a given time-frame,*
5 *unless Nalcor objects, in which case it shall refer the matter to the Board."*
6

7 On December 17, 2009 the Board received an intervenor submission from Twin Falls Power
8 Corporation Limited ("TwinCo") stating that it could be an affected supplier and proposing limited
9 participation in the matter for the purpose of obtaining all documents and information filed in the
10 proceeding.

11
12 On December 22, 2009 the Board received an intervenor submission from the Innu of Uashat mak
13 Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band Council and certain traditional
14 families of the Uashat mak Mani-Utenam Innu (the "Uashaunnuat") claiming possession, occupation
15 and use of the territory and natural resources which they say may be affected by the proposed
16 Agreement and seeking:

17
18 *"AN ORDER refusing to establish the terms of a water management agreement, or in the alternative,*
19 *AN ORDER staying the proceedings in regard to the establishment of the terms of a water*
20 *management agreement pending meaningful consultation and accommodation of the Intervenors.*
21

22 *AN ORDER in any event of the cause that Nalcor Energy pay all the expenses incurred by the*
23 *Intervenors in connection with these proceedings.*
24

25 *If the Board of Commissioners of Public Utilities orders that all expenses of the Board of*
26 *Commissioners of Public Utilities in connection with these proceedings be paid by the parties, AN*
27 *ORDER that these expenses be paid by Nalcor Energy and Churchill Falls (Labrador) Corporation*
28 *Limited."*
29

30 On December 22, 2009 Nalcor requested that it be heard with respect to the requests for intervenor
31 status. On January 6, 2010 the Board received submissions from Nalcor and CF(L)Co each taking
32 the position that all three requests for intervenor status should be denied. On January 14, 2010 the
33 Board received replies from the Uashaunnuat and the Innus of Ekuanitshit. On January 22, 2010 the
34 Board issued Order No. P. U. 2(2010) granting intervenor status to the Uashaunnuat, the Innus of
35 Ekuanitshit and TwinCo.

36
37 On January 26, 2010 Nalcor filed a submission in relation to the claim for interim costs set out in the
38 intervenor submission of the Innus of Ekuanitshit. On January 26, 2010 CF(L)Co advised that it
39 would not be making submissions on the interim costs claim. On January 27, 2010 the Innus of
40 Ekuanitshit filed a reply. On January 29, 2010 the Board issued Order No. P. U. 5(2010) denying the
41 claim of the Innus of Ekuanitshit for interim costs.
42

43 On December 7, 2009 the Board received a letter from Hydro-Québec requesting that the Board
44 restrict public access to two documents filed by Nalcor with the Application, specifically: i) the
45 Guaranteed Winter Availability Contract between Hydro-Québec and CF(L)Co; and ii) the
46 Shareholders' Agreement between Newfoundland and Labrador Hydro, Hydro-Québec and CF(L)Co.
47 Hydro-Québec submitted that these documents are confidential in nature and contain information of

1 a commercial nature. On January 29, 2010 the Innus of Ekuanitshit filed a submission in relation to
2 Hydro-Québec's request. On January 29, 2010 Nalcor and CF(L)Co filed letters setting out no
3 objection to the Board considering the Guaranteed Winter Availability Contract and the
4 Shareholders' Agreement as confidential and not making them publicly available. On February 4,
5 2010 the Board issued Order No. P.U. 6(2010) placing the Guaranteed Winter Availability Contract
6 and the Shareholders' Agreement on the record as confidential documents with the terms and
7 conditions of the release of documents to be determined by the Board on a receipt of a request for
8 disclosure.

9
10 On February 10, 2010 the Innus of Ekuanitshit claimed confidentiality to two reports filed in
11 response to PUB-CIE-1. On February 12, 2010 the Uashaunnuat agreed that these reports should be
12 treated as confidential. On February 12, 2010 Nalcor asked for a copy of the two reports. On
13 February 15, 2010 the reports were released on an undertaking from counsel for Nalcor, with the
14 consent of the Innus of Ekuanitshit.

15
16 On February 15, 2010 the Uashaunnuat requested access to the Guaranteed Winter Availability
17 Contract and the Shareholder Agreement. On February 18, 2010 Hydro Québec filed comments in
18 relation to the request for the release of the documents. On February 22, 2010 the Uashaunnuat filed
19 a reply. On February 24, 2010 Hydro-Québec filed additional comments. On February 25, 2010 the
20 Board advised the parties that counsel for the Uashaunnuat could personally view the documents.

21 22 **3. Submissions and Hearing**

23
24 On February 12, 2010 the Uashaunnuat filed a request for an oral hearing in relation to the following
25 three issues:

26
27 *“Does the establishment of the Water Management Agreement or the management of water*
28 *thereunder trigger a duty to consult and accommodate the Intervenors?”*

29
30 *Does the Board of Commissioners of Public Utilities have the jurisdiction and obligation to decide*
31 *whether this duty to consult and accommodate has been triggered and whether this duty has been*
32 *discharged?*

33
34 *In all circumstances, and in any event, should the Board of Commissioner of Public Utilities order*
35 *Nalcor and CF(L)Co to consult and accommodate the Intervenors?”*

36
37 On February 12, 2010 the Innus of Ekuanitshit filed a motion requesting that the Board suspend the
38 Application until the Lower Churchill Hydroelectric Project is released pursuant to the
39 *Environmental Protection Act*, SNL 2002, c. E-14.2 and until there has been meaningful
40 consideration of the consultation issue. The Innus of Ekuanitshit gave notice to the Attorney General
41 of Canada and the Attorney General of Newfoundland and Labrador of an intention to raise a
42 constitutional question as to whether the duty of the Crown to consult Aboriginal peoples is engaged
43 and has been discharged. On February 18, 2010 the Board received correspondence from the
44 Department of Justice of the Province acknowledging receipt of the notice and advising that the
45 Attorney General of Newfoundland and Labrador would not be participating. On February 22, 2010
46 the Board received correspondence from the Federal Department of Justice advising that the
47 Attorney General of Canada would not be intervening.

1 On February 15, 2010 a technical conference was held supplementing the exchange of information
 2 through the Request for Information process. In all a total of 88 Requests for Information were asked
 3 and answered.

4
 5 On February 16, 2010 the Uashaunnuat filed an amended Interevenor Submission amending the
 6 relief sought as follows:

7
 8 *"An ORDER that the Crown meaningfully consult and accommodate the Intervenors in regard to the*
 9 *water management agreement or the management of water thereunder, and an ORDER that Nalcor*
 10 *and CF(L)Co. meaningfully consult and accommodate the Intervenors in regard to the water*
 11 *management agreement or the management of water thereunder;*

12
 13 *Or, in the further alternative, an Order establishing a term of the water management agreement that*
 14 *directs the Crown (1) to meaningfully consult and accommodate the Intervenors in regard to the*
 15 *water management agreement or the management of water thereunder and (2) to report back to the*
 16 *Board thereon; and an ORDER establishing a term of the water management agreement that directs*
 17 *Nalcor and CF(L)Co. (1) to meaningfully consult and accommodate the Intervenors in regard to the*
 18 *water management agreement or the management of water thereunder and (2) to report back to the*
 19 *Board thereon;"*

20
 21 On February 19, 2010 Nalcor, the Innus of Ekuanitshit, the Uashaunnuat, and counsel for the Board
 22 filed written submissions. On February 22, 2010 CF(L)Co filed written submissions. On February
 23 22, 2010 Nalcor filed a reply submission. On February 23, 2010 CF(L)Co advised that it would not
 24 file a reply submission.

25
 26 The Board set aside February 25, 2010 and February 26, 2010 for the hearing of the motion by the
 27 Innus of Ekuanitshit and the issues outlined by the Uashaunnuat. On February 25, 2010 the Board
 28 heard oral submissions from David Schulze for the Innus of Ekuanitshit, Gary Carot for the
 29 Uashaunnuat, Ian F. Kelly, Q.C. for Nalcor and Jamie Smith, Q.C. for CF(L)Co. The Board thanks
 30 counsel for the well prepared written and oral submissions which were very helpful in the
 31 preparation of this decision. TwinCo did not file written submissions or participate in oral
 32 submissions.

33 34 **II MOTION TO SUSPEND**

35
 36 On February 12, 2010, the Innus of Ekuanitshit filed a motion *"to suspend the proceedings to*
 37 *establish the terms of a water management agreement for the Churchill River."* The Innus of
 38 Ekuanitshit set out two grounds for the motion:

- 39
 40 "a. *Section 68 of the Environmental Protection Act, SNL 2002, c. E-14.2 prohibits the Public*
 41 *Utilities Board from determining the terms of the Water Management agreement until the*
 42 *Project is released under Part X of the said Act;*
 43 b. *The Board must suspend in order to meaningfully consider the issue of the constitutional duty*
 44 *of consultation that has been raised by Ekuanitshit and other Intervenors."*

45
 46 In the motion the Innus of Ekuanitshit argue that section 68 of the *Environmental Protection Act*
 47 prohibits the Board from establishing a water management agreement at this time. Section 68 of the

1 *Environmental Protection Act* says:

2
3 "68.(1) A licence, permit, approval or other document of authorization issued under another Act
4 pertaining to an undertaking shall not be issued until the undertaking has been exempted or released
5 under this Part."
6

7 In the motion the Innus of Ekuanitshit argue that, since the Lower Churchill Hydroelectric Project is
8 an "undertaking", section 68 prohibits the Board from approving a water management agreement
9 until the project has been released pursuant to Part X of the *Environmental Protection Act*. In
10 written submissions the Innus of Ekuanitshit argued that section 68 applies to the Application
11 because, pursuant to section 5.5 of the *EPCA*, the Board is "approving" the Agreement. The Innus of
12 Ekuanitshit state that the fact that Nalcor has submitted a ready-made agreement for the Board's
13 approval emphasizes that it is an approval process. (Written Submission, para. 59) It is suggested
14 that if the Application involved section 5.4 of the *EPCA* whereby the Board was asked to approve a
15 jointly proposed agreement, section 68 would prohibit approval. Therefore the Innus of Ekuanitshit
16 argue that to find that section 68 doesn't apply to an application under section 5.5 would subvert the
17 Legislature's intent to ensure that projects are subject to a complete and sufficient environmental
18 assessment before any government agencies allow an aspect of the project to move forward. The
19 Innus of Ekuanitshit cite section 4 of the *Environmental Protection Act* which states:

20
21 "4(1) Where there is a conflict between this Act and another Act, this Act prevails."
22

23 In oral submissions counsel for the Innus of Ekuanitshit said:

24
25 "Nalcor says, well, no, no, Mr. Schulze has misunderstood because it's not the Public Utilities Board
26 that will allow Lower Churchill to be built, and that I'm in perfect agreement with, but the Legislature
27 has said, "No approvals pertaining to an undertaking", and this approval that is before you today
28 pertains to Lower Churchill. It may not be the approval that is make or break for Lower Churchill,
29 but it pertains to it, and the *Environmental Protection Act* says not to go ahead in that case."
30 (Transcript, Feb. 25, 2010, pg. 12/13-24)
31

32 The Uashaunnuat did not make an argument in relation to section 68 of the *Environmental*
33 *Protection Act* and clarified in oral submissions that they take no position on this issue. (Transcript,
34 Feb. 25, 2010, pg. 138/7-10)
35

36 Nalcor argues in written submissions that the Board does not have the power to suspend the
37 Application and further that it is not necessary or appropriate in any event to suspend the
38 Application. Nalcor suggests that it is clear from the language of section 5.4 of the *EPCA* that a
39 water management agreement is required early in the development process. Nalcor states that the
40 fundamental principle of statutory interpretation is that statutory provisions should be given a
41 "purposive" interpretation that best achieves the objects of the legislation. Nalcor states that the
42 Board does not issue any licence, permit, approval or other document of authorization within the
43 meaning of section 68 of the *Environmental Protection Act*. Nalcor states that establishing the terms
44 of a water management agreement does not authorize the Lower Churchill Project. Nalcor argues
45 that approval of a water management agreement under section 5.5 of the *EPCA* is not a document of
46 authorization and, even if approved under section 5.4(3)(a) of the *EPCA*, is not an approval within

1 the meaning of section 68 of the *Environmental Protection Act*. Nalcor states that establishing the
2 water management agreement in advance of the hearing by the Joint Review Panel facilitates the
3 environmental assessment process. Ultimately Nalcor argues that the *EPCA* is intended to have
4 paramouncy over all other statutory provisions of general application and cites section 34 of the
5 *EPCA* which states:

6
7 *“34.(1) An Act or contract, whether enacted before or after the commencement of this Act relating to*
8 *a producer or retailer shall be read and construed subject in all respects to this Act, which in a case*
9 *of conflict shall, notwithstanding a provision to the contrary contained in another Act or contract,*
10 *prevail over a general or special Act enacted or a contract entered into prior to the commencement of*
11 *this Act.”*

12
13 Nalcor states in its reply submissions that it would potentially be prejudicial to all participants and
14 the environmental assessment process itself if the water management agreement was not established
15 prior to the environmental assessment hearings. In oral submissions Nalcor states:

16
17 *“This Board doesn’t do anything that authorizes the Lower Churchill Project. You are simply*
18 *establishing the terms of the Water Management Agreement, which in turn is going to be of utility, as*
19 *I’ll come to in a moment, in that environmental assessment process, but there’s no conflict between*
20 *the Acts. In fact, the Acts are set up to work perfectly logically together because the EPCA says at the*
21 *proposal stage, you establish the Water Management Agreement, that’s going to feed into the*
22 *environmental assessment process and then are you issuing a licence, permit, approval, or other*
23 *document of authorization; no. So there’s no conflict, the two statutes work well together, they’re*
24 *designed to work well together, and that’s the logical interpretation that makes sure you fulfil both of*
25 *the objectives.”*

26 (Transcript, Feb. 25, 2010, pgs. 118/10-25; 119/1-4)

27
28 CF(L)Co takes the same position as Nalcor arguing that section 68 of the *Environmental Protection*
29 *Act* does not prohibit the Board from establishing a water management agreement. CF(L)Co states in
30 written submissions:

31
32 *“The modern rule of statutory interpretation is that a statute is to be read in its entire context, in its*
33 *grammatical and ordinary sense harmoniously with the object of the statute and the intention of the*
34 *legislature.”*

35
36 CF(L)Co submits that there is no ambiguity or conflict as, in its grammatical and ordinary sense,
37 section 68 of the *Environmental Protection Act* refers to a licence, permit or approval that
38 “authorizes” an undertaking and the Board has no jurisdiction to authorize any undertaking in respect
39 of the Lower Churchill Project. According to CF(L)Co the Board’s role is to establish and oversee
40 implementation of a water management agreement.

41
42 Having considered all of the submissions in relation to section 68 of the *Environmental Protection*
43 *Act* the Board agrees with both CF(L)Co and Nalcor that there is no ambiguity or conflict in the
44 operation of the *Environmental Protection Act* and the *EPCA*. These pieces of legislation can be
45 interpreted using the plain and ordinary meaning to establish a scheme which allows for the early
46 approval of a water management agreement between two operators while leaving all approvals in the
47 nature of authorizations relating to the project until after the completion of the environmental review.

1 The Board finds that the phrase "*or other document of authorization*" modifies the word "approval"
2 in the *Environmental Protection Act*. In establishing or approving a water management agreement
3 the Board is not issuing a document of authorization. Therefore the Board finds that section 68 of the
4 *Environmental Protection Act* does not prohibit the Board from fulfilling its mandate under section
5 5.5 of the *EPCA* to establish a water management agreement.
6

7 The Motion filed by the Innus of Ekuanitshit also asked that the Board suspend approval of a water
8 management agreement until the duty of the Crown to consult has been considered.
9

10 **III DUTY TO CONSULT**

11
12 The Uashaunnuat and the Innus of Ekuanitshit ask that the Board suspend approval of the proposed
13 Agreement until after the Crown fulfills its duty to consult with them. They argue that the Crown is
14 obliged to consult on two grounds: 1) a statutory duty to consult arising from the *EPCA*; and, 2) a
15 constitutional duty to consult.
16

17 The statutory duty to consult is argued to be founded in section 4 of the *EPCA* which states:
18

19 *"4. In carrying out its duties and exercising its power under this Act or under the Public Utilities Act,*
20 *the public utilities board shall implement the power policy declared in section 3, and in doing so shall*
21 *apply tests which are consistent with generally accepted sound public utility practice."*
22

23 The Uashaunnuat and the Innus of Ekuanitshit argue that this section of the *EPCA* requires that the
24 Board ensure that the Crown consult with them before a water management agreement is established.
25 In the absence of case law considering this section the Board will adopt a plain and ordinary meaning
26 interpretation. Taking this approach the Board finds that this section requires that the Board apply
27 tests which are consistent with generally accepted sound utility policy when it exercises its
28 jurisdiction implementing the power policy of the province. Without more specific language the
29 Board cannot read into this section a statutory duty on the Crown to consult. The Board has
30 concluded that it is in compliance with this section since the tests applied in analyzing the
31 Agreement pursuant to section 5.5 of the *EPCA* are consistent with generally accepted sound public
32 utility practice. The Board notes that the concept of good utility practice is enshrined in the
33 Agreement in Articles 4.2, 4.3, and 7.1. The Board is not persuaded that a statutory duty to consult
34 can be founded on this section.
35

36 The Uashaunnuat and the Innus of Ekuanitshit also raise the constitutional duty of the Crown to
37 consult which is founded on subsection 35(1) of the *Constitution Act*, 1982, being Schedule B to the
38 *Canada Act 1982 (U.K.)*, 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44, which states:
39

40 *"35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby*
41 *recognized and affirmed."*

1 The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3
2 S.C.R. 511 found that the honour of the Crown requires that it consult Aboriginal peoples regarding
3 resources to which Aboriginal peoples make a claim. The Court said at para. 12:

4
5 *"The jurisprudence of this Court supports the view that the duty to consult and accommodate is part*
6 *of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and*
7 *continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual*
8 *sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982.*
9 *This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal*
10 *peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people*
11 *and de facto control of land and resources that were formerly in the control of that people."*

12
13 The Supreme Court of Canada concludes that the Crown owes this duty even before Aboriginal
14 rights or title have been proven, stating at para. 35:

15
16 *"But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour*
17 *and the goal of reconciliation, suggest that the duty arises when the Crown has knowledge, real or*
18 *constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that*
19 *might adversely affect it."*

20
21 The Court goes on to provide an explanation in relation to the Crown's duty to consult at para. 37:

22
23 *"There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate,*
24 *accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but*
25 *unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty,*
26 *however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim*
27 *may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law*
28 *is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and*
29 *established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts*
30 *can assist. Difficulties associated with the absence of proof and definition of claims are addressed by*
31 *assigning appropriate content to the duty, not by denying the existence of a duty."*

32
33 The duty of the Crown to consult with Aboriginal peoples has been discussed in numerous court
34 decisions since *Haida*, including several other Supreme Court of Canada decisions. However, there
35 has not yet been a clear statement from the Supreme Court of Canada as to the role that a quasi-
36 judicial decision maker such as the Board has in relation to this duty. While the Board acknowledges
37 it may be somewhat beyond its accustomed area of decision-making in assessing the duty to consult
38 issue, it accepts that it is generally appropriate for a quasi-judicial decision maker such as the Board
39 to address constitutional questions which arise in the context of exercising its jurisdiction. The
40 particular role of the Board in relation to the duty to consult issue may ultimately be clarified by the
41 Supreme Court of Canada with the hearing of the appeal in *Carrier Sekani Tribal Council v. British*
42 *Columbia (Utilities Commission)*, [2009] 4 W.W.R. 381(BCCA) and, if leave to appeal is granted, in
43 *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 CarswellNat 3493(FCA). In
44 the meantime the Board has concluded that it is appropriate to make a determination in relation to the
45 Crown's duty to consult in this Application.

1 The Board has reference to the words of the Supreme Court of Canada in *Haida* which state that the
2 duty to consult is triggered if the Crown has knowledge of the potential existence of Aboriginal right
3 or title and contemplates conduct that might adversely affect it. It is clear from the case law that the
4 duty to consult is triggered at a low threshold. (*Mikisew Cree First Nation v. Canada (Minister of*
5 *Canadian Heritage)*, [2005] 3 S.C.R. 388) Further the Crown is not entitled to narrowly interpret the
6 facts and each case must be approached individually and with flexibility. (*Labrador Metis Nation v.*
7 *Newfoundland & Labrador (Minister of Transportation & Works)* (2007), 288 D.L.R. (4th)
8 641(NLCA))

9
10 During the proceeding the parties acknowledged that Nalcor represents the Crown and that CF(L)Co
11 does not. Mr. Carot, on behalf of the Uashaunuat, submitted that the constitutional duty to consult
12 lies in the Crown and the Crown alone and agreed that Nalcor could consult in the name and on
13 behalf of the Crown. (Transcript, Feb. 25, 2010, pg. 79/20-25) Mr. Schulze, on behalf of the Innus
14 of Ekuanitshit, stated that the Board should make sure that Nalcor consults. (Transcript, Feb. 25,
15 2010, pg. 32/10-13)

16
17 Nalcor accepts that the Crown has knowledge of the potential existence of Aboriginal right or title
18 and specifically states at para. 43 of its written submission:

19
20 *"The Conseil des Innus de Ekuanitshit and the Innu of Uashat Mak Mani-Utenam have asserted a*
21 *potentially credible claim of an Aboriginal interest in relation to land and resource usage. Nalcor*
22 *has accepted that there is a sufficiently credible claim to engage a duty of consultation in relation to*
23 *the Lower Churchill Project itself."*

24
25 The fundamental question that remains to be determined is whether the Crown, through Nalcor, is
26 contemplating conduct which might adversely affect Aboriginal right or title through the
27 implementation of the proposed water management agreement.

28
29 Consideration of this question is undertaken in the context of the legislated responsibility of the
30 Board. It is notable that the Board does not have the general supervision of Nalcor or the other
31 responsibilities usually associated with the regulation of a utility under the *Public Utilities Act*. The
32 Board's responsibilities in relation to Nalcor are set out in the *EPCA* and relate to the required water
33 management agreement between producers of power on a body of water. Section 5.4(1) of the *EPCA*
34 states:

35
36 *"5.4(1) Two or more persons who have been granted rights by the province to the same body of water*
37 *as a source for the production of power and who utilize, or propose to utilize, or to develop and*
38 *utilize the body of water as a source for the production of power shall enter into an agreement for the*
39 *purposes of achieving, with respect to the body of water, the policy objective set out in subparagraph*
40 *3(b)(i)."*

41
42 Where a water management agreement is reached the *EPCA* requires that the parties refer it to the
43 Board for approval as proposed, approval with changes, or refusal. If the parties are not able to reach
44 an agreement application may be made to the Board under section 5.5(1) of the *EPCA* to establish
45 the terms of a water management agreement. In this case the Board is required to establish the terms

1 of an agreement within 120 days of the receipt of an application. The *EPCA* and the *Regulations* set
2 out the particular requirements to be addressed by a water management agreement which, when
3 approved or established by the Board, will govern the duties and responsibilities of the parties with
4 respect to the production of power on the body of water.

5
6 The Agreement proposed by Nalcor in this Application under section 5.5 of the *EPCA* is essentially the
7 framework by which it will co-ordinate its activities with CF(L)Co. The Agreement does not set out
8 specifics in relation to water flows or energy production but sets up a scheme whereby this is managed
9 by an Independent Coordinator and a Water Management Committee. Article 6.2 of the Agreement
10 sets out the specific responsibilities of the Independent Coordinator:

11
12 *"The Independent Coordinator shall, based on the information provided by the Suppliers, and in the*
13 *exercise of reasonable judgement, establish short and long term Production Schedules for all*
14 *Production Facilities on the Churchill River, through the coordination of production scheduling of*
15 *the Suppliers based upon the use of the aggregate generating Capability, storage and transmission*
16 *facilities of any Supplier on the Churchill River, in accordance with the objectives set out at Section*
17 *3(1) of the Regulations and with this Agreement."*

18
19 Nalcor explains in PUB-NE-32 that the language of the Agreement requires that Nalcor and
20 CF(L)Co, through the Water Management Committee and the Independent Coordinator, utilize
21 "*good utility practice*" which includes a responsibility to act "*in a manner which is consistent with*
22 *laws and regulations and with due consideration for safety, reliability, environmental protection,*
23 *and economic and efficient operations.*" Following from this the Independent Coordinator must
24 have regard to reservoir levels, minimum flow requirements and any other regulatory or permit
25 requirements when establishing production schedules for both suppliers. In addition Articles 5.5 and
26 6.2(d) of the Agreement expressly state that the Water Management Committee and the Independent
27 Coordinator shall not act in a manner inconsistent with any provision of the Agreement, the *EPCA*,
28 or the *Regulations*.

29
30 In PUB-NE-29 Nalcor states that the operating parameters for the Lower Churchill Project, in
31 particular the reservoir levels and water flows, are set out in its environmental impact statement and
32 that these operating parameters will be considered as part of the environmental review process. The
33 operating regime (water levels) and the Aboriginal consultation appear to be ongoing issues in the
34 environmental review process as set out in the January 26, 2010 letter from the Joint Review Panel to
35 Nalcor which was filed in this Application on February 22, 2010. Nalcor states in PUB-NE-45 that
36 the Agreement "*is structured to operate in relation to whatever operating parameters are*
37 *established through the environmental assessment and consultation processes.*"

38
39 The Board finds that the Agreement is a framework for Nalcor and CF(L)Co to work together to
40 coordinate and maximize power production within established statutory, professional and industry
41 standards and the limitations, restrictions and conditions imposed through the environmental review
42 and project authorization process. The Board notes the significant number of permits, approvals and
43 authorizations as detailed by Nalcor in PUB-NE-50 which may be required before the Lower
44 Churchill Project can proceed. The Board accepts Nalcor's statement in PUB-NE-40 that no
45 amendment to the Agreement would be necessary if the operating regime intended at this time is
46 changed prior to project commissioning.

1 The issue for the Board is whether the conduct contemplated by the Crown might have an adverse
 2 impact on Aboriginal right or title. The conduct which is contemplated by the Crown in this case is
 3 the execution by Nalcor of a water management agreement with CF(L)CO. This distinguishes this
 4 case from the other authorities filed in this proceeding in relation to the duty to consult. The Board is
 5 not issuing a certificate of public convenience and necessity, is not approving the purchase and sale
 6 of power and energy, and is not authorizing any aspect of the physical development of the Lower
 7 Churchill Project. The necessary approvals and authorizations to enable the project to proceed will
 8 take place in other established processes apart from this proceeding. This Application is necessary
 9 only because there are multiple operators on the Churchill River and this proceeding does not replace
 10 or change any of the usual approvals and processes otherwise required in the development of the
 11 Lower Churchill Project. The Agreement manages the relationship of Nalcor and CF(L)Co leaving
 12 the details of the development, including the requirements and standards in relation to water flows,
 13 reservoir levels and other operating parameters, to be determined in accordance with the usual
 14 project approval processes, which includes a full environmental review. Therefore the Board cannot
 15 conclude that this Agreement might have an adverse impact on Aboriginal right or title and the
 16 Board finds that Nalcor does not have a duty to consult in relation to the Agreement.

17
 18 In light of the Board's finding that Nalcor does not have a duty to consult with respect to the water
 19 management agreement the motion to suspend pending consultation with the Intervenors is
 20 dismissed.

21 22 23 **IV WATER MANAGEMENT AGREEMENT**

24 25 **1. Objectives of the EPCA and Regulations**

26
 27 Section 5.4(1) of the *EPCA* provides that two or more persons that have been granted rights by the
 28 province to the same body of water for the production of power must enter into an agreement "*for*
 29 *the purpose of achieving with respect to a the body of water, the policy objective set out in*
 30 *subparagraph 3(b)(i).*"

31
 32 Section 5.5(1) states that:

33
 34 *"5.5(1) Where 2 or more persons to whom subsection 5.4(1) applies fail to enter into an agreement*
 35 *within a reasonable time, one or more of them may apply to the public utilities board to establish the*
 36 *terms of an agreement between them."*

37
 38 The policy objective set out in section 3(b)(i) of the *EPCA* states:

39
 40 *"Power policy*

41 *3. It is declared to be the policy of the province that*

42 *....*

43 *(b) all sources and facilities for the production, transmission and distribution of power*
 44 *in the province should be managed and operated in a manner*

45 *(i) that would result in the most efficient production, transmission and*
 46 *distribution of power."*

1 In discharging its mandate the Board has a responsibility under section 4 of the *EPCA* to apply tests
 2 which are consistent with generally accepted sound public utility practice in implementing the power
 3 policy declared in section 3 of the *EPCA*.

4
 5 The agreement referred to in section 5.4(1) of the *EPCA* is defined as a water management
 6 agreement in section 2(j) of the *Regulations*. Section 3(1) of the *Regulations* states the objective of a
 7 water management agreement:

8
 9 *“3(1) The objective of a water management agreement shall be the coordination of the power*
 10 *generation and energy production in the aggregate for all production facilities on a body of water to*
 11 *satisfy the delivery schedules for all suppliers on the body of water, in a manner that provides for the*
 12 *maximization of the long term energy-generating potential of a body of water, while ensuring that the*
 13 *provisions of a contract for the supply of power governed by section 5.7 of the Act are not adversely*
 14 *affected.”*

15
 16 In assessing the proposed Agreement the Board is required to determine whether the Agreement
 17 satisfies the policy objectives as set out in section 3(b)(i) of the *EPCA* and section 3(1) of the
 18 *Regulations*. These policy objectives include efficiency considerations, sound public utility
 19 practices, and protection of prior power contracts. In addition section 3(2) of the *Regulations* identify
 20 the elements that must be included in a water management agreement, adherence to which must also
 21 be evaluated.

22 23 **2. Efficiency Considerations**

24
 25 Nalcor and CF(L)Co submit that the efficiency policy and regulatory objectives of the *EPCA* are
 26 fulfilled by the proposed Agreement. This is achieved through mechanisms that ensure the reduction
 27 of spills, maintenance of sufficient reservoir elevation, and accounting for energy losses resulting
 28 from transmission and distribution of power, all subject to the suppliers’ delivery requirements and
 29 prior power contracts. Overall water management under the agreement is accomplished through
 30 coordination of flows and storage to maximize energy production.

31
 32 Article 6.2 of the proposed Agreement sets out the duties of the Independent Coordinator which
 33 include a requirement that the Independent Coordinator not act in a manner inconsistent with any
 34 provision of the Agreement, the *EPCA*, the *Regulations*, or any procedures, directions or guidelines
 35 established by the Water Management Committee. The Water Management Committee is also
 36 subject to the same limitation on powers in Article 5.5 of the Agreement.

37
 38 The purpose of coordinated production as contemplated by the *EPCA* and the proposed Agreement is
 39 to ensure that there is no wastage of water through spilling and that there is sufficient water at the
 40 Lower Churchill facilities while protecting existing power contracts. This represents efficient use of
 41 the available water and is consistent with the stated policy objectives of section 3(b)(i) of the *EPCA*.

42 No parties challenged the proposed Agreement with respect to its adherence to the efficiency policy
 43 of the *EPCA*. The Board is satisfied that no amendments or additions to the proposed Agreement are
 44 required for the purpose of the efficiency policy objective set out section 3(b)(i) of the *EPCA*.

1 **3. Sound Public Utility Practice**

2
3 Section 3(2) of the *Regulations* sets out the necessary components of a water management
4 agreement. Section 3(2)(b) sets out the suppliers' requirement to supply the Independent
5 Coordinator with certain information "*all prepared in a manner consistent with good utility*
6 *practices*". Section 3(4) states:

7
8 "*3(4) Each supplier, in complying with the requirements of subsection 3(2), shall:*

9 *(a) maintain its production facilities in serviceable and good repair; and*

10 *(b) operate its facilities in a manner not inconsistent with principles of good utility practice."*

11
12 The elements of what constitutes good utility practice are set out in section 2(d) of the *Regulations*
13 which defines "*good utility practice*" as:

14
15 "*2(d) ...those practices, methods or acts, including but not limited to the practices, methods or acts*
16 *engaged in or approved by a significant portion of the electric utility industry in Canada, that at a*
17 *particular time, in the exercise of reasonable judgment, and in light of the facts known at the time a*
18 *decision was made, would be expected to accomplish the desired result in a manner which is*
19 *consistent with laws and regulations and with due consideration for reliability, safety, environmental*
20 *protection, and economic and efficient operations."*

21
22 No party to the Application disagreed that "sound public utility practice" as set out in the *EPCA* is
23 synonymous with "*good utility practice*" as set out in the *Regulations*. In assessing whether the
24 proposed Agreement is in accordance with sound public utility practice the Board must determine
25 whether the terms of the Agreement require Nalcor and CF(L)Co to act in a manner which is
26 consistent with laws and regulations and with due consideration for reliability, safety, environmental
27 practice and economic and efficient operations.

28
29 The definition of "*good utility practice*" set out in section 2(d) of the *Regulations* has been carried
30 forward into the proposed Agreement. Article 4.2 of the proposed Agreement requires CF(L)Co and
31 Nalcor to adhere to the production schedules set by the Independent Coordinator provided that "*in*
32 *no event shall the Suppliers be required to operate in a manner which is inconsistent with Good*
33 *Utility Practice...*" Article 4.2 goes further to describe the required conditions for operations.
34 Article 4.3 requires the suppliers to provide certain information to the Independent Coordinator "*all*
35 *prepared in a manner consistent with Good Utility Practice."*

36
37 The Board is satisfied that the proposed Agreement provides for the coordinated operation of the
38 power production facilities in a manner consistent with good utility practice and that no further
39 amendments or additions are required.

1 **4. Prior Power Contracts**

2
3 Section 5.7 of the *EPCA* states:

4
5 *“5.7 A provision of an agreement referred to in section 5.4 or 5.5 shall not adversely affect a*
6 *provision of a contract for the supply of power entered into by a person bound by the agreement and*
7 *a third party that was entered into before the agreement under section 5.4 or 5.5 was entered into or*
8 *established, or a renewal of that contract.”*

9
10 Four prior contracts are listed under Article 3.2 of the proposed Agreement. These are:

- 11
- 12 1. the power contract entered into between Hydro-Québec and CF(L)Co dated May 12, 1969 as
 - 13 well as Schedule III of such power contract which relates to its renewal (the “HQ Power
 - 14 Contract”);
 - 15 2. the Churchill Falls Guaranteed Winter Availability Contract between Hydro-Québec and
 - 16 CF(L)Co dated November 1, 1998, as amended on March 29, 2000 (the “GWAC”);
 - 17 3. the sublease entered into between Twin Falls Power Corporation Limited and CF(L)Co dated
 - 18 November 15, 1961, as amended in April 15, 1963, November 30, 1967 and July 1, 1974 and
 - 19 renewed pursuant to an agreement dated June 9, 1989, and the operating lease between the
 - 20 same parties dated November 30, 1967, as amended in July 1, 1974 and November 10, 1981
 - 21 (the “Twinco Sublease”); and
 - 22 4. the power contract entered in to between Newfoundland and Labrador Hydro-Electric
 - 23 Corporation and CF(L)Co dated March 9, 1998, as amended on April 1, 2009 (the “Recall
 - 24 Power Contract”).

25
26 As set out in section 5.7 of the *EPCA* these contracts are between a party bound by the proposed

27 Agreement and a third party for the supply of power. These contracts were entered into prior to the

28 coming into force of sections 5.4, 5.5 and 5.7 of the *EPCA* and the *Regulations*, are for the supply of

29 power, and are between CF(L)Co and third parties.

30
31 In its pre-filed evidence (pg. 7) Nalcor notes that the Guaranteed Winter Availability Contract

32 between Hydro-Québec and CF(L)Co is not, strictly speaking, a contract for the supply of power.

33 According to Nalcor, since a generating unit is not dispatched, no power is supplied through this

34 contract. However, as noted by Nalcor, if CF(L)Co maintains its unit availability under the

35 Guaranteed Winter Availability Contract then its units will be available for delivery in the HQ Power

36 Contract. For this reason Nalcor has agreed to include the Guaranteed Winter Availability Contract

37 as a relevant contract in the proposed Agreement.

38
39 The terms of the proposed Agreement, as set out in Article 3.1, explicitly state that prior contracts

40 cannot be adversely affected:

41
42 *“3.1 No Adverse Effect*

43 *The parties acknowledge that pursuant to Section 5.7 of the Act, nothing in this Agreement*
44 *shall adversely affect a provision of a contract for the supply of Power and Energy entered*
45 *into by a Supplier and a third party prior to this Agreement, or a renewal of that contract*
46 *(collectively “Prior Power Contracts”), and that all provisions of this Agreement and*
47 *ancillary documents and agreements shall be interpreted accordingly.”*

1 In addition subsections 4.7(d), 6.3(a)(i) and 7.1(h)(i) also speak directly to the requirement to protect
 2 existing power contracts. No parties challenged the adherence of the proposed Agreement with
 3 Section 5.7 of the *EPCA*.

4
 5 The Board is satisfied that the terms of the proposed Agreement ensure that existing power contracts
 6 and renewals of these contracts are not adversely affected. Existing prior contracts are expressly
 7 identified in Article 3.2. Under the terms of the proposed Agreement existing power purchasers will
 8 receive the same amount of power and energy, subject to the same limitations and contractual
 9 provisions.

10 **5. Components of the Water Management Agreement**

11
 12
 13 Section 3(2) of the *Regulations* sets out the specific mandatory provisions that are to be included in
 14 any proposed water management agreement. As part of its Application Nalcor provided a Table of
 15 Concordance which outlines the mandatory components of the proposed Agreement. In its
 16 December 10, 2009 submission CF(L)Co filed an identical proposed water management agreement
 17 and included a similar Table of Concordance which identified additional provisions which promote
 18 the objectives set out in the *EPCA* and the *Regulations*. The compliance of the proposed Agreement
 19 with the legislative requirements was further addressed by both Nalcor and CF(L)Co in responses to
 20 Board information requests. There were no objections or issues raised by any party as to the
 21 compliance of the proposed Agreement with the requirements set out in the *EPCA* and the
 22 *Regulations*.

23
 24 The Board is satisfied, based on review of the proposed Agreement and further information filed by
 25 both Nalcor and CF(L)Co, that the requirements set out in section 3.2 of the *Regulations* have been
 26 incorporated in the proposed Agreement.

27 **6. Reporting and Monitoring Requirements**

28
 29
 30 In establishing or approving an agreement the Board may impose reporting and monitoring
 31 requirements as set out in subsection 5.6(2) of the *EPCA*:

32
 33 *"5.6(2) The public utilities board may require reporting, commitments, and impose monitoring*
 34 *requirements, as it considers appropriate, to ensure that the persons to an agreement approved by the*
 35 *public utilities under subsection 5.4(3) or established under subsection 5.5(2) comply with the terms*
 36 *and conditions of the agreement."*

37
 38 In accordance with subsections 3(2)(g) and 3(2)(h)(ii) of the *Regulations* the proposed Agreement
 39 includes provisions for both record keeping and reporting. Article 4.6 requires each supplier to
 40 maintain the required records, for a period of no less than seven years, which must be available upon
 41 request to the Board or the Minister. Article 6.2(a)(1v) requires the Independent Coordinator to
 42 maintain similar records which shall also be made available to the Board or the Minister upon
 43 request. Article 6.2(a)(vi) also requires the Independent Coordinator to provide to the Minister and,
 44 on request, the Board, an annual report summarizing its activities in a form acceptable to the
 45 Minister.

1 In its written submission Nalcor states that the annual report should be a sufficient mechanism to
2 provide information to both the Minister and the Board to demonstrate compliance by Nalcor and
3 CF(L)Co with the terms and conditions of the Agreement. CF(L)Co agrees with this position, stating
4 in its written submission that the annual reports by the Independent Coordinator, together with the
5 Board's right to request documents kept by the suppliers and the Independent Coordinator, constitute
6 sufficient provision to allow the Board to ensure compliance with the Agreement.
7

8 The Uashaunnuat requested that, if the Board establishes the terms of a water management
9 agreement, the Board should provide for the monitoring of the consultation process with the
10 Intervenors through the reporting requirements. (Written Submissions, pg. 34, paras. 183, 184 and
11 189)
12

13 In the context of the Board's finding that Nalcor does not have a duty to consult with respect to the
14 proposed Agreement the provision requested by the Uashaunnuat is not necessary. The Board is
15 satisfied that the Agreement contains sufficient provision for record keeping and reporting to allow
16 the Board to discharge its oversight responsibilities with respect to compliance with the Agreement.
17 The Board has access to these records and reports and may request this information at any time in its
18 monitoring of the Agreement. No further reporting commitments or monitoring requirements are
19 necessary at this time.
20

21 **V COSTS**

23

24 Nalcor shall pay all expenses of the Board incurred in connection with this matter. The parties may
25 apply to the Board for an order in relation to costs.

DATED at St. John's, Newfoundland and Labrador this 17th day of March 2010.



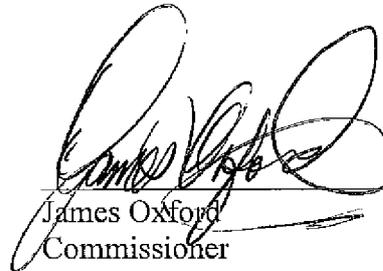
Andy Wells
Chair & Chief Executive Officer



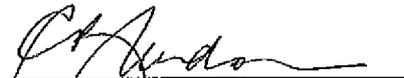
Darlene Whalen, P.Eng.
Vice-Chair



Dwanda Newman, LL.B.
Commissioner



James Oxford
Commissioner



Cheryl Blundon
Board Secretary