IN THE MATTER OF the *Electrical Power Control Act, 1994*, SNL 1994, Chapter E-5.1, as amended (the "*EPCA*"); and

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

WRITTEN SUBMISSIONS OF

CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

("CF(L)CO")

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Per: Jamie M. Smith, Q.C.

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PART I – FACTS

1. By Application dated November 10, 2009 made pursuant to Section 5.5 of the *EPCA*, Nalcor applied to have the Board establish the terms of a water management agreement between Nalcor and CF(L)Co.

2. Pursuant to Section 6 of the *Water Management Regulations* (the "*Regulations*"), CF(L)Co and Nalcor, on or about December 10, 2009, filed Written Submissions, inclusive of a common "proposed water management agreement".

3. CF(L)Co has previously observed that "it can be expected that there should be few facts or issues in dispute". Further, CF(L)Co has recognized that "as a guiding principle, any proposed WMA must meet the requirements set out in Section 3.2 of the *Water Management Regulations*".

Reference: CF(L)Co Written Submissions of December 10, 2009

4. By requests dated December 15, 2009 and December 21, 2009 respectively, the Conseil des Innus de Ekuanitshit and the Innu of Uashat Mak Mani-Utenam, *et al.* sought intervenor status before the Board (the "Aboriginal Intervenors").

5. By request dated December 17, 2009, Twin Falls Power Corporation ("Twinco") sought intervenor status as well.

6. By Board Order dated January 22, 2010 [PU-2 (2010)], the Board granted intervenor status to the Conseil des Innus de Ekuanitshit, the Innu of Uashat Mak Mani-Utenam, *et al.* and Twinco.

7. By Motion dated February 12, 2010, the Conseil des Innus de Ekuanitshit applied to the Board for an order "to suspend the proceedings to establish the terms of a water management agreement for the Churchill River", citing a breach of Section 68 of the

Environmental Protection Act and failure of the Board to meaningfully consider the issue of "duty to consult".

8. CF(L)Co is duly incorporated pursuant to the laws of Canada and more particularly the *Canada Business Corporations Act*.

9. The common shares of CF(L)Co are held 65.8% by Newfoundland and Labrador Hydro and 34.2% by Hydro-Québec.

Reference: Nalcor Application, Vol. II, Exhibit 2, pg. 7.

10. The shareholders of CF(L)Co are subject to a Shareholders' Agreement which requires a Special Majority Decision of the Board of Directors in certain matters, including those in the nature of the proposed water management agreement.

Reference: Nalcor Application, Vol. II, Exhibit 9

11. On October 27, 2009, CF(L)Co notified Nalcor that the required CF(L)Co Board approval to enter into a water management agreement with Nalcor had not been achieved.

Reference: Nalcor Application, Vol. I, Appendix D

PART II – LIST OF ISSUES

I. Does the proposed Water Management Agreement filed by CF(L)Co and Nalcor satisfy the requirements of the *Electrical Power Control Act* and the *Regulations* made pursuant thereto?

II. Should the Board require reporting commitments and/or impose monitoring requirements to ensure compliance with the terms of a Water Management Agreement?

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PART III – ARGUMENT

ISSUE I. Does the Water Management Agreement filed by CF(L)Co and Nalcor satisfy the requirements of the *Electrical Power Control Act* and the *Regulations* made pursuant thereto?

(i) Object of the EPCA and the Regulations

12. The object of the *EPCA* is set out, in part, in the policy statement at Section 3(b)(i):

> Power policy
>
> 3. It is declared to be the policy of the province that
>
> ...
>
> (b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner
>
> (i) that would result in the most efficient production, transmission and distribution of power,

13. Section 5.4 of the *EPCA* generally provides that two or more persons that have been granted hydro rights on a body of water must enter into an agreement. The stated purpose of that agreement is to achieve the "policy objectives" set out in subparagraph 3(b)(i). More particularly section 5.4(1) reads:

> 5.4(1) Two or more persons who have been granted rights by the province to the same body of water as a source for the production of power and who utilize, or propose to utilize, or to develop and utilize the body of water as a source for the production of power shall enter into an agreement for the purpose of achieving, with respect to the body of water, the policy objective set out in subparagraph 3(b)(i).
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> (underline added)

14. Section 2(j) of the *Regulations* defines an agreement entered into pursuant to section 5.4(1) of the *EPCA* as a Water Management Agreement. Section 3(1) of the *Regulations* states that the objective of a Water Management Agreement is:

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

15. The EPCA requires that all sources and facilities be managed and operated in a manner that results in the most efficient production, transmission and distribution of power. The *Regulations*, more particularly, speak to the coordination of production facilities to satisfy delivery schedules in a manner that maximizes the long term energy-generating potential of a body of water. The statements are consistent and complement each other.

16. Subsections 3(2) (a) through (n) of the *Regulations* set out the provisions required by regulation to be included in a Water Management Agreement. Subparagraphs (a), (b), (f), (g), (h), (m) and (n) relate largely to the information to be provided to the independent coordinator for purposes of determining production schedules. The remaining subparagraphs relate to the function of the Independent Coordinator in setting production schedules.

17. It is respectfully submitted that the terms of the proposed WMA satisfy the purpose of the policy objectives in Section 3(b)(i) of the *EPCA* and Section 3.(1) of the *Regulations*.

Reference: PUB-CF(L)Co-1; PUB-CF(L)Co-2

(ii) Efficiency Factors to be Considered

18. The factors to be considered in determining "the most efficient production, transmission and distribution of power", would be those factors allowing for "maximization of the long term energy-generating potential of the Churchill River". These would include the reduction of spills, maintenance of sufficient reservoir elevation (which affects the energy conversion rate) and accounting for energy losses resulting from transmission and distribution of power, all subject to the suppliers' delivery requirements and prior power contracts.

19. Pursuant to Article 6.2 of the proposed WMA, the production schedules to be prepared by the independent coordinator must comply with the objective stated at Section 3(1) of the *Regulations*. Compliance with such schedules by the suppliers pursuant to Article 4.2 of the WMA will ensure and promote the reduction of spills, the maintenance of sufficient reservoir elevation and the accounting for energy losses resulting from transmission and distribution of power, again, subject to the suppliers' delivery requirements and prior power contracts.

20. It is respectfully submitted that no amendments, additions or deletions to the proposed WMA are necessary or desirable to achieve the purpose of the policy objectives in EPCA section 3(b)(i).

(iii) Sound Public Utility Practice

21. Section 4 of the *EPCA* reads:

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

22. Section 2(d) of the *Regulations* defines "good utility practice" as:

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

23. "Sound utility practice" is taken to be synonymous with "good utility practice". The factors to be considered when applying generally accepted sound utility practice in the WMA would include those contemplated in the definition of "good utility practice" in the *Regulations*. Good utility practice clearly encompasses acting in a manner which is "consistent with laws and regulations and with due consideration for reliability, safety, environmental protection, and economic and efficient operations".

24. The terms of the proposed WMA accord with generally accepted sound public utility practice. An example is Article 4.2 of the WMA which provides that in "no event shall the Suppliers' be required to operate in a manner which is inconsistent with Good Utility Practice" (as defined in the *Regulations*). Such practice is stated to include, without limitation, operating in a manner which (i) may endanger human life or safety, (ii) may damage or cause excessive wear and tear to their equipment or facilities, (iii) may endanger or compromise the security and integrity of their reservoir structures, or (iv) would require that water levels of any reservoir of a Supplier be carried higher than those established by engineering criteria for freeboard or lower than those recommended for operations.

25. Therefore, a production schedule which would require operation of the suppliers' facilities contrary to Good Utility Practice (ie: in violation of laws and regulations, or inconsistent with reliability, safety, environmental protection, and economic and efficient operations)

cannot be imposed by the Independent Coordinator. Moreover, Section 4(b) of the *Regulations* provides that each supplier, in complying with the requirements of subsection 3(2) (which provides for the obligatory content of the WMA), shall operate its facilities in a manner not inconsistent with principles of good utility practice.

26. It is respectfully submitted that no amendments, additions or deletions to the proposed WMA are necessary or desirable to accord with generally accepted sound public utility practice.

(iv) Prior Power Contracts

27. Section 5.7 of the *EPCA* is set out below. It is expressly headed "**Provision of an Agreement Void**":

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

28. There are four contracts which constitute prior contracts between a party bound by the WMA and a third party for the supply of power, as contemplated by Section 5.7 of the *EPCA*. These contracts are listed under Article 3.2 of the proposed WMA, and defined as "Prior Power Contracts". All such Prior Power Contracts (i) have been entered into prior to the coming into force of Sections 5.4, 5.5 and 5.7 of the *EPCA* and the *Regulations*, (ii) are for the supply of power and (iii) are between CF(L)Co and third parties.

29. In drafting the WMA, due consideration and recognition were given to protecting the provisions of Prior Power Contracts, as mandated by Section 5.7 of the *EPCA*. This is reflected in the following Articles of the WMA, 2.1 – Objective of the Agreement; 3.1 - No Adverse Effect; 4.7(d) – Scheduling; 6.3(a)(i) - Limitation on the Independent

Coordinator's Powers; 9.1 - Maintenance Scheduling; and 10.1 – Allocation of Deficiencies.

Reference: PUB-CF(L)Co-6

30. The terms of the proposed WMA may not adversely affect any provision of the Prior Power Contracts. With respect to modifications by the Board, as stated above, no such modification is necessary or desirable to achieve the purpose of the policy objectives in section 3(b)(i) of the *EPCA*, or to ensure that a provision of a Prior Power Contract will not be adversely affected.

ISSUE II **Should the Board require reporting commitments and/or impose monitoring requirements to ensure compliance with the terms of a Water Management Agreement?**

31. Section 5.6(2) of the *EPCA* reads:

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

32. The requirements for reporting and record-keeping are expressly provided for in the *Regulations* and the WMA. Section 3(2)(g) of the *Regulations* provides that the WMA shall require the suppliers and the independent coordinator to maintain, for at least 7 years, and make available to the Board and the minister upon request, the records required of the suppliers and the independent coordinator to undertake their responsibilities under the WMA and the *Regulations*. This provision is incorporated at Article 4.6 of the WMA with respect to the suppliers, and Article 6.2(a)(iv) for the independent coordinator.

33. In addition, section 3(2)(h) of the *Regulations* provides that the WMA shall require the independent coordinator to provide the suppliers with reports on its activities at regular intervals, and provide the minister, and on request, the Board, with an annual report summarizing its activities. This is provided for at Articles 6.2(a)(v) and (vi) of the WMA. Thus, the annual reports by the independent coordinator, together with the Board's right to request documents kept by the suppliers and the independent coordinator, constitute sufficient provision to allow for compliance with the WMA.

34. It is respectfully submitted that there is no requirement for additional reporting or monitoring to ensure compliance with the WMA.

ISSUE III **Does CF(L)Co have a duty to consult the Aboriginal Intervenors?**

35. The "duty to consult" is that of the Crown or an agent of the Crown. Only one of the Aboriginal Intervenors, Innu of Uashat Mak Mani-Utenam, et. al., asserts a duty to consult on the part of CF(L)Co.

36. CF(L)Co is not a Crown Corporation. Its issued and outstanding common shares are held 65.8% by Newfoundland and Labrador Hydro and 34.2% by Hydro-Québec.

37. CF(L)Co is governed by a Board of Directors who decisions are subject to a unanimous Shareholders' Agreement.

38. CF(L)Co's actions are not those of the Crown. CF(L)Co does not represent the Crown and no procedural aspects of consultation have been delegated to it. The duty to consult is a duty of the Crown only, unless the Crown has delegated certain procedural aspects of the consultation to other parties. The following paragraphs from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 are instructive:

> 53 It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.
>
> ...
>
> 56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.
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> (underline added)

39. The authorities are clear that the only Crown entities bound by the duty to consult are the Crown itself and agents of the Crown acting as such.

Reference:

- ***Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 (CanLII) at ¶34.**
- ***Musqueam Indian Band et al v. City of Richmond et a.i*, 2005 BCSC 1069 (CanLII) at ¶114.**
- ***Splatsin First Nation v. British Columbia (Ministry of Environment)* [2007] B.C.E.A. No. 13 at ¶59**
- ***Saulteau First Nations v. British Columbia Oil and Gas Commission*, [2004] 4 C.N.L.R. 284 (B.C.S.C.) aff'd 2004 BCCA 286 at ¶131-138.**
- ***Tzeachten First Nation v. Canada (Attorney General)*, [2008] 4 C.N.L.R. 293 (Fed. Ct.) at ¶ 76, 84-86 aff'd 2009 FCA 337 (CanLII).**

40. It is respectfully submitted that CF(L)Co has no duty to consult with the Aboriginal Intervenors in the circumstances. It is not an agent of the Crown and there has been no delegation of such duty to it.

ISSUE IV Does Nalcor have a duty to consult the Aboriginal Intervenors?

(i) The Duty to Consult

41. Section 35(1) of the *Constitution Act, 1982* is the source of the Crown's duty to consult. It reads as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

42. The duty to consult arises when the Crown (i) has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and (ii) contemplates conduct that might adversely affect it (*Haida*, ¶35). Both of the foregoing must be established before the duty to consult arises. The threshold for establishing a duty to consult does not require proof that (i) the claim exists (only that it is "credible" (*Haida*, ¶37)); nor (ii) that the "adverse effect" will be serious.

43. It is not proposed to contest, at this stage, whether the Aboriginal Intervenors have a sufficiently credible claim. Thus the immediate issue is whether the Aboriginal Intervenors have demonstrated "any" adverse effect on any such claim and, if so, the seriousness of such adverse effect.

44. It is submitted that there is a strong argument that the WMA itself will have no "adverse effect" upon any valid aboriginal claim. The Aboriginal Intervenors have presented no cogent evidence to the contrary. In such circumstances, the duty to consult simply does not arise.

45. In this regard CF(L)Co has maintained, and there is no evidence to the contrary, that the proposed WMA operates "wholly within the existing operating parameters of the CF(L)Co facility and existing customer requirements for seasonal and hourly flexibility".

Reference: CIE – CF(L)Co-1, CIE – CF(L)Co-2, CIE – CF(L)Co-3, PUB – CF(L)Co-7

46. Implementation of the WMA has no incremental effect whatsoever, on the operation of the CF(L)Co facility or its reservoirs.

47. The WMA is limited in scope. It establishes the framework for CF(L)Co and Nalcor to exploit and utilize their respective power initiatives vis-à-vis the Churchill River but it (i) does not, in any manner, adversely affect the Upper Churchill facility and (ii) for the Lower Churchill, only sets out the framework within which Nalcor will be able to exercise its water management rights to the Churchill River. The WMA does not and cannot establish the final parameters for Nalcor's use of the Churchill River as these, in fact, can only be established after the environmental assessment of the Lower Churchill project has been completed.

48. The parameters governing Nalcor's use of the Lower Churchill are subject to a separate environmental process under applicable federal and provincial legislation which is currently underway. It is that process which will determine the parameters. If there is a duty to consult and it can be adequately addressed by the assessment under such legislation then clearly that is the more appropriate forum. It is the Lower Churchill project, and not the WMA (given the constraints within which it will be established) that arguably may have an adverse impact upon the aboriginal claims.

49. In the alternative, if an adverse effect can be demonstrated, it is submitted that such adverse effect cannot be said to be "serious", in the circumstances. As such, any duty to consult is minimal and notice and intervention in the current process may be sufficient to satisfy same.

50. If established, the content and extent of the duty to consult and accommodate varies with the circumstances and is proportionate to (a) a preliminary assessment of the strength of the case supporting the existence of the right or title and (b) the seriousness of the potentially adverse effect upon the right or title claimed. Therefore, the strength of the aboriginal claim and the materiality of the adverse effect will determine whether the duty to consult has been fulfilled by a less complete consultation. In the words of *Haida*, ¶40, "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."

(underline added)

51. The following rationale applies:

(a) Pursuant to section 5.7 of the *EPCA*, the WMA cannot adversely affect the provisions of Prior Power Contracts, which contracts govern and determine the current utilization of the Upper Churchill. The Board may consider only

(i) the effect of the WMA upon the Lower Churchill, and

(ii) any impact that the WMA may have on the Upper Churchill River which is not already the result of a Prior Power Contract or the *Lease Act*, i.e. incremental.

(b) For purposes of assessing the Aboriginal Intervenors' claims, the Board may not consider any existing adverse effect resulting from Prior Power Contracts or the *CF(L)Co Lease Act* which clearly do not arise from the WMA. In the case of *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484 (CanLII), discussed below, the court considered it significant, for the purpose of determining the scope of the duty to consult, that the land involved with respect to the project had already been exploited and was thus already affected by other projects:

> [29] It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.

> [30] .... Even to the extent that cultural, environmental and traditional land use issues were raised in the evidence, they were not linked specifically to the projects themselves. This is not surprising because the evidence was clear that the Pipeline Projects were constructed on land that had been previously exploited and which was almost all held under private ownership. For example, the evidence is clear that the Alberta Clipper and Southern Lights projects will have negligible, if any, impact upon the Treaty One First Nations outstanding land claims in southern Manitoba. The Southern Lights Pipeline uses the same corridor as the Alberta Clipper Pipeline. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land.
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> ...
>
> [32] The NEB findings concerning the Keystone Pipeline were to the same general effect and are reasonably supported by the evidence in that record. In fact, the Treaty One First Nations do not dispute the NEB findings that the land affected by the Keystone Pipeline was almost all in private ownership and previously utilized for pipeline, agricultural and ranching purposes. Once buried it is reasonable to conclude that this pipeline would have a minimal impact on the surrounding environment.
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> (underline added)

(ii) Board's Jurisdiction to Consider and Apply the Duty to Consult

52. While there is conflicting jurisprudence on this issue, there are cogent arguments that the Board has neither the jurisdiction nor the obligation to determine the existence and extent of a duty to consult the Crown.

53. On the matter of expertise, if the Board were to consider this issue, it would not be sufficient for it to merely decide that there was a duty to consult. If it decided there was such a duty it would have to then decide if such duty had been fulfilled which would require that it examine both the seriousness of the Aboriginal Intervenors' claims and the potential adverse effects of the proposed WMA. It is submitted that these are more appropriate questions for a court to decide particularly given the mandate and the legislative framework of the Board.

54. On the issue of the obligation of the Board to consider and decide upon the duty to consult, several cases have held that such an obligation may arise. In *Carrier Sekani Tribal Council*

v. British Columbia (Utilities Commission), 2009 BCCA 67 (CanLII) (on appeal to the SCC) ("***Sekani***"), the court held that the first question to be determined is whether the Board has the power to decide questions of law:

> [38] Moving on to whether administrative tribunals have the power to decide constitutional law questions, the Court in *Paul* stated, at para. 39:
>
> > The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

55. Following the approach in *Sekani*, if the Board has the jurisdiction to determine questions of law, as a decision-maker with respect to the WMA, it has the jurisdiction and the obligation to determine whether the Newfoundland Crown has the obligation to consult with the Aboriginal Intervenors in connection with the establishment of the WMA.

> [15] The Commission is a quasi-judicial tribunal with authority to decide questions of law. As such, it has the jurisdiction, and in my opinion the obligation, to decide the constitutional question of whether the duty to consult exists and, if so, whether it has been discharged: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), 2003 SCC 55, [2003] 2 S.C.R. 585. That obligation is not met by deciding, as a preliminary question, an adverse impact issue that properly belongs within an inquiry whether a duty is owed and has been fulfilled.
>
> ...
>
> [51] Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.
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> ...
>
> [53] If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation.
>
> [54] While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only that the

> Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation. It is useful to remember the relationship between government and administrative tribunals generally.

56. In *Sekani*, the court determined that the Commission itself does not have a duty to consult but the Crown (as represented by a Minister and a Crown corporation which is an agent of the Crown) does:

> [56] No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, 1994 CanLII 113 (S.C.C.), [1994] 1 S.C.R. 159 at 183. The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.
>
> [57] The honour of the Crown as a basis for the duty to decide is compelling on the facts here: one Crown entity, the responsible Ministry, granted the water licence, allegedly infringing Aboriginal interests without prior consultation; another Crown entity, B.C. Hydro, purchases electricity generated by the alleged infringement on a long-term contract; and a third, the tribunal, dismisses the appellant's claim for consultation on a preliminary point.

57. See also *Kwikwetlem First Nation v British Columbia Transmission Corporation*, 2009 BCCA 68 (CanLII), 2009 BCCA 68. At paragraph 65 the Court stated as follows:

> [65] Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case.
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> ...
>
> [66] BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.
>
> ...
>
> [70] If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the

> EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.
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> (underline added)

58. And *Nlaka'pamux Nation Tribal Council v. Griffin*, 2009 BCSC 1275 (CanLII) commenting upon the decision in *Kwikwetlem*:

> [93] The Court of Appeal held that the Commission erred in failing to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the application before it, that is, the application for a Certificate of Public Convenience. As I understand the *Kwikwetlem* decision, it stands for the proposition that a decision maker must consider whether the Crown's duty to consult and accommodate has been appropriately dealt with at each stage of an approval process. The error which the Commission fell into was to decline to consider this issue at all and to rely on the process under the EAA to address the Crown's duty to consult.

59. However, in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 (CanLII), the Federal Court of Appeal came to a different conclusion. Notably the entities before the National Energy Board (the "NEB") were of the private sector. The court first appears to suggest that this may be an important distinction given that prior cases involved Crown agents. However, the court also raises several objections to the competence of a tribunal such as the NEB considering the *Haida* duty of the Crown and suggests that, even if the NEB was competent, it would not have the power to order the Crown to undertake such consultation. The court goes on to suggest that it is more appropriate for the courts to determine whether there is a duty on the Crown to consult which has not been fulfilled.

60. The following passages from *Standing Buffalo,* while extensive, demonstrate the dilemma facing the Courts on the question whether a tribunal such as the Board has the jurisdiction to consider and apply any duty to consult:

> [27] Counsel for SFM/MFN argued that the decisions in *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), [2003] 2 S.C.R. 585, 2003 SCC 55, and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*,

2009 BCCA 68, [2009] 9 W.W.R. 92, authoritatively determine this jurisdictional question. I disagree.

...

[30] In my respectful view, *Paul* provides no authoritative support for the proposition that the NEB was required to undertake the *Haida* analysis before considering the merits of the Project approval applications. If anything, paragraph 47 of *Paul* appears to me to indicate that the courts are the appropriate venue for the adjudication of Aboriginal issues.

[31] In *Kwikwetlem First Nation*, the British Columbia Utilities Commission considered an application for an approval of an electrical transmission project by the British Columbia Transmission Corporation. In that case, the Commission accepted that it was under a *Haida* duty and negotiations were undertaken by the parties on that basis. The question before the Court was whether the Commission could issue an approval without first having decided whether the duty to consult had been discharged to that point in the proceedings. It is noteworthy that all parties accepted that British Columbia Transmission Corporation was the Crown or a Crown agent for the purposes of the *Haida* analysis and that the consultations undertaken by it took place in furtherance of its *Haida* duty. Thus, the question of whether or not the British Columbia Utilities Commission was required to undertake the entire *Haida* analysis to determine whether the applicant before it was under a duty to consult was not before the Commission. The existence of the *Haida* duty was not contested.

[32] In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwikwetlem First Nation* does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.

[33] I note as well that the applicant before the British Columbia Utilities Commission in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (CanLII), 2009 BCCA 67, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, was accepted by the parties as being the Crown or its agent. Accordingly, I am of the view that this case provides no support for SFN/MFN's argument on this issue.

[34] Finally, I would add that the NEB itself is not under a *Haida* duty and, indeed, the appellants made no argument that it was. The NEB is a quasi-judicial body (see *Quebec (Attorney General) v. Canada (National Energy Board)*, 1994 CanLII 113 (S.C.C.), [1994] 1 S.C.R. 159, at page 184, and, in my view, when it functions as such, the NEB is not the Crown or its agent.

...

[37] The appellants then contend that while the NEB's mandated consultation by the Project proponents may have addressed potential infringements of Aboriginal rights

> by those proponents, the failure of the NEB to undertake the *Haida* analysis means that potential infringements of those rights by the Crown would not be addressed. Thus, the argument goes, by failing to undertake the *Haida* analysis, the NEB could be sanctioning potential infringements of Aboriginal rights by the Crown, thereby breaching subsection 35(1) of the Constitution. (emphasis in original)
>
> [38] The appellants further argue that in the context of an application for a Section 52 Certificate, the NEB must "have regard to all considerations that appear to it to be relevant", as specifically stated in section 52 of the NEB Act. And, according to the appellants, whether the Crown has, and has satisfied, a *Haida* duty, are matters that are relevant to, and therefore must be addressed by, the NEB. A failure to do so, their argument continues, would result in breach by the NEB of its obligation to make its decisions in accordance with the dictates of the Constitution.
>
> (underline added)

61. The Federal Court, in *Standing Buffalo*, cited several reasons for departing from the argument developed in *Sekani* and other authorities:

> [39] For several reasons, I cannot accede to these arguments.
>
> [40] First, as noted above, the decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision-making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable Project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard for existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution.
>
> [41] Secondly, the appellants were unable to point to any provision of the NEB Act or any other legislation that prevents it from issuing a Section 52 Certificate without first undertaking a *Haida* analysis or that empowers it to order the Crown to undertake *Haida* consultations.
>
> [42] Thirdly, the Province of Saskatchewan argued that the NEB lacks jurisdiction to undertake a *Haida* analysis where the Crown that is alleged to have a *Haida* duty

> is the Crown in right of a province. The appellants did not contest this limitation on the ability of the NEB to conduct a *Haida* analysis in relation to the Crown in right of a province.
>
> [43] Fourthly, a determination that the NEB was not required to determine whether the Crown was under, and had discharged, a *Haida* duty before making the Decisions does not preclude the adjudication of those matters by a court of competent jurisdiction. Indeed, the quotations from paragraphs 37 and 60 of *Haida* and paragraph 47 of *Paul* point towards recourse to the courts in such circumstances.
>
> [44] I would add that the ability of an Aboriginal group to have recourse to the courts to adjudicate matters relating to the existence, scope and fulfillment of a *Haida* duty in respect of the subject matter of an application for a Section 52 Certificate should not be taken as suggesting that the Aboriginal group should decline to participate in the NEB process with respect to such an application. As previously stated, the NEB process focuses on the duty of the applicant for a Section 52 Certificate. That process provides a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it. While the Aboriginal group is free to determine the course of action it wishes to pursue, it would be unfortunate if the opportunity afforded by the NEB process to have Aboriginal concerns dealt with in a direct and non-abstract matter was not exploited.
>
> (underline added)

62. It is submitted that *Standing Buffalo* is authority for the proposition that the Board does not have jurisdiction to consider and apply the duty to consult.

(iii) Extent of Nalcor's Duty to Consult

63. To the extent Nalcor is an agent of the Newfoundland Crown, Nalcor may have a duty to consult if it is contemplating action which has the potential to adversely affect credible aboriginal rights. However, a distinction must be drawn between a duty to consult in respect of the Lower Churchill project and a duty to consult in respect of the establishment of the WMA.

64. With respect to the Lower Churchill, if the Aboriginal Intervenors can establish a potential to affect credible aboriginal rights, then Nalcor may be under a duty to consult, the extent of which, as noted above, will depend upon the credibility of the aboriginal claims and the

seriousness of the adverse impact of the Lower Churchill project on such claims. It appears likely, however, that any duty to consult in respect of the WMA (if it exists) can be adequately addressed by the applicable environmental legislation and that the processes undertaken under that legislation are the more appropriate forums.

65. It is important to emphasize that any duty to consult in respect of the Lower Churchill project is not the issue before the Board.

66. If the Aboriginal Intervenors make out a *prima facie* case for Nalcor having a minimal duty to consult in respect of the WMA, the fact that the establishment of the WMA will have a minimal if not negligible impact on the Churchill River and its environment, means that the duty to consult can be fulfilled by fairly minimal notice and consultation with the Aboriginal Intervenors.

67. The Aboriginal Intervenors have been given time to present their claims and present their evidence. Arguably, the duty to consult, if it exists, can and is being appropriately fulfilled in the context of the current Board process. In the case of *Brokenhead*, the court held that the Crown's duty to consult had been met by hearings by the National Energy Board which had permitted aboriginal communities to "address their concerns about development projects" (¶42). In addition, as noted above, the court decided that, as is the case here, the project in question (a pipeline) would have a "minimal impact on the surrounding environment" given that the land involved had already been affected by other projects.

> [30] The fundamental problem with the claims advanced in these proceedings by the Treaty One First Nations is that the evidence to support them is expressed in generalities. Except for the issue of their unresolved land claims in southern Manitoba that evidence fails to identify any interference with a specific or tangible interest that was not capable of being resolved within the regulatory process…
>
> …
>
> [42] I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that

> regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate: see *Ahousaht v. Canada*, 2008 FCA 212, [2008] F.C.J. No. 946 at paras. 52-53. This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.
>
> ...
>
> [44] I have no doubt, however, that had any of the Pipeline Projects crossed or significantly impacted areas of unallocated Crown land which formed a part of an outstanding land claim a much deeper duty to consult would have been triggered. Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to consult in such a context.

ISSUE V **Does s. 68 of the *Environmental Protection Act* prohibit the Pubic Utilities Board from establishing a Water Management Agreement at this time?**

68. The following sections of the *Environmental Protection Act* are relevant:

> **Definitions**
>
> **2.** In this Act
>
> (mm) "undertaking" includes an enterprise, activity, project, structure, work or proposal and a modification, abandonment, demolition, decommissioning, rehabilitation and an extension of them that may, in the opinion of the minister, have a significant environmental effect
>
> **Prohibition**
>
> **48.** A person shall not proceed with an undertaking unless that undertaking has been exempted or released under this Act.

Authorization

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

(2) This Part does not exempt a proponent of an undertaking from the requirements imposed upon an undertaking by

(a) another Act or regulation of the province or of Canada; or

(b) a municipal regulation, by-law or requirement

69. The modern rule of statutory interpretation is that a statute is to be read in its entire context, in its grammatical and ordinary sense harmoniously with the object of the statute and the intention of the legislature.

70. In *Archean Resources Ltd. v. Newfoundland*, [2002] 215 Nfld. & P.E.I.R. 124, Green J. A. (now C.J.N.L.), observed:

> [19] The starting point for interpretation of any statute enacted by the legislature of this province is the legislature's own directive to the courts as found in s. 16 of the *Interpretation Act*:
>
> > Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning.
>
> [20] What is noteworthy about this provision is that it applies to all legislative acts regardless of subject matter. It draws no distinction between social reform legislation, taxation statutes, legislation that deals with or affects property rights, or penal laws or statutes that affect personal or common law rights, to name a few types of statutes that from time to time have been said to attract special interpretative treatment. It eliminates special approaches, by way of presumptions of strict or other specialized construction, to the interpretation of certain types of statutes and not to others.
>
> [23] In truth therefore, s. 16 enunciates a principle of harmonization in which the courts are directed, in cases of dispute, to adopt and apply an interpretation that fairly reconciles the language used in the enactment with the broader objects of the legislation so as to achieve the general goal, or to rectify the mischief, to which the legislative act appears to have been directed. That exercise determines the general

> ambit of impact of the legislative act and provides the basis for the court to conclude whether the particular fact situation before it should fall inside or outside that ambit.
>
> (underline added)

71. It is submitted that the phrase "or other document of authorization", as appears in Section 68 of the *EPA*, qualifies the reference to licence, permit and approval. In its grammatical and ordinary sense Section 68 of the *EPA* contemplates a licence, permit or approval that "authorizes" an undertaking. There is no ambiguity or conflict.

72. In the present case the establishment of a water management agreement between CF(L)Co and Nalcor in no way amounts to "an authorization" on the part of the Board, within the meaning of Section 68 of the EPA.

73. In any event, the Board has no jurisdiction to authorize any undertaking in respect of the Lower Churchill project or otherwise. The Board's role is to establish and oversee implementation of a water management agreement, the parameters of which are prescribed by statute.

74. It is respectfully submitted that Section 68 of the *Environmental Protection Act* does not prohibit the Pubic Utilities Board from establishing a Water Management Agreement.

ISSUE VI Does the Board have authority to suspend Nalcor's Application?

75. Section 7 of the *Regulations* provides as follows:

> **Time period**
>
> **7.** Notwithstanding section 5, the board shall approve or establish a water management agreement within 120 days of the referral to the board of a proposed water management agreement under section 5.4 of the Act, or the filing of an application under subsection 5.5(1) of the Act.

76. The issue becomes whether the obligation to approve or establish a water management agreement within 120 days of Nalcor's Application to the Board, is "mandatory" or "directory". If mandatory, the Board is under a statutory obligation to establish a WMA within 120 days and its failure to do so goes to jurisdiction and is fatal. If directory, then failure to do so may not be fatal, but likely still attracts consequences.

77. In *Wnek v. Witless Bay (Town)*, 2003 NLSCTD 17, Mercer J. observed at paragraphs 18 and 19:

> 18 The *Interpretation Act*, R.S.N.L. 1990, c.I-19, provides in Section 11(2) as follows:
>
> The words "shall" shall be construed as imperative and the word "may" as permissive and empowering.
>
> Section 3 of the *Interpretation Act* states:
>
> 3. (1) This Act extends and applies to every Act and every regulation enacted or made, except where a provision of this Act
>
> (a) is inconsistent with the intent or object of the Act or regulation;
>
> (b) would give to a word, expression, or clause of the Act or regulation an interpretation inconsistent with the context or the interpretation section of the Act or regulation; . . .
>
> 19 Accordingly, in provincial statutes, "may" is to be interpreted as permissive, not imperative, unless that interpretation is inconsistent with the intent or purpose of the Act or the particular context in which it occurs. In this proceeding the issue therefore becomes -- would it be inconsistent with the intent or purpose of the Act or the context of Part XI of that Act for there to be a discretion whether to enforce an order made under Development Regulations?

78. In *Oates v. Royal Newfoundland Constabulary Public Complaints Commissioner*, 2003 NLCA 40 (CanLII) Roberts, J.A., for the majority, observed:

> [2] ... Even though "shall", both grammatically and by virtue of s. 11(2) of the Interpretation Act, denotes the imperative, paradoxically, in the domain of statutory interpretation it often does not. That is not a recent phenomenon. ...

> [4] In other words, the dictate that "shall" is to be construed as imperative is no more than a *prima facie* basis for interpreting a particular statutory provision. I agree with Bowlby J.'s observation in Regina v. F., (1985), 20 C.C.C. (3d) 334 (Ont. H.C.J.), that a review of the cases and commentators identifies three major rules which can assist a court in getting beyond that *prima facie* or presumptive position.

79. The rules laid down by Roberts J. in *Oates* derive from prior authorities and can be summarized as follows:

> 1. It is the duty of courts to try and get at the real intention of the legislature by carefully considering the whole scope of the statute. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time, would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.
>
> 2. When a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.
>
> 3. The possible prejudice to the parties. Courts will be more inclined to read a provision as directory where the only prejudice might be delay but mandatory where it results in the very real possibility of prejudice to a party.

80. Ultimately in *Oates*, the Court applied the rules of statutory interpretation and determined that the provision in question was directory and not mandatory, despite the use of "shall".

81. Sullivan on the Construction of Statutes, 5th ed. ("Sullivan") suggests that a better approach is to consider that "shall" is always imperative and the real issue is the consequences flowing from a failure to comply with such imperative.

> When "shall" and "must" are used in legislation to impose an obligation or create a prohibition or requirement, they are always imperative. A person who "shall" or "must" do something has no discretion to decide whether or not to do it. A person prohibited from doing something is equally devoid of lawful choice. The issue that arises in connection with "shall" and "must" is not whether they are imperative, but the

> consequences that flow from a failure to comply. In some legislation, the consequences of failing to do what one is obliged to do (or not do) are clearly set out, but in other contexts the legislation is silent and it is left to the courts to determine whether non-compliance can be cured.
>
> If breaching an obligation or requirement imposed by "shall" entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate in so far as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion. The confusion is compounded when "mandatory" and "imperative" are used interchangeably – that is, when "mandatory" is used to indicate that a provision is binding or "imperative". These are distinct concepts. "Shall" and "must" are always imperative (binding); neither ever confers discretion. But they may or may not be mandatory; that is, breach of a binding obligation or requirement may or may not lead to nullity. The mandatory-directory distinction reflects the fact that there is more than one way to enforce an obligation.

82. It is submitted that Section 7 of the *Regulations* is clearly imperative.

83. It is further submitted that Section 7 of the *Regulations* is mandatory. It would be inconsistent with the intent and purpose of the *EPCA* and the *Regulations* to hold otherwise. As such, the Board is under a statutory duty to establish a water management agreement between CF(L)Co and Nalcor within 120 days of receipt of Nalcor's Application.

84. Section 7 of the *Regulations* is clearly binding on the Board and would appear to prohibit the Board suspending and/or adjourning Nalcor's Application if the effect of same would be to compromise the 120 days prescribed by the *Regulations*.

PART IV - RELIEF SOUGHT

85. CF(L)Co respectfully requests that the Board establish the terms of a Water Management Agreement in the form and as proposed by CF(L)Co and Nalcor.

86. It is further requested that the Motion to Suspend, as filed by the Conseil des Innus de Ekuanitshit, be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of February, 2010.

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