IN THE MATTER OF the *Electrical Power Control Act, 1994*, S.N.L. 1994, c.E-5.1, as amended; 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.

TO: The Board of Commissioners of Public Utilities

THE REPLY OF the Conseil des Innus de Ekuanitshit **SAYS THAT:**

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I. The admissibility of Ekuanitshit's intervention

A. The Board's limited discretion to review an intervention

1. For the purposes of the current proceedings the term "intervenor" is simply defined as "a person, other than the applicant, who files a submission."

> *Board of Commissioners of Public Utilities Regulations, 1996*, N.L.R. 39/96, s. 2(c)(i).

2. The *Regulations* offer no further guidance on the characterization of an intervenor. Nor do they contain any provisions whatsoever on the procedure to be followed to ascertain whether an intervenor has status to intervene. At the same time, the *Regulations* do specifically address the procedures to be followed during pre-trial conferences (s. 16), the amendment of an intervenor's submissions to remove extraneous issues (s. 11), and the exchange of information requests (ss. 14 and 15).

3. The *Regulations* do not contemplate a procedure for contesting an individual's status to intervene because it is generally expected that all individuals who make a submission to the Board will be permitted to intervene. While the Board is not under an absolute duty to allow all interventions, the silence of the regulations with respect to the status to intervene speaks to Board's duty to receive interventions on a broad basis.

4. This inclusive approach to interventions is expected of administrative tribunals because one of their primary purposes is to ensure that the public interest is respected. As stated in MaCaulay & Sprague:

> I believe that most agencies should allow standing to most intervenors. In the end, the agency will have to decide what weight should be given to the submissions. This practice is in the public interest.
>
> R.W. MaCaulay & J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals,* looseleaf (Toronto: Carswell, 2009), p. 12-66.4(1)

B. Ekuanitshit satisfies the criteria for leave to intervene in any case

1) Criteria for leave to intervene

a. Before administrative tribunals and regulatory bodies

5. While the *Newfoundland Telephone Co. v. TAS Communication Systems Ltd.* case cited by Nalcor may stand for the proposition that intervenors must show they reach a threshold of interest, that in the case at bar is defined by the administrative and public law nature of the Board's proceedings.

> *Newfoundland Telephone Co. v. TAS Communication Systems Ltd.* (1984), 47 Nfld. & P.E.I.R. 277 (NLCA) [TAB 10 in Nalcor's submission]

6. Moreover, the proposed intervenor in the *Newfoundland Telephone* case admitted that he had no specific interest in the proceedings and the Supreme Court of Canada held that he lacked the statutory authority to intervene before this Board.

> *Newfoundland Telephone Co. v. TAS Commuincation Systems Ltd.*, [1984] 2 S.C.R. 466 [TAB 11 in Nalcor's submission]

7. The general principle that administrative tribunals apply when deciding whether a group or individual should be granted intervenor status is one of "sufficient interest, or some expertise or view which the agency feels will benefit the proceeding to have represented."

> MaCaulay & Sprague, *supra*, p. 12-66.3

8. It is important to distinguish this test from the "specific interest" test applied by courts. Administrative tribunals are not courts, and the threshold of interest required to intervene in proceedings before them is lower than that required to intervene before the courts. MaCaulay & Sprague are adamant on this point:

> The traditional differences between courts and agencies ought to make it clear to agencies that they cannot rely on court practice and procedure to declare whether a person has a right, or even a duty to appear before an agency.
>
> MaCaulay & Sprague, *supra*, p. 9-26.

9. The role of the Board in imposing a water management agreement is "polycentric", that is, "conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies." Its hearings are not a "judicial procedure [which] is premised on a bipolar opposition of parties, interests, and factual discovery," but instead addresses problems which "require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties."

> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, para. 36
> http://www.canlii.org/en/ca/scc/doc/1998/1998canlii778/1998canlii778.html

10. The rules governing intervention must be applied accordingly.

b. Newfoundland civil procedure

11. In its reply, Nalcor cites the Newfoundland Supreme Court decision in *Dalton v. Hutton* as one authority for the test courts should apply to intervenor applications. This test does not apply because the rules for intervening before courts and the rules for intervening before the Board of Commissioners of Public Utilities are not the same.

> *Dalton v. Hutton*, 2003 CarswellNfld 25 [TAB 8 in Nalcor's submission]

12. Furthermore, the court in *Dalton* followed its enunciation of the test with the qualification that the test was not the same when a matter of public interest is before the court:

> There is a clear demarcation between public and private litigation in how courts view applications for leave to intervene. Applicants who have no direct interest in the outcome of proceedings are more likely to get leave to intervene if the proceedings involve "public law issues". Public law issues are matters of broad public and societal concern, and include such things as health, environmental and aboriginal matters.
>
> *Dalton v.* Hutton, *supra,* para. 35

13. The court's decision in *Dalton* drew from its earlier decision in *Newfoundland (Minister of* Government *Services & Lands) v. Drew*. In that case Abitibi-Consolidated Inc. was successful in its application to intervene in proceedings brought by the Crown to force the defendants to remove their log cabins from a wilderness reserve. Abitibi argued that the defendants' Aboriginal rights defence, if successful, would affect its ability to exercise its rights on the surrounding land. The court accepted that this qualified as an "interest" in the subject matter of the proceedings and allowed Abitibi to intervene, despite the fact that Abitibi had no rights in the land the cabins were built upon.

14. In finding that a sufficient interest existed, the court noted when Aboriginal rights are raised:

> That is a constitutional and public law issue which warrants a less rigid approach in the exercise of the court's discretion as to whether to permit interventions.
>
> *Newfoundland (Minister of Government Services & Lands) v. Drew*, [2000] 4 C.N.L.R. 239, para. 23

15. Due to its grand scale, every aspect of Nalcor's current project is a matter of public interest, especially where, as in this case, there is the potential for infringement of Aboriginal rights.

16. The public interest issues distinguish this case from *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)*, where the parties had applied to the court for an interpretation of a Memorandum of Understanding that they had negotiated.

17. In denying an application to intervene, the court applied a private law notion of specific interest test. It applied the much narrower test because the matter before it was analogous to contractual interpretation, where the input of a third party is neither necessary nor desirable.

> *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 157 Nfld. & P.E.I.R. (TD) [TAB 7 in Nalcor's submission]

2) Ekuanitshit's interest in the matter

18. The Applicant Nalcor Energy and its shareholder, the Government of Newfoundland, acknowledged in 2005 that the Innu of Ekuanitshit assert Aboriginal rights in Labrador and that a third party might be obliged to consult them about this project.

> Government of Newfoundland and Labrador, *Lower Churchill Hydro Resource: Request for Expressions of Interest and Proposals* (January 2005), p. 23

19. Moreover, it is a matter of public knowledge that in 1979, the Government of Canada accepted the claim to 700,000 square kilometres in Quebec and Labrador filed by the Conseil Atikamekw-Montagnais (CAM) on behalf of Innu communities including Ekuanitshit. (After 1994, Ekuanitshit continued negotiations as a member of the Assemblée Mamu Pakatatau Mamit.)

> Indian and Northern Affairs Canada, "Comprehensive Claims Policy and Status of Claims" (19 July 2000), p. 11
> http://dsp-psd.tpsgc.gc.ca/Collection/R32-221-2000E.pdf

20. Research filed by Nalcor as part of the environmental assessment for this project shows recent use of Gull Lake by the Ekuanitshit Innu ("people from Mingan") and heavy use of the area by the Mingan Innu in the 19th century.

> Nalcor, Component Studies Socio-Economic Environment: Cultural Heritage Resources, Report 5, *Historic Resources (Labrador Study) 1999 Environmental Studies*, pp. 33, 78
> http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31993/se-ch-05.pdf
>
> Nalcor, Component Studies Socio-Economic Environment: Cultural Heritage Resources, Report 4, *Historic Resources Overview Assessment 1998-2000*, vol. 1, p. 27

http://www.acee-ceaa.gc.ca/050/documents_staticpost/26178/31993/se-ch-04.pdf

21. When describing the impact of the La Romaine project, Hydro-Québec had no problem recognizing that "[TRANSLATION] essentially, the territory used by the Ekuanitshit Innu in the 20th century … extends as far as the Churchill River in Labrador."

> Hydro-Québec, *Complexe de La Romaine; Étude d'impact sur l'environnement*, vol. 6, *Milieu humain – Communautés innues et archéologie* (December 2007), p. 38-8
> http://www.acee-ceaa.gc.ca/050/documents_staticpost/cearref_2613/ei_volume06.pdf

22. The guidelines issued for this project by the federal and provincial governments specify that the Innu of Ekuanitshit are one of the Aboriginal groups whose "interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues" are to be considered by Nalcor in its Environmental Impact Study (EIS).

> Government of Canada and Government of Newfoundland and Labrador, *Environmental Impact Statement Guidelines: Lower Churchill Hydroelectric Generation Project, Newfoundland and Labrador Hydro* (July 2008), §4.8
> http://www.ceaa.gc.ca/050/documents/28050/28050E.pdf

23. Moreover, it is a matter of public record that the Innu of Ekuanitshit (as represented by the Corporation Nishipiminan) are an intervenor in the environmental assessment of this project.

> Canadian Environmental Assessment Agency, Participant Funding Program Review Committee - Aboriginal Funding Envelope, Lower Churchill Hydroelectic Generation Project (June 5, 2008)
> http://www.ceaa.gc.ca/050/document-eng.cfm?document=31359

3) Application of the case law on intervention to these facts

24. Interventions before the Board of Commissioners of Public Utilities require that the group seeking status show a sufficient interest in the issue. The principles of administrative law dictate that the threshold is a low one. The presence of public interest issues such as environmental concerns and Aboriginal rights dictate that the threshold is a low one. The threshold is not that applied by the courts.

25. By virtue of the important Aboriginal rights issues raised by their submission, the Innu of Ekuanitshit have a sufficient interest to be granted intervenor status before the Board of Commissioners of Public Utilities in its consideration of Nalcor Energy's application pursuant to s. 5.5(1) of the *Electrical Power Control Act.*

II. Legal issues raised by Ekuanitshit's intervention

A. Introduction

26. The submissions below are made for the guidance of the Board in disposing of the matter of Ekuanitshit's intervention.

27. More particularly, the submissions are made under reserve of the Board's duty to conduct a hearing into the relief sought by the Innu of Ekuanitshit.

B. The Water Management Agreement engages the duty to consult

1) The utilities' statutory duty

28. The applicant Nalcor and the respondent CF(L)Co. have a statutory duty to consult with Aboriginal peoples affected by the project requiring the water management agreement sought in these proceedings.

29. The power policy of the province set out in the governing statute for these proceedings includes 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;
>
> *Electrical Power Control Act, 1994*, S.N.L. 1994, c. E-5.1, s. 3.

30. The notion of efficiency in power production is not scientific or technical, but is determined by the context:

> 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.

31. With respect to water management agreements in particular, the Lieutenant Governor in Council has defined "sound utility practice" as follows:

> "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.
>
> *Water Management Regulations*, N.L.R. 4/09, s. 2(d)

32. All of the utilities which are members of the Canadian Electricity Association, including Nalcor, have approved the following practices to which they have declared themselves to be committed:

> - Recognizing and respecting the status and diversity of Aboriginal peoples, and their historic and cultural ties to the land.
> - Informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them.
>
> Canadian Electricity Association, "CEA Statement on Aboriginal Relations" (February 2004)
> http://www.canelect.ca/en/Pdfs/Aboriginal_2004.pdf

33. At the federal level, the National Energy Board has informed utilities that "the Board will continue to examine the efforts made directly by applicants to contact potentially affected Aboriginal peoples to advise them of the project and to involve them in meaningful discussions regarding potential project impacts and appropriate mitigation as set out in the Board's Guidelines for Filing Requirements."

> National Energy Board, Memorandum of Guidance, "Consultation with Aboriginal Peoples", File 230-A000-16 (4 March 2002)
> https://www.neb.gc.ca/ll-eng/Livelink.exe/fetch/2000/90463/522930/523056/Memorandum_Of_Guidance_%28A0C8Q3%29.pdf?nodeid=522841&vernum=0

34. Moreover, the "environmental protection" sought by "good utility practice" pursuant to s. 2(d) of the *Water Management Regulations* must be consistent with the definition of the environment provided by the legislature in other statutes:

> (m) "environment" includes
> (i) air, land and water,
> (ii) plant and animal life, including human life,
> (iii) the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community,
> (iv) a building, structure, machine or other device or thing made by humans,

> (v) a solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of humans, or
>
> (vi) a part or a combination of those things referred to in subparagraphs (i) to (v) and the interrelationships between 2 or more of them;
>
> *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, s. 2

35. Aboriginal land use and occupation is one of the combinations or interrelationships between land and water or plant and animal life, on the one hand, and the social, cultural and economic life of humans, on the other.

36. Aboriginal land use and occupation is therefore part of the environment which good utility practice seeks to protect.

2) The Crown's constitutional duty

a. The test

37. The Crown's duty to consult and accommodate Aboriginal peoples has been succinctly set out as follows in a recent Labrador case:

> [122] Following the directions set out by the Supreme Court of Canada, the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. (*Haida Nation* [*v. British Columbia (Minister of Forests)* (2004) 3 S.C.R. 511] at paragraph 33).
>
> …
>
> [125] And further at paragraph 39 of *Haida Nation* (*supra*) MacLaughlin [sic] C.J.C. states:
>
> > "The content of duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed." (Emphasis added)
>
> *Labrador Metis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, [2006] 4 C.N.L.R. 94 (NL S.C.T.D.), aff'd. (2007) [2008] 1 C.N.L.R. 48 (NL C.A.)
> http://www.canlii.org/en/nl/nlsctd/doc/2006/2006nltd119/2006nltd119.html

b. The role of the Crown and its agents

38. The applicant Nalcor is an agent of the provincial Crown: *Hydro Corporation Act, 2007*, S.N.L. 2007, c. H-17, s. 3(4).

39. The Board is a corporation whose members are appointed by the Lieutenant Governor in Council: *Public Utilities Act*, R.S.N.L. 1990, c. P-47, s. 6(1), (2).

40. The Board has the duty of ensuring that the development and utilization of a body of water as a source for the production of power and to which two or more persons who have been granted rights by the province achieves the policy objective set out in s. 3(b)(i) of *Electrical Power Control Act, 1994*, pursuant to s. 5.5(2).

41. In these proceedings, in the absence of agreement between the two parties, the Board has a broad discretion "to establish the terms of an agreement between them": s. 5.5(1).

42. The terms of the agreement will determine, among other things:

    a. "the generating capacity, storage capacity, or transmission capability available to a supplier from all facilities on the body of water": *Water Management Regulations*, s. 3(2)(e)(ii);

    b. the amount of "water stored in the body of water's reservoirs" and the consequences "if water spillage occurs": s. 3(2)(j).

c. The rights of the Innu of Ekuanitshit

43. The potential scope and nature of the aboriginal rights asserted by the Innu of Ekuanitshit have been repeatedly acknowledged, as set out above, including:

    a) by Nalcor and the Government of Newfoundland: *Lower Churchill Hydro Resource: Request for Expressions of Interest and Proposals* (January 2005), p. 23;

    b) by the federal government: "Comprehensive Claims Policy and Status of Claims" (19 July 2000), p. 11;

    c) by the federal and provincial governments when deciding on the environmental assessment for this project: *Environmental Impact Statement Guidelines: Lower Churchill Hydroelectric Generation Project, Newfoundland and Labrador Hydro* (July 2008), §4.8.

d. The potentially adverse effects

44. It should be obvious that changing the natural river flows to follow the dictates of Nalcor's and CF(L)Co.'s commercial interests has a potentially adverse effect on the rights and title over those rivers and their watersheds asserted by the Innu of Ekuanitshit, especially their exercise of hunting and fishing rights.

45. The facilities for which Nalcor is seeking a water management agreement are Brobdingnagian[1] in scale:

> In addition to the approximately 70,000 km^2 associated with the upper Churchill, the tributaries that will flow into the Gull Island and Muskrat Falls reservoirs drain an area of approximately 23,000 km^2. The Gull Island reservoir will be contained within the Churchill River valley, and will extend from the Gull Island powerhouse back to the tailrace at Churchill Falls. The reservoir will be approximately 225 km long and will have approximately 580 million m^3 of live storage. The Muskrat Falls reservoir will extend from the Muskrat Falls powerhouse back to the Gull Island tailrace. It will have approximately 50 million m^3 of live storage.
>
> Nalcor, *Water Management Agreement Application: Pre-filed Evidence*, p. 8

46. The water management agreement which is the subject of this application will play a key role in determining the conditions for this gargantuan storage of water.

47. More particularly, Nalcor's goal in its application is to seek the Board's assistance in deviating from the rivers' natural flows in order to maximize the production of electricity.

> The purpose of a water management agreement is to coordinate power and energy production from facilities on a body of water to maximize energy production over time. The amounts of power and energy produced from a generating facility are functions of the quantity of water available at the generating station at any given time. If natural flows arrived at the generating station in exactly the right amount and when required for production, there would be no need for water management. However, natural flows are not synchronized to production requirements. Therefore, reservoir storage is required to regulate the flow. For a downstream operator, control of flows from upstream facilities may also be required in order to regulate flow to the downstream generating station.
>
> Nalcor, *Water Management Agreement Application Pre-filed Evidence*, p. 11 (emphasis added)

[1] After Brobdingnag, a country in *Gulliver's Travels* by Jonathan Swift, where everything was enormous.

48. For Nalcor, water management is primarily the management of reservoir levels for power production:

> […] Water management (regulating the reservoir levels) is intended to maximize efficiency of the generation facilities with the effect that there will be little variations in reservoir levels. The fluctuations that occur will affect daily/weekly load swings. The reservoir level will be lowered each spring to LSL [low supply level] in preparation for the substantial inflows that result from melting snow. At times of extreme precipitation events, the water level may rise to the maximum flood level. The operational regime will maximize energy production through the anticipated range of river flow through the life of the Project.
>
> …
>
> Water management agreements are standard on rivers with more than one operator. The provincial government is currently moving to regulate the coordination of water management on provincial rivers so that hydroelectric facilities operating on the same river work together. This optimizes the value of the resource, and therefore benefits both the Province and power generators. As a result of this legislation, the reservoir level of the Gull Island facility will operate as close to the 125 FSL [full supply level] as possible to maximize the efficiency of the facility. The amendment to the *Electrical Control Power Act* (ECPA) provides a framework for the Public Utilities Board (PUB) to regulate the coordination of water management agreements. The amendment allows for the delivery commitments under existing power contracts to be honoured, including the 1969 power contract for the Upper Churchill. The amendment provides hydroelectric operators sharing a river system, as will be the case on the Churchill River with the Upper Churchill and the Project, with certainty over the coordination of water flow. Through this amendment, the needs of both the Churchill Falls Power Station and the Project will be accommodated.
>
> Nalcor, *Environmental Impact Statement, Lower Churchill Hydroelectric Generation Project*, vol. IA, *Project Planning and Description* (February 2009), pp. 3-52, 4-59 (emphasis added)
>
> http://www.ceaa.gc.ca/050/documents_staticpost/26178/31991/v1a.pdf

49. Water management which does not take into account Aboriginal rights when changing natural river flows clearly has the potential to affect those rights adversely.

3) The Board has jurisdiction to decide the issue of consultation

a. Consultation by utilities pursuant to statute

50. The statutory duty imposed on the applicant Nalcor and the respondent CF(L)Co. to consult with Aboriginal peoples affected by the project requiring the water management agreement is set out above.

51. As set out above, consultation of Aboriginal peoples forms part of "sound public utility practice" within the meaning of the *Electrical Power Control Act, 1994*, s. 4 and the *Water Management Regulations*, s. 2(d).

52. Applying the test of whether the utilities appearing before have engaged in sound practices goes to the heart of the Board's jurisdiction under the *Electrical Power Control Act, 1994*, ss. 4 and 5.5(2).

b. Consultation by the Crown pursuant to its constitutional obligations

53. The Court of Appeal has held:

> The Board is empowered to decide all questions of law and fact within the ambit of its jurisdiction and is master of *its* own house with respect to all matters of procedure, including the composition of the panel to hear a particular matter.
>
> *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 83 Nfld. & P.E.I.R. 257 (NL C.A.) at 261 (emphasis added), rev'd. on other grounds [1992] 1 S.C.R. 623
> http://www.canlii.org/en/nl/nlca/doc/1990/1990canlii2626/1990canlii2626.html

54. The Board's power to determine questions of law arises by necessary implication from the possibility of an appeal to the Court of Appeal from its orders "upon a question as to its jurisdiction or upon a question of law": *Public Utilities Act*, R.S.N.L. 1990, c. P-47, s. 99(1).

55. Moreover, the Board's power to determine questions of law is provided for in:

a) its "general supervision of all public utilities," including to ensure "the compliance by public utilities with the law": *Public Utilities Act*, s. 16; and

b) its possession of "all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act": s.118(2).

56. At the federal level, the National Energy Board has informed utilities that:

> …it has a responsibility to determine whether there has been adequate Crown consultation before rendering its decision in cases where the effect of the decision may interfere with an aboriginal or treaty right.
>
> Therefore, in considering applications before it, the Board will require applicants to clearly identify the Aboriginal peoples that have an interest in the area of the proposed project and to provide evidence that there has been adequate Crown consultation where rights pursuant to section 35 of the *Constitution Act, 1982* may be infringed if the Board approves the applied-for facilities.
>
> In such cases, applicants will be expected to contact the appropriate Crown department or agency to ensure that the requisite Crown consultations are carried out and to arrange for the information pertaining to those consultations to be filed with the Board. In the absence of such evidence, an application may be considered deficient by the Board or questions may be posed to the applicant to elicit the necessary information.
>
> National Energy Board, Memorandum of Guidance, "Consultation with Aboriginal Peoples", File 230-A000-16 (4 March 2002)
> https://www.neb.gc.ca/ll-eng/Livelink.exe/fetch/2000/90463/522930/523056/Memorandum_Of_Guidance_%28A0C8Q3%29.pdf?nodeid=522841&vernum=0

57. The Board of Commissioners of Public Utilities must exercise its decision-making function in accordance with the dictates of the Constitution, including s. 35 of the *Constitution Act, 1982*.

> *Quebec (Attorney General)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 185
> http://www.canlii.org/en/ca/scc/doc/1994/1994canlii113/1994canlii113.html
> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 2 C.N.L.R. 58 (B.C.C.A.), at para. 45
> http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca67/2009bcca67.html

58. The honour of the Crown requires not only that the Crown consult, but also that the Board of Commissioners of Public Utilities decides any consultation dispute which arises within the scheme of its regulation.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)* at para. 51, 54

59. The Board of Commissioners of Public Utilities is a quasi-judicial tribunal with authority to decide questions of law on proceedings under applicable statutes and regulations. It is not necessary to find an explicit grant of power in the applicable statutes and regulations

to consider constitutional questions; so long as the Legislature intended that the Board of Commissioners of Public Utilities decide questions of law, that is sufficient.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)* at para. 15, 45
> *Kwikwetlem First Nation v. B.C. (Utilities Commission)*, [2009] 2 C.N.L.R. 212 (B.C.C.A.), at para. 8
> http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca68/2009bcca68.html
> *Public Utilities Act*, R.S.N.L. 1990, c. P-47, ss. 16, 99(1) and 118(2)
> *Board of Commissioners of Public Utilities Regulations, 1996*, art. 27

60. As such, the Board of Commissioners of Public Utilities has the jurisdiction and the obligation to decide whether the duty to consult and accommodate has been triggered and whether this duty has been discharched with respect to the establishment of the water management agreement.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)* at para. 15
> *Kwikwetlem First Nation v. B.C. (Utilities Commission)* at para. 8

61. Not only has the Board of Commissioners of Public Utilities the ability to decide the consultation issue, it is the appropriate forum to decide the issue. Indeed, if the Intervenors are entitled to early consultation in regard to water management agreement, it necessarily follows that the board with the power to establish the water management agreement must accept the responsibility to assess the adequacy of consultation.

62. Otherwise, the Intervenors will be driven to seek an interlocutory injunction, which, according to the Supreme Court of Canada, is often an unsatisfactory route.

> *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)* at para. 53
> *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 14
> http://www.canlii.org/en/ca/scc/doc/2004/2004scc73/2004scc73.html

C. The duty to consult properly forms the basis of Ekuanitshit's intervention

1) The Board is not being asked to adjudicate Aboriginal rights

63. The submissions of the applicant Nalcor and the respondent CF(L)Co. are without merit when they allege that the Innu of Ekuanitshit are asking the Board "to hear and determine matters of Aboriginal rights or title".

> Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Uashat mak Mani-Utenam, para. 33; Reply by CF(L)Co. to Request for Intervenor Status by Ekuanitshit, para. 16

64. The Innu of Ekuanitshit are relying upon Nalcor's statutory duties and the Crown's duty to consult and accommodate Aboriginal peoples.

65. The Crown's duty arises in the face of potential rights, as the Court of Appeal has explained:

> The Crown obligation to undertake an analysis of whether the Crown owes a duty to consult is triggered at a low threshold. See *Mikisew Cree* [(2005) 3 S.C.R. 388], at para. 55. To trigger that obligation, the Crown must have knowledge, real or constructive, of the "potential" existence of an aboriginal right that "might" be adversely affected by conduct contemplated by the Crown. See *Haida*, at para. 35. All that is necessary is that the Crown have "some idea" of the potential scope and nature of the aboriginal right asserted and of the alleged infringements of these rights. See *Haida*, at para. 36.
>
> *Labrador Metis Nation v. Newfoundland and Labrador* (NL C.A.), para. 29 (emphasis added)

66. In that case, the provincial Crown had "knowledge of a credible but unproven claim sufficient to trigger a duty to consult and accommodate": *Labrador Metis Nation* (NL S.C.T.D.), para.123 (emphasis added); aff'd NL C.A., para. 53(iii).

67. The claim need not be proven precisely because the duty of consultation and accommodation is meant to address the problems inherent in proving Aboriginal rights and title.

> Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?
>
> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending

> resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.
>
> *Haida Nation* (S.C.C.), para. 26-27

2) The environmental assessment cannot satisfy the duty to consult

a. Ekuanitshit has not been consulted in fact

68. The allegation by Nalcor and the respondent CF(L)Co. that the Innu of Ekuanitshit are being consulted by the proponent as part of the environmental assessment process is flatly contradicted by the record in these proceedings and before the Lower Churchill Hydroelectric Generation Project Joint Review Panel.

> Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Uashat mak Mani-Utenam, para. 19; Reply by CF(L)Co. to Request for Intervenor Status by Ekuanitshit, para. 14

69. The Innu of Ekuanitshit have already filed with the Board their earlier submissions to the Joint Review Panel stating that no consultation by Nalcor had taken place, despite the requirement in the guidelines for the Environmental Impact Study (EIS).

> Conseil des Innus de Ekuanitshit, Canadian Environmental Assessment Registry (CEAR) ref. no. 07-05-26178, document no. 213, "Comments regarding the EIS conformity review" (22 June 2009) (English translation prepared by CEAA) http://www.ceaa.gc.ca/050/documents/36689/36689E.pdf

70. More recently, the Innu of Ekuanitshit have informed the Joint Review Panel of their position that Nalcor's EIS, even as supplemented by its responses to requests for additional information, does not meet the requirements of the *Guidelines* and cannot serve as the basis for public hearings, due to the complete lack of consultation by Nalcor.

> …[T]he proponent waited until May 2008 to contact the Innu of Ekuanitshit and, then, only to propose a meeting, without providing any support to assist the community in its ability to respond to this invitation (Response, IR# JRP.2.a-2).
>
> The proponent knew or should have known that, at the same time, the Innu of Ekuanitshit were busy participating in the environmental assessment of the Romaine Hydroelectric Complex Project (CEAR Reference No. 04-05-2613), another major project proposed in the heart of their territory.
>
> …

> The proponent made no other concrete gestures before proposing, in a letter in May 2009, the funding of a single consultation officer position (Response, IR# JRP.2.c). Despite the obvious inadequacy of this offer, given the scope of the project, the Council agreed to meet with the proponent's representatives on an exploratory basis during a meeting held in the community on June 1, 2009 (Response, IR# JRP.2).
>
> The proponent has still not decided on a method for gathering information concerning "the interests, values, concerns, contemporary and historic activities" of the Innu of Ekuanitshit, as required by the *Guidelines*, and it has still not proposed a method for how these will be considered "in planning and carrying out the project."
>
> Conseil des Innus de Ekuanitshit, CEAR ref. no. 07-05-26178, document no. 290, "Comments regarding the review of the proponent's responses to Information Requests- Additional 30 day public consultation period" (18 December 2009) (English translation prepared by CEAA)
> http://www.ceaa.gc.ca/050/documents/40327/40327E.pdf

b. The Joint Review Panel cannot ensure consultation as a matter of law

71. Nalcor's own exhibit flatly contradicts its submissions and those of CF(L)Co. that the environmental assessment process could be the appropriate forum for consultation and accommodation of the Innu of Ekuanitshit.

> Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Uashat mak Mani-Utenam, para. 33; Reply by CF(L)Co. to Request for Intervenor Status by Ekuanitshit, para. 19

72. As a matter of law, the federal-provincial agreement produced by Nalcor expressly forbids the Lower Churchill Hydroelectric Generation Project Joint Review Panel from considering the adequacy of consultation and accommodation of Aboriginal interests by the Crown.

> The Panel will not have a mandate to make any determinations or interpretations of:
> - the validity or the strength of any Aboriginal group's claim to aboriginal rights and title or treaty rights;
> - the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
> - whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*; and
> - The scope, nature or meaning of the Labrador Inuit Land Claims Agreement.

Agreement Concerning the Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project between the Government of Canada and the Government of Newfoundland and Labrador (2008), "Part II – Scope of the Environmental Assessment", p.10 (emphasis added)
http://www.ceaa.gc.ca/050/documents/30731/30731E.pdf

c. Environmental assessment is not equivalent to consultation and accommodation

73. The Supreme Court of Canada has found that a decision taken pursuant to the *Canadian Environmental Assessment Act* was insufficient to satisfy the Crown's duty to consult and accommodate Aboriginal peoples.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388
http://www.canlii.org/en/ca/scc/doc/2005/2005scc69/2005scc69.html

74. The Court found that even though the actual content of the Crown's duty of consultation lay at the lower end of the spectrum, nonetheless:

a) "The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users)."

b) "This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests."

c) "The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights."

d) "'The Crown's duty to consult imposes on it a positive obligation to reasonably ensure… that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.'"

Mikisew Cree First Nation (S.C.C.), para. 64

75. The judge at first instance, whose judgment was upheld, made a distinction between the "standard procedures mandated by the environmental assessment rules… designed to minimize environmental impacts" and the "steps taken to minimize the effects of the proposed road on the constitutional rights" of members of a Aboriginal people.

> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2001), [2002] 1 C.N.L.R. 169 (F.C.), para. 173
> http://www.canlii.org/en/ca/fct/doc/2001/2001fct1426/2001fct1426.html

76. It therefore cannot be presumed that the Crown's obligation to consult would be fulfilled in simply following the process in the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, or the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

77. In another case, the Supreme Court of Canada did find that the process engaged in by the Province of British Columbia under its *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate.

> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550
> http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html

78. However, the process which the Supreme Court held was acceptable provided the Aboriginal party with a special role:

a) the provincial statute required that Aboriginal peoples whose traditional territory included the site of the project be invited to participate in a Project Committee (para. 33);

b) representatives of the First Nation participated fully as Project Committee members (para. 34);

c) the First Nation received financial assistance to participate in Project Committee meetings (para. 37); and

d) in face of concerns raised by the First Nation, the provincial office responsible for assessment commissioned a study on traditional land use by an expert approved by the First Nation and under the auspices of an Aboriginal study steering group (para. 13).

79. None of the special conditions which applied to the Taku River First Nation have been respected in the environmental assessment for Nalcor's project.

80. On the contrary, the Innu of Ekuanitshit have been even more systematically excluded from the process than the Mikisew Cree:

a) the Crown has provided no notice or information to the Innu – consultation has only been required from Nalcor as the proponent;

b) the Joint Review Panel is prohibited from addressing Aboriginal rights and title, or even the adequacy of Crown consultation

e) none of the Aboriginal peoples whose traditional territory include the site of the project are not participating as members of the Joint Review Panel;

f) financial assistance to the Innu of Ekuanitshit to participate in the environmental assessment has been restricted to $50,000 provided through the Canadian Environmental Assessment Agency's Participant Funding Program; and

g) no study of the Innu of Ekuanitshit's traditional land use has been carried out by any expert, let alone one approved by or acting under Ekuanitshit's auspices.

THE WHOLE OF WHICH is respectfully submitted.

DATED at Montreal, this 14th day of January 2010

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