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

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

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TO: The Board of Commissioners of Public Utilities ("PUB")

SUBMISSIONS OF THE INNU OF UASHAT MAK MANI-UTENAM, THE INNU TAKUAIKAN UASHAT MAK MANI-UTENAM BAND COUNCIL AND CERTAIN TRADITIONAL FAMILIES OF THE UASHAT MAK MANI-UTENAM INNU NATION ("Intervenors")**:**

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I. INTRODUCTION

1. The Churchill River watershed lies within traditional lands of the Innu of Uashat and Mani-Utenam and certain traditional families of the Uashat mak Mani-Utenam Innu Nation ("Uashaunnuat"), which include a significant portion of Labrador, and particularly the lands and natural resources located approximately between Parallels 52 and 56 of latitude north and Meridians 61 and 69 of longitude west. Some parts of the traditional lands are shared with other Innu or Aboriginal groups[1].

2. The traditional territory of the Uashaunnuat includes all of the natural resources thereof, including living and inanimate things, and for greater certainty, surface and subsurface waters. Specifically, this includes the natural resources of the Churchill River basin[2].

3. The Uashaunnuat assert Aboriginal title, Aboriginal rights and treaty rights in Labrador which includes a significant part of the Churchill River watershed. The Uashaunnuat claim Aboriginal title, Aboriginal rights and treaty rights with regard to natural resources, including water resources. These Aboriginal and treaty rights specifically include the right and jurisdiction over the water resources in a large part of Labrador[3].

4. The establishment of a WMA and the management of water thereunder will deny or impede the Uashaunnuat's exclusive or shared right to use, possess, occupy, and control the Churchill River watershed and the natural resources therein. The establishment of a WMA and the management of water thereunder will deny the Uashaunnuat's right to choose to what use the Churchill River watershed and the natural resources therein can be put. The establishment of a WMA and the management of water thereunder will be a denial of Aboriginal jurisdiction and of the right to self-government and self-determination of the Uashaunnuat.

5. The construction and exploitation of hydroelectric facilities, including water management, on the Churchill River at Churchill Falls, Muskrat Falls and Gull Island is incompatible and irreconcilable with the nature of the Uashaunnuat's attachment to the land which forms the basis of their claim to Aboriginal rights and title.

6. Any use of such waters of the Churchill River requires the consent of the Intervernors, which the proposed WMA does not contemplate. A WMA and the management of water thereunder which does not have the consent of the

[1] Response to PUB-IUM-1, p. 1
[2] Ibid. p. 2
[3] Ibid, pp. 1-2

Intervenors will adversely affect the Aboriginal rights and title and treaty rights of the Uashaunnuat.

7. The Intervenors' have not consented to, or been consulted or accommodated in regard to, the establishment of a WMA and the management of water thereunder, the lower Churchill hydroelectric project, and the upper Churchill hydroelectric project[4].

8. There has been no environmental assessment and that there is no ongoing environmental assessment or monitoring in regard to the effects of the operating parameters, operating regime or operation of the upper Churchill hydroelectric project, including reservoirs, on the upper Churchill river basin, reservoirs, tributaries and adjoining watersheds[5].

9. There has been no environmental assessment in regard to the effects of a WMA and the management of water thereunder, and particularly the management of water at Churchill Falls, including reservoirs, on the upper Churchill River basin, including reservoirs, tributaries and adjoining watersheds[6].

10. In these circumstances, the establishment of a WMA and the management of water thereunder will infringe the Aboriginal rights and title and treaty rights of the Uashaunnuat, including their fishing, trapping and hunting rights, as well as perpetuate the historical infringement of the Aboriginal rights and title and treaty rights of the Uashaunnuat.

II. FACTS

The proceedings

11. Between April and October 2009, Nalcor and CF(L)Co. failed to enter into a water management agreement ("WMA") pursuant to s. 5.4 *EPCA*[7].

12. On November 10, 2009, Nalcor filed with an Application with the PUB to establish the terms of a WMA with respect to "the use of the Churchill River for the production of power"[8].

13. In the absence of an agreement between Nalcor and CF(L)Co., the PUB has the duty to establish a WMA that is binding on "two or more persons who have been granted rights by the province to the same body of water as a source for the

[4] Answer to PUB-NE-13; Answer to PUB-IUM-5, pp. 6-7; IUM submissions date January 14, 2010, p. 11
[5] Answer to IUM-CF(L)Co.-1
[6] Answer to IUM-CF(L)Co.-2
[7] Nalcor Application dated November 10, 2010 ("Application"), pp. 3-4; Written submissions on behalf of CF(L)Co. dated December 10, 2010 ("CF(L)Co. Submissions"), p. 2
[8] PUB's Public Notice of Application dated November 18, 2010

production of power and who utilize, or propose to utilize, or to develop and utilize the body of water as a source of for the production of power"[9].

14. Nalcor filed a proposed WMA with its Application. The parties to the proposed WMA are Nalcor and CF(L)Co.[10].

15. On December 10, 2009, CF(L)Co. filed a proposed WMA that is "identical" to the one filed by Nalcor[11].

16. On December 21, the Intervenors filed a request for intervenor status seeking leave from the PUB to intervene in the present proceedings[12].

17. On January 22, 2010, the PUB granted leave to intervene to the Intervenors[13].

The Uashaunnuat

18. The traditional territory of the Uashaunnuat includes the entire area of the Upper Churchill hydroelectric project, a portion of the area of the Lower Churchill Hydroelectric Development, and the areas of transmission lines forming part of these projects[14].

19. A large part of this traditional territory of the Uashaunnuat is divided into various traditional Innu family territories which generally correspond with beaver trapping lots and which are used, occupied and managed by traditional Innu families of the Uashaunnuat. A significant portion of Quebec and Labrador, including a large portion of the Churchill River watershed, is divided into these family territories[15].

20. The Uashaunnuat currently live, occupy, possess and use the western, central and northern portions of Labrador located approximately between Parallels 52 and 55 of latitude north and Meridians 62 and 68 of longitude west. The Uashaunnuat share their traditional lands, which include a portion of the Churchill River watershed, in part with the Innu of Matimekush-Lac-John and with the Innu of Sheshatshit. There are many family ties between the Innu of the Uashat mak Mani-Utenam, Matimekush-Lac-John and Sheshatshit communities[16].

21. Since time immemorial, or at least since prior to contact with Europeans, the Uashaunnuat have continuously occupied, possessed, controlled and managed their traditional lands and that part of the Churchill River watershed which is

[9] EPCA, ss. 5.4, 5.5
[10] Nalcor Application, supra note 1, Schedule A
[11] CF(L)Co. Submission, supra note 1, p. 3 and Tab C
[12] Intervenors' request for intervenor status dated December 21, 2009
[13] PUB Order no. P.U. 2(2010)
[14] Answer to PUB-IUM-1, p. 2
[15] Ibid.
[16] Ibid. p. 1

located within these traditional lands. They have used the Churchill River watershed for hunting, trapping, fishing and other subsistence activities, for transportation and for other traditional activities[17].

22. The Uashaunnuat are a distinct Innu society and use, occupy and manage their traditional territory in ways that are integral to their distinctive Innu culture, through, among other things, the exercise of various traditional activities and the harvesting of natural resources within their traditional territory. The Churchill River was a main route for the ancestors of the Innu of Uashat mak Mani-Utenam, the Innu of Matimekush-Lac-John and the Innu of Sheshatshit. The ancestors of the Innu of Uashat mak Mani-Utenam, the Innu of Matimekush-Lac-John and the Innu of Sheshatshit hunted caribou and migratory birds in the Churchill River watershed, trapped various species of wildlife (such as beaver) in the Churchill River watershed and fished in the Churchill River and its tributaries. The natural resources of the Churchill River watershed provided them with all the necessities and means of subsistence and had spiritual and cultural meaning. The Churchill River watershed and its natural resources served to make Innu culture what it was and still is to this day[18].

23. The present-day communities of Uashat mak Mani-Utenam, Matimekush-Lac-John and Sheshatshit (together with the Innu of other Quebec Lower North Shore communities) are all direct descendants of the Innu who have used, possessed and occupied the Churchill River basin for centuries and can all assert Aboriginal title, Aboriginal rights and treaty rights[19].

24. The huge territory through which the Churchill River flows and where the Churchill River watershed lies was used and occupied by the Uashaunnuat and their ancestors, particularly those who used the Moisie River and connected rivers and tributaries to travel to their hunting territories, among which were the Michikamau and Petitsikapau bands identified by Frank Speck (also ancestors of the Uashaunnuat)[20].

25. The region located between Lake Michikamau (north of the Churchill River) and Lake Ossokmanuan (south of the Churchill River) was used and occupied from fall to spring by Innu families. These families set up camps in the region and hunted caribou and migratory birds, trapped beaver and fished for subsistence[21].

26. From the 1940s to the 1960s, Innu families also used the region when the territories they usually hunted in were poor in beaver. The Churchill River basin

[17] Ibid. p. 2
[18] Ibid.
[19] Ibid. p. 2
[20] Ibid. p. 3
[21] Ibid.

was then relatively rich in beaver. These families hunted and trapped in the Churchill River area and then returned to their specific family territories[22].

27. In the past, some families who did not travel back to the coast spent summer in the Churchill River watershed, including on the southeast and southwest shores of Lake Michikamau. Traces of old campsites remained until approximately 50 years ago. The Innu families which were present in the region from the 1940s to the 1960s used and occupied the same places as their ancestors and also travelled to the area of Churchill Falls and Lake Winokapau. Men travelled from these campsites to Sheshatshit in order to buy necessities. They would usually travel to Sheshatshit in March and return to their campsites where their families remained[23].

28. Some sites were preferred for gatherings. Families would meet, for instance, southwest of Lake Wade, near Lake Ashuanipi, during the month of December and would celebrate Christmas together. They also gathered in springtime near Lake Lobstick and Lake Sandgirt to hunt beaver. They would often meet with families from Ekuanitshit and Sheshatshit[24].

29. Besides these campsites and gathering sites, the Uashaunnuat can identify routes which were used by their ancestors as well as birthplaces, places of death and burial sites. Furthermore, this region having been used for a long time, the Uashaunnuat can identify sites where important events in their history happened and have Innu names for several places[25].

30. Further to the west, it is known that Lake Ashuanipi and Lake Menihek as well as the Ashuanipi River were used by many families to travel towards the interior and back to the coast. These water bodies were important routes for the Uashaunnuat. There are specific sites where families would part in the fall and where they would wait for each other in the spring. One of these sites is on an island on Lake Ashaunipi and is particularly well-known to the Uashaunnuat. This island was recently used by the Innu of Uashat mak Mani-Utenam and the Innu of Matimekush-Lac-John[26].

31. Currently and in recent times, hunters from Uashat mak Mani-Utenam have travelled to the east and to the south of the Smallwood Reservoir and to Churchill Falls and sometimes further to hunt caribou in accordance with their traditions. These hunts include community hunts. The Innu of Uashat mak Mani-Utenam meet during these hunts with the Innu of Matimekush-Lac-John, Sheshatshit, Ekuanitshit, Unaman-Shipit and other communities[27].

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[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid. pp. 3-4

32. For decades and particularly at the beginning of the 20th century, the Uashaunnuat travelled to the trading post in Sheshatshit and vice-versa. This resulted in many family ties between both communities. José Mailhot, who has worked with the Sheshatshit community, states that this community is in part comprised of descendants of the Uashaunnuat[28].

The Crown has knowledge of Uashaunnuat's Aboriginal rights and title

33. In 1979, the Government of Canada accepted the Uashaunnuat's land claims respecting their traditional territory located in Quebec and in Labrador[29].

34. In January 2005, the Government of Newfoundland and Labrador, in partnership with Newfoundland and Labrador Hydro, acknowledged that the Innu of Uashat mak Mani-Utenam claim Aboriginal rights in Labrador and that they may need to be consulted in regard to the lower Churchill hydroelectric development[30].

35. On April 5, 2007, certain traditional families of the Uashat mak Mani-Utenam Innu Nation filed proceedings in the Federal Court (*Edouard Vollant et al. c. Sa Majesté la Reine* – file no. T-568-07) seeking a declaration of Aboriginal title, Aboriginal rights and treaty rights in respect to their family territories and traditional territory located in Labrador. The Attorney General of Newfoundland and Labrador and the Attorney General of Quebec are interveners in these proceedings. These proceedings were suspended by the Federal Court of Appeal in a decision dated June, 3 2009. However, the Plaintiffs in that case, among other recourses, intend to institute similar proceedings before the courts of the Province of Newfoundland and Labrador. Most of the traditional family territories encompassed in these proceedings are located within the Churchill River watershed[31].

36. In July 2008, the Government of Canada and the Government of Newfoundland and Labrador issued the *Environmental Impact Statement Guidelines* ("Guidelines") for the Lower Churchill hydroelectric project. The guidelines direct Nalcor Energy to consult with the Innu of Uashat mak Mani-Utenam. The guidelines specify that that the Innu of Uashat mak Mani-Utenam are one of the Aboriginal groups whose "interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues" is to be considered by Nalcor in its Environmental Impact Study[32].

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[28] Ibid. p. 4
[29] Government of Canada, Comprehensive claims policy and status of claims, July 19, 2000, at pp. 11-12
[30] Government of Newfoundland and Labrador, *Request for Expressions of Interest and Proposals*, January 2005
[31] Amended Statement of Claim at the Federal Court of Canada, no. T-568-07, *Edouard Vollant et. al.* c. *Sa Majesté la Reine* – June 20, 2007
[32] Government of Canada and Government of Newfoundland and Labrador, *Environmental Impact Statement Guidelines*, *Lower Churchill Generation Project*, July 2008, at para. 4.8

37. On December 17, 2009, Chef Ernest Gregoire sent a letter to Premier Danny Williams in respect to the rights of the Uashaunnuat in regard to the caribou hunt on their traditional lands in Labrador[33]. The Intervenors have taken a firm stance on their Aboriginal right to hunt caribou in Newfoundland and Labrador. The caribou hunt of the Uashaunnuat in Labrador takes place mainly in the Churchill River watershed and is an important component of the Innu culture till this day

The Upper Churchill hydroelectric project

38. Territories of Uashaunnuat families were flooded or otherwise heavily affected by the Upper Churchill hydroelectric project and more will be affected by the Lower Churchill Hydroelectric Development[34].

39. The Intervenors have not consented to, or been consulted or accommodated in regard to, the upper Churchill hydroelectric project, including water management. The Intervenors have received no compensation in respect to the upper Churchill hydroelectric project[35].

40. As indicated, there has been no environmental assessment and that there is no ongoing environmental assessment or monitoring in regard to the effects of the operating parameters, operating regime or operation of the upper Churchill hydroelectric project, including reservoirs, on the upper Churchill river basin, reservoirs, tributaries and adjoining watersheds.

41. The Upper Churchill facility operates pursuant to the *Churchill Falls (Labrador) Corporation Limited (Lease) Act, 1961*[36]. There are no other permits or similar government authorizations in respect to the operations of the upper Churchill hydroelectric project.

Effects of the Upper Churchill project on the lower Churchill River

42. The Smallwood Reservoir covers 6,988 km², and has a drainage area of approximately 71,700 km²; this includes the upper Churchill River as well as portions of the Naskaupi and Kanatriktok rivers. The addition of water from the latter two watersheds has increased the overall flows to the lower Churchill River by approximately 15 percent[37].

43. The Churchill Falls Power Station has affected the existing aquatic habitat within the lower Churchill River by regulating seasonal flows. Inflows in the upper basin are stored and released from the Smallwood and Ossokmanuan reservoirs for hydroelectric generation as needed[38].

[33] Response to PUB-NE-47 Attachment 3, pp. 159-161
[34] Response to PUB-IUM-1, p. 2
[35] IUM submissions dated January 14, 2010, p. 9
[36] Response to IUM-CF(L)Co.-3, p. 1
[37] Response to PUB-IUM-15, p.5
[38] *Ibid*.

44. The Churchill Falls Power Station regulates the drainage from over 75 percent of the total watershed area and, consequently, this has reduced the natural flow variability of the Churchill River. All water is discharged back into the Churchill River once passed through the turbines. As a result, compared to natural conditions, flows in the Churchill River are now higher in winter and lower in late spring and summer. As an illustration of downstream flow effects, the highest average monthly flows at Muskrat Falls have decreased (in June) and the lowest monthly flows (in April) have increased, compared to flows before the Churchill Falls Power Station became operational. This has resulted in a less variable flow regime over the course of the year, both seasonally and monthly[39].

45. This change in flow regime in the lower Churchill River has affected aspects of the aquatic environment within the main stem, including water velocity, ice processes and saltwater intrusion. The operating regime of the Churchill Falls Power Station has reduced the peak high flows associated with the spring freshet, while greatly adding to the typical low-flow period through mid-winter. Fish populations, therefore, experience a lower range of velocity and a less variable area of habitat than before[40.]

46. The portion of the lower Churchill River near the Churchill Falls Power Station tailrace now remains ice-free long into the winter months. Prior to the existing development, an ice cover would form on Winokapau Lake, initiating the progression of the ice cover upstream towards (and perhaps past) the present tailrace location. With the Churchill Falls dam in place, the progression of ice cover development is slower, likely delayed due to the thermal retention of the Smallwood Reservoir. In addition, as the water flows through the power station itself, it is warmed slightly, which also contributes to the maintenance of a small open water area at the tailrace[41].

47. Water management practices at Churchill Falls influence the frequency, timing and severity of flood and ice scour events. Consequently, the historical distribution or species composition of Riparian Meadows may have changed as well as the rate and course of succession of Riparian thickets[42].

Water Management of the Churchill River

48. The establishment of a WMA and the management of water thereunder would permit Nalcor and CF(L)Co., among other things, to modify, control, manage and regulate the following (including reservoirs):

    a. the hydrology of the Churchill River basin,

[39] *Ibid*.
[40] *Ibid*
[41] *Ibid*.
[42] *Ibid*.

b. the use of the waters of the Churchill River,
c. the flow of the waters of the Churchill River,
d. the water levels of the Churchill River,
e. the water volumes of the Churchill River,
f. the runoff that reaches the Churchill River basin;
g. ice formation and break up in the Churchill River[43].

49. For instance, the establishment of a WMA and the management of water thereunder may affect water flows and levels on an hourly basis[44].

50. The upper Churchill reservoirs will be the main source for the modification, control, management and regulation of water flow and water levels of the Churchill River[45].

51. As indicated, however, there has been no environmental assessment in regard to the effects of a WMA and the management of water thereunder, and particularly the management of water at Churchill Falls, including reservoirs, on the upper Churchill River basin, including reservoirs, tributaries and adjoining watersheds.

52. Nevertheless, the establishment of WMA and the management of water thereunder will among other things, negatively impact the following:

a. the lands, natural resources and entire environment of the Churchill River basin.
b. the marine plants and animals of the Churchill River, including reservoirs,
c. the plants and animals that inhabit or use the Churchill River basin, including reservoirs, and adjoining watersheds and tributaries.

53. More specifically, the establishment of a WMA and the management of water thereunder will have the following negative environmental effects, among others, in the lower Churchill River basin:

a. water management will affect runoff, water flow, water levels and water volumes in the Churchill River basin[46];
b. altered flow and water levels resulting from impounding and water management will affect ice formation and breakup. This can affect some wildlife species that use the ice, as well as migratory waterfowl that use open water areas during ice breakup[47];
c. water management may affect future fish populations[48];
d. water management could impede Caribou movement[49];

[43] IUM submissions dated January 14, pp.8-9; Nalcor prefiled evidence, pp. 3-17
[44] Answer to PUB-NE-23
[45] Nalcor prefiled evidence, at pp. 12-13; Nalcor Energy, *Environmental Impact Statement, Lower Churchill Hydroelectric Generation Project* ("*EIS*"), at Vol. IIA, p. 4-38
[46] Nalcor prefiled evidence, pp. 3-17
[47] *EIS*, *supra* note 45, at Vol. III, p. 5-17
[48] *Ibid*. at Vol IIA, p. 4-48

e. water management will cause sensory disturbance for the Red Wine Mountains Caribou Herd[50];
f. water management may affect through water fluctuation the quantity and quality of forage (including shoreline habitat and aquatic plants) available to Moose[51];
g. water management will influence Black Bear shoreline habitat and will result in Black Bear avoidance during this activity[52];
h. water management may result in changes to individual Black Bear health during operation and maintenance phase[53];
i. Spring staging options for Canada Gosse will become more limited once ashkui along the Lower Churchill are lost to more persistent and extensive ice cover on the reservoirs as result of the water management and operating regime[54];
j. the increased extent and persistence of ice cover as result of the water management and operating regime may affect Surf Scoter habitat[55];
k. the persistence if ice on the reservoirs for an additional one to two weeks because of the water management and operating regime may influence breeding, nest initiation and foraging of Osprey[56];
l. water management and fluctuating water levels may reduce the availability of shallow waters preferred by Harlequin Duck for feeding[57].

54. In these circumstances, the establishment of a WMA and the management of water thereunder will negatively and irreparably impact the traditional lands of the Uashaunnuat and the natural resources therein.

55. The proposed WMA and the management of water thereunder does not take into account the Aboriginal rights and treaty rights and interests respecting Labardor of the Uashaunnuat.

Absence of consultation of the Intervenors

56. The Intervenors have not been consulted or accommodated in regard to the establishment of a WMA and the management of water thereunder.

57. The Intervenors have not been consulted or accommodated in regard to the lower and upper Churchill hydroelectric projects, including the operating regime or parameters thereof and water management.

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[49] *Ibid*. at Vol IIB, p. 5-68
[50] *Ibid*. at p. 5-67
[51] *Ibid*. at pp. 5-69, 5-83
[52] *Ibid*. at pp. 5-69, 5-85
[53] *Ibid*. at p. 5-75
[54] *Ibid*. at p. 5-70
[55] *Ibid*. at p. 5-71
[56] *Ibid*. at pp. 5-72, 5-96
[57] *Ibid*. at p. 5-73

58. Neither the Government of Canada nor the Government of Newfoundland and Labrador has properly consulted the Intervenors in connection with the proposed Lower Churchill Hydroelectric Development[58].

59. On February 15, 2008, a brief meeting was held between the Canadian Environmental Assessment Agency (CEAA), some representatives of the Intervenors and a representative of the Government of Newfoundland and Labrador. The CEAA informed the Intervenors that there would be an environmental assessment process regarding the Lower Churchill Hydroelectric Development and provided the Intervenors with information on how the CEAA would carry out the process and on how the Intervenors would be able to participate[59].

60. On February 27, 2008, the Intervenors commented on the draft guidelines for the Environmental Impact Statement for the proposed Lower Churchill Hydroelectric Development. The Intervenors stated that the draft guidelines did not specifically require the consultation of the Innu of Uashat mak Mani-Utenam and of Aboriginal peoples in general and did not address the extent of the concerns of the Innu of Uashat mak Mani-Utenam regarding the proposed Lower Churchill Hydroelectric Development. The draft guidelines did not mention the collective interests of the Innu of Uashat mak Mani-Utenam or the interests of the traditional Innu families affected by the proposed Lower Churchill Hydroelectric Development. The Intervenors then suggested adding some guidelines on these matters[60].

61. The public notice issued on the deadline for submitting such comments had been forwarded to the Intervenors by Bill Parrott, the Assistant Deputy Minister (Environment) of the Government of Newfoundland and Labrador on January 25, 2008[61].

62. On July 17, 2009 and December 18, 2009, the Intervenors provided - without prejudice to their rights and without prejudice to any legal proceedings - comments to the joint panel reviewing the proposed Lower Churchill hydroelectric project, particularly in regard to the deficiencies and inadequacy of the environmental assessment and consultation process[62].

63. On December 12, 2009, an information meeting was also held in Ottawa by representatives of the CEAA on the subject of the consultation process with the Intervenors that has been imposed on Nalcor by the CEAA in connection with the proposed Lower Churchill Hydroelectric Development. This information meeting

[58] Response to PUB-IUM-5, p. 6
[59] Ibid.
[60] *Ibid*.
[61] Ibid. p. 7
[62] Comments provided by the Intervenors on July 17, 2009 and December 18, 2009 to the joint panel reviewing the proposed Lower Churchill hydroelectric project.

was not meant to fulfill and has obviously not fulfilled the duty to consult of the Government of Canada and the Government of Newfoundland and Labrador with regard to the Intervenors. No further meetings have been held since[63].

64. Nalcor has not properly consulted the Intervenors respecting the Lower Churchill Hydroelectric Development, although there has been occasional correspondence from 2007 to 2010 between Nalcor and the Intervenors respecting the Lower Churchill Hydroelectric project[64].

65. Much of the correspondence relates to an information meeting held between Nalcor and the Intervenors on January 12, 2009, in Uashat[65].

66. During the meeting, Nalcor representatives presented the Lower Churchill Hydroelectric Development to the Intervenors. The Intervenors asked questions about the Lower Churchill Hydroelectric Development, informed Nalcor of their rights and shared some of their concerns with Nalcor, but not to the extent of turning the information meeting into a consultation. It was clear between the parties that the meeting was not a consultation, nor was it meant to be. Nalcor communicated to the Intervenors that Nalcor could not deal with the rights of the Uashaunnuat[66].

67. A letter from Gilbert Bennett, Vice-President, Lower Churchill Project (Nalcor Energy) dated May 13, 2009 was sent to the Intervenors respecting the Lower Churchill Hydroelectric Development. The letter stated that Nalcor had expressed an interest in consulting with the Intervenors. To enable this consultation, Gilbert Bennett stated in his letter that Nalcor had prepared a Community Consultation Agreement which intended to facilitate the consultation on the environmental effects of both the generation and transmission projects[67].

68. In their response to Gilbert Bennett, the Intervenors reiterated their rights and expressed their concerns on the impacts of the Lower Churchill Hydroelectric Development (including the transmission lines) on their rights and interests but refused to have a "one size fits all" consultation agreement with Nalcor. They have nonetheless stated that they were open to discussions[68]. No discussions or meetings have taken place between the interested parties since January 12, 2009[69].

69. However, Nalcor in a letter dated January 12, 2010, has now suggested that the parties meet in February 2010, but has not indicated that it recognized any rights

[63] Response to PUB-IUM-5, p. 7
[64] Ibid.
[65] Ibid.
[66] Ibid
[67] Response to PUB-NE-47, Attachment 3, pp. 65-77
[68] Ibid. pp. 91-92
[69] Response to PUB-IUM-5, p. 7; Comments provided by the Intervenors on December 18, 2009 to the joint panel reviewing the proposed Lower Churchill hydroelectric project

or interests of the Uashaunnuat in the lands and natural resources of their traditional territory[70].

III. ISSUES

70. Does the establishment of a WMA and the management of water thereunder trigger a duty to consult and accommodate the Intervenors?

71. If so, what is the scope and content of the duty to consult and accommodate the Intervenors in the circumstances?

72. Was the duty to consult and accommodate the Intervenors discharged in the circumstances?

73. Does the PUB have the jurisdiction and obligation to decide whether the duty to consult and accommodate the Intervenors has been triggered and whether this duty has been discharged?

74. If the duty to consult and accommodate has not been discharged, what powers are available to the PUB to effect a remedy?

IV. SUBMISSIONS

A. THE WATER MANAGEMENT AGREEMENT TRIGGERS A DUTY TO CONSULT AND ACCOMODATE

75. The establishment of a WMA and the management of water thereunder triggers a duty to consult and accommodate the Intervenors.

1. The water management agreement triggers a statutory duty to consult

76. Nalcor and CF(L)Co. have a statutory duty to consult with Aboriginal peoples affected by the establishment of the water management agreement.

77. The power policy of the province set out in the governing statute for these proceedings provides 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[71].

[70] Response to PUB-NE-47, Attachment 3, pp. 165-166

78. 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[72]. (emphasis added)

79. With respect to water management agreements in particular, "sound utility practice" is defined 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[73]. (emphasis added)

80. 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[74].

81. 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

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[71] *EPCA*, s. 3
[72] *EPCA*, s. 4
[73] Water Management Regulations, N.L.R. 4/09, s. 2(d)
[74] Canadian Electricity Association, "CEA Statement on Aboriginal Relations" (February, 2004)

(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[75].

82. Aboriginal land use and occupation is one of the combinations or inter-relationships 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.

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

84. Nalcor and CF(L)Co have not consulted the Intervenors in regard to the establishment of a WMA and the management of water thereunder. Consequently, Nalcor and CF(L)Co have not fulfilled their statutory obligations to consult the Intervenors.

2. The water management agreement triggers the constitutional duty to consult and accommodate

a. Aboriginal rights and title

85. Aboriginal rights are *sui generis*[76]. Various aboriginal practices that are and continuously have been integral to the Uashaunnuat's distinctive culture and identity correspond to various Aboriginal rights. The Supreme Court of Canada has rejected the view of a dominant right to the land, from which other rights, like the right to hunt or fish, flow. According to the Supreme Court of Canada, it is more accurate to speak of a variety or a spectrum of independent Aboriginal rights[77].

86. One of these rights is Aboriginal title to land. Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, custom and traditions which are integral to the distinctive aboriginal culture concerned. Aboriginal title encompasses a broad variety of uses of land which go beyond the right to enjoyment and occupancy. Aboriginal title encompasses the right to choose to what uses land can be put[78].

87. In other words, Aboriginal title is a right to the land itself, including natural resources. For greater certainty, natural resources include living and inanimate things, such as surface and subsurface waters. That land, including natural resources, may be used for a variety of activities, none of which need be

[75] *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, s. 2
[76] *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 382; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 112)
[77] *Delgamuukw*, *supra* note 76, at para. 138; *R. v. Marshall, R. v. Bernard*, [2005] 2 S.C.R. 220, at para 54
[78] *Delgamuukw*, *supra* note 76, at paras. 117, 119, 166

individually protected as aboriginal rights under s. 35(1) of the *Constitution Act, 1982*[79].

88. The content of Aboriginal title contains an inherent limit: lands held pursuant cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the claim to Aboriginal title[80].

89. At the other end of the spectrum of Aboriginal rights, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture. However, the occupation and use of land where the activity is taking place may not be sufficient to support a title to the land. In the middle of the spectrum, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although one may not be able to demonstrate title to the land, one may nevertheless have a site-specific right to engage in a particular activity[81].

90. According to the Supreme Court of Canada in *R. v. Marshall, R. v. Bernard*[82]:

> […] To establish title, claimants must prove "exclusive" pre-sovereignty "occupation" of the land by their forebears: per Lamer C.J., at para. 143.
>
> "Occupation" means "physical occupation". This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw*, per Lamer C.J., at para. 149.
>
> "Exclusive" occupation flows from the definition of aboriginal title as "the right to *exclusive* use and occupation of land": *Delgamuukw*, per Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means "the intention and capacity to retain exclusive control", and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title (para. 158). Non-exclusive occupation may establish aboriginal rights "short of title" (para. 159).
>
> It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each

[79] *Ibid*. at para 122, 124, 140).
[80] *Ibid*. para 125
[81] *Ibid*. para 138
[82] *R. v. Marshall, R. v. Bernard*, *supra* note 76, at paras. 55-59

> year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.
>
> The distinction between the requirements for a finding of aboriginal title and the requirements for more restricted rights was affirmed in *Côté*, where the Court held the right to fish was an independent right (para. 38). Similarly in *Adams*, the Court held that rights short of title could exist in the absence of occupation and use of the land sufficient to support a claim of title to the land: see Adams, at para. 26; *Côté*, at para. 39; *Delgamuukw*, at para. 159. To say that title flows from occasional entry and use is inconsistent with these cases and the approach to aboriginal title which this Court has consistently maintained.

b. When is the constitutional duty to consult accommodate triggered?

91. According to the Supreme Court in *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, a duty to consult and accommodate:

> 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[83]. (emphasis added)

92. This duty is triggered prior to the proof of claims and the determination of rights. In other words, a ruling on consultation and accommodation is not a ruling on rights and title. In these circumstances, the submissions of Nalcor and CF(L)Co. are without merit when they allege that the Intervenors are asking the PUB "to hear and determine matters of Aboriginal rights or title"[84].

93. More particularly, in the words of the Supreme Court of Canada:

> 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[85]. (emphasis added)

94. In these circumstances, a duty to consult and accommodate arises specifically to protect Aboriginal rights and title and treaty rights even before proof of the claims and the determination of rights are made.

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[83] Haida Nation v. B.C. (Minister of Forests), [2004] 3 S.C.R. 511 at para 35

[84] *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, at paras 26, 27, 34, 36, 38 ; *Newfoundland and Labrador* v. *Labrador Métis Nation* 2007 NLCA 75 (CanLII), at para. 29; Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and the Intervenors, para. 33; Reply by CF(L)Co. to Request for Intervenor Status by Intervenors, para. 14

[85] Haida Nation v. B.C. (Minister of Forests), [2004] 3 S.C.R. 511, at para 27

95. The duty to consult and accommodate is triggered at a low threshold. According to the Court of Appeal of Newfoundland and Labrador:

> 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[86].

c. <u>What is the scope and content of the constitutional duty to consult and accommodate?</u>

96. There is a distinction between knowledge sufficient to trigger a duty to consult and accommodate and the content or the scope of the duty to consult and accommodate in a particular case.

97. According to the Supreme Court in *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511:

> […] Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.
>
> […]
>
> The content of the duty to consult and accommodate varies with the circumstances […]. 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 of title claimed[87].

d. <u>Does the establishment of a WMA and the management of water thereunder trigger the duty to consult and accommodate?</u>

98. The establishment of a WMA and the management of water thereunder triggers a duty to consult and accommodate the Intervenors.

i. <u>*The Uashaunnuat claim Aboriginal rights and title to the area affected by the water management agreement*</u>

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[86] *Newfoundland and Labrador* v. *Labrador Métis Nation* 2007 NLCA 75 (CanLII), at para. 29. See also *Mikisew Cree First Nation* v. *Canada*, [2005] 3. S.C.R. 388, at para. 55.
[87] *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511at paras. 37, 39

99. The Uashaunnuat claim Aboriginal rights and treaty rights to the area affected by a WMA and the management of water thereunder.

100. The Uashaunnuat have continuously occupied, possessed, controlled and managed their traditional territory and natural resources which will be affected by a WMA and the management of water thereunder. They have continuously used the Churchill River watershed for hunting, trapping, fishing and other subsistence activities, for transportation and for other traditional activities. They have continuously used the air, lands, water, plant and animal life of the territory affected by a WMA and the management of water thereunder.

101. There is a strong *prima facie* case in support of the claim to aboriginal title, aboriginal rights and treaty rights of the Uashaunnuat.

ii. The Crown has knowledge of the existence of Aboriginal rights and title

102. The Crown has knowledge – real or constructive – of the existence of Aboriginal rights and treaty rights of the Uashaunnuat.

103. However, the portion of the land claims relating to Labrador was never meaningfully addressed by the Government of Canada.

104. To date, there have been no meaningful discussions between the Intervenors and the Government of Newfoundland and Labrador regarding the Uashaunnuat's Aboriginal title, Aboriginal rights and treaty rights within the Province of Newfoundland and Labrador and regarding the Churchill River watershed specifically.

105. Newfoundland and Labrador has failed to recognize and respect the rights, interests and claims of the Uashaunnuat or to engage in good faith negotiations with the Intervenors regarding these rights, interests and claims.

iii. *The establishment of a water management agreement or the management of water thereunder will adversely affect Aboriginal rights and title of the Uashaunnuat*

106. The establishment of a WMA and the management of water thereunder will adversely affect the Aboriginal rights and treaty rights of the Uashaunnuat.

Water management

107. The establishment of a WMA and the management of water thereunder is aimed at modifying, controlling, managing, and regulating water resources – resources which are included in the claims of Aboriginal rights and title of the Uashaunnuat. More particularly, the establishment of the a WMA will, among other things, modify, control, manage and regulate the hydrology of the Churchill River, including reservoirs, such as water flow, water levels, water volumes, spillage, runoff, and ice formation/break up.

108. Such modification, control, management and regulation of the Churchill River will, among other things, negatively impact the traditional lands of the Uashaunnuat and the environment of the Churchill River basin, including flora and fauna.

109. Such modification, control, management and regulation of the Churchill River will have major negative impacts on the way of life of the Uashaunnuat ─ culturally, spiritually, socially and economically.

110. More particularly, the WMA agreement or the management of water thereunder will have a negative impact on the Uashaunnuat culturally and spiritually by interfering with the Uashaunnuat's special attachment to the land and the ability to carry out various spiritual and traditional practices. Indeed, because water management will modify and control the hydrology of the Churchill River, including water flow, water levels, water volumes, runoff, and ice formation/break up, and cause negative environmental effects, the Uashaunnuat's traditional lands and their special relationship to those lands will be permanently and irreparably modified.

111. Similarly, the Water Management Agreement or the management of water thereunder will negatively affect the Uashaunnuat socially. More particularly, as previously indicated, the establishment of a WMA will deny or impede the Uashaunnuat exclusive or shared right to use, possess, occupy, and control the Churchill River watershed and the natural resources therein. The establishment of a WMA and the management of water thereunder will deny the Uashaunnuat right to choose to what use the Churchill River watershed and the natural resources therein can be put and interfere with a particular and unique way of life and particular traditional Innu family territories. The establishment of a WMA and the management of water thereunder is a denial of Aboriginal jurisdiction and of the right to self-government and self-determination of the Uashaunnuat.

112. Moreover, the Water Management Agreement or the management of water thereunder will negatively impact, among other things, fish populations, the movement of caribou, and the migration of birds[88], thus impeding and infringing

[88] See *supra* notes 17-27

the Uashaunnuat's rights to hunt, fish and trap in the area affected by a WMA and the management of water thereunder.

113. In other words, altered flow and water levels could result in, among other things, reduced opportunity for hunting, particularly migratory birds[89]. Furthermore, the Uashaunnuat's communal hunting practices will be disrupted. Additionally, the Water Management Agreement or the management of water thereunder will negatively impact the Uashaunnuat's use of the Churchill River as a transportation route. For instance, travel will be made less safe on the Churchill River (including reservoirs) due unpredictable changes to water flow and levels, especially if there are hourly modifications of water flow and levels of the Churchill River.

114. According to the Supreme Court of Canada, lands held pursuant to aboriginal title have an inescapable economic component[90]. As such, by depriving the Uashaunnuat of their right to use, possess, occupy, and control the Churchill River watershed and the natural resources therein, a WMA and the management of water thereunder will economically prejudice the Intervenors. Moreover, the negative environmental effects (such as on fish, Caribou, and birds) of a WMA and the management of water will further cause economic damage to the Intervenors.

Upper and lower Churchill hydroelectric projects

115. Moreover, the construction and exploitation of hydroelectric facilities, including water management, on the Churchill River at Churchill Falls, Muskrat Falls and Gull Island is incompatible and irreconcilable with the nature of the Uashaunnuat attachment to the land which forms the basis of their claim to Aboriginal rights and title.

116. No environmental assessment has been performed in regard to the upper Churchill hydroelectric project, and particularly in regard to the effects of the operating parameters or regime and water management in the area of the upper Churchill river Basin (including the reservoirs of the upper Churchill hydroelectric development). In the absence of such an environmental assessment, it is difficult to specifically identify the environmental effects of water management in the upper Churchill River basin.

117. Nevertheless, the establishment of the Water Management Agreement or the management of water thereunder will perpetuate and exacerbate the major negative impacts of the upper Churchill hydroelectric project on the way of life of the Uashaunnuat and the environment. Indeed, as indicated, some family territories of the Uashaunnuat were flooded or otherwise heavily affected by the upper Churchill hydroelectric project.

[89] *EIS*, *supra* note 45, at Vol. III, p. 5-17
[90] Delgamuukw, supra note 76, at para. 166

118. As such, the upper Churchill hydroelectric development infringed and continues to infringe the Aboriginal rights and title of the Uashaunnuat. Indeed, the construction and operation of the upper Churchill hydroelectric project caused and continues to cause major negative impacts on the way of life of the Uashaunnuat. The upper Churchill hydroelectric project irreparably and irremediably transformed and continues to transform the natural environment of the traditional lands of the Uashaunnuat.

119. Additionally, the completion of the lower Churchill hydroelectric project will have major negative impacts on the way of life of the Uashaunnuat ─ culturally, spiritually, socially and economically. The lower Churchill hydroelectric project will irreparably and irremediably transform the natural environment of the traditional lands of the Uashaunnuat.

120. Furthermore, the Intervenors have not consented to, or been consulted and accommodated in regard to, the establishment of a WMA and the management of water thereunder and the upper and lower Churchill hydroelectric projects, including the operating regime or parameters and water management.

Aboriginal rights and treaty rights adversely affected

121. In these circumstances, the establishment of a WMA agreement or the management of water thereunder will adversely affect and infringe the Aboriginal rights and treaty rights of the Uashaunnuat and perpetuate the historical infringement of the Aboriginal rights and title of the Uashaunnuat – to the benefit of the province, Nalcor and CF(L)Co.[91].

122. For greater certainty, anything that has an adverse effect on (1) the Aboriginal rights and title and treaty rights of the Uashaunnuat, (2) the way of life of the Uashaunnuat – culturally, spiritually, socially and economically – and (3) the traditional lands of the Uashaunnuat and natural resources therein affects the Uashaunnuat.

123. Moreover, the establishment of a WMA and the management of water thereunder will make a less satisfactory resolution of the Uashaunnuat's claimed right to, among others, use, manage and control the water resources in the future, namely the Churchill River and adjoining watersheds and tributaries.

124. More particularly, the establishment of a WMA and the management of water thereunder will deprive the Uashaunnuat from some or all of the benefits of the Churchill River watershed and the natural resources therein. Moreover, if further damage is done to the Uashaunnuat's traditional lands and the resources therein, and if these lands and resources are further impacted by projects such as the

[91] *EIS, supra note 45,* Vol. IA, p. 4-59

hydroelectric development within the Churchill River watershed, any resolution of the claims of the Uashaunnuat would likely prove to be very unsatisfactory because the traditional lands and the resources therein may have been irreparably damaged or impacted by then. The lands may be rendered unusable and some of the natural resources may be gone. This of course is unjust and unacceptable.

125. In sum, a constitutional duty to consult and accommodate the Intervenors is therefore triggered by the establishment of a WMA and the management of water thereunder.

B. WHAT IS THE SCOPE AND CONTENT OF THE DUTY TO CONSULT AND ACCOMODATE IN THE CIRCUMSTANCES?

1. The establishment of a WMA

126. The establishment of a WMA requires consultation at the high-end of the spectrum. In other words, the facts bear out the importance of full consultation and accommodation in the present circumstances.

127. Indeed, there is a strong *prima facie* case in support of the claim to Aboriginal title, aboriginal rights and treaty rights of the Uashaunnuat.

128. Moreover, the establishment of WMA and the management of water thereunder will negatively and irreparably impact:

i. the Aboriginal rights and title and treaty rights of the Uashaunnuat;
ii. the traditional lands of the Uashaunnuat and natural resources therein;
iii. the way of life of the Uashaunnuat - culturally, spiritually, socially and economically;
iv. the hunting, fishing, and trapping activities and opportunities of the Uashaunnuat.

129. Furthermore, the establishment of WMA and the management of water thereunder will :

i. perpetuate the historical infringement of the Aboriginal rights and title of the Uashaunnuat;
ii. deny or impede the Uashaunnuat's exclusive or shared right to use, possess, occupy, and control the Churchill River watershed and the natural resources therein;
iii. deny the Uashaunnuat's right to choose to what use the Churchill River watershed and the natural resources therein can be put;
iv. deny the Uashaunnuat's Aboriginal jurisdiction and of the right to self-government and self-determination.

2. The implementation of a WMA and the management of water thereunder

130. If the Intervenors are meaningfully consulted and accommodated in regard to the establishment of a WMA, the duty to consult and accommodate nevertheless persists during the implementation of a WMA and the management of water thereunder.

131. However, this duty is no longer at the high end of the spectrum. More particularly, the degree or intensity of consultation and acoomodation should be sufficient to ensure monitoring and compliance of the terms of a WMA. For instance, this ongoing duty could be discharged by providing regular notice to the Intervenors of the Independent coordinator's decisions and reports.

132. Nevertheless, if the implementation of a WMA interferes with the Aboriginal rights and treaty rights of the Uashaunnuat in such a way that was not contemplated by a WMA established in consultation with the Intervenors, then the duty to consult and accommodate is at the high end of the spectrum.

C. WHO CAN DISCHARGE THE DUTY TO CONSULT AND ACCOMMODATE THE INTERVENORS?

1. The statutory duty to consult and accomodate

133. Nalcor and CF(L)Co. are parties to the proposed WMA and to a future WMA established by the PUB, if any.

134. Nalcor and CF(L)Co. therefore both have the duty to consult and accommodate the Interevenors in accordance with "good utility practice".

135. The PUB therefore has the power to order Nalcor and CF(L)Co. to consult and accommodate the Intervenors.

2. The constitutional duty to consult and accomodate

136. The constitutional duty to consult and accommodate the Intervenors in regard to the establishment of a WMA and the management of water thereunder must be discharged by the provincial and federal Crown.

137. As such, the PUB should order the provincial Crown, as well as the federal Crown, as represented by the Attorney General of Newfoundland and the Attorney General of Canada, to consult and accommodate the Intervenors in respect to the establishment of a WMA and the management of water thereunder.

138. In the alternative, for the sole purpouse of the establishment of a WMA and the management of water thereunder, and without prejudice to the position of Intervenants in other proceedings, in view of the statutory designation of Nalcor as an agent of the Crown[92], and the circumstances of these proceedings as constituted before the PUB, the PUB should as a minimum order that Nalcor, in the name and on behalf of the provincial Crown, consult and accommodate the Intervenors in regard to the establishment of WMA and the management of water thereunder.

D. THE DUTY TO CONSULT AND ACCOMMODATE HAS NOT BEEN SATISFIED IN THE CIRCUMSTANCES.

1. The Intervenors have not been consulted in fact

139. As previously mentioned, the Intervenors have not been consulted and accommodated in regard to the establishment of a WMA and the management of water thereunder. This was explicitly admitted by Nalcor.

140. The Intervenors have not been consulted or accommodated in regard to the upper and lower Churchill hydroelectric projects.

141. As such the duty to consult and accommodate the Intervenors has not been satisfied in regard to the establishment of a WMA and the management of water thereunder.

2. The environmental assessment of the lower Churchill project cannot satisfy the duty to consult

142. The Government of Canada, the Government of Newfoundland and Labrador, and Nalcor have not consulted the Intervenors in regard to the lower Churchill hydroelectric project.

143. The allegation by Nalcor that the Intervenors are being consulted by Nalcor as part of the environmental assessment process of the lower Churchill hydroelectric project is manifestly untrue[93].

144. The allegation by Nalcor that the Intervenors have received funding to participate in the environmental assessment of the lower Churchill project is also untrue. The Intervenors have not received any funding in that regard[94].

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[92] *Energy Corporation Act* S.N.L. 2007 Chapter E-11.01, s. 3(5)

[93] Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors, para. 19

[94] Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors, para. 19; see also RFI PUB-NE 23, p. 4

145. As such, the environmental assessment of the lower Churchill project cannot satisfy the duty to consult and accommodate the Intervenors in the circumstances.

146. In any event, even if there was consultation in respect to the lower Churchill hydroelectric project, which is expressly denied, this consultation would be inadequate in satisfying the duty to consult and accommodate in respect to the establishment of a WMA and the management of water thereunder.

147. Indeed, the establishment of a WMA and the management of water thereunder encompasses both the upper and lower Churchill River.

148. However, there has been has been no environmental assessment in regard to the upper Churchill hydroelectric project, including water management.

149. Moreover, the Intervenors have not consented to, and have not been consulted and accommodated in regard to, the upper Churchill hydroelectric project, including water management.

150. As such, in the absence of consultation and accommodation that is specific to the establishment of a WMA and the management of water thereunder, and particularly in regard to water management in the upper Churchill River, including reservoirs, the environmental assessment of the lower Churchill project cannot satisfy the duty to consult and accommodate the Intervenors in the circumstances.

3. The lower Churchill Joint Review Panel cannot ensure consultation as a matter of law

151. Nalcor's own exhibit flatly contradicts its submissions and those of CF(L)Co. that the lower Churchill environmental assessment process could be the appropriate forum for consultation and accommodation of the Intervenors[95].

152. 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;

[95] Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors, para. 33 and Tab 4; Reply by CF(L)Co. to Request for Intervenor Status by Intervenors, para. 12

- 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[96] (emphasis added).

4. Environmental assessment is not equivalent to consultation and accommodation

153. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, the Supreme Court of Canada 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.

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

> 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). 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. 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.
>
> […]
>
> […] 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[97].

155. The judge at first instance, whose judgment was upheld by the Supreme Court of Canada, 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*

[96] 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 [Tab 4 of Submissions by Nalcor Energy with respect to the Intervenor Applications of Ekuanitshit and Intervenors]

[97] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, at para. 64

Nation v. *Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 (CanLII) (F.C.), at para. 173, see also paras. 141, 143, 156, 157.

156. 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.

157. 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 in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

158. However, the process which the Supreme Court of Canada 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;
b. representatives of the First Nation participated fully as Project Committee members;
c. the First Nation received financial assistance to participate in Project Committee meetings; 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[98].

159. Unlike the Appellants in the Supreme Court decision in *Taku River Tlingit First Nation v. B.C.*, [2004] 3. S.C.R. 550, the Intervenors are not "full participants" in the environmental assessment of the lower Churchill hydroelectric project. The Intervenors have only provided comments to the joint panel. They have not received any funding to participate in this process. They have no control over the panel's process.

160. In any event, there has been no consultation of the Intervenors in respect to lower Churchill hydroelectric project.

[98] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, at pp. 568-570

E. THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES HAS THE JURISDICTION AND OBLIGATION TO CONSIDER CONSULTATION AND ACCOMODATION

1. Statutory duty to consult

161. The PUB has the jurisdiction and the obligation to determine whether Nalcor and CF(L)Co have fulfilled their statutory obligations to consult the Intervenors in accordance with "sound utility practice".

162. The *EPCA* explicitly grants jurisdiction to the PUB to determine such issues:

> 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[99]. (emphasis added)

163. In these circumstances, in establishing a WMA pursuant to 5.5 of the *EPCA*, the PUB must determine whether Nalcor and CF(L)Co have fulfilled their obligations to consult the Intervenors in accordance with "sound utility practice".

2. Constitutional duty to consult and accommodate

164. The PUB must exercise its decision-making function in accordance with the dictates of the Constitution, including s. 35 of the *Constitution Act, 1982*[100].

165. The honour of the Crown requires not only that the Crown consult, but also that the PUB decides any consultation dispute which arises within the scheme of its regulation[101].

166. The PUB 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 PUB decide questions of law, that is sufficient[102].

167. As such, the PUB has the jurisdiction and the obligation to decide whether the duty to consult and accommodate has been triggered and whether this duty has

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[99] EPCA, s. 4

[100] Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159, at p. 185; Carrier Sekani Tribal Council v. B.C. (Utilities Commission), [2009] 4 W.W.R. 381, at para. 45

[101] Carrier Sekani Tribal Council v. B.C. (Utilities Commission), [2009] 4 W.W.R. 381, at paras. 51, 54)

[102] *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 4 W.W.R. 381, at paras. 15, 45; *Kwikwetlem First Nation v. B.C. (Utilities Commission)*, [2009] 9 W.W.R. 92, at para. 8; *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, NLR 39/96, art. 27

been discharged with respect to the establishment of the water management agreement[103].

168. Not only does the PUB have the ability to decide the consultation issue, it is the appropriate forum to decide the issue.

169. Indeed, if the Intervenors are entitled to early consultation in regard to the establishment of a WMA, it necessarily follows that the board with the power to establish a WMA must accept the responsibility to assess the adequacy of consultation. Otherwise, the Intervenors will be driven to seek an interlocutory injunction, which, according to the Supreme Court in *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, is often an unsatisfactory route[104].

F. THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES HAS THE POWER TO EFFECT A REMEDY

170. If the PUB has the jurisdiction and obligation to consider whether the duty to consult and accommodate the Intervenors has been discharged, it necessarily follows that the PUB has the power to effect a remedy if it decides that the duty to consult and accommodate has not been discharged in the circumstances. Otherwise, as indicated, the Intervenors will be driven to seek an interlocutory injunction, which is often an unsatisfactory route[105].

171. More particularly, s. 30(1) of the *EPCA* provides as follows:

> 30.(1) In carrying out its duties under this Act, the public utilities board has and may exercise all the powers given to it under the *Public Utilities Act*.
>
> […]

172. S. 118 of the *Public Utilities Act*, s. 118 states:

> 118. (1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.

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[103] Carrier Sekani Tribal Council v. B.C. (Utilities Commission), [2009] 4 W.W.R. 381, at para. 15; Kwikwetlem First Nation v. B.C. (Utilities Commission), [2009] 9 W.W.R. 92, at para. 8

[104] Carrier Sekani Tribal Council v. B.C. (Utilities Commission), [2009] 4 W.W.R. 381, at para. 53; Haida Nation v. B.C. (Minister of Forests), [2004] 3 S.C.R. 511, at para. 14

[105] *Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 4 W.W.R. 381, at para. 53; *Haida Nation* v. *B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 14

(2) The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.

[….]

(emphasis added)

173. As such, the PUB has the power to refuse to establish the terms of WMA if it decides that the duty to consult and accommodate has not been discharged in the circumstances.

174. In the alternative, the PUB nevertheless has the power to stay the proceedings and the establishment of a WMA pending the meaningful consultation and accommodation of the Intervenors.

175. Moreover, the *EPCA* and the *Board of Commissioners of Public Utilities Regulations* specifically grant the PUB the power to the stay proceeding pending the examination or determination of an issue.

176. S. 27(1) of the *EPCA* reads as follows:

27. (1) The public utilities board may

(a) give directions as to the nature and extent of interventions by persons interested in a matter that is to be the subject of a reference or inquiry held under this Act;
(b) set aside for future examination an issue that in its opinion requires a more prolonged examination; and
(c) make interim reports pending its final report with respect to the subject matter of a reference or inquiry.

[…]

(emphasis added)

177. S. 27 of the *Board of Commissioners of Public Utilities Regulations* states:

27. If it appears to the board that there is a question or issue of law or of jurisdiction or of practice or procedure that should be decided before a proceeding continues, the board may,

(a) direct the question or issue to be raised for determination by the board; or
(b) state a case as provided in the Act,

and the board may, pending the determination of that question or issue, order the whole or any part of the proceeding to be stayed.

178. As such, the PUB has the power to stay the proceedings pending the resolution examination or determination of an issue, namely the meaningful consultation and accommodation of the Intervenors.

179. The proceedings will be stayed up until the PUB is satisfied that the duty to consult and accommodate has been discharged in the circumstances.

180. In any event, it follows from the foregoing that the PUB has the power and obligation to order the provincial and federal Crown, Nalcor and CF(L)Co to consult and accommodate the Intervenors. In the absence of such an order of consultation and accommodation, the PUB will be unable to properly exercise its jurisdiction and duties under the Constitution and the EPCA.

181. In the alternative, the PUB must establish terms of the WMA which will direct the Crown, Nalcor and CF(L)Co to consult and accommodate the Intervenors and to report

182. Indeed, the PUB is explicitly granted the power to establish the terms of a WMA in s. 5.5(2) of the *EPCA*. This duty must be exercised in conformity with the Constitution and the *EPCA*. In these circumstances, the establishment of the terms of a WMA must contain provisions which will satisfy the duty to consult and accommodate the Intervenors.

183. In any event, if the PUB decides to establish the terms of a WMA, the PUB must provide for the monitoring of the consultation process with the Intervenors to ensure compliance with the terms of a WMA, the Constitution and the EPCA.

184. The *EPCA* specifically provides the power to the PUB to establish a term of a WMA which imposes reporting requirements. The PUB is also granted explicit powers to order a defaulting person to comply with terms and conditions of a WMA. More specifically, the *EPCA* reads as follows:

> 5.6 (1) An agreement approved by the public utilities board under subsection 5.4(3) or established under subsection 5.5(2) may not be amended by the persons to whom the agreement applies without the prior approval of the public utilities board.
>
> (2) <u>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.</u>
>
> (3) Where the public utilities board believes that one or more of the persons to an agreement approved by the board under subsection 5.4(3) or established under subsection 5.5(2) have failed to comply with the terms and conditions of the agreement, the public utilities board may, independent of any of the rights or remedies available to the persons to the agreement,

(a) order a defaulting person to comply with the terms and conditions of the agreement; and

(b) exercise a contractual remedy that may be available to a person who is a party to the agreement as if it were a party to the agreement (Emphasis added).

V. ORDERS SOUGHT

185. The Intervenors seek the following orders:

186. An ORDER refusing to establish the terms of a water management agreement, or in the alternative, an ORDER staying the proceedings in regard to the establishment of the terms of a WMA, pending meaningful consultation and accommodation of the Intervenors.

187. An ORDER that the provincial and federal Crown, as represented by the Attorney General of Newfoundland and the Attorney General of Canada, meaningfully consult and accommodate the Intervenors in regard to a WMA and the management of water thereunder, or in the alternative, an Order that Nalcor as an agent of the provincial Crown consult and accommodate the Intervenors

188. An ORDER in any event that Nalcor and CF(L)Co. meaningfully consult and accommodate the Intervenors in regard to the establishment of a WMA and the management of water thereunder.

189. In the further alternative, an ORDER establishing a term of a WMA that directs the provincial and federal Crown as represented by the Attorney General of Newfoundland (or in the alternative, as represented by its agent Nalcor) and the Attorney General of Canada, (1) to meaningfully consult and accommodate the Intervenors in regard to the WMA and the management of water thereunder and (2) to report back to the PUB thereon; and an ORDER establishing a term of a WMA that directs Nalcor and CF(L)Co. (1) to meaningfully consult and accommodate the Intervenors in regard to the WMA and the management of water thereunder and (2) to report back to the PUB thereon.

190. AN ORDER in any event of the cause that Nalcor pay all the expenses incurred by the Intervenors in connection with these proceedings.

191. If the PUB orders that all expenses of the PUB in connection with these proceedings be paid by the parties, AN ORDER that these expenses be paid by Nalcor and CF(L)Co.

This 19th day of February, 2010

O'REILLY & ASSOCIES

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