

**NEWFOUNDLAND AND LABRADOR  
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES**

**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.

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**NOTICE OF CONSTITUTIONAL QUESTION**

(s. 57, *Judicature Act*, R.S.N.L. 1990, c. J-4)

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1. TAKE NOTICE that the Intervenor, the Conseil des Innus de Ekuanitshit, intends to raise a question as to whether a constitutional duty to consult Aboriginal peoples pursuant to section 35 of the *Constitution Act*, 1982 is engaged and has been discharged in relation to an Application currently before the Board of Commissioners of Public Utilities (“Board”).
2. More particularly, the Conseil des Innus de Ekuanitshit has filed the attached motion to suspend the application pending consultation.
3. Dates for an oral hearing are reserved from February 24<sup>th</sup> to 26<sup>th</sup>, if so requested by the parties and ordered by the Board.
4. The following are the material facts giving rise to the issues:
  - a. On November 10, 2009, the Applicant, Nalcor Energy, applied to the Board to establish the terms of a Water Management Agreement between itself and Churchill Falls (Labrador) Corporation Limited (“CF(L)Co”), pursuant to s. 5.5 of the *Electrical Power Control Act*, R.S.N.L., 1994, c. E-5.1.
  - b. The Water Management Agreement relates to the terms of use of the Churchill River by Nalcor and CF(L)Co for the production, transmission and distribution of power by both companies.
  - c. On December 15, 2009, the Conseil des Innus de Ekuanitshit applied to the Board, requesting leave to intervene in the proceedings.

- d. On January 22, 2010, the Board granted leave to intervene to the Conseil des Innus de Ekuanitshit.
5. The following is the legal basis for the constitutional question:
- a. The Crown's constitutional duty to consult with Aboriginal peoples is engaged when it has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and when it contemplates conduct that might adversely affect those rights.
  - b. The Conseil des Innus de Ekuanitshit claims Aboriginal rights within the Churchill River watershed, in the area contemplated by the proposed Water Management Agreement.
  - c. The Crown has had real knowledge of these rights since 1979, when the Government of Canada accepted for negotiation the Intervenor's comprehensive land claim which includes the Churchill River watershed.
  - d. The Conseil des Innus de Ekuanitshit claims that the Water Management Agreement has the potential to adversely affect Aboriginal rights because it authorizes water management that could damage the plant and animal life in the Churchill River and its tributaries and within the traditional territory of the Intervenor.
  - e. The Conseil des Innus de Ekuanitshit further claims that no consultation by the Crown with respect to the Water Management Agreement has taken place.
  - f. As a result, the Intervenor claims that the Board must suspend the proceedings pending meaningful consultation.
  - g. Alternatively, the Intervenor claims that the Board must reject Nalcor's Application because the Crown's duty to consult concerning the Water Management Agreement has been engaged, but not discharged.

Please govern yourself accordingly.

**DATED** at Montreal, this 12<sup>th</sup> day of February 2010



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**TO:** The Board of Commissioners of Public Utilities

**MOTION of the Conseil des Innus de Ekuanitshit TO SUPEND THE PROCEEDINGS TO ESTABLISH THE TERMS OF A WATER MANAGEMENT AGREEMENT FOR THE CHUCHILL RIVER**

**I. INTRODUCTION**

1. On November 10, 2009, Nalcor Energy (Nalcor) applied to the Public Utilities Board (the Board) for the determination of a Water Management Agreement between itself and Churchill Falls (Labrador) Corporation, pursuant to s. 5.5(1) of the *Electrical Power Control Act, 1994*, S.N.L. 1994, c. E-5.1.
2. On January 22, 2010, the Board granted the Conseil des Innus de Ekuanitshit (Ekuanitshit) standing to intervene in Nalcor's application.
3. Ekuanitshit seeks to have the proceedings suspended on two grounds:
  - a. Section 68 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 prohibits the Public Utilities Board from determining the terms of the Water Management agreement until the Project is released under Part X of said *Act*;
  - b. The Board must suspend in order to meaningfully consider the issue of the constitutional duty of consultation that has been raised by Ekuanitshit and other Intervenors.

**II. THE PROHIBITION IN S. 68 OF THE ENVIRONMENTAL PROTECTION ACT**

4. The Lower Churchill Hydroelectric Project is an "undertaking" to which Part X of Newfoundland and Labrador's *Environmental Protection Act* applies, pursuant to s. 47(2) of the *Act* and s. 34(1)(a) and (d) of the *Environmental Assessment Regulations*, 2003, N.L.R. 54/03, as appears from the Government of

Newfoundland and Labrador's *Environmental Assessment Bulletin*, Reg. 1305 issued on December 1, 2006.

5. Section 68 of the *Environmental Protection Act* appears in Part X of the *Act* and reads:

68. (1) A licence, permit, approval or other document of authorization issued under another Act pertaining to an undertaking shall not be issued until the undertaking has been exempted or released under this Part.
6. Sections 5.4 and 5.5 of the *Electrical Power Control Act* oblige the Public Utilities Board to determine whether Water Management Agreements fulfill the power policy of the Province stated in s. 3(b)(i) of the *Act*.
7. Accordingly, s. 68(1) of the *Environmental Protection Act* prohibits the Board from approving a Water Management Agreement until the Project has been released pursuant to Part X of the *Environmental Protection Act*.
8. No exemption or release under Part X of the *Environmental Protection Act* has been issued for the Lower Churchill Hydroelectric Project.
9. Nor does the exemption described in s. 68(2) of the *Environmental Protection Act* apply, as there is no provision of a statute or other legal obligation that required Nalcor to submit its Water Management Agreement on November 10, 2010.
10. For these reasons the Board should suspend these proceedings until the Project has been released under Part X of the *Environmental Protection Act*.

### III. THE BOARD MUST SUSPEND TO MEANINGFULLY CONSIDER THE ISSUE

11. The Innu of Ekuanitshit assert Aboriginal rights and title to the territory that will be affected by the Water Management Agreement, as appears from their response to PUB-CIE-1.
12. Nalcor Energy and its shareholder, the Crown in the right of Newfoundland and Labrador, acknowledged Ekuanitshit's assertion of rights in the area in 2005, as appears from page 23 of the *Lower Churchill Hydro Resource: Request for Expressions of Interest and Proposals* issued by the Government of Newfoundland and Labrador in January 2005 and produced in support of Ekuanitshit's Reply on the matter of intervenor status.
13. The Crown in the right of Canada has knowledge of Ekuanitshit's claim, as appears from its acceptance of the claim for negotiation described in PUB-CIE-2.

14. The obligation to consult arises whenever the Crown has knowledge, real or constructive of the potential existence of Aboriginal right or title, as set out in paragraph 37 of Ekuanitshit's Reply on the matter of intervenor status.
15. As a quasi-judicial tribunal that is empowered to consider questions of law, the Public Utilities Board has the power to consider consultation disputes which arise within the scheme of its regulatory powers.
16. Not only does the Board have the ability to decide the consultation issue, the honour of the Crown in fact obliges it to do so, as it is a body to which decision-making powers have been delegated by the Crown.
17. Ekuanitshit does not suggest that the Board itself has the duty to consult and accommodate. Its obligation is to assess those efforts to determine whether the Crown's honour was maintained in its dealings with the Innu.
18. To fulfill this duty the Board must give the consultation issue meaningful and effective consideration.
19. Ekuanitshit has established a *prima facie* case for consultation with respect to the Water Management Agreement, as appears from its Reply on the matter of intervenor status and its responses to PUB-CIE-1 through PUB-CIE-16.
20. The Applicant Nalcor has admitted that no consultation has taken place with respect to the Water Management Agreement, as appears from PUB-NE-14.
21. The *prima facie* case for consultation engages the Board's duty to give the consultation issue meaningful and effective consideration.
22. A suspension to allow for the meaningful and effective consideration of the constitutional issues raised by Ekuanitshit and other Intervenors is preferable to the Board being obliged to make a final determination on the consultation issue at this time. In matters respecting Aboriginal rights, measures which favour the balancing of Aboriginal interests with other interests are to be preferred to all-or-nothing decisions about whether an aspect of a project goes ahead or not: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 14.
23. In addition, a suspension at this time would save the parties and the Board from spending more time and money on a proceeding which, for the reasons cited above, is inadequate to allow the Board to give proper consideration to the constitutional issues raised by the Intervenors.

**CONSIDERING THE FOREGOING**, the Conseil des Innus de Ekuanitshit  
**REQUESTS THAT THE BOARD EXERCISE ITS POWER UNDER S. 27 OF**  
**THE *Board of Commissioners of Public Utilities Regulations, 1996* TO:**

**SUSPEND** the application to establish a Water Management Agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation until the Lower Churchill Hydroelectric Project is released pursuant to the *Environmental Protection Act*;

AND

**SUSPEND** the application to establish a Water Management Agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation until a procedure that will allow the Public Utilities Board to give meaningful consideration to the consultation issues can be determined by agreement between the parties.

The whole with costs.

**DATED** at Montreal, this 12<sup>th</sup> day of February 2010



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