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A V O C A T S

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By mail and e-mail to <cblundon@pub.nl.ca>

Board of Commissioners of Public Utilities
c/o Cheryl Blundon
Director Corporate Services & Board Secretary
Suite E210, Prince Charles Building
120 Torbay Road
St. John's, NL
A1A 5B2

Re : Public Utilities Board Requests for Information to the Innu of Uashat mak Mani-Utenam et al. (IUM)

PUB-IUM-1

Please detail the nature and extent of the Aboriginal rights and title claimed by the Intervenor affected by the Water Management Agreement setting out facts and evidence of these rights.

The Water Management Agreement contemplates all of the Churchill River located in Labrador. Prior to the creation of the Smallwood Reservoir, the Churchill River found its source in Lake Ashuanipi, which lies at the center of the traditional lands of the Uashaunnuat. The Churchill River watershed lies within the Uashaunnuat's traditional lands 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.

The Innu of Uashat and Mani-Utenam (the Uashaunnuat) and certain traditional families of the Uashat mak Mani-Utenam Innu Nation (Intervenor with the Innu Takuaikan Uashat mak Mani-Utenam Band Council) assert Aboriginal title, Aboriginal rights and treaty rights in this portion of Labrador which thus includes a significant part of the Churchill River watershed. The Intervenor claim Aboriginal title, Aboriginal rights and treaty rights with regard to the water resources. These rights will be further prejudiced by the proposed Water Management Agreement.

The Intervenor 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.

More particularly, 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. As indicated, 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.

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. 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.

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

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.

The Intervenors submit that this Public Utilities Board (PUB) process is not an appropriate forum for the Intervenors to make extensive proof of their Aboriginal title, Aboriginal rights or treaty rights. Moreover, the Intervenors have not been given reasonable time to answer the PUB's request for information in any detailed fashion.

Nonetheless, in addition to the facts mentioned above relating to use, occupation and possession of the territory which relate to Aboriginal title, Aboriginal rights and treaty rights, Intervenors have collected archaeological, anthropological, historical and linguistic evidence as well as oral testimony in support of their rights.

Furthermore and in any event, there is significant evidence of Innu occupation of the Churchill River basin. There does not appear to be much controversy on the use, possession and occupancy of the Churchill River watershed by the Innu. 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.

Consequently, the answers to PUB-IUM-1 are given under reserve that a more detailed response, if necessary, could be submitted at a later date, under reserve of the recourses of the Uashaunnuat.. Some additional facts, evidence and arguments which can be made at this point and under the time constraints imposed by the PUB are as follows:

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).

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.

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

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.

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.

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.

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 Ashuanipi 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.

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.

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.

PUB-IUM-2

Have such rights and title been established, approved, or accepted by the Government of Canada or Newfoundland and Labrador? If they have, please provide details. If they have not, please describe any processes, such as legal processes or negotiations, in which the Intervenors are engaged for the purpose of establishing rights and title in the territory affected by the Water Management Agreement.

The Government of Canada accepted the Uashaunnuat's land claims respecting their traditional territory located in Quebec and in Labrador in 1979. However, the portion of the land claims relating to Labrador was never meaningfully addressed by the Government of Canada.

To date, there have been no meaningful discussions between the Intervenors and the Government of Newfoundland and Labrador regarding the Intervenors' Aboriginal title, Aboriginal rights and treaty rights within the Province of Newfoundland and Labrador and regarding the Churchill River watershed specifically. Newfoundland and Labrador has failed to recognize and respect the rights, interests and claims of the Intervenors or to engage in good faith negotiations with the Intervenors regarding these rights, interests and claims.

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.

The Intervenors have also 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.

PUB-IUM-3

Please detail how the establishment of a Water Management Agreement between Nalcor and CF(L)Co will affect the Aboriginal rights and title claimed or established by the Intervenors and, if so, describe the manner in which the Aboriginal rights and title will be affected.

The Board of Commissioners of Public Utilities has the duty to establish a water management agreement that is binding on two or more persons who have failed to reach a water management

agreement and who have been granted “rights” by the Province to the same body of water as a source for the production of power and who utilize, or propose to utilize, or to develop and utilize the body of water as a source for the production of power.

The Water Management Agreement proposed by Nalcor does not take into account the rights and interests of the Intervenors and will adversely affect the Aboriginal rights and title of the Intervenors.

The establishment of the Water Management Agreement is aimed at modifying, controlling, managing and regulating water resources – resources which are included in the Aboriginal rights and title claims of the Intervenors.

More specifically, the establishment of the Water Management Agreement will, among other things, modify, control, manage and regulate the following:

- the hydrology of the Churchill River basin,
- the use of the waters of the Churchill River,
- the flow of the waters of the Churchill River,
- the water levels of the Churchill River,
- the water volumes of the Churchill River,
- the runoff that reaches the Churchill River basin.

Consequently, such modification, control, management and regulation of the Churchill River will, among other things, negatively impact the lands and natural resources subject to the rights of the Uashaunnuat including:

- the lands, natural resources and entire environment of the Churchill River basin and adjoining watersheds and tributaries, such as the Naskaupi and Kanatrikok Rivers,
- the marine plants and animals of the Churchill River,
- the plants and animals that inhabit or use the Churchill River basin and adjoining watersheds and tributaries,
- the use, possession and control of the Churchill River and adjoining watersheds and tributaries, including natural resources therein, by the Intervenors.

The Upper Churchill hydroelectric development infringed and continues to infringe the Aboriginal rights and title and treaty rights 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 Intervenors. For instance, numerous traditional family territories were flooded (some completely) by the Smallwood Reservoir or other components of the Upper Churchill hydroelectric project. The Upper Churchill hydroelectric project irreparably and irremediably transformed and continues to transform the natural environment of the traditional lands of the Intervenors. The rights of the Uashaunnuat and their ancestors have never been respected by Newfoundland and Labrador and its agents and corporations “authorized” by it and the Uashaunnuat have never been compensated in regard to the Upper Churchill hydroelectric development.

The completion of the Lower Churchill hydroelectric project will have major negative impacts on the way of life of the Intervenors – culturally, spiritually, socially and economically. The Lower Churchill hydroelectric project will irreparably and irremediably transform the natural environment of the traditional lands of the Intervenors.

The establishment of the Water Management Agreement without any consideration for the rights and interests of the Uashaunnuat will add to the adverse effects and infringements of the

Aboriginal rights and title and treaty rights of the Uashaunnuat and perpetuate the historical infringement thereof.

Furthermore, the establishment of the Water Management Agreement will make it likely that there will not be a satisfactory resolution of the Intervenor's entitlement to, among other things, use, manage and control the water resources in the future, namely the Churchill River and adjoining watersheds and tributaries.

PUB-IUM-4 Please identify specific provisions of the Water Management Agreement proposed by the Applicant that the Intervenor says will affect the Aboriginal rights and title claimed by it and describe the manner in which its rights and title will be affected.

The Water Management Agreement in substance, purpose and effect negatively affects the Aboriginal rights and title and treaty rights of the Intervenor and constitutes an additional denial of the property rights and jurisdiction of the Intervenor in respect to the natural resources of their traditional territory. The Water Management Agreement is aimed, without the consent of the Intervenor, at modifying, controlling, managing and regulating water resources – resources which are subject to the Aboriginal rights, Aboriginal title and treaty rights of the Intervenor. More particularly, sections 1, 2, 3, 4, 5, 7, 9, 10, 12 of the Agreement infringe the rights of Intervenor.

PUB-IUM-5 Have the Intervenor been consulted, or offered the opportunity for consultation by the Governments of Canada or Newfoundland and Labrador, the Applicant, or any other party affiliated with the Crown, in connection with the proposed Lower Churchill Hydroelectric Development?

Neither the Government of Canada nor the Government of Newfoundland and Labrador has legally or properly consulted the Intervenor in connection with the proposed Lower Churchill Hydroelectric Development.

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

On February 27, 2008, the Intervenor commented on the draft guidelines for the Environmental Impact Statement for the proposed Lower Churchill Hydroelectric Development. The Intervenor 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 Intervenor then suggested adding some guidelines on these matters.

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

An information meeting was also held in Ottawa on December 12, 2009 by representatives of the CEAA on the subject of the consultation process with the Intervenor that has been imposed on Nalcor by the CEAA in connection with the proposed Lower Churchill Hydroelectric Development. This information meeting 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 Intervenor. No further meetings have been held since.

The Lower Churchill Hydroelectric Development requires consultation at the high-end of the spectrum (See extracts from *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 in section B of the Intervenor's reply to the submissions of Nalcor and CF(L)Co). In other words, the facts bear out the importance of full consultation and accommodation in the present circumstances. There is a strong *prima facie* case in support of the claim to Aboriginal title, Aboriginal rights and treaty rights of the Intervenor and the Lower Churchill Hydroelectric Development will infringe those rights, as well as perpetuate the historical infringement of the Aboriginal rights and title of the Intervenor. Moreover, the Intervenor has never been consulted on the Upper Churchill Project.

The Intervenor takes the position that Nalcor has not legally or properly consulted the Intervenor respecting the Lower Churchill Hydroelectric Development, although there has been occasional correspondence from 2007 to 2010 between Nalcor and the Intervenor respecting the Lower Churchill Hydroelectric project.

Much of the correspondence relates to an information meeting held between Nalcor and the Intervenor on January 12, 2009, in Uashat. During the meeting, Nalcor representatives presented the Lower Churchill Hydroelectric Development to the Intervenor. The Intervenor 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 Intervenor that Nalcor could not deal with the rights of the Uashaunnuat.

A letter from Gilbert Bennett, Vice-President, Lower Churchill Project (Nalcor Energy) dated May 13, 2009 was sent to the Intervenor respecting the Lower Churchill Hydroelectric Development. The letter stated that Nalcor had expressed an interest in consulting with the Intervenor. 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.

In their response to Gilbert Bennett, the Intervenor 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. No discussions or meetings have taken place between the interested parties since January 12, 2009 and there has been no consultation of the Intervenor by Nalcor.

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

PUB-IUM-6 **If consultation with the Governments of Canada or Newfoundland and Labrador, the Applicant or any other parties affiliated with the Crown regarding these issues set out in PUB-IUM-5 has taken place, or if there has been an offer of consultation please provide a description of all such consultation that has taken place or been offered?**

Please see the response to PUB-IUM-5.

PUB-IUM-7 **Have the Intervenor been consulted, or offered the opportunity for consultation, by the Governments of Canada or Newfoundland and Labrador, the Applicant or any other party affiliated with the Crown, in connection with particular aspects of the project such as environmental assessment?**

Please see the response to PUB-IUM-5.

PUB-IUM-8 **If consultation with the Governments of Canada or Newfoundland and Labrador, the Applicant or any other parties affiliated with the Crown regarding these issues set out in PUB-IUM-7 has taken place, or if there has been an offer or consultation please provide a description of all such consultation that has taken place or been offered.**

Please see the response to PUB-IUM-5.

PUB-IUM-9 **Have the Intervenor been consulted, or offered the opportunity for consultation by the Governments of Canada or Newfoundland and Labrador, the Applicant, or any other party affiliated with the Crown, in connection with the establishment of a Water Management Agreement?**

The Intervenor have not been consulted or offered the opportunity for consultation by the Government of Canada or the Government of Newfoundland and Labrador, or any other party affiliated with the Crown, in connection with the establishment of a Water Management Agreement.

PUB-IUM-10 **If consultation with the Governments of Canada or Newfoundland and Labrador, the Applicant or any other parties affiliated with the Crown regarding these issues set out in PUB-IUM-9 has taken place, or if there has been an offer of consultation please provide a description of all such consultation that has taken place or been offered.**

Not applicable, please see the response to PUB-IUM-9.

PUB-IUM-11 **Have the Intervenors participated in any other processes with other parties where consultation has taken place or where the opportunity for consultation has been offered?**

Respecting the present matter, the Intervenors have not participated in any other processes with other parties where consultation has taken place or where the opportunity for consultation has been offered.

PUB-IUM-12 **If consultation has taken place has it been concluded or is it ongoing?**

Not applicable, please see the response to PUB-IUM-11.

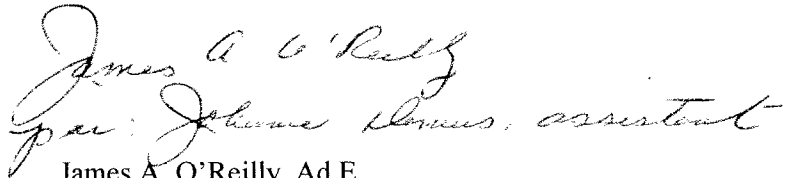
PUB-IUM-13 **What has been the outcome of any consultation that has taken place?**

Not applicable, please see the response to PUB-IUM-11.

Other Comments

The Intervenors have taken cognizance of a letter dated January 25, 2010 from David Schulze, counsel to Ekuanitshit Intervenors, respecting the position of the Ekuanitshit Intervenors regarding the request of the PUB for information and also adopt the submissions therein and submit the present response under reserve of the arguments therein.

O'REILLY & ASSOCIÉS



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Uashat mak Mani-Utenam et al. (IUM)