

# SMITH LAW OFFICES

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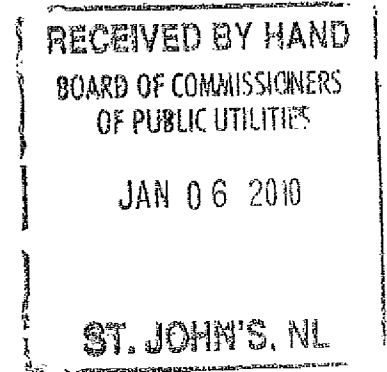
JAMIE M. SMITH, Q.C.

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January 6, 2010

**Via Courier**

Board of Commissioners of Public Utilities  
120 Torbay Road  
P.O. Box 21040  
St. John's, NL A1A 5B2



**Attn: Ms. Cheryl Blundon – Board Secretary**

**Re: Application of Nalcor Energy to Establish Water Management Agreement**

Dear Ms. Blundon:

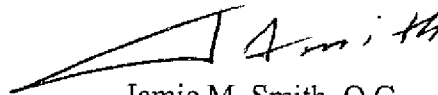
Further to the above-captioned matter, please find enclosed the following:

1. Reply of CF(L)Co to Request for Intervenor Status from the Innu of Uashat Mak Mani-Utenam, the Innu Takuaitkan Uashat Mak Mani-Utenam Band Council and Certain Traditional Families of the Uashat Mak Mani-Utenam Innu Nation;
2. Reply of CF(L)Co to Request for Intervenor Status from the Conseil des Innus de Ekuanitshit; and
3. Reply of CF(L)Co to Request for Intervenor Status from Twin Falls Power Corporation Limited;

We trust this is satisfactory.

Yours truly,

**JAMIE M. SMITH PLC INC.**



Jamie M. Smith, Q.C.

JMS/cm  
Enclosures

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

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

**REPLY OF CF(L)Co TO REQUEST FOR INTERVENOR STATUS**

**BY**

**THE CONSEIL DES INNUS DE EKUANITSHIT**

**SMITH LAW OFFICES**  
Solicitors for CF(L)Co  
The Law Chambers, 2<sup>nd</sup> Floor  
263 Duckworth Street  
St. John's, NL A1C 1G9  
**Per: Jamie M. Smith, Q.C.**

**TO:**           **The Board of Commissioners of Public Utilities**  
120 Torbay Road  
P.O. Box 21040  
St. John's, NL A1A 5B2  
Attn: Cheryl Blundon – Board Secretary

**AND TO:**   **Dionne Schulze**  
507 Place d'Armes, #1100  
Montreal, Quebec H2Y 2W8  
Attn: David Schulze

**AND TO:**   **Nalcor Energy**  
Hydro Place, 500 Columbus Drive  
P.O. Box 12800  
St. John's, NL A1B 0C9  
Attn: Ian F. Kelly, Q.C. and  
Geoffrey P. Young

1. The Board's discretion to grant intervenor status is addressed in Section 27 of the *EPCA*:

**Powers of board**

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;

2. The *Board of Commissioners of Public Utilities Regulations, 1996*, defines intervenor as:

- (c) "intervenor"

(i) when used in connection with proceedings commenced by an application to the board, means a person, other than the applicant, who files a submission, and

(ii) when used in connection with proceedings commenced by the board on its own motion, means a person who files a submission;

The *Regulations* otherwise provide little assistance in determining any issue of intervenor status.

3. It is submitted that the Board's discretion to grant intervenor status is guided, in part, by Section 5 of the *Water Management Regulations*:

**Application of regulations**

5. The *Board of Commissioners of Public Utilities Regulations, 1996* shall apply to the referral to the board of a proposed water management agreement under section 5.4 of the Act, or the filing of an application under subsection 5.5(1) of the Act, except to the extent these regulations deviate from it, or the board believes the process under those regulations are not necessary or useful, or would unnecessarily delay, the establishment of a water management agreement.

4. It is generally accepted that intervenor status should be granted only where it is useful, if not necessary, to a determination of an issue before the Board or to assist the Board in the discharge of its statutory obligation.

5. The onus is on the party seeking intervenor status to establish 1) a proper or sufficient interest in the proceeding before the Board and 2) a useful contribution to any determination to be made by the Board.
6. Pursuant to Section 5.5(2) of the *EPCA*, the Board is under a statutory obligation to establish the terms of a water management agreement for the purpose of achieving the policy objective set out in subparagraph 3(b)(i) of the *Act*.
7. Section 3(b)(i) of the *EPCA* provides:

**Power policy**

**3. It is declared to be the policy of the province that**

- (b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner**
  - (i) that would result in the most efficient production, transmission and distribution of power,**

8. Additionally, Section 3.1 of the *Water Management Regulations* provides:

**Objective of water management agreement**

3. (1) The objective of a water management agreement shall be the coordination of the power generation and energy production in the aggregate for all production facilities on a body of water to satisfy the delivery schedules for all suppliers on the body of water, in a manner that provides for the maximization of the long term energy-generating potential of a body of water, while ensuring that the provisions of a contract for the supply of power governed by section 5.7 of the *Act* are not adversely affected.
9. Thus, the Board is required by statute to establish the terms of a water management agreement between Nalcor and CF(L)Co that achieves the policy objective set out in subparagraph 3(b)(i) of the *EPCA* while ensuring that such agreement contains/addresses the requirements set out in section 3(2)(a) – (n) of the *Water Management Regulations*.
10. Here, the Applicant's interest in the proceeding before the Board is grounded in a claim to aboriginal rights and title. More particularly the Applicant asserts that Nalcor and/or the Province of Newfoundland and Labrador have a duty to consult pursuant to Section 37 of the *Constitution Act*, 1982.
11. At paragraphs 3, 4, 9 and 13 of its submission, the Applicant specifically states:
  3. When the Government of Newfoundland and Nalcor Energy ("Nalcor") issued a Request for Expressions of Interest and Proposals in 2005 for the development of

the Lower Churchill project, they acknowledged that the Innu of Ekuanitshit assert Aboriginal rights in Labrador and that it might be necessary for a third part to consult them.

4. The Conseil des Innus de Ekuanitshit is the body elected pursuant to the *Indian Act*, R.S.C. 1985, c.I-5, which represents the population and is an intervenor before the Joint Panel currently conducting the environmental review of the proposed Lower Churchill Hydroelectric Generation Project.
9. One of the practices approved by a significant portion of the electric utility industry in Canada is “informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them.”
13. Approval and implementation of the proposed water management agreement constitutes conduct that might adversely affect the applicants’ right and title.
12. The Applicant acknowledges that it “is an intervenor before the Joint Panel currently conducting the environmental review of the proposed Lower Churchill Hydroelectric Generation Project” and that it is pursuing its claim to aboriginal rights and title before that panel.
13. As noted, the Applicant asserts that “one of the practices approved by a significant portion of the electric utility industry in Canada is ‘informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them’ ”.
14. It is submitted that, to the extent that the Applicant may be correct in its assertion, presumably such practice has been observed insofar as the Applicant, by its own admission, has been informed and consulted on the Lower Churchill Development Project.
15. Alternatively, it is submitted that establishment of a water management agreement pursuant to the *EPCA* is neither a “planned activity” nor a “project” within the context of the Applicant’s assertion.
16. In substance the Applicant is asking that the Board recognize and/or determine aboriginal rights and title. Alternatively, the Applicant is cautioning the Board not to establish a water management agreement that adversely affects “aboriginal rights and title”. In the further alternative, the Applicant asserts a duty to consult on the part of Nalcor and/or the Province of Newfoundland and Labrador.
17. It is submitted that the Board has no jurisdiction to determine matters of “aboriginal rights and title”.
18. It is further submitted that the Applicant has not established that the proposed or any water management agreement made pursuant to the *EPCA*, of itself, adversely affects aboriginal rights and title.

19. It is further submitted that any duty to consult in the circumstances does not extend to the subject Water Management Agreement but rather to the Lower Churchill Development Project itself, which consultation has already been extended to the Applicant and is ongoing.
20. It follows that the Applicant has no proper or sufficient interest in the proceedings before the Board. Neither can the Applicant make a useful contribution to any determination to be made by the Board or otherwise assist the Board in the discharge of its statutory duty.
21. It is respectfully submitted that the within application for intervenor status be dismissed.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 6<sup>th</sup> day of January, 2010.



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**Per: Jamie M. Smith, Q.C.**