

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

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

## **I. Introduction**

1. The Innus of Ekuanitshit (the Intervenor) have intervened in Nalcor Energy's (Nalcor) application under s. 5.5(1) of the *Electrical Power Control Act*, S.N.L. 1994, c.E-5.1 to establish the terms of a Water Management Agreement with Churchill Falls (Labrador) Corporation (CF(L)Co). The Intervenor asserts its right to be consulted and accommodated.
2. The duty to consult is triggered in this case but has not been discharged. Both Nalcor and the Crown in the right of Newfoundland and Labrador have knowledge of the Aboriginal rights and title that the Intervenor asserts. Furthermore, the Intervenor has serious concerns regarding the possible effects of the Water Management Agreement on those rights and title. Despite this, neither the province nor Nalcor has consulted the Intervenor regarding the Water Management Agreement.
3. The Intervenor requests that the Public Utilities Board (the Board) order a suspension of these proceedings until the Board can assure itself that the Intervenor has been properly and meaningfully consulted by the Crown in right of Newfoundland and Labrador with respect to the Water Management Agreement.
4. In the alternative, the Intervenor requests that the Board order a suspension of the proceedings until the Intervenor has been properly and meaningfully consulted by Nalcor with respect to the Water Management Agreement, after which the Board must ensure that the duty has been discharged in a manner consistent with the honour of the Crown.
5. Should the Board decide that it cannot order the above remedies, the Intervenor submits that the application must be rejected.
6. In any case, the Intervenor submits that the Board is legally required to suspend its consideration of Nalcor's application pending environmental assessment, pursuant to s. 68 of the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2

## II. Issues

7. In this submission the Intervenor will address the following issues:
- (1) the jurisdiction and duty of the Board to address the consultation issue;
  - (2) the case for consultation that has been made out by the Intervenor and the nature of the duty to consult;
  - (3) the parties that have a duty to consult, the nature of that duty, and the need to suspend proceedings pending consultation;
  - (4) the prohibition in s. 68 of the *Environmental Protection Act*; and
  - (5) the powers of the Board to effect the remedies that the Intervenor seeks.

## III. Legal Arguments

### (1) The jurisdiction and duty of the Board to address the consultation issue

8. The Public Utilities Board is a corporation whose members are appointed by the Lieutenant Governor in Council as per the *Public Utilities Act*, R.S.N.L. 1990, c. P-47, s. 6(1), (2). In the current proceedings, the Board has the duty to ensure that the development and utilization of the Lower Churchill River as a source for the production of power achieves the policy objective set out in s. 3(b)(i) of *Electrical Power Control Act*, 1994, pursuant to s. 5.5(2). To do so, it must approve a Water Management Agreement that will bind the two parties with rights on the Lower Churchill River, namely Nalcor and CF(L)Co.
9. In carrying out this mandate the Public Utilities Board acts as a quasi-judicial tribunal with the authority to decide questions of law on proceedings under applicable statutes and regulations. The Board's power to consider questions of law is confirmed by s. 99(1) of the *Public Utilities Act*, R.S.N.L. 1990, c. P-47, which states that parties can appeal the decisions of the Board on questions of law to the Court of Appeal.
10. In other words, the Board has the power to consider all matters of fact and law that arise within the ambit of its jurisdiction. This has been confirmed by the Court of Appeal for Newfoundland and Labrador.

*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 83 Nfld. & P.E.I.R. 257 (NL C.A.) at 261, rev'd. on other grounds [1992] 1 S.C.R. 623
11. A quasi-judicial tribunal that has the power to consider questions of law has the jurisdiction to consider constitutional issues. The consultation of Aboriginal peoples is a

constitutional issue. 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 Public Utilities Board decide questions of law, that is sufficient.

*Carrier Sekani Tribal Council v. B.C. (Utilities Commission)*, [2009] 2 C.N.L.R. 58 (B.C.C.A.) at para. 15, 45

*Kwikwetlem First Nation v. B.C. (Utilities Commission)*, [2009] 2 C.N.L.R. 212 (B.C.C.A.), at para. 8

*Public Utilities Act*, R.S.N.L. 1990, c. P-47, ss. 16, 99(1) and 118(2)

*Board of Commissioners of Public Utilities Regulations, 1996*, art. 27

*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 83 Nfld. & P.E.I.R. 257 (N.L.C.A.) at 261, rev'd. on other grounds [1992] 1 S.C.R. 623

12. Not only does the Board have the jurisdiction to consider the duty to consult, but the honour of the Crown in fact requires it to do so. In its discussion of the British Columbia Utilities Commission, the British Columbia Court of Appeal stated the following principle of general application with respect to quasi-judicial tribunals that exercise powers delegated to them by the Crown:

Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

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

13. The Board is the only appropriate forum to decide the issue of consultation with respect to the Water Management Agreement. It is the only Crown entity that is required to review and approve the Agreement. Furthermore, this is the first time that any aspect of the Lower Churchill Hydroelectric Project has come before a decision-making body with the power to consider issues of consultation.
14. As such, the Board of Commissioners of Public Utilities has the jurisdiction and the obligation to decide whether the duty to consult and accommodate has been triggered and whether this duty has been discharged with respect to the establishment of the Water Management Agreement.

*Carrier Sekani Tribal Council v. B.C. (Utilities Commission)* at para. 15

*Kwikwetlem First Nation v. B.C. (Utilities Commission)* at para. 8

## **(2) The existence of the duty to consult**

### **(2)(a) The test**

15. The test for whether or not a duty to consult exists has been summarized as follows by the Newfoundland and Labrador Court of Appeal:

The Crown obligation to undertake an analysis of whether the Crown owes a duty to consult is triggered at a low threshold. See *Mikisew Cree* [(2005) 3 S.C.R. 388], at para. 55. To trigger that obligation, the Crown must have knowledge, real or constructive, of the “potential” existence of an aboriginal right that “might” be adversely affected by conduct contemplated by the Crown. See *Haida* [v. *British Columbia (Minister of Forests)*], [2004] 3 S.C.R. 511], at para. 35. All that is necessary is that the Crown have “some idea” of the potential scope and nature of the aboriginal right asserted and of the alleged infringements of these rights. See *Haida*, at para. 36.

*Labrador Metis Nation v. Newfoundland and Labrador* (2007), [2008] 1 C.N.L.R. 48 (NL C.A.), para. 29 (emphasis added)

### **(2)(b) The rights and title asserted by the Intervenor and the knowledge of these rights**

16. The Intervenor asserts Aboriginal rights and title over an area that extends through the Quebec-Labrador peninsula, to the Churchill River watershed. The borders of the Innu of Ekuanitshit’s traditional territory stretch from the north shore of the St. Lawrence to the Hamilton River (now the Churchill River) watershed.

Robert Comtois, *Occupation et utilisation du territoire par les Montagnais de Mingan*, 1983, pp. 3, 18

17. As such, the land affected by the Water Management Agreement falls squarely within the traditional territory of the Innu of Ekuanitshit.

18. The Innu of Ekuanitshit have historically traveled throughout their territory, occupying the land and harvesting its resources. They traveled by waterways to reach the northern parts of their territory within the Labrador region, including Atikonak Lake, Winokapau Lake, and the North West River. In fall, they would hunt as far as Lake Melville. The routes and camp sites of the Innu of Ekuanitshit within the Labrador region extended to Goose Bay and Muskrat Falls.

Robert Comtois, *Occupation et utilisation du territoire par les Montagnais de Mingan*, 1983, pp. 48, 53, 72, 120, 124

19. To this day members of the community continue to travel into Labrador to hunt for caribou.
20. Both Nalcor and the Crown in the right of Newfoundland and Labrador have knowledge of the rights and title asserted by the Intervenor. They acknowledged in 2005 that the Innu of Ekuanitshit assert Aboriginal rights in Labrador and that a third party might be obliged to consult them about this project.

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

21. Furthermore, research filed by Nalcor as part of the environmental assessment for this project shows recent use of Gull Lake by the Ekuanitshit Innu (“people from Mingan”) and heavy use of the area by the Mingan Innu in the 19th century.

Nalcor, Component Studies Socio-Economic Environment: Cultural Heritage Resources, Report 5, *Historic Resources (Labrador Study) 1999 Environmental Studies*, pp. 33, 78

Nalcor, Component Studies Socio-Economic Environment: Cultural Heritage Resources, Report 4, *Historic Resources Overview Assessment 1998-2000*, vol. 1, p. 27

22. The Crown in the right of Canada has had knowledge of the Intervenor’s claim of rights and title over the area since 1979, when it accepted for negotiation the comprehensive claim of the Conseil Atikamekw-Montagnais (CAM), which includes the Intervenor’s claim. The federal government accepted the claim on the basis of traditional occupation and use of the territory by the claimants since time immemorial. The area accepted for negotiation included Labrador.

Conseil des Attikameks-Montagnais, *Nishatanan Nitasinan*, (1979) *Recherches amérindiennes au Québec*, vol. 9, p. 171

Letter from the Honorable Jake Epp, Minister of Indian and Northern Affairs, to René Simon, President of the Conseil Attikamek-Montagnais (October 5, 1979)

Indian and Northern Affairs Canada, “Comprehensive Claims Policy and Status of Claims” (19 July 2000), p. 11

23. Both the Crown in the right of Newfoundland and Labrador and the Crown in the right of Canada reaffirmed their knowledge of the Intervenor’s claim when they specified that the Intervenor’s “interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues” must be considered by Nalcor in its Environmental Impact Study (EIS).

Government of Canada and Government of Newfoundland and Labrador,  
*Environmental Impact Statement Guidelines: Lower Churchill Hydroelectric  
Generation Project, Newfoundland and Labrador Hydro* (July 2008), §4.

24. Throughout these proceedings the Intervenor has insisted that the procedure established by the Board has not allowed it to make full proof of its asserted rights and title and the associated duty to consult. Nevertheless, the record shows that the Innu of Ekuanitshit have potential rights in the portion of the Lower Churchill watershed that will be affected by the Water Management Agreement and that the potential existence of these rights is known by both Nalcor and the Crown in the right of Newfoundland and Labrador.

**(2)(c) The potential adverse effects of the Water Management Agreement on the rights and title asserted by the Intervenor**

25. Nalcor and CF(L)Co acknowledge that implementing the Water Management Agreement will change water flows in the Lower Churchill River from what they may otherwise have been without the Agreement (PUB-NE-28, CIE-NE-2, CIE-CF(L)Co-2).

26. CF(L)Co's decision-making process as to how much water is released into the Lower Churchill will also be changed by the Water Management Agreement. Rather than solely taking into account the demands of its own customers when deciding how much water to release into the Lower Churchill River, CF(L)Co will now be required take into account the Production Schedule as set by the Independent Coordinator for both CF(L)Co and Nalcor Production Facilities (CIE-CF(L)Co-1).

27. Water flows are a key part of any ecosystem. The Intervenor is concerned with the potential adverse impacts of changes in flows on, among other things:

- fish species;
- large ungulates, waterfowl and other wildlife species that they trap and hunt;
- quality and diversity of natural environments;
- transportation and navigation routes and corridors; and
- conservation of and respect for their cultural heritage.

28. The adverse effects of changes in water flow are not just "potential" but very real. As noted by the Innu Nation in their comments to the Joint Review Panel, since the construction of the Upper Churchill and the changes in water flows that have resulted from the operation of that facility, the Common Wood Sorrel, an uncommon species in Labrador, has from "Fred's Island" in Gull Lake:

That island has since been completely scoured over, and no trees remaining standing. The old photos, local knowledge, large fallen tree remains, and the fact that Common Wood Sorrel only grows in rich soils under mature stands show that the small island was previously stable and supported mature forest. The increased winter flows, daily

fluctuations in the river and increased ice damming related to the Churchill Falls Project appear to have contributed to the relatively fast erosion of this island. This is another example of probable downstream effects.

Innu Nation Comments, Lower Churchill Hydroelectric Generation Project, Nalcor Energy Responses to JRP Information Requests, p.74 (emphasis added)

29. That these changed flows may still be within the existing flow parameters for the Upper Churchill is irrelevant, and not solely because there has never been a proper environmental assessment of these parameters. The Water Management Agreement will change the flows from what they otherwise might have been and these changes could have an adverse effect on the Intervenor's rights. The duty to consult is therefore engaged.
30. Furthermore, the fact that the Upper Churchill facility was not subject to an environmental assessment and is not subject to ongoing environmental assessment or monitoring (as set out in IUM-CF(L)Co-1) does not excuse Nalcor and CF(L)Co from consulting with respect to the Water Management Agreement. The Board's decision is a new one which must be made in accordance with the law currently in force. That law requires consultation with respect to the Water Management Agreement.

**(2)(d) Concluding remarks on the duty to consult**

31. The record in these proceeding shows that the Intervenor has asserted Aboriginal rights in the territory that will be affected by the Water Management Agreement, that both Nalcor and the Crown have knowledge of these potential rights, and that the Water Management Agreement has the potential to adversely affect these rights.
32. The Intervenor must be consulted with respect to the Water Management Agreement.
33. Only the Public Utilities Board is in a position to ensure that the Crown fulfills this duty to consult.

**(3) The parties that have a duty to consult, the nature of that duty, and the need to suspend proceedings pending consultation**

**(3)(a) Both Nalcor and the Crown in the right of Newfoundland and Labrador are under a duty to consult**

34. The Intervenor submits that both Nalcor and the Crown in the right of Newfoundland and Labrador have a duty to consult. Nalcor's duty is a statutory one while the Crown's duty derives from the principle of the honour of the Crown, as described above.

35. To be clear, it is not the position of the Intervenor that Nalcor is the Crown for the purposes of the constitutional duty to consult. Rather, Nalcor's duty to consult derives from the Board's duty to "apply tests which are consistent with generally accepted sound public utility practice" when implementing the power policy declared in s. 3 of the *Electrical Power Control Act*.

*Electrical Power Control Act*, 1994, S.N.L. 1994, c. E-5.1, s. 4

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

"good utility practice" means those practices, methods or acts, including but not limited to the practices, methods or acts engaged in or approved by a significant portion of the electric utility industry in Canada, that at a particular time, in the exercise of reasonable judgment, and in light of the facts known at the time a decision is made, would be expected to accomplish the desired result in a manner which is consistent with laws and regulations and with due consideration for reliability, safety, environmental protection, and economic and efficient operations.

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

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

(m) "environment" includes

- (i) air, land and water,
- (ii) plant and animal life, including human life,
- (iii) the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community,
- (iv) a building, structure, machine or other device or thing made by humans,
- (v) a solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of humans, or
- (vi) a part or a combination of those things referred to in subparagraphs (i) to (v) and the interrelationships between 2 or more of them;

*Environmental Protection Act*, S.N.L. 2002, c. E-14.2, s. 2

38. Aboriginal land use and occupation is one of the combinations or interrelationships between land and water or plant and animal life, on the one hand, and the social, cultural and economic life of humans, on the other.
39. Section 16 of the *Public Utilities Act* grants the Board a general supervisory power over public utilities, and a power to make all necessary examinations and inquiries into the compliance of public utilities with the law.



40. A “sound utility practice” includes accounting for Aboriginal groups’ relationship with the environment by consulting them with regard to projects that will alter that environment.
41. All of the utilities which are members of the Canadian Electricity Association, including Nalcor, have approved the following practices to which they have declared themselves to be committed:
- Recognizing and respecting the status and diversity of Aboriginal peoples, and their historic and cultural ties to the land.
  - Informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them.

Canadian Electricity Association, “CEA Statement on Aboriginal Relations” (February 2004)

42. The Board must therefore verify that Nalcor has consulted Aboriginal groups.
43. This interpretation is consistent with the National Energy Board’s policy, which states that:

The Board will continue to examine the efforts made directly by applicants to contact potentially affected Aboriginal peoples to advise them of the project and to involve them in meaningful discussions regarding potential project impacts and appropriate mitigation as set out in the Board’s Guidelines for Filing Requirements.

National Energy Board, Memorandum of Guidance, “Consultation with Aboriginal Peoples”, File 230-A000-16 (4 March 2002)

44. To summarize, both Nalcor and the Crown in the right of Newfoundland have the duty to consult with respect to the Water Management Agreement that is currently before the Board. Nalcor’s duty derives from its statutory obligation to follow “sound utility practice”. The Crown in the right of Newfoundland’s duty to consult is engaged by the principle of the honour of the Crown, as described above.

**(3)(b) Neither Nalcor nor the Crown in the right of Newfoundland and Labrador have in fact consulted the Intervenor with respect to the Water Management Agreement**

45. Neither of the parties required to consult the Intervenor with respect to the Water Management Agreement have done so.
46. The Intervenor’s only contact with the Crown in the right of Newfoundland and Labrador occurred in December of 2007. There has been no other significant communication by

any representative of the Government of Newfoundland and Labrador with the Intervenor.

47. For its part, Nalcor acknowledges that “[t]here have been no consultations regarding the Water Management Agreement specifically” (PUB-NE-14).
48. Nalcor takes the position that any and all consultation with respect to the Lower Churchill Hydroelectric Project will take place through the environmental assessment process. If this is true, a point which the Intervenor does not concede, it nonetheless follows that the Board cannot fulfill its duty to assess the adequacy of consultation on the Water Management Agreement until the environmental assessment has run its course.
49. Furthermore, the Board cannot conclude that environmental assessment fulfills the duty to consult for two reasons. First, in order to so conclude the Board must assume that the duty to consult is at the low end of the spectrum. The record in these proceedings does not allow for such a determination. Second, for the Board to conclude that environmental assessment fulfills the duty to consult, consultation within the environmental assessment would actually have to be completed. As outlined in the Intervenor’s responses to PUB-CIE-3 and PUB-CIE-4, this is very far from the case.
50. A cautious approach is consistent with the position of the Newfoundland Court of Appeal, which has itself criticized hasty resource development when it stated that:

In any event, it appears just plain common sense to require development of resources to await the relatively short time that will be taken to allow adverse environment effects to be assessed and mitigated, if not eliminated.

*Labrador Inuit Assn. c. Newfoundland (Minister of Environment and Labour)*, (1997) 152 D.L.R. (4th) 50

**(3)(c) The Board must suspend the current proceedings pending consultation**

51. Considering the lack of consultation with respect to the Water Management Agreement, the Board must suspend the current proceedings until it can assure itself that proper consultation by Nalcor and the Crown in the right of Newfoundland and Labrador has taken place.
52. A suspension to allow for consultation to take place 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.

**(4) In any case, s. 68 of the *Environmental Protection Act* prohibits the Board from establishing a Water Management Agreement at this time**

53. If the Board cannot grant the above requested relief, the Intervenor submits that it must suspend nonetheless on the grounds that s. 68 of the *Environmental Protection Act* prohibits the Board from establishing a Water Management Agreement until the Lower Churchill Hydroelectric Project has been released under Part X of this *Act*.

**(4)(a) The prohibition in s. 68(1)**

54. 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.

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

<http://www.env.gov.nl.ca/env/Env/EA%202001/Archival%20EA%20Documents/Bulletins/20061201.pdf>

55. Section 68(1) of the *Environmental Protection Act* appears in Part X of the *Act*, entitled “Environmental Assessment”, 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.

56. A release under Part X of the *Environmental Assessment Act* is the first item in Nalcor’s table of permits required for the Lower Churchill Hydroelectric Generation Project (PUB-NE-50). It appears under the heading of “Project Construction/Commencement”.

**(4)(b) The application of the prohibition to s. 5.5 of the *Electrical Power Control Act***

57. Nalcor has applied to the Public Utilities Board under s. 5.5(1) of the *Electrical Power Control Act*, 1994, S.N.L. 1994, c. E-5.1. This provision allows a person to whom s. 5.4(1) applies to apply to the Public Utilities Board to “establish” the terms of a Water Management Agreement between themselves and the other person who has been granted rights for power production in the same body of water. Section 5.5(2) directs the Board to establish an agreement that respects the power policy set out in s. 3(b)(i) of the *Act*.

58. Under s. 5.5(1), the Public Utilities Board is engaged in is one of “approving” whatever agreement is entered into so that it respects the power policy set out in the *Act*. Thus the

prohibition under s. 68(1) of the *Environmental Protection Act* applies to Nalcor's application.

59. The fact that Nalcor, in these proceedings, has submitted a ready-made agreement for the Board's approval emphasizes that the Board's task is one of approval. If Nalcor and CF(L)Co had submitted this agreement to the Board pursuant to s. 5.4(1) of the *EPCA*, its task would be the same and s. 68(1) of the *Environmental Protection Act* would apply. Section 68(1) must therefore also apply to applications made under s. 5.5(1). To find otherwise would subvert the legislature's intent, enshrined in the *Environmental Protection Act*, that projects be subject to a complete and sufficient environmental assessment before any government agencies allow an aspect of the project to move forward.

60. The legislature's intent that environmental assessment should take precedence is expressed in s. 4(1) of the *Act*, which states:

4. (1) Where there is a conflict between this Act and another Act, this Act prevails.

**(4)(c) The exemption in s. 68(2) is unavailable to Nalcor**

61. Section 68(2) of the *Environmental Protection Act* clarifies the application of s. 68(1) as follows:

68. (2) This Part does not exempt a proponent of an undertaking from the requirements imposed upon an undertaking by

- (a) another Act or regulation of the province or of Canada; or
- (b) a municipal regulation, by-law or requirement.

62. Nalcor might argue that it had no choice but to bring this application because s. 5.5(1) required it to apply to the Public Utilities Board if it failed to conclude a Water Management Agreement with CF(L)Co within "a reasonable time". Section 4 of the *Water Management Regulations*, N.L.R. 4/09, defines the term "reasonable time" for the purposes of s. 5.5(1) as meaning 60 days.

63. However, s. 5.5(1) of the *Electrical Power Control Act* is a permissive provision. It states that a where the parties to whom s. 5.4 applies have not entered into an agreement within a reasonable time "one or more of them may apply the public utilities board" (emphasis added).

64. The 60 day "reasonable time" threshold is included in the *Regulations* to prevent a party from immediately seeking recourse to the Board without first attempting to negotiate an agreement. If the 60-days period was meant as a strict limitation period, the statute would impose a sanction for not applying within that period. There is no such sanction,

and in fact none was imposed on Nalcor and CF(L)Co, who waited a good deal longer than 60 days between the granting of Nalcor's Water Lease and its application to the Board.

65. Since Nalcor was under no requirement to apply to the Public Utilities Board at this time, it cannot rely on s. 68(2) to exempt the current proceedings from the application of s. 68(1).

66. The purpose of s. 68(2) is to make clear that the prohibition on government agencies of issuing licenses and approvals does not relieve Nalcor from honouring its legal obligations – the project is on hold but Nalcor still has to obey the law. Such an approach is consistent with the overarching role envisioned for environmental assessment within the *Environmental Protection Act*.

**(4)(d) Concluding remarks on s. 68 of the *Environmental Protection Act***

67. The Court of Appeal has recalled the importance of environmental assessment in Labrador and the precedence it takes over other decision-making:

[85] Likewise, the Inuit and Innu may also be viewed as representing general vital interests. They are understandably pre-occupied with the protection from adverse environmental effects on the immediate area affected, to which their whole cultural, social and economic lives have been linked for generations. Nevertheless, in a very real sense they too are representing the interests of their fellow citizens in this Province inasmuch as the heritage of the environment is a legacy to be preserved for all Newfoundlanders and Labradorians, wherever their abode. Viewed from this perspective the general may be said to transcend the particular environmental concerns more immediately engaged. After all, indiscriminate development without regard to environmental impact translates eventually into agonizing problems for generations yet unborn from every corner of the Province, whether it be the depleted fishery; forestry harvesting in the absence of silvaculture; uncontrolled effluent and emissions from plants; or the tragedies of flourospar or asbestos mines. We are sure that all parties involved would not want to have the mining development at Voisey's Bay to be placed in the same category.

[86] The Government showed it was very alert to the need to reconcile environmental protection with this development. In its wisdom it addressed the challenge by committing the proposed undertaking at Voisey's Bay to a joint federal-provincial assessment.

[87] In a nutshell, the Exploration Support Works were included in the undertaking committed to that process. For the foregoing reasons, the Minister

has no jurisdiction to subsequently deal with the Works as he purported to do by treating them as outside of the Memorandum of Understanding.

*Labrador Inuit Assn. c. Newfoundland (NL C.A.)*

68. Section 68(1) of the *Environmental Protection Act* therefore prohibits the Public Utilities Board from establishing a Water Management Agreement until the Lower Churchill River Hydroelectric Generation Project is released pursuant to Part X of the *Environmental Protection Act*. The Board must suspend the proceedings until the undertaking is released.

**(5) The powers of the Board to issue a suspension**

69. It is a fundamental principle of administrative law that quasi-judicial tribunals like the Board are masters of their own procedure.

70. The *Public Utilities Act* provides that the Board can generally do those things it considers necessary for the exercise of its powers, and has all the additional, implied and incidental powers needed to carry out its mandate under that *Act*:

25. The board may

(g) generally do those things which the board considers necessary, convenient or advisable for or incidental to the exercise of the powers, functions and duties of the board.

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.

(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.

71. When confronted with a question or issue of law or jurisdiction, s. 27 of *Board of Commissioners of Public Utilities Regulations, 1996* grants the Board the power to stay proceedings pending a determination of that question or issue.

72. In the present case, the Board has been confronted with a question of law regarding the constitutionally protected rights of the Intervenor.

73. The Board is obliged to ensure that it exercises its jurisdiction in conformity with the requirements of the *Constitution Act, 1982*.

74. In order to ensure that the Board can properly consider the questions of law in issue in these proceedings, and that its decision is consistent with constitutional principles, the Board must exercise the powers granted to it under its enabling legislation and operating regulations and issue a suspension.

**THE WHOLE OF WHICH** is respectfully submitted.

**DATED** at Montreal, this 19<sup>th</sup> day of February 2010

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Department of Environment and Conservation  
Environmental Assessment Division

## **ENVIRONMENTAL ASSESSMENT BULLETIN**

Environment and Conservation Minister Clyde Jackman has announced the following event relative to Part 10 Environmental Assessment of the Environmental Protection Act.

### **UNDERTAKING REGISTERED:**

**Lower Churchill River Hydroelectric Generation Project** (Reg. 1305)  
**Proponent: Newfoundland and Labrador Hydro**

The proponent proposes to construct and operate two hydroelectric power generating facilities on the lower section of the Churchill River at Gull Island and Muskrat Falls in Labrador. Gull Island is located approximately 100 kilometres and Muskrat Falls 30 kilometres to the southwest of the Town of Happy Valley-Goose Bay, respectively. The two facilities will have a combined power generation capacity of approximately 2,800 megawatts (MW). The Gull Island facility will have a capacity of 2,000 MW, including a dam 99 metres high by 1,315 metres long with a reservoir 225 kilometres long, flooding an additional 85 square kilometre area. The Muskrat Falls facility will have a capacity of 800 MW, including a dam at the north section 32 metres high by 180 metres long, and, south section 29 metres high by 370 metres long with a reservoir 60 kilometres long, flooding an additional 36 square kilometre area. The project will also include interconnecting transmission lines to the existing Labrador grid at Churchill Falls Generating Station. Construction is scheduled to begin in mid-2009 at Gull Island with first power generation in mid-2014, and construction of Muskrat Falls is proposed to start three years following the start of construction at Gull Island. The undertaking was registered on December 1, 2006; public comments are due by January 15, 2007; and, the Minister's decision is due by January 25, 2007.

The Minister encourages all interested parties to become involved and to make comments known. Comments on submitted documents are invited from the public, addressed in writing to the Minister, and are welcome prior to the deadline date shown.

Further information may be obtained by contacting the Director of Environmental Assessment at (709) 729-4211 or toll-free: 1-800-563-6181 or by mail to:

Director, Environmental Assessment Division  
Department of Environment and Conservation  
West Block, Confederation Building  
P.O. Box 8700, St. John's, NL, A1B 4J6

Environmental Assessment Information is on the Government Web Site at  
<http://www.gov.nl.ca/env>