Q. Further to CA-NP-139, please provide a copy of the preliminary ruling of the arbitration panel established to determine the value of the assets involved.

A. A copy of the preliminary ruling of the arbitration panel established to determine the value of the assets involved is included as Attachment A.

Arbitration Rules Agreement
December 5, 2008

IN THE MATTER OF a Lease made the 23rd day of November, 1946, between the St. John's Municipal Council and Newfoundland Light and Power Company Limited Affecting Rights Under Section 195 of the *St. John's Municipal Act, 1921,* as amended

AND

IN THE MATTER OF an Arbitration Rules Agreement dated the 5th day of December, 2008

BETWEEN:

NEWFOUNDLAND POWER INC. **"NF POWER"**

AND:

CITY OF ST. JOHN'S **"CITY"**

DECISION ON THE PRELIMINARY QUESTIONS ASKED OF THE ARBITRATORS.

The Tribunal is constituted under the terms of a Lease as amended, with a final date of October 21, 1949. In the Lease the lands and watershed of the Mobile River together with ancillary rights outside the watershed, were granted by the City of St. John's to Newfoundland Power Inc. for a term of fifty (50) years automatically renewing for five (5) year periods, but with a right of termination by the City upon three (3) years

notice after forty-seven (47) years. The City gave notice of termination to NF Power on February 9th 2006.

The Tribunal has been constituted to establish the totality of the value of what NF Power will be returning to the City at the conclusion of the termination process. The termination process, including the setting up of the Tribunal of Arbitrators, is mandated by the Lease. The work of the Tribunal has been assisted by the parties' filing of an agreed statement of facts followed by two preliminary questions which have been posed to the Tribunal for decision. Because the Tribunal is in fact three arbitrators constituted under the authority of the legislation and the Lease, I will refer to the Tribunal as "the arbitrators" and the parties, which are the successors of the original parties, simply as the "City" and "NF Power".

The Lease which is in the process of being terminated by the City mandates that the arbitrators are to value NF Power's interest in the electrical power generation system which exists by virtue of and under the terms of the Lease of the Mobile watershed.

To assist the reader I will, in the following paragraphs, reproduce the wording in the amended Lease which we are required to interpret, together with Section 3, Clause (f) in the *St. John's Municipal Council (Amendment) Act of 1949*, which gives legislative sanction to the amending agreement of October 1949.

Following the reproduction of the clauses mentioned above, I will to assist in understanding the context in which the power development occurred, give a history of the events, from the legislative grant of the watershed to the City in 1921. That I believe needs to be done because without context, understanding would be difficult.

Understanding the matter has been greatly facilitated by both counsel in their preparation and submission of the agreed statement of facts which contain reproductions of all relevant documents.

The involvement of the City began with the *St. John's Municipal Council (Amendment) Act of 1921* and in particular, Section 195.

"LIGHTING.

195. The Council shall have power to provide for the lighting of the City, and may contract with any person or Company for such Electric or Gas lights as may be required for the purpose.

The Council shall have possession and control of the waters and watershed of Mobile River and shall have power:

(a) To devote such portion of its revenues as may be deemed necessary to the examination and inspection of said river and other water powers in this Colony;

(b) To borrow on the authorization of the Governor in Council such sums as may be found necessary to develop such water powers, to install machinery for the purpose of generating electrical power, and to do such other acts and works as may be necessary or incidental thereto;

(c) To acquire a right of way over private or public lands for the construction of transmission lines for the purpose of conveying such electrical powers to and for the use of the City for lighting and power;

(d) To sell and dispose of such surplus power as may remain at such rates as may be deemed advisable.

The annual profits which may accrue from the sale of such electrical power shall be devoted, first to the establishment of a sinking fund, which shall liquidate the capital sum invested, and second, to the general expenses of the City."

The NF Power involvement in the Mobile River watershed began by Lease dated November 23rd 1946, in which the City leased its rights under the 1921 Act, to the Company. NF Power at the time, pursuant to the *St. John's Street Railway Charter of 1896* distributed and sold electricity in St. John's and the surrounding area and held the exclusive use of the waters of Tors Cove Brook which is in the same general area of the Avalon Peninsula as is the Mobile River watershed.

In the 1946 Lease, the City leased all its rights to use and develop the Mobile River watershed to NF Power. The term of the Lease (later amended) was five (5) years. The termination process was also prescribed, as follows:

"TO HOLD AND ENJOY the said rights and liberties hereby demised unto the Company during the term of five (5) years from the date of this LEASE such term to be automatically extended for successive periods of five (5) years provided the Council shall have the right to terminate the said LEASE upon three (3) years' notice in writing to the Company given at any time after the expiration of five (5) years from the date hereof and upon payment to the Company of the aggregate cost of all works and erections constructed by the Company within the Mobile River Watershed subsequent to the date of this LEASE less depreciation on such works to the date of such termination and provided further that should the Council during the continuance of this LEASE or extension thereof exercise its right to purchase the Company's undertaking within the meaning of Section 29 of the St. John's Street Railway Charter 1896 as amended then and in that event all works constructed or provided by the Company in connection with

> the said Mobile waters shall be deemed to form part of the Company's undertaking."

Other clauses dealing with payment of rentals etc., are not germane to the questions now before us.

I will not recite all of the amendments to the *St. John's Street Railway Act*, but I do note that NF Power's former role in providing electricity to run the St. John's tramway, (street car system), became less important as time passed, while the concept of the further development of electrical generation, including the development of the Mobile River watershed became more important to both the City and NF Power.

In the late 1940's a bus service was established in the City, the tramway tracks were "lifted" and NF Power became exclusively concerned with the generation, distribution and sale of power in the St. John's area.

As the development of the Mobile watershed became increasingly desirable both for the City and NF Power, it was recognized and agreed that in order for NF Power to develop the full potential of the watershed under a Lease from the City, it would have to obtain adequate financing, and to do that, it required of necessity a lengthy lease. That concept was agreed to in 1949, however during the 1940's a further issue had presented itself in the planning process and became important, particularly for NF Power which would be the developer of what was to be a major project at that time.

That important issue was the prospect of future termination of its intended lease and the valuation of what it intended to develop during the term of the Lease at some unknown time fifty (50) years or more in the future. In earlier past agreements and legislation, the prescribed valuation method had varied between the "aggregate cost of all works and creations less depreciation" as in the 1946 Lease, whereas the original concept in the *St. John's Street Railway Act of 1896* was one of "value as a going concern".

It is interesting as a historical note that Section 29 of the *St. John's Railway Act,* introduced in 1896 the concept of value and also the concept of the appraisal of value by three experienced arbitrators, which concept has endured over the years in the agreements, lease provisions and legislation under which this present arbitration has been set up.

> Section 29 of the Act of 1896 said in part in respect of the street railway:
>
> 29. For the establishment and operation of the said railway, the said Company is hereby granted an exclusive franchise on all streets and highways within the city limits, for a period of fifty years from the date of the passing of this Act: Provided that the said Municipal Council or other municipal body having charge of the municipal affairs of the town of St. John's may, after the lapse of fifty years from the date of this charter, purchase the said railway and other rights of the said Company as a going concern, upon giving to the said Company twelve months notice of their intention so to do; and in case the said municipality shall decide to exercise the right reserved by this section, the value of the said railway and rights of the said Company shall be appraised by three experienced arbitrators, one to be appointed by the said Company, one by the said Municipal Council, and the third by the said two so appointed; ..." [emphasis mine]

Though the foregoing applies to the street railway and the predecessor company of NF Power, the dichotomy between "cost less depreciation" and other meanings of the term "value", remains central to the issue before us.

During the period leading up to the 1949 legislation and the amended lease agreement, NF Power representatives met on various occasions with the Municipal Council and agreement resulted as confirmed in the minutes of the Council meeting held on March 25th 1949. The minutes of the meeting said:

> "The question of the basis for valuing the Mobile properties was also raised by the Company, and it was agreed that the basis be altered from 'cost less depreciation' to 'value'." [emphasis mine]

Subsequently the solicitor for the City prepared a Memorandum of Agreement which was to be submitted to the Legislature for enactment. The proposed legislation had as one of its purposes:

> "(b) To request the Government of Newfoundland to amend Section 195 sub-section 2.(f) of the St. John's Municipal Act, 1921, so as to empower the Council on termination of the lease to pay the lessee for all works or erections constructed or provided by the lessee on the basis of value as set out in Clause 1.(a) above."

The request was submitted to Government and as a result the Legislature enacted the *St. John's Municipal Council (Amendment) Act* on March 31st 1949, Act No. 36.

For some reason, perhaps by mistake, the amending Clause (f) was not amended by the Legislature to substitute "value" for "cost less depreciation" which provision remained as it was in the 1946 Act.

After discovery of this omission to substitute "value" for "cost less depreciation", the Council at a meeting on July 14th 1949, approved the request of a further amendment to the March 25th legislation, again requesting the inclusion of the word "value" as the governing mandate and removing references to "cost less depreciation" as a method of valuation.

As a result, on the 13th of August 1949 the Legislature enacted a further amendment to the *St. John's Municipal Council Act* being the Act No. 50 of 1949, the relevant clause of which I will reproduce, as follows:

> "3. Subsection (2) of Section 195 of the said Act, as enacted by the Act No. 40 of 1946 and as amended by the Act No. 36 of 1949, is hereby further amended by striking out paragraph (f) thereof and substituting therefor the following:
>
> (f) To enter into a lease upon such terms and conditions as it may deem advisable with any person firm or company as lessee in respect of waters, lands and rights acquired by the Council under this Section, and such terms and conditions may provide for the termination of such lease upon notice and upon payment to the lessee of the value at the time of such termination of all works and erections constructed by the lessee within or outside the watershed of Mobile River subsequent to the date of the lease for the primary purpose of and used for developing the waters of Mobile River and such value shall be determined by appraisal by three experienced arbitrators, …"

On October 21st 1949 by formal agreement between the City and NF Power, it was agreed that Clause 1 of the Lease would be amended to read:

> "THIS AGREEMENT made this *21st* day of October Anno Domini One Thousand Nine Hundred and Forty Nine BETWEEN The St. John's Municipal Council, being the Municipal body having charge of the municipal affairs of the City of St. John's and hereinafter called 'the Council' of the one part AND Newfoundland Light and Power Company Limited, a company registered under the Companies Act of Newfoundland, and hereinafter called 'the Company' (which expression shall where the context admits include the assigns of the said Company) of the other part, is supplemental to an indenture of lease (hereinafter called 'the said lease') made between the parties hereto and dated the 23rd day of November, 1946, and relating to the leasing of the waters of Mobile and WITNESSETH as follows:-
>
> 1. Clause 1 of the said lease shall be and it is hereby deleted and the following clause shall be and it is hereby substituted therefor in the said lease:-
>
> '1. In consideration of the rent and royalty hereinafter reserved or made payable to the Council and of the covenants on the part of the Company hereinafter contained, the Council hereby grants and demises to the Company all the rights of the Council under Section 195 of the St. John's Municipal Act, 1921, as amended, including all the rights of the Council in or to any lands, lands covered by water, easements and other rights granted to the Council thereby with the full and exclusive right and liberty to and for the Company to take, divert and use for power purposes all or any of the waters within the watershed of the Mobile River, to impound and store the same in any reservoir, lake or pond and to develop power therefrom with the further right and liberty to the Company to divert all or any of the said waters into the drainage basin of Tors Cove Brook either directly or through the drainage basin of the LeManche River and to develop power therefrom at its existing power houses at Tors cove and Rocky Pond or either of them or at any other powerhouse hereafter constructed TO HOLD AND ENJOY the said rights and liberties hereby demised unto the Company during the term of fifty (50) years from the date of this Lease such term to be automatically extended for successive periods of five (5) years provided the Council shall have the right to terminate the said Lease upon three (3) years' notice in writing to the Company given at any time after the expiration of forty seven (47) years from the date of this Lease and upon payment to the Company of the value of all works and erections constructed or provided by the Company within and without the Mobile River watershed subsequent to the date of this Lease for the primary

> purpose of developing the waters of Mobile provided such works and erections are in use by the Company for that primary purpose at the time notice of termination of the Lease is given by the Council and also at the time of termination of the said Lease; and in case the Council shall decide to exercise the right reserved by this Section the value of the said works and erections of the Company shall be appraised by three experienced arbitrators, one to be appointed by the Company, one by the Council and the third by the said two so appointed; and in the event of the said two arbitrators not agreeing upon a third, then such third arbitrator shall, upon the application of either party within one month after due notice, be appointed by the Supreme Court of Newfoundland, and the award of any two such arbitrators shall be final and binding between the parties and provided further that should the Council during the continuance of this Lease or extension thereof exercise its right to purchase the Company's undertaking within the meaning of Section 29 of the St. John's Street Railway Charter 1896 as amended then and in that event all works and erections constructed or provided by the Company in connection with the said Mobile Waters shall be deemed to form part of the Company's undertaking.'" [emphasis mine]

Because the October 1949 Agreement amending the Lease specifically refers to Section 29 of the *St. John's Street Railway Charter 1896*, I will for the sake of completeness reproduce Section 29, as follows:

> "29. For the establishment and operation of the said railway, the said Company is hereby granted an exclusive franchise on all streets and highways within the city limits, for a period of fifty years from the date of the passing of this Act: Provided that the said Municipal Council or other municipal body having charge of the municipal affairs of the town of St. John's may, after the lapse of fifty years from the date of this charter, purchase the said railway and other rights of the said Company as a going concern, upon giving to the said Company twelve months notice of their intention so to do; and in case the said municipality shall decide to exercise the right reserved by this section, the value of the said railway and rights of the said Company shall be appraised by three experienced arbitrators, one to be appointed by the said Company, one by the said Municipal Council, and the third by the said two so appointed; and in the event of the said two arbitrators not agreeing upon a third, then such third arbitrator shall, upon the application of either party within one month after due notice, be

> appointed by the Supreme Court, and the award of any two such arbitrators shall be final and binding between the parties; and provided that in case the said Municipal Council shall not, after the lapse of the said period of fifty years, exercise the rights of pre-emption hereunder, the rights and privileges hereby granted shall continue until the said Municipal Council shall exercise the said right of pre-emption." [emphasis mine]

With the background having been placed before the reader, I turn now to the two preliminary questions which the arbitrators have been asked to consider and rule upon.

(1) What is to be valued under the provisions of Clause 1 of the Lease as amended?

and

(2) What is the meaning of the word "value" as used in Clause 1 of the Lease as amended?

I will therefore turn to the respective arguments of the parties.

As to what has to be valued in this arbitration, the City's written argument says in its essential parts:

> "What is to be valued or appraised are 'works and erections'. These are physical constructions, chattels and fixtures, not land rights or water rights. Works and erections include buildings, transmission lines, towers, dams, penstocks, spillways, generators, electrical equipment, tools, computer equipment and all manner of physical things created or acquired, in this case, by NP.
>
> The assets include items within or without the Mobile River watershed. This wording was specifically included (as may be seen by reference to the Minutes of the Council Meeting of June 8, 1948 at Tab 15) to take into account the deployment of equipment or other physical resources outside the watershed and is used in conjunction with the words 'for the primary purpose of developing the waters of the Mobile River'. The description is

not geographical but purposive. In our submission, the intent is to include all works and erections reasonably required or desirable for utilization of the water rights on the Mobile River which have been constructed or provided by NP.

The limitation in the relevant section relates to time of use of the assets. Such assets must have been constructed or provided after the date of the Lease. It is not necessary to address that limitation at this point; if the assets are determined to include land not subject of the lease, there may be an issue in respect of one piece of land acquired by NP in 1942, but that can be addressed at a later time. The further limitations are two-fold: the assets must have been in use on the day notice to terminate was given, February 9, 2006, and on the date of termination of the Lease, March 1, 2009. It will be the position of the City that the right to compensation for NP crystallizes only when the Lease terminates, as only then can the assets to be appraised be finally determined. In our view, this necessarily implies a termination date that must be fixed and known prior to finalization of the appraisal process—otherwise, the Tribunal could not answer the question put to it, as it could not identify the assets to be appraised. The right to compensation is a condition of the termination to be satisfied by payment after termination of an amount that can only be determined after termination. We do ask the Board to confirm that the 'time of termination of the said Lease' as these words are used in Clause 1 is, on the facts agreed, March 1, 2009.

While, in our view, this discussion makes it clear that the water rights themselves are not assets to be appraised, not being works or erections by the plain meaning of those words, the City wishes to address the suggestion of NP that the assets to be appraised should include the water rights—i.e. that the appraisal should [be] based upon the value of the Mobile operations as a going concern. Aside from the obvious point that the water rights are not 'works' or 'erections', there are sound legal reasons for excluding the value of the water rights from consideration, and, the water rights being an essential part of the 'going concern', for excluding any notion of valuation as a going concern.

It is consistent with principles of legal construction of a lease authorized by a statute to consider the provisions of other statues *in pari materia*. Further, in this instance, given the reference to the *St. John's Street Railway Charter, 1896*, (the 'Charter') such cross-reference is mandatory.

The Charter is the constating document of the predecessor of NP which entered into the Lease. It contained in Section 29 an option for the City to

> purchase the undertaking of the company as a going concern. The Lease provides that, if such option were exercised 'during the continuance of [the] Lease or any extension thereof', works and erections constructed or provided in connection with Mobile waters would be a part of the undertaking of the Company for that purpose. The use of the words 'as a going concern' in Section 29 of the Charter is in stark contrast to the use of the words 'works and erections' in the Lease. Two clear cases are created: an option to purchase the entire undertaking of NP during the continuance of the Lease leads to a valuation of the assets on a going concern basis; a valuation occurring on termination of the Lease is restricted to works and erections. The clear expression of the going concern basis of valuation in the one case makes it clear that the other case is to be regarded differently.
>
> In any event, basic principles of property law exclude the water rights from consideration after termination of the lease. The nature of a lease is an interest in property limited in time. Upon termination of the lease, the rights demised are surrendered back to the Lessor. Such rights are no longer the property of the lessee and hence can have no value to the lessee. There can be no question of compensating NP for something to which its right has expired.
>
> It is, therefore, in our submission, abundantly clear that no water rights or other incorporeal property need to be considered in determining the assets to be valued.
>
> There is no explicit direction in the lease as to the basis of valuation of the assets. The Tribunal is simply directed to appraise 'the value' of the works and erections in question. …"

After quoting a definition of "value", which I will come back to later, the written argument continues:

> "Clearly, the intent is to compensate NP for the works and erections it has constructed or provided under the Lease, and the focus, in our submission, should be on the value to NP of those works and erections. As NP is a regulated public utility, subject as regards the operation of facilities for the generation of electricity to the *Public Utilities Act*, R.S.N.L. 1990, c. P-47, (the 'PUA') [Tab 1] the requirements of that Act and its implications for public utility assets are central to the consideration of the Tribunal in determining value.

Newfoundland and Labrador is an original cost jurisdiction for purposes of public utility regulation. This conclusion is inherent in the provisions of the PUA, that provide for rates that allow a utility to recover its operating costs and a return on 'rate base' i.e. the original cost of its capital equipment less an appropriate allowance for depreciation. (Section 80 PUA) Depreciation amounts are claimed by the utility as an expense, form a part of the expenses permitted to be recovered in rates and are paid by ratepayers in their bills. While this process does not give the ratepayers any ownership interest in the utility's assets, fairness and reasonableness in rates, as prescribed by the PUA require that ratepayers not pay the same depreciation charges twice.

This principle has lead to the application of specific tests when a utility is selling its assets. If a utility is permitted to sell its assets at an amount in excess of the depreciated original cost and those assets are employed after the sale to serve customers who were served by the original utility owner, ratepayers will pay the same depreciation twice if the new owner is permitted to include in rate base the full purchase price. Were this to be allowed, the utility would get a bump-up in its rate base and the assets would be depreciated twice. That excess of purchase price over depreciated cost is referred to by regulators as the 'premium' and that premium is typically excluded from the rate base of the new purchaser, where that purchaser is a utility. This principle was applied when a company associated with the parent of NP acquired utility assets in Alberta, as can be seen from the decision of the **Alberta Energy and Utilities Board in Re Aquila Networks Canada Ltd.**, (2004) A.E.U.B.D. No. 27 …

Section 48 of the PUA is essentially identical to the provisions giving rise to these decisions in Alberta and Nova Scotia. As discussed in the cases, the legislation gives no explicit criteria upon which the Board should act in approving a transfer of utility assets, but the scheme of the Act as outlined above necessarily implies the application of the tests referred to above in order to preserve the integrity of the regulatory process.

In the context of a regulated utility like NP, the 'value' of these assets is limited to what they may be permitted to produce for NP under the applicable legislation, i.e. the PUA. While NP operated the assets, its return on these assets was limited to its approved rate of return on rate base applied to the depreciated original cost of the assets. Given that these assets will inevitably continue to serve persons who are now ratepayers of NP, the value of the assets at the time of transfer cannot exceed that depreciated original cost. Even if the output of these plants is devoted to facilities of the City of St. John's, the City is a ratepayer of NP and entitled

to the benefit of having paid depreciation on these, and other assets, through its rates paid to NP and its predecessors since 1949.

It should not be forgotten that the assets in question here are core electrical utility assets—a generation plant, and associated controls and transmission. This is not a case like the situation considered by the Supreme Court of Canada in **ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board),** [2006] S.C.J. No. 4, [Tab 5] where the asset there in question was a building susceptible of utility and non-utility uses. That case does nothing more than confirm that ratepayers are not owners of the assets they pay for through their rates; their right is to fair and reasonable rates, and allowing transfer of assets at anything more than depreciated original cost in a jurisdiction like Newfoundland and Labrador deprives ratepayers of that right. Incidentally, this principle simplifies considerably the determination of value of these assets for purposes of the Lease.

This position is entirely consistent with the intent of the underlying legislation, the *City of St. John's Act*, the Lease itself and the expressed purpose of the development of water powers on the Mobile River. This intent was clearly to provide a reliable source of electrical power to the residents of the City of St. John's. That was the reason why the City was granted the water rights, why the City leased them to NP and why NP sought and obtained the lease. NP has assumed the public duty of providing electrical service and has recovered its approved level of profit from these assets during the term of the Lease. The assets should continue to be devoted to serving the City of St. John's and its residents, and there is no justification for allowing any windfall profit to NP on the transfer of the assets associated with those water rights back to the City of St. John's which will manage those assets, in accordance with its public duty, for the benefit of the City and its residents.

The City submits that the Tribunal should answer the questions put to it as follows:

1. The assets to be appraised are the works and erections constructed or provided by NP within or without the Mobile River Watershed after the 23rd day of November, 1946, for the primary purpose of developing the waters of the Mobile River, limited to such works and erections as were in use for that primary purpose on February 9th, 2006, and are in use for such primary purpose as of March 1, 2009;

2. The value of the assets is the amount recorded in the regulated accounts of NP as the depreciated net book value of such assets."

NF Power in its argument, traces the history of the *1896 St. John's Street Railway Act* beginning with the exclusive franchise to the predecessors of NF Power for fifty (50) years to operate a street railway powered by either electricity or steam. It authorized the Municipal Council to purchase the railway and other rights after a period of fifty (50) years as a "going concern" with its "value" to be appraised by three experienced arbitrators etc. and that if the Municipal Council "should not" after fifty (50) years exercise its right of pre-emption, i.e. the right to purchase, then the privilege thereby granted would continue indefinitely until the Municipal Council shall exercise the said right of pre-emption.

NF Power notes the grant of the Mobile watershed to the City in 1921 and quotes the amendment to Section 29 of the *Street Railway Act of 1949*, done while the City and NF Power were negotiating vis-à-vis the Mobile River. That amendment said:

> "The Municipal Council or other municipal body having charge of the municipal affairs of the town of St. John's may, after the lapse of sixty years from the date of this charter, purchase the undertaking, plant, property, assets and rights of the Company as a going concern, upon giving to the Company three years' notice of their intention so to do and in case the Council shall decide to exercise the right reserved by this section, the value of the said undertaking, plant, property, assets and rights of the Company shall be appraised by three experienced arbitrators, one to be appointed by the Company, one by the Council, and the third by the said two so appointed; and in the event of the said two arbitrators not agreeing upon the application of either party within one month after due notice, be appointed by the Supreme Court, and the award of any two such arbitrators shall be final and binding between the parties; and in the event that the

> Council shall not after the lapse of the said period of sixty years exercise the rights of pre-emption hereunder, the rights and privileges granted by this Act shall continue until the Council shall exercise the said right of pre-emption."

NF Power's argument went on to detail the provisions of the 1946 Lease to NF Power which was amended in 1949 to say:

> "TO HOLD AND ENJOY the said rights and liberties hereby demised unto the Company during the term of fifty (50) years from the date of this Lease such term to be automatically extended for successive periods of five (5) years provided the Council shall have the right to terminate the said Lease upon the three (3) years' notice in writing to the Company given at any time after the expiration of forty seven (47) years from the date of this Lease and upon payment to the Company of the value of all works and erections constructed or provided by the Company within or without the Mobile River watershed subsequent to the date of this Lease for the primary purpose of developing the waters of Mobile provided such works and erections are in use by the Company for that primary purpose at the time notice of termination of the Lease is given by the Council and also at the time of termination of the said Lease; and in case the Council shall decide to exercise the right reserved by this Section the value of the said works and erections of the Company shall be appraised by three experienced arbitrators ... and provided further that should the Council during the continuance of this Lease or extension thereof exercise its right to purchase the Company's undertaking within the meaning of Section 29 of the St. John's Street Railway Charter 1896 as amended then and in that event all works and erections constructed or provided by the Company in connection with the said Mobile Waters shall be deemed to form part of the Company's undertaking."

NF Power emphasizes in its argument the distinction between "aggregate cost less depreciation" and the word "value" which became the finally agreed provision in the legislation and of the parties in 1949 and brought about the Agreement which amended the Lease. NF Power has during the fifty year term of the Lease met all of its obligations under it.

NF Power also dealt in its argument with the principles of contractual interpretation, and in a lengthy argument makes the following points, supporting its view by case law. It argues that the "works and erections" referred to in the Lease are only valuable in conjunction with the use of the leased land and water which enable the production of electricity and that what NF Power is leasing and giving up by the termination, the City is gaining by the termination and is required to pay value for it, as a commercial undertaking, which is a hydro electricity generating business. The argument also stresses the importance of the words "in use" which must be applied not only at the time of the three year notice of termination, but also at the actual time of termination, thus leading to the loss by NF Power and the gain by the City, of a going concern.

In support of that argument it referred to the case of **Perth Gas Co. v. Perth Corporation**, (1911) Privy Council Cases 168, p. 174. The gist of that reference is that when a statute or contract authorizes the taking of physical things, which things are a whole commercial enterprise and would be worthless to the taker without the franchise as privilege rights, then the inference is that the taking and the resulting valuation were not just a taking and valuing of physical things, but were the taking and valuing of the whole commercial undertaking, i.e. the things and their earning capacity.

In addition counsel listed a considerable number of Canadian and other cases where the whole commercial undertaking was required to be valued and paid for.

The argument went on to assert that there is nothing in the Lease to indicate that NF Power's right to use the land and water were not part of the works and erections "in use" and that the requirement that the City pay value for the works and erections "in use", is in essence a requirement that the City must first pay NF Power in order for the City to obtain an assignment of the right to use the works and erections and the right to use the lands, water and lands covered by water, i.e. to receive the entire undertaking as a going concern.

Quoting MacDonald J.A. in **Cumberland (City) v. Cumberland Electric Light Co.**, (1931) 2 W.W.R. 377, 43 B.C.R. 525, (1931) 3 D.L.R. 69, counsel argued:

> "In support of its position, NP also cites page 81 of the Cumberland Electric Light Company case where MacDonald J.A. noted that the municipality had argued that the franchise was terminated and that a right that is gone, cannot have value. MacDonald J.A. responded stating that:
>
> > 'The point however is its value, if any, while it was an existing right. The City are purchasing what the Company had; not what it ceased to hold. An extinguished right is not capable of valuation unless provision is made with a payment of compensation. But that is not the question as I view it. We are concerned with the value, if any, of the undertaking, property right and privileges before extinction.'"

The submission continued:

> "This comment by MacDonald J.A. is also applicable to this situation. NP has lease rights from the City which rights automatically continue. Termination of NP's lease rights can only occur upon notice of three years and upon payment of the value of the works and erections in use. Termination only occurs upon notice and upon payment. Termination is in essence a forced assignment of the rights to use the works and erections and a reassignment of the rights to use the lands, lands covered by water and the waters held by NP pursuant to the Lease in return for payment by the City

> to NP of the value of those rights. In the words of MacDonald J.A., the City are purchasing what NP had, not what it ceased to hold after termination. In the within proceeding we are concerned with the value of the works and erections in use before termination.
>
> Objectively reading the words used in Clause 1 of the Lease indicates that what is to be valued is works and erections in use, works and erections and their earning capacity, the whole Mobile River commercial undertaking or going concern."

In essence NF Power's argument as to the meaning of the words in the various instruments including Clause 1 in the final version of the 1949, all point in the same direction when read together, namely that a proper interpretation is that the leased property and water rights together with all that has been developed on it, must be taken back as a going concern and that while a cost approach is generally an accounting exercise, a determination of value is an appraisal exercise and that what is to be appraised here is the Mobile River hydro electricity going concern, the works and erections and their earning capacity, in use at both the time of the notice and the time of the actual takeover.

The argument then discusses the factual matrix which I have already discussed in the background portion of these reasons and to which I will refer again later. The following two paragraphs encapsulate the argument on the use of the matrix of fact to support the going concern approach.

> "This is not a case of the City being obliged to buy works at the end of a lease term whether the lease was successful or not. This is not a case of the city guaranteeing NP re-imbursement for the construction costs of its

> capital works. The City had no obligation to purchase anything and certainly not the capital works of an unsuccessful electricity business.
>
> The Lease states that the City could choose to terminate upon notice and upon paying value and states that the City would not pay value for the works and erections that were not in actual use. The City would only want the property if the electricity generation business was successful. If the electricity generation business was successful the City would want all of the works and erections necessary to the City successfully operating the electricity generation business. If the business was successful, then the City wanted the water reservoirs, dams, altered streams, generators and poles and wires linking the development to the market—the works and erections in use within and without the Mobile River, the enterprise.
>
> If the City was to take the business if it was successful, then what was it fair for NP to want to be paid and what was it fair for the City to pay for such a taking?
>
> Again, this was not a case of the City having to pay for capital works at the end of a Lease term. The City had no obligation to buy or obligation to end the Lease term and stop it from continually renewing. The City had no risk and no obligation."

NF Power's argument then addresses the meaning of the word "value" in the context of the Lease as amended, as meaning the "market value" or "value in exchange" of the entire hydro electric business in issue, as a going concern, drawing from a number of decided cases for support.

In conclusion NF Power says:

> "Based upon the principles of contractual interpretation and the words used by the parties and their context, the answers to the two questions posed in this proceeding are:
>
> I. What is to be valued under the provision of Clause 1 of the Lease as amended is the Mobile River commercial undertaking or going

concern operated by NP pursuant to the Lease as amended (i.e. the works and erections and their earning capacity).

II. The meaning of the word 'value' as used in Clause 1 of the Lease as amended is market value or value in exchange of the Mobile River Hydro Electric business or going concern, the market value or value in exchange of the works and erections and their earning capacity, the commercial value of the works and erections."

Having noted the questions posed to the arbitrators, set out the background to the dispute and summarized the essential arguments of both counsel, I will now turn to a consideration of the issues, which at this stage should be confined to the two questions which have been asked of us. To discuss or rule upon more than the two questions would be to trespass upon the subject matter of the valuation itself on which we have as yet, heard neither evidence nor argument.

Both parties are agreed that the two questions are:

(a) What is to be valued under the provisions of Clause 1 of the Lease as amended, and

(b) What is the meaning of the word "value" as used in Clause 1 of the Lease as amended?

Because these questions are questions of Lease (contract) interpretation and to some extent of statutory interpretation, I will refer first to the rules of such interpretation and the text *Canadian Contractual Interpretation Law* by Geoff R. Hall. The author begins Chapter 2, which is on the fundamental precepts by saying:

"2.1 WORDS AND THEIR CONTEXT

> Contractual interpretation is, for the most part, an exercise in giving effect to the intentions of the parties. In doing so, it is of paramount importance to achieve accuracy in interpretation. There is little point in giving effect to the intentions of the parties if the court has not accurately discerned what those intentions are. Accuracy in interpretation requires consideration of two things, namely the words selected by the parties to set out their agreement, and the context in which those words have been used. Words and their context, therefore, are the primary theme of the law of interpretation of contracts, and set the parameters for the interpretive exercise. An interpretation which strays too far from the words selected by the parties is not legitimate because it fails to give effect to the very means the parties invoked to define their legal obligations. An interpretation which strays too far from the context in which the parties used those words risks inaccuracy; even if an interpretation is literally correct, if the words are taken out of context, the meaning does not accurately correspond to what the parties were attempting to do. Interpretation therefore involves a search for meaning within the constraints of the words and their context. An ideal interpretation is one which accords with both. …
>
> … The interpretation of a contract always begins with the words it uses. All of the various aspects of contractual interpretation are rooted in the actual language of the parties. Effect must first be given to the intention of the parties, to be gathered from the words they have used."

The author further noted that in **Eli Lilly & Co. v. Novopharm Ltd.**, (1998) SCJ No. 59 (1998) 2 S.C.R. 129, the Supreme Court of Canada held that it is unnecessary to go beyond the words of a contract and into the realm of extrinsic evidence if there is no ambiguity in those words. In the present case both counsel were of the opinion that there is no ambiguity and that their arguments as to construction are the correct ones. That being so, I believe that in the present case it is the words themselves together with the context, i.e. the matrix of fact, which should guide the arbitrators.

Mr. Hall goes on to say at page 9 of Chapter 2, that:

> "While the words of a contract must always be the starting point for interpretation, it is an overstatement to say that the interpretative exercise can ever end with them because context is always important to discerning meaning accurately.
>
> It is also a fundamental principle that contractual interpretation requires an examination of the contract as a whole, not just a consideration of the specific words in dispute. Individual words and phrases must be read in the context of the entire document."

In **Scanlon v. Castlepoint Development Corp.**, (1992) O.J. No. 2692, 11 O.R. (3d) 744 at 770-71 (Ont. C.A.), in which leave to appeal to the Supreme Court was refused, the Court noted: "words in a contract are presumed to have meaning." The author goes on to say at p. 13, "As always, context is crucial and may lead to the conclusion that parties used language differently in different parts of an agreement."

I do not believe that the foregoing applies in this case. Here there was no confusion, but different language in different though similar agreements over the years. In my view the context is of considerable help in arriving at an interpretation of the final contract, which was the lease of October 1949 following the Act No. 50 of August 1949 which authorized it.

At p. 15 Mr. Hall says in respect of factual matrix:

> "Contractual interpretation is all about giving meaning to words in their proper context, including the surrounding circumstances in which the contract has arisen—usually referred to as the "factual matrix." Because language always draws meaning from context, the factual matrix constitutes

> an essential element of contractual interpretation in all cases, even when there is no ambiguity in the language."

The term "matrix of facts" was first used by Lord Wilberforce in the 1920's in **Prenn v. Simonds**, (1971) 3 All E.R. 237 (H.L.):

> "...
>
> > 'In order for the agreement of 6th July, 1960 to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. ... We must ... enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.'
>
> In the second [case], *Reardon Smith Line Ltd. v. Hansen-Tangen,* Lord Wilberforce elaborated on the importance to the interpretive process of an understanding of the commercial circumstances underlying a contract: ..."

The Supreme Court of Canada in **Eli Lilly & Co. v. NovoPharm,** supra p. 23, said:

> "The contractual interest of the parties is to be determined by reference to the words they used in drafting the document, possibly read in the light of the surrounding circumstances which were prevalent at the time."

Mr. Hall makes the point that it could be interpreted from the above quote that Eli Lilly cast doubt on the principle of the use of the factual matrix, but later cases have confirmed that Eli Lilly has not dampened the use of the factual matrix in the lower courts. In **Hi-Tech Group Inc. v. Sears Canada Inc.** (2001) O.J. No. 33, 52 O.R. (3d) 97, the Court wrote:

> "Indeed, because words always take their meaning from their context, evidence of the circumstances surrounding the making of a contract has been regarded as admissible in every case."

An examination of the cases shows that if there is a "bright line" running through them, it is that while precedent can and has, established rules of construction, cases are rarely if ever identical. The intent of the parties must be found from the wording of the contract or instrument in issue, with the help of the matrix of fact when necessary, to provide context.

As the Privy Council said in **Hamilton Gas Company v. Hamilton Corporation**, (1910) A.C. 300 at 305, 79 L.J.P.C. 76:

> "Their Lordships, however, are of the opinion that each of these cases and also the present case depended and depends not upon any rule or principle of law of general application, but solely and entirely upon what is the just construction of the language, whether statute or agreement, regulating the measure and nature of the claim"

Having concluded that context and the matrix of fact are crucial in construing the words in the Act No. 50 and the amending Agreement of October 1949 I will move to an interpretation of the words used in the 1949 Clause "1" which was substituted for the former Clause "1" in the 1946 lease. However before doing so I will refer to the dictionary definitions of certain key words. In doing so I am not saying that dictionary definitions are entirely determinative, the totality of the words used in the Clause together

with the context/matrix of fact will govern. Nevertheless words have generally accepted meanings which cannot be ignored in contractual interpretation.

The initial portion of Clause 1 which encompasses the actual grant and the description of what is being granted, has not and does not now pose a problem, nor does subclause (b) which deals with the rentals to be paid by NF Power.

The problem portion begins on page 2 with the words "TO HOLD AND ENJOY". The word "value" which appears at line 8 from the top of the page is of crucial importance.

The *Oxford Encyclopedic English Dictionary* in listing the meanings of the word "value" most applicable to the present exercise are:

> "(1) the worth, desirability, or utility of a thing, or the qualities on which these depend
>
> (2) worth as estimated; valuation
>
> (3) the amount of money or goods for which a thing can be exchanged in the open market; purchasing power
>
> (4) the equivalent of a thing; what represents or is represented by or may be substituted for a thing
>
> (5) v.tr. (value, valued, valuing), estimate the value of; appraise (esp. professionally) valued the property at _____)."

It is also interesting that the word "depreciation" though it is not used in Clause 1, has been used in some of the earlier instruments. It is defined as "the amount of wear and tear [of a property etc.] for which a reduction may be made in a valuation, an estimate, or a balance." I mention the definition of "depreciation" because it deals with a concept separate from that which defines the word "value" generally.

The definition of value which appears in *Black's Law Dictionary* (Revised Fourth Edition) is:

> "In economic consideration, the word 'value', when used in reference to property, has a variety of significations, according to the connection in which the word is employed. It may mean the cost of a production or reproduction of the property in question, when it sometimes called 'sound value', or it may mean the purchasing power of the property, or the amount of money which the property will command in exchange, if sold, this being called its 'market value', which in the case of any particular property may be more or less than either the cost of its production or its value measured by its utility to the present or some other owner; or the word may mean the subjective value of the property, having in view its profitableness for some particular purpose, sometimes termed its 'value for use'."

In the above definition there is nothing to lead the mind to the concept of depreciated cost as representing a value in the context of the present case.

It is a fact that the minutes of the St. John's Municipal Council meeting of March 25th 1949 say:

> "The question of the basis for valuing the Mobile properties was also raised by the Company and it was agreed that the basis be altered from 'cost less depreciation' to 'value'.

In pursuance of that intention, a Memorandum of Agreement was prepared by the Solicitor for the City, which at Clause (b) said:

> "To request the Government of Newfoundland to amend Section 195, sub-section 2.(f) of the *St. John's Municipal Act*, 1921, so as to empower the Council on termination of the lease to pay the lessee for all works or erections constructed or provided by the lease on the basis of value as set out in Clause 1(a) above."

The above clause not only confirmed the request for amended legislation, it also confirmed the concept of value which appeared above it in Clause 1.(a) of the same draft Memorandum of Agreement which used the following words in respect of a termination:

> "Upon payment to the Company of the value of all works and erections constructed or provided by the Company, within and without the Mobile River watershed subsequent to the date of this Lease for the primary purposes of developing the waters of Mobile…"

As the background material has shown, the legislators, perhaps by inadvertence, used words vis-à-vis termination which did not reflect the parties' wishes. The March 31st 1949 Clause (f) said:

> "(f) To enter into a lease upon such terms and conditions as it may deem advisable with any person, firm or company as lessee in respect of waters, lands, and rights acquired by the Council under this section, and such terms and conditions may provide for the termination of such lease upon notice and upon payment to the lessee <u>of the aggregate cost of all works and erections constructed by the lessee</u> within or outside the watershed of Mobile River subsequent to the date of the lease for the primary purpose of and used for developing the waters of Mobile River <u>less depreciation on such works to the date of such determination.</u>" [emphasis mine]

N.B. Aggregate cost less depreciation, had been used in the original 1946 Lease.

As the reader is already aware, the Municipal Council in its meeting of July 14th 1949 approved a requested amendment to the statute, to correct the wording in the Act of March 31st 1949 to the desired wording which appears below.

The Legislature acquiesced in the request for correction and further amended the Act some four and one-half months later on August 13th 1949 repealing Clause (f), above, and substituting the following words in a new Clause (f) saying:

> "(f) To enter into a lease upon such terms and conditions as it may deem advisable with any person firm or company as lessee in respect of waters, lands and rights acquired by the Council under this Section, and such terms and conditions may provide for the termination of such lease upon notice and upon payment to the lessee of the value at the time of such termination of all works and erections constructed by the lessee within or outside the watershed of Mobile River subsequent to the date of the lease for the primary purpose of and used for developing the waters of Mobile River and such value shall be determined by appraisal by three experienced arbitrators, ..."
>
> [emphasis mine]

The wording as it appears in the above amending Act No. 50 of 1949 authorized the wording which is used in the final and governing Lease of October 21st 1949, which in the relevant portion of Clause 1, says:

> "TO HOLD AND ENJOY the said rights and liberties hereby demised unto the Company during the term of fifty (50) years from the date of this Lease such term to be automatically extended for successive periods of five (5) years provided the Council shall have the right to terminate the said Lease upon three (3) years' notice in writing to the Company given at any time after the expiration of forty seven (47) years from the date of this Lease and upon payment to the Company of the value of all works and erections constructed or provided by the Company within and without the Mobile River watershed subsequent to the date of this Lease for the primary purpose of developing the waters of Mobile provided such works and

> erections are in use by the Company for that primary purpose at the time notice of termination of the Lease is given by the Council and also at the time of termination of the said Lease; and in case the Council shall decide to exercise the right reserved by this Section the value of the said works and erections of the Company shall be appraised by three experienced arbitrators, … and provided further that should the Council during the continuance of this Lease or extension thereof exercise its right to purchase the Company's undertaking within the meaning of Section 29 of the St. John's Street Railway Charter 1896 as amended then and in that event all works and erections constructed or provided by the Company in connection with the said Mobile Waters shall be deemed to form part of the Company's undertaking."

It is clear that based on the agreement of the parties, the change mandated by the termination process was changed from "depreciated cost" to "value". The Legislature by the Act No. 50 of 1949 authorized the change thus enabling the Lease Agreement with the change, to be executed on October 21st 1949.

In my opinion the appraisal process which we are now conducting, would be in error if it appraised what is being taken away by the termination of the Lease, on the basis of "cost less depreciation". To express it another way, whatever the word "value" means in the present context, it cannot mean "cost less depreciation", because that wording was abandoned in the legislation and the agreement. If the arbitrators were to adopt and use cost less depreciation as the basis for their appraisal of value they would be contravening the clear intent of the legislation and the Lease amendment, as agreed upon and executed by the parties.

The words, "all works and erections" as used in the Lease, connote to me everything that NF Power constructed and did, in order to convert the potential of the land and watershed as described and demised in the Lease, into an operating producer of electricity, i.e. an undertaking which is a going concern.

The Lease as amended, continues:

> "... provided such works and erections are in use by the Company for that primary purpose at the time notice of termination of the Lease is given by the Council and also at the time of termination of the said Lease; and in case the Council shall decide to exercise the right reserved by this Section the value of the said works and erections of the Company shall be appraised by three experienced arbitrators..." [emphasis mine]

In my opinion the true meaning of the foregoing words of Clause 1 is demonstrated by the requirement that both at the time of the notice of termination and at the time of termination, the works and erections must be in use. In other words, what the City would be taking back 50 years from 1949 or later as the case may be, would be an operating and functioning electrical generating and distributing facility, i.e. an undertaking as a going concern.

The *Oxford Encyclopedic English Dictionary* defines "undertaking" in this context as: "a work etc. undertaken, an enterprise"; *Webster's Dictionary* as, "that which is undertaken: any business or project engaged in"; and *Collins Dictionary*, as "affair, attempt, business, effort, endeavour, enterprise, game, operation, project, task, venture."

Lastly, the final words of Clause 1 say:

> "… and provided further that should the Council during the continuance of this Lease or extension thereof exercise its right to purchase the Company's undertaking within the meaning of Section 29 of the St. John's Street Railway Charter 1896 as amended then and in that event all works and erections constructed or provided by the Company in connection with the said Mobile Waters shall be deemed to form part of the Company's undertaking." [emphasis mine]

The final amendment to the *St. John's Street Railway Act*, prior to its repeal in 1993, was enacted in 1946 by Act No. 38, which was proclaimed on September 14th 1948, a Proclamation which was requested by the St. John's Municipal council, as noted in the Proclamation itself and came into force on that date, approximately one year before the 1949 amended Lease was executed.

That Act gives the St. John's Street Railway Company including its successor NF Power, certain powers in Section 9, which were:

> "9. The Company shall have power to generate electricity and to sell and dispose of any electricity to any corporation or persons for power, light or heating purposes, and shall have all the powers of a company formed for the purposes of supplying light, heat and power by means of electricity, and shall have the right to erect poles and wires in and through the streets of St. John's and country adjacent thereto, for the purpose of distributing the electricity produced by it at any power-house or power-houses, and also, if it deems it advisable, for the purpose of delivering electricity for the operation of any street car or trolley bus system operated by it or by any other corporation or person."

Because NF Power was the successor company to the St. John's Street Railway Company, is not surprising that there was reference to the *Street Railway Company Act* in

Clause 1(f) of the Lease to NF Power a year later in October 1949. It is the wording of Clause I which we must now construe.

The then newly enacted Section 29 of the *St. John's Street Railway Act* said:

> "29. The Municipal Council or other municipal body having charge of the municipal affairs of the town of St. John's may, after the lapse of sixty years from the date of this charter, purchase the undertaking, plant, property, assets and rights of the Company as a going concern, upon giving to the Company three years' notice of their intention so to do and in case the Council shall decide to exercise the right reserved by this section, the value of the said undertaking, plant, property, assets and rights of the Company shall be appraised by three experienced arbitrators, ... and in the event that the Council shall not after the lapse of the said period of sixty years exercise the rights of preemption hereunder, the rights and privileges granted by this Act shall continue until the Council shall exercise the said right of preemption." [emphasis mine]

Section 29 of the *St. John's Street Railway Act* in respect of the City used the word "purchase" and later in the same context, the word "preemption". I can come to no other conclusion but that the Act did not draw a distinction in meaning between the two words.

The operative word used in the *St. John's Municipal Council (Amendment) Act* No. 50 of 1949 and the final amendment to the Lease in October 1949 is "termination", and in the amended Lease the word "purchase".

The only right which the Lease gives to the city is the right of termination. The reference in the Lease, to Section 29 of the *St. John's Street Railway Act* must be presumed to have been included for a purpose. Therefore when Clause I of the Lease

uses the words "purchase the Company's undertaking" within the meaning of Section 29, then those interpreting Clause I must look to the thrust of Section 29 and its use of the words "value", "assets", "rights" and "going concern", as aids to interpretation of Clause I of the Lease.

In this case the wording of Clause 1 of the Lease as amended ties the termination process to the concepts expressed in Section 29 of the *St. John's Street Railway Act*. It is also a fact that at the time that the *Street Railway Act* was amended and the amendment proclaimed, the Lease in question was about to be granted and later amended. It was also in the timeframe when the Street Railway was about to go out of existence, while electrical generation was steadily increasing in importance. The only purpose which I can see for the reference in Clause I of the Lease to Section 29 of the *St. John's Street Railway Act* was to provide a guide for the appraisal of value at a time fifty (50) years or more in the future.

The City has argued throughout, that the Lease expires on March 1st, 2009 and that the Lease having expired, after March 1st the only things NF Power has left to be appraised by the arbitrators are the various works and erections. I do not subscribe to that proposition. The Lease says in Clause 1.

> "The Council shall have the right to terminate the said Lease upon three (3) years notice in writing to the Company given at any time after the expiration of forty seven (47) years from the date of this Lease and [emphasis mine] upon payment to the Company of the value of all works and erections…"

It is clear that at the time of notice and also at the time of termination, the works and erections must be in use until termination has occurred. The use of the words "and upon payment" are crucial in my view to interpretation of the parties' intentions. The Lease does not say that termination occurs on a date which is three (3) years from the date of the notice. What it does say is that termination occurs upon notice and upon payment to the Company and it also provides for a mandatory process for the appraisal of the amount that must be paid, which process is this arbitration. To argue that the Lease expires on a set date which is to be three (3) years from the date of notice is in my view an unsupportable contention in the context of the Lease and the Act No. 50 of 1949. Termination in my opinion occurs after the expiration of three (3) years and after payment for value has been made, following the appraisal.

Counsel for the City has argued the issue of the applicability of Provincial Public Utilities legislation in the determination of value. That issue may or may not become relevant when the value is being determined. It is not, in my opinion, an applicable consideration for the arbitrators at this stage, when their role is to answer the two questions posed to them.

These questions must be answered within the framework imposed by the legislation and agreements, including the final amendment to Clause 1 of the Lease, in order to reach conclusions as to the intentions of the parties in 1949 and the meaning of Clause 1. The applicable legislation and agreements begin with the St. John's Street

Railway Act of 1896 and end with the Lease as amended on October 21st 1949. In my opinion the arbitrators are required to interpret the Lease within the above framework only, for the purpose of answering the two questions which have been asked of them.

In conclusion and having regard to the entire presentation of agreed facts and arguments and for the reasons given, I will now answer the two questions asked of the arbitrators.

1. What is to be valued under the provisions of Clause 1 of the Lease as amended?

   Answer: The valuation is to be the valuation as a going concern, of the entire generation and distribution system and business being the undertaking as created and operated by NF Power under the terms of the amended Lease of 1949.

   It follows that it is open to the parties to present evidence and argument on all aspects of value which may be relevant to the appraisal of value.

2. What is the meaning of the word "value" as used in Clause 1 of the Lease as amended?

   Answer: The word "value" in the context of the Lease as amended means value of the business or enterprise which is the entire undertaking of NF Power under the Lease, including the lands and water which will revert to the City upon termination and payment, following the arbitration process.

I wish to thank Counsel for their presentations both oral and written, which were comprehensive and clearly presented.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 6th day of March, 2009.

Hon. Robert Wells, Q.C.

Charles W. White, Q.C.

Authorities Cited:

Cases:

Alberta Energy and Utilities Board in Re Aquila Networks Canada Ltd., (2004) A.E.U.B.D. No. 27
ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board), [2006] S.C.J. No. 4
Perth Gas Co. v. Perth Corporation, (1911), Privy Council Cases 168
Cumberland (City) v. Cumberland Electric Light Co., (1931) 2 W.W.R. 377, 43 B.C.R. 525, (1931) 3 D.L.R. 69
Eli Lilly & Co. v. Novopharm Ltd., (1998) SCJ No. 59 (1998) 2 S.C.R. 129
Scanlon v. Castlepoint Development Corp., (1992) O.J. No. 2692, 11 O.R. (3d) 744 at 770-71 (Ont. C.A.)
Prenn v. Simonds, (1971) 3 All E.R. 237 (H.L.)
Hi-Tech Group Inc. v. Sears Canada Inc. (2001) O.J. No. 33, 52 O.R. (3d) 97
Hamilton Gas Company v. Hamilton Corporation, (1910) A.C. 300 at 305, 79 L.J.P.C. 76

Statutes:

St. John's Municipal Council (Amendment) Act of 1949
St. John's Municipal Council (Amendment) Act of 1921
St. John's Street Railway Act of 1896
Public Utilities Act, R.S.N.L. 1990, c. P-47
Street Railway Act of 1949

Text:

Hall, Geoff R. (2007), *Canadian Contractual Interpretation Law,* Markham, ON, LexisNexis.
Oxford Encyclopedic English Dictionary
Black's Law Dictionary (Revised Fourth Edition)
Webster's Dictionary
Collins Dictionary

DISSENT

The Arbitration Panel was constituted under the terms of the Lease, as amended, between the parties, Newfoundland Power Inc. ("Newfoundland Power") and the City of St. John's ("City"), to appraise the value of the works and erections constructed or provided by Newfoundland Power within and without the Mobile River watershed after November 23, 1946 for the primary purpose of developing the waters of Mobile River and which are in use for that primary purpose at the time notice was given to terminate the Lease, February 9, 2006, and also at the time of the termination of the Lease.

The parties requested a preliminary determination on the following two questions:

1. What is to be valued under the provisions of Clause 1 of the Lease as amended?

2. What is the meaning of the word "value" as used in Clause 1 of the Lease as amended?

For the reasons set out below, I would answer these questions as follows:

1. What is to be valued under the provisions of Clause 1 of the Lease are the physical assets, the "works and erections", that were constructed and provided by Newfoundland Power for the development of the Mobile River which were in use at the time the City gave notice of termination of the Lease, that is February 9, 2006, and which are also in use on the termination of the Lease. The rights to develop the

Mobile River, that is, the water rights, are not included within the meaning of "works and erections" as used in Clause 1 of the Lease, nor is the valuation to include consideration of the assets used as a going concern as determined by the majority of the panel.

2. There is no direction in the Lease as to the manner in which the works and erections are to be valued other than the Arbitrators are to appraise the "value". The basis for valuation must reflect the nature of the assets to be valued. Having determined that what is to be valued are physical works and erections only, the appropriate basis for valuation is the loss to Newfoundland Power of the use of the assets. It is open to the parties to present evidence and argument on how this is to be valued.

FACTS

The City was granted the power to provide for the lighting requirements of the City of St. John's and was given the authority to contract with any person or company for such purpose by Section 195 of the *St. John's Municipal Act*, 1921 12 Geo V. Cap. 13, and was specifically given the right to posses and control the waters and watershed of Mobile River. This section was subsequently amended in 1946 by *An Act Further To Amend The St. John's Municipal Act*, 1921-1945 to state:

> "195. – (1) The Council shall have power to provide light and power for the City and may contract with any person, firm, or company for the provision of such light and power as may be required for the purpose.
>
> (2) The waters and lands covered by water within the watershed of the Mobile River as described in Schedule F to this

> Act are hereby vested in the Council absolutely; and all other Crown lands within the said watershed, which may be reasonably necessary for use in connection with the development of waterpower from the said waters or the development of the waters as a source of water supply for the City, are hereby reserved from operation of the Crown Lands Act, 1930, and Acts in amendment thereof, and upon delivery to the Commissioner for Natural Resources by the Council or its lessees of plans and specifications showing to his satisfaction that any of such lands are reasonably necessary for such use and issue of his certificate accordingly, such lands shall forthwith vest in the Council, and in respect of such waters and lands vested in the Council under this subsection, the Council shall have the following powers:
>
> . . .
>
> (f) To enter into a lease upon such terms and conditions as it may deem advisable with any person, firm or company as lessee in respect of waters, lands and rights acquired by the Council under this section, and such terms and conditions may provide for the termination of such lease upon notice and upon payment to the lessee of the aggregate cost of all works and erections constructed by the lessee within the watershed of Mobile River subsequent to the date of the lease less depreciation on such works to the date of such determination.
>
> (g) To grant to such a lessee as is referred to in paragraph (f) of this section such of the rights given to the Council under this section as the Council may determine.

Thus, under this amendment, the City was authorized to enter into a lease with any party for the development of the Mobile River watershed on such terms and conditions as deemed advisable, including that termination of the Lease could occur, upon notice and upon payment "of the aggregate cost of all works and erections constructed by the lessee within the watershed of Mobile River subsequent to the date of the lease less depreciation on such works to the date of such termination".

The City subsequently entered into a lease with Newfoundland Power for the development of the Mobile River watershed dated November 23, 1946. Clause 1 of this Lease stated with respect to the term:

> "TO HOLD AND ENJOY the said rights and liberties hereby demised unto the Company during the term of five (5) years from the date of this LEASE such term to be automatically extended for successive periods of five (5) years provided the Council shall have the right to terminate the said LEASE upon three (3) years' notice in writing to the Company given at any time after the expiration of five (5) years from the date hereof and upon payment to the Company of the aggregate cost of all works and erections constructed by the Company within the Mobile River watershed subsequent to the date of this LEASE less depreciation on such works to the date of such termination and provided further that should the Council during the continuance of this LEASE or extension thereof exercise its rights to purchase the Company's undertaking within the meaning of Section 29 of the St. John's Street Railway Charter 1896 as amended then and in that event all works and erections constructed or provided by the Company in connection with the said Mobile waters shall be deemed to form part of the Company's undertaking."

Subsequently, in 1949, there were amendments to both the *St. John's Municipal Act* and the Lease between the parties. In March, 1949 Section 195 (2)(f) of the *St. John's Municipal Act* was amended by striking out paragraph (f) and substituting the following:

> "(f) To enter into a lease upon such terms and conditions as it may deem advisable with any person, firm, or company as lessee in respect of waters, lands, and rights acquired by the Council under this section, and such terms and conditions may provide for the termination of such lease upon notice and upon payment to the lessee of the aggregate cost of all works and erections constructed by the lessee within or outside the watershed of Mobile River subsequent to the date of the lease for the primary purpose of and used for developing the waters

> of Mobile River less depreciation on such works to the date of such determination."

On August 13, 1949 the *St. John's Municipal Act* was further amended to delete the previous paragraph (f) and to substitute as follows:

> "(f) To enter into a lease upon such terms and conditions as it may deem advisable with any person, firm or company as lessee in respect of waters, lands and rights acquired by the Council under this Section, and such terms and conditions may provide for the termination of such lease upon notice and upon payment to the lessee of the value at the time of such termination of all works and erections constructed by the lessee within or outside the watershed of Mobile Rover subsequent to the date of the lease for the primary purpose of and used for developing the waters of Mobile River and such value shall be determined by appraisal by three experienced arbitrators, one to be appointed by the Council, one by the lessee and the third by the two arbitrators, appointed by the Counsel and the lessee, and in the event of the said arbitrators not agreeing upon a third arbitrator, then such third arbitrator shall, upon the application of either party within one month after the notice, be appointed by the Supreme Court of Newfoundland, and the award of any two such arbitrators shall be final and binding between the Council and the lessee."

Subsequently, on October 21, 1949, the City and Newfoundland Power entered into an amendment to the Lease which deleted Clause 1 of the 1946 Lease and substituted it with the following with respect to term:

> "TO HOLD AND ENJOY the said rights and liberties hereby demised unto the Company during the term of fifty (5) years from the date of this Lease such term to be automatically extended for successive periods of five (5) years provided the Council shall have the right to terminate the said Lease upon three (3) years' notice in writing to the Company given at any time after the expiration of forty seven (47) years from the date of this Lease and upon payment to the Company of the value of all works and erections constructed or provided by the Company within or without the Mobile River watershed subsequent to the date of this Lease for the primary purpose of

> developing the waters of Mobile provided such works and erections are in use by the Company for that primary purpose at the time notice of termination of the Lease is given by the Council and also at the time of termination, of the said Lease; and in case the Council shall decide to exercise the right reserved by this Section the value of the said works and erections of the Company shall be appraised by three experienced arbitrators, one to be appointed by the Company, one by the Council and the third by the said two so appointed; and in the event of the said two arbitrators not agreeing upon a third, then such third arbitrator shall, upon the application of either party within one month after due notice, be appointed by the Supreme Court of Newfoundland, and the award of any two such arbitrators shall be final and binding between the parties and provided further that should the Council during the continuance of this Lease or extension thereof exercise its right to purchase the Company's undertaking within the meaning of Section 29 of the St. John's Street Railway Charter 1896 as amended then and in that event all works and erections constructed or provided by the Company in connection with the said Mobile Waters shall be deemed to form part of the Company's undertaking."

The 1949 amendment to the Lease significantly altered the terms between the parties as set out in the 1946 Lease by: (i) increasing the term from five years to fifty years; (ii) not allowing for notice of termination of the Lease until after forty-seven years of the Lease term had elapsed; (iii) stating that upon termination, Newfoundland Power was to be paid "the value of all works and erections" (and thus deleting "aggregate cost of works and erections less depreciation"); (iv) adding the requirement that the works and erections had to be in service at the date of notice of termination, as well as on the date of termination; (v) adding the requirement that the works and erections had to be constructed or provided either within or without the Mobile River watershed for the primary purpose of developing the waters of Mobile River; and (vi) adding that the value of the works and erections was to be appraised by three experienced arbitrators.

By letter dated the 9th day of February, 2006, the City gave notice to Newfoundland Power providing the required three year notice to terminate the Lease, effective March 1, 2009.

The question before the Arbitrators is the interpretation of the agreement between the parties as set out in Clause 1 of the Lease, as amended.

The City and Newfoundland Power were also engaged in other contractual arrangements which were relied upon by the parties at various times in their submissions. Newfoundland Power had been involved in distributing and selling electricity in St. John's and the surrounding area to the St. John's Street Railway which was formed in 1896 pursuant to the *St. John's Street Railway Act*, 1896 60 Vic-Cap 20. The purpose of the Street Railway Company was to operate a street railway using electricity or steam to operate a railway in the City and it also had the power to sell surplus electricity for power, light or heating purposes. Newfoundland Power was the assignee of rights granted under the *St. John's Street Railway Act*. Newfoundland Power's role in providing electricity to run the St. John's streetcar system became less important as time passed and eventually Newfoundland Power became exclusively concerned with the generation, distribution and sale of power.

Section 29 of the *St. John's Railway Act* originally stated as follows:

> "For the establishment and operation of the said railway, the said Company is hereby granted an exclusive franchise on all streets and highways within the city limits, for a period of fifty

> years from the date of the passing of this Act: Provided that the said Municipal Council or other municipal body having charge of the municipal affairs of the town of St. John's may, after the lapse of fifty years from the date of this charter, purchase the said railway and other rights of the said Company as a going concern, upon giving to the said Company twelve months' notice of their intention so to do and in case the said municipality shall decide to exercise the right reserved by this section, the value of the said railway and rights of the said Company shall be appraised by three experienced arbitrators, one to be appointed by the said Company, one by the said Municipal Council, and the third by the said two so approved; and in the event of the said two arbitrators not agreeing upon a third, then such third arbitrator shall upon the application of either party within one month after due notice be appointed by the Supreme Court and the award of any two such arbitrators shall be final and binding between the parties; and provided that in case the said Municipal Council shall not after the lapse of the said period of fifty years, exercise the rights of pre-emption hereunder, the rights and privileges hereby granted shall continue until the said Municipal Council shall exercise the said right of pre-emption. "

This section was subsequently amended in 1946 by *An Act Further To Amend the Act 60 Victoria Chapter 20 Entitled An Act To Incorporate The St. John's Street Railway Company* (proclaimed in force on September 15, 1948) to state:

> "The Municipal Council or other municipal body having charge of the municipal affairs of the town of St. John's may, after the lapse of sixty years from the date of this charter, purchase the undertaking, plant, property, assets and rights of the Company as a going concern, upon giving to the Company three years' notice of their intention so to do and in case the Council shall decide to exercise the right reserved by this section, the value of the said undertaking, plant, property, assets and rights of the Company shall be appraised by three experienced arbitrators, one to be appointed by the Company, one by the Council, and the third by the said two so appointed; and in the event of the said two arbitrators not agreeing upon the application of either party within one month, after due notice, be appointed by the

> Supreme Court , and the award of any two such arbitrators shall be final and binding between the parties; and in the event that the Council shall not after the lapse of the said period of sixty years exercise the rights of pre-emption hereunder, the rights and privileges granted by this Act shall continue until the Council shall exercise the said right of pre-emption."

The same Act stated that the Company meant "The Newfoundland Light and Power Company Limited".

Having reviewed the relevant facts, I turn now to the questions before the Arbitrators.

QUESTION ONE – WHAT IS TO BE VALUED UNDER THE PROVISIONS OF CLAUSE 1 OF THE LEASE?

As noted above, the essential issue is the interpretation of a clause in a contractual agreement between the parties. Both parties relied extensively on the text *Canadian Contractual Interpretation Law* by Geoff Hall. The following extract from this text reflects the principles for contractual interpretation:

> "Contractual interpretation is, for the most part, an exercise in giving effect to the intentions of the parties. In doing so, it is of paramount importance to achieve accuracy in interpretation. There is little point in giving effect to the intentions of the parties if the court has not accurately discerned what those intentions are. Accuracy in interpretation requires consideration of two things, namely the words selected by the parties to set out their agreement, and the context in which those words have been used. Words and their context, therefore, are the primary theme of the law of interpretation of contracts, and set the parameters for the interpretive exercise. An interpretation which strays too far from the words selected by the parties is not legitimate because it fails to give effect to the very means the parties invoked to define their legal obligations. An interpretation which strays too far from the context in which

> the parties used those words risks inaccuracy; even if an interpretation is literally correct, if the words are taken out of context, the meaning does not accurately correspond to what the parties were attempting to do. Interpretation therefore involves a search for meaning within the constraints of the words and their context. An ideal interpretation is one which accords with both."[1]

Thus, the goal for the interpretation of the words used in a contract is to ascertain the intention of the parties at the time they entered into the contract. The interpretation always begins with the words used as pointed out by Hall. As well, context is important to determine the parties' intention. Context is said to have two aspects: the context of the document and the surrounding circumstances giving rise to the contract[2]. Only facts known to both parties at the time of contracting are to be considered. Evidence of the parties' negotiations or their subjective intentions is not to be used in the interpretation exercise.[3]

In applying these principles for contractual interpretation to the facts of the present case, one must begin with the words used by the parties themselves which are found in Clause 1 of the Lease, as amended. Under this Clause, the City has the right to terminate the Lease upon giving the appropriate notice and upon payment of:

> "The value of all works and erections constructed or provided by the Company within or without the Mobile River watershed subsequent to the date of this Lease for the primary purpose of developing the waters of Mobile provided such works and erections are in use by the Company for that primary purpose at the time of notice of termination of the Lease is given by the Council and also at the time of termination of the said Lease; and in case the Council shall decide to exercise the right

[1] Hall, Canadian Contractual Interpretation Law, (2007) at p. 7
[2] Hall, Canadian Contractual Interpretation Law, (2007) at p. 9
[3] Hall, Canadian Contractual Interpretation Law, (2007) at p.17

> reserved by this Section the value of the said works and erections of the Company shall be appraised by three experienced arbitrators. . . . "

No case was submitted by the parties which used the same wording as used by the parties in their contract. While a number of cases were referred to by the parties in argument, each had different contractual language and arose in different circumstances.

In *Hamilton Gas Company v. Hamilton Corporation* 79 L.J.P.C. 76, the Privy Council was asked to determine what was included in the phrase "gas works and plant". It stated at page 77:

> "The Lordships however are of opinion that each of these cases and also the present case depended and depends, not upon any rule or principle of law or general application, but solely and entirely upon what is the just construction of the language, whether of statute or agreement, regulating the measure and nature of the claim."

And after referring to other cases, the Privy Council went on to say at page 77:

> "In none of these did the decision invoke any general principle whatsoever except that the language employed by the parties must be carefully looked at in order to attach to its accurate meaning."

What is to be valued under Clause 1 of the Lease, as amended are "works and erections". Reference to dictionaries illustrate the normal meaning of these words. "Works" is defined by Black's Law Dictionary, 8th ed., s.v. as:

> "A mill, factory or other establishment for manufacturing or other industrial purposes; a manufacturing plant; a factory and any building or structure on land."

The Dictionary of Canadian Law, 2nd ed., s.v. defines "works" to mean:

> "Physical things, not services, includes all property buildings, erections, plant machinery, installation material, dams, canals, devices, fittings, apparatus, appliances and equipment."

"Erections" is defined by the Websters New World dictionary, 2nd ed., s.v. as:

> "1. an erecting or being erected 2. something erected; structure, building, etc."

It is clear from reference to these dictionaries that the phrase "works and erections" normally refers to physical assets, such as buildings, structures, chattels and fixtures. It would not normally include intangible rights, such as water rights or goodwill of a business.

It is also important to look at the context in which the words "works and erections" were used. The facts establish that the City was granted the water rights to the Mobile River watershed by the Government of Newfoundland for the benefit of the residents of the City and, under the agreement with Newfoundland Power, agreed to assign or lease these rights to Newfoundland Power on certain terms and conditions. The conditions included that the Lease could not be terminated for fifty years to allow financing for the project to proceed, but that after that period the City had the right to terminate the Lease upon three years' written notice and upon payment of a determined amount. The rights given to Newfoundland Power were not in perpetuity, nor were they absolute, but were determinable at any time after 47 years, at the discretion of the City, upon giving the required notice.

Another significant factor in the context of the Lease is that the parties were also involved in other arrangements under the *St. John's Railway Act* which was also amended in 1946. Under Section 29 of that Act, the City had the right to purchase "the undertaking as a going

concern". Thus, in another business context involving the same parties, broader language was used to state that should the City exercise its rights, it would be required to purchase the assets and the full undertaking. However, the same parties in reflecting what was to be valued upon the exercise of the City of it rights to terminate under Clause 1 of the Lease, did not use such broader language but chose to state that what was to be valued was "works and erections" which are clearly physical assets within the normal meaning of the words.

Newfoundland Power, in its submission, also referred to commercial efficacy as a principle of interpretation to say that the words must reflect commercial reasonableness. In my view, the original transaction contemplated that Newfoundland Power would build and operate the assets for the development of the Mobile River watershed for at least 50 years without disturbance by the City and during that period of time, it was able to derive a reasonable return as a regulated utility on the assets that it constructed and were in service to serve the residents of the City. What it has not recovered to date is the undepreciated value of these assets or the net book value as reflected in its accounts. It, however, has operated the physical assets for a lengthy term on what has been acknowledged by the parties to be a profitable basis. Payment for the physical assets only, or the "works and erections", in addition to the return or profit earned on the assets over the term of the Lease, reflects a reasonable commercial result.

Certain Minutes of Council Meetings of the City and correspondence between the parties were included with the Agreed Statement of Facts that was filed. The parties took different

positions on whether they were to be considered in interpreting the language of Clause 1 of the Lease.

In my view, these materials reflect negotiations between the parties that occurred before the final contract was determined and they are not to be considered in determining the meaning of the words used in the contract as explained by Hall in his text *Canadian Contractual Interpretation Law* at pages 20-22. Moreover, in the circumstances of the present case, there was no information provided in these materials which would lead to a different interpretation than I have found.

I turn now to look at the cases cited by the parties. As mentioned above, no case was referred to which interpreted the same words as are at issue here.

In the case of *Cumberland (City) v. Cumberland Electric Light Co.*, [1931] 3 D.L.R. p. 69, the municipal council there had the right to purchase the "undertaking, property rights and privileges" of an electric company. The Court found that the City had the right to purchase the entire business of the corporation, including those parts of the business where it operated a franchise beyond the city limits. Clearly the wording to be interpreted there, including "undertaking" and "privileges" were broader than the wording in the present case.

In the case of *Hamilton Gas Company v. Hamilton* referred to above, the Court relied upon statutory provisions, limited to the facts of that case, that it was the rights, powers and

privileges of the corporation that were to be assessed and gave a broad interpretation of what was to be valued.

In the case of *Toronto Street Railway Company v. Toronto* [1893] A.C. 511, the City granted a company the right to construct and maintain railways in the City, and the City had the right to terminate after thirty years. At the expiration of the term, the City could "assume the ownership of the railway and all real and personal property in connection with the working thereof, in payment of their value, to be determined by the arbitration". There the Court found valuation was limited to the physical assets with no regard to any right to operate the railway.

While other cases were cited by the parties, all reflect the point that the interpretation to be accorded in a dispute between parties must reflect the words used in the agreement between the parties.

Another factor relevant to the determination of Question 1 relates to the date of termination of the Lease and when the water rights for Mobile River watershed revert to the City. Under Clause 1 of the Lease the City has the right to terminate upon three years' notice in writing to the Company given at any time after the expiration of forty-seven years from the date of the Lease and upon payment to the Company of the value of all works and erections constructed or provided by the Company within and without the Mobile River watershed subsequent to the date of the Lease for the primary purpose of developing the Mobile River

watershed provided the works and erections are in use for that primary purpose both at the time of notice of termination and at the time of actual termination. The City has argued that the right to compensation from Newfoundland Power crystallizes when the Lease terminates as it is only then that the assets can be appraised to determine the amount of compensation.

As stated by the City in its submission:

> "It will be the position of the City that the right to compensation for NP crystallizes only when the Lease terminates, as only then can the assets to be appraised be finally determined. In our view, this necessarily implies a termination date that must be fixed and known prior to finalization of the appraisal process – otherwise, the Tribunal could not answer the question put to it, as it could not identify the assets to be appraised. The right to compensation is a condition of the termination to be satisfied by payment after termination of an amount that can only be determined after determination."

This, in my view, is the correct interpretation of the clause, which is that the Lease terminates on March 1, 2009 with the water rights reverting back to the City. This also is consistent with the interpretation that no water rights were intended to be included in the valuation process.

This review of the context of the Lease confirms that the parties intended that the words "works and erections" were to be given their ordinary meaning for the valuation process.

QUESTION TWO – WHAT IS THE MEANING OF THE WORD "VALUE" AS USED IN CLAUSE 1 OF THE LEASE AS AMENDED?

Having determined what is to be valued, the question now arises as to how the physical assets constructed and provided by Newfoundland Power within and without the Mobile River watershed for the production of power and meeting the other specified criteria, are to be valued.

I refer to the definitions of "value" set out in the decision of the majority from the Oxford Encyclopaedic English Dictionary and the Black's Law Dictionary. As can be seen from both these standard dictionaries, the word "value" is capable of a number of interpretations.

In this case the appropriate definition must reflect the intention of the parties at the time the lease was entered into. As noted above, it is my finding that what is to be valued includes only the physical assets provided and constructed by Newfoundland Power that meet the other criteria of Clause 1 of the Lease. No intangible assets are to be valued, including water rights or the whole undertaking of the generation of electricity from the Mobile River watershed. What is to be valued will influence how the valuation process is to be completed.

At the time of entering into the Lease, it was known that the City had the right to terminate the Lease upon three years' written notice and that the water rights assigned to Newfoundland Power would revert to the City. Newfoundland Power would have been concerned with recovery for the cost of assets it had put in place and which it had operated and on which it had recovered a return through the regulated rate-setting process. The

parties chose not to use any other term to describe value such as "market value" or the value for the undertaking as a whole or value as a going concern but chose to simply use the word "value". In the situation when what is to be valued are physical assets only, without water rights or intangible assets, the question which must be asked is how should the appropriate valuation take place.

It has been argued by Newfoundland Power that the 1949 amendment to the Lease removed the words "aggregate cost less depreciation" that was in the original Lease and that this should be considered conclusive that it was not the intention of the parties that "cost less depreciation" be used as a method of valuation. While it is true that the Lease was amended to remove the reference to cost less depreciation, the parties did not make clear an intention to use a particular basis for valuation which was open to them to do at the time, such as using the phrase "market value" or the fact that the valuation was to take into account the whole undertaking if that, in fact, had been the intention of the parties. As noted above, the parties were aware that in another business context, relating to them, the language provided that if the City exercised its rights, then the railway and other rights "as a going concern" were to be appraised. The language of Clause 1 of the Lease and the facts here do not exclude cost less depreciation as a basis for valuation.

It is reasonable to conclude that it was the intention of the parties that what was to be valued was the loss to Newfoundland Power, that is Newfoundland Power was to be compensated

for the works and erections it was no longer able to use once the City exercised its right to terminate the Lease.

It my view, it is open to the parties to present evidence and argument on how the assets are to be valued when considered in the context of the directions given with respect to what is to be valued.