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Via Email & Courier

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

Attention: Ms. Cheryl Blundon
Director of Corporate Services & Board Secretary

Dear Ms. Blundon:

Re: NLH 2017 GRA - Motion of the Consumer Advocate requesting clarification of the Jurisdiction of the Board – Hydro's Submissions

The following are Newfoundland and Labrador Hydro's ("Hydro") submissions in response to the Consumer Advocate's motion requesting clarification of the jurisdiction of the Board dated April 5, 2018 (the "Motion").

1.0 Motion Background

On July 28, 2017, Hydro filed a General Rate Application ("GRA") with the Board. The GRA requested the Board approve, among other things, i) Hydro's proposal to have its 2018 and 2019 Test Year revenue requirements, and resulting rates, reflect the costs of the continued supply of power to the Island Interconnected System from existing Island generation, and ii) Hydro's proposal to establish a deferral account – the Off-Island Purchases Deferral Account – to include any difference between the actual costs attributable to off-island power purchases (including the cost of delivery) and the costs that would have been incurred if that same amount of energy had been supplied from the Holyrood Thermal Generating Station ("Holyrood TGS") based on the approved Test Years' unit cost of No. 6 Fuel. These proposals are described in Chapters 1 and 5 of the evidence filed in support of the GRA. On

September 15, 2017, Hydro filed supplemental evidence respecting the proposed Off-Island Purchases Deferral Account, included as Chapter 6 – *Supplemental Evidence*.

Hydro subsequently filed revisions to its GRA based on amendments that were required to its Cost of Service Studies and to its Depreciation Report. Hydro also responded to approximately 950 Requests for Information ("RFIs") which provided additional information on, among other things, how the proposed Off-Island Purchases Deferral Account would operate, the estimated net savings projected to accumulate in the deferral account (including estimated gross costs and gross savings), as well as expert evidence providing regulatory support for the deferral account.

On January 4, 2017, the Consumer Advocate filed an application with the Board requesting that the Board delay the proceedings and order Hydro to file additional information. As a result, on January 26, 2018 the Board issued Order No. P.U. 2(2018) directing Hydro to file additional information providing the 2018 and 2019 revenue requirements and cost of service studies based on the off-island purchasing supply scenario ("the Expected Supply Scenario"). The Board also requested Hydro to provide similar information based on Hydro's proposed Off-Island Purchases Deferral Account but using the fall 2017 fuel price update ("the Revised Deferral Account Scenario"), and to address the requirements for a deferral account mechanism to address uncertainties related to supply cost variability for 2018 and 2019.

In compliance with Order No. P.U. 2(2018), on March 22, 2018 Hydro filed a *Summary Report – Additional Cost of Service Information*. The report provides a summary of the cost of service, revenue deficiencies and customer rate impacts using both the Revised Deferral Account Scenario and the Expected Supply Scenario. The report also addresses the changes required in deferral mechanisms to deal with supply cost uncertainty in the 2018 and 2019 Test Years due to off-island purchases. Appended to the report are the 2018 and 2019 revenue requirements and cost of service studies required by the Board.

On March 27, 2018, the Board issued a schedule for the GRA proceeding, directing among other things i) a process for RFIs on the additional cost of service information, and ii) that all preliminary motions be filed on or before April 5, 2018. Hydro subsequently responded to 93 RFIs regarding the additional cost of service information.

On April 5, 2018, the Consumer Advocate filed the within Motion with the Board requesting clarification of the Board's jurisdiction to determine certain aspects of the GRA. Specifically, the Consumer Advocate requests a Board Order declaring whether Orders-in-Council OC2013-342 and OC2013-343 restrict the Board's jurisdiction to allow Hydro's GRA to recover any costs relating to components of the Muskrat Falls Project. In effect, the Consumer Advocate's Motion seeks clarification of whether the Board is authorized to approve the Off-Island Purchases Deferral Account in light of OC2013-342 and OC2013-343.

2.0 Hydro's Response

A. Overview

It is Hydro's position that the Board is authorized to approve the Off-Island Purchases Deferral Account. The Deferral Account Scenario does not propose inclusion of Muskrat Falls Project related costs – which costs are exempt from the requirement of Board approval pursuant to OC2013-342 – in the cost of service, nor does Hydro seek recovery of such costs in 2018 and 2019 rates – the timing of which recovery is directed by OC2013-343. Rather, the cost of service presented by the Deferral Account Scenario, to be recovered in rates, reflects the costs of the continued supply of power to the Island Interconnected System from existing Island generation. Under the Deferral Account Scenario, off-island purchase costs are to be deferred in the Off-Island Purchases Deferral Account, together with the off-setting associated savings, for Board ordered dissemination at a later date. The purpose of the Off-Island Purchases Deferral Account is to achieve rate shaping responsive to the significant increases in rates expected upon commissioning of the Muskrat Falls Project. The Board will not contravene OC2013-342 or OC2013-343 by approving Hydro's proposed Off-Island Purchases Deferral Account.

B. The Proposed Deferral Account Scenario

The GRA proposes that Hydro's 2018 and 2019 Test Year revenue requirements, and resulting rates, reflect the cost of continued supply of power to the Island Interconnected System from exiting Island generation. Hydro expects that the Labrador-Island Link ("the LIL"), the Labrador Transmission Assets ("the LTA") and the Maritime Link ("the ML") will be available in 2018 and 2019 to provide off-island purchases to reduce the generation required from the Holyrood TGS. Hydro has therefore proposed that any costs and savings associated with the use of these assets prior to the commissioning of the Muskrat Falls Project be set aside in the proposed Off-Island Purchases Deferral Account. The deferral account would capture any differences between the i) actual costs attributable to off-island power purchases, including the cost of delivery, and ii) costs that would have been incurred if that same amount of energy had been supplied from the Holyrood TGS based on approved Test Years' unit cost of No. 6 Fuel. Following the conclusion of the GRA, the Board will determine whether the savings accumulated in the deferral account are to be i) used to minimize electricity rates during the Muskrat Falls Project pre-commissioning period, ii) set aside for future use to help mitigate the impact of post-commissioning Muskrat Falls Project costs on customer rates, or iii) some combination of rate shaping both pre- and post-Muskrat Falls commissioning.

For sake of clarity, notwithstanding Hydro's filing of the additional cost of service information as required by Order No. P.U. 2(2018), Hydro has not amended its 2017 GRA; Hydro maintains its application for the proposed Deferral Account Scenario. If the Board determines that the Deferral Account Scenario should reflect a revised fuel forecast, such a decision will not change Hydro's proposed approach to

establishing Test Year revenue requirements. Hydro filed the additional cost of service information in compliance with Order No. P.U. 2(2018) for the sole purpose stated in the Order: to provide the Board with information that it directed would be helpful in assessing the reasonableness of Hydro's Deferral Account Scenario.[1] Hydro's filing of the additional cost of service information does not represent a refiling or amendment of the GRA.

C. The Board's Authority to Approve the Deferral Account Scenario

Analysis of the Board's authority to approve the Deferral Account Scenario requires consideration of (i) the Board's authorizing legislation, (ii) the relevant Orders-in-Council limiting the Board's authority, (iii) principles applicable to the interpretation of Orders-in-Council, (iv) the context of the issuance of OC2013-342 and OC2013-343, and (v) finally, the application of the cumulative legislative framework to the proposed Off-Island Purchases Deferral Account.

i. The Board's Authorizing Legislation

The Board's jurisdiction to approve the Deferral Account Scenario is derived from its statutory powers and responsibilities set out in the *Public Utilities Act*, RSN 1990, Chapter P-47 ("the *Act*") and the *Electrical Power Control Act, 1994,* SNL 1994, Chapter E-5.1 ("the *EPCA*").

The *Act* confers the Board with responsibility for the general supervision of public utilities in the province, which requires the Board to approve rates, capital expenditures and other aspects of the business of public utilities. As stated at paragraph 8 of the GRA, Hydro specifically applies under sections 58, 64, 70, 71, 75, 76, 78 and 80 of the *Act.* Subsection 70(1) of the *Act* relating to approval of rates reads:

> **Compensation for services**
>
> **70.** (1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

The *Act* aside, the Board is further mandated through the *EPCA*, and in particular section 3 which states the power policy of the province, and section 4 which requires the Board to implement the policy. The *EPCA* mandates the Board to make rate

[1] Order No. P.U. 2(2018), p. 7, lines 7-14.

decisions that are reasonable and not unjustly discriminatory, and in doing so to apply tests consistent with generally accepted sound public utility practice. Rates are to be established, wherever practical, based on forecast costs for the supply of power for one or more test years. The legislation also ensures that the utilities are permitted to earn a just and reasonable financial return while maintaining a sound credit rating in the financial markets of the world. The legislation calls for the most efficient production, transmission and distribution of power that will afford customers the lowest possible cost electricity consistent with equitable, safe and reliable service.

The Newfoundland and Labrador Court of Appeal ("the NLCA") has commented on the Board's authorizing legislation on numerous occasions. For example, in *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)* (2012), 323 Nfld. & P.E.I.R. 127 (NLCA) ("the *RSP Appeal*"), the Court provided the following overview of the Board's powers:

> [54] The Board's jurisdiction and powers are governed by the *PUB Act* and the *Electrical Power Control Act, 1994,* SNL 1994 c. E-5.1 ("*EPC Act*"). The *PUB Act* confers on the Board the power for "the general supervision of all public utilities". Specifically the Board has sole authority to approve the rates charged by public utilities – ss. 70(1) and 71 – and the power to approve interim rates unilaterally – s. 75. The breadth of the Board's authority over rates is illustrated by s. 76 which confers the right to rescind or alter rates, s. 82 which confers the right to investigate a rate, where the Board believes that it is unreasonable or unjustly discriminatory, and ss. 84-87 which authorize the Board, following a formal complaint, to investigate and to cancel rates and void contracts where rates are found to be unjust, unreasonable, insufficient or unjustly discriminatory.

The NLCA further commented on prospective rate making and the Board's authority to approve deferral accounts, as follows:

> [59] The *EPC Act* requires that, wherever practicable, rates are to be established based on forecast costs – s. 3(a)(ii) – and utilizing tests which are consistent with "generally accepted sound public utility practice" – s. 4. The rates policy stipulated in s. 3 of the *EPC Act* is consistent with the widely accepted principle of ratemaking that rates should be set prospectively, i.e., retroactive ratemaking should generally not be permitted. ...
>
> [60] It is nevertheless clear from the authorities that the above noted principle of prospective ratemaking cannot bar the use of two widely used regulatory tools authorized by applicable legislation though the

> same may be thought to have an element of retrospectivity. These two are interim rates and deferral accounts. See *Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission),* [1989] 1 S.C.R. 1722 (*Bell Canada 1989*); *Bell Canada v. Bell Aliant Regional Communications,* [2009] 2 S.C.R. 764 (*Bell Canada 2009*).
>
> ...
>
> [63] The operation of deferral accounts is permissible under the existing regulatory scheme in this province regardless of whether it might be argued they incidentally have retrospective or retroactive effect. Deferral accounts are utilized in public utility regulation to deal with the effects of uncertain or volatile costs in a manner that ensures that rates are reasonable, not unjustly discriminatory and that the utility earns a just and reasonable return. They permit the recovery or rebate in a subsequent period of any deficiency or excess between forecast and actual costs. Regulatory regimes generally permit the operation of deferral accounts.

The Board's authority to approve accounts for excess revenues also arose in *Reference Re Section 101 of the Public Utilities Act (Nfld.)* (1998), 164 Nfld. & P.E.I.R. 60 (NLCA), wherein the NLCA commented:

> [98] ...[A utility] can monitor its financial progress and can organize its accounts in such a way as to account for excess revenue so as to prevent the possibility of it being disposed of before any subsequent order dealing with the excess may be made. The utility does not need an express order of the Board requiring it, as a general rule, to set up a reserve account for this purpose. Nevertheless, the use of a reserve account is a convenient way of doing this. It may well be, however, that the Board may, through other directions with respect to the manner of keeping accounts, develop other accounting procedures that will enable the utility to identify excess returns and to segregate them for other use.
>
> [99] A reserve fund could be ordered by the Board to be used in the future to improve service, or to keep rates low or for some other purpose that is consistent with the objectives and policies of the legislation. Whether the advancement of these policies is done formally through the use of a reserve fund or through some other mechanism such as an order setting further rates, tolls and charges taking the prior excess revenue into account, the utility should not be prejudiced, in light of the fact that it knows that it is not entitled to earn a return in excess of a just and reasonable return.

Finally, the NLCA has specifically commented on the principles applicable to interpretation of the Board's authorizing legislation, in the *RSP Appeal* as follows:

> [55] In considering the extent of the Board's powers under the *PUB Act* reference must be made to s. 118 which states:
>
> > 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
> >
> > (2) The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.
>
> [56] The *EPC Act* states the electrical power policy of the province in s. 3. It obligates the Board to implement that policy as it carries out its duties and exercises its powers under the *PUB Act* and in so doing s.4 requires the Board to apply tests which are consistent with "generally accepted sound public utility practice".
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> [57] In [*Reference Re Section 101 of the Public Utilities Act (Nfld.)* (1998), 164 Nfld. & P.E.I.R. 60 (NLCA)] Green J.A. stated some of the general principles applicable to the interpretation of the *PUB Act* and *EPC Act* as follows:
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> > [36] ...
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> > 1. The Act (*PUB Act*) should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;
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> > 2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;
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> > 3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an

identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

The foregoing statements of the Board's authority in respect of approval of rates and deferral accounts generally serve as the foundation for analysis of the specific issue of whether the Board has authority to approve the Off-Island Purchases Deferral Account in light of OC2013-342 and OC2013-343.

ii. Orders-in-Council Limiting the Board's Authority

The Board's legislative authority is subject to limitation and direction by Order-in-Council, as provided for in sections 5.1 and 5.2 of the *EPCA,* and section 4.1 of the *Act*:

- Section 5.1(1) provides that notwithstanding sections 3 and 4 (i.e., the power policy and direction to implement it), the Lieutenant-Governor in Council may direct the Board with respect to the policies and procedures to be

implemented by the Board with respect to the determination of rate structures.

- Section 5.1(2)(a) expressly provides that *"for the purpose of the Muskrat Falls Project"* the Lieutenant-Governor in Council may direct the Board to implement directives respecting the exercise of powers and the performance of the duties of the Board under the *EPCA* or the *Act*, including directives respecting *"the costs, expenses and allowances that are to be included in the rates, tolls and charges approved for a public utility, and the terms of that inclusion;"*.

- Section 5.2 provides that the Lieutenant-Governor in Council may exempt a public utility from the application of the *EPCA* as a matter of public convenience, or where such general policy is in the best interest of the Province. An equivalent provision exists in section 4.1 of the *Act,* providing for exemption from that statute.

Under such authority, on November 29, 2013 the Lieutenant-Governor in Council issued two Orders-in-Council as regards the Muskrat Falls Project:

1. Under the authority of section 5.2 of the *EPCA* and section 4.1 of the *Act*, the Lieutenant-Governor in Council exempted Hydro in respect of certain expenditures, payments, obligations and activities relating to the Muskrat Falls Project ("Muskrat Falls Project costs") from the application of the *Act* and Part II of the *EPCA* (the *Muskrat Falls Project Exemption Order*, referred to herein as "OC2013-342"); and

2. Under the authority of section 5.1 of the *EPCA,* the Lieutenant-Governor in Council directed the Board to adopt a certain policy, subject to section 3 of the *EPCA*, regarding the inclusion of Muskrat Falls Project costs in Hydro's cost of service for recovery in Island Interconnected rates ("OC2013-343"). OC2013-343 directs, among other things, the timing for the inclusion of Muskrat Falls Project costs in Hydro's cost of service. While OC2013-343 directs that Muskrat Falls Project costs be recovered from Island Interconnected rates, it prohibits the recovery of those costs until the Muskrat Falls Project is commissioned or nearing commissioning and Hydro is receiving services from the project.

Analysis of the Orders-in-Council and their application to the proposed Off-Island Purchases Deferral Account requires consideration of the principles applicable to their interpretation, as well as the context of their issuance.

iii. <u>Principles Applicable to the Interpretation of Orders-in-Council</u>

The principles applicable to the interpretation of Orders-in-Council are well established. Such orders must be interpreted in accordance with the so-called *"modern approach of statutory interpretation"*.[2] The modern approach of statutory interpretation directs that *"the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."*[3]

It is also necessary, in interpreting an Order-in-Council, to consider the words granting the authority to issue such order. It is not enough to ascertain the meaning of an Order-in-Council when read in light of its own object and the facts surrounding its making. The words conferring the Order-in-Council must also be considered in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the Order-in-Council.[4]

As regards ambiguities in an Order-in-Council, one must consider the entire context of the provision before one can determine if it is reasonably capable of multiple interpretations. It is necessary, in every case, to undertake the contextual and purposive approach set out in the *"modern approach"*, and thereafter to determine if the words are ambiguous.[5]

The modern approach echoes provisions of the *Interpretation Act,* RSNL 1990, Chapter I-19, which give direction on the interpretation of legislation generally. Section 16 provides that *"every regulation and every provision of [a]... regulation"* is to be considered remedial and receive *"the liberal construction and interpretation that best ensures the attainment of the objects of the... regulation, or provision according to its true meaning."* The term *"regulation"* is defined in the *Interpretation Act* as including an Order-in-Council.

The NLCA provided the following helpful commentary regarding section 16 of the *Interpretation Act* in *Tuck v. Supreme Holdings,* 2016 NLCA 40 (*"Tuck"*):

> *[Section 16 of the Interpretation Act] directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed*

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[2] This was confirmed by the Supreme Court of Canada in *Amarantunga v. Northwest Atlantic Fisheries Organization,* 2013 SCC 66, at para. 36.

[3] This wording of E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, was endorsed by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and has been recurrently applied ever since.

[4] *Amarantunga v. Northwest Atlantic Fisheries Organization,* 2013 SCC 66, at para. 36.

[5] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at pars. 29-30.

> *its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aides are all sources to be consulted in this exercise. ...*
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> *In truth therefore, s. 16 enunciates a principle of harmonization in which the courts are directed, in cases of dispute, to adopt and apply an interpretation that fairly reconciles the language used in the enactment with the broader objects of the legislation so as to achieve the general goal, or to rectify the mischief, to which the legislative act appears to have been directed.*

Therefore, in engaging in analysis of OC2013-342 and OC2013-343, the words of each Order-in-Council is to be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the Order, the object of such Order and the intention of the Lieutenant-Governor in Council in issuing the Order. The words of the statutes authorizing the issuance of Orders-in-Council – in particular, sections 5.1 and 5.2 of the *EPCA,* and section 4.1 of the *Act* – are also to be considered in determining the true meaning of OC2013-342 and OC2013-343, as their legislative intent transcends and governs the intent of the Orders-in-Council. It is insufficient to consider the bare words of the Orders-in-Council alone. Rather, consideration must be given to the "mischief" to which the Lieutenant-Governor in Council directed OC2013-342 and OC2013-343 as remedies, as well as the broad social and legislative context in which the Orders-in-Council were issued.

iv. <u>The Context of the Issuance of OC2013-342 and OC2013-343</u>

OC2013-342 and OC2013-343 were issued in the context of a framework of measures taken by the Province to achieve financial close of the Muskrat Falls Project.

On November 30, 2012, Canada guaranteed the debt financing of the Muskrat Falls Project ("the Federal Loan Guarantee"). The terms and conditions of the Federal

Loan Guarantee include, as condition precedent to its execution and delivery, that legislation be enacted and formal agreements be executed between the Province and Nalcor Energy to put into legally binding effect certain commitments, to Canada's satisfaction. The Province committed, among others things, to ensure (i) that upon the LIL achieving in-service, the regulated rates for Hydro will allow it to collect sufficient revenue in each year over the service life of the LIL to enable Hydro to recover its costs incurred for transmission services, and (ii) that upon the LTA achieving in-service, the regulated rates for the provision of transmission service over the LTA will provide for a recovery of costs over the service life of the asset.

On December 22, 2012, to allow for fulfillment of the condition precedent to the Federal Loan Guarantee, the Province amended the *EPCA* to authorize the Lieutenant-Governor in Council to direct the Board for the purpose of the Muskrat Falls Project respecting *"the costs, expenses and allowances that are to be included in the rates, tolls and charges approved for a public utility, and the terms of that inclusion"* (i.e., to add the current section 5.1(2)(a) to the *EPCA*).[6] The then-Minister of Natural Resources explained the intent and purpose of the amendment to the House of Assembly during the second reading of the associated Bill:

> *"The legislative amendments look at securing the financial agreement, ensuring that we have non-recourse borrowing, which protects the Province and Nalcor and restricts then the ability on default to act upon the assets that are the subject of the guarantee.*
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> *...*
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> *In order to achieve the non-recourse debt structure, we have to show the lenders that the rates charged to Island ratepayers will be sufficient to cover the cost of the generation and transmission of Muskrat Falls power. That is all we are saying to the PUB. We have to ensure that there are sufficient revenues coming in, that the revenues are sufficient to cover the cost, and that it will flow unfettered to the lenders to satisfy debt repayment.*
>
> *The amendment here [...] we will be directing the PUB that they will not be able to allow or disallow project costs when setting the rates for Newfoundland and Labrador Hydro. As such, Mr. Speaker, the amounts charged to Newfoundland and Labrador Hydro by the entities responsible for the Labrador-Island Transmission Link and the Muskrat Falls generation will have to be accepted by the PUB.*
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> *...*

[6] See Bill 61, *An Act to Amend the Electrical Power Control Act, 1994, the Energy Corporation Act and the Hydro Corporation Act, 2007* (Assented to December 22, 2012), s. 2.

A primary purpose of the amendment will allow us to direct the PUB that Newfoundland and Labrador Hydro's cost for the purchase and delivery of power from the Muskrat Falls Project will be included in Newfoundland and Labrador Hydro's Island revenue requirement without review and approval by the PUB. While that is the primary purpose of the amendment, the LGIC will have added authority on what it can direct the PUB, including the terms of orders and approvals on rates and tolls, criteria for approval by the PUB, et cetera, but they only relate to Muskrat Falls.

...

The PUB will be directed to include all Muskrat Falls Project costs. This will not affect the PUB authority, including retaining oversight and approval authority of Newfoundland and Labrador Hydro's other existing Island costs, as well as any future Newfoundland and Labrador hydro costs and capital plans.

...

[The Board] retain authority over allocating Newfoundland and Labrador Hydro's cost to customer classes and approving rates, including the allocation of Muskrat Falls' power costs. ... There is still a role for the PUB.

...

Under 5.1, Cabinet, as I have indicated, has the power to direct the PUB with respect to the policies and procedures to be implemented by the PUB regarding the determination of rate structures of public utilities.

Under that direction, Mr. Speaker, the PUB is still – and this is an important point – expected to carry out its mandate under both the EPCA and the Public Utilities Act, but in doing so it must comply with the direction given. So, it is not an exclusion and it is not an exemption, it is a direction.

Now, the acts are outlined, the sections of the act, what we are doing for a greater clarity, we are ensuring that the direction in 5.1(1), in Bill 61, will relate directly to the Muskrat Falls Project. So, in the financing bill, Mr. Speaker, related to Muskrat Falls what we are doing, we are adding an additional provision, and it will apply only to Muskrat Falls, as the existing authority, we feel, may not be sufficient...

...

We have proposed to direct the public utility here in terms of how the Muskrat Falls costs are to be recovered; as required by the bill in

> *general, Mr. Chair, and more specifically, the federal loan guarantee, the bond rating agencies and the banks.*
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> ...
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> *We are saying to the PUB: You still have a role to play; it is a lesser role, but we need to recover the costs."*[7]

As evidenced by Hansard then, the Lieutenant-Governor in Council's intent was clearly stated. In summary:

- It was intended that Muskrat Falls Project costs would be excluded from the Board's oversight and approval authority, such that the costs would not be subject to scrutiny or adjustment. This intent was eventually implemented through the issuance of OC2013-342.

- It was further intended that the Board would be directed to accept the Muskrat Falls Project costs included in Hydro's cost of service, but that this would not otherwise affect the Board's oversight and approval authority. The Board would still be expected to carry out its mandate under both the *EPCA* and the *Act*, but in doing so comply with the direction given. The Board would be further directed regarding the manner of the recovery of the Muskrat Falls Project costs, which direction would reflect the requirements of the Federal Loan Guarantee. This intent was eventually implemented through the issuance of OC2013-343.[8]

On November 29, 2013 – the date of issuance of the Orders-in-Council – agreements were entered in respect of the Muskrat Falls Project, in further fulfilment of the condition precedent of the Federal Loan Guarantee. The agreements included two commercial agreements whereby Hydro agreed to make payments in respect of the LTA and the LIL: the Muskrat Falls Power Purchase Agreement (the "MF PPA") and the Transmission Funding Agreement (the "TFA"). The MF PPA is between Hydro and the Muskrat Falls Corporation ("MFCo") and the TFA is between Hydro and the Labrador-Island Link Operating Corporation ("LIL Opco").

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[7] Statements by Hon. Jerome Kennedy, Minister of Natural Resources in respect of Bill 61, *An Act to Amend the Electrical Power Control Act, 1994, the Energy Corporation Act and the Hydro Corporation Act, 2007*, House of Assembly Proceedings, December 18, 2012, Hansard Vol. XLVII No. 71.

[8] The Consumer Advocate significantly overstates the effect of OC2013-342 and OC2013-343 at paragraph 8 of the Motion, in stating that the Orders-in-Council *"purged the Board of its legislated jurisdiction relating to these matters"* and that *"Hydro's Application to recover any costs relating to components of the Muskrat Falls Project therefore has no jurisdictional basis before the Board."* As addressed throughout Hydro's within submissions, the Board continues to have authority to address Muskrat Falls Project costs, just in a limited (by OC2013-342) and directed (by OC2013-343) manner.

Consistent with the overall framework of legislative measures taken by the Province to achieve financial close of the Muskrat Falls Project, the MF PPA and the TFA provide for Hydro's payment of the Muskrat Falls Project costs, commencing upon the Muskrat Falls Project's commissioning or near commissioning. As the following analysis demonstrates, the agreements contemplate the various component assets of the Muskrat Falls Project achieving *"commissioned or near commissioning"* status contemporaneously (i.e., at the same time).

The MF PPA is the agreement by which MFCo agrees to design, construct, operate and maintain the MF Plant, and further enter into the Generator Interconnection Agreement with Labrador Transmission Corporation for the completion of the LTA and the interconnection of the Muskrat Falls generating facility to the LTA. The MF PPA sets out the payment terms and obligations of Hydro, commencing when the first generating unit of the Muskrat Falls generating facility and the LTA come into service (i.e., the First Power Date). Completion of the LTA Commissioning, meaning the testing activities required to demonstrate that the LTA is ready for safe and reliable commercial operations, is only one aspect of the commissioning contemplated by the MF PPA. The commissioning date under the agreement is the date on which *"all of the following have occurred"*: (i) completion of MF Plant commissioning, (ii) completion of LTA commissioning, (iii) Newfoundland and Labrador System Operator ("NLSO") acceptance in writing that the LTA commissioning has been completed, and (iv) the financing parties' acceptance in writing that the MF Plant commissioning has been completed and the financing parties with respect to the LTA have accepted in writing that the LTA commissioning has been completed. Similarly, the commissioning period under the MF PPA (i.e., *"nearing commissioning"* contemplated by OC2013-343) commences on the *"First Power Date"*, which is defined as meaning *"the date which is latest"* of certain listed milestones, which list includes *"the date of start-up and completion of testing activities required to demonstrate that one generation unit of the MF Plant is ready for sale and Reliable provision of Energy, Capacity and Ancillary Services"*. Therefore, as the foregoing demonstrates, the MF PPA inextricably weaves the LTA commissioning and the MF Plant commissioning together for the purpose of triggering Hydro's payment of Muskrat Falls Project costs thereunder.

The second agreement – the TFA – is that wherein Hydro agrees to pay LIL Opco upon the full commissioning of the LIL, thereby providing LIL Opco with the necessary funds to fulfil its obligations under the LIL Lease. On receiving any payments from Hydro pursuant to the TFA, LIL Opco is obligated to provide written notice to the NLSO to account for such payments through credits against Hydro's payment obligations arising under any transmission service agreements to which Hydro is a party. The TFA defines commissioning as meaning the testing activities required to demonstrate that the LIL is ready to transmit energy and capacity. The

TFA commissioning date is *"the date on which all of the following has occurred"*: (i) completion of LIL commissioning, (ii) NLSO acceptance in writing that the LIL commissioning has been completed, and (iii) the financing parties' acceptance in writing that the LIL commissioning has been completed. TFA payments are comprised of operating and maintenance costs, rent and a small annual profit component (to ensure that LIL Opco is not deemed to be an agent of the partnership under the LIL Lease). Such payments do not commence until the Commissioning Date. It is noteworthy that LIL Opco's obligation to operate, maintain and sustain the LIL also arises on the date the LIL is commissioned. The LIL Lease includes the same definitions of *"Commissioning"* and *"Commissioning Date"* as the TFA.

Considering the MF PPA and the TFA together, it is noteworthy that the LTA's obtaining commissioned or near commissioning status is dependent on the MF generating plant, at a minimum, demonstrating that one generation unit of the plant is ready for safe and reliable service – an event that has not yet occurred. Moreover, while the LIL may obtain commissioned or near commissioning status as a single asset of the Muskrat Falls Project, Hydro will not commence payments in respect of the LIL until the assets subject of the MF PPA obtain commissioning or near commissioning status. The agreements do not anticipate, or in any way contemplate, the various component assets of the Muskrat Falls Project coming into service and achieving *"commissioned or near commissioning"* status separately at different times.

It is in this context – of the Federal Loan Guarantee, the amendment of the *EPCA* to allow for issuance of Orders-in-Council in fulfillment of the Federal Loan Guarantee's condition precedent, and the MF PPA and TFA providing for Hydro's payments in respect of the LTA and the LIL upon the Muskrat Falls Project's commissioning or nearing commissioning – that OC2013-342 and OC2013-343 were issued. The scheme, object and intent of the Lieutenant-Governor in Council in effecting this legislative and contractual framework was to achieve financial close of the Muskrat Falls Project, and specifically to ensure lenders that the Muskrat Falls Project costs will be recovered in rates, and that Hydro's payments in respect of such costs will be accepted by the Board without adjustment.

It is in this context that the application of OC2013-342 and OC2013-343 to the Off-Island Purchases Deferral Account must be considered.

v. <u>Application of the Orders-in-Council to the proposed Off-Island Purchases Deferral Account</u>

The Orders-in-Council raise two principal issues concerning the proposed Off-Island Purchases Deferral Account:

1. Whether the costs of the Deferral Account Scenario are exempt from the requirement of Board approval pursuant to OC2013-342; and

2. If so, whether the recovery of the costs of the Deferral Account Scenario in rates as directed by OC2013-343 has been triggered.

1. <u>The costs of the Deferral Account Scenario are exempt from the requirement of Board approval pursuant to OC2013-342</u>

It is Hydro's position that the costs of the Deferral Account Scenario are exempt pursuant to OC2013-342 from the requirement of Board approval. The Order-in-Council exempts, among other things, certain described payments by Hydro from the application of the *Act* and Part II of the *EPCA*. The exempt payments in respect of the LTA and the LIL are those described in subsection 4(1) of the Order-in-Council:

> *4. (1) Newfoundland and Labrador Hydro is exempt in respect of*
>
> *(a) any*
>
> *(i) expenditures, payments, or compensation paid to MFCo by Newfoundland and Labrador Hydro relating to the purchase and storage of electrical power and energy, the purchase of interconnection facilities, ancillary services, and greenhouse gas credits,*
>
> *(ii) obligations of Newfoundland and Labrador Hydro in addition to subparagraph (i) to ensure MFCo's and LTACo's ability to meet their respective obligations under financing arrangements related to the construction and operation of Muskrat Falls and the LTA, and*
>
> *(iii) expenditures, payments, or compensation paid to MFCo and revenues, proceeds or income received by Newfoundland and Labrador Hydro relating to the sale of electrical power and energy acquired from MFCo to persons located outside of the province*
>
> *whether under one or more power purchase agreements or otherwise;*

> *(b) any activity relating to the receipt of delivery, use, storage or enjoyment by Newfoundland and Labrador Hydro of any electrical power and energy, interconnection facilities, ancillary services, and greenhouse gas credits under paragraph (a);*
>
> *(c) any expenditures, payments, or compensation paid to LilParty and claimed as costs, expenses or allowances by Newfoundland and Labrador Hydro relating to the design, engineering, construction and commissioning of transmission assets and the purchase of transmission services and ancillary services, electrical power and energy, from LilParty or otherwise with respect to the LiL, under one or more transmission services agreements, transmission funding agreements, or otherwise; and*
>
> *(d) any activity relating to the receipt of delivery, use, storage or enjoyment by Newfoundland and Labrador Hydro of any transmission services and ancillary services, electrical power and energy, with respect to the LiL under paragraph (c).*

Hydro submits that the Deferral Account Scenario payments to be made: (i) in respect of the LTA are *"payments... paid to MFCo by [Hydro] relating to ... the purchase of interconnection facilities"* within the meaning of subsection 4(1)(a)(i) of OC2013-342; and (ii) in respect of the LIL are *"payments... paid to LilParty and claimed as costs... by [Hydro] relating to... the purchase of transmission services and ancillary services"* within the meaning of subsection 4(1)(c) of the Order-in-Council.[9] The words used in the Order-in-Council are clear in their meaning, that in issuing OC2013-342 the Lieutenant-Governor in Council intended such payments to be exempt from the requirement for Board approval set out in subsection 70(1) of the *Act*. From a contextual perspective, this intent is reflected in the statements made by the then-Minister of Natural Resources in the House of Assembly during the second reading of the Bill amending the *EPCA* (recited above), among others that *"...we will be directing the PUB that they will not be able to allow or disallow project costs when setting the rates for [Hydro]... the amounts charged to [Hydro] by the entities responsible for the Labrador-Island Transmission Link and the Muskrat Falls*

[9] At paragraph 11 of the Motion, the Consumer Advocate references clause 5.12 of the Newfoundland and Labrador Development Agreement between Nalcor Energy and Emera Inc., which states that Nalcor *"shall use commercially reasonable efforts to cause the Partnership to be a public utility regulated by the PUB or other Authorized Authority allowed to recover costs associated with the LiL on a cost of service basis."* While the reference appears in isolation of the Consumer Advocate's other submissions, Hydro responds by reiterating that the Lieutenant-Governor in Council clearly intended that LIL related costs would be exempt from the review and approval authority of the Board by virtue of OC2013-342.

generation will have to be accepted by the PUB." The intent is further reflected in the commitments of the Province in the Federal Loan Guarantee.

Hydro submits that while the payments to be made under the Deferral Account Scenario are not payments pursuant to the MF PPA or the TFA, they are payments that accord with the description of exempt payments in subsection 4(1) of OC2013-342. Moreover, subsection 4(1) contemplates agreements *other* than the MF PPA and the TFA with respect to such payments, as it references payments *"under one or more power purchase agreements or otherwise"* and *"under one or more transmission services agreements, transmission funding agreements, or otherwise"*. The agreements to be concluded by Hydro to allow for pre-commissioning use of the LIL and the LTA to effect the Deferral Account Scenario would constitute such additional agreements.

Hydro submits that whereas the Deferral Account Scenario payments are payments to which OC2013-342 applies they are also payments to which OC2013-343 applies, as the latter Order-in-Council applies to *"any expenditures, payments or compensation paid directly or indirectly by [Hydro], under an agreement or arrangement to which the Muskrat Falls Project Exemption Order applies"*.

Alternatively, if the Deferral Account Scenario payments are not payments to which OC2013-342 applies, the Board's jurisdiction to approve the Deferral Account Scenario is entirely unencumbered by OC2013-342 and OC2013-343.

2. <u>The Recovery of the costs of the Deferral Account Scenario in rates directed by OC2013-343 has not been triggered</u>

Hydro submits that the cost recovery scheme set out in OC2013-343 is not yet triggered with respect to the Deferral Account Scenario costs. The Order-in-Council directs the Board regarding the recovery of Muskrat Falls Project costs in Hydro's rates. Section 1 reads:

> *1) Any expenditures, payments or compensation paid directly or indirectly by Newfoundland and Labrador Hydro, under an agreement or arrangement to which the Muskrat Falls Project Exemption Order applies, to:*
>
> *a) a LiLParty,*
>
> *b) a system operator in respect of a tariff for transmission services or ancillary services in respect of the LiL, that otherwise would have been made to a LiLParty, or*

c) Muskrat Falls Corporation, in respect of:

i) electrical power and energy forecasted by Muskrat Falls Corporation and Newfoundland and Labrador Hydro to be delivered to, consumed by, or stored by or on behalf of Newfoundland and Labrador Hydro for use within the province, whether or not such electrical power and energy is actually delivered, consumed, or stored within the province, and

ii) greenhouse gas credits, transmission services and ancillary services, and

iii) obligations of Newfoundland and Labrador Hydro in addition to those in paragraphs (i) and (ii) to ensure the ability of Muskrat Falls Corporation and Labrador Transmission Corporation to meet their respective obligations under financing arrangements related to the construction and operation of Muskrat Falls and the LTA

shall be included as costs, expenses or allowances, without disallowance, reduction or alteration of those amounts, in Newfoundland and Labrador Hydro's cost of service calculation in any rate application and rate setting process, so that those costs, expenses or allowances shall be recovered in full by Newfoundland and Labrador Hydro in Island interconnected rates charged to the appropriate classes of ratepayers;

The words of section 1 make clear that the Deferral Account Scenario payments are *prima facie* to be included as costs in Hydro's cost of service calculation in the GRA, so that they will be fully recovered by Hydro in Island Interconnected customers' rates. Consistent with OC2013-342, the costs are to eventually be included in the cost of service calculation without disallowance, reduction or alteration.

Section 3 of OC2013-343 is the caveat to section 1 that directs the timing of the recovery of Muskrat Falls Project costs in rates. Section 3 reads:

3) Notwithstanding sections 1 and 2, no amounts paid by Newfoundland and Labrador Hydro described in those sections shall be

> *included as costs, expenses or allowances in Newfoundland and Labrador Hydro's cost of service calculation or in any rate application or rate setting process, and no such costs, expenses or allowances shall be recovered by Newfoundland and Labrador Hydro in rates:*
>
> *a) where such amounts are directly attributable to the marketing or sale of electrical power and energy by Newfoundland and Labrador Hydro to persons located outside of the province on behalf of and for the benefit of Muskrat Falls Corporation and not Newfoundland and Labrador Hydro; and*
>
> *b) in any event, in respect of each of Muskrat Falls, the LTA or the LiL, until such time as the project is commissioned or nearing commissioning and Newfoundland and Labrador Hydro is receiving services from such project.*

The words of section 3 are clear that the Deferral Account Scenario payments are prohibited from inclusion in Hydro's cost of service calculation in the GRA, and from recovery by Hydro in rates, until the Muskrat Falls Project is *"commissioned or nearing commissioning and Hydro is receiving services from such project"*.

From a contextual perspective, the words of section 1 and section 3 of OC2013-343 accord with the legislative and contractual framework intended to achieve financial close of the Muskrat Falls Project. As reflected in Schedule A of the Federal Loan Guarantee and the Hansard statements by the then-Minister of Natural Resources concerning Bill 61, the Lieutenant-Governor in Council was intent on directing the Board regarding the manner of recovery of the Muskrat Falls Project costs in rates to reflect the requirements of the debt guarantee. Specifically, the debt financing required that upon the LIL and the LTA achieving in-service, the costs would be recovered in rates over the service life of the assets, without adjustment of the costs. The agreed MF PPA and TFA further detailed that Hydro's payment of the Muskrat Falls Project costs will commence upon the various component assets of the Muskrat Falls Project achieving *"commissioned or nearing commissioning"* status contemporaneously.

Hydro submits that this being the meaning of section 3 of OC2013-343, the timing for the recovery of the Deferral Account Scenario payments in rates has not yet been triggered, as the Muskrat Falls Project has not yet achieved *"commissioned or nearing commissioning"* status. As discussed above in analysis of the MF PPA and the TFA, the Muskrat Falls Project will not achieve near commissioning status until, at a minimum, the First Power Date under the MF PPA. The First Power Date is predicated on start-up and completion of testing activities required to demonstrate

that one generation unit of the MF Plant is ready for sale and reliable provision of energy. This milestone has not yet been achieved.

Again, the proposed Deferral Account Scenario does not offend OC2013-343 as Hydro is not including Muskrat Falls Project costs in its cost of service calculation, nor seeking to recover payments in respect of such costs in rates at the present time. Rather, the cost of service presented by the Deferral Account Scenario, to be recovered in rates, reflects the costs of the continued supply of power to the Island Interconnected System from existing Island generation. Under the Deferral Account Scenario, off-island purchases costs are to be deferred in the Off-Island Purchases Deferral Account, together with the off-setting associated savings, for Board ordered dissemination at a later date.

The Consumer Advocate misrepresents the Deferral Account Scenario in this regard, where in paragraph 5 of the Motion he states that the GRA *"includes, inter alia, a request for recovery of its costs of service in relation to... specifically those costs arising from components of the Muskrat Falls Project, including the LTA and the LiL costs."* On the contrary, Hydro's present GRA does not propose recovery of Muskrat Falls Project costs. The GRA proposes that the costs to use the Muskrat Falls Project transmission assets be recognized and paid for from savings from off-island purchases. In order to access off-island power purchases, Hydro is required to enter into agreements which will permit Hydro to use the LIL and the LTA and require Hydro to pay the operating and maintenance costs for that use. Hydro is proposing that the operating and maintenance costs incurred to use the LIL and the LTA be treated as deferred regulatory expenses to be charged to the proposed Off-Island Purchases Deferral Account. The eventual recovery of these costs through the deferral account is consistent with OC2013-343, as Hydro will not be recovering amounts in rates from customers with respect to the LIL and the LTA until after commissioning of the Muskrat Falls Project.

As regards the prudence of the costs paid by Hydro for use of the LTA and the LIL, by virtue of OC2013-342 such costs are exempt from the Board's jurisdiction of oversight and approval. The Board is further directed by OC 2013-343 to adopt a policy whereby the costs be included, at the appropriate directed time, in Hydro's cost of service *"without disallowance, reduction or alteration"*, so that the costs will be recovered *"in full"* by Hydro in Island Interconnected rates. For added certainty, OC2013-343 explicitly directs that the costs *"shall not be subject to subsequent review, and shall persist without disallowance, reduction or alteration"*.

Not only is the proposed Off-Island Purchases Deferral Account in accordance with OC2013-342 and OC2013-343, it is also consistent with established regulatory principles, most notably the cost of service standard. The Consumer Advocate

selectively references, at paragraph 7 of the Motion, J.T. Browne Consulting's statement of the cost of service standard in its Expert Report of December 4, 2017, that the adoption of such standard assures customers that *"they are paying no more than what is necessary for the services they receive"*. The Consumer Advocate omits J.T. Browne Consulting's analysis of the Off-Island Purchases Deferral Account and its finding that the deferral account is consistent with the cost of service standard. J.T. Browne Consulting explains that under Hydro's proposal the deferred costs will be included in determining Hydro's revenue requirements, but only once and only at a later date, following commissioning of the Muskrat Falls Project. The costs will not be considered in setting rates in the period in which they are deferred; rather, they will be included in the determination of revenue requirements in a future period or periods in which the Off-Island Purchases Deferral Account is amortized. The Consumer Advocate's claim that the proposed deferral account *"offends the regulatory standards"* at paragraph 10 of the Motion is refuted by the expert evidence.

As an alternative submission, Hydro recognizes that the Board may determine that the words of subsection 3(b) of OC2013-343 do not refer to the Muskrat Falls Project as a whole achieving commissioned or nearing commissioning status and providing service, but rather specifically refer to each separate component (i.e., *"Muskrat Falls, the LTA or the LiL"*) achieving such status separately. The Board may further determine, as matter of fact, that the LTA and the LIL have each achieved *"near commissioning"* status and each provide service. In the event the Board determines such is the case, Hydro submits that the cost recovery scheme of OC2013-343 is triggered with respect to the Deferral Account Scenario costs, and that such costs are appropriately included in the GRA and deferred in the proposed Off-Island Purchases Deferral Account. In such scenario, the Board's authority to approve the proposed deferral account, which authority is derived from section 70 of the *EPCA* and confirmed by the NLCA in the *RSP Appeal* (as referenced above), is untrammeled by OC2013-343.

In summary, Hydro's proposal of the Off-Island Purchases Deferral Account is structured as follows regarding OC2013-342 and OC2013-343:

1. The costs to be paid by Hydro for use of the LTA and the LIL, including the operating and maintenance costs of those assets, are costs exempted from the Board's review and approval pursuant to OC2013-342 and therefore captured by section 1 of OC2013-343. As such, they are *prima facie* required to be included as costs in Hydro's cost of service calculation, for recovery in rates, subject to the timing set out in section 3 of OC2013-343.

2. The timing for recovery of these payments, set out in section 3 of OC 2013-343, has not yet been triggered as the Muskrat Falls Project is not yet *"commissioned or nearing commissioning"*. Achievement of this triggering status requires all the component assets of the Muskrat Falls Project to reach this stage contemporaneously.

3. The proposed deferral account complies with OC2013-343 in that the costs to be paid by Hydro for the use of the LTA and the LIL are not presently being included in Hydro's cost of service calculation and are not presently being sought for recovery in rates. As such, the proposed deferral account does not contravene the prohibition in section 3 against recovery prior to the triggering event.

4. In the alternative, Hydro states that the Board may find that upon the LIL and the LTA each reaching the status of commissioned or near commissioning and providing service to Hydro, in which case it may permit the recovery of those costs in rates to be charged by Hydro, or if the Board sees fit, it may recognize those costs for later disposition in a deferral account.

3.0 Summary and Conclusion

For these reasons, it is Hydro's position that the Board has authority to approve the proposed Off-Island Purchases Deferral Account. The Board's authority to do so is not restricted by OC2013-342 or OC2013-343, as approval of Hydro's proposed deferral account would be compliant in all respects with the said Orders-in-Council.

In the result, Hydro submits that the Board should determine the Motion by issuing an Order confirming the Board's authority to approve the Off-Island Purchases Deferral Account.

Should you have any questions, please contact the undersigned.

Yours very truly,

J. Alex Templeton

cc: Gerard Hayes - Newfoundland Power
Paul Coxworthy - Stewart McKelvey
Denis J. Fleming - Cox & Palmer
ecc: Van Alexopoulos - Iron Ore Company
Senwung Luk – Olthius Kleer Townshend LLP
Dennis Browne, Q.C. – Brown Fitzgerald Morgan & Avis
Dean Porter - Poole Althouse
Benoît Pepin - Rio Tinto

Encl.:
1. *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)* (2012), 323 Nfld. & P.E.I.R. 127 (NLCA)
2. *Reference Re Section 101 of the Public Utilities Act (Nfld.)* (1998), 164 Nfld. & P.E.I.R. 60 (NLCA)
3. OC2013-342
4. OC2013-343
5. *Amarantunga v. Northwest Atlantic Fisheries Organization,* 2013 SCC 66
6. *Interpretation Act,* RSNL 1990, Chapter I-19
7. *Tuck v. Supreme Holdings,* 2016 NLCA 40
8. Muskrat Falls Project Federal Loan Guarantee, November 30, 2012
9. Bill 61, *An Act to Amend the Electrical Power Control Act, 1994, the Energy Corporation Act and the Hydro Corporation Act, 2007* (Assented to December 22, 2012)
10. Statements by Hon. Jerome Kennedy, Minister of Natural Resources in respect of Bill 61, House of Assembly Proceedings, December 18, 2012, Hansard Vol. XLVII No. 71
11. Muskrat Falls Power Purchase Agreement, November 29, 2013
12. Transmission Funding Agreement, November 29, 2013

Date: 20120619
Docket: 10/113
Citation: *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

NEWFOUNDLAND AND LABRADOR HYDRO — APPELLANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — FIRST RESPONDENT

AND:

THE CONSUMER ADVOCATE as represented by THOMAS JOHNSON — SECOND RESPONDENT

AND:

CORNER BROOK PULP AND PAPER LIMITED — THIRD RESPONDENT

AND:

NORTH ATLANTIC REFINING LIMITED — FOURTH RESPONDENT

AND:

TECK RESOURCES LIMITED — FIFTH RESPONDENT

AND:

VALE NEWFOUNDLAND AND LABRADOR LIMITED — SIXTH RESPONDENT

AND:

ABITIBI CONSOLIDATED COMPANY OF CANADA — SEVENTH RESPONDENT

AND:

NEWFOUNDLAND POWER INC. — EIGHTH RESPONDENT

AND

Docket No. 10/114

BETWEEN:

THE CONSUMER ADVOCATE as represented by THOMAS JOHNSON — APPELLANT

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — FIRST RESPONDENT

AND:

NEWFOUNDLAND AND LABRADOR HYDRO — SECOND RESPONDENT

AND:

CORNER BROOK PULP AND PAPER LIMITED — THIRD RESPONDENT

AND:

NORTH ATLANTIC REFINING LIMITED — FOURTH RESPONDENT

AND:

TECK RESOURCES LIMITED — FIFTH RESPONDENT

AND:

VALE NEWFOUNDLAND AND LABRADOR LIMITED — SIXTH RESPONDENT

AND:

ABITIBI CONSOLIDATED COMPANY OF CANADA — SEVENTH RESPONDENT

AND:

NEWFOUNDLAND POWER INC. — EIGHTH RESPONDENT

Coram: Green C.J.N.L., Mercer and Harrington, JJ.A.
Appealed From: Newfoundland and Labrador Board of Commissioners of Public Utilities, (Order No. P. U. 25)

Appeal Heard: December 9, 10 and 13, 2010
Judgment Rendered: June 19, 2012

Reasons for Judgment by the Court.

Counsel for Newfoundland and Labrador Hydro: Geoffrey Young

Counsel for the Consumer Advocate: Thomas Johnson

Counsel for Newfoundland and Labrador Board of Commissioners of Public Utilities: Dan Simmons, Jackie Glynn

Counsel for Corner Brook Pulp and Paper Limited, North Atlantic Refining Limited, Teck Resources Limited and Vale Newfoundland and Labrador Limited:	Paul Coxworthy Dean Porter
Counsel for Abitibi Consolidated Company of Canada:	Greg Moores
Counsel for Newfoundland Power Inc.:	Ian Kelly, Q.C. Gerard Hayes

By the Court:

[1] Two appeals come before this Court arising from a preliminary decision of the Newfoundland and Labrador Board of Commissioners of Public Utilities ("Board") in Order No. P.U. 25 (2010) ("Decision") issued August 26, 2010. They come directly to this Court under s. 99 of the *Public Utilities Act*, RSNL 1990, c. P-47 as amended ("*PUB Act*").

[2] Fundamentally, what is at issue in this appeal is whether certain savings generated in a rate stabilization plan established by the Board can be shared among all residential and industrial power consumers on the island portion of the province or only among industrial customers. The appeal engages the interpretation of the Board's governing legislation, in particular, s. 75 of the *PUB Act*, and whether the Board erred in determining it did not have jurisdiction to allocate savings to customers other than certain industrial customers.

[3] The appellant, Newfoundland and Labrador Hydro ("Hydro"), is a Crown corporation and the appellant, the Consumer Advocate ("Advocate"), is a statutorily appointed representative of the interests of domestic and general service customers of both Hydro and Newfoundland Power Inc. ("Newfoundland Power") pursuant to s. 117 of the *PUB Act*. The Advocate does not represent Hydro's industrial customers or the utility, Newfoundland Power. A hearing was conducted following written submissions by interested parties regarding a series of preliminary questions posed by the Board. The questions were raised in the context of a pending general rate application by Hydro affecting its industrial customers to have interim rates for the years 2008, 2009 and 2010 made final ("2009 GRA").

[4] The appellants allege that the Decision unduly restricts the Board's authority to deal with the disposition of certain surplus revenue credits or system savings which have been accrued under a rate stabilization plan ("RSP") in accounts established for tracking cost of service to Hydro's industrial customers for the three year period under consideration. As noted, the characterization of these accounts and the determination of whether customers other than industrial customers can benefit from the disposition of these credits either prospectively or retrospectively is at the core of this appeal.

[5] The appellants allege that the Board erred by fettering its jurisdiction when it ruled in its preliminary determination of the scope of Hydro's 2009 GRA that it was prevented from conferring any benefit from the disposition of systems savings accruing within the RSP for industrial customers on any of its other customers. Specifically, the Board held that the fact that the rates for Hydro's non-industrial customers had been made final for the period 2008 to 2010 barred consideration of any claim of entitlement to the systems savings by non-industrial customers when settling the final rates for industrial customers for the three year period affected by the 2009 GRA.

BACKGROUND

[6] Hydro established the RSP effective January 1, 1986 under a directive from the Provincial Government. The Board modified and approved the RSP. The object of the RSP was to provide rate stability to Hydro's customers through a mechanism designed to eliminate volatility in Hydro's revenue requirements beyond its reasonable expectations.

[7] The RSP provided for adjustments to recover the differences between the forecasted test year costs used to set rates and the actual costs affected by: (i) differences in the price of bunker C fuel affecting the cost of oil-fired power generation at Holyrood, ii) variation in Hydro's hydraulic power generation; and iii) major variations in load consumed by its customers.

[8] These appeals directly affect customers who are on the Interconnected System on the island portion of the Province. These include Hydro's one utility customer, Newfoundland Power and in turn all of Newfoundland Power's customers. These appeals also directly affect Hydro's industrial customers and Hydro's own residential and general service customers on the Island Interconnected System.

[9] There are two major electrical systems operating within the Province. The Island Interconnected System functions as a stand-alone system comprised of various hydro-electric developments and thermal power generated at the Holyrood Thermal Generating Station ("Holyrood"). The Labrador Interconnected System is supplied by Churchill Falls and is connected to the North American power grid. The more remote and isolated areas of the Province, whether on the island or in Labrador, are serviced by individual diesel generating facilities owned and operated by Hydro.

[10] The primary source of electrical power and energy for the Island Interconnected System is hydro-electric with the other major source of power being the Holyrood generating plant which burns bunker C oil purchased by Hydro on the world oil markets. It is much less costly for Hydro to generate electricity on the Island Interconnected System by its hydro-electric sources than it is to generate electricity at Holyrood.

[11] Hydro is the primary generator of electricity in the province. Hydro sells its power to utilities, industrial and its own 35,000 residential and general service customers in over 200 communities across the Province. Newfoundland Power serves over 239,000 residential and commercial customers making up approximately 85% of all electricity customers in the province. Newfoundland Power purchases approximately 90% of its electricity from Hydro and generates the balance from its own smaller hydro electric stations.

[12] Hydro's overall fuel costs at Holyrood on an annual basis can vary significantly. These fuel costs are affected by:

a) the price of a barrel of oil as determined by the world market;

b) the amount of available hydro-electric energy - which essentially is a function of the amount of precipitation; and

c) the amount of energy consumed by the customers on the Island Interconnected System (referred to as "load").

[13] Given the variability that can occur in Hydro's annual fuel costs, a mechanism in the form of the RSP was developed to ensure that Hydro's rates are adequately collecting the cost of fuel that it is purchasing to service the needs of the Island Interconnected System customers. Absent such a mechanism, the rates that are set for Hydro to charge its customers for electricity which are based on forecast costs for the test year, could cause

Hydro to lose or gain considerable sums of money in a given year. At Hydro's last general rate application filed in 2006, a 2007 test year was used as the basis for establishing the electricity rates to be charged by Hydro. At that time, it was known that large increases in oil prices or lower than expected hydrology could create a significant revenue shortfall for Hydro. On the other hand, higher than expected hydrology at its hydro electric generating facilities and lower than expected load consumption by industrial consumers could result in large unexpected revenues.

[14] The RSP provides a mechanism to smooth the effects on rates of increases or decreases in commodity costs over time. The RSP has been modified a number of times since its introduction. However, the current RSP has been in place since Hydro's general rate application in 2003.

[15] Under the RSP, these variables are tracked for the purpose of calculating RSP adjustment rates for Hydro's utility and industrial customers. In the case of Newfoundland Power, Hydro makes an annual application to the Board for approval of the appropriate RSP adjustment to take effect on July 1st of each year. In the case of the industrial customers, the RSP adjustment takes effect on January 1st of each year. The amount of the rate adjustment and whether the adjustment will be a decrease or increase on January 1st or July 1st, as the case may be, depends upon the net activity in the RSP as calculated in accordance with its provisions.

[16] The load variation element of the RSP is of particular significance on these appeals. The load variation - the amount of energy consumed compared to the amount forecast for the test year - works generally in a similar manner to fuel price and hydrology - to the extent that if higher load occurs (i.e., more electrical energy must be generated to meet customers' electricity requirements than was forecast when rates were last set) it results in higher fuel costs at Holyrood and the corresponding amount is owed by customers to the RSP to be recovered in rates in a future period. However, if the load is lower than the test year forecast, it will result in an amount owing to customers from the RSP.

[17] In another way, the load variation provisions work differently from the fuel price and hydrology elements. Load variation can affect the amount of oil that is required to be burned at Holyrood, thereby affecting Hydro's costs. Load variation also has an impact upon the amount of revenue that Hydro receives from its rates. At Hydro's 2003 GRA the RSP was amended so as to place the financial consequences of the load variation on the

customer class whose actual load varied from the test year load forecast. Therefore, in a year in which the industrial customers' load was higher than forecast in the last test year, the effect of the variation would be to cause rate increases for the affected class.

[18] Increased industrial customers' load causes higher rates between GRAs because energy rates for this class are based upon Hydro's average costs of electricity production (e.g. reflecting a mix of cheaper hydro power and more expensive Holyrood power). However, the incremental energy production to actually service the increase in load comes from Holyrood where the cost of production is higher than the average energy cost which the energy rate reflects. Therefore, on each extra kilowatt hour that Hydro sells to fulfill an increased load, Hydro would, without an adjustment mechanism, be actually losing money. While it is collecting more revenue from the industrial customers because of the increased load, the increase in revenue is outstripped by the extra cost to which it is being put in order to supply the extra kilowatt hour. The load variation provisions in the RSP require that customer class which caused the load increase to bear the burden of those costs in a future period so that Hydro is made whole.

[19] On the other hand, if the industrial customers' load were to decrease relative to the test year forecast, the opposite would be the case. That is to say, a decrease in load would cause Hydro to burn less oil than anticipated thereby being able to supply more of the system's requirements with cheaper hydro energy instead of being required to burn the estimated number of barrels of oil that its rates were based upon in the last GRA. In this instance, while Hydro's revenues from the industrial customers would be decreased, so would Hydro's costs. In fact, the avoided costs vastly outstrip the loss in revenue occasioned by the decrease in load. The load variation provisions in the RSP assign to the customer class that caused the load decrease the benefit of these cost savings in a future period. It is this load feature of the RSP that is a key aspect in the factual matrix of these appeals.

[20] At Hydro's 2003 GRA, the participating parties agreed that both the revenue and the fuel amounts related to load variation should be assigned to the customer base within the RSP where the load variation occurred. Previously, revenues were assigned to the RSP based on which customer class caused the load variation but the related fuel costs were allocated between Newfoundland Power and the industrial customers based on the 12 months-to-date energy ratios for each customer class. The change in customer assignment was considered to improve fairness because costs

would now be assigned between Newfoundland Power and industrial customers based on causality.

[21] Hydro's 2006 GRA resulted in a Settlement Agreement which provided for a further review of the RSP (the "2007 RSP Review"). It was anticipated that any changes resulting from the 2007 RSP Review would be implemented by January 1, 2008. The allocation of load variation transfers was one of the items to be addressed in the review. Meanwhile, arising out of Hydro's 2006 GRA, final rates were approved for the industrial customers to be effective January 1, 2007 in Order No. P.U. 8 (2007).

[22] Starting in the fall of 2007, significant events were taking place in the province's pulp and paper sector adversely affecting the load variation of the normal operation of the RSP. In November of 2007, Corner Brook Pulp and Paper Limited shut down a paper machine which resulted in a 22% reduction in load from the industrial customers on the island. In 2008, Abitibi Bowater closed its paper mill at Grand Falls-Windsor. In anticipation of projected volatility in load during the 3 year rate period, Hydro sought and obtained an order from the Board for interim rates for 2008 and 2009 which were effectively sustaining those that were in place for 2007.

[23] A projected rate change that otherwise would have taken place for industrial customers on January 1, 2008 under the established rules, prompted Hydro to take another approach. On December 20, 2007 Hydro applied to the Board for an Order "that the Board approve and make an Interim Order that the rates currently in effect for industrial customers, which were approved in Order No. P.U. 8 (2007) and which are set out in Schedule "A" continue in effect on an interim basis until such time as the Board issues a final order with respect to industrial customers' rates for 2008".

[24] Hydro provided the Board with its rationale for the requested Order in the following terms:

> By Order No. P.U. 40 (2003) the Board approved the manner by which the Rate Stabilization Plan (RSP) is calculated and by which RSP adjustments are applied to the rates charged by Hydro to its Island Interconnected Industrial Customers. Under that Order, Hydro is required to provide an Industrial Customer fuel price projection to the Board and to certain of Hydro's customers by the tenth working day of October each year.

> Due initially to a projected increase in the RSP rate and subsequently to a significant load change of one of Hydro's Industrial Customers, Hydro determined that there was potential volatility in its Industrial Customers' rates both for 2008 and future years. The impact of these changes was deemed to be significant and it was judged to be prudent to further analyze and consider their impact, in conjunction with also determining the final level of year end hydraulic balances, prior to making application to the Board with respect to an appropriate treatment of this issue.
>
> Hydro wishes to have further opportunity to consider the appropriate means to address Industrial Customers' rates issues.

The Board approved the interim rates requested.

[25] On June 30, 2009, Hydro applied to the Board requesting the finalization of rates charged to industrial customers.

[26] In its cover letter accompanying the application, Hydro stated:

> Although the attached Application does not contain any proposed changes, the Board may wish to consider suspension of the existing load variation allocation rules and holding in abeyance current and future load variation amounts until such time as Hydro can develop a proposal to address the current anomalies in the RSP. Hydro anticipates that an application with regard to the RSP load variation can be made prior to the end of 2009.

[27] Since the industrial customers' rates were declared interim effective January 1, 2008 there had been large sums of money accruing in the RSP due to the fuel savings that Hydro was experiencing at Holyrood due to the steep decline in the load of the industrial customers since Hydro's last GRA. Evidence filed in the proceeding before the Board forecast that over the period 2007 to 2010 some $74 million in system savings tied to load would have accrued, with some $68 million accruing since the industrial customers' rates were declared interim.

[28] The load variation balances that have been assigned to the industrial customers under the interim RSP rules produced rate scenarios well beyond reasonable expectations. Using the refunding methods provided by the RSP rules, the forecast average rates for industrial customers for 2010 were projected to be *negative* figures reflecting a scenario where there would be more money to be refunded to customers than energy revenues received from them by Hydro.

[29] The industrial customers claimed entitlement to the entire load variation balance. Based on the available information prior to the preliminary hearing, the current industrial customers were paying approximately $20 million in annual electricity costs. However, $68 million of load variation transfers were accumulating as system savings on an interim basis since January 1, 2008 which represented approximately three and a half times the annual electricity costs of the current industrial customers.

[30] Hydro, Newfoundland Power and the Consumer Advocate in their evidence recommended that the Board allocate these system savings between the industrial customers and Newfoundland Power using a cost of service approach.

[31] The Board advised all parties that the public hearing respecting the 2009 GRA would not proceed and further advised that the Board wished to hold a preliminary hearing into its jurisdiction and authority. Counsel for each of the parties and the Board met and developed the preliminary issues that would be addressed by the Board. These issues were then formally posed to the Board by way of a letter from Hydro's counsel dated June 2, 2010.

[32] The questions posed were:

> Does the Board have the jurisdiction to issue an order which changes how the Rate Stabilization Plan (RSP) operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes? In particular:
>
> - Does legislation or common law give the Board any specific relevant authority or alternatively, restrict the Board's authority?
>
> - What would generally accepted sound public utility practice as set out in s. 4 of the EPCA require?
>
> - Are there any concerns in relation to vested rights, i.e. does the language of the RSP create a right/obligation in each of the customers or customer classes? If so, at what point does this right/obligation accrue? Does this mean that credits/debits allocated to each customer in accordance with the plan are the responsibility of or to the benefit of customers in the class at the time of the accumulation or does the Board have the jurisdiction to order alternative disbursements of the balances?

- Does the issuance of Order Nos. P.U. 34 (2007), P.U. 37 (2008), P.U. 6 (2009), the filing of Hydro's application on June 30, 2009, or any other order of the Board impact the jurisdiction of the Board?

THE BOARD DECISION

[33] The written decision of the Board issued August 26, 2010 was divided into a discussion of deferral accounts and interim orders. The deferral account section dealt primarily with the Board's general jurisdiction over the disposition of balances accumulated in deferral accounts, such as the RSPs. The interim order section dealt more specifically with the Board's jurisdiction under section 75 of the *PUB Act* to deal with balances accumulated due to a difference between interim and final rates.

[34] The Board considered the RSP to be an example of a deferral account. Such an account is used for various purposes in public utility rate regulation to, amongst other things, allow a public utility to maintain its approved rate of return when actual revenues or expenses vary from those that were forecast when rates were set. This would reduce fluctuations in rates charged to consumers of power if such variances were not spread over longer periods of time.

[35] With respect to its jurisdiction over deferral accounts generally the Board stated at p. 8:

> While the Board has jurisdiction in relation to deferral accounts the Board has stated that it views the use of these accounts to be an extraordinary measure … The Board believes that its jurisdiction with respect to deferral accounts is limited by the principles of predictability and fairness, as discussed by the Alberta Court of Appeal in *ATCO [Calgary (City) v. Alberta (Energy and Utilities Board*, 2010 ABCA 132], and does not necessarily extend to changing how balances are calculated and allocated in the past.

[36] The Board continued at p. 9:

> In the Board's view changing how the RSP operated in prior years would be analogous to the situation that Mr. Justice Green suggested might constitute retroactive regulation in *Reference: re s. 101 of the Public Utilities Act (Nfld)* (1998), 164 Nfld & PEIR 60 (Nfld. C.A.) at paragraph 91:

> *The issue, therefore, is not whether the Board may revise the definition of excess revenue and then apply the revised definition to the results of previous years. That might well engage the principle of non-retroactivity.*
>
> (Emphasis in original.)

[37] The Board determined that the interim orders gave the Board the full jurisdiction to change all aspects of the industrial customers' rate, including the power to change the rules and regulations affecting the RSP.

[38] However, having noted that the Hydro applications for interim rates and its 2009 GRA seeking the approval of a final rate for industrial customers had not sought any changes to the RSP, the Board held at p. 9 that the RSP rules applying to allocation of load variations continued to apply:

> In the absence of an application, the Board did not take it upon itself to consider suspending the operation of the load variation allocation rules as suggested by Hydro in its correspondence [that accompanied the June 20, 2009 application for final rates].

[39] The Board then considered the effect on its jurisdiction of the interim rate orders and section 75 of the *PUB Act* which provides in pertinent part:

> **75.** (1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.
>
> ....
>
> (3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be
>
> (a) refunded to the customers of the public utility; or
>
> (b) placed in a reserve fund for the purpose that may be approved by the board.

[40] Addressing the position of Hydro, Newfoundland Power and the Consumer Advocate, the Board stated:

> Hydro, Newfoundland Power and the Consumer Advocate suggest that [s. 75] permits the Board to place any excess revenue paid by the Industrial Customer group as a result of the interim rates into an account for the possible benefit of [another] customer group. This interpretation would not appear to be consistent

with the scheme of the legislation generally or with generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory. The Board has reference to the comments of Mr. Justice Green in Reference Re: s. 101 of the Public Utilities Act (Nfld.) (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. CA) ... at paragraph 18 ...

[41] The Board then concluded at pp. 11-12:

> Reading s. 75 in the overall context of the legislation and regulatory structure the Board believes that a purposeful interpretation would require that the refund or the reserve fund must, to the extent possible, be for the benefit of the customer group which was found to have paid the excess revenue. There may be times when it is not practical to refund to the customers that paid the excess, for example where the amount is nominal or the customers cannot be found. The Board believes that, in the absence of extraordinary circumstances, a finding that interim rates for a group of customers were in excess of reasonable rates would require that the same customer group be effectively charged the reasonable rates through a refund or the use of a reserve account.

[42] In response to the position of the industrial customers that the ability to set final rates under s. 75 of the *PUB Act* did not authorize the Board to revise the RSP rules that applied to the industrial customers, the Board concluded at p. 13:

> The interim orders clearly provide the Board with the full jurisdiction to, in the words of the Supreme Court of Canada, "*modify in its entirety the rate structure*" for the Industrial Customer group, which includes all aspects of the Industrial Customers' rate, including the RSP rate. The Board does not accept the position of the Industrial Customers that the Board has no power to change the rules and regulations affecting the RSP.

[43] However, the Board held at p. 14 that:

(i) it has jurisdiction to set "just and reasonable rates" for the Industrial Customers for 2008 and 2009, including the determination of the industrial customers' RSP rates and the manner of operation of the Industrial Customer RSP for those years,

(ii) "given the manner in which this matter was brought forward", it has no jurisdiction to change the manner in which the Newfoundland Power RSP operated in prior years, either in terms of the rates charged or the resulting balances, and

(iii) it has jurisdiction to determine whether overpayments by the Industrial Customers resulting from the interim rates should be refunded to the industrial customer group or placed in a reserve account to the benefit of that customer group.

[44] Although the Board ultimately determined that its jurisdiction to deal with the RSP balance was limited to determining "...whether any overpayment as a result of the interim rates is to be refunded to the Industrial Customer group or placed in a reserve account to the benefit of the Industrial Customer group", the Board essentially determined that the accrued balance of system savings had to be used for the benefit of the Industrial Customer class only and could not be applied to the benefit of other customers on the Island Interconnected System or used for other purposes in connection with the operation of the Island Interconnected System.

LEAVE TO APPEAL

[45] Section 99 of the *PUB Act* provides that an appeal from an order of the Board can be taken directly to the Court of Appeal upon a question of the Board's jurisdiction or upon a question of law, but only with leave of a judge of the Court.

[46] Leave to appeal will only be granted: (i) where it is apparent that the question on appeal is one of jurisdiction or law; and (ii) where the appellant can show "a reasonably arguable case for success" on the appeal: *Consumer Advocate v. Newfoundland Power Inc.*, 2006 NLCA 20, 255 Nfld. & P.E.I.R. 234, per Cameron J.A. at para. 10; *Labrador City (Town) et al. v. Newfoundland and Labrador Hydro Inc.* (2004), 241 Nfld. & P.E.I.R. 81 (NLCA) at para. 5.

[47] It is manifest from the notices of appeal that have been filed that each of the stated issues involves a question as to whether the Board erred in determining its jurisdiction or erred in law in reaching the Decision it did. Given the position taken by the respondents and the Board in not opposing leave, it can be presumed that there is a reasonably arguable case to be made on appeal.

[48] In this case, on the application for leave, all parties, except the Board, who were provided with notice pursuant to s. 99 (2), consented to leave being granted and, in the case of the Board, it stated that it "does not object" to the granting of leave. Accordingly, on a preliminary application, both the Consumer Advocate and Hydro were granted leave to appeal.

[49] Newfoundland Power supports Hydro and the Consumer Advocate on these appeals. Various industrial customers support the decision of the Board. The Board itself was also represented by counsel in support of the Decision.

ISSUES

[50] The following issues arise on these appeals:

(a) What is the appropriate standard of review to be applied to the Board's decision?

(b) What is the extent of the Board's jurisdiction to change the operation of the RSP, particularly with respect to the operation of the load variation component, and to allocate load variation balances accrued to Industrial Customers before and after the interim order effective January 1, 2008 for the benefit of other customers on the Island Interconnected System?

(c) Is the Board's jurisdiction limited to determining whether any overpayment as a result of the interim rates is to be refunded to the industrial customer group or placed in a reserve account for the benefit of the industrial customer group?

[51] The main focus of this appeal is the Board's determination that it did not have the jurisdiction to allocate balances accrued under the RSP rules, while the industrial customer rates were interim, to other customer classes. The practical effect of this determination is that the system savings which accrued in what was characterized as a "deferral account" while rates were interim must flow to the exclusive benefit of the industrial customers.

ANALYSIS

(a) Statutory Framework and Basic Principles

[52] An outline of the Board's statutory framework and the nature of deferred accounts and interim rates will assist in the resolution of the issues before the Court.

[53] In *Reference Re Section 101 of the Public Utilities Act (Nfld.)* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld.C.A.) ("*Stated Case*"), Green J.A. noted the Board's statutory basis as follows:

> [13] The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

[54] The Board's jurisdiction and powers are governed by the *PUB Act* and the *Electrical Power Control Act, 1994*, SNL 1994 c. E-5.1 (*"EPC Act"*). The *PUB Act* confers on the Board the power for "the general supervision of all public utilities". Specifically the Board has sole authority to approve the rates charged by public utilities – ss. 70(1) and 71 – and the power to approve interim rates unilaterally – s. 75. The breadth of the Board's authority over rates is illustrated by s. 76 which confers the right to rescind or alter rates, s. 82 which confers the right to investigate a rate, where the Board believes that it is unreasonable or unjustly discriminatory, and ss. 84-87 which authorize the Board, following a formal complaint, to investigate and to cancel rates and void contracts where rates are found to be unjust, unreasonable, insufficient or unjustly discriminatory.

[55] In considering the extent of the Board's powers under the *PUB Act* reference must be made to s. 118 which states:

> 118.(1) This Act shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the board.
>
> (2)The board created has, in addition to the powers specified in this Act, all additional, implied and incidental powers which may be appropriate or necessary to carry out all the powers specified in this Act.
>
> .....

[56] The *EPC Act* states the electrical power policy of the province in s. 3. It obligates the Board to implement that policy as it carries out its duties and exercises its powers under the *PUB Act* and in so doing s. 4 requires the Board to apply tests which are consistent with "generally accepted sound public utility practice".

[57] In the *Stated Case* Green J.A. stated some of the general principles applicable to the interpretation of the *PUB Act* and *EPC Act* as follows:

[36] ...

1. The Act *(PUB Act)* should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;

2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;

3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

[58] Though the *Stated Case* concerned a utility's rate of return, the principles stated above, including those in sub-paragraphs 5 and 6, apply in a similar manner to the determination of rates for a utility's customers.

[59] The *EPC Act* requires that, wherever practicable, rates are to be established based on forecast costs – s. 3(a)(ii) – and utilizing tests which are consistent with "generally accepted sound public utility practice" – s. 4. The

rates policy stipulated in s. 3 of the *EPC Act* is consistent with the widely accepted principle of ratemaking that rates should be set prospectively, i.e., retroactive ratemaking should generally not be permitted. That principle and the distinction between retroactive and retrospective ratemaking were summarized recently in *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 ("*Atco Gas*") in the following paragraphs of the majority decision:

> [46] A brief overview of some central principles of ratemaking, including the related concepts of retroactive and retrospective ratemaking, is necessary. Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd. v. Saratoga Processing Co.* (1981), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at 691 and 699 ("*Northwestern Utilities*").
>
> [47] Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at 1749 ("*Bell Canada 1989*"). Utility regulators cannot retroactively change rates (*Stores Block* at para. 71) because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.
>
> [48] Retrospective ratemaking, in contrast, imposes on the utility's current consumers shortfalls (or surpluses) incurred by previous generations of consumers. It is generally prohibited because it creates inequities or improper subsidizations as between past and present consumers (who may not be the same). "[T]oday's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers": Yvonne Penning, *"The 1986 Bell Rate Case: Can Economic Policy and Legal Formalism be Reconciled"* (1989), 47(2) U.T. Fac. L. Rev. 607 at 610. This is sometimes referred to as the problem of inter-generational equity (which the Board discusses at p. 12 of the Limitations Decision reproduced at para. 23).
>
> [49] Sometimes *retrospective* ratemaking is referred to as *retroactive* ratemaking. This is because rates imposed on a future generation of consumers, while prospective, create obligations in respect of past transactions, and in this sense they are retroactive: *City of Edmonton* at 402.

See also *Stated Case*, paragraphs 33 and 80.

[60] It is nevertheless clear from the authorities that the above noted principle of prospective ratemaking cannot bar the use of two widely used

regulatory tools authorized by applicable legislation though the same may be thought to have an element of retrospectivity. These two are interim rates and deferral accounts. See *Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 *(Bell Canada 1989); Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 *(Bell Canada 2009)*.

[61] The power of the Board to authorize interim rates is granted in s. 75 of the *PUB Act*. That section allows the board to set rates expeditiously without full evidence and submissions, such rates being subject to review and possible modification in the final order of the Board, as is expressly provided for in subsections 75(2) and (3). Depending on the nature of the final order of the board it may have a retroactive or retrospective effect. In *Bell Canada 1989*, Gonthier J. stated:

> The statutory scheme established by the *Railway Act* and the *National Transportation Act* is such that one of the differences between interim and final orders must be that interim decisions may be reviewed and modified in a retrospective manner by a final decision. It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. I hasten to add that the words "further directions" do not have any magical, retrospective content. Under the *Railway Act* and the *National Transportation Act*, final orders are subject to "further [prospective] directions" as well. It is the interim nature of the order which makes it subject to further retrospective directions.
>
> (p. 1752)
>
> ...The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order. As a result, it cannot be said that the rate review process begins at the date of the final hearing; instead, the rate review begins when the appellant sets interim rates pending a final decision on the merits. As was stated in *obiter* in *Re Eurocan Pulp & Paper Co. and British Columbia Energy Commission* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), with respect to a similar though not identical legislative scheme, the power to make interim orders effectively implies the power to make orders effective from the date of the beginning of the proceedings. In turn, this power must comprise the power to make appropriate orders for the purpose of remedying any discrepancy between the rate of return yielded by the interim rates and the rate of return allowed in the final

> decision for the period during which they are in effect so as to achieve just and reasonable rates throughout that period.
>
> (p. 1761)

[62] The statutory scheme of the *PUB Act* is to the same effect, as noted in the *Stated Case* as follows:

> [87] The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superceded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by s. 75(3) of the **Act**.

[63] The operation of deferral accounts is permissible under the existing regulatory scheme in this province regardless of whether it might be argued they incidentally have retrospective or retroactive effect. Deferral accounts are utilized in public utility regulation to deal with the effects of uncertain or volatile costs in a manner that ensures that rates are reasonable, not unjustly discriminatory and that the utility earns a just and reasonable return. They permit the recovery or rebate in a subsequent period of any deficiency or excess between forecast and actual costs. Regulatory regimes generally permit the operation of deferral accounts. See *Bell Canada 2009* at paras. 54-55; *Atco Gas* at paras. 33-44; *City of Edmonton v. Northwestern Utilities Ltd.*, [1961] S.C.R. 392 at p. 406. It was properly acknowledged by all parties that the *PUB Act* authorizes the utilization of deferral accounts. See *Stated Case* at paras. 93-98.

[64] In *Bell Canada 2009* the use of deferral accounts to ensure that rates return to a utility the actual - not forecast - costs,was held to preclude a finding of retroactivity or retrospectivity:

> [63] In my view, the credits ordered out of the deferral accounts in the case before us are neither retroactive nor retrospective. They do not vary the original rate as approved, which included the deferral accounts, nor do they seek to remedy a deficiency in the rate order through later measures, since these credits or reductions were contemplated as a possible disposition of the deferral account balances from the beginning. These funds can properly be characterized as encumbered revenues, because the rates *always* remained subject to the deferral

> accounts mechanism established in the Price Caps Decision. The use of deferral accounts therefore precludes a finding of retroactivity or retrospectivity. Furthermore, using deferral accounts to account for the difference between forecast and actual costs and revenues has traditionally been held not to constitute retroactive rate-setting (*EPCOR Generation Inc. v. Energy and Utilities Board*, 2003 ABCA 374, 346 A.R. 281, at para. 12, and *Reference Re Section 101 of the Public Utilities Act* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.), at paras. 97-98 and 175).
>
> (Emphasis added.)

[65] As stated, funds in a deferral account can properly be characterized as encumbered revenues as the rates are subject to the deferral account mechanisms established by the regulatory authority.

(b) The Regulatory Context

[66] This appeal concerns the legal authority of the Board respecting the disposition of amounts accumulating in a deferral account, Hydro's RSP, while interim orders were in effect from January 1, 2008.

[67] Final rates for the Industrial Customers were last approved by the Board in Order No. P.U. 8 (2007) effective January 1, 2007. In the same year final rates for Newfoundland Power were established by Order No. P.U. 11 (2007) effective July 1, 2007. In the following years prior to the next GRA under the current RSP Hydro would have been expected to make annual applications to the Board to reflect the appropriate RSP adjustments to the rates. As noted previously, for the Industrial Customers the RSP adjustment would take effect as of January 1st each year and for Newfoundland Power the adjustments would take effect as of July 1st each year.

[68] Those adjustments have not been made for the Industrial Customers since July 1, 2007. For the stated reason of needing to assess the effect of significant changes in Industrial Customer load, Hydro applied on December 20, 2007 for the continuation on an interim basis of the Industrial Customer rates then in effect. By Order No. P.U. 34 (2007) the Board approved the required interim rates for 2008. In December 11, 2008 Hydro again applied to the Industrial Customer rates over an interim basis in view of inevitable changes to Industrial Customer load consequent upon closure of a paper mill. By Order P.U. 37 (2008) the Board approved the continuation of the rates until March 31, 2009, and subsequently under Order No. P.U. 6 (2009)

the duration of the interim order was extended to June 30, 2009. In the meantime, Newfoundland Power's rates for its customers had been made final.

[69] On June 30, 2009 Hydro applied to have the existing Industrial Customer rates made final. It was at that point that the issue of whether the Board had the legal authority to change the manner of operation of the RSP to benefit customers, other than industrial customers, in prior years when those other customers' rates had already been finalized, arose.

(c) Standard of Review

[70] As this tribunal appeal is taken from orders of the Board directly to this Court, it is necessary to apply a standard of review analysis in accordance with the principles in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and subsequent cases, to determine the scope of review that this Court may undertake.

[71] As *Dunsmuir* pointed out, it is not necessary to undertake a full standard of review analysis if prior "jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question" (paragraph 62). It is only when the inquiry into existing jurisprudence "proves unfruitful" that the court must proceed to a full analysis of the factors identified in *Dunsmuir* that make it possible to identify the proper standard of review.

[72] In the case of the Board, there is prior jurisprudence that has addressed the standard of review of Board decisions. In *Labrador City,* Cameron J.A. concluded on an application for leave to appeal, that the issues to be dealt with on the appeal, if leave were to be given (whether a common rate policy for electrical customers in Labrador was non-discriminatory; and whether the Board erred in failing to consider certain arguments submitted to it) should be reviewed on a standard of reasonableness. In like manner, in *Newfoundland Power*, Cameron J.A. held, on another application for leave, that an issue involving a contextual interpretation of a previous Board order, while involving a question of law, should nevertheless be reviewed on a standard of reasonableness. In both of these cases, the judge had to consider whether, as a condition of granting leave, the proposed appellant had a "reasonably arguable case" and in deciding that question, consideration should be given to the standard of review to be applied by the Court, if leave were granted, "in respect of the particular issues raised" (*Newfoundland Power*, paragraph 10; and *Labrador City*, paragraph 5).

[73] We do not consider the *Newfoundland Power* and *Labrador City* cases to be determinative of the issue of the standard of review in this case because: (i) they were decided before *Dunsmuir*; (ii) they are not decisions of a full panel; (iii) they were decided in the context of applications for leave to appeal, where the need for a definitive determination of the issue of standard of review was not directly engaged; and (iv) the issues being reviewed in those cases were dissimilar from the particular issues raised in the current case. They nevertheless remain of some assistance, insofar as they express views on the general structure of the legislation and the context in which the Board operates.

[74] Accordingly, it is necessary to engage in an analysis of the factors that have been identified in other cases to determine the proper standard of review (correctness or reasonableness) in this particular case.

[75] There are two statutory mechanisms whereby issues dealt with by the Board can be considered by this Court. They are contained in sections 99, 101 and 102 of the *PUB Act*:

> 99.(1) An appeal lies to the Court of Appeal from an order of the board upon a question as to its jurisdiction or upon a question of law …
>
> 101. The board may of its own motion or upon the application of a party, …state a case in writing for the opinion of the Court of Appeal upon a question which in the opinion of the board is a question of law and a similar reference may also be made at the request of the Lieutenant-Governor in Council.
>
> 102. The Court of Appeal shall hear and determine the question of law arising in a case stated under section 101 and remit the matter to the board with the opinion of the court attached.

[76] In matters brought before the Court under both s. 99 and s. 101, the focus is on considerations involving "a question of law". In s. 99, there is the additional focus on "a question as to [the board's] jurisdiction" but that is a specialized form of legal question as well. In references under s. 101, in which the Court's opinion is sought on questions of law, the Court is obligated, pursuant to s. 102, to provide its own view on what it considers to be the "correct" answer to the question posed, as was done in the *Stated Case*. By enacting ss. 101 and 102, the legislature has determined it appropriate for the Board to defer to the Court's opinion on questions of law, rather than the Court deferring to the expertise of the Board in determining those types of questions.

[77] On an appeal brought under s. 99 where the focus is also on "a question of law", the question arises as to whether the same standard for determining questions of law should be applied or whether something more restrictive – involving a degree of deference to the original decision-maker – should be employed. On one viewpoint, it could be said that if the legislature intended, in its similar characterization of the types of questions that could be raised under s. 99 and s. 101, that there should be more deference accorded under s. 99, it could have said so, but it did not. On the other side, it could be said that the process under s. 99 is different, involving as it does, a challenge to decisions of the Board that the Board believes are correct and does not involve the Board itself questioning its own view. In such situations, more deference might be justifiable.

[78] That said by way of preliminary observation, it is now necessary to turn to a consideration of the "contextual guideposts" (per Fish J. in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at paragraph 41) that are to be applied to assist in determining the scope of review. The basic factors to consider were re-iterated in *Dunsmuir* to include: (i) the presence or absence of a privative clause; (ii) the purpose of the tribunal as determined by interpretation of its enabling legislation; (iii) the nature of the question at issue; and (iv) the expertise of the tribunal (paragraph 64). These factors are non-exhaustive: *Nor-Man* at paragraph 40.

[79] It should be noted at the outset that the contextual factors are designed to assist in determining the intention of the legislature as to the intended scope of review. In the end, what is sought is to discern whether the legislature intended to limit the degree of scrutiny of the tribunal's decision by the court.

[80] Turning to the first guidepost – the presence or absence of a privative clause – the restriction placed by s. 99 on the Court by limiting appeals to questions of jurisdiction and law and effectively excluding appeals respecting factual matters and inextricably intertwined questions of mixed law and fact is effectively a privative clause regarding those factually-related matters. On the other hand, inasmuch as the legislation allows appeals on jurisdiction and law, it is not a privative clause in respect of those matters.

[81] In *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 S.C.R. 476 at paragraph 11, Gonthier J., for the majority , observed that: "While the presence of a statutory right of appeal is not decisive of a correctness standard … it is a factor suggesting a more

searching standard of review". See also, Michel Bastarache, "Modernizing Judicial Review" (2009), 22 C.J.A.L.P. 227 at p. 234. It must also be recognized, however, that the absence of a privative clause does not necessarily lead to the conclusion that a high level of scrutiny is necessarily intended "where other factors bespeak a low standard" (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998]1 S.C.R. 982, per Bastarache J. at paragraphs 30, 37). That said, in the context of the legislative scheme involved in this case, this first factor, considered alone, points towards a correctness standard rather than a deferential one on issues of law and jurisdiction.

[82] As to the second guidepost – the purpose of the tribunal – Cameron J.A. observed in *Labrador City* that:

> [17] The Board is comprised of full and part-time members who have different backgrounds. This would include engineers and accountants, for example. It has a professional staff. Its role is a many-faceted one, including the supervision of all public utilities and the regulation of rates, tolls and charges. Policy, both that imposed by legislation and that developed by the Board, plays a major role in the Board's performance of its duties. Some of those policies are developed over time. There can be no doubt that the Board is a specialized tribunal with expertise in matters related to the regulation of electrical utilities. In questions related to the determination of rates, which involve the application of industry practice, the Board is clearly in a position superior to that of the Court. This would suggest a more deferential standard of review.
>
> ...
>
> [19] ... The *Public Utilities Act* and the *Electrical Power Control Act, 1994* provide a scheme for the regulation of electrical utilities which requires the Board to address policy issues and to balance interests. They operate in tandem. This factor suggest[s] a more deferential standard to the Board's decisions.

These observations are equally applicable today. I would add the caveat, however, that the deference to be shown is in relation to the area that is entrusted to the Board for regulation and where the Board's superior expertise in the understanding, development and application of policy and the application of regulatory legal standards and balancing of interests exists.

[83] In *Council for Licensed Practical Nurses v. Walsh*, 2010 NLCA 11 Welsh J.A. at paragraph 11 pointed out that the existence of a right of appeal does not automatically mean that a standard of correctness will apply where the nature of the question (in *Walsh*, one of mixed law and fact) engages the

expertise of the tribunal. That brings us to the two remaining factors to be considered: nature of the issue and tribunal expertise.

[84] With respect to the third factor – the nature of the issue – it is important to appreciate that "different standards of review will apply to different legal questions depending on the nature of the question to be determined and the relative expertise of the tribunal in those particular matters." (per Major J. in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.,* 2011 SCC 36, [2001] 2 S.C.R. 100 at paragraph 27.

[85] It is now recognized that deference should be shown to many types of tribunal decisions even though they involve a question of law. This is especially so where a specialized tribunal, in the course of carrying out its statutory duties, is interpreting its "home statute" within its area of expertise. See, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, per Fish J. at paragraph 37; *Celgene Corp v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 per Abella J. at paragraph 34. In fact, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 S.C.R. 654, Rothstein J., writing for the majority, went so far as to say, at paragraph 39, that: "[w]hen considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness."

[86] That said, there must remain, if the rule of law is to be given effect, an area where a statutory delegate must be required to make decisions that, on review by the superior courts, must be correct. In *Alliance Pipeline*, Fish J., writing for a majority of eight, identified the following areas where correctness still has application:

> [26] … The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" …; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" …

[87] In the *Alberta Teachers' Association* case, the Supreme Court again recognized that the principle that deference will be shown to tribunal decisions interpreting their home statutes applies "unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply" (paragraph 30), i.e. the four categories identified by Fish J. in *Alliance Pipeline*.

[88] *Alberta Teachers' Association* also stresses that the category of "true questions of jurisdiction or *vires*" is a very narrow one (paragraph 33) and that Courts should not be too quick to brand a legal question as jurisdictional and thereby revert to the interventionist attitudes towards judicial review that obtained prior to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Rothstein J. explained:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on a particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction... [I]t is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity", should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[89] Nothing written in *Alberta Teachers' Association* has eliminated true questions of jurisdiction or *vires* – narrow though that category may be – as attracting a correctness standard of review. The real question is what in essence constitutes a true question of jurisdiction or *vires*? Although Rothstein J. confessed in *Alberta Teachers' Association* that he was "unable to provide a definition of what might constitute a true question of jurisdiction" (paragraph 42), reference to *Dunsmuir* is nevertheless helpful. There, Bastarache and Lebel JJ. stated:

> [59] ... "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.

[90] In the instant case, it was the Board that determined that before it could hear Hydro's rate application (something that was clearly within its jurisdiction to hear) a "preliminary hearing" had to be held to determine the question set out previously in paragraph 32 of this decision. The formulation specifically raised the question:

> Does the Board have *jurisdiction* to issue an order which changes how the Rate Stabilization Plan (RSP) operated before the date of the order and, if so, does this

> *jurisdiction* extend to any aspect of the operation of the RSP, including the rate charged to customers, the determination of the balance(s) in the RSP, and how these balances are allocated to customers or customer classes?
>
> (Emphasis added.)

[91] In its Decision, the Board described the preliminary hearing as follows:

> The preliminary hearing was held to receive submissions from the parties on the question of whether the Board has the *jurisdiction* to change the manner in which the RSP operated, including the rates charged, the determination of the balance(s) in the RSP and how these balances are allocated to customer classes. This question of *jurisdiction* is raised in the context of the interim orders issued by the Board for Industrial Customer rates since December 2007.
>
> (Emphasis added.)

[92] The parties at the preliminary hearing divided as to whether the Board had legal authority to make an order dealing with the money in the RSP that would include residential customers, as well as industrial customers, as beneficiaries. The Board described the difference as follows:

> All parties agree that the Board has the *jurisdiction* to set final rates for the Industrial Customers as of January 1, 2008. Hydro, Newfoundland Power and the Consumer Advocate submit that, in establishing those rates, *the Board also has jurisdiction* to deal with the manner of how those rates, and in particular the RSP rates, are calculated as of the date of any interim order, including the disposition of any balances in the RSP arising. The Industrial Customers submit that *s. 75 of the Act only allows the Board to set interim rates* and that the rules and regulations affecting those rates cannot be made interim. The Industrial Customers argue that the Board's *jurisdiction* with respect to the disposition of any balances in the RSP is confined to the existing RSP rules and regulations.
>
> (Underlining added.)

Noting that the RSP was a type of "deferral account", the Board approached this issue by reference to, amongst other things, the scope of the authority granted by s. 75 of the *PUB Act*, as well as the underlying principles of utility regulation, derived in part from this Court's decision in the *Stated Case* as well as other jurisprudence.

[93] The Board's conclusions, reproduced in paragraph 43 of this decision, were also stated in jurisdictional terms. In particular, note is taken of the statement, "... *the Board does not have jurisdiction* to change how the

Newfoundland Power RSP operated in prior years, either in terms of the rates charged or the resulting balances" (Italics added.). While it is true that in the elaboration of its reasons leading to this conclusion the Board purported to rely on underlying principles and policies of utility regulation – matters with which it has great familiarity and some expertise – in the end the conclusion reached was that the Board had no jurisdiction, in the sense of legal authority, to distribute deferral account balances, and in particular the RSP in question, to customers other than industrial customers or to otherwise benefit them in the context or orders setting interim rates.

[94] We agree with counsel for Newfoundland Power, who submitted:

> The issue that the Board stated for itself was a true question of jurisdiction or *vires*. It engaged the question of what the Board had the legal power and authority to do, not what the Board should do as a matter of regulatory judgment and decision-making. The issue was engaged on a preliminary hearing before the Board proceeded to a hearing on the merits.
>
> (Paragraph 122, Newfoundland Power's Factum.)

[95] If the Board is incorrect on this issue, its decision in effect would amount to declining to exercise an authority it has by law (i.e. a "wrongful decline of jurisdiction", as referred to by Bastarache and Lebel JJ. in *Dunsmuir*, quoted above). The result, if incorrect, would be the shutting out of a large class of power consumers from the benefits of the legislative scheme being administered by the Board. The issue, therefore, of the authority of the Board to benefit customers other than industrial customers through regulating a deferral account like the RSP under s. 75 in the context of interim orders has all the hallmarks of a true question of jurisdiction.

[96] In *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2010 ABCA 236, which dealt with a statutory appeal from a decision of the Alberta Energy and Utilities Board on questions of law and jurisdiction, the court confirmed that despite the general expertise of the Board and regulatory purpose of the legislation, the "key factor" was the nature of the questions raised on the appeal (whether the Board should have referred to investigate and hold a hearing into a complaint and, instead, summarily dismissed it). The court concluded that the question of law relating to the right of the Board to refuse to investigate or hold a hearing was an important question of law that did not engage the specialized expertise of the Board. The Court stated:

> [29] ... [T]he legislation provides for a right of appeal on questions of law and, in our view, because this is a question of the proper interpretation of the Board's right to refuse to act on a complaint, the Board must be correct.

[97] In similar manner in the instant case, because this is a question of the proper interpretation of the Board's right to decline, according to law, to deal with a deferral account, in the context of interim rates, for the benefit of certain classes of customers, the Board should also be correct because the matter involves the jurisdiction of the Board.

[98] Counsel for the Board submitted, however, that a key consideration differentiating the Board's decision in this case from a true question of jurisdiction is the statutory direction in the *Electrical Power Control Act, 1994*, s. 4 to apply "generally accepted sound public utility practice" to the implementation of the power policy of the province, something that falls within the expertise of the Board. That argument, however, has no application to the issue in this case. This is not a case where the Board purported to make a determination that, as a matter of sound public utility practice, it *should not* exercise its powers in a certain way; rather, it is a case where the Board purported to determine that it *could not* do so.

[99] To determine whether the Board *could* exercise its authority in the circumstances of this case, the Board had to interpret s. 75 in light of the underlying principles of utility regulation (such as the principle against retroactivity). There is nothing in s. 75 of a technical nature that requires the Board's expertise in its construction. Indeed, the underlying principles which the Board purported to apply are those which were pronounced upon by this Court in the *Stated Case*. As noted previously, the results of stated cases brought under s. 101 require the Board to defer to the view of the Court rather than the other way around. That would include the Court subsequently pronouncing on the meaning of what it said in earlier jurisprudence. The Court is therefore in as good a position as the Board to determine the scope of s. 75 insofar as it confers legal authority on the Board.

[100] In *Bell Canada 1989*, which involved a statutory appeal from the Canadian Radio-Television and Communications Commission to the Federal Court of Appeal on questions of law or jurisdiction, where the issues, as ultimately stated by the Supreme Court of Canada, were whether the Commission had the "legislative authority" to review revenues made by Bell Canada during a period when interim rates were in force and whether the Commission had "jurisdiction" to make an order compelling Bell to grant a one-time credit to its customers, the Court, recognizing that deference

should be given to the Commission's decisions on issues which fell within its area of expertise, nevertheless held that the issues at play were jurisdictional and were not within the Commission's area of expertise. Gonthier J. explained at p. 1747:

> In this case, the respondent is challenging the appellant's decision on a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the appellant when it makes interim decisions. ... It is ... a question of jurisdiction because it involves an inquiry into whether the appellant had the power to make a one-time credit order.
>
> Except as regards the choice, amongst remedies available to the appellant, of the most appropriate remedy to achieve the goal of just and reasonable rates throughout the interim period, the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise ...

[101] The decision in the foregoing case can usefully be contrasted with *Bell Canada 2009* where the issue was the appropriateness of the manner in which the Commission exercised its rate-setting jurisdiction in directing the allocation of certain funds to various purposes. In that, case, unlike the earlier *Bell Canada 1989*, the question was not whether the Commission had the legal authority to order certain dispositions but whether its choice of methodology was appropriate, something the Court held was at the "core" of the Commission's specialized expertise. As a result, a deferential standard of review was employed.

[102] The instant case is more akin to the 1989 decision. Here, the core of the dispute is the Board's decision that it did not have the jurisdiction, or legal authority, to allocate balances accrued under RSP rules to other classes in circumstances where industrial customers' rates were interim.

[103] We conclude, therefore, that the issue before the Board, as stated in its decision to hold a preliminary hearing, in the arguments made at the hearing, in the Board's formulation of the issues in its Decision and in the conclusions it reached, was a true question of jurisdiction and should be reviewed on a standard of correctness.

[104] There is, of course, a fourth factor to be considered – the expertise of the Board. However, in light of the conclusion reached above, little more need be said. As noted in *Barrie Public Utilities*, "The proper concern of the reviewing court is not the expertise of the decision-maker in general, but its expertise relative to that of the court itself *vis-à-vis* the particular issue" (per Gonthier J. at paragraph 12).

[105] There is certainly little doubt that the Board is regarded as a specialized tribunal with expertise in the area of regulation of electrical utilities and the establishment and approval of rates, tolls and charges. As noted in the *Labrador City* case, the legislative scheme requires the Board to develop and apply policy in the course of its work. Further, s. 6 of the *PUB Act* requires the Lieutenant-Governor in Council, when making appointments to the Board, to "take into consideration the need of the board to be composed of commissioners who have expertise in law, engineering, accountancy and finance." It is clear that the legislature intended the Board to be a tribunal with specialized expertise within the field of its legislative mandate.

[106] As pointed out in the *Bell Canada 1989* decision, however, the Board is not to be regarded as superior to the Court in respect of questions of a true jurisdictional nature. With respect to the issues engaged in this appeal, therefore, the fact that the Board is a specialized tribunal within the area of its mandate does not call for deference to its decisions relating to true jurisdictional matters.

[107] Taking all factors together, there should be appellate review of the Decision on a correctness standard.

(d) The Board's Approach

[108] In the context of an application by Hydro that previously-approved interim rates for certain industrial customers be made final, the Board determined that, by way of preliminary hearing, the parties should first address whether the Board had "jurisdiction to issue an order which changes how the ... RSP operated before the date of the order and, if so, does this jurisdiction extend to any aspect of the RSP, including ... how these balances are allocated to customers or customer classes."

[109] The Board appeared to be concerned, amongst other things, that a change to the RSP that could involve customers, other than industrial customers, potentially benefiting from any change in the RSP rules even though those other customers' rates were, for the relevant period, no longer interim, was not permissible. The Board was also concerned with whether exercising such a jurisdiction, if it existed, might offend the presumption against retroactivity.

[110] The Board described the position of Hydro, Newfoundland Power and the Consumer Advocate as follows:

> Hydro, Newfoundland Power and the Consumer Advocate submit that, in establishing these final rates, the Board also has the jurisdiction to deal with the manner of how those rates, and in particular the RSP rates, are calculated as of the date of any interim order, including the disposition of any balances in the RSP arising.
>
> (p.7)

[111] By contrast, the Industrial Customers took the position, in the view of the Board, that although the Board could set interim rates, "the rules and regulations affecting those rates cannot be made interim" and that "the Board's jurisdiction with respect to the disposition of any balances in the RSP is confined to the existing RSP rules and regulations". Put another way, it meant that the balances in the RSP could not be distributed to anyone other than the Industrial Customers under the guise of making interim rates for Industrial Customers final when other customers' rates had already been made final.

[112] The Board restated the "fundamental question" as follows: "how an established deferral account, such as the RSP, should be treated by the Board in the context of interim orders affecting the balances in the account" (p.7)

[113] The Board's approach to the questions it had posed for preliminary decision essentially involved a consideration of three matters:

1. The nature of deferral accounts generally and how they could be disposed of;

2. The impact of interim decision-making on the disposition of deferral accounts;

3. The impact of how, procedurally, the issue had been brought before the Board.

Although interrelated, it is necessary to consider each of these matters in turn. In fact, the procedural issues in item three cut across the Board's consideration of the other two items as well.

(i) Deferral Accounts

[114] A deferral account in utility regulatory practice is an accounting practice whereby a separate account is used to

> [54] ... "[e]nable a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year". They have traditionally protected against future eventualities, particularly the difference between forecasted and actual costs and revenues, allowing a regulator to shift costs and expenses from one regulatory period to another.
>
> (Bell Canada 2009.)

[115] As discussed previously, use of such accounts helps to smooth out the occurrence of unexpected or currently unknown costs or revenues and to provide rate stability to customers. Deferral accounts are regarded as "accepted regulatory tools" to be operated as part of rate-setting powers: *Bell Canada 2009*, paragraph 54. As noted earlier, the proper use of deferral accounts does not involve violation of the principle against retroactivity or retrospectivity.

[116] Implicit in the creation of deferral accounts is the power of the regulator to order the disposition of the funds contained in them: *Bell Canada 2009*, paragraph 56. In *Bell Canada 2009,* for example, the Supreme Court held that deferral account balances representing the difference between certain telephone rates actually charged by local exchange carriers and those determined by a price-cap formula ordained by the regulator could be used to expand high-speed broadband internet services in remote and local communities, to improve accessibility for individuals with disabilities and to give a one-time credit to certain residential subscribers.

[117] The Board determined that the RSP was a form of deferral account because it "allows for the accumulation of balances which are subsequently collected from or refunded to customers". This determination was accepted by all parties.

[118] The RSP is arguably more complex than the normal type of deferral account such as the one which was the subject of discussion in *Bell Canada 2009*. In that case, the deferral account was used to record the difference between the revenues derived from certain residential telephone services that were actually charged, and the revenues that would otherwise have been derived from rates determined by a "price caps" formula designed to limit prices in accordance with inflation. In the instant case, however, the amount that accumulates in the RSP is determined by a number of factors, some of which may work against others in their ultimate effect. The amounts that accrue result not only from increases or decreases in cost – which could be said to relate to only the Industrial Customers operations – but also from

increases or decreases in load variation. In fact, this factor swamps the other factors in terms of magnitude.

[119] The Board, correctly, concluded that the use of deferral accounts is "consistent with prospective regulation" and does not violate the anti-retroactivity principle (p. 7). However, it went on to state that although it had "jurisdiction" in relation to deferral accounts, the use of such accounts is "an extraordinary measure" and that its jurisdiction was "limited by the principles of predictability and fairness ... and does not necessarily extend to changing how balances are calculated and allocated in the past" (p. 8; underlining added).

[120] It is apparent that in the foregoing passages, the Board is commingling two different concepts. The first reference to "jurisdiction" is to the existence of a legal authority for the establishment of deferral accounts. This is a correct use of the notion of jurisdiction. The second reference, on the other hand, is to the manner in which the jurisdiction, or authority, should be exercised – as an extraordinary measure, limited by certain rate-making principles, etc. This analysis does not go to the notion of jurisdiction, as legal authority, but to the manner in which the jurisdiction is to be exercised. This is evident from the observation of the Board that the use of deferral accounts does not "necessarily" extend to changing how balances were allocated in the past, thereby recognizing that these principles do not define the jurisdictional parameters of the operation of deferral accounts but would merely have an influence on the decision, in a given case, as to how a deferral account should be regulated.

[121] By intruding into the area of how the Board's jurisdiction with respect to the operation of a deferral account should be exercised, in the context of an examination of the true jurisdictional question it posed for itself, the Board committed legal error.

[122] In support of its analysis, the Board then referred to past practice of the Board. It stated at p. 8:

> While the Board acknowledges that the RSP has been used creatively over the years to address a variety of issues it is also clear that changes to the established RSP rules have always been made on a prospective basis.[1]

[1] In support of this proposition, the Board cited a portion of Hydro's written submission to the Board, as follows:

> Barring an intervening order of the Board, which can be either a final order changing the way the collection or disbursement of amounts occur through rate setting of for future energy

While past Board practice may be relevant as to how the Board ought to exercise its jurisdiction in a given case, it cannot be used to determine the jurisdictional parameters of the legal authority which the Board has. In relying on past practice in this regard, the Board erred in its analysis.

[123] The Board then stated a conclusion which obviously drew upon its previous conclusions about exercising its jurisdiction only in "extraordinary" circumstances, not "necessarily" changing how balances were calculated or allocated in the past, and about the influence of past practice:

> In the Board's view changing how the RSP operated in prior years would be analogous to the situation that Mr. Justice Green suggested might constitute retroactive regulation in [the *Stated Case*]
>
> (p. 9)

Because the premises supporting this conclusion are, for the reasons given above, not valid when dealing with the jurisdiction of the Board to deal with deferral accounts, as opposed to the question of how that jurisdiction should be exercised in a given case, the conclusion that changing how the RSP operated in prior years might amount to retroactive regulation is severely weakened.

[124] Furthermore, it was of questionable utility for the Board to have stated this conclusion at this stage in its analysis, when it was only commenting on deferral accounts without reference to the effect of interim orders. The questions posed by the Board, set out in paragraph 32 above, were meant to address the Board's power of disposition over balances in the RSP which accumulated during the currency of interim orders. A conclusion that the RSP, as a deferral account, could not be changed relative to its operation in prior years, without considering the fact that what was being dealt with was in the context of interim orders, was therefore premature. We will come back to the issue of interim orders later in these reasons.

> consumption, or an interim order signaling a potential change in the rate for consumption that occurs after the interim order is issued, the customer can expect to rely upon the rate structure to provide an outcome which will be calculated in manner which has already been set.

This statement does not in fact support the Board's statement in the text. Hydro's submission contained the relevant qualification that the general proposition would not be applicable if there had been an interim order. It was therefore illogical for the Board to offer Hydro's statement as support when it was qualified by the reference to an interim order, clearly applicable to the matter under consideration.

[125] Finally, in the context of its discussion of deferral accounts, the Board made reference to a procedural consideration which appeared to affect its jurisdictional analysis.

[126] The Board noted that Hydro's applications for the interim rates for its Industrial Customers and its 2009 GRA had not sought any changes to the RSP rules, nor had Hydro filed any application for RSP reviews prior to the end of 2009 as had been indicated in the covering letter to its 2009 application. In the absence of an application, the Board declined "to consider suspending the operation of the load variation allocation rules as suggested by Hydro in its correspondence" (p. 9).

[127] The phraseology of that portion of the decision suggests that either the Board believed it could not act on that matter without an application or that the absence of an application was a sufficient reason for the Board not to exercise its jurisdiction. It is not clear which. With respect to the first possible interpretation, in our view the *PUB Act*, including s. 82, confers broad powers upon the Board to investigate rates and take remedial action if appropriate. Exercise of such powers is not dependent upon receipt of an application. Procedure cannot determine jurisdiction. It may affect its exercise but not its existence. With respect to the second interpretation of the Board's statement we consider the statement to be conclusory only, lacking an explanation of why the stated factor would be sufficient.

(ii) Interim Orders

[128] Section 75 of the *PUB Act* gives broad powers to the Board to make orders approving rates, tolls and charges on an interim basis until a final order of the Board is made. When made, the final order is treated as having been made as of the date of the interim order: *Stated Case*, paragraph 87. If therefore, the rates, tolls and charges collected pursuant to the interim order were higher than those finally approved, it is necessary to deal with the excess that, in accordance with the final order, should not have been collected.

[129] Subsection 75(3) provides, in broad terms, that the Board may order that excess revenue earned pursuant to an interim order be dealt with, not only by refunding it to the customers of the public utility concerned, but also by placing it in a reserve fund "for the purpose that may be approved by the board." This provides considerable flexibility to the Board to dispose of excess revenue earned as a result of an interim order, that is not confirmed in

the final order, in a variety of ways that may or may not involve the customers of the utility who contributed to the excess benefiting directly through a refund. As was noted in the *Stated Case*, "[t]he Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy" (paragraph 36, item 2). In so doing, the Board must "balance the interests, as identified in the legislation, of the utility against those of the consuming public" (paragraph 36, item 4).

[130] Indeed, as noted in the *Stated Case*, paragraph 94, "[t]he power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer" even if there is no express statutory provision dealing with the type of excess revenue under consideration. The manner in which the Board can deal with excess revenue is limited only by the broad purposes of the legislative regime as it is perceived by the Board to apply in a given case.

[131] The Board rejected the submission of Hydro, with the support of Newfoundland Power and the Consumer Advocate, that, as the Industrial Customers had been subject to interim orders since January 1, 2008 under s. 75 of the *PUB Act*, the Board's power to determine the appropriateness of rates since January 1, 2008 included the power to determine the disposition of any accumulated balance in the RSP on a prospective basis to all customer groups, not just the Industrial Customers. Instead, the Board accepted the argument of the Industrial Customers that, although the rates applicable to the RSP could be changed back to the date of the last interim order, the balance in the RSP attributed to the Industrial Customer group had to be distributed only for the benefit of that group.

[132] In *Bell Canada 1989*, Gonthier J. stated at p. 1761:

> The underlying theory behind the rule that a positive approval scheme only gives jurisdiction to make prospective orders is that the rates are presumed to be just and reasonable until they are modified because they have been approved by the regulatory authority on the basis that they were indeed just and reasonable. However, the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order.
>
> (Emphasis added.)

[133] The Consumer Advocate relied on this passage to submit that if the Board is dealing with interim rates, the whole rate structure is "up for revision". The Board stated that it accepted the proposition in *Bell Canada*

1989 that "the power to make interim orders necessarily implies the power to modify in its entirety the rate structure previously established by final order" but interpreted that proposition restrictively:

> ... The Board does not believe that an interim rate order for one group of customers empowers the Board to change the utilities' entire rate structure. This interpretation would not be in keeping with the principles of predictability and fairness cited by the Alberta Court of Appeal in the 2010 ATCO decision or with the specific language of the Supreme Court of Canada in [Bell Canada 1989] where the Court states at para. 39:
>
> > "Thus, the question before this Court is whether the appellant has jurisdiction to make orders for the purpose of remedying the inappropriateness of rates which were approved by it in a previous interim decision."
>
> (p. 11; Emphasis added.)

[134] The above passage from *Bell Canada 1989* referenced by the Board was part of a paragraph in which Gonthier J. was describing the matter that was then before the Supreme Court of Canada and it should not be taken as a legal proposition that the powers of a regulatory authority in the context of interim orders are limited to that single defined situation. The propositions stated by Gonthier J. after a review of the applicable legislation and authorities are the legal principles established by *Bell Canada 1989* respecting the powers accruing to a regulatory authority which is authorized to make interim orders – see paragraph 61 above. In restrictively interpreting the general principles enunciated in *Bell Canada 1989* as it did, the Board erred.

[135] In like manner, the Board interpreted s. 75 restrictively to enable it to reject the proposition advanced by the Consumer Advocate that s. 75, by its language, allowed the Board, in its words, "to place any excess revenue paid by the Industrial Customer group as a result of the interim rates into an account for the possible benefit of [some] other customer group" (p. 11). The Board reasoned as follows:

> ... This interpretation would not appear to be consistent with the scheme of the legislation generally or with generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory.
> ...

> Reading s. 75 in the overall context of the legislation and regulatory structure the Board believes that a purposeful interpretation would require that the refund or the reserve fund must, to the extent possible, be for the benefit of the customer group which was found to have paid the excess revenue. There may be times when it is not practical to refund to the customers that paid the excess, for example where the amount is nominal or the customers cannot be found. The Board believes that, in the absence of extraordinary circumstances, a finding that interim rates for a group of customers were in excess of reasonable rates would require that the same customer group be effectively charged the reasonable rates through a refund or the use of a reserve account.
>
> (pp. 11-12)

[136] In this passage the seeds of error are evident. Although commencing to interpret s.75 in accordance with the scheme of the *Act* and basic principles of utility regulation with a view to determining whether it had the legal authority to do what Hydro, Newfoundland Power and the Consumer Advocate submitted it *could* do, the Board's analysis morphed into determining what it *should* do in accordance with sound utility practice. This is evident from the conclusion that there "may be times when it is not practical to refund to the customers that paid the excess", thereby recognizing that other groups could in "exceptional circumstances" benefit. This analysis recognizes the Board was determining its jurisdiction according to what it considered, as a general rule, it *should* do, in a given case, not what it had, as a matter of law, authority to do.

[137] Noting that Newfoundland Power's rates had already been made final, the Board nevertheless concluded that s. 75 "does not ... contemplate a wholesale review of the rate structure of all the customers of the utility where only one group of customers has interim rates" and that "[t]his is the only reading ... which is consistent with fair and reasonable rates and the principles of predictability and fairness" (p. 12). While this might be an appropriate result in a given case, it does not follow that such an interpretation is the "only" appropriate reading. As the Board itself noted, there may well be circumstances where it would not be appropriate or possible to benefit only the group who paid the excess revenue. The Board has to have the authority to make other dispositions of that revenue. Its jurisdiction must therefore extend to such situations.

3. Procedural Considerations

[138] Reference has already been made to how the Board's perceptions of how the matter came before it procedurally appeared to affect the Board's jurisdictional analysis. See, paragraphs 125-127 above in relation to deferral

accounts. The Board also gave consideration to what it considered to be procedural problems when dealing with its analysis relating to interim orders.

[139] The Board placed great emphasis in its analysis on the fact that Hydro had not, in its applications for interim rates for the Industrial Customers, requested changes to the RSP rules or refunds of excess revenue to other customer groups:

> In its applications for interim rates for the Industrial Customers, Hydro did not request changes to the RSP rules and did not ask that any excess revenue be refunded to the benefit of other customer groups.
>
> (p. 12)
>
> The interim rate applications put the Industrial Customers on notice that the Board would be reviewing the Industrial Customers rates for reasonableness and that it may set different rates and a different method of calculating the Industrial Customers' RSP balances and rates. Hydro did not provide notice that anyone other than the Industrial Customers may be affected and did not put the Industrial Customers on notice that the accumulating balances in the RSP may be transferred to the benefit of other customer groups. The potential for a review of Hydro's rate structures or that any excess revenue as a result of the interim rates could be put to the benefit of other customer groups was not made clear. This result would not be consistent with the historical operation of the RSP and would be unprecedented in the context of an interim rate order in this province and therefore could not reasonably have been anticipated by the Industrial Customers.
>
> (p. 13)

[140] Accepting the foregoing paragraph as factually correct, its significance in our view was not properly explained. There was no finding that the Industrial Customers had to date suffered any actual detriment owing to the absence of prior notice of the possible disposition of the RSP balance other than for their exclusive benefit. The observation that Hydro's current proposal is unprecedented may be pertinent but of itself is of no significance on the jurisdictional issue. The jurisdictional issue cannot be resolved by reference to past practice or procedural issues of notice. References to sound utility practice may be relevant to making a decision within jurisdiction but not to whether jurisdiction exists in the first place.

[141] The Board did accept that it has the power to modify the entire rate structure for the Industrial Customer Group, including the RSP rules. It stated:

> The interim orders clearly provide the Board with the full jurisdiction to, in the words of the Supreme Court of Canada, "*modify in its entirety the rate structure*" for the Industrial Customer group, which includes all aspects of the Industrial Customers' rate, including the RSP rate. The Board does not accept the position of the Industrial Customers that the Board has no power to change the rules and regulations affecting the RSP. The Industrial Customers argue that because there is one set of RSP rules which apply to both the Industrial Customers and Newfoundland Power and because there was no interim order in relation to Newfoundland Power then the rules could not have been made interim. The Board notes, as referenced by the Consumer Advocate, that the Industrial Customers' rate sheet specifically states that the RSP adjustment reflects the operation of the RSP. The Board agrees with Hydro when it states "*The RSP rules are just a means of calculating a rate. That's their only role*." (Transcript, June 12, 2010, pg.32 18/7-8) The Board finds no distinction between the rates and the RSP rules used to calculate the rates.
>
> The Board finds that it has the jurisdiction to set reasonable rates for the Industrial Customers for the period beginning on January 1, 2008 but it does not have the jurisdiction to make a comprehensive assessment of the reasonableness of Hydro's entire rate structure. Had there been an application for a change to the RSP along with an application for interim rates for Hydro's other customers or a request that any excess go to the benefit of other customer groups the Board may have taken a different view of the Application. ...
>
> (p. 13; Underlining added.)

[142] The Board was obviously concerned that the issue of the disposition of the RSP account should have been brought before it by Hydro in a different manner and at an earlier time. It stated:

> The Board is frankly disappointed with Hydro's handling of this matter, both substantively and procedurally. Hydro was in the best position to know the impacts of the anticipated significant load changes. Major changes in load will not only impact the operation of the RSP but may also potentially impact significantly the cost of service and base rates that were set in the last general rate application. The Board would expect that, in light of such major changes from test year forecasts and the resulting impact on Industrial Customer rates, Hydro would have filed a general rate application. Such major changes could only have been addressed through a general rate application or, alternatively, perhaps an application which sought a review of its rate structure, changes to the RSP and interim rates for all potentially affected customers. Such an application should have set out specific proposals in relation to the excess so that all affected customers understood what was at stake. In addition, the Board would have expected Hydro to address these load changes promptly to avoid the complications which have now arisen as a result of the passing of two years. Hydro failed to take timely appropriate steps in the circumstances so that the

> matter could be effectively addressed, ensuring that all stakeholders understood the issues.
>
> (p. 14)

[143] The significance of that concern was emphasized in the Board's "Conclusion" which stated:

> The Board finds that in the circumstances its jurisdiction to make orders in relation to how the RSP operated in prior years is limited. Given the manner in which this matter was brought forward the Board does not have the jurisdiction to change how Newfoundland Power's RSP operated in prior years, either in terms of the rates charged or the resulting balances. The Board does have the jurisdiction to issue an order which sets just and reasonable rates for the Industrial Customers for 2008 and 2009, including the Industrial Customers' RSP rates and how the Industrial Customers RSP operated for those years. The Board also finds that it has jurisdiction to determine whether any overpayment as a result of the interim rates is to be refunded to the Industrial Customer group or placed in a reserve account to the benefit of the Industrial Customer group. ...
>
> (Emphasis added.)

[144] For the reasons already expressed, procedural considerations cannot define the Board's jurisdiction. In allowing itself to be influenced by such matters, the Board erred.

(e) Conclusion

[145] The reasoning articulated by the Board does not justify the conclusions reached. The Board determined that as interim orders had been in effect it had the jurisdiction to modify, in its entirety, the rate structure for the Industrial Customers including the RSP rates and the RSP rules used to calculate that rate. That determination was not challenged on this appeal and we agree that it gave proper effect to the jurisprudence respecting interim orders. Our concerns are that the full implications of that determination were not recognized, that the Board failed to recognize the extent of the power conferred upon it by the *PUB Act*, and that it was unduly affected by procedural aspects whose effect upon jurisdiction was unexplained.

[146] It is apparent from the Board decision that it considered the load variation balances in the RSP to be "excess revenue" as contemplated by subsection 75(3) of the *PUB Act*. There was no explanation for that conclusion. We agree with the submission of Newfoundland Power that this was an error. "Excess revenue" in that subsection refers to the difference between the revenue received under the interim rates and the revenue

authorized to be received under the final rates. The subsection addresses revenue that was earned by a public utility. However, balances in the RSP are not revenue earned by the utility. They are encumbered revenues in a deferral account which are to be disposed of in accordance with an order of the Board pursuant to the RSP rules.

[147] The Board concluded that it had the power to modify the RSP rules and consequential rates for the Industrial Customers with effect from January 1, 2008. (We note that it was undisputed that there is one set of rules for the RSP which applies both to the Industrial Customers and Newfoundland Power.) It follows that it could modify the RSP rules pertaining to the method of allocating the cost effects of load variations if such modification were in accordance with generally accepted sound public utility practice. The Board did not appear to recognize the implications of its power to modify the RSP rules in that manner. The existing RSP rules apply a "class assignment approach" which means that the cost savings accruing to Hydro because of industrial shutdowns were allocated to the Industrial Customers' side of the RSP ledger. Clearly that is not the only possible approach to the allocation of such costs as witnessed by the operation of the RSP prior to the 2003 GRA. A modification of the RSP rules for the Industrial Customers, which the Board accepts is within its power, could therefore encompass a change from the class assignment approach with consequential effects upon the final rates for the Industrial Customers from January 1, 2008 and upon the appropriateness of contemplated prospective distributions of any balances in the RSP.

[148] The consequential effect of any modification of the RSP rules upon rates, upon the revenue authorized to be earned by Hydro and upon the accumulated balances in the RSP then fall to be addressed by the Board pursuant to the *PUB Act*, including but not limited to subsection 75(3).

[149] Subsection 75(3) authorizes an order that excess revenue be "refunded to the customers of the public utility" or "placed in a revenue fund for the purpose to be approved by the Board". The statutory language pertaining to the reserve fund confers a broad jurisdiction on the Board to deal with excess revenue which jurisdiction should be exercised "to achieve the purposes of the legislation and to implement provincial power policy". *Stated Case*, para. 36. The Board found that it was constrained to ensure that "excess revenue" be disposed of solely for the benefit of Industrial Customers. Clearly that constraint did not arise from the express statutory language of subsection 75(3). There was no analysis from the Board explaining how the scheme or purpose of the *PUB Act* required an

interpretation of that subsection that constrained the power of the Board to deal with reserve funds.

[150] The Board indicated that the constraint arose from "generally accepted sound public utility practice which requires that rates be just and reasonable and not unjustly discriminatory". While application of such practice considerations might (but not necessarily) justify a conclusion to limit disposition of reserve funds to industrial customers in a given case, it does not justify giving a restrictive interpretation to the broad language of subsection 75(3), thereby foreclosing its use and application for all such cases. As noted above, the Board approached this aspect on the basis that the RSP balances should be treated as excess revenue to Hydro. However, on that basis and given the magnitude of the anticipated RSP balances it is apparent that the constraint stated by the Board could adversely affect the ability to establish reasonable and non-discriminatory rates for the Industrial Customers from January 1, 2008. See paragraphs 29-30 above .

[151] Accordingly, the decision of the Board is not capable of being derived from its statement respecting the effect of public utility practice and its conclusion respecting subsection 75(3) is without support.

[152] Furthermore as stated earlier it follows from *Bell Canada 1989* and *Bell Canada 2009* that the balances in the RSP, which would be determined in the process of establishing final rates for the Industrial Customers, would be subject to disposition by the Board in accordance with the RSP rules which are subject to modification by the Board in the application before it.

[153] The Board made repeated reference to procedural considerations as affecting its decision. These procedural concerns do not logically justify the stated conclusion as to jurisdiction. We agree with the submission of the Consumer Advocate that:

> ... First, by virtue of the interim orders and as a matter of law, everything about the Industrial Customers' rates, including the rules pertaining to load variation and the normal load variation allocation rules were made interim and therefore are inherently subject to subsequent review and modification on a retrospective basis. To further insist that Hydro was required to state that which was already the case by operation of law in order for the Board to assume its jurisdiction, is not logical or sustainable.

[154] The Board was presented with an application for Hydro to set final rates for the Industrial Customers effective January 1, 2008. The accompanying letter stressed concern with "the appropriateness of the current mechanism for allocating the impact of the load variation in the

RSP". That was consistent with a concern raised by Hydro in its initial application for interim rates in December, 2007. We note that the record before this Court indicates that since Hydro's application for final rates for the Industrial Customers, all parties (excluding, of course, the Board) set forth their positions respecting the RSP in the course of an interrogatory process and the filing of expert evidence on that issue. The Board did not explain the necessity of a formal application for a change to the RSP in those circumstances, nor did it advert to subsection 3(4) of the *Board of Commissioners of Public Utilities Regulations, 1996*, which would permit the Board to direct Hydro to file a formal application if it considered it necessary for the proper consideration and disposition of an issue.

[155] As stated earlier, exercise of the Board's jurisdiction was not contingent upon the wording of Hydro's application. The Board had the jurisdiction to set final rates and consequently to address the appropriate disposition of balances in the RSP that accumulated during the currency of the interim orders.

[156] In summary, the Board erred in:

1. allowing its determination of its jurisdiction to be arbitrarily limited by the manner in which the issue was brought before it; procedure cannot trump jurisdictional substance;

2. not concluding, in accordance with *Bell Canada 1989*, that, in respect of interim orders, all aspects of rates, including RSP rules, were made interim and therefore inherently subject to subsequent review and possible modification, on an application to make interim rates final; and

3. concluding that the *PUB Act*, properly interpreted, restricted the manner in which deferral accounts could be dealt with and in particular, restricted the classes of beneficiaries of such accounts. See *Bell Canada 2009*.

[157] We conclude that the Board has jurisdiction to deal with and dispose of remaining amounts in the RSP in accordance with the broad powers contained in the legislation, which include, but are not limited to, refunding it to the Industrial Customers. But these powers are not necessarily confined to disposing of the RSP fund balances solely to the benefit of one class of customers, in this case the Industrial Customers. This is not to say, of course, that the Board should include customers other than the Industrial

Customers as beneficiaries, only that the Board has the jurisdiction and authority to, and should, consider the submissions of all interested parties on this issue, taking into account generally accepted sound public utility practice and the imperative of setting just and reasonable rates that are non-discriminatory.

SUMMARY AND DISPOSITION

[158] For the foregoing reasons the decision of the Board declining jurisdiction is incorrect. The appeals are allowed. Order No. P.U. 25 (2010) is set aside. The matter is remitted to the Board for hearing and determination on the merits in accordance with this decision.

[159] The matter of costs not having been fully addressed by all parties, leave is given to any party to apply within 15 days of the release of this judgment for a determination of costs on the appeal. In the absence of such an application, an order will go directing that each party shall bear its own costs.

J. D. Green C.J.N.L.

K. J. Mercer J.A.

M. F. Harrington J.A.

Supreme Court of Newfoundland and Labrador, Court of Appeal
Section 101 of the Public Utilities Act (Newfoundland) (Re)
Date: 1998-06-15

V. Randell J. Earle, Q.C., for the Board of Commissioners of Public Utilities;
Ian F. Kelly, Q.C., for Newfoundland Light and Power Co.;
Mark Kennedy, for the Consumer Advocate.

(96/141)

June 15, 1998.

[1] **GREEN, J.A.:** The Board of Commissioners of Public Utilities has stated a case for the opinion of this court, pursuant to s. 101 of the **Public Utilities Act** [see footnote 1]. The questions posed concern the jurisdiction and powers of the Board as they affect the approach of the Board to the determination of a "just and reasonable return" on the rate base of a utility, as well as related matters.

The Stated Case in Context

[2] The Board is the statutory body which has the authority and duty for the "general supervision of all public utilities" in Newfoundland and Labrador and in the course of exercising that supervisory role has general authority to "make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law" and, as well, it has the right "to obtain from a public utility all information necessary to enable the Board to fulfil its duties" [see footnote 2].

[3] One of the Board's primary functions with respect to electrical utilities is the regulation and approval of rates, tolls and charges [see footnote 3]. In so doing, the Board must take account of the statutory requirement that the utility is entitled to earn annually a "just and reasonable return" as determined by the Board on the rate base as fixed and determined by the Board [see footnote 4]. The process essentially involves the fixing and determining of the appropriate rate base, the determination of a "just and reasonable return" on that rate base and then the approval of a schedule of rates, tolls and charges that would be appropriate to generate the revenue which, in the Board's estimation, would be necessary to provide the determined rate of return. Once rates, tolls and charges are

set by the Board they continue to apply until altered under the Act, as a result of a reapplication by the utility for an increase, a complaint by the public or an order for a reexamination initiated by the Board itself.

[4] It is important to remember, however, that in addition to its periodic adjudicative role which itself involves a large measure of policy implementation in arriving at its decisions, the Board has, because of its duty of "general supervision of all public utilities", an ongoing supervisory role of the activities of the utility between hearings as well, which is facilitated by statutory requirements for periodic reporting of financial information to the Board.

[5] In 1991 the Board made Orders [see footnote 5] determining a just and reasonable return for Newfoundland Light and Power Co. Ltd. [see footnote 6] and approving a schedule of rates, tolls and charges based on estimated revenue requirements necessary to cover operating expenses and to provide that level of return. The essential features of the 1991 order determining the just and reasonable rate of return were that:

(a) The just and reasonable return was determined to be between a stated range (10.6% - 11.19%) of the company's average age rate base;

(b) The rate base was determined on the basis of a hypothetical test year (1992);

(c) The Board determined that the just and reasonable return, as defined, would provide an opportunity to NLP to earn a rate of return on common equity between a certain stated range (13% to 13.5%);

(d) The schedule of rates, tolls and charges was determined applying a rate of return equal to the mid-point between the stated range of returns on rate base;

(e) The Board ordered that a particular capital structure of NLP be adopted and continue to be the basis of NLP's financial plan.

[6] The Board had previously adopted a policy allowing NLP to retain earnings above the allowed range of return on rate base, provided those earnings were within the allowed range of rates of return on comon equity. Where the earnings exceeded the allowed rate of return on common equity, the Board, in purported exercise of its statutory powers to regulate NLP's accounting procedures, as well as other powers, required NLP

to set up a reserve account in which these excess earnings would be held and dealt with in accordance with subsequent direction by the Board.

[7] In April of 1996, NLP petitioned the Board for another order fixing and determining a new rate base, determining a just and reasonable return and approving a revised schedule of rates, tolls and charges, amongst other matters. One of the parties represented at the hearing was the "Consumer Advocate", who was appointed [see footnote 7] by the Government of Newfoundland and Labrador to represent the interests of domestic and general service consumers in respect of the rate hearing.

[8] During the years between the making of the 1991 orders and the 1996 hearing, NLP had filed annual returns with the Board, as required by s. 59(2) of the Act, which indicated that in the years 1991, 1992 and 1993 the company's rate of return on rate base was in excess of the range determined in the 1991 Order. However, as calculated by NLP, the rate of return on common equity was always within the range that had been stipulated by the Board. The rates of return on rate base and on common equity were calculated based on actual expenses and on the actual capital structure of NLP.

[9] In its periodic reports to the Board, NLP disclosed that its actual advertising costs in 1992 exceeded the amounts projected to the Board as a forecast for 1992 which had been approved as reasonable and prudent by the Board in its 1991 Order in the course of fixing and determining the rate base.

[10] During the course of the 1996 hearing, certain submissions were made to the Board respecting, amongst other things,

> (a) whether NLP should be regarded as having earned revenue in excess of its allowed range of rate of return where its rate of return on common equity was nevertheless within the stated allowable range;
>
> (b) whether the manner of calculation of excess revenue and the proposed manner of the disposition of any excess was permitted;
>
> (c) whether NLP could and should be required to alter its capital structure so as to obtain its capital requirements in a manner other than the way in which it was presently doing;

(d) whether the Board could and should take account, in setting future rates, of past expenditures which were in excess of amounts deemed reasonable and prudent at the time of a previous hearing.

[11] Questions arose as to the jurisdiction and power of the Board to entertain and **Act** on the sorts of submissions that were made. This prompted the Board to state the current case to this court. NLP and the Consumer Advocate were granted standing to appear and be heard at the hearing.

The Specific Questions

[12] The Stated Case poses for consideration by this court the following questions:

"(1) Does the Board have jurisdiction pursuant to the **Act** to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.

"(2). Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

"(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to:

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility.

"(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

"(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

"(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

"(7) Does the Board have jurisdiction to require a public utility to maintain

(i) a ratio; or

(ii) a ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

"(8) Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year."

Although the questions are stated above as they appear in the Stated Case filed with the court, there are several obvious typographical errors in the language used. This was recognized by the participants in references to the questions in their written arguments. In particular "supplied" was at times substituted for the word "applied" in questions I(i), 3(i)

and 4(i) and "base rate" in Question 3(i) was replaced by "rate base." In addition, the phrase "In the event that a public utility should..." at the beginning of Question 3 was used at times in the written submissions in preference to the phrase "Should a public utility..." Nothing turns on these informal changes. They do, however, make the import of the questions clearer and I will interpret the questions in that light.

The Legislative Framework

[13] The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board.

[14] While a number of specific provisions of the **Act** and related legislation will have to be referred to in the course of this opinion, certain legislative provisions, which are central to this analysis, can be conveniently set forth here:

Public Utilities Act

> "58. The board may prescribe the form of all books, accounts, papers and records to be kept by a public utility and a public utility shall keep its books, accounts, papers and records and make its returns in the manner and form prescribed by the board and comply with all directions of the board relating to those books, accounts, papers, records and returns.
>
> "69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.
>
> "(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.
>
> "(3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.
>
> "(4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from

distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order.

"(5) An order under this section shall be made only after hearing the public utility concerned.

"70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

"75.(1) The board may make an interim order unilaterally and without public hearing or notice, approving with or without modification, a schedule of rates, tolls and charges submitted by a public utility, upon the terms and conditions that it may decide.

"(2) The schedule of rates, tolls and charges approved under subsection (1) are the only lawful rates, tolls and charges of the public utility until a final order is made by the board under section 70.

"(3) The board may order that the excess revenue that was earned as a result of an interim order made under subsection (1) and not confirmed by the board be

(a) refunded to the customers of the public utility; or

(b) placed in a reserve fund for the purpose that may be approved by the board.

"76. The board may upon notice to the public utility and after hearing as provided in this Act, by order rescind, alter or amend an order fixing rates, tolls, charges or schedules, or other order made by the board, and certified copies of the order shall be served and take effect as provided in this Act for original orders.

"78.(1) Except as otherwise provided in this Act, the board may fix and determine a separate rate base for each kind of service provided or supplied to the public by a public utility, and may revise the base.

"(2) In fixing a rate base the board may, in addition to the value of the property and assets as determined under section 64, include

. . . . .

(h) other fair and reasonable expenses which

(i) the board thinks appropriate and basic to the public utility's operation, and

(ii) has, with the approval of the board, been charged to capital account,

but the expenses shall be allowed only to the extent not amortized in previous years.

"80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.

"(2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this **Act** and the rules and regulations of the board.

"(3) Reasonable payments each year to former employees of a public utility who have retired and are receiving payments of supplemental income from the public utility are expenses that the board may allow as reasonable and prudent and properly chargeable to the operating account of the public utility.

"(4) The board may use estimates of the rate base and the revenues and expenses of a public utility.

"84.(1) Upon a complaint made to the board against a public utility by an incorporated municipal body or the Newfoundland and Labrador Federation of Municipalities or by 5 persons, firms or corporations, that the rates, tolls, charges or schedules are unreasonable or unjustly discriminatory or that a regulation, measurement, practice or **Act** affecting or relating to the operation of a public utility is unreasonable, insufficient or unjustly discriminatory or that the service is inadequate or unobtainable, the board shall proceed, with or without notice, to make the investigation that it considers necessary or expedient.

"(2) The board may order the rates, tolls, charges or schedules reduced, modified or altered, and make other orders as to the reduction, modification or change of the regulation, measurement, practice or acts that the case may require, and may order on the terms and subject to the conditions that are just that the public utility provide reasonably adequate service and facilities and make extensions that may be required, but an order shall not be made or entered by the board without a public hearing or inquiry.

"87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential

or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable.

"91.(1) A public utility shall not issue shares, which for the purposes of this section shall include preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than 1 year from the date of issue, except as provided in subsection (2) until it has obtained approval from the board for the proposed issue;

. . . . .

"(3) After hearing the application and where satisfied that the proposed issue by a public utility of its shares, stocks, bonds, debentures or other evidence of indebtedness is to be made in accordance with law and for a purpose approved by the board, it is the duty of the board to make an order approving the proposed issue to the amount that it considers appropriate, and also to prescribe the purpose to which the issue or the proceeds of the issue are applied.

. . . . .

"(5) Without first obtaining the approval of the board,

(a) a public utility shall not make a material alteration in the characteristics of its stocks or shares, or its bonds, debentures, securities, or other evidence of indebtedness as those characteristics are described by the board in granting its approval of the issue;..."

Electrical Power Control Act. 1994 [see footnote 8]

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

(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province

(i) should be reasonable and not unjustly discriminatory,

(ii) should be established, wherever practicable, based on forecast costs for that supply of power for 1 or more years,

(iii) should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the Public Utilities **Act** so that it is able to achieve and maintain a sound credit rating in the financial markets of the world, and

. . . . .

(b) all sources and facilities for the production, transmission and distribution of power in the province should be managed and operated in a manner

(i) that would result in the most efficient production, transmission and distribution of power,

(ii) that would result in consumers in the province having equitable access to an adequate supply of power,

(iii) that would result in power being delivered to consumers in the province at the lowest possible cost consistent with reliable service,...

. . . . .

"4. In carrying out its duties and exercising its powers under this **Act** or under the Public Utilities Act, the public utilities board shall implement the power policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice."

Approach to Interpretation

[15] The court was not referred to any decisions in this or other jurisdictions which directly addressed, let alone answered, the specific types of questions which have been posed. To answer the questions, therefore, it is necessary to develop a theoretical frame of reference within the context of the general language of the existing legislation so as to determine the approach to be taken to its application in concrete situations.

[16] It is necessary to examine the specific legislative provisions in the larger regulatory context and against the background of the purposes of the legislation and the general principles which have been developed as part of regulatory practice [see footnote 9]. This approach follows from s. 118 of the **Act** which provides:

"118.(1) This **Act** shall be interpreted and construed liberally in order to accomplish its purposes, and where a specific power or authority is given the board by this **Act**, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this **Act** conferred on the board.

"(2) The Board created has, in addition to the power specified in this **Act**, all additional implied and incidental powers which may be appropriate or necessary to carry out the powers specified in this **Act**.

> "(3) A substantial compliance with the requirements of this **Act** is sufficient to give effect to all the rules, orders, acts and regulations of the Board, and they shall not be declared inoperative, illegal or void for an omission of a technical nature."

[17] In addition, the **EPC Act** [see footnote 10], provides that the Board, in carrying out its duties and exercising its powers under the **Public Utilities Act** must implement the power policy of the province, as declared in s. 3 of the Act, and in so doing must "apply tests which are consistent with generally accepted sound public utility practice".

[18] It follows from these provisions that a literal and technocratic interpretation and application of the provisions of the **Act** is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation [see footnote 11], as well as the power policy of the province and be consistent with generally accepted sound public utility practice.

[19] In answering the questions posed, therefore, it is necessary to identify generally accepted principles of sound public utility practice and to give to the legislation an interpretation which follows those principles and advances the stated legislative policy of the Province.

[20] The trade off for the regulation by the state of the rates, tolls and charges of monopolistic utilities in the interests of consumers is the statutory recognition that the utility should be entitled to earn a fair return for its efforts. Although differing in details, the regulatory statutory regimes existing throughout North America can, as a generalization, be said to be broadly similar in approach [see footnote 12], although in recent years the regulatory schemes and their coverage are being affected more and more by the trends towards deregulation.

[21] The regulatory body in question (in Newfoundland, the Board of Commissioners of Public Utilities) is generally charged with balancing the competing interests of consumers and the investors in the utility [see footnote 13]. As deGrandpre observed:

> "This involves the Board attempting to make sure that, in the consumers' interests, the service provided is adequate and provided at just and reasonable rates and, for the utility and its investors, that those rates provide a sufficient income."

[22] This balancing of interests is found in the province's stated power policy in s. 3 of the **EPC Act** where, emphasizing the interests of the utility, it is declared that the rates charged for the power should provide sufficient revenue to the utility to enable it to earn a just and reasonable return "so that it is able to achieve and maintain a sound credit rating in the financial markets of the world" [see footnote 15] while at the same time declaring that the rates should be "reasonable" [see footnote 16] and that the utilities' facilities should be managed and operated in a manner that would result in power being delivered to consumers "at the lowest possible cost consistent with reliable service" [See footnote 17]. This policy finds legislative expression in the regulatory mechanisms of the **Act** itself, which provides that a utility must provide service and facilities which are "reasonably safe and adequate and just and reasonable" [see footnote 18] and prohibits a utility from charging rates, tolls and charges unless they have been approved by the Board [see footnote 19] while at the same time stating as a general principle that the utility is entitled to earn annually a just and reasonable return on its rate base [see footnote 20].

[23] This statutory entitlement of the utility to earn a "just and reasonable" return is the linguistic touchstone for the balancing exercise. This phrase emphasizes the fairness aspect, both to the utility, in earning sufficient revenues to make its continued investment worthwhile and to maintain its credit rating in financial markets, and to the consumer, in obtaining adequate service at reasonable rates. It also emphasizes the need for a tempering of each interest group's economic imperative by consideration of the interests of the other.

[24] Having said that, the entitlement of the utility to a fair return on its investment is always regarded as of fundamental importance [see footnote 21]. In the United States, controls which fail to allow a fair return have the potential of running afoul of constitutional strictures against confiscation of property without due compensation. While the same constitutional concerns may not be present in Canada, the case law has at times nevertheless referred to the entitlement to a fair return as a "common law right" [see footnote 22] which should be read into the legislation even where it is not specifically expressed.

[25] There is no uniform methodology employed in the regulatory jurisdictions in North America for the determination of a just and reasonable rate of return [see footnote 23]. What recurs, however, is a theme that the process is not an exact science and depends on a variety of factors necessary to balance the competing interests involved. Rate setting is essentially a prospective exercise where determinations are made on the basis of estimates and information that will not necessarily remain static.

[26] Most jurisdictions adopt a "multiple factor" approach. The **Bluefield Waterworks** case [see footnote 24] in the United States emphasized early on that the determination of a fair rate of return

> "...depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts." [see footnote 25]

[27] Statements such as "the company will be allowed as large a return on the capital invested in the enterprise...as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise" [see footnote 26] often occur. For the rationale for such statements one need look no further than the provincial policy, stated in s. 3(a)(iii) of the **EPC Act** that the utility must be "able to achieve and maintain a sound credit rating in the financial markets of the world" so as to be able to raise the money necessary for the proper performance of its functions. To achieve such a goal of attracting capital, factors such as comparisons with other comparable enterprises, the respective costs of debt and equity, the capital breakdown between debt and equity and general economic conditions, amongst other things, are considered.

[28] In **Federal Power Commission v. Hope Natural Gas Co.** [see footnote 27], another landmark United States case, the court emphasized that it is the "end result of the process which has to be judged as to whether the rate is "just and reasonable". As a result, in the words of deGrandpre:

> "In stating that the end result was the only point of consideration, whatever the means of arriving thereat, the court opened the door to a wide variety of ways and means to arrive at a proper calculation of returns. In effect, it left the valuation of rate bases to the Commission's or Court's discretion." [see footnote 28]

DeGrandpré's conclusion, based on his survey of North American regulatory regimes, is later stated as follows:

> "The constantly changing economic conditions are perhaps a good reason why there should be no stringent rules for determining a rate of return. As was often stated, the process is one which calls for common sense, good judgment and a proper appreciation of all surrounding factors." [see footnote 29]

[29] This approach is also reflected in the decision of this court in **Newfoundland Light & Power Co. v. P.U.C. (Bd.)** where O'Neill, J.A., speaking for the court in rejecting an argument that the Board of Commissioners of Public Utilities had exceeded its jurisdiction in determining a just and reasonable rate of return by not adopting a particular methodology (a "comparable earnings" test), stated:

> "...it is within the discretion of the Board, having heard all the evidence and giving consideration to the various tests which may be used, to make its ruling on the basis of what in the Board's opinion will give to the applicant a just and reasonable return and permit it to maintain a sound financial credit rating." [see footnote 30]

The Board therefore has a broad discretion to adopt appropriate methodologies for the calculation of allowable rates of return. So long as the methodologies chosen are not inconsistent with generally accepted sound public utility practice and the purposes and policies of the **Act** and can be supported by the available opinion evidence, the determination of what constitutes a just and reasonable return in a given case will generally be within the province of the Board and will not normally be interfered with [see footnote 31]. The jurisdiction of the Board must therefore be defined to enable that process to occur.

[30] Because setting the rate of return is not an exact science no matter what methodology is chosen, because the viewpoint is essentially prospective, it has been recognized that there is a "zone of reasonableness" within which a rate of return chosen by the Board should be regarded as just and reasonable. This has been expressed by the United States Supreme Court in the following language:

> "Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high." [see footnote 32]

This notion has also at times been recognized in Canada, [see footnote 33]

[31] This leads to another point: because the setting of the rate of return is based on projections, one cannot be sure that the rate of return will be achieved in practice. Although the utility is "entitled" by s. 80 of the **Act** to have the Board determine a just and reasonable rate of return based on appropriate predictive techniques and methodologies, it is not "entitled", in the sense of being guaranteed, to that rate of return [see footnote 34]. The utility therefore takes the risk that its chosen management techniques and the future economic climate may not yield its expected success. Although some of the activities of the utility are regulated within the framework of the statutory objectives, the utility nevertheless remains subject to business risks and the effects of management decisions. To that extent, the financial risks associated with the operation of the utility, just as in the case of any private business, are to be born by the investors in the enterprise, not the consumer of the service.

[32] The corollary of this position is that the utility must be accorded a degree of managerial flexibility in decision-making in order to be able to minimize the risks to which it must respond. Thus, it is often said that the powers of the Board must be regulative and corrective, but not managerial, and they do not therefore contemplate a retroactive adjustment of the actions of management.

[33] This leads to the general principle of non-retroactivity which prevents a utility from recovering expenses incurred in the past out of current rates. The utility must live with the decisions it makes and the economic vicissitudes that occur [see footnote 35].

[34] By the same token, it is sometimes argued that the occurrence of the reverse situation, of the utility doing better than expected, should mean that the utility should be able to reap the advantage of better and more efficient management techniques and favourable economic conditions and keep any surplus. The concern for the consumer interest is often put forward as a brake on this idea, however. The requirement that the consumer receive power "at the lowest possible cost" [see footnote 36] consistent with the utility's requirement of earning a just and reasonable return for its purposes means, it is

often argued, that the regulator ought to have power to ensure that excessive returns are somehow accounted and compensated for.

[35] Another factor that is referred to in the cases is the recognition that the capital structure of the utility will often have a bearing on the total cost of capital and this will therefore be important where the determination of the rate base depends on the total debt and equity capital requirements. DeGrandpre observes that "the reasonableness of the ratio of debt to equity is a question of fact left to the appreciation of the Board or Court" [see footnote 37]. Thus, issues such as whether the Board can dictate to the utility a particular mix of debt and equity or, for the purpose of setting the rate of return, do so on the basis of a notional blend of capital requirements if the actual blend is not in accordance with what the Board feels is optimal to ensure a fair return as well as low rates, tolls and charges, often surface. Indeed, this issue is presented in this case.

[36] Having conducted this brief survey, I will now attempt to state some general principles to be used in the interpretation and application of the local legislation:

1. The **Act** should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;

2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;

3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

4. In carrying out its functions under the **Act**, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;

5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.

6. The Board has jurisdiction, which will not generally be interfered with on judicial review, to make a determination of what is a just and reasonable rate of return within a "zone of reasonableness" and in so doing is not constrained in its choice of applicable methodologies, so long as they can be rationally justified in accordance with sound utility practice and are not inconsistent with the achievement of the purposes and policies of the legislation.

[37] It is now necessary to consider each of the specific questions that have been posed. In approaching them, it is worth remembering that the questions have been posed in the abstract and ask for answers to broadly-identified issues of jurisdiction. The case is not an appeal and there can be no findings of fact made by this court in arriving at its conclusions. The information provided by the Board as to past hearings was given as background only so as to assist the Court in better understanding the scope and potential importance of the questions. While the answers given may provide guidance with respect to specific issues that have arisen in hearings in the past, they cannot be taken as an adjudication of those issues in the specific factual context in which they arose.

Question No. 1

"(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares."

[38] It will become apparent from the ensuing discussion that a number of the questions posed on this stated case are interrelated in the sense that the answer to some of them will provide a strong impetus for a particular response in others. This is particularly evident in Question 1.

[39] The answer to Question 1 in fact involves a consideration of two sub-issues. The first relates to the legal significance of a determination by the Board on a given application of the just and reasonable return to which the utility is entitled. The second sub-issue, which is affected by the decision

[40] on the first, relates to the powers of the Board to make determinations with respect to the rate of return on a utility's common equity portion of its capital structure.

(a) The Legal Significance of a "Determination"

[41] It is to be noted that Question 1 asks whether the Board has jurisdiction to "set and fix" the utility's return whereas s. 80(1) of the **Act** speaks in terms of the utility being entitled to earn a return as "determined" by the Board. The use of this differing terminology in the question, as explained by counsel for the Board at the hearing, was designed deliberately to raise the issue as to whether the Board may, by determining the level of return, be said to be prescribing that level as an upper limit to the level of earnings to which the utility may be entitled and thereby exercise certain powers with respect to disposition of any excess that may in fact be earned. This issue becomes more focused when Question 3 is considered. The answer to that question will, to some extent, be influenced by the power which the Board can be said to have under s. 80 with respect to the setting of a level of return.

[42] It is obvious, of course, that in the process of approving rates, tolls and charges under s. 70(1) the Board must determine what is a just and reasonable return on the utility's rate base in order to determine the level of revenue needed by the utility [see footnote 38]. This flows from the utility's "entitlement" in s. 80(1) to earn that level of return. The determination of a just and reasonable return on rate base is therefore an essential component in the series of calculations which the Board must undertake in the process of approving rates, tolls and charges. If the determination of a just and reasonable return is merely a step in the process of approving rates, tolls and charges under s. 70(1), that is, if it is only an intermediate calculation necessary to arrive at the final result of consumer rate approval, the "determination" of a just and reasonable level of return will have no independent legal significance, in the sense of prescribing the limit of the utility's return for other purposes of the Board's functions.

[43] On the other hand, if the determination of a just and reasonable level of return has, as it were, an independent life of its own, in the sense of it not being a mere intermediate calculation but can be "set and fixed", in the sense of being prescribed, it could, for example, be used to support an argument that a utility is not entitled to earn in excess of a just and reasonable return. As indicated, this impacts directly on Question 3.

While counsel for NLP suggested that there may be other mechanisms available to deal with excess earnings (by means of the use of a designated excess revenue reserve fund), that would not require the derivation of such a power from s. 80, counsel for the Board and the Consumer Advocate both indicated that they were concerned about the legal basis for the derivation of the operation of an excess revenue account from other parts of the legislation, such as the administrative and supervisory power of the Board to regulate a utility's accounts. It is appropriate therefore that this matter be addressed.

[44] The issue boils down to this: If the power to "determine" the return encompasses the notion of fixing, in the sense of prescribing the limits of entitlement, one would be able to derive from s. 80(1) a power in the Board to say to the utility that it may earn that level of return and no more. If not, the power to determine would simply be part of a calculation that leads to consumer rate setting with no independent existence or significance for regulatory practice generally.

[45] **Black's Law Dictionary** [see footnote 39] explains "determine" in part as follows:

> "To bring to a conclusion, to settle by authoritative sentence, to decide....To adjudicate on an issue presented...
>
> "To estimate...
>
> "To decide, and analogous to 'adopt' or 'accept'..."

[46] The **Concise Oxford Dictionary** [see footnote 40] defines the word in pertinent part as:

> "1. v.t. & i. settle, decide, (dispute, person's fate...), come to a conclusion, give decision, be the decisive factor in regard to...; ascertain precisely, fix;...
>
> "3. v.t. & i. (esp. Law) bring or come to an end.
>
> "4. v.t. limit in scope, define; fix (date) beforehand."

[47] For what limited value these definitions can have in this context, it would appear that the primary meaning of the word determine, with its emphasis on coming to a final decision and amounting to a decisive factor as well as the notion of ascertaining

something precisely and "fixing", encompasses something more than a mere calculation in a broader process.

[48] Having said that, it is to be noted that s. 80(1) is structured in such a way that its emphasis is on the entitlement of the utility to a just and reasonable return, as determined by the Board, rather than involving the express conferral on the Board of a power to prescribe the level of return. The structure of the subsection could be said to be directed towards establishing a minimum base line of entitlement without saying anything expressly about the power of the Board to create a cap. To put the matter beyond doubt, the insertion of the words "and no more" after the language entitling the utility to a just and reasonable return would certainly have clearly indicated a prescriptive power in the Board, if that had been intended. Furthermore, although the return is referred to as being "determined" by the Board, the subsection goes on to indicate that the return so determined is applied to the rate base "as fixed and determined" by the Board. On a strict linguistic analysis alone, the use of the word "fixed" in conjunction with "determined" in one place would imply that its absence in the other was deliberate.

[49] Notwithstanding these matters, I am not satisfied that a linguistic analysis of the subsection can provide the answer in this case. Even a cursory perusal of the remaining provisions of the **Act** indicates that there is no uniform terminology chosen to describe the various decision-making functions in which the **Board** may engage. For example, the **Act** provides that the Board may "inquire into and determine" [see footnote 41] the valuation of a utility's assets and may "determine" [see footnote 42] those values in accordance with a number of stated rules. It may "ascertain and determine" [see footnote 43] what are proper and adequate rates of depreciation of classes of utility property. Its role with respect to the utility's rates, tolls and charges is one of "approval" [see footnote 44]. Indeed, if there is any decision of the Board which is contemplated as having operative legal effect and to amount to a "fixing" of the utility's rates, tolls and charges from which the utility may not deviate, it is the "approval" contemplated in this regard; yet the word "fix" does not appear. In another context, the Board may "fix and determine" [see footnote 45] a separate rate base for each kind of service supplied by a utility; yet when describing what is to be included in the calculation of rate base, the reference to "determine" is dropped and it is

simply described as "fixing a rate base" [see footnote 46]. Finally, the term "approval" surfaces again in the context of the power of the Board to authorize new stock issues of the utility [see footnote 47].

[50] To resolve this conundrum, resulting from inconsistency in terminology, resort must be had to the purposes of and policies underlying the legislation as mandated in s. 118 of the **Act** as well as s. 4 of the **EPC Act**. As indicated previously [see footnote 48], the Board is required, in carrying out its functions under the **Act**, to balance the interests, as identified in the legislation, of the utility against those of the consuming public. The notion of a "just and reasonable return" in s. 80(1) is the benchmark against which fairness to the utility and the consumer is to be measured. It is pivotal in the balancing exercise. The interests of the consuming public in obtaining power at the lowest possible cost consistent with reliable service [see footnote 49] must accommodate the utility's interest in being afforded the opportunity to earn a fair rate of return for its efforts. In the methodology adopted by the Board, the approval of appropriate rates, tolls and charges necessarily factors the just and reasonable return, and only that level of return, into that calculation. Otherwise, the interests of the consumer would not be protected in obtaining power at the lowest possible cost. It is therefore inherent in the process that in determining a just and reasonable return for the utility, the utility should have the opportunity of earning that return but, other things being equal, should not expect to earn any more. Accordingly, determining the just and reasonable return necessarily involving prescribing the return and in that sense can be said to amount to "setting and fixing" the rate of return.

[51] It follows from this that the use of the word "determine" can, in the context of the use of that and other terminology in the Act, encompass something more than the notion of mere calculation and extends to the idea of prescribing, or fixing, a level of return in the nature of a legal decision which can bind and have effect on the utility for other purposes related to the Act.

(b) The Power to Set and Fix the Level of Return on Common Equity

[52] In order to determine the just and reasonable return on rate base to which the utility is entitled by s. 80(1), the Board must first determine the cost to the utility of the

various components of its sources of funds. The costs associated with long term debt and preference shares are generally static over the period covered by a particular rate hearing. Accordingly, they are often described as "embedded costs". The rate of return necessary to be earned on rate base to cover the cost of debt and preference shares can therefore usually be easily determined based on the interest rates or dividend rates applicable to such instruments. In the case of common equity, however, the cost to the utility of this source of funds depends upon a number of factors, especially current market conditions which, by nature, can be volatile.

[53] At a rate hearing, therefore, the Board usually faces a greater difficulty in determining the component of rate of return on common equity than on the other sources of funds because their embedded costs are usually well defined.

[54] Since the rate base is financed by a combination of debt, preference shares and common equity, the rate of return on which is different for each component, the overall rate of return on rate base is calculated as a weighted average of the rates of return on the various individual components [see footnote 50].

[55] As a generalization, it is sometimes said that the cost of common equity is often higher than that of debt [see footnote 51]. The rate of return on common equity may therefore be expressed as a percentage which is higher than the overall rate of return on the full rate base because the higher equity cost will be weighted downwards by the rates for the other components.

[56] The issue raised by Question I(ii) is whether the Board may set and fix the rate of return on common equity, as a component of the overall rate of return on rate base in a manner such that it can be used as an independent benchmark for other purposes in the same way as the overall determination of return on rate base can be. Alternatively, is the "determination" of the rate of return on common equity to be treated in the narrower sense of a mere calculation leading to the final determination of overall return?

[57] Section 80(1) makes no reference at all to determining, let alone setting and fixing, the rate of return on common equity. The calculation of an appropriate rate of return

on common equity is truly a mere component in the overall process of determining a just and reasonable return on rate base. Furthermore, there is nothing in the purpose of the **Act** or the policies which the Board is to implement which would lead inexorably to the conclusion that the Board ought to have the power to prescribe a rate of return on common equity as a component of an overall return or rate base, any more than it ought to have a power to prescribe a return on any other component.

[58] The Consumer Advocate submitted that inasmuch as s. 80(1), by its express language, contemplates that the only measure of what NLP may earn annually is to be determined by a just and reasonable return on rate base, to allow the utility to measure what it may earn annually based upon a different factor, such as a rate of return on common equity which could very well be higher than the overall rate of return on rate base and might lead to a higher overall return that could be said to be justified, would be to allow the utility to earn more than that to which it is statutorily entitled.

[59] It is to be noted, however, that in its previous orders [see footnote 52] the Board has not sought to determine the level of return on the basis of anything other than a rate of return on rate base. For example, in the 1991 Order, the Board ordered:

> "A just and reasonable return for [NLP] is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%." (Emphasis added)

The reference to the range of rates of return on common equity appears to have been inserted more as information in support of a rationale for the determination of the overall return on rate base, since the Board states that the determination of the return on rate base "will provide" an "opportunity" to earn a rate of return on common equity. Similarly, the 1996-97 Order simply described the rate of return on rate base as being "derived from" a given range of return on common equity. This is the correct approach.

[60] As to whether the Board may make other decisions, for example relating to the manner in which an excess revenue fund should be maintained, by reference to the contemplated rate of return on common equity, is a separate matter which should be dealt with in that context.

[61] I therefore conclude that the power to "determine" a just and reasonable return on rate base, as contained in s. 80(1) does not include within it a power to "set and fix a rate of return on common equity" but it obviously does contemplate that the analysis of appropriate rates of return on common equity will be undertaken and factored into the conclusion as to what is a just and reasonable return on rate base.

[62] Accordingly, giving the words "set and fix" in the question a meaning which implies the notion of prescribing, I would answer Question 1 as follows:

As to
1.(i) – Yes
1. (ii) – No

Question No. 2

"(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return"

[63] In light of my answer to the second part of Question 1, it is only necessary to address Question 2 in the context of whether the Board has jurisdiction to set the rate of return on rate base as a "range of permissible rates of return".

[64] It has already been stressed that the determination of a just and reasonable return on rate base involves a consideration of the differing costs of the components of the utility's capital structure and that in arriving at the overall rate of return, it is permissible for the Board to use a weighted average of the rates associated with each individual component. It has also been pointed out that the cost of common equity is often difficult to estimate with precision. The best that experts are often able to do is estimate rates within a reasonable range. Inasmuch as the cost of common equity is weighted into the overall rate of return on rate base, that range would also have to be reflected in the ultimate rate of return on rate base, as determined by the Board.

[65] In **Northwestern Utilities Ltd. v. City of Edmonton** [see footnote 53] Smith, J., emphasized:

> "The question of a fair rate of return on a risky investment is largely a matter of opinion, and is hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board."

[66] It is evident, as **Newfoundland Light & Power Co. v. P.U.C. (Bd.)** [see footnote 54] demonstrates, that the determination of a just and reasonable return is an area in which the Board is accorded a broad discretion as to the methodology to be adopted. Obviously, the striking of a balance between the interests of the utility and the consumer, whilst at the same time attempting to comply with the Board's obligation to approve rates which will produce a fair return to the utility, cannot be done with the precision of a simple mathematical calculation. Realistically, the balance can only be struck within a reasonable range. It is for that reason that the courts have, on subsequent appeal or applications for judicial review, generally deferred to the determinations of boards in this regard provided the determination is not arbitrary or capricious and can be said to fall within a reasonable range [see footnote 55]. As indicated in the earlier discussion [see footnote 56], in the United States the notion of a "zone of reasonableness" as an "area rather than a pinpoint" has been recognized. Whilst this notion has been enunciated as a justification for deference to Board decisions in the context of challenges on appeal or judicial review, it nevertheless indicates a recognition of what is inherent in the rate setting process.

[67] I see no reason, therefore, why, instead of attempting to justify a particular decision ex post facto by an argument that a particular rate falls within a zone of reasonableness, the Board could not expressly indicate what it believes that area of reasonableness to be by expressing what it believes to be a just and reasonable return in terms of a range of rates of return. This indeed is a practice that has been adopted elsewhere [see footnote 57].

[68] It is to be noted that s. 80(1) does not speak in terms of a "rate" or "rates" of return; rather, it speaks of a just and reasonable "return". It is not limited by its language to the pinpointing of a particular rate of return. I conclude that a liberal construction of the word "return" in the context of s. 80(1) leads to the conclusion that it can include a range of rates of return.

[69] Of course, in applying the rate of return to the rate base, as ascertained by the Board, a single figure will have to be used since rates, tolls and charges are expressed as finite numbers. The Board in practice has chosen the mid-point of its stated range of rates of return as the figure to be used for this purpose. This is a perfectly acceptable practice for the purpose of setting the rates. By expressing a range, however, the Board leaves open to the utility the flexibility of earning more than the mid-point up to the maximum end of the range so as, in effect, to give the benefit of the doubt to the utility that the expert evidence favouring the upper end of the range turns out to be the more accurate and to provide an incentive to the utility towards managerial efficiency.

[70] The Consumer Advocate expressed concern in argument that the use of the word "permissible" in Question 2, as qualifying the phrase "rates of return", might be misleading. As I understand the argument, the concern is that the adoption of a range approach might lead to the conclusion that the "entitlement" of the utility to a just and reasonable return would be regarded as an entitlement, or guarantee, of earning up to the maximum end of the range. While the utility, if it earned as much as the maximum would be entitled to keep that amount of earnings, it is not, for reasons already given, guaranteed that level of return if it is not in fact successful in earning them. The Board is under no obligation to adjust future rates or to take other steps to make up any such shortfall. Any rate of return earned within the range would be regarded as permissible and it is only when a rate of return exceeds the upper limit of the range that it would be regarded by the Board as subject to any excess revenue regulation.

[71] Accordingly, recognizing that, on my analysis, Question 2 only relates to whether the Board has jurisdiction to set rates of return as a range in relation to its determination of a just and reasonable return on rate base, the answer I would give to Question No. 2 is: "Yes".

Question Nos. 3 and 4

" (3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on

(i) the base rate as fixed and determined by the Board for each type of service applied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility.

"(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service applied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years."

[72] The analysis leading to the answers to Questions 3 and 4 can be considered together since they both address the same general theme: the scope of the Board's powers to deal with situations where a utility in fact earns a rate of return that is greater than that determined to be a just and reasonable return.

[73] It was suggested by counsel for NLP that the concept of "excess earnings" does not exist under the **Act** other than by reference to a definition of what is to be deposited into a reserve fund which the utility may be ordered to create and maintain pursuant to s. 69(3) of the Act. This submission follows from the position taken by NLP that the Board has no power under s. 80(1) to "set and fix", in the sense of prescribing, a maximum rate of return. NLP had submitted that the Board's power to deal with excess earnings comes solely from its statutory powers to prescribe the form of accounts to be maintained by the utility [see footnote 58] and to create a reserve fund "for a purpose which the Board thinks appropriate" [see footnote 59] which could include the purpose of dealing with excess returns. This argument has already been rejected in the analysis relating to Question 1. It follows, therefore, that the issue of excess earnings may present itself for consideration by the Board in circumstances even where a reserve account has not been ordered to be set

up. For the purpose of regulation by the Board, the concept of excess earnings is derived from the process of prescribing a just and reasonable return on rate base and not by the decision to require the creation of a reserve account. The question to be considered is what enforcement mechanisms the Board may use to deal with excess earnings so identified.

[74] If, as determined in the answer to Question 1, the Board has jurisdiction flowing from s. 80(1) to prescribe the maximum rate of return which a utility may earn in a given year, it is a necessary consequence of such a determination that revenue earned in excess of the maximum of the prescribed range of return is excess revenue to which, by definition, the utility will not be entitled. The Board accordingly must have jurisdiction to regulate how that excess revenue is to be dealt with.

[75] Question 3 requires the court to consider the range of enforcement mechanisms which the Board may employ to ensure that the utility does not benefit from any windfall profits resulting from earnings in excess of the just and reasonable return to which it is entitled. Three scenarios are proposed:

> (1) use excess earnings to reduce revenue requirements for the succeeding year ("Revenue Reduction Approach");
>
> (2) place the excess earnings in a reserve fund to enable an adjustment of rates, tolls and charges at a future date ("Reserve Fund Approach");
>
> (3) require a rebate of excess earnings to consumers ("Rebate Approach").

Question 4 is really a subset of the Revenue Reduction Approach. In one sense it really asks the same question as in Question 3(i) but does not limit the process to the application of excess earnings to only the year next succeeding the year in which the excess earnings have been achieved. It appears to ask the court to address the question of whether, in the absence of the existence of a reserve account, the Board may, upon being made aware of excess earnings in prior years, reach back into those prior years and take account of those excess earnings by using them to reduce rates, tolls and charges in subsequent periods below what would otherwise be indicated.

[76] In approaching these questions, it is important to bear in mind the nature of the rate setting process and the general principles which are recognized as being applicable to govern the manner in which that process is carried out.

[77] The process of rate setting is generally prospective by nature. Although the Board must set rates for the future, it only has data from past experience, the evidence from utility officials as to planned changes in operations and the opinions of experts as to future economic trends as a guide to what the revenue requirements of the utility will likely be. It is, therefore, necessarily speculative. In developing the utility's requirements, the Board focuses on a "test year" as the basis for its estimates and adjustments. Traditionally, in North America the test year was chosen as the latest 12 month period for which complete data were available [see footnote 60]. More recently, due largely to inflation, boards adopted a forward-looking test year which in effect amounts to a forecast of what expenses and costs, and hence revenue requirements, will be. This has been the practice of the Board [see footnote 61] and is supported by the **Act** [see footnote 62] and the **EPC Act** [see footnote 63]. Past experience of course remains relevant, however, insofar as it gives insight into the possibility of forecasting error [see footnote 64].

[78] Because the process is prospective, there is a good possibility that all of the assumptions will not be achieved in practice. The actual rate of return may therefore differ from the rate, or range of rates, prescribed at a previous hearing. On paper, this difference may appear to redound to the benefit or detriment of the utility depending upon whether the actual rate is greater or less than the rate or range prescribed.

[79] When, as a result of actual experience, it appears that the actual rate of return was greater than the rate prescribed for the same period, it becomes necessary to address what the Board can do, if anything, to ensure that the earnings in excess of the prescribed level, (which by definition will be regarded as greater than a just and reasonable return on the rate base), are not allowed to remain with the utility or its investors. In the **Bell Rebate** case [see footnote 65], Gonthier, J., observed that differences between projected and actual rates "call for a high level of flexibility in the exercise of the [Board's] regulatory duties".

[80] Those opposing a broad jurisdiction on the part of the Board to define and deal with excess revenue couch the objection, at least in part, in terms of a violation of the non-retroactivity principle [see footnote 66]. In its narrow sense, it is a principle of benefit to consumers, that "today's rate payers should pay the cost of today's services and not the cost of past or future services" [see footnote 67]. More broadly, it also yields a presumption (which is of benefit to the utility as well), flowing from the idea that the Board acts prospectively in setting rates, that the Board cannot or, even if it has jurisdiction, should not as a general rule, make orders that have the retroactive effect of disturbing existing rights already enjoyed by the utility. In practical terms, it leads to the argument that where rates, tolls and charges have been approved by the Board as being permissible for the utility to charge, the Board cannot or should not make a subsequent order that has the direct or indirect effect of reducing or otherwise changing those rates. In other words, changing past transactions or attaching new consequences to past transactions would be prohibited.

[81] As Penning points out [see footnote 68] the retroactivity rule has its genesis in general rules of statutory interpretation that guard against interpreting a statutory provision as having a retrospective operation unless it is clear that such an effect was intended. It is not an immutable rule but can give way to contrary legislative intention.

[82] Doctrinally, in the context of utility rate regulation, the retroactivity principle is described by Penning in this way:

> "...the rule is concerned more with issues of fairness, both to customers and to utility shareholders. The customer-related fairness issue is often referred to as the 'inter-generational equity' problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to attract and maintain reasonably-priced equity investment in a utility, shareholders require some certainty that matters already dealt with by the regulator have some degree of finality associated with them." [see footnote 69]

[83] It was argued that one of the questions that is theoretically presented in this case is the degree to which the Board is authorized to trespass on the no-retroactivity

principle in fulfilment of its legislative powers, specifically, to enforce a prescription that a utility may earn a just and reasonable return and no more.

[84] In reality, however, in light of the prospective nature of this Opinion, the non-retroactivity principle is not, in practical terms engaged by Question No. 3. The answers to previous questions have already established that the concept of excess revenue is to be determined by reference to the meaning of a "just and reasonable return" as that phrase is understood in s. 80(1); and not by the definition used to operate an excess revenue account. All participants in the regulatory process must therefore take account of that concept and conduct their activities accordingly. The "rules of the game" are known.

[85] Section 59 of the **Act** requires the utility, unless otherwise ordered by the Board, to close its accounts at the end of each calendar year and to file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the following year. Effectively, therefore, within 3 months after the utility's year end, both the utility and the Board will know the financial position of the company for the previous year and from that, as well as any other information which the Board may require, a determination of the actual level of return earned by the utility in the previous year can be made. Applying the known definition of excess revenue, by reference to the upper end of the range of return on rate base, as determined by the Board's prior orders under s. 80(1), it can be determined whether there has been any excess revenue earned. There is no revisiting and revision of a prior order respecting the allowable return on rate base. The examination of actual results in the context of a comparison with the previously prescribed rate merely leads to enforcement of the original order. Any decision by the Board with respect to disposition of excess revenue will therefore not retroactively interfere with past revenues which the utility assumes belong to it and which may be disbursed to shareholders or otherwise spent. Given the concept of excess revenue, as explained in this option, the utility knows in advance that it is not entitled to excess revenue so defined and may institute whatever accounting practices are necessary to segregate and deal with such revenues pending direction from the Board.

[86] The situation is conceptually no different from the concept behind an excess revenue account set up under s. 69(3), which the utility accepts as a legitimate way of dealing with such revenue. Just as in the case of an excess revenue account, the definition of excess revenue is known in advance and the utility can account for such revenue accordingly.

[87] The scenario contemplated by Questions 3 & 4 is unlike the situation which arises where an interim order setting rates, tolls and charges is subsequently superseded by a final order, resulting in excess revenue being earned in the intervening period because the rates, tolls and charges charged in that period pursuant to the interim order were higher than those which were ultimately found to be justified in the final order. In that situation, if the final order is treated as being operative as and from the date of the interim order that was superceded, the final order will, indeed, have a retroactive effect. In the context of the Newfoundland legislation, that situation is specifically contemplated and authorized by s. 75(3) of the **Act**.

[88] In the situation presently under consideration, however, there is no subsequent order of the Board which retroactively changes previously-approved rates, tolls or charges or revises the prescribed level of return to which the utility is entitled. All that occurs is the subsequent examination of actual results and a determination of whether excess revenue was in fact earned by applying a pre-existing standard derived from a previous Board order made under s. 80(1).

[89] I recognize that, to the extent that the utility in the past may have been operating under the impression, perhaps engendered by positions taken by the Board, that excess revenue need only be calculated by reference to the excess over the rate of return on common equity as defined for the purpose of operating the existing excess revenue account, it may consider that if the concept of excess earnings as discussed in this Opinion is applied at this stage to those previous years, there may effectively be a change in the "rules of the game". In that practical sense, there would be a "retroactive" readjustment.

[90] The court is not being asked, however, to determine the position of the utility specifically in relation to the years 1991 through 1996 and to determine the entitlement of the utility to excess revenues as calculated by reference to the current definition. The degree of NLP's misapprehension, if any, the actions of the Board in dealing with the excess revenue issue in the past, the degree to which NLP may have acted to its prejudice, and the degree to which the utility may nevertheless be required to disgorge excess revenues in previous years in accordance with presently understood concepts raise complex issues of mistake of law in the law of restitution and the defence of change of position which require for their resolution a detailed factual base. It would be inappropriate to attempt to answer such questions in this Opinion.

[91] The issue, therefore, is not whether the Board may revise the definition of excess revenue and then apply the revised definition to the results of previous years. That might well engage the principle of non-retroactivity. Here, assuming (without deciding) there was a misapprehension in the past as to how excess revenue should be calculated, the "change" in calculation method comes about, not because of a retroactive change in the rule by the Board but by a (perhaps) unanticipated declaration and clarification by the Court of what the law is and how it is or should be applied.

[92] I turn now to the determination of the powers of the Board to deal with excess revenue once it has been determined to exist.

[93] The only express provisions of the **Act** dealing with excess revenue are s. 69(4) which provides a power to require a utility to refrain from distributing extra revenue as dividends until further order, and s. 75(3) which enables the Board to order that excess revenue earned as a result of an "interim order" made under s. 75(1) and not confirmed by final order be either refunded to customers or placed in a reserve account for an approved purpose. Does the fact that similar powers are not expressed in respect of "final" orders mean that they were not intended to be available?

[94] I do not believe so. The power to deal with excess revenue is inherent in the nature of the regulatory scheme the Board is required to administer. The starting point is the power, found to exist in the answer to Question 1, that the Board may prescribe a rate

of return under s. 80(1) which carries with it the necessary corollary that the utility is only entitled to earn that level of return, as determined by the Board to be just and reasonable. It follows that unless the Board is to be a "toothless tiger" it must be accorded the means by which revenues earned in excess of the prescribed level of return are used in furtherance of the objectives and policies of the legislation and not simply for the benefit of the utility's investors. Such policies as the maintenance of a sound credit rating by the utility [see footnote 70], the efficient production, transmission and distribution of power [see footnote 71], the delivery of power at the lowest possible cost [see footnote 72] and the provision of reliable service [see footnote 73] are all candidates for the use of the excess. It does not follow, as the Consumer Advocate argued, that any dealing with the excess should involve only a return or rebate to consumers so as to ensure that the goal of delivery of low cost power is vindicated. While the maintenance of low rates is an important objective of the legislation, it is not the only one. As emphasized earlier [see footnote 74], the Board is always engaged in a balancing exercise between the interests of the consumer and the interests of the utility. It is not correct to say that any revenues earned in excess of a just and reasonable return belong to the consumer. Just as the utility is not "entitled" to earn and retain revenues in excess of such a level of return, so also the consumer is not absolutely "entitled" to the excess. The Board, having identified that an excess exists, must deal with it in furtherance of the objectives of the legislation.

[95] The means whereby the excess is dealt with should not be, unless expressly limited by the legislation, rigidly prescribed provided the means chosen comport with the objectives and policies of the legislation. It is worth repeating Gonthier, J.'s, observation in the **Bell Rebate** case that the fact that the differences between projected and actual rates of return are common calls for "a high level of flexibility in the exercise of the [Board's] regulatory duties", [see footnote 75]

[96] Counsel for NLP argued that the only power of the Board to deal with excess revenue, aside from interim order situations, flows from its power in s. 58 to prescribe the form of books and accounts to be kept by the utility and that, if it ordered, pursuant to s. 69(3), the creation of a reserve fund "for a purpose which the Board thinks appropriate", it could stipulate that the accounts should be kept in such a way as to require excess

revenues to be accounted for in such a reserve account. I do not find the jurisdiction to deal with excess revenue in the power to prescribe the utility's accounts. That is only a procedural means of exercising powers, the jurisdiction for which must be found elsewhere. Whilst the creation, pursuant to s. 69(3), of a reserve fund to deal with excess revenues could be said to be "a purpose which the Board thinks appropriate" (provided that purpose is consistent with the powers otherwise conferred on the Board), there is nothing in the language of s. 69(3) which expressly makes it applicable to an excess revenue situation and there is certainly nothing there which would purport to make the use of a reserve fund for the purpose of dealing with excess revenue as the only mechanism which would be at the Board's disposal to deal with this issue.

[97] I conclude that, bearing in mind the approach to interpretation mandated by s. 118(2) of the Act, the Board must of necessity have broad powers to deal with revenue earned by a utility in excess of the prescribed rate of return. Inasmuch as the ascertainment of the existence of excess revenue can only be made following a subsequent review, any order dealing with excess revenue will of necessity have certain retrospective elements about it. But that is not the same as saying that an order dealing with excess revenue ascertained by application of a pre-existing concept of what constitutes excess revenue is a retroactive order. It was argued by NLP that the setting up of a reserve account would be the only method that would not involve any trespass on the principle of non-retroactivity because the utility would know in advance that it had to set up its reserve account and could therefore provide for it without running the risk of spending or distributing excess revenues in ignorance of the fact that they would have to be held accountable for them.

[98] For reasons already given, this argument is unconvincing. By virtue of the answers given to Question 1, the utility knows that it is only entitled to earn a just and reasonable rate of return pursuant to any order made by the Board to that effect under s. 80(1). It can monitor its financial progress and can organize its accounts in such a way as to account for excess revenue so as to prevent the possibility of it being disposed of before any subsequent order dealing with the excess may be made. The utility does not need an express order of the Board requiring it, as a general rule, to set up a reserve

account for this purpose. Nevertheless, the use of a reserve account is a convenient way of doing this. It may well be, however, that the Board may, through other directions with respect to the manner of keeping accounts, develop other accounting procedures that will enable the utility to identify excess returns and to segregate them for other use.

[99] A reserve fund could be ordered by the Board to be used in the future to improve service, or to keep rates low or for some other purpose that is consistent with the objectives and policies of the legislation. Whether the advancement of these policies is done formally through the use of a reserve fund or through some other mechanism such as an order setting further rates, tolls and charges taking the prior excess revenue into account, the utility should not be prejudiced, in light of the fact that it knows that it is not entitled to earn a return in excess of a just and reasonable return.

[100] A rebate to consumers would also be permissible since it would have the indirect effect of ex post facto keeping the rates low. While it is true that any rebate would not, because of the fluid nature of the customer base, result in a return to exactly the same body of consumers who had paid the original rates, this is not an insuperable objection to using this type of mechanism. Penning [see footnote 76] observes:

> "As a practical matter, however, at least some of this concern appears misplaced. By far the majority of today's rate payers for the majority of regulated public service utilities were also yesterday's rate payers -especially since the time frames at issue are typically not more than a year or two. So the unfairness argument about cost allocation loses some of its force. Furthermore, to the extent it is still present, it can be dealt with through the choice of mechanism design - so instead of adjusting all rates, through either surcharges or refunds, the individual customers who met the timing criteria would receive an adjustment to their bill."

[101] This recognition was echoed by Gonthier, J., in the **Bell Rebate** case [see footnote 77] as follows:

> "...it is true that the one time credit ordered by the appellant will not necessarily benefit the customers who are actually billed excessive rates. However, once it is found that the appellant does have the power to make a remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one time credit is not the perfect way of reimbursing excess revenues. However, in view of the cost and the complexity of finding who actually paid excessive rates, where these

> persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement among its several classes of customers to determine just and reasonable rates, the appellant's decision was imminently reasonable..."

[102] Accordingly, I conclude that each of the Revenue Reduction, Reserve Fund and Rebate approaches to dealing with excess returns are within the jurisdiction of the Board and could, in particular circumstances, all constitute reasonable responses to a finding that the utility has earned in excess of a just and reasonable return.

[103] I would also add that the setting up of a reserve fund in a given case does not exhaust the ways in which the Board may deal with excess revenue. The methodologies proposed are not mutually exclusive. The Board has jurisdiction to deal with all revenue in excess of a just and reasonable return on rate base using one, or a judiciously blended combination, of the methodologies identified.

[104] Having said that, it must be emphasized that just because the Board has the jurisdiction to use these approaches, the particular circumstances may well dictate that one or more of them may be inappropriate in a given case. For example, the ordering of a rebate to consumers of the total amount of an excess return might not, in the light of the general financial condition of the utility, be appropriate when measured against such legislative objectives as the maintenance of the utility's sound credit rating. It might be appropriate, when all of the interests are properly balanced, for the Board, for example, to order that only the excess over a stipulated rate of return on equity, or some other measure, be refunded or otherwise dealt with. These are all matters to be considered by the Board in a given case.

[105] The answers to Questions 3 and 4 can be given as follows:

As to:

3(i) – Yes
3(ii) – Yes
3(iii) - Yes

[106] The answer to Question 4 is also "yes" on the assumption that what is being asked is not whether the Board may retroactively revise a previous order but merely whether, applying a defined and understood concept of excess revenue, (ie. an excess of a just and reasonable return on rate base) the excess so determined to have existed in prior years may then be taken account of and applied in setting future rates, tolls and charges.

Question 5

"Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4)."

[107] In order to understand the import of this question, it is necessary to review the approach taken by the Board to the definition of excess earnings in past years.

[108] In correspondence passing between NLP, Newfoundland Telephone Company Limited (which at that time was regulated by the Board) and the Board during the late 1980's, there was considerable discussion as to the manner of defining "excess revenue" for the purpose of the operation of the reserve account which the Board had required the utilities to maintain for that purpose. As a result of these discussions, the Board approved a change in the utilities' systems of accounts to recognize a new definition of excess earnings. As indicated, this was accomplished by defining the excess revenue account in the utilities' system of accounts as follows:

> "This account shall be credited with any revenue in excess of the maximum return on common equity determined by the Board at the previous rate hearing to be refunded to customers or used for such purposes as the Board may order."

[109] By the operation of this definition, the situation could occur whereby the utility might earn a rate of return on rate base in excess of the maximum range of returns determined by the Board pursuant to s. 80(1) but could nevertheless be within the range

of return on common equity used by the Board for the purpose of determining a just and reasonable return on rate base under s. 80(1). If that eventuality occurred, there would be no requirement on the utility to pay anything into the excess revenue account; yet, the result would be that the utility would have earned more than a just and reasonable return on rate base. In light of the answer given to Question 1, the benchmark for determining excess revenue is the range of return on rate base determined by the Board to be just and reasonable. Does the Board have jurisdiction to deal with this money as excess earnings in light of the fact that it has defined excess earnings for the purposes of the utility's accounting by reference to the maximum return on common equity?

[110] Question 5, we were told, attempts to address this issue. As phrased, however, the question merely asks whether the fact that the Board has "advised" (presumably, in the form of its order changing the definition of excess revenue for the purposes of the establishment of the excess revenue account) the utility of this new definition of excess revenue "affect" the jurisdiction of the Board to approve rates, tolls and charges. The short answer to this question, strictly construed, is "no". The Board cannot limit its jurisdiction, in the sense of its legal power, by determinations made in exercise of its powers. It either has the jurisdiction or it does not. Whether it chooses to exercise the jurisdiction is another matter.

[111] As a result of the discussions at the hearing, however, it is apparent that there is a more fundamental issue at stake. The assumption appears to be that if the Board chooses to define excess revenue for the purpose of establishment of the excess revenue account in terms of revenue earned in excess of the maximum return on common equity, it is in effect saying that revenue earned below that maximum but which happens to be in excess of the just and reasonable return on rate base as determined by the Board under s. 80(1) is necessarily money which the utility can keep. This position is obvious from the arguments made by counsel for NLP since his position has been throughout that excess revenue has no meaning other than by reference to the definition used for the purposes of the excess revenue account. As indicated previously [see footnote 78], this is not a correct interpretation of the situation. The same assumption is also apparent from the position taken by the Consumer Advocate who argues that the decision of the Board to define

excess revenue for the purpose of the excess revenue account in terms of exceeding the return on common equity, as opposed to rate base is ultra vires the Board because the Board must determine excess revenue by reference to revenues which are earned in excess of a just and reasonable return on rate base.

[112] The assumption that the definition of excess revenue for the purpose of the operation of the reserve account is equivalent to the concept of excess revenue flowing from earnings in excess of a just and reasonable return on rate base as prescribed under s. 80(1), is false. I agree with the Consumer Advocate, for reasons already given [see footnote 79], that any revenues earned in excess of the maximum range of a just and reasonable return on rate base are revenues to which the utility is not automatically entitled. It does not follow, however, that for the purposes of regulating the accounts of the utility, the Board is prevented from requiring payment into an excess revenue account on a different basis (provided it does not deprive the utility of the level of return on rate base to which it has been determined to be entitled). The Board can and should deal with all revenue earned in excess of a just and reasonable return on rate base; however, it does not have to require that all of it be paid into an excess revenue account.

[113] As indicated in the answers to questions 3 and 4, the Board has a broad jurisdiction as to how to deal with the excess and it may well be that, in the circumstances obtaining, it will determine that only a portion (i.e. that portion above the maximum return on common equity) should be paid into a reserve account. It might determine that the rest should be rebated to consumers or used by the utility in furtherance of the objective of ensuring that it maintains a sound credit rating in the financial markets of the world. In short, there is nothing wrong in principle with the Board defining excess revenue for the purposes of a reserve account differently from the notion of excess revenue as determined by a comparison with a just and reasonable return on rate base as determined by s. 80(1). In so doing, however, the Board ought not to assume that any additional excess revenue ought necessarily to be returned to the utility to be used as it sees fit. The Board has jurisdiction, and in exercise of its legislative mandate it ought to exercise that jurisdiction, to make a determination as to how that remaining excess revenue, if any, should be dealt with consistent with the objectives and policies of the legislation.

[114] Accordingly, the technical answer to Question 5 is "no" but so as to limit any confusion over the implications of the wording of the question, I would add that the Board has jurisdiction to define excess revenue for the purposes of maintenance of a reserve account by reference to the maximum level of return on common equity (or any other appropriate measure for that matter) but that does not mean that the Board may for all purposes define the level of excess revenue to which the utility is not entitled by reference to that measure; rather, the Board must determine, on the specific circumstances of the case, what is to be done with respect to any excess revenue measured against a just and reasonable return on rate base. If all or a portion of the excess revenue, measured against the return on rate base, is not ordered to be paid into a reserve account, it must nevertheless be dealt with in some other manner consistent with the objects and policies of the legislation. It should not be simply assumed that such excess revenue if not required to be paid into a reserve account belongs to the utility to be dealt with as it sees fit.

Question 6

"Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account."

[115] The just and reasonable return on rate base which the Board determines that the utility is entitled to earn annually is "in addition to those expenses which the Board may allow as reasonable and prudent and properly chargeable to the operating account...". [see footnote 80] Thus, in the process leading up to the prospective setting of rates, the Board may look at the type and level of projected expenses of the utility in the test year and determine whether they are reasonable and, if not, only allow, for the purposes of calculation of a just and reasonable return on rate base, such types and levels of expenses as are, in the opinion of the Board, reasonable.

[116] In the 1991 rate hearing, certain types and levels of projected advertising expenses were approved by the Board. At the 1996 rate hearing, it was suggested that in

the light of what actually happened in the years subsequent to 1991, the utility had in fact incurred advertising expenses well in excess of the amounts approved as reasonable and also of a type different from those which were approved, i.e. for corporate image building rather than related to the supply of service. The issue posed by Question No. 6 is whether expenses of a class which were previously approved as reasonable but which are in excess of the projected amounts can be disallowed by the Board for the purposes of rate regulation.

[117] The level of operating costs is obviously an important factor in fixing rates. It is generally accepted that Board supervision as to reasonableness of such costs is therefore essential to effective regulation [see footnote 81]. Phillips describes the matter thus:

> "Commissions seldom challenge expenditures controlled by competitive forces, such as those for plant maintenance, raw materials and labor. Conflicts do arise over whether certain expenditures should be charged to operating expenses or paid for by owners out of earnings.
>
> "Management might vote itself high salaries and pensions. Payments to affiliated companies for fuel and services might be excessive. Expenses for advertising, rate investigations, litigation and public relations should be closely scrutinized by the commissions to determine if they are extravagant or if they represent an abuse of discretion. In all cases, moreover, the commissions should require proof as to the reasonableness of a utility's charges to operating expenses." [see footnote 82]

Accordingly, the power to determine reasonable rates necessarily requires supervision of operating expenses.

[118] In defining the parameters of such supervisory power, however, the Board must account for a competing principle, namely, that the Board is not the manager of the utility and should not as a general rule substitute its judgment on managerial and business issues for that of the officers of the enterprise. [see footnote 83]

[119] Nevertheless, it is recognized that regulatory boards have a wide discretion to disallow or adjust the components of both rate base and expense [see footnote 84]. In an American case [see footnote 85] the matter was put as follows:

> "The contention is that the amount to be expended for these purposes is purely a question of managerial judgment. But this overlooks the consideration that the

charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any other purposes."

[120] Having said that, however, there will normally be a presumption of managerial good faith and a certain latitude given to management in their decisions with respect to expenditures. In the United States, the test for disallowance is usually "abuse of discretion" showing "inefficiency or improvidence" or "extravagant or unnecessary costs". [see footnote 86]

[121] When the issue becomes a retrospective examination of actual expenses as compared with what was projected and determined to be reasonable and prudent, there ought, similarly, to be caution exercised before determining that an expense was improperly incurred. The circumstances facing a utility are not static and a considerable latitude has to be given to the decisions of management in making expenditures to respond to the new situations as they present themselves.

[122] Nevertheless, it is still within the jurisdiction of the Board to supervise and review both the type and level of expenses incurred by the utility in respect of its operations. If it did not have that jurisdiction, the actual rate of return earned on rate base in a given year would be subject to manipulation by the utility as, for example, in a year where near the close of the fiscal period it appears that the rate of return will be more than anticipated, the utility, if totally unsupervised, could make large expenditures, unrelated to the delivery of service, simply to bring the rate of return in line with what had been projected.

[123] The jurisdiction of the Board to take account of deviations from estimates of expenses when setting future rates does not differ from that pertaining to its jurisdiction with respect to taking account of excess revenue. The disallowance of an expense may lead, in effect, to a greater rate of return, and potentially to excess revenue if the resulting actual adjusted rate of return is in excess of the previously determined acceptable range of return. The excess revenue over a just and reasonable range of return on rate base can be dealt with by the Board as discussed in the answers to Questions 3 and 4. It does not remain the property of the company.

[124] Accordingly, the answer to Question 6 is "yes". In giving this answer, however, I would emphasize that the question that was asked is a jurisdictional one. It does not give, in the circumstances of a particular case, a wide unfettered power to "second guess" managerial decisions with respect to expenses. In this regard, I agree with the comments of Phillips:

> "Public utilities...cannot spend freely and expect all expenditures to be included as allowable operating expenses. In effect, this means the commissions are permitted to question both the judgment and integrity of management. And if rates must be high enough to yield sufficient revenue to cover all operating expenses, the consumer has the right to expect that such expenditures will be necessary and reasonable.
>
> "At the same time, managerial good faith is presumed. Public utilities must be given the opportunity to prove the necessity and reasonableness of any expenditure challenged by a commission (or intervenor). To justify an expenditure, a company must show that the expense was actually incurred (or will be incurred in the near future), that the expense was necessary in the proper conduct of its business or was of direct benefit to the utility's rate payers, and that the amount of the expenditure was reasonable. Moreover, it must be emphasized again that a public utility may still spend its money in any way it chooses. Management's function is to set the level of expenses; the commission's duty is to determine what expense burden the rate payer must bear."

Question Nos. 7 and 8

> **"(7) Does the Board have jurisdiction to require a public utility to maintain**
>
> **(i) a ratio; or**
>
> **(ii) a ratio within a stated range of ratios**
>
> **of equity and debt, as the means of obtaining the capital requirements of the public utility.**
>
> **"(8) Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year."**

[125] These two questions will be considered together because the issues they raise are interrelated.

[126] In theory, both the overall level of capitalization and the individual components of a utility's structure are of interest to regulatory boards. Clearly, if a utility is allowed to engage in financing practices which result in overcapitalization, the whole viability of the enterprise may be threatened with consequent impact on the delivery of service to the public.

[127] Furthermore, unlike in competitive conditions where the enterprise would not be able effectively to raise its prices over those of its competitors even if its costs of capital were excessive, overcapitalization of a regulated utility may well affect rates. That is because, in principle, rates must be set at such a level as to allow for recovery of the utility's costs, including its costs of capital, as well as a just and reasonable return. Overcapitalization, if uncontrolled, would increase the utility's costs and hence its rates. If the utility is not permitted to recover its costs in this regard it will, like any unregulated business, face bankruptcy with the consequence of disruption of service to customers. Overcapitalization may therefore indirectly put an upward pressure on rates to ensure the continued viability of the utility to enable service to be maintained. Alternatively, service may suffer.

[128] Arguably, the purpose of s. 91 of the **Act** is to enable the Board to control the risk of overcapitalization and its impact on the viability of the utility, or at least on its credit standing. By examining each proposed new security issue in advance, the Board has a chance of minimizing the adverse effects of overcapitalization before they occur.

[129] The composition of a utility's capital structure, that is, the mix of debt and equity, is also a matter that is necessarily of interest to regulatory boards.

[130] Because the costs of the individual components of a utility's capital structure, i.e. the embedded costs of debt and preference shares and the reasonable rate of return on common equity, are given a weighted cost, proportional to their share of the total capital structure, for the purpose of deriving a reasonable rate of return on rate base, the level of the actual proportional share of each component will necessarily have an effect on the result of the overall determination of a just and reasonable return on rate base. The

makeup of the utility's capital structure can therefore influence that determination. [see footnote 87]

[131] Phillips [see footnote 88] expresses it this way:

> "...the traditional theory of business finance holds that the average cost of capital to a firm varies with the capital structure upon which it is based. The interest rate on debt is normally lower than the cost of equity capital. Consequently, within limits determined by such factors as the risk of a business, the overall cost may be somewhat lower when the debt-equity ratio is high than when the debt-equity ratio is low."

It is too simplistic, however, to say that in all cases, the higher the debt equity ratio, the lower will be the overall costs of capital. As deGrandpre [see footnote 89] points out:

> "It is often argued that if utilities increased their debt ratio, their cost of capital would be reduced since the cost of debt is less than the cost of equity. This may be true, but then the rate of return would have to be increased under the risk factor since the interest has to be paid before dividends and the investor might find himself deprived of dividends because of insufficient earnings."

The debt equity ratio can, therefore, have a complicated effect. What is undeniable, however, is that the debt-equity mix does have an effect on the rate of return. Hence, it is something which, in principle, should come within the regulatory umbrella in fulfilment of the policies of keeping the costs to consumers low and of ensuring a sound credit rating for the utility. The higher the cost of capital, the higher will be the return necessary to be awarded to the utility to enable it to maintain a sound credit rating in world financial markets. This would inevitably lead to higher rates, tolls and charges which would work against the policy of providing power to consumers at the lowest possible cost consistent with reliable service.

[132] From this, the Consumer Advocate and the Board itself argued that it is a necessary and appropriate power on the part of the Board to regulate the ratio of debt to equity in a utility's capital structure. Without such a power, the Board is limited, it was suggested, in its ability to ensure that sources and facilities for the production, transfer and distribution of power are managed and operated in a manner that would result in power being delivered to consumers at the lowest possible cost consistent with reliable service.

[133] In like manner, it was argued that the Board has the power, as a necessary incident of the legislative scheme, to stipulate, from time to time, that a public utility must obtain its capital requirements by the issue of financial instruments of a specified nature.

[134] Granting that the level of overall capitalization and the composition of the capital structure of a utility are both matters of regulatory concern, at least insofar as they affect the utility's rate of return on rate base and hence the cost to consumers of the delivery of reliable service, the question to be determined is the degree of intrusion which the Board may undertake into the financial affairs of the utility. Can it be proactive and, as Question 7 suggests, "require" the utility to maintain a particular debt-equity ratio or, as Question 8 implies, "require" the utility to finance its activities in a particular way, or is it limited to passive disallowance of particular financing proposals either in the process of setting rates or in the course of other applications?

[135] In approaching these questions, it has to be remembered that there is no such thing as one ideal capital structure. It is a function of economic conditions, business risks and "largely a matter of business judgment" [see footnote 90]. Furthermore, a given capital structure cannot be changed easily or quickly. As well, the long-term effects of changes on capital structure on the enterprise and on the future cost of capital may not be easily predictable. Capitalization decisions also have other business dimensions that transcend the considerations relevant to the issues directly presented in the regulatory process.

[136] All of these considerations favour an approach that, in principle, should limit the degree of intrusion by the Board into the managerial control by the utility over financial decision-making. As emphasized earlier [see footnote 91] the powers of the Board should be generally regulatory and corrective, not managerial. A debate has nevertheless occurred over whether regulatory agencies can and should "fix" debt-equity ratios and restrict new financing techniques to specified types of instruments [see footnote 92]. Phillips notes that:

> "These methods, however, have limitations. For example, since the financial conditions of individual utilities vary, no one ratio of debt to equity is correct. The

> refusal to approve a bond issue may lead to no issue at all, since, if a utility's earnings are insufficient to maintain its stock at par, it is in no position to issue more stock; bonds are the only way new capital can be raised. As a result of these problems, few commissions are willing to substitute their judgments for those of management..." [see footnote 93]

[137] An alternative to actual intrusion into the utility's financial affairs in the form of a direction as to how the enterprise should be structured is for the regulator, for the purpose of setting rates, to base its estimates of the cost of capital on a hypothetical appropriate capital structure, thereby disregarding the utility's actual capitalization [see footnote 94]. The justification for this approach is given by Phillips who, citing other authors, states:

> "Locklin has argued that most commissions 'disregard actual capital structures and set up an ideal or normal structure for the purpose. To do otherwise would burden the public with the higher costs of obtaining capital that result from a capital structure that is something less than ideal, and may, in fact, be quite unsound'. And Rose argues: 'When a commission in determining cost of capital disregards the actual capital structure or a capital structure proposed by management it is no more invading the domain of management than when it disregards unreasonable expenses for labor, fuel, or other productive factors in prescribing rates'." [see footnote 95]

It appears, however, that actual capitalization has also been used as a basis [see footnote 96]. Nevertheless, the arguments in favour of the ability of the Board to disregard the actual capital structure in an appropriate case and base its determinations upon a hypothetical structure are convincing. Indeed, this has occurred in Canada [see footnote 97]. Without such a power, the Board would not be able effectively to fulfil its mandate of promoting the delivery of reliable service to consumers at the lowest possible cost and at the same time maintaining a sound credit rating for the utility in the financial markets of the world. Having said that, in exercising that power, it goes without saying that the Board ought to have a healthy respect for managerial judgment [see footnote 98] in such matters since if a hypothetical capital structure is used that is too far off the mark of the actual structure, it may in practical terms make the utility unable to meet its actual commitments, thereby threatening its credit standing and possibly affecting service to customers.

[138] It is not necessary to go further, for the purpose of promotion of the objectives and policies of the legislation, and accord to the Board a power of actual intrusion into the

capital structure of the utility. The distinction between actual intrusion and disallowance for rate making purposes is justified in the context of the existing legislation and enables the Board to respect the principle of general deference to managerial decisions.

[139] The question that remains is whether s. 91 of the Act, which is the only provision expressly dealing with the powers of the Board respecting capital structure, can be said, either expressly, or by necessary implication, to accord greater powers to the Board.

[140] On its face, s. 91 appears to be limited to a situation where the Board may approve or disapprove of a particular proposal from the utility for the issuance of a proposed form of securities. It is expressed in terms of a power of negative disallowance rather than positive direction.

[141] As noted previously [see footnote 99], s. 91 enables the Board to control the level of overall capitalization. Is that the only purpose for which a disallowance under s. 91 can be made? Obviously, an indirect effect of an approval or refusal of a particular security issue could be to affect the utility's future proposed debt-equity ratio and hence the composition of its capital structure. In practical terms, the power to disallow a specific proposal will enable the Board to exercise at the very least, by means of moral suasion in discussion, a degree of positive influence over total capitalization as well as capital structure. The power of disallowance under s. 91 may, in my view, be used, in appropriate cases, to further such objectives. Section 91(3) requires the Board, before approving a security issue, to be satisfied that it is in accordance with law and "for a purpose approved by the Board". Accordingly, so long as the power of approval or disallowance under s. 91 is exercised in a manner that is consistent with and in furtherance of any of the policies which the legislation was designed to serve, it will be within the jurisdiction of the Board to so act. In that way, the Board may influence the total level of capitalization as well as the particular debt-equity ratio. It does not, however, permit the Board to direct the utility to raise money in a particular way or to maintain a particular debt-equity ratio. In other words, it cannot be used as a springboard for an aggressive intrusion into the day to day financial and managerial decision making of the utility with respect to the capital structure of the

enterprise. Nor can the general policies underlying the legislation justify such a power. As indicated, financing is undertaken for considerations that are not necessarily directly related to utility regulation. Furthermore, it has also been noted that, within the regulatory context, the utility is still subject to business risks and the effects of management decisions and the utility, other things being equal, ought to have the power to respond to that zone of risk. To that extent, the utility must be able to make financial decisions related to the overall health of the enterprise for reasons other than strictly regulatory ones, provided that in so doing it does not trespass on the objectives and policies of the legislation.

[142] Accordingly, while recognizing that a degree of influence over the utility's capital structure and over the choice of financial instruments to be used in financing the enterprise can be exercised by means of the powers conferred by s. 91 and the powers inherent in the regulatory scheme itself, the answers to Questions 7 and 8, insofar as the questions imply an ability to directly stipulate particular financing results, is, in each case, "no".

General Observations

[143] In answering the foregoing questions, it is worth emphasizing that the answers are given in terms of the jurisdiction of the Board. The fact that the Board may have jurisdiction, in the sense of legal power, to do something does not mean that, in a particular case, the power ought to be exercised. In the arguments which were presented on the hearing of the stated case, it was apparent that some of the positions taken by a party were being advanced out of a concern that if the jurisdiction was conceded, it would necessarily follow that the Board would exercise its power in a manner adverse to that party.

[144] The question of whether the Board should in fact exercise powers within its sphere of jurisdiction and the question of the manner in which those powers should be exercised raise very different considerations. It must always be remembered that, as has been emphasized throughout this opinion, the Board is charged with balancing the competing interests of the utility and the consumers of the service it provides. Neither set

of interests can be emphasized in complete disregard of the interests of the other. Thus, in choosing to exercise a particular power within the Board's jurisdiction, the Board must always be mindful of whether, in so acting, it will be furthering the objectives and policies of the legislation and doing so in a manner that amounts to a reasonable balance between the competing interests involved.

Opinion

[145] Pursuant to s. 101 of the **Act**, I would summarize my opinion on the questions posed as follows:

Question 1 (i) – Yes
Question 1 (ii) – No
Question 2 – Yes
Question 3(i) – Yes
Question 3(ii) – Yes
Question 3(iii) – Yes
Question 4 – Yes
Question 5 – No
Question 6 – Yes
Question 7 – No
Question 8 - No

I emphasize that inasmuch as the import of the answers given depends on my interpretation of the questions posed, it is necessary to read the answers in the context of the rest of this Opinion.

[146] Pursuant to s. 102, the Deputy Registrar of the court is directed to remit this Opinion to the Board.

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[147] **O'Neill, J.A.** [dissenting in part]: The Board of Commissioners of Public Utilities (the Board) is a statutory body existing under the provision of the **Public Utilities Act**, R.S.N. 1990, c. P-47, as amended (the Act).

[148] The general powers of the Board are set out in s. 16 of the **Act:**

> "The board shall have the general supervision of all public utilities, and may make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the law and shall have the right to obtain from a public utility all information necessary to enable the board to fulfil its duties."

[149] In addition to the powers and obligations given to and imposed on the Board by the Act, the Board has certain duties and powers under the **Electrical Power Control Act**, 1994, Chapter E-5.1, as amended and, by s. 4 of that **Act**, is specifically directed to "implement the power policy" of the Province, as set out in s. 3 of that **Act**, and in doing so to apply tests "which are consistent with generally accepted sound public utility practice".

[150] By s. 101 of the **Act**, the Board may, of its own motion, state a case in writing for the opinion of the court upon a question which in the opinion of the Board is a question of law.

[151] On August 14, 1996, the Board stated a case requesting the opinion of the court with respect to certain specific questions as set out therein. Following an application for directions, the court ordered that, inter alia, certain parties be notified of the proposed hearing. Subsequently Newfoundland Light & Power Co. Ltd., a utility, and "the Consumer Advocate" were granted status to appear and be heard at the hearing before the court.

[152] In its application to the court, the Board stated that in the course of a hearing before it, the submissions of various parties raised questions as to the jurisdiction of the Board under the **Act** and the Board thereupon stated a case for the court upon the following questions:

> "(1) Does the Board have jurisdiction pursuant to the **Act** to set and fix the return which a public utility may earn annually upon:
>
> (i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or
>
> (ii) the investment which the Board has determined has been made in the public utility by the holders of common shares.
>
> "(2) Does the Board have jurisdiction to set the rates of return referred to in Question (1) as a range of permissible rates of return.

"(3) Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment, which the Board has determined, has been made in the public utility by holders of common shares,

does the Board have jurisdiction to

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date; or

(iii) require the public utility to rebate the excess earnings to customers of the public utility?

"(4) Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility, or

(ii) the investment, which the Board has determined, has been made in the public utility by the holders of common shares,

in prior years.

"(5) Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question (4).

"(6) Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.

"(7) Does the Board have jurisdiction to require a public utility to maintain

(i) A ratio; or

(ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility.

"(8) Does the Board, upon an application pursuant to Section 91 of the **Act** or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year."

Question #1

"(1) Does the Board have jurisdiction pursuant to the Act to set and fix the return which a public utility may earn annually upon:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; and/or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares."

[153] It may be useful to set out here the relevant parts of ss. 37, 70 and 80 of the **Act:**

"37.(1) A public utility shall provide service and facilities which are reasonably safe and adequate and just and reasonable.

"70.(1) A public utility shall not charge, demand, collect or receive compensation for a service performed by it whether for the public or under contract until the public utility has first submitted for the approval of the board a schedule of rates, tolls and charges and has obtained the approval of the board and the schedule of rates, tolls and charges so approved shall be filed with the board and shall be the only lawful rates, tolls and charges of the public utility, until altered, reduced or modified as provided in this Act.

"80.(1) A public utility is entitled to earn annually a just and reasonable return as determined by the board on the rate base as fixed and determined by the board for each type or kind of service supplied by the public utility but where the board by order requires a public utility to set aside annually a sum for or towards an amortization fund or other special reserve in respect of a service supplied, and does not in the order or in a subsequent order authorize the sum or a part of it to be charged as an operating expense in connection with the service, the sum or part of it shall be deducted from the amount which otherwise under this section the public

utility would be entitled to earn in respect of the service, and the net earnings from the service shall be reduced accordingly.

"(2) The return shall be in addition to those expenses that the board may allow as reasonable and prudent and properly chargeable to operating account, and to all just allowances made by the board according to this **Act** and the rules and regulations of the board.

"(4) The board may use estimates of the rate base and the revenues and expenses of a public utility."

[154] In the past, the Board has ordered that a just and reasonable return for a utility is "determined" to be between two stated percentages of its annual rate base for a test year, and ordered the utility to file, for examination by the Board, a schedule of rates, tolls and charges which will comply with the Board's determination, and, if so found to comply, approval is granted for those rates, tolls and charges.

[155] The rate base is arrived at by calculating the utility's net investment in plant and equipment required for the rendering of the regulated service.

[156] While not having fixed the return which the utility may earn, the Board has, in its orders, directed that a utility establish an "excess revenue reserve" into which revenue exceeding a certain rate of return on equity is to be deposited.

[157] The Board, in its order dated December 4, 1991, having fixed the average rate base for Newfoundland Power for the year 1992, and having determined a just and reasonable return for Newfoundland Power on its average rate base for that year, noted that that return would provide an opportunity for it to earn a somewhat higher rate of return on common equity:

"A just and reasonable return for [Newfoundland Power] is determined to be between 10.96% and 11.19% on its average rate base for 1992, which will provide an opportunity to earn a rate of return on common equity between the range of 13.00% to 13.50%."

[158] The Board's position before the court was that since what is a just and reasonable return on rate base is influenced by the proportion of the various financing components, including long term and short term debt and preferred shares, it is imperative that the Board be able to set and fix the return which the holders of the common shares in

the utility may earn since the market conditions for debt could alter the return to the holders of the common shares significantly.

[159] Although s. 80 does not specifically provide for a rate of return for common shares, the determination of a rate of return on the common shares of a utility is very much a part of the rate making process. Further, it must be noted that by s. 3 of the **Electrical Power Control Act**, the policy of the Province is declared to be that the rates to be charged, either generally or under specific contracts, for the supply of power within the Province "should provide sufficient revenue to the producer or retailer of the power to enable it to earn a just and reasonable return as construed under the **Public Utilities Act** so that it is able to achieve and maintain a sound credit rating in the financial markets of the world...".

[160] For Newfoundland Power it was argued that the Board has the jurisdiction to determine the just and reasonable return on the rate base and, as part of that process, the jurisdiction to determine the return on common equity, it being one of its sources of funds. I see no distinction between "determine" and "set and fix" insofar as the jurisdiction of the Board here is concerned. The calculations and projections made by the Board in arriving at the rate of return, whether specifically on rate base or the return on common equity, involve by their very nature, looking into the future, estimating as best can be done the revenues and expenditures contemplated for the utility's operations, the costs of money which may vary substantially, up and down, and then to fix a rate base, and a just and reasonable return on that base upon which the rates, tolls and charges will be based and approved.

[161] Although the Board is supplied on a regular basis and has the authority to demand all the financial information it requires of a utility, the rates are, in effect, established for relatively long periods, (in excess of one year) and the likelihood of the accuracy of the forecasts which are necessarily made in setting the rate base and the rates of return is somewhat diminished.

[162] For the Consumer Advocate it was argued that s. 80(1) only gives the Board the jurisdiction to calculate the rate of return on rate base and does not allow a calculation of what return the common equity shares will have.

[163] As noted earlier, common shares constitute one of the components of the financial make-up of a utility and, as argued by counsel for the Board, while, theoretically, the Board only determines a just and reasonable return on the rate base as fixed and determined by it, in a practical sense, the return on common equity must be considered as part of the mix in setting the return on rate base, just as are the rates of interest paid on preferred shares, bonds and other financial obligations.

[164] In the result, in my opinion, questions I(i) and I(ii) should be answered in the affirmative.

Question #2

"Does the Board have jurisdiction to set the rates of return referred to in question (1) as a range of permissible rates of return?"

[165] There is no question but that the rate setting process of the Public Utilities Board is prospective and is performed by the Board's making estimates of the myriad of factors which have to be considered. The problem is exacerbated by the fact that the process is not one which is contemplated to be reviewed regularly or on a short term basis. The meaningful interpretation of the word "return" as it appears in s. 80(1) allows for and, in the circumstances, contemplates a range of rates of return. It follows then that a just and reasonable return, though it may be stated as a fixed percentage, may be a range of rates which is determined to be just and reasonable. In making such a determination, the Board is clearly acting within its jurisdiction. As noted earlier, a consideration of a just and reasonable return on common equity as one of the components of the financial investment in the company is a necessary part of the process of arriving at a just and reasonable return on rate base, and this return may also be stated as a range.

[166] I would answer question 2 in the affirmative.

Question #3

"Should a public utility earn annually a rate of return which is in excess of the rate of return determined by the Board to be just and reasonable, either on:

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment, which the Board has determined has been made in the public utility by holders of common shares,

does the Board have jurisdiction to

(i) require the public utility to use the excess earnings to reduce revenue requirements for the succeeding year; or

(ii) require the public utility to place the excess earnings in a reserve fund for the purpose of adjusting rates, tolls and charges of the public utility at a future date, or

(iii) require the public utility to rebate the excess earnings to customers of the public utility?"

[167] Under s. 69 of the Act, the Board has very broad powers including requiring a public utility to set aside from earnings monies in a depreciation account and creating and maintaining a reserve fund. Section 69 of the **Act** is as follows:

> "69.(1) A public utility, if so ordered by the board, shall, out of earnings, set aside all money required and carry it in a depreciation account.
>
> "(2) The depreciation account shall not, without the consent of the board, be spent otherwise than for replacements, new constructions, extensions or additions to the property of the company.
>
> "(3) The board may by order require a public utility to create and maintain a reserve fund for a purpose which the board thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations.
>
> "(4) The board, in a case where it has made an order which has the effect of increasing a public utility's revenues, may require the public utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the board's opinion attributable to the order."

[168] The answer to the question also requires a consideration of the powers of the Board as set out in ss. 58 and 59 of the **Act**.

[169] By ss. 58 and 59, the Board may prescribe the form of all books of account and records to be kept by the public utility and to make its returns to the Board on such forms

as may be prescribed by it. By s. 59, unless otherwise ordered by the Board, the utility shall close its accounts at the end of each calendar year and shall file with the Board its balance sheet, together with such other information as may be required by the Board, before April 2nd of the year following. In effect, approximately three months after the close of the utility's financial year, the Board is made aware of the exact financial position of the company at the end of the previous year and of any other information which it may require.

[170] It will be seen from s. 69(3) that the Board has the power to direct a utility to set up reserves out of revenue to be used for replacement of equipment, new construction, extensions or additions to the property of the company. As well, reserves may be ordered to be created which would have the effect of "improving the status of the utility as a borrower or seeker of funds for necessary maintenance or expansion". There is a further power which comes to the Board from s. 69(4) and that is to require the utility to set up a reserve of monies which may have been in excess of those anticipated by the Board at the time of setting the rate of return and to prevent the distribution of that money or any part of it as dividends until the further order of the Board.

[171] In the setting of rates, the Board is looking into the future and addressing the anticipated revenues and expenses of the utility with the many variables which may occur. It follows then that it must have the authority to anticipate that there will be variations from what was forecast. While the rates, tolls and charges are set following a hearing and only by an order following a hearing, the constant reporting which a utility must make to the Board allows the Board to be kept informed as to the financial operations of the utility and, in the result, to be aware of how these revenues and expenditures affect the rate of return anticipated by the Board and set out in its order. At the same time, as stated earlier, the rate of return on rate base and on common equity are set not as specific percentages but as a range.

[172] In order P.U. 6-1991, the following appears at p. 56:

> "The applicant has applied for a rate of return on common equity in the range of 13.5% to 14.0%, with rates set at 13.75%. The midpoint of the range was chosen

since it is consistent with past practice and gives the Company the motivation to strive for a higher range (up to 14.0%) while giving them an opportunity to remain within the range if they are unable to come in on forecast (i.e. earn 13.5%)."

And later at p. 72:

> "The Board orders a range of 13.00% to 13.50% be adopted as the Company's rate of return on common equity with rates being set at the mid-point of the range, 13.25%. In the opinion of the Board this will give [Newfoundland Power] the opportunity to earn a fair and reasonable return and will increase [Newfoundland Power's] interest coverage in 1992 to 2.87 times.
>
> "The Board believes that [Newfoundland Power's] interest coverage in 1991 of 2.81 times at existing rates, which is an increase from 2.7 times in 1990, together with the increase to 2.87 in 1992 is satisfactory."

[173] In my view, when rates, tolls and charges are set, the revenues generated belong to the company. If the net revenues are less than forecast and result in a return on rate base or on common equity less than as set out in the Board's order, then that loss is the company's loss. Revenues which are greater than anticipated belong to the company and any revenues in excess of those forecast by the Board as reflected in its order belong to the company and cannot be used, except as discussed in the following paragraph, to reduce the revenues of the utility in the future.

[174] I see nothing to preclude the Board's directing that those revenues of a utility in excess of the top of the range allowed by the Board in its order as a return on common equity, be set aside and maintained in a reserve fund by an order of the Board, as contemplated by s. 69 "for a purpose which the [B]oard thinks appropriate, including the improvement of the public utility's status as a borrower or seeker of funds for necessary maintenance or expansion of its operations". I do not view any revenues of a utility in excess of those required to achieve the higher point of the range of return either on rate base or on common equity as becoming excess funds unless and until they are set aside by an order of the Board as authorized by s. 69. Until such order, these funds remain the property of the utility and may be treated as such. The creation of a reserve fund is a power given to the Board to be exercised as it sees fit. Indeed, s. 69(4) gives the Board the authority to "require the utility to refrain from distributing as dividends until further order the whole or a part of the extra revenue which is in the [B]oard's opinion, attributable to the

order". Indeed, it may happen from time to time that circumstances may so change following the making of an order that a utility may need to and may actually earn revenues in excess of those contemplated by the Board when the last order was issued.

[175] It follows from what I have said that the Board does not have the power to order rebates to the customers of the utility other than out of such a reserve fund. To order a rebate from revenues other than those which have been placed in a reserve fund and, in that sense, not available to the company directly, would be to make a retroactive order. A sufficiently good reason for this is that just as additional billings are not permitted to be made to customers because of revenues which have fallen below the range set when the order was made, so any additional revenues may not be paid out. The role of rate making is prospective and this in itself in my view would preclude any reaching back.

[176] Reference should also be made to s. 80(1) which in my view contemplates, by the use of the words "earn annually", that each year becomes a separate unit and the revenues from one year may not be applied to another year so as to effect any change in the financial makeup of the utility, except through the use of the reserve fund, which, on its creation by order of the Board, has the effect of removing funds from the particular financial year affected by the order of the Board creating or ordering the placing of funds in the reserve fund and, in effect, makes those monies unavailable for the general use of the utility, including the payment of dividends to the holders of common equity.

[177] I would answer question 3(i) in the negative, 3(ii) in the affirmative and 3(iii) in the negative.

Question #4

"Does the Board have jurisdiction to order that the rates, tolls and charges of a public utility shall be approved taking into account earnings in excess of a just and reasonable return upon,

(i) the rate base as fixed and determined by the Board for each type of service supplied by the public utility; or

(ii) the investment which the Board has determined has been made in the public utility by the holders of common shares,

in prior years?"

[178] Although the Board's jurisdiction is to fix and determine a rate base which will enable the utility to earn annually a just and reasonable return on that rate base, it follows that, depending on the range settled upon by the Board in its order and considering that the rates, tolls and charges are set using the mid-point of that range as a basis, the utility may, from time to time, record net revenues which are less than or more than that contemplated by the range as set. Although the wording of s. 80 of the **Act** states that the utility is entitled to earn a just and reasonable return, it does not follow that it may not nor should not have revenues in excess of those contemplated. At the same time, for reasons which may be beyond the complete control of the utility, the revenues received might be substantially below those anticipated when the rates, tolls and charges were set and approved.

[179] In my view, the Board cannot set rates, as argued by counsel for the Board, in a manner that would compensate for prior "excess" earnings. At the same time, in setting rates, as it must do prospectively, the Board must be alive to the various factors which may have caused the utility in any previous year to earn more or less than that anticipated by the Board in its order, and it must factor those causes into the percentages and ranges for return on rate base and for return on common equity in future orders.

[180] I would answer question 4 in the negative.

Question #5

"Does the fact that the Board has advised the public utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return, upon the rate base as fixed and determined by the Board for each type of service supplied by the public utility, but not in excess of the return determined by the Board to be a just and reasonable return upon the investment which the Board has determined has been made in the public utility by the holders of common shares, affect the jurisdiction of the Board to approve rates, tolls and charges on the basis queried in Question 4."

[181] Counsel for the Board argued that the authority of the Board to amend, alter or rescind any order made by it is plenary and the Board has full power to reconsider any order made previously by it, notwithstanding that there is a right of appeal in respect of its decisions on questions of law. Further, he argued that the fact that the Board has

previously ruled or ordered a particular basis for the calculation of excess revenue does not preclude the Board from considering the effect of such earlier decisions in determining what revenues will be required by the utility in setting new rates based on a just and reasonable return in accordance with a new method of calculation.

[182] Counsel further argued that since there is no fixed term for the continuing application of any approved rates, tolls or charges, the Board is not precluded from altering its previous order and assessing what is a just and reasonable return based upon its current assessment of the utility. Counsel argued that s. 87(1) of the **Act** clearly sets out that power:

> "87.(1) Where upon an investigation the rates, tolls, charges or schedules are found to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or in violation of this Act, the board has power to cancel those rates, tolls, charges or schedules and declare void all contracts or agreements, either oral or written, dealing with them upon and after a day named by the board, and to determine and by order substitute those rates, tolls or schedules that are reasonable."

[183] The investigation undertaken under s. 87(1) follows upon a complaint made to the Board as set out in s. 84(1) and following upon the procedures set out in ss. 85 and 86 of the **Act**.

[184] The legislation empowers and indeed directs the Board to conduct a constant monitoring of the financial position of the utility and gives the Board the authority to institute a correction process at any time. It does not, in my opinion follow, as argued by counsel for the Board, that the Board in setting new rates, tolls and charges may take into account earnings of the utility in previous years in excess of a just and reasonable return upon the rate base or upon the investment which the Board has determined has been made in the public utility by the holders of common shares. This is so notwithstanding that the Board has previously ordered or advised a utility that it is permitted to retain earnings in excess of the rate of return determined by the Board to be a just and reasonable return upon the rate base as fixed and determined by the Board where not in excess of the return determined by the Board to be a just and reasonable return upon the investment made by the holders of common shares.

[185] Counsel for the utility argued that the Board does not have jurisdiction to order that the rates, tolls and charges shall be approved taking into account earnings in excess of a just and reasonable return, either on rate base or on common equity, in prior years. Counsel further argued that such a power would "constitute retroactive appropriation of past revenues for future purposes". He further argued that the only mechanism available to the Board, where a utility earns in excess of the rate of return on rate base or on common equity, is to require the utility to deposit excess revenue, as defined by the Board, into a reserve account in the year earned. It is then, he argued, that the Board may approve the application of these funds as revenue in determining the rates, tolls and charges for a future period but any funds not ordered to be deposited in the reserve account are funds of the utility, belong to the utility, and cannot be considered in setting future rates. To do so, he argued, would be to change the system of accounts so that funds which were not excess in a previous year will then become excess and be brought forward - a retroactive order which is beyond the jurisdiction of the Board.

[186] For the Consumer Advocate it was argued that although the Board had advised the utility that it was permitted to retain earnings in excess of the rate of return as determined by the Board, it is not precluded from later making an order under s. 80(1) and s. 76 of the **Act** rescinding, altering or amending any existing order and in declaring these earnings as excess revenue. The Consumer Advocate also argued that in light of its position taken in response to question 4, the Board does not have jurisdiction to order that the "excess revenue" earned in previous years by the utility should be taken into account in setting rates, tolls and charges in subsequent years but that the Board must order that it be rebated to customers of the utility.

[187] I agree with the position taken by the utility. I would answer question 5 in the negative.

Question #6

"Does the Board have jurisdiction to order the rates, tolls and charges of the public utility shall be approved taking into account the amount of expenses previously incurred by the public utility which the Board may now consider inappropriate to be allowed as reasonable and prudent and properly

chargeable to operating account notwithstanding that such classes of expenses were allowed as reasonable and prudent and properly chargeable to operating account.".

[188] The example given by the Board in its factum illustrative of the situation giving rise to question 6 is as follows:

> "In determining in 1991 what was a just and reasonable return on the basis of projections for test year, 1992, the Board was presented with projections for the future cost of operating expenses including advertising. The actual cost of advertising for 1995 exceeded the projection for 1992 by some $314,000.00. As such, the amounts for advertising contemplated by the Board as being reasonable, prudent and properly chargeable to operating account vary significantly for the year 1995 from the estimate upon which the Board determined a just and reasonable rate of return."

[189] Counsel for the Board argued that "the circumstances of a significant increase in expenses over the estimates used for the test year is indistinguishable from the circumstances of an increase in net earnings. For the same reasons as advanced by it in question 5, it argued that the Board had jurisdiction to order that the rates, tolls and charges could be approved taking into account these expenses, previously incurred, but now considered inappropriate to be allowed as reasonable and prudent.

[190] For the utility, it was argued that once rates, tolls and charges are set, the resulting revenue belongs to the utility except for any amounts which the Board may order to be deposited into an excess revenue account. Further, although the Board has the authority to determine whether the expenses comply with s. 80(2), which jurisdiction is necessary to ensure the integrity of the excess revenue account, the Board does not have jurisdiction to disallow the amount of any operating expense which is reasonable or which had previously been allowed as a just allowance. Further, it argued that the Board may not disallow an expense because it is of the opinion that had it been the manager, it would not have made that expenditure. The question is whether the expenditure is one that could have been made by a reasonable and prudent manager.

[191] The utility further argued that there should be no "microscopic review" especially with the benefit of hindsight. Counsel argued that the Board makes its annual review of the returns made by the utility and, in the specific example here, the Board had obviously

made the decision that that expense, although it exceeded predictions, was reasonable (or at least the fact that it didn't say anything about it would indicate that it was reasonable). That expense should not, except in very rare circumstances, be later held to be unreasonable. The utility's position was stated in its factum as follows:

> "The Board does not have jurisdiction to order that rates, tolls and charges shall be approved taking into account the amount of such 'disallowed' expenses. The Board's jurisdiction is limited to disallowing expenses which it determines not to be 'reasonable and prudent and properly chargeable to operating account' or otherwise not a 'just allowance' under s. 80(2). The disallowance of an expense would lead to the company earning a somewhat greater return on common equity for the purpose of the excess revenue account for the year in which the expense was incurred. However, this revenue remains the property of the company and its shareholders unless the amount disallowed would mean that the company's return on common equity would exceed the maximum return on common equity previously allowed by the Board. If that were to occur, the amount which would be beyond the maximum return on common equity would be deposited into the 'excess revenue account'."

[192] For the Consumer Advocate, it was argued that the Board may take into account past expenses in order to forecast more accurately future revenues and expenditures. However, its counsel argued that the Board does not have jurisdiction to set future rates, tolls and charges designed to compensate for past expenses that the Board may now consider inappropriate to be allowed as reasonable and prudent and properly chargeable to operating account.

[193] I agree with the arguments proferred by the utility and the Consumer Advocate.

[194] I would answer question 6 in the negative.

Questions #7 & 8

Question #7

"Does the Board have jurisdiction to require a public utility to maintain:

(i) A ratio; or

(ii) A ratio within a stated range of ratios

of equity and debt, as the means of obtaining the capital requirements of the public utility."

Question #8

"Does the Board, upon an application pursuant to Section 91 or otherwise, have the jurisdiction to require a public utility to obtain its capital requirements by the issue of specific financial instruments, whether common shares, preferred shares, stocks, bonds, debentures or evidence of indebtedness payable in more than one year."

[195] In his decision which I have read in draft, Green, J.A., considered questions 7 and 8 together because, as he stated, the issues they raise are interrelated. I agree with the reasoning of Green, J.A., in dealing with these questions and I would answer both questions, as he did, in the negative.

[196] I would also agree with the comments made by Green, J.A., in that part of his decision, entitled "General Observations".

Conclusion

[197] In the result then I would answer the questions posed as follows: 1(i) yes, 1(ii) yes, question 2 - yes, question 3(i) - no, question 3(ii) - yes, question 3(iii) - no, question 4 - no, question 5 - no, question 6 -no, question 7 - no, and question 8 - no.

Order accordingly.

Footnotes

1. R.S.N. 1990, c. P-47 as amended (hereinafter the "**Act**")

2. **Act**, s. 16

3. **Act**, s. 70

4. **Act**, s. 80

5. Board Orders P.U.6 (1996) and P.U.7 (1991)

This is an official version.

Important Information
(Includes details about the availability of printed and electronic versions of the Statutes.)

Table of Regulations **Main Site** **How current is this regulation?**

NEWFOUNDLAND AND LABRADOR
REGULATION 120/13

Muskrat Falls Project Exemption Order
under the
Electrical Power Control Act, 1994
and the
Public Utilities Act
(O.C. 2013-342)

(Filed November 29, 2013)

Under the authority of section 5.2 of the *Electrical Power Control Act, 1994* and section 4.1 of the *Public Utilities Act,* the Lieutenant-Governor in Council makes the following Order.

Dated at St. John's , November 29, 2013.

Julia Mullaley
Clerk of the Executive Council

REGULATIONS

Analysis

Short title

1. This Order may be cited as the *Muskrat Falls Project Exemption Order* .

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Interpretation

2. (1) In this Order

(a) "LiL" means the transmission line and all related components of the Muskrat Falls Project described in section 2.1(1)(a)(ii) of the *Energy Corporation Act* , and for greater certainty "all related components" in that subparagraph includes converter stations, synchronous condensers, and terminal, telecommunications, and switchyard equipment;

(b) "LilParty" means Labrador-Island Link Holding Corporation, the Labrador-Island Link General Partner Corporation, the Labrador-Island Link Limited Partnership, or Labrador-Island Link Operating Corporation, or any combination of them as the context may require;

(c) "LTA" means the transmission facilities of the Muskrat Falls Project described in subparagraph 2.1(1)(a)(iii) of the *Energy Corporation Act* ;

(d) "LTACo" means the Labrador Transmission Corporation;

(e) "MFCo" means the Muskrat Falls Corporation;

(f) "Muskrat Falls " means the hydroelectric facilities of the Muskrat Falls Project as described in subparagraph 2.1(1)(a)(i) of the *Energy Corporation Act* .

(2) In this Order, references

(a) to a public utility or an activity being "exempt" means the public utility or the activity is exempt from the application of

(i) the P*ublic Utilities Act,* and

(ii) Part II of the *Electrical Power Control Act, 1994* ; and

(b) to a corporation or limited partnership, where the corporation or limited partnership does not exist as of the date of this Order coming into force, shall be valid upon the creation of the corporation or limited partnership under the *Energy Corporation Act* and the *Corporations Act* or the *Limited Partnership Act* .

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Public utilities

3. LilParty, LTACo and MFCo are acknowledged to be public utilities under the *Public Utilities Act* for the purpose of this Order.

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Exemption

4. (1) Newfoundland and Labrador Hydro is exempt in respect of

(a) any

(i) expenditures, payments, or compensation paid to MFCo by Newfoundland and Labrador Hydro relating to the purchase and storage of electrical power and energy, the purchase of interconnection facilities, ancillary services, and greenhouse gas credits,

(ii) obligations of Newfoundland and Labrador Hydro in addition to subparagraph (i) to ensure MFCo's and LTACo's ability to meet their respective obligations under financing arrangements related to the construction and operation of Muskrat Falls and the LTA, and

(iii) expenditures, payments, or compensation paid to MFCo and revenues, proceeds or income received by Newfoundland and Labrador Hydro relating to the sale of electrical power and energy acquired from MFCo to persons located outside of the province

whether under one or more power purchase agreements or otherwise;

(b) any activity relating to the receipt of delivery, use, storage or enjoyment by Newfoundland and Labrador Hydro of any electrical power and energy, interconnection facilities, ancillary services, and greenhouse gas credits under paragraph (a);

(c) any expenditures, payments, or compensation paid to LilParty and claimed as costs, expenses or allowances by Newfoundland and Labrador Hydro relating to the design, engineering, construction and commissioning of transmission assets and the purchase of transmission services and ancillary services, electrical power and energy, from LilParty or otherwise with respect to the LiL, under one or more transmission services agreements, transmission funding agreements, or otherwise; and

(d) any activity relating to the receipt of delivery, use, storage or enjoyment by Newfoundland and Labrador Hydro of any transmission services and ancillary services, electrical power and energy, with respect to the LiL under paragraph (c).

(2) MFCo is exempt in respect of any activity, and any expenditures, payments or compensation, or any revenues, proceeds or income, relating to the following:

(a) the design, engineering, planning, construction, commissioning, ownership, operation, maintenance, management and control of Muskrat Falls ;

(b) producing, generating, storing, transmitting, delivering or providing electric power and energy, capacity, ancillary services, and greenhouse gas credits, to or for Newfoundland and Labrador Hydro or any other person or corporation for compensation;

(c) any activity required or related to an agreement under section 5.4 or 5.5 of the *Electrical Power Control Act, 1994* ;

(d) negotiating, concluding, executing and performing any and all agreements for any activity referred to in paragraph (a), (b) or (c);

(e) raising and securing financing necessary to conduct any activity in paragraph (a), (b), (c) or (d), including without limitation the negotiation, conclusion, execution and performance of any and all agreements and security documentation with any lender providing that financing; and

(f) any agreements, contracts or instruments necessary or incidental to any activity described in this exemption, including agreements with LTACo.

(3) LilParty is exempt in respect of any activity, and any expenditures, payments or compensation, or any revenues, proceeds or income, relating to the following:

(a) the design, engineering, planning, construction, commissioning, ownership, operation, maintenance, management and control of the LiL;

(b) producing, generating, storing, transmitting, delivering or providing electric power and energy to or for Newfoundland and Labrador Hydro or any other person or corporation for compensation;

(c) negotiating, concluding, executing and performing any and all agreements for activities referred to in paragraph (a) or (b);

(d) raising and securing any financing necessary to conduct any activity in paragraph (a), (b) or (c), including without limitation the negotiation, conclusion, execution and performance of any and all agreements and security documentation with any lender providing that financing; and

(e) any agreements, contracts or instruments necessary or incidental to any activity described in this exemption, including agreements between one or more LilParty.

(4) LTACo is exempt in respect of any activity, and any expenditures, payments or compensation, or any revenues, proceeds or income, relating to the following:

(a) the design, engineering, planning, construction, commissioning, ownership, operation, maintenance, management and control of the LTA;

(b) producing, generating, storing, transmitting, delivering or providing electric power and energy to or for Newfoundland and Labrador Hydro or any other person or corporation for compensation;

(c) negotiating, concluding, executing and performing any and all agreements for activities referred to in paragraphs (a) and (b);

(d) raising and securing any financing necessary to construct the LTA, including without limitation the negotiation, conclusion, execution and performance of any and all agreements and security documentation with any lender providing that financing to the projects; and

(e) any agreements, contracts or instruments necessary or incidental to any activity described in this exemption, including agreements with MFCo.

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2013/11/29

OC2013-343

NR/DM
TB/Secretary
FIN/DM
E.Martin/Nalcor
A. Wells/PUB
AG
Deputy Clerk
File

MC2013-0534. NR2013-021. TBM2013-180.

Under the authority of section 5.1 of the Electrical Power Control Act, 1994, the Lieutenant Governor in Council is pleased to direct the Board of Commissioners of Public Utilities to adopt a policy, subject to section 3, that:

1) Any expenditures, payments or compensation paid directly or indirectly by Newfoundland and Labrador Hydro, under an agreement or arrangement to which the Muskrat Falls Project Exemption Order applies, to:

a) a LiLParty,

b) a system operator in respect of a tariff for transmission services or ancillary services in respect of the LiL, that otherwise would have been made to a LiLParty, or

c) Muskrat Falls Corporation, in respect of:

i) electrical power and energy forecasted by Muskrat Falls Corporation and Newfoundland and Labrador Hydro to be delivered to, consumed by, or stored by or on behalf of Newfoundland and Labrador Hydro for use within the province, whether or not such electrical power and energy is actually delivered, consumed, or stored within the province,

ii) greenhouse gas credits, transmission services and ancillary services, and

iii) obligations of Newfoundland and Labrador Hydro in addition to those in paragraphs (i) and (ii) to ensure the ability of Muskrat Falls

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Corporation and Labrador Transmission Corporation to meet their respective obligations under financing arrangements related to the construction and operation of Muskrat Falls and the LTA

shall be included as costs, expenses or allowances, without disallowance, reduction or alteration of those amounts, in Newfoundland and Labrador Hydro's cost of service calculation in any rate application and rate setting process, so that those costs, expenses or allowances shall be recovered in full by Newfoundland and Labrador Hydro in Island interconnected rates charged to the appropriate classes of ratepayers;

2) The costs, expenses or allowances of Newfoundland and Labrador Hydro described above, and the rates for Newfoundland and Labrador Hydro established by the Board of Commissioners pursuant to the direction under section 1, shall not be subject to subsequent review, and shall persist without disallowance, reduction or alteration of those costs, expenses or allowances or rates, throughout any processes for any public utility, including Newfoundland Power Inc., or any other process under the Electrical Power Control Act, 1994 or the Public Utilities Act;

3) Notwithstanding sections 1 and 2, no amounts paid by Newfoundland and Labrador Hydro described in those sections shall be included as costs, expenses or allowances in Newfoundland and Labrador Hydro's cost of service calculation or in any rate application or rate setting process, and no such costs, expenses or allowances shall be recovered by Newfoundland and Labrador Hydro in rates:

a) where such amounts are directly attributable to the marketing or sale of electrical power and energy by Newfoundland and Labrador Hydro to persons

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located outside of the province on behalf of and for the benefit of Muskrat Falls Corporation and not Newfoundland and Labrador Hydro; and

b) in any event, in respect of each of Muskrat Falls, the LTA or the LiL, until such time as the project is commissioned or nearing commissioning and Newfoundland and Labrador Hydro is receiving services from such project.

4) In this Order in Council, terms shall have the same meaning ascribed to them in the Muskrat Falls Project Exemption Order.

Julia Mullaley

Clerk of the Executive Council

Tissa Amaratunga *Appellant*

v.

Northwest Atlantic Fisheries Organization, a body corporate *Respondent*

and

Canadian Civil Liberties Association *Intervener*

INDEXED AS: AMARATUNGA *v.* NORTHWEST ATLANTIC FISHERIES ORGANIZATION

2013 SCC 66

File No.: 34501.

2013: March 28; 2013: November 29.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Public international law — Jurisdictional immunity — International organizations — Former senior manager of international organization headquartered in Canada filing wrongful dismissal suit — International organization claiming immunity under Order reflecting agreement with Canada — Whether claimed immunity applies — Meaning of immunities "required" for performance of functions — Northwest Atlantic Fisheries Organization Privileges and Immunities Order, SOR/80-64, s. 3(1).

NAFO is an international organization headquartered in Nova Scotia. Its mandate is to manage and preserve fishing resources in the Northwest Atlantic Ocean. A worked at NAFO as a senior manager from 1988 until 2005 when NAFO terminated his employment. When A then commenced a wrongful dismissal suit, NAFO claimed immunity as an international organization under its *Northwest Atlantic Fisheries Organization Privileges and Immunities Order* ("*NAFO Immunity Order*") agreement with Canada. The Supreme Court of Nova Scotia rejected NAFO's immunity defence and determined that A's wrongful dismissal suit could proceed

Tissa Amaratunga *Appelant*

c.

Organisation des pêches de l'Atlantique Nord-Ouest, une personne morale *Intimée*

et

Association canadienne des libertés civiles *Intervenante*

RÉPERTORIÉ : AMARATUNGA *c.* ORGANISATION DES PÊCHES DE L'ATLANTIQUE NORD-OUEST

2013 CSC 66

N° du greffe : 34501.

2013 : 28 mars; 2013 : 29 novembre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit international public — Immunité de juridiction — Organisations internationales — Poursuite pour congédiement injustifié par un ancien cadre supérieur d'une organisation internationale dont le siège est au Canada — Revendication par l'organisation internationale de l'immunité de juridiction fondée sur le décret énonçant l'entente conclue entre elle et le Canada — L'immunité revendiquée s'applique-t-elle? — Sens des immunités qu'« exige » l'exercice de fonctions — Décret sur les privilèges et immunités de l'Organisation des pêches de l'Atlantique nord-ouest, DORS/80-64, art. 3(1).

L'OPANO est une organisation internationale dont le siège est situé en Nouvelle-Écosse. Elle a le mandat de veiller à la gestion et à la conservation des ressources halieutiques dans l'Atlantique Nord-Ouest. A a travaillé pour l'OPANO à titre de cadre supérieur de 1988 à 2005, lorsque l'organisation l'a congédié. Lorsqu'il a intenté un recours pour congédiement injustifié, l'OPANO a plaidé qu'elle jouissait de l'immunité de juridiction en tant qu'organisation internationale en application du *Décret sur les privilèges et immunités de l'Organisation des pêches de l'Atlantique nord-ouest* (« *Décret sur l'immunité de l'OPANO* ») dont elle avait convenu avec

to trial, including A's claim for a separation indemnity under NAFO Staff Rules. The Court of Appeal, however, allowed NAFO's appeal and determined that NAFO enjoyed immunity from all of A's claims.

Held: The appeal should be allowed in part.

NAFO is entitled to immunity, except from A's separation indemnity claim under the Staff Rules. Without immunity, an international organization would be vulnerable to intrusions into its operations by the host state and that state's courts. However, no rule of customary international law confers immunity on international organizations. Instead, they derive their immunity from treaties, or in the case of smaller international organizations like NAFO, from agreements with host states.

NAFO reached an agreement with Canada, which is reflected in the *NAFO Immunity Order*. Section 3(1) of the *NAFO Immunity Order* grants NAFO immunities "to such extent as may be required for the performance of its functions". In accordance with modern statutory interpretation, the meaning of that phrase must be read in its entire context and in its grammatical and ordinary sense, harmoniously with the object and scheme of the *NAFO Immunity Order* and in light of the grant of authority and the intention of Parliament. The meaning of the phrase, including the word "required", is determinative of the disposition of this appeal.

While the grammatical and ordinary sense of the word "required" is "necessary", the context of s. 3(1) suggests instead a broader interpretation. Indeed, the word "required" in s. 3(1) should be interpreted to have the same broad meaning as in s. 3(3) because the Governor in Council is presumed to have been consistent in making the *NAFO Immunity Order*. The Governor in Council is granted authority to determine the scope of the immunity for each international organization on a case-by-case basis. For NAFO, the Governor in Council conferred a broad functional immunity as can be seen from the very words of s. 3(1) — "for the performance of [NAFO's] functions". To not interpret s. 3(1) broadly would run counter to the object and scheme of the *NAFO Immunity*

le Canada. La Cour suprême de la Nouvelle-Écosse a rejeté la défense de l'OPANO fondée sur l'immunité et jugé que le procès pour congédiement injustifié intenté par A pouvait avoir lieu, y compris en ce qui avait trait à la demande de ce dernier relative à l'indemnité de cessation d'emploi à laquelle il prétendait en application du règlement régissant le personnel de l'OPANO. La Cour d'appel a toutefois accueilli le pourvoi de l'OPANO et jugé que celle-ci jouissait d'une immunité qui la mettait à l'abri de toutes les demandes formulées par A.

Arrêt : Le pourvoi est accueilli en partie.

L'OPANO a droit à l'immunité, sauf en ce qui a trait à la demande de paiement d'une indemnité de cessation d'emploi formulée par A et fondée sur le règlement régissant le personnel de l'organisation. En l'absence d'une telle immunité, rien n'empêcherait l'État d'accueil et ses tribunaux de s'ingérer dans les opérations d'une organisation internationale. Il n'existe en revanche aucune règle de droit international coutumier conférant une immunité aux organisations internationales. Celle-ci est plutôt une créature des traités ou, dans le cas d'organisations internationales plus petites comme l'OPANO, elle découle d'ententes avec leur État d'accueil.

L'OPANO et le Canada ont conclu une entente qu'énonce le *Décret sur l'immunité de l'OPANO*. Le paragraphe 3(1) de cette entente confère à l'OPANO un droit à l'immunité « dans la mesure où ses fonctions l'exigent ». Conformément aux principes modernes d'interprétation des lois, pour en dégager la signification, cette proposition doit être interprétée dans son contexte global, en suivant le sens ordinaire et grammatical des mots qui s'harmonise avec l'esprit et l'objet du *Décret sur l'immunité de l'OPANO* compte tenu des pouvoirs conférés et de l'intention du législateur. Le sens de la proposition, y compris celui des termes « l'exigent », est déterminant pour l'issue du présent pourvoi.

Même si le sens grammatical et ordinaire des termes « l'exigent » est « nécessaire », le contexte du par. 3(1) suggère qu'il faut plutôt leur donner une interprétation plus libérale. En effet, les termes « l'exigent » qui figurent au par. 3(1) doivent être interprétés de telle sorte qu'ils aient le même sens libéral que celui qu'ils ont au par. 3(3), parce que le gouverneur en conseil est présumé avoir fait preuve de cohérence dans l'établissement du *Décret sur l'immunité de l'OPANO*. La loi confère au gouverneur en conseil le pouvoir de déterminer l'étendue des immunités à accorder au cas par cas à chaque organisation internationale. Or, il a conféré à l'OPANO une large immunité fonctionnelle, comme en témoigne le libellé même du par. 3(1) : « dans la mesure où [l]es

Order as well as Parliament's intention of modernization, flexibility and respect for the independence of international organizations.

In this case, NAFO requires immunity from A's claims for it to perform its functions, except A's separation indemnity claim under the Staff Rules. A was the second-in-command in the Secretariat. He directly supervised other staff and was responsible for the scientific aspect of NAFO's mission. NAFO must have the power to manage its employees, especially those in senior positions, if it is to perform its functions efficiently. To allow employment-related claims of senior officials to proceed in Canadian courts would constitute undue interference with NAFO's autonomy in performing its functions and would amount to submitting its managerial operations to the oversight of its host state's institutions. The absence of a dispute resolution mechanism or of an internal review process is not, in and of itself, determinative of whether NAFO is entitled to immunity. While the fact that A has no forum in which to air his grievances and seek a remedy is unfortunate, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state.

For NAFO to perform its functions, however, it does not require immunity from A's separation indemnity claim. The separation indemnity does not interfere with NAFO's functions. Indeed, NAFO recognizes that it owes a separation indemnity to A under its Staff Rules and concedes that the *NAFO Immunity Order* does not immunize it from A's claim. This claim should be allowed to proceed and the appeal should be granted to that extent.

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Considered: *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Re Canada Labour Code*, [1992] 2 S.C.R. 50; **referred to:** *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, I.C.J. (February 3, 2012); *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571; *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285; *Bristol-Myers Squibb Co. v. Canada (Attorney*

fonctions [de l'organisation] l'exigent ». Ne pas interpréter libéralement le par. 3(1) irait à l'encontre de l'objet et de l'esprit du *Décret sur l'immunité de l'OPANO* de même que des objectifs poursuivis par le législateur, soit la modernisation, la souplesse et le respect de l'indépendance des organisations internationales.

En l'espèce, sauf en ce qui a trait à la demande de paiement de l'indemnité de cessation d'emploi fondée sur le règlement régissant le personnel de l'OPANO, celle-ci a besoin de l'immunité quant aux réclamations de A pour pouvoir s'acquitter de ses fonctions. A était le numéro deux du secrétariat. Il supervisait directement d'autres employés et était responsable du volet scientifique du mandat de l'organisation. L'OPANO doit être en mesure de gérer ses employés, notamment ceux qui occupent des postes supérieurs, afin d'accomplir efficacement ses fonctions. Permettre que des poursuites liées à l'emploi intentées contre l'OPANO par ses cadres supérieurs soient entendues par les tribunaux canadiens porterait atteinte de façon injustifiée à l'autonomie de l'OPANO dans l'exercice de ses fonctions et reviendrait à assujettir ses opérations de gestion à la surveillance des institutions de l'État d'accueil. L'absence d'un mécanisme de règlement des différends ou d'un processus interne d'examen n'est pas en soi déterminante pour décider si l'OPANO bénéficie de l'immunité. Bien qu'il soit regrettable que l'appelant ne puisse pas faire valoir ses moyens devant un tribunal et demander réparation, c'est dans la nature même de l'immunité de juridiction que certaines affaires soient soustraites de la compétence des tribunaux de l'État d'accueil.

Pour que l'OPANO puisse s'acquitter de ses fonctions, il n'est toutefois pas nécessaire qu'elle jouisse de l'immunité à l'égard de la réclamation de A relative à son indemnité de cessation d'emploi. D'ailleurs, l'OPANO reconnaît devoir une telle indemnité à A en application du règlement régissant son personnel et concède que le *Décret sur l'immunité de l'OPANO* ne la met pas à l'abri de cette réclamation. Cette dernière doit pouvoir suivre son cours et l'appel être accueilli à cet égard.

Jurisprudence

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David A. Copp, for the appellant.

John T. Shanks and *Richard Dunlop*, for the respondent.

Ewa Krajewska and *Heather K. Pessione*, for the intervener.

The judgment of the Court was delivered by

LeBel J. —

I. Introduction

[1] International organizations are active and necessary actors on the international stage. Although they are subjects of international law, they have to operate on the territories of sovereign states with political and legal systems of their own. To avoid undue interference in the operations of an international organization, the treaty that establishes it will recognize certain privileges and immunities. If not, the host state will promise to do so. In this regard, some form of immunity from legal process in domestic courts is critical, and commonly granted.

[2] This appeal pits the Northwest Atlantic Fisheries Organization ("NAFO"), an international organization responsible for the management of fishery resources in the Northwest Atlantic, against one of its former employees, the appellant, Tissa Amaratunga. The appellant sued NAFO for breach of his contract of employment in the Nova Scotia Supreme Court, as NAFO is headquartered in Dartmouth, Nova Scotia. NAFO successfully claimed immunity from this action. The Nova Scotia Court of Appeal held that NAFO was entitled to immunity in this matter by virtue of s. 3(1) of the *Northwest Atlantic Fisheries Organization Privileges and Immunities Order*, SOR/80-64 ("*NAFO Immunity Order*"). For the reasons that follow, I conclude that NAFO is entitled to immunity and that the appeal must fail in this respect, but must be allowed in part, in respect of the right to the separation indemnity

David A. Copp, pour l'appelant.

John T. Shanks et *Richard Dunlop*, pour l'intimée.

Ewa Krajewska et *Heather K. Pessione*, pour l'intervenante.

Version française du jugement de la Cour rendu par

Le juge LeBel —

I. Introduction

[1] Les organisations internationales jouent un rôle actif et nécessaire sur la scène internationale. Bien qu'elles soient assujetties au droit international, ces organisations exercent leurs activités sur le territoire d'États souverains, dotés de leurs propres systèmes politique et juridique. Pour éviter toute ingérence injustifiée dans les activités d'une organisation internationale, le traité qui la constitue lui reconnaît certains privilèges et immunités. Dans le cas contraire, l'État d'accueil s'engage à les lui accorder. À cet égard, une certaine forme d'immunité de juridiction devant les tribunaux de l'État d'accueil est indispensable, et habituellement accordée.

[2] Le présent pourvoi oppose l'Organisation des pêches de l'Atlantique Nord-Ouest (« OPANO ») — une organisation internationale chargée de la gestion des ressources halieutiques dans l'Atlantique Nord-Ouest — à un de ses anciens employés, l'appelant, Tissa Amaratunga. Ce dernier a intenté une action contre l'OPANO pour rupture d'un contrat de travail, et ce devant la Cour suprême de la Nouvelle-Écosse, parce que l'organisation intimée a son siège à Dartmouth, en Nouvelle-Écosse. L'OPANO a invoqué avec succès l'immunité de juridiction contre cette action. La Cour d'appel de la Nouvelle-Écosse a conclu que l'OPANO avait droit à l'immunité en l'espèce en application du par. 3(1) du *Décret sur les privilèges et immunités de l'Organisation des pêches de l'Atlantique nord-ouest*, DORS/80-64 (« *Décret sur l'immunité de l'OPANO* »). Pour les motifs qui suivent, je conclus

payment granted in accordance with the NAFO Staff Rules, with costs to the appellant.

II. Background Facts

[3] NAFO, which was founded in 1979 as a successor to the International Commission of the Northwest Atlantic Fisheries, is an intergovernmental body concerned with fisheries science and management. As stated in art. II(1) of the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Can. T.S. 1979 No. 11 ("Convention"), its overall objective is "to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources" of the Northwest Atlantic. Canada is a contracting party to the Convention.

[4] NAFO consists of four bodies: the General Council, the Scientific Council, the Fisheries Commission, and the Secretariat. The functions of these bodies are detailed in the Convention.

[5] Article II(4) of the Convention provides that NAFO's headquarters is to be located in Dartmouth. The Convention also provides that NAFO has legal personality. As a corollary to this legal personality, the organization enjoys certain immunities and privileges. The Convention provides in art. II(3) that NAFO and Canada are to agree on what those immunities and privileges will be in Canada. The resulting agreement is set out in the *NAFO Immunity Order*, which was made by the Governor in Council on January 11, 1980.

[6] The appellant joined NAFO in 1988 as Assistant Executive Secretary (the position's title was later changed to Deputy Executive Secretary); his position was a senior one within the Secretariat. In that role, he had to be familiar with all aspects of NAFO's operations and requirements. His

que l'OPANO a droit à l'immunité et que le pourvoi échoue à cet égard, mais doit être accueilli en partie au sujet du droit au paiement de l'indemnité de cessation d'emploi accordée conformément au règlement régissant le personnel de l'OPANO, avec dépens en faveur de l'appelant.

II. Contexte

[3] Fondée en 1979 pour remplacer la Commission internationale pour les pêcheries de l'Atlantique Nord-Ouest, l'OPANO est un organisme intergouvernemental se consacrant aux sciences halieutiques et à la gestion des pêches. Comme l'indique l'art. II(1) de la *Convention sur la future coopération multilatérale dans les pêches de l'Atlantique Nord-Ouest*, R.T. Can. 1979 nº 11 (« Convention »), cet organisme a pour mandat général de « contribuer par la consultation et la coopération à l'utilisation optimale, à la gestion rationnelle et à la conservation des ressources halieutiques » de l'Atlantique Nord-Ouest. Le Canada est une partie contractante de la Convention.

[4] L'OPANO comporte quatre sections : le conseil général, le conseil scientifique, la commission des pêches et le secrétariat. Leurs fonctions respectives sont décrites dans la Convention.

[5] Suivant l'art. II(4) de la Convention, l'OPANO a son siège à Dartmouth. La Convention prévoit aussi que l'OPANO a une personnalité juridique. Cela signifie qu'elle jouit corollairement de certaines immunités et de certains privilèges. La Convention précise en outre à l'art. II(3) que les immunités et privilèges de l'OPANO au Canada seront déterminés par une entente à conclure entre elle et son pays d'accueil. L'entente dont il a été convenu est énoncée dans le *Décret sur l'immunité de l'OPANO*, pris par le gouverneur en conseil le 11 janvier 1980.

[6] L'appelant est entré au service de l'OPANO en 1988 en tant que secrétaire exécutif adjoint — le titre du poste en anglais, « *Assistant Executive Secretary* », a plus tard été rebaptisé « *Deputy Executive Secretary* » —, un poste supérieur au secrétariat. En cette qualité, il devait bien connaître

responsibilities included directly supervising four of the Secretariat's eleven staff members; assuming the duties of the Executive Secretary as needed; providing operational and advisory services to the Scientific Council; liaising with chairpersons within NAFO and the administrators of national and international bodies to fulfill the needs of the Scientific Council; managing scientific information and NAFO's biological and statistical databases; managing and editing NAFO's scientific and statistical publications; and managing computer systems as necessary for NAFO's operations.

tous les aspects des opérations et des exigences de l'OPANO. Il s'acquittait notamment des tâches suivantes : superviser directement quatre des onze employés du secrétariat; exercer au besoin les fonctions du secrétaire exécutif; fournir des services opérationnels et consultatifs au conseil scientifique; assurer la liaison avec les présidents au sein de l'OPANO et avec les administrateurs des organismes nationaux et internationaux pour répondre aux besoins du conseil scientifique; gérer l'information scientifique ainsi que les bases de données biologiques et statistiques de l'OPANO; gérer et mettre au point les publications scientifiques et statistiques de cette dernière; et gérer les systèmes informatiques nécessaires pour ses opérations.

[7] The appellant was dismissed from his employment by the Executive Secretary on June 24, 2005. As can be seen from the statement of claim, the working relationship between the appellant and this Executive Secretary, who had been appointed in January 2003, had been deteriorating.

[7] Le 24 juin 2005, l'appelant a été congédié par le secrétaire exécutif nommé en janvier 2003, après que, tel qu'il appert de la déclaration, leurs relations de travail se sont détériorées.

[8] On the day of his dismissal, the appellant was informed by letter that he would receive a sum of $153,149. That sum comprised two amounts. The first amount of $102,193 represented his salary up to July 31, 2005, his leave entitlement and the separation indemnity due to him under rule 10.4 of the NAFO Staff Rules. The second amount of $50,956, provided on a gratuitous basis, was intended to compensate the appellant for any financial disadvantages that might result from the termination of his employment. The appellant agreed with NAFO that the separation indemnity in the amount of $80,987 would be paid in a first instalment of $30,987 in 2005 and a second instalment of $50,000 in 2006. The appellant also requested confirmation from NAFO that the gratuitous payment of $50,956 would be paid without prejudice. NAFO did not respond to this request.

[8] Le jour de son congédiement, l'appelant a reçu une lettre l'informant qu'il recevrait une somme de 153 149 $. Celle-ci était constituée de deux montants. Le premier, de 102 193 $, représentait son salaire jusqu'au 31 juillet 2005, ses congés payés ainsi que l'indemnité de cessation d'emploi qui lui était payable en application de l'art. 10.4 du règlement régissant le personnel de l'OPANO. Le deuxième, de 50 956 $ et versé à titre gracieux, visait à l'indemniser pour tout désavantage financier qui pouvait découler de sa cessation d'emploi. L'appelant a convenu avec l'OPANO que l'indemnité de cessation d'emploi de 80 987 $ serait payée en deux versements : le premier, de 30 987 $, serait versé en 2005, et le deuxième, de 50 000 $, en 2006. Il a également demandé à l'OPANO une confirmation que le paiement à titre gracieux de 50 956 $ serait versé sous toutes réserves. L'OPANO n'a pas répondu à cette demande.

[9] NAFO paid the appellant the amount due for salary, accrued leave and the first instalment of the separation indemnity in 2005. In February 2006, the appellant received a single cheque for both the

[9] En 2005, l'OPANO a payé à l'appelant le montant dû au titre des salaires et des congés accumulés et a effectué le premier versement de l'indemnité de cessation d'emploi. En février 2006,

second instalment of the separation indemnity and the gratuitous payment. Because he had not received confirmation from NAFO that the gratuitous payment was without prejudice, he returned the cheque. A second cheque in the same amount was sent to the appellant in April 2006, and he returned it for the same reason.

[10] On June 15, 2006, the appellant filed a statement of claim in the Nova Scotia Supreme Court seeking damages for breach of his contract of employment and for breach of the contract under which NAFO was required to pay the separation indemnity in two instalments. More specifically, the appellant claimed the following damages: the balance of the separation indemnity in the amount of $50,000; salary in lieu of reasonable notice; general damages; and punitive or aggravated damages.

[11] In its statement of defence, NAFO submits that under the *NAFO Immunity Order*, it enjoys immunity from the appellant's claims, and that the Nova Scotia Supreme Court lacks jurisdiction to entertain them.

III. Judicial History

[12] By notice of motion, NAFO sought a determination of its claim that it enjoys immunity from the appellant's lawsuit by virtue of the *NAFO Immunity Order*. Robertson J. ordered that NAFO's defence of immunity be determined separately from the trial of the appellant's claims. The proceedings that led to this appeal concerned the determination of NAFO's claim of immunity.

A. *Nova Scotia Supreme Court, 2010 NSSC 346, 295 N.S.R. (2d) 331*

[13] Wright J. rejected NAFO's claim of immunity. In his view, the word "required" as used in the phrase "to such extent as may be required for the performance of its functions" in s. 3(1) of the

l'appelant a reçu en un seul chèque le deuxième versement de l'indemnité de cessation d'emploi et le paiement à titre gracieux. Comme il n'avait reçu de l'OPANO aucune confirmation selon laquelle le paiement du montant versé à titre gracieux était fait sous toutes réserves, l'appelant lui a renvoyé le chèque. Un deuxième chèque du même montant a été envoyé à l'appelant en avril 2006, chèque que l'appelant a renvoyé pour le même motif.

[10] Le 15 juin 2006, l'appelant a déposé une déclaration à la Cour suprême de la Nouvelle-Écosse, sollicitant des dommages-intérêts pour rupture de son contrat de travail et du contrat obligeant l'OPANO à payer l'indemnité de cessation d'emploi en deux versements. L'appelant a réclamé plus précisément, à titre de dommages-intérêts : le reste de l'indemnité de 50 000 $ payable pour la cessation d'emploi; le versement d'une indemnité en lieu et place du préavis raisonnable de fin d'emploi; des dommages-intérêts généraux; et des dommages-intérêts punitifs ou majorés.

[11] Dans sa défense, l'OPANO a plaidé que le *Décret sur l'immunité de l'OPANO* lui confère l'immunité de juridiction à l'égard des réclamations de l'appelant et que la Cour suprême de la Nouvelle-Écosse n'est pas compétente pour les entendre.

III. Historique judiciaire

[12] Par avis de requête, l'OPANO a demandé qu'une décision soit rendue sur son allégation selon laquelle le *Décret sur l'immunité de l'OPANO* lui confère l'immunité de juridiction contre l'action intentée par l'appelant. Le juge Robertson a ordonné que cette défense fondée sur l'immunité soit jugée séparément des réclamations de l'appelant. La procédure qui a mené au présent pourvoi demande de décider si l'OPANO jouit de l'immunité de juridiction.

A. *Cour suprême de la Nouvelle-Écosse, 2010 NSSC 346, 295 N.S.R. (2d) 331*

[13] Le juge Wright a rejeté l'allégation d'immunité de l'OPANO. Selon lui, les termes « l'exigent » de la proposition « dans la mesure où ses fonctions l'exigent » du par. 3(1) du *Décret sur l'immunité*

NAFO Immunity Order means "demand as necessary" or "essential" (para. 56). NAFO had to demonstrate that immunity from the appellant's claim was necessary or essential to the performance of its functions. Wright J. concluded that immunity was not necessary or essential for that purpose.

[14] Wright J. found that NAFO's functions were to "contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fish resources in the Northwest Atlantic Ocean" (para. 57). He held that little factual evidence supported NAFO's argument that it would be an impermissible intrusion into the organization's internal management for the court to take jurisdiction. According to Wright J., the following factors militated against immunity: the appellant's claims relate to a private contract of employment voluntarily entered into by NAFO; the claims are limited to monetary damages for breach of that contract and NAFO is not asserting just cause; no right to interfere with the internal organization, management or governance of NAFO is being claimed; the appellant is not seeking to subject NAFO to Canadian legislation; and no sovereign, political or security elements arise in this case.

[15] Wright J. added that his conclusion that NAFO is not entitled to immunity in this case was reinforced by the fact that if the Canadian court lacked jurisdiction, the appellant would be left with no recourse to pursue his claims. He said that the *NAFO Immunity Order* should be interpreted in a way that is consistent with the right of an individual with a legitimate claim to a fair hearing by a competent, independent and impartial tribunal established by law in accordance with the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("*ICCPR*").

de l'OPANO signifient que l'OPANO possède les privilèges et les immunités [TRADUCTION] « exigés comme nécessaires » ou « essentiels » (par. 56). L'OPANO devait donc établir que l'immunité de juridiction contre l'action intentée par l'appelant était nécessaire ou essentielle à l'exercice de ses fonctions. Or, pour le juge Wright, elle ne l'était pas.

[14] Le juge Wright a conclu que l'OPANO avait pour fonction de [TRADUCTION] « contribuer par la consultation et la coopération à l'utilisation optimale, à la gestion rationnelle et à la conservation des ressources halieutiques dans l'océan Atlantique Nord-Ouest » (par. 57). Peu d'éléments de preuve factuels étayaient selon lui l'argument de l'OPANO selon lequel le fait pour la cour de se déclarer compétente constituerait une ingérence inacceptable dans la régie interne de cette organisation. De l'avis du juge Wright, les facteurs suivants s'opposaient à une conclusion favorable à l'immunité : les allégations de l'appelant se rapportaient à un contrat de travail privé conclu volontairement par l'OPANO; l'appelant réclamait uniquement des dommages-intérêts pour rupture de ce contrat et l'OPANO ne faisait pas valoir de motif valable pour justifier sa décision; aucun droit d'ingérence dans l'organisation interne, la gestion ou la gouvernance de l'OPANO n'était invoqué; l'appelant ne cherchait pas à assujettir l'OPANO au droit canadien; et aucun élément relatif à la souveraineté, à la politique ou à la sécurité n'entrait en jeu en l'espèce.

[15] En outre, pour le juge Wright, sa conclusion selon laquelle l'OPANO n'a pas droit à l'immunité en l'espèce était renforcée par le fait que si les tribunaux canadiens n'avaient pas compétence, l'appelant serait privé de tout recours pour faire valoir ses droits. Selon lui, le *Décret sur l'immunité de l'OPANO* devrait être interprété d'une manière compatible avec le droit d'une personne, dont le recours est légitime, à un procès équitable devant un tribunal compétent, indépendant et impartial, établi par la loi, conformément au *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171 (« *PIRDCP* »).

B. *Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Beveridge and Bryson JJ.A.), 2011 NSCA 73, 306 N.S.R. (2d) 380*

[16] MacDonald C.J.N.S., writing for the court, held that the immunity provided for in s. 3(1) of the *NAFO Immunity Order* shielded NAFO from the appellant's claims. In reaching that conclusion, he adopted a functional approach to the immunity granted in the *NAFO Immunity Order*.

[17] MacDonald C.J.N.S. said that Wright J. had set the bar for a finding that NAFO is entitled to immunity too high, essentially requiring that the appellant's suit represent "an impermissible intrusion into NAFO's internal management", "NAFO's official functions [being] significantly impeded", or "excessive interference or hindrance in [its] actual operations" (para. 27). In MacDonald C.J.N.S.'s view, that approach was overly restrictive.

[18] MacDonald C.J.N.S. relied on this Court's decision in *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, for guidance in interpreting the *NAFO Immunity Order*. He found that it was appropriate to apply the rationale of necessity and autonomy adopted in the context of parliamentary privilege to the determination of the scope of the immunity granted to NAFO. He reasoned that just as parliamentary immunity exists to preserve Parliament's autonomy as a legislative and deliberative body, NAFO's immunity has been granted to preserve its autonomy as an international organization consisting of many nations.

[19] MacDonald C.J.N.S. drew three guiding principles from *Vaid*. First, immunity is rooted in "necessity", and a broad view should be taken of the concept of "necessity". Second, what is "necessary" is the preservation of the organization's autonomy to carry out its functions. Third, in the employment

B. *Cour d'appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Beveridge et Bryson), 2011 NSCA 73, 306 N.S.R. (2d) 380*

[16] S'exprimant au nom de la Cour d'appel, le juge en chef MacDonald a conclu que l'immunité conférée par le par. 3(1) du *Décret sur l'immunité de l'OPANO* mettait cette dernière à l'abri de toute action intentée par l'appelant. En tirant cette conclusion, il a adopté une interprétation fonctionnelle de l'immunité accordée par le *Décret sur l'immunité de l'OPANO*.

[17] Le juge en chef MacDonald a écrit que le juge Wright avait fixé à un niveau trop élevé les conditions d'application de l'immunité en exigeant essentiellement que la poursuite de l'appelant représente [TRADUCTION] « une ingérence inacceptable dans la régie interne de l'OPANO », « un obstacle important à l'exercice [. . .] des fonctions officielles de l'OPANO », ou « une ingérence excessive dans [ses] activités ou un obstacle excessif à l'exercice de celles-ci » (par. 27). De l'avis du juge en chef MacDonald, cette approche était trop restrictive.

[18] Le juge en chef MacDonald s'est fondé sur l'arrêt rendu par la Cour dans *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667, pour interpréter le *Décret sur l'immunité de l'OPANO*. Il est approprié, selon lui, d'appliquer les critères de nécessité et d'autonomie adoptés dans le contexte de la mise en œuvre du privilège parlementaire lorsqu'il s'agit de déterminer l'étendue de l'immunité accordée à l'OPANO. À son avis, de la même façon que l'immunité parlementaire vise à protéger l'autonomie du Parlement en tant qu'assemblée législative et délibérante, l'immunité conférée à l'OPANO vise à préserver son autonomie en tant qu'organisation internationale formée de nombreux États.

[19] Le juge en chef MacDonald a identifié trois principes directeurs dans l'arrêt *Vaid*. Premièrement, l'immunité émane du principe de la « nécessité » et il convient de retenir une conception large de ce principe. Deuxièmement, ce qui est « nécessaire », c'est la préservation de

context, the closer an aggrieved employee's tasks come to the organization's core function, the more likely it is that the organization's autonomy will be affected and, therefore, the more likely it is that immunity will be required.

[20] MacDonald C.J.N.S. concluded that Wright J. had erred in his interpretation of s. 3(1) of the *NAFO Immunity Order*, stating that he "would declare [NAFO to be immune] from any domestic suit that stands to interfere with NAFO's autonomy in performing its functions" (para. 44). He would not require "significant", "excessive" or "impermissible" interference (*ibid.*).

[21] On whether the appellant's claims interfered with NAFO's autonomy in performing its functions, MacDonald C.J.N.S. found that Wright J. had committed a palpable and overriding error in finding that NAFO was not challenging the merits of the appellant's case. In MacDonald C.J.N.S.'s view, it was clear from the record that NAFO had in fact asserted just cause in dismissing the appellant. This error is important because Wright J. had relied on his conclusion that NAFO was not challenging the merits of the case to conclude that the appellant's claim did not represent an impermissible intrusion into NAFO's operations.

[22] MacDonald C.J.N.S. also took issue with Wright J.'s overall characterization of the appellant's claims. He viewed the claims as a much more significant encroachment on NAFO's operations than did Wright J. In MacDonald C.J.N.S.'s opinion, wrongful dismissal actions by their very nature represent critical and far-reaching reviews of the employer-employee relationship. He concluded on the basis of the appellant's position and responsibilities that the appellant's claims would

l'autonomie de l'organisation dans l'exercice de ses fonctions. Troisièmement, dans le domaine de l'emploi, plus les fonctions de l'employé s'estimant lésé se rapprochent des fonctions essentielles de l'organisation, plus il devient probable que l'autonomie de celle-ci sera affectée et plus augmente donc la probabilité que l'immunité s'avère nécessaire.

[20] Le juge en chef MacDonald a conclu que le juge Wright avait commis une erreur dans son interprétation du par. 3(1) du *Décret sur l'immunité de l'OPANO*, et a affirmé qu'il [TRADUCTION] « reconnaîtrait [à l'OPANO] l'immunité de juridiction contre toute poursuite interne susceptible de porter atteinte à son autonomie dans l'exercice de ses fonctions » (par. 44). Il n'y avait pas lieu selon lui d'exiger une ingérence « importante », « excessive » ou « inacceptable » (*ibid.*).

[21] En cherchant ensuite à déterminer si les réclamations de l'appelant portaient atteinte à l'autonomie de l'OPANO dans l'exercice de ses fonctions, le juge en chef MacDonald a estimé que le juge Wright avait commis une erreur manifeste et dominante lorsqu'il avait conclu que l'OPANO ne contestait pas le bien-fondé de la cause de l'appelant. Selon lui, il ressortait clairement du dossier que l'OPANO avait bel et bien fait valoir l'existence d'un motif pour justifier le congédiement de l'appelant. Cette erreur était à son avis importante parce que le juge Wright s'était fondé sur sa conclusion selon laquelle l'OPANO ne contestait pas le bien-fondé de la cause pour conclure que la réclamation de l'appelant ne représentait pas une ingérence inacceptable dans les opérations de l'OPANO.

[22] Le juge en chef MacDonald a également contesté la caractérisation générale des réclamations de l'appelant faite par le juge Wright. Ces réclamations constituaient selon lui une ingérence beaucoup plus importante dans les opérations de l'OPANO. À son avis, la nature même des actions en congédiement injustifié implique des examens très importants et en profondeur de la relation employeur-employé. Il a conclu, compte tenu du poste et des responsabilités de l'appelant, que les

inevitably put NAFO's core operations under the microscope. Moreover, the appellant's claims for punitive damages and for solicitor-client costs focused on NAFO's alleged misconduct. According to MacDonald C.J.N.S., the appellant was asking the Nova Scotia Supreme Court to review and condemn NAFO's management structure. For the court to do so would amount to interference with NAFO's autonomy.

[23] MacDonald C.J.N.S. acknowledged that a finding that NAFO is entitled to immunity in this case would leave the appellant with no enforceable remedy, and noted Wright J.'s concern with the *ICCPR*. However, he stated that "it is one thing to interpret legislation in a manner that reflects the values and principles of international treaties. It is quite another to deny immunity in circumstances where, by legislation, it clearly exists" (para. 73). He therefore concluded that NAFO enjoyed immunity from all the appellant's claims.

IV. Analysis

A. *Issues*

[24] Two issues must be addressed by this Court. The main one is whether the immunity granted to NAFO applies. It raises the question of the interpretation to be given to the words "to such extent as may be required for the performance of its functions" set out in s. 3(1) of the *NAFO Immunity Order*. These words determine the scope and purpose of the immunity granted to the respondent.

[25] If the Court concludes that NAFO enjoys immunity from the appellant's claims, a second issue related specifically to the separation indemnity will have to be resolved: Does the immunity also apply to the appellant's claim with respect to the separation indemnity due to him under the NAFO Staff Rules?

réclamations de ce dernier supposeraient inévitablement un examen à la loupe des activités essentielles de l'OPANO. De plus, les réclamations visant l'obtention de dommages-intérêts punitifs et de dépens avocat-client étaient axées sur l'inconduite reprochée à l'OPANO. Selon le juge en chef MacDonald, l'appelant demandait alors à la Cour suprême de la Nouvelle-Écosse de revoir et de condamner la structure de gestion de l'OPANO. Le fait pour la cour d'accéder à une telle demande constituerait une ingérence dans l'autonomie de l'OPANO.

[23] Par ailleurs, le juge en chef MacDonald a reconnu qu'une conclusion selon laquelle l'OPANO aurait droit à l'immunité en l'espèce priverait l'appelant de tout recours contre elle, et il a souligné la réserve du juge Wright concernant le *PIRDCP*. Il a toutefois affirmé : [TRADUCTION] « . . . c'est une chose que d'interpréter la loi d'une manière qui reflète les valeurs et les principes des traités internationaux. C'en est une tout autre que de refuser l'immunité lorsque la loi l'accorde manifestement » (par. 73). Il a donc conclu que l'OPANO jouissait de l'immunité de juridiction contre toutes les réclamations de l'appelant.

IV. Analyse

A. *Questions en litige*

[24] La Cour doit répondre à deux questions. La principale est celle de l'application ou non de l'immunité de juridiction accordée à l'OPANO. Elle soulève la question de l'interprétation à donner aux termes « dans la mesure où ses fonctions l'exigent » utilisés au par. 3(1) du *Décret sur l'immunité de l'OPANO*. En effet, ces termes établissent la portée et l'objet de l'immunité conférée à l'intimée.

[25] Si la Cour conclut que l'OPANO jouit de l'immunité de juridiction à l'égard des réclamations de l'appelant, elle devra se pencher sur une deuxième question, soit celle portant précisément sur l'indemnité de cessation d'emploi. Il s'agira de déterminer si l'immunité s'applique également à la réclamation de l'appelant relative à l'indemnité de cessation d'emploi qui lui est payable en application du règlement régissant le personnel de l'OPANO.

[26] Before addressing the interpretation to be given to s. 3(1) of the *NAFO Immunity Order*, I will make some general comments on immunities and privileges granted to international organizations. More specifically, I will highlight certain differences between state immunities on the one hand and immunities granted to international organizations on the other.

B. *State Immunities and Immunities Granted to International Organizations*

[27] According to a general rule of customary international law, states enjoy immunity from the jurisdiction of other states: *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, I.C.J. judgment (February 3, 2012), at para. 56; International Law Commission, "Jurisdictional immunities of States and their property", in *Yearbook of the International Law Commission 1980* (1981), vol. II, Part Two, 137, at pp. 147-48. The International Court of Justice has held that state immunity "derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order": *Jurisdictional Immunities of the State*, at para. 57. The *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) is the first attempt to codify the rules relating to state immunity in a general international convention, but it has not yet entered into force.

[28] Like other jurisdictions, Canada has legislated on state immunity. Parliament has enacted the *State Immunity Act*, R.S.C. 1985, c. S-18, which confers immunity from the jurisdiction of Canadian courts on foreign states, except in proceedings that relate to a "commercial activity". Canada has adopted a restrictive approach to state immunity and rejected the absolute approach under which states had historically enjoyed immunity in all circumstances: J. H. Currie, C. Forcese and V. Oosterveld, *International Law: Doctrine, Practice, and Theory* (2007), at pp. 494-501; see also

[26] Avant de me pencher sur l'interprétation qu'il convient de donner au par. 3(1) du *Décret sur l'immunité de l'OPANO*, je formulerai certains commentaires généraux sur les immunités et les privilèges accordés aux organisations internationales. Plus précisément, je ferai ressortir certaines différences entre les immunités accordées aux États, d'une part, et celles accordées aux organisations internationales, d'autre part.

B. *Immunités accordées aux États et immunités accordées aux organisations internationales*

[27] Une règle générale du droit international coutumier reconnaît aux États une immunité de juridiction devant les tribunaux d'autres États : *Immunités juridictionnelles de l'État (Allemagne c. Italie : Grèce (intervenant))*, C.I.J., arrêt (3 février 2012), par. 56; Commission du droit international, « Immunités juridictionnelles des États et de leurs biens », dans *Annuaire de la Commission du droit international 1980* (1981), vol. II, deuxième partie, 134, p. 144-145. Selon la Cour internationale de justice, l'immunité de l'État « procède du principe de l'égalité souveraine des États qui, ainsi que cela ressort clairement du paragraphe 1 de l'article 2 de la Charte des Nations Unies, est l'un des principes fondamentaux de l'ordre juridique international » : *Immunités juridictionnelles de l'État*, par. 57. La *Convention des Nations Unies sur les immunités juridictionnelles des États et de leurs biens* (2004) est la première convention internationale générale visant à codifier les règles relatives à l'immunité des États; elle n'est toutefois pas encore en vigueur.

[28] À l'instar d'autres États, le Canada a légiféré quant à l'immunité des États. En effet, le Parlement a adopté la *Loi sur l'immunité des États*, L.R.C. 1985, ch. S-18, qui reconnaît aux États étrangers l'immunité de juridiction devant les tribunaux canadiens, sauf dans les actions portant sur des « activités commerciales ». Le Canada a ainsi adopté une approche restrictive à l'égard de l'immunité des États et rejeté l'approche absolue selon laquelle les États bénéficient traditionnellement d'une immunité en toutes circonstances : J. H. Currie, C. Forcese et V. Oosterveld, *International Law :*

Kuwait Airways Corp. v. Iraq, 2010 SCC 40, [2010] 2 S.C.R. 571.

[29] In the case of international organizations, unlike that of states, the prevailing view at present is that no rule of customary international law confers immunity on them. International organizations derive their existence from treaties, and the same holds true for their rights to immunities: H. Fox, *The Law of State Immunity* (2nd ed. 2008), at pp. 725-26. Such an organization must operate on the territory of a foreign state and through individuals who have nationality and is therefore vulnerable to interference, since it possesses neither territory nor a population of its own: Fox, at p. 724. This reality makes immunity essential to the efficient and independent functioning of international organizations. It also shapes the immunities and privileges that are granted to international organizations. Such immunities and privileges are created through a complex interplay of international agreements and the national law of host states.

[30] International organizations vary greatly in size, sphere of activities and powers. This is reflected in the source and the scope of their immunities and privileges. For example, the *Convention on the Privileges and Immunities of the United Nations*, 1 U.N.T.S. 15, and the *Convention on the Privileges and Immunities of the Specialized Agencies*, 33 U.N.T.S. 261, contain detailed provisions conferring broad immunities and privileges on the United Nations and its agencies. In addition to international conventions granting uniform immunities and privileges that apply in all member states, the most important international organizations such as the United Nations and its agencies also negotiate exhaustive and detailed headquarters agreements with host countries: see, e.g., *Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization*, Can. T.S. 1992 No. 7, and the Supplementary Agreements of 1999 and 2013.

[31] In the case of smaller international organizations, each organization must enter into an

Doctrine, Practice, and Theory (2007), p. 494-501; voir aussi *Kuwait Airways Corp. c. Irak*, 2010 CSC 40, [2010] 2 R.C.S. 571.

[29] Selon le point de vue dominant à l'heure actuelle, il n'existe en revanche aucune règle de droit international coutumier conférant une immunité aux organisations internationales. Celles-ci sont des créatures des traités et il en va de même des immunités auxquelles elles ont droit : H. Fox, *The Law of State Immunity* (2e éd. 2008), p. 725-726. De telles organisations exercent leurs activités sur le territoire d'États étrangers et par l'intermédiaire de personnes pourvues de la nationalité de ces États; elles sont par le fait même exposées à des ingérences, parce qu'elles ne possèdent ni territoire, ni population qui leur sont propres : Fox, p. 724. Cette réalité rend l'immunité essentielle au fonctionnement efficace et indépendant des organisations internationales. Elle façonne aussi les immunités et les privilèges qui leur sont accordés et qui procèdent d'une interaction complexe entre des accords internationaux et le droit interne des États d'accueil.

[30] Les organisations internationales varient considérablement quant à leur taille, à leur sphère d'activité et à leurs pouvoirs. Cela se reflète dans la source et l'étendue des immunités et privilèges qui leur sont conférés. À titre d'exemple, la *Convention sur les privilèges et immunités des Nations Unies*, 1 R.T.N.U. 15, et la *Convention sur les privilèges et immunités des institutions spécialisées*, 33 R.T.N.U. 261, contiennent des dispositions détaillées conférant des immunités et des privilèges étendus aux Nations Unies et à ses institutions. En plus des conventions internationales conférant des immunités et des privilèges uniformes applicables dans tous les États membres, les organisations internationales les plus importantes comme les Nations Unies et ses institutions négocient aussi des accords de siège exhaustifs et détaillés avec l'État d'accueil : voir, p. ex., l'*Accord de siège entre le gouvernement du Canada et l'Organisation de l'aviation civile internationale*, R.T. Can. 1992 nº 7, et les accords supplémentaires de 1999 et 2013.

[31] Les immunités conférées aux organisations internationales plus petites sur le territoire de l'État

agreement with the host state regarding the immunities to be enjoyed in that state's territory. Such is the case for NAFO. Article II of the Convention provides that NAFO is to come to an agreement with the contracting party (i.e. Canada) regarding the immunities and privileges it will enjoy in the territory of that party. NAFO and Canada reached an agreement in this regard, and it is reflected in the *NAFO Immunity Order*.

C. *Content and Meaning of the NAFO Immunity Order*

[32] The *NAFO Immunity Order* is an order made by the Governor in Council pursuant to the *Privileges and Immunities (International Organizations) Act*, R.S.C. 1985, c. P-23 ("*PIIO Act*"). That act was subsequently repealed and replaced by the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIO Act*"), but s. 16 of the *FMIO Act* provides that every regulation and order made under the *PIIO Act* is deemed to have been made under the *FMIO Act*.

[33] The authority of the Governor in Council to make orders in respect of the immunities of international organizations is granted in s. 5(1)(*b*) of the *FMIO Act*, which reads as follows:

5. (1) The Governor in Council may, by order, provide that

. . .

(*b*) an international organization shall, to the extent specified in the order, have the privileges and immunities set out in Articles II and III of the Convention on the Privileges and Immunities of the United Nations, set out in Schedule III;

[34] Section 3(1) of the *NAFO Immunity Order* specifies the scope of NAFO's immunities:

3. (1) The Organization shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be required for the performance of its functions,

d'accueil sont, pour leur part, déterminées par une entente entre chacune de ces organisations et l'État en question. Il en va ainsi pour l'OPANO. L'article II de la Convention prévoit en effet que les immunités et privilèges dont elle jouit sur le territoire de la partie contractante (c.-à-d. le Canada) sont déterminés par une entente dont elles conviennent. L'OPANO et le Canada ont conclu une telle entente qu'énonce le *Décret sur l'immunité de l'OPANO*.

C. *Contenu et sens du Décret sur l'immunité de l'OPANO*

[32] Le *Décret sur l'immunité de l'OPANO* a été pris par le gouverneur en conseil en vertu de la *Loi sur les privilèges et immunités des organisations internationales*, L.R.C. 1985, ch. P-23 (« *LPIOI* »). Par la suite, cette loi a été abrogée et remplacée par la *Loi sur les missions étrangères et les organisations internationales*, L.C. 1991, ch. 41 (« *LMÉOI* »), mais l'art. 16 de cette dernière prévoit toutefois que les règlements, décrets et arrêtés d'application de la *LPIOI* sont réputés avoir été pris en vertu de la *LMÉOI*.

[33] Le pouvoir du gouverneur en conseil de prendre des décrets relatifs aux privilèges et immunités des organisations internationales lui est conféré par l'al. 5(1)*b*) de la *LMÉOI*, dont le texte suit :

5. (1) Le gouverneur en conseil peut, par décret, disposer :

. . .

b) qu'une organisation internationale bénéficie, dans la mesure spécifiée, des privilèges et immunités énoncés aux articles II et III de la Convention sur les privilèges et immunités des Nations Unies reproduite à l'annexe III;

[34] Le paragraphe 3(1) du *Décret sur l'immunité de l'OPANO* précise l'étendue des immunités conférées à l'OPANO :

3. (1) L'Organisation possède, au Canada, la capacité juridique d'un corps constitué et possède, dans la mesure où ses fonctions l'exigent, les privilèges et les immunités

have the privileges and immunities set forth in Articles II and III of the Convention for the United Nations.

Both the *FMIO Act* and the *NAFO Immunity Order* refer to the *Convention on the Privileges and Immunities of the United Nations*. For the purposes of this appeal, the only relevant provision of the *Convention on the Privileges and Immunities of the United Nations* is art. II(2), which grants immunity to the United Nations from every form of legal process, except where it has expressly waived its immunity.

[35] This appeal requires the Court to determine the meaning of the phrase "to such extent as may be required for the performance of its functions" found in s. 3(1) of the *NAFO Immunity Order*. In other words, the Court must establish the scope of the immunity granted to NAFO by the Governor in Council. This is a matter of legal interpretation.

[36] Regulations and orders in council must be interpreted in accordance with the modern principle of statutory interpretation: *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, at para. 19; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 368. As Binnie J. explained in *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 38, however, it is necessary, in interpreting a regulation, to consider the words granting the authority to make the regulation in question in addition to the other interpretive factors. In this regard, Binnie J. quoted the following comment by E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 247:

> It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.

[37] The words "to such extent as may be required for the performance of its functions" found in s. 3(1) of the *NAFO Immunity Order* must therefore be read in their entire context, in their

prévus pour les Nations Unies aux Articles II et III de la Convention.

La *LMÉOI* et le *Décret sur l'immunité de l'OPANO* font tous les deux référence à la *Convention sur les privilèges et immunités des Nations Unies*. Dans le présent pourvoi, la seule disposition pertinente de cette convention est l'art. II(2), qui confère aux Nations Unies l'immunité de juridiction, sauf dans la mesure où elle y a expressément renoncé.

[35] En l'espèce, la Cour doit déterminer la signification des mots « dans la mesure où ses fonctions l'exigent » utilisés au par. 3(1) du *Décret sur l'immunité de l'OPANO*. Autrement dit, elle doit établir l'étendue de l'immunité conférée à l'OPANO par le gouverneur en conseil. Il s'agit d'une question d'interprétation législative.

[36] Les règlements et les décrets doivent être interprétés conformément aux principes modernes d'interprétation des lois : *Contino c. Leonelli-Contino*, 2005 CSC 63, [2005] 3 R.C.S. 217, par. 19; *Glykis c. Hydro-Québec*, 2004 CSC 60, [2004] 3 R.C.S. 285, par. 5; R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 368. Comme l'a toutefois expliqué le juge Binnie au par. 38 de l'arrêt *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, 2005 CSC 26, [2005] 1 R.C.S. 533, pour interpréter un règlement, il est nécessaire d'examiner les termes conférant le pouvoir de le prendre, en plus des autres facteurs d'interprétation. Le juge Binnie a cité à cet égard l'observation suivante formulée par E. A. Driedger dans son ouvrage *Construction of Statutes* (2e éd. 1983), p. 247 :

> [TRADUCTION] Il ne suffit pas de déterminer le sens d'un règlement en l'interprétant au regard de son propre objet et des circonstances dans lesquelles il a été pris; il faut aussi interpréter les termes conférant les pouvoirs dans le contexte global de la loi habilitante. L'objet de la loi transcende et régit l'objet du règlement.

[37] Les termes « dans la mesure où ses fonctions l'exigent » utilisés au par. 3(1) du *Décret sur l'immunité de l'OPANO* doivent donc être interprétés dans leur contexte global, en suivant le

grammatical and ordinary sense, harmoniously with the scheme and object of the *FMIO Act*, and in light of the grant of authority and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; E. A. Driedger, *The Construction of Statutes* (1974), at p. 67.

[38] The appellant contends that the word "required" in s. 3(1) of the *NAFO Immunity Order* should be understood in its ordinary and grammatical meaning of "necessary". He also submits that any interpretation of s. 3(1) must be consistent with Canada's international obligations, as this Court explained in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, and *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292. This means that the *NAFO Immunity Order* must be interpreted in a manner consistent with the right to a fair hearing provided for in the *ICCPR*. The intervener, the Canadian Civil Liberties Association, takes a similar view, submitting that the interpretation of the *NAFO Immunity Order* should not violate the fundamental principle of access to justice. The respondent argues that, if a proper functional approach to interpretation is taken, it is entitled to immunity from the appellant's claims.

[39] I will now turn to the interpretation of the phrase "to such extent as may be required for the performance of its functions" found in s. 3(1) of the *NAFO Immunity Order*. This issue will be determinative of the disposition of this appeal.

1. Ordinary and Grammatical Meaning of the Word "Required" and Context

[40] The first question concerns the ordinary and grammatical meaning of the words. In this regard, it is argued that the word "required" can be defined as "necessary". Wright J. accepted that argument and concluded that the immunity provided for in the *NAFO Immunity Order* applies only to the extent that it is necessary, indeed indispensible,

sens ordinaire et grammatical qui s'harmonise avec l'esprit et l'objet de la *LMÉOI*, compte tenu des pouvoirs conférés et de l'intention du législateur : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; E. A. Driedger, *The Construction of Statutes* (1974), p. 67.

[38] L'appelant soutient que les mots « l'exigent » qui figurent au par. 3(1) du *Décret sur l'immunité de l'OPANO* devraient être interprétés selon leur sens ordinaire et grammatical, et signifier « le nécessitent ». Il fait aussi valoir que l'interprétation donnée au par. 3(1) doit être compatible avec les obligations internationales du Canada comme l'a expliqué la Cour dans les arrêts *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, et *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292. Le *Décret sur l'immunité de l'OPANO* doit donc être interprété de manière compatible avec le droit à une audition équitable prévu par le *PIRDCP*. L'intervenante, l'Association canadienne des libertés civiles, adopte un point de vue semblable et soutient que l'interprétation du *Décret sur l'immunité de l'OPANO* ne devrait pas contrevenir au principe fondamental d'accès à la justice. L'intimée maintient que, si une méthode d'interprétation fonctionnelle adéquate est adoptée, elle bénéficie de l'immunité de juridiction à l'égard des réclamations de l'appelant.

[39] Je vais maintenant interpréter la proposition « dans la mesure où ses fonctions l'exigent » utilisée au par. 3(1) du *Décret sur l'immunité de l'OPANO*. Cette question est déterminante pour l'issue du présent pourvoi.

1. Sens ordinaire et grammatical des mots « l'exigent » et contexte

[40] La première question porte sur le sens ordinaire et grammatical des mots. À cet égard, on fait valoir que les mots « l'exigent » signifient « le nécessitent ». Le juge Wright a accepté cet argument et conclu que l'immunité prévue dans le *Décret sur l'immunité de l'OPANO* s'applique uniquement dans la mesure où elle est nécessaire,

to NAFO's performance of its functions. On this basis, since NAFO's functions relate to the utilization, management and conservation of fisheries resources, the organization does not require immunity in employment-related matters. In my view, the analysis must be taken beyond this admittedly common, although limited, definition of the word "required". Other interpretive factors are relevant to a determination of the meaning of s. 3(1) of the *NAFO Immunity Order*. These other factors point toward a broader interpretation of the word "required" than the one advanced by the appellant.

[41] The appropriateness of adopting a broad interpretation is evident from a cursory review of the context of s. 3(1) of the *NAFO Immunity Order*. If the word "required" were to be interpreted as meaning "necessary" in the strictest sense, officials working for NAFO would enjoy only such personal immunities and privileges as are required for the performance of their duties. This is so because the same words — "to such extent as may be required for the performance of their functions" — appear in s. 3(3) as in s. 3(1). Such a narrow interpretation of the word "required" would mean that NAFO officials would not be entitled to import their furniture and effects free of duty — arguably a common immunity enjoyed by individuals working for international organizations — because, in light of NAFO's mission, the importation of such items would not, in this strict sense, be "required" for the performance of their duties.

[42] The appellant contends that the word "required" in s. 3(1) should not be coloured by the use of the same word in s. 3(3), because the former provision concerns NAFO as a corporate entity, whereas the latter concerns NAFO's officials. This argument is without merit. The Governor in Council is presumed to have been consistent in making the *NAFO Immunity Order*. In this context, the word "required" must be deemed to have the same meaning in s. 3(1) as in s. 3(3).

voire indispensable, à l'exercice des fonctions de l'OPANO. Par conséquent, comme ses fonctions ont trait à l'utilisation, à la gestion et à la conservation de ressources halieutiques, l'OPANO n'a pas besoin d'une immunité pour les questions liées à l'emploi. À mon avis, l'analyse doit aller au-delà de cette définition certes courante, quoique restreinte, des termes « l'exigent ». D'autres facteurs d'interprétation sont utiles pour déterminer le sens du par. 3(1) du *Décret sur l'immunité de l'OPANO*, des facteurs qui militent pour une interprétation plus libérale des termes « l'exigent » que celle avancée par l'appelant.

[41] L'opportunité d'interpréter largement ces termes ressort clairement d'un examen rapide du contexte dans lequel se situe le par. 3(1) du *Décret sur l'immunité de l'OPANO*. Si les termes « l'exigent » devaient être interprétés comme signifiant « le nécessitent » dans le sens le plus strict, les fonctionnaires au service de l'OPANO ne bénéficieraient que des privilèges et des immunités personnels exigés par leurs fonctions. Il en est ainsi parce que les mêmes termes — « dans la mesure où leurs fonctions l'exigent » — apparaissent non seulement au par. 3(1) mais aussi au par. 3(3). Selon une interprétation aussi restrictive des termes « l'exigent », les fonctionnaires de l'OPANO ne pourraient pas importer en franchise leur mobilier et leurs effets personnels — une immunité dont, peut-on soutenir, bénéficient habituellement les employés des organisations internationales —, parce que, compte tenu de la mission de l'OPANO, l'importation de tels articles ne serait pas, dans ce sens strict, « exig[ée] » par leurs fonctions.

[42] L'appelant soutient que l'interprétation des termes « l'exigent » au par. 3(1) ne devrait pas être influencée par l'utilisation des mêmes termes au par. 3(3), parce que la première disposition concerne l'OPANO en tant que personne morale alors que la deuxième vise les fonctionnaires de l'organisation. Cet argument est sans fondement. Le gouverneur en conseil est présumé avoir fait preuve de cohérence dans l'établissement du *Décret sur l'immunité de l'OPANO*. Dans ce contexte, il faut considérer que les termes « l'exigent » utilisés aux par. 3(1) et 3(3) ont le même sens.

2. Objective of the *FMIO Act*

[43] In enacting the *FMIO Act*, Parliament sought to accomplish three things: consolidate the contents of the *Diplomatic and Consular Privileges and Immunities Act*, R.S.C. 1985, c. P-22, and the *Privileges and Immunities (International Organizations) Act* in a single statute; modernize the immunities it grants to foreign states and international organizations in accordance with developments in international law and practice; and provide for immunities and privileges to subunits of foreign states so that the provinces' missions abroad can receive reciprocal immunities: *House of Commons Debates*, vol. III, 3rd Sess., 34th Parl., October 4, 1991, at pp. 3332 ff. In referring specifically to international organizations, the Honourable Marcel Danis said the following on behalf of the Secretary of State for External Affairs:

> International law also grants a special status to international organizations. Membership in the UN, the OECD, and other organizations of states, carries with it the obligation to grant those organizations and their officers certain privileges and immunities. Without legislation permitting the grant of such privileges and immunities, Canada could not be a member of those organizations. Nor could we act as host for such organizations as the International Civil Aviation Organization in Montreal or the Commonwealth of Learning in Vancouver.
>
> At present, such organizations are granted privileges and immunities by Order in Council under the Privileges and Immunities (International Organizations) Act. The level of treatment which Canada can grant international organizations has not changed since the predecessor to that act, the Privileges and Immunities (United Nations) Act, was passed in 1947. But international standards of treatment for such organizations have changed significantly, and the restrictions of the existing legislation have created difficulties for Canada's relations with international organizations, including the largest international organization with headquarters in Canada.
>
> . . .
>
> One way in which we can enhance our role in such organizations is by encouraging them to establish offices, or preferably headquarters, in Canada. With modernized

2. Objet de la *LMÉOI*

[43] En adoptant la *LMÉOI*, le législateur avait trois objectifs : fusionner en une seule loi la *Loi sur les privilèges et immunités diplomatiques et consulaires*, L.R.C. 1985, ch. P-22, et la *Loi sur les privilèges et immunités des organisations internationales*; moderniser les immunités qu'il accorde aux États étrangers et aux organisations internationales conformément à l'évolution du droit international et de la pratique y afférente; et accorder des immunités et privilèges à des subdivisions d'États étrangers pour que les missions provinciales à l'étranger puissent, réciproquement, jouir d'immunités : *Débats de la Chambre des communes*, vol. III, 3e sess., 34e lég., 4 octobre 1991, p. 3332 et suiv. Se référant plus particulièrement aux organisations internationales, l'honorable Marcel Danis a rappelé ces objectifs au nom de la secrétaire d'État aux Affaires extérieures :

> Le droit international confère également un statut particulier aux organisations internationales. L'adhésion aux Nations Unies, à l'OCDE et à d'autres organisations d'États est assortie de l'obligation d'accorder certains privilèges et immunités à ces organisations et à leurs agents. À défaut d'une loi permettant d'accorder ces privilèges et immunités, le Canada ne pourrait pas être membre de ces organisations, pas plus qu'il ne pourrait accueillir sur son territoire leur siège comme c'est le cas de l'Organisation de l'aviation civile internationale à Montréal ou du Commonwealth of Learning à Vancouver.
>
> À l'heure actuelle, ces organisations obtiennent des privilèges et des immunités par décret, en vertu de la Loi sur les privilèges et immunités des organisations internationales. Le traitement que le Canada peut accorder à des organisations internationales n'a pas changé depuis l'adoption de la loi précédente, la Loi sur les privilèges et immunités des Nations Unies, en 1947. Cependant, les normes internationales en ce qui concerne le traitement de ces organisations ont changé du tout au tout et les limites imposées par la législation actuelle nuisent aux relations du Canada avec des organisations internationales, notamment la plus importante ayant son siège au Canada.
>
> . . .
>
> Une des façons de mieux défendre nos objectifs au sein de ces organisations consiste à les encourager à établir leurs bureaux ou, encore mieux, leur siège au

legislation Canada can pursue more vigorously its policy of working to attract the offices of international organizations in Canada. [pp. 3333-34]

[44] Thus, Parliament's objective in enacting the *FMIO Act* was, where international organizations are concerned, to modernize the rules respecting the immunities and privileges it could grant them. This was done both to reflect recent trends in international law and to make Canada an attractive location for such organizations to establish headquarters or offices. To limit the immunity granted in s. 3(1) as narrowly as the appellant proposes would run counter to Parliament's objectives of modernization, flexibility and respect for the independence of international organizations hosted by Canada.

[45] It bears repeating at this point that immunity is essential to the efficient functioning of international organizations. Without immunity, an international organization would be vulnerable to intrusions into its operations and agenda by the host state and that state's courts. See W. M. Berenson, "Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial: The Case of the OAS", in H. Cissé, D. D. Bradlow and B. Kingsbury, eds., *The World Bank Legal Review* (2012), vol. 3, 133. See also L. Preuss, "The International Organizations Immunities Act" (1946), 40 *Am. J. Int'l L.* 332, at p. 345.

3. Granting of Authority in the *FMIO Act*

[46] As I mentioned above, in interpreting a regulation or an order in council, a court must consider, in addition to the usual interpretive factors, the statutory provision that grants the authority to make the regulation or order in council in question: *Bristol-Myers Squibb*, at para. 38. Section 5(1)(*b*) of the *FMIO Act* authorizes the Governor in Council to make an order providing that an international organization

shall, to the extent specified in the order, have the privileges and immunities set out in Articles II and III of the Convention on the Privileges and Immunities of the United Nations . . .

Canada. Grâce à une législation plus moderne, nous pourrons poursuivre de façon plus dynamique notre politique tendant à attirer les bureaux des organisations internationales au Canada. [p. 3333-3334]

[44] En adoptant la *LMÉOI*, le législateur avait donc entre autres pour objectif de moderniser les règles relatives aux immunités et aux privilèges qu'il pouvait accorder aux organisations internationales. Il voulait ainsi tenir compte des tendances actuelles en droit international et faire du Canada un endroit attrayant pour l'établissement du siège ou des bureaux de telles organisations. Interpréter l'immunité accordée au par. 3(1) pour lui donner une portée aussi limitée que le propose l'appelant irait à l'encontre des objectifs poursuivis par le législateur, soit la modernisation, la souplesse et le respect de l'indépendance des organisations internationales accueillies par le Canada.

[45] Il convient ici de répéter que l'immunité est essentielle au fonctionnement efficace des organisations internationales. En son absence, rien n'empêcherait l'État d'accueil et ses tribunaux de s'ingérer dans leurs opérations et leur programme. Voir W. M. Berenson, « Squaring the Concept of Immunity with the Fundamental Right to a Fair Trial : The Case of the OAS », dans H. Cissé, D. D. Bradlow et B. Kingsbury, dir., *The World Bank Legal Review* (2012), vol. 3, 133. Voir aussi L. Preuss, « The International Organizations Immunities Act » (1946), 40 *Am. J. Int'l L.* 332, p. 345.

3. Attribution de pouvoir dans la *LMÉOI*

[46] Comme nous l'avons vu, dans l'interprétation d'un règlement ou d'un décret, les tribunaux doivent tenir compte non seulement des facteurs d'interprétation habituels, mais aussi de la disposition législative conférant le pouvoir de prendre le règlement ou le décret en question : *Bristol-Myers Squibb*, par. 38. C'est l'alinéa 5(1)*b*) de la *LMÉOI* qui autorise le gouverneur en conseil à disposer par décret qu'une organisation internationale

bénéficie, dans la mesure spécifiée, des privilèges et immunités énoncés aux articles II et III de la Convention sur les privilèges et immunités des Nations Unies . . .

The *FMIO Act* therefore grants to the Governor in Council the power to confer on an international organization all, or some of, the privileges and immunities conferred on the United Nations in arts. II and III of the *Convention on the Privileges and Immunities of the United Nations*. The *FMIO Act* gives the Governor in Council flexibility to determine the scope of the immunities and privileges to be granted to each international organization on a case-by-case basis. The Governor in Council is delegated a broad regulatory authority to frame the immunities in a way that is consistent with the functions to be discharged by various international organizations. The immunities are not limited to the narrowest possible range. Rather, the Governor in Council must assure the international community that, as a host, our country will be mindful and respectful of the roles and the institutional independence of international organizations.

La *LMÉOI* accorde donc au gouverneur en conseil le pouvoir de conférer à une organisation internationale l'ensemble ou une partie des privilèges et des immunités accordés aux Nations Unies par les art. II et III de la *Convention sur les privilèges et immunités des Nations Unies*. La *LMÉOI* donne au gouverneur en conseil une certaine souplesse pour déterminer l'étendue des immunités et des privilèges à accorder au cas par cas à chaque organisation internationale. Le gouverneur en conseil dispose d'un vaste pouvoir de réglementation lui permettant d'établir les immunités d'une manière qui est compatible avec les fonctions dont doivent s'acquitter différentes organisations internationales. Il n'est pas tenu de fournir l'éventail le plus restreint possible d'immunités. Il doit plutôt donner à la communauté internationale l'assurance que nous serons un pays d'accueil conscient et respectueux du rôle des organisations internationales et de leur indépendance institutionnelle.

4. Scheme of the *NAFO Immunity Order*

[47] The context and objectives discussed above are reflected in the *NAFO Immunity Order*. The order sets out a scheme by which Canada confers certain immunities and privileges on NAFO. These immunities and privileges are found in s. 3, which reads as follows:

3. (1) The Organization shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be required for the performance of its functions, have the privileges and immunities set forth in Articles II and III of the Convention for the United Nations.

(2) Representatives of states and governments that are members of the Organization shall have in Canada, to such extent as may be required for the performance of their functions, the privileges and immunities set forth in Article IV of the Convention for representatives of members.

(3) All officials of the Organization shall have in Canada, to such extent as may be required for the performance of their functions, the privileges and immunities set forth in Article V of the Convention for officials of the United Nations.

4. Régime établi par le *Décret sur l'immunité de l'OPANO*

[47] Le *Décret sur l'immunité de l'OPANO* a été établi compte tenu du contexte et des objectifs examinés précédemment. Il établit un régime par lequel le Canada confère certaines immunités et certains privilèges à l'OPANO. Ces immunités et privilèges sont décrits à l'art. 3, rédigé en ces termes :

3. (1) L'Organisation possède, au Canada, la capacité juridique d'un corps constitué et possède, dans la mesure où ses fonctions l'exigent, les privilèges et les immunités prévus pour les Nations Unies aux Articles II et III de la Convention.

(2) Les représentants d'États et de gouvernements membres de l'Organisation possèdent, au Canada, dans la mesure où leurs fonctions l'exigent, les privilèges et les immunités prévus pour les représentants de membres à l'Article IV de la Convention.

(3) Tous les fonctionnaires de l'Organisation possèdent, au Canada, dans la mesure où leurs fonctions l'exigent, les privilèges et les immunités prévus pour les fonctionnaires des Nations Unies à l'Article V de la Convention.

(4) All experts performing missions for the Organization shall have in Canada, to such extent as may be required for the performance of their functions, the privileges and immunities set forth in Article VI of the Convention for experts on missions for the United Nations.

(5) Nothing in this Order exempts a person who is a Canadian citizen residing or ordinarily resident in Canada from liability for any duties or taxe[s] imposed by any law in Canada.

[48] The *NAFO Immunity Order* provides privileges and immunities for all those who are associated with NAFO's activities. Section 3(1) grants immunity to NAFO itself, given that it has the legal capacities of a body corporate. Sections 3(2) through (4) confer privileges and immunities on certain individuals: representatives of member states of NAFO; NAFO officials; and experts performing missions for NAFO. The privileges and immunities thus conferred on NAFO and on its officials, representatives and experts are the ones set forth in the *Convention on the Privileges and Immunities of the United Nations*, and they are granted "to such extent as may be required for the performance of [its/their] functions".

[49] In limiting these immunities and privileges to the extent required for NAFO to perform its functions, the Governor in Council did not grant NAFO the absolute immunity conferred on the United Nations in the *Convention on the Privileges and Immunities of the United Nations*: P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed. 2009), at p. 494. Rather, the Governor in Council granted NAFO a functional immunity, that is, the immunity required to enable NAFO to perform its functions without undue interference.

[50] In interpreting this functional immunity, the Court of Appeal drew a parallel with parliamentary privilege and based its analysis on this Court's decision in *Vaid*. At issue in that case was whether the Canadian Human Rights Commission could investigate Mr. Vaid's complaint that he had been constructively dismissed by the Speaker of the House of Commons for reasons that amounted to workplace discrimination and harassment. The Court had to decide whether the hiring and firing

(4) Tous les experts accomplissant des missions pour l'Organisation possèdent, au Canada, dans la mesure où leurs fonctions l'exigent, les privilèges et les immunités prévus à l'Article VI de la Convention à l'égard des experts en mission pour l'Organisation des Nations Unies.

(5) Aucune disposition du présent décret n'exonère un citoyen canadien résidant ou ayant sa résidence ordinaire au Canada de l'obligation de payer les impôts ou droits établis par une loi au Canada.

[48] Le *Décret sur l'immunité de l'OPANO* prévoit des privilèges et des immunités pour toutes les personnes associées aux activités de l'OPANO. Suivant le par. 3(1), l'OPANO elle-même bénéficie de l'immunité, puisqu'elle possède la capacité juridique d'un corps constitué. Les paragraphes 3(2) à (4) confèrent des privilèges et des immunités à certaines personnes : aux représentants d'États membres de l'OPANO, aux fonctionnaires de cette dernière, et aux experts accomplissant des missions pour elle. L'OPANO, ses fonctionnaires, ses représentants et ses experts possèdent donc les privilèges et immunités prévus dans la *Convention sur les privilèges et immunités des Nations Unies*, « dans la mesure où [ses/leurs] fonctions l'exigent ».

[49] En limitant ces immunités et ces privilèges à ceux qu'exigent les fonctions de l'OPANO, le gouverneur en conseil n'a pas accordé à l'OPANO l'immunité absolue conférée aux Nations Unies par la *Convention sur les privilèges et immunités des Nations Unies* : P. Sands et P. Klein, *Bowett's Law of International Institutions* (6e éd. 2009), p. 494. Il lui a plutôt accordé l'immunité fonctionnelle, c'est-à-dire l'immunité dont elle a besoin pour être en mesure d'exercer ses fonctions sans ingérence injustifiée.

[50] En interprétant cette immunité fonctionnelle, la Cour d'appel a établi un parallèle avec le privilège parlementaire et a fondé son analyse sur l'arrêt rendu par la Cour dans *Vaid*. Il fallait déterminer dans cette affaire si la Commission canadienne des droits de la personne pouvait enquêter sur la plainte de M. Vaid selon laquelle le président de la Chambre des communes l'avait congédié indirectement pour des motifs qui constituaient de la discrimination et du harcèlement en matière d'emploi. La

of House employees are "internal affairs" to which parliamentary privilege applies. Since the object of parliamentary privilege is the same as that of an immunity conferred on an international organization (or any other immunity), that is to remove the subject of the immunity from the jurisdiction of the courts, *Vaid* is relevant to the interpretation of s. 3(1) of the *NAFO Immunity Order*.

[51] In *Vaid*, Binnie J. said that the foundation of parliamentary privilege is the concept of "necessity", which is to be broadly construed and is understood to relate to the "dignity and efficiency of the House": para. 29. He observed that dignity and efficiency are linked to autonomy, which is necessary in order for Parliament to conduct its business: *ibid.* In consequence, a functional approach should be taken in assessing parliamentary privilege: only those acts that are necessary (in the broad sense mentioned above) in order for Parliament to conduct its business will be exempt from the jurisdiction of the courts.

[52] In my view, this same approach should be taken in determining the scope of the immunity granted to NAFO in the *NAFO Immunity Order*. The drafters of the *NAFO Immunity Order* adopted a functional approach to immunity, as can be seen from the very words they chose for s. 3(1): "to such extent as may be required for the performance of its functions".

[53] It follows that NAFO's autonomy to conduct its business and the actions it takes in performing its functions must be shielded from undue interference. What is necessary for the performance of NAFO's functions, or what constitutes undue interference, must be determined on a case-by-case basis.

D. *Application to This Case*

[54] In this appeal, the Court must determine whether the management of relationships with senior officials should come under the protection of

Cour devait décider si l'embauche et le renvoi des employés de la Chambre des communes constituent des « affaires internes » auxquelles s'applique le privilège parlementaire. Puisque l'objet d'un privilège parlementaire est le même que celui d'une immunité conférée à une organisation internationale (ou de toute autre immunité), soit de priver les tribunaux de toute compétence quant aux matières visées par l'immunité, l'arrêt *Vaid* est pertinent pour l'interprétation du par. 3(1) du *Décret sur l'immunité de l'OPANO*.

[51] Dans l'arrêt *Vaid*, le juge Binnie a affirmé que le fondement du privilège parlementaire est la « nécessité », concept devant être interprété largement et se rapportant à la « dignité et [à] l'efficacité de l'Assemblée » : par. 29. Il a fait observer que la dignité et l'efficacité se rapportent à l'autonomie, nécessaire pour que le Parlement accomplisse son travail : *ibid.* En conséquence, il convient d'adopter une approche fonctionnelle dans l'évaluation du privilège parlementaire : seuls les actes nécessaires (au sens large, rappelons-le), pour que le Parlement accomplisse son travail ne sont pas assujettis à la compétence des tribunaux.

[52] Il convient, à mon avis, d'adopter la même approche pour déterminer l'étendue de l'immunité accordée à l'OPANO dans le *Décret sur l'immunité de l'OPANO*. En effet, les auteurs de ce décret ont adopté une approche fonctionnelle à l'égard de l'immunité, comme en témoigne le libellé même choisi du par. 3(1) : « dans la mesure où ses fonctions l'exigent ».

[53] L'autonomie de l'OPANO et les mesures qu'elle prend dans l'exercice de ses fonctions doivent donc être mises à l'abri de toute ingérence injustifiée. Toutefois, les questions portant sur les mesures nécessaires pour l'exercice des fonctions de l'OPANO ou sur ce qui constitue une ingérence injustifiée doivent être tranchées au cas par cas.

D. *Application en l'espèce*

[54] En l'espèce, la Cour doit déterminer si la gestion des relations avec les cadres supérieurs devrait être visée par l'immunité conférée à

the immunity granted to NAFO. In my view, immunity from the appellant's claims is "required", within the meaning of the *NAFO Immunity Order*, in order for NAFO to perform its functions.

[55] The overall objective of NAFO is to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fisheries resources of the Northwest Atlantic. Wright J. found that hearing the appellant's claims would not constitute an impermissible intrusion into NAFO's internal management. With respect, I cannot accept that conclusion.

[56] This Court has recognized that labour relations are important to the achievement of an organization's mission: *Re Canada Labour Code*, [1992] 2 S.C.R. 50. Indeed, without employees, NAFO could not further its overall objective. In *Re Canada Labour Code*, this Court had to determine whether labour relations at a U.S. military base in Newfoundland constituted a sovereign activity that was immune from the jurisdiction of Canadian courts. Although the case dealt with the *State Immunity Act*, S.C. 1980-81-82-83, c. 95, and with the concept of "commercial activity" for which no immunity exists in Canada, it is nonetheless relevant because of what La Forest J., writing for the majority, said about employment in the context of immunity. He held that the employment relationship is a "multi-faceted" one that must be considered as a whole and in light of its context: pp. 76 and 80.

[57] In the case at bar, the appellant was the Deputy Executive Secretary of NAFO, the second-in-command in the Secretariat. He directly supervised other staff and was responsible for the scientific aspect of NAFO's mission. That alone would be sufficient to conclude that immunity is required in this case in order for NAFO to perform its functions. NAFO must have the power to manage its employees, especially those in senior positions, if it is to perform its functions efficiently. To

l'OPANO. À mon avis, ses fonctions « exigent », au sens où il faut l'entendre pour l'application du *Décret sur l'immunité de l'OPANO*, que l'OPANO jouisse de l'immunité de juridiction contre les réclamations de l'appelant.

[55] L'OPANO a pour mandat général de contribuer par la consultation et la coopération à l'utilisation optimale, à la gestion rationnelle et à la conservation des ressources halieutiques de l'Atlantique Nord-Ouest. Selon le juge Wright, entendre les réclamations de l'appelant ne constituerait pas une ingérence inacceptable dans la régie interne de l'OPANO. En toute déférence, je ne puis souscrire à cette conclusion.

[56] La Cour a reconnu que les relations de travail jouent un rôle important dans l'accomplissement de la mission d'une organisation : *Re Code canadien du travail*, [1992] 2 R.C.S. 50. L'OPANO ne pourrait d'ailleurs pas réaliser son mandat général sans ses employés. Dans *Re Code canadien du travail*, la Cour était appelée à déterminer si les relations de travail dans une base militaire américaine à Terre-Neuve constituaient des activités d'un État souverain qui bénéficiaient de l'immunité de juridiction devant les tribunaux canadiens. Même s'il concernait la *Loi sur l'immunité des États*, S.C. 1980-81-82-83, ch. 95, et le concept des « activités commerciales » auxquelles ne s'applique pas l'immunité de juridiction au Canada, cet arrêt demeure pertinent en raison des observations du juge La Forest, au nom des juges majoritaires, sur le rôle des relations d'emploi dans le contexte de l'immunité de juridiction. En effet, il a déclaré que la relation d'emploi constitue une relation « à plusieurs facettes » à considérer dans sa globalité et en tenant compte du contexte : p. 76 et 80.

[57] En l'espèce, l'appelant était le secrétaire exécutif adjoint de l'OPANO, c'est-à-dire le numéro deux du secrétariat. Il supervisait directement d'autres employés et était responsable du volet scientifique du mandat de l'organisation. Cela suffirait en soi pour conclure que les fonctions de l'OPANO exigent l'application de l'immunité de juridiction en l'espèce. L'OPANO doit être en mesure de gérer ses employés, notamment ceux qui occupent des postes supérieurs, afin d'accomplir

allow employment-related claims of senior officials to proceed in Canadian courts would constitute undue interference with NAFO's autonomy in performing its functions and would amount to submitting its managerial operations to the oversight of its host state's institutions.

[58] This result would flow from the very nature of the appellant's legal proceedings. In his statement of claim, he alleges that the Executive Secretary "engaged in improper management practices": A.R., vol. II, at p. 13. He also seeks punitive damages. In doing so, he is asking the Nova Scotia Supreme Court to pass judgment on NAFO's management of its employees. That, in my view, would constitute interference with NAFO's internal management, which goes directly to its autonomy.

E. *Denial of Justice*

[59] One last issue needs to be addressed with respect to s. 3(1) of the *NAFO Immunity Order*. In slightly different arguments, both the appellant and the intervener submit that to find that NAFO is entitled to immunity would constitute a denial of justice, because the appellant would be left without a forum to air his grievances and without a remedy. The intervener, relying on the *Canadian Bill of Rights*, R.S.C. 1985, App. III, and European case law, submits that the absence of a dispute resolution mechanism at NAFO should militate against such a finding.

[60] The absence of a dispute resolution mechanism or of an internal review process is not, in and of itself, determinative of whether NAFO is entitled to immunity. As I mentioned above, an employment relationship must be considered as a whole and in light of its context. Furthermore, the European cases upon which the intervener relies arose in a different legal context, namely that of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221.

efficacement ses fonctions. Permettre que des poursuites liées à l'emploi intentées contre l'OPANO par ses cadres supérieurs soient entendues par les tribunaux canadiens porterait atteinte de façon injustifiée à l'autonomie de l'OPANO dans l'exercice de ses fonctions et reviendrait à assujettir ses opérations de gestion à la surveillance des institutions de l'État d'accueil.

[58] Ce résultat découlerait de la nature même de la procédure judiciaire intentée par l'appelant. Dans sa déclaration, l'appelant allègue que le secrétaire exécutif [TRADUCTION] « a appliqué des pratiques de gestion irrégulières » : d.a., vol. II, p. 13. Il sollicite également des dommages-intérêts punitifs. Ce faisant, il demande à la Cour suprême de la Nouvelle-Écosse de se prononcer sur la façon dont l'OPANO gère ses employés. Ce type d'intervention constituerait, à mon avis, une ingérence dans la régie interne de l'OPANO, une ingérence qui touche directement à son autonomie.

E. *Déni de justice*

[59] Le paragraphe 3(1) du *Décret sur l'immunité de l'OPANO* soulève une dernière question. En formulant des arguments légèrement différents, tant l'appelant que l'intervenante font valoir que si l'OPANO bénéficiait de l'immunité de juridiction, il en résulterait un déni de justice, puisque l'appelant se trouverait par le fait même privé de la possibilité de faire valoir ses moyens devant un tribunal et d'obtenir réparation. Se fondant sur la *Déclaration canadienne des droits*, L.R.C. 1985, app. III, et sur la jurisprudence européenne, l'intervenante soutient que l'absence de mécanisme de règlement des différends à l'OPANO devrait militer contre l'application de l'immunité.

[60] L'absence d'un mécanisme de règlement des différends ou d'un processus interne d'examen n'est pas en soi déterminante pour décider si l'OPANO bénéficie de l'immunité. Comme nous l'avons vu précédemment, il faut considérer la relation d'emploi dans sa globalité et en tenant compte du contexte. En outre, la jurisprudence européenne sur laquelle se fonde l'intervenante a été établie dans un contexte juridique différent, soit celui de la *Convention de sauvegarde des droits de l'homme et des libertés fondamentales*, 213 R.T.N.U. 221.

[61] As for the *Canadian Bill of Rights*, the "right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" recognized in s. 2(*e*) does not create a substantive right to make a claim. Rather, it provides for a fair hearing if and when a hearing is held. (See also *Islamic Republic of Iran v. Hashemi*, 2012 QCCA 1449, [2012] R.J.Q. 1567, at para. 109; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 59-61.) Section 2(*e*) is the source of a procedural right, not of a substantive right.

[62] The same holds true for the appellant's argument based on art. 14 of the *ICCPR*, a provision which guarantees that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Like s. 2(*e*) of the *Canadian Bill of Rights*, art. 14 creates a guarantee of a procedural nature. Furthermore, in its commentary on the *ICCPR*, the United Nations Human Rights Committee explains that a limitation on this right that is based on an immunity deriving from international law would not violate art. 14: *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, U.N. Doc. CCPR/C/GC/32, August 23, 2007, at para. 18.

[63] The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state's courts. As La Forest J. said in *Re Canada Labour Code* in the context of sovereign immunity, it is an "inevitable result" of a grant of immunity that certain parties will be left without legal recourse, and this is a "policy choice implicit" in the legislation: p. 91. The same holds true in the instant case.

[61] Dans le cas de la *Déclaration canadienne des droits*, le droit reconnu à l'al. 2*e*) « à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations », ne crée pas un droit substantiel d'intenter une action. Cette disposition prévoit plutôt la tenue d'une audience impartiale si effectivement une audience a lieu. (Voir aussi *Islamic Republic of Iran c. Hashemi*, 2012 QCCA 1449, [2012] R.J.Q. 1567, par. 109; *Authorson c. Canada (Procureur général)*, 2003 CSC 39, [2003] 2 R.C.S. 40, par. 59-61.) L'alinéa 2*e*) crée donc un droit procédural, et non un droit substantiel.

[62] Il en va de même pour l'argument de l'appelant fondé sur l'art. 14 du *PIRDCP*, disposition selon laquelle « [t]oute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé de toute accusation en matière pénale dirigée contre elle, soit des contestations sur ses droits et obligations de caractère civil. » Tout comme l'al. 2*e*) de la *Déclaration canadienne des droits*, l'art. 14 crée une garantie de nature procédurale. De plus, dans ses observations relatives au *PIRDCP*, le Comité des droits de l'homme des Nations Unies a expliqué qu'une restriction à ce droit fondée sur une immunité découlant du droit international ne contreviendrait pas à l'art. 14 : *Observation générale n° 32, Article 14. Droit à l'égalité devant les tribunaux et les cours de justice et à un procès équitable*, Doc. N.U. CCPR/C/GC/32, 23 août 2007, par. 18.

[63] Il est regrettable que l'appelant ne puisse pas faire valoir ses moyens devant un tribunal et demander réparation. Cependant, la nature même de l'immunité de juridiction soustrait certaines affaires de la compétence des tribunaux de l'État d'accueil. Comme l'a affirmé le juge La Forest dans *Re Code canadien du travail*, le fait que certaines parties se trouveront dépourvues de tout recours judiciaire est le résultat « inévitabl[e] » de l'octroi de l'immunité de juridiction et constitue un « choix de principe implicite » dans la loi : p. 91. Il en est de même en l'espèce.

F. *Appellant's Claim for the Separation Indemnity*

[64] The appellant also claims the balance of the separation indemnity in the amount of $50,000. Although the Court of Appeal did not address this issue directly, it concluded that NAFO enjoys immunity from all the appellant's claims. NAFO submits that because the appellant's statement of claim inextricably links his attacks on its management with its failure to pay the second allotment of the separation indemnity, it enjoys immunity from this claim as well. In my view, this position is untenable.

[65] First, this claim relates solely to rule 10.4 of the NAFO Staff Rules, which provides that a separation indemnity must be paid to any departing employee, regardless of the reasons for the termination of the employment relationship. The enforcement of rule 10.4 would not amount to submitting NAFO's managerial operations to the oversight of Canadian courts. The separation indemnity claim would in no way interfere with NAFO's performance of its functions.

[66] Second, the resolution of this issue is made even simpler in this case because NAFO recognizes that a separation indemnity is owed to the appellant under the Staff Rules and concedes that the "Immunity Order does not immunize NAFO from a lawsuit that only seeks payment of entitlements under the NAFO Staff Rules": R.F., at para. 57; see also para. 93.

[67] In sum, no compelling reason exists for finding that s. 3(1) of the *NAFO Immunity Order* applies to the appellant's claim with respect to the separation indemnity. This claim should be allowed to proceed.

F. *Indemnité de cessation d'emploi réclamée par l'appelant*

[64] Par ailleurs, l'appelant réclame également le reste de l'indemnité de 50 000 $ payable pour la cessation d'emploi. Bien qu'elle n'ait pas répondu directement à la question, la Cour d'appel a conclu que l'OPANO bénéficie de l'immunité de juridiction contre toutes les réclamations présentées par l'appelant. Selon l'OPANO, vu que l'appelant, dans sa déclaration, lie inextricablement ses attaques contre le mode de gestion de l'OPANO au défaut de cette dernière d'effectuer le deuxième versement de l'indemnité de cessation d'emploi, l'immunité de juridiction s'applique également à cette réclamation. À mon avis, cette position est intenable.

[65] Premièrement, cette réclamation concerne uniquement l'art. 10.4 du règlement régissant le personnel de l'OPANO, selon lequel une indemnité de cessation d'emploi doit être payée à tout employé quittant son emploi, indépendamment des motifs de son départ. Appliquer l'art. 10.4 ne reviendrait pas à assujettir les opérations de gestion de l'OPANO à la surveillance des tribunaux canadiens. La réclamation relative à l'indemnité de cessation d'emploi ne porterait nullement atteinte à l'exercice des fonctions de l'OPANO.

[66] Deuxièmement, le fait que l'OPANO reconnaisse à l'appelant le droit à une indemnité de cessation d'emploi en application du règlement régissant le personnel et concède que le [TRADUCTION] « Décret sur l'immunité ne met pas l'OPANO à l'abri d'une poursuite visant uniquement à obtenir le paiement de montants dus au titre du règlement régissant le personnel de cette organisation » simplifie encore davantage la résolution de cette question : m.i., par. 57; voir aussi par. 93.

[67] En somme, aucune raison valable ne permet de conclure que le par. 3(1) du *Décret sur l'immunité de l'OPANO* s'applique à la réclamation de l'appelant relative à l'indemnité de cessation d'emploi. Cette réclamation devrait pouvoir suivre son cours.

V. Conclusion

[68] I conclude that pursuant to s. 3(1) of the *NAFO Immunity Order*, NAFO enjoys immunity from the appellant's claims, with the exception of the claim concerning the separation indemnity. The appeal is therefore allowed in part, with costs to the appellant. The matter is remanded to the Nova Scotia Supreme Court for adjudication of the remaining claim.

Appeal allowed in part with costs.

Solicitor for the appellant: David A. Copp, Halifax.

Solicitors for the respondent: Stewart McKelvey, Halifax.

Solicitors for the intervener: Borden Ladner Gervais, Toronto.

V. Conclusion

[68] Je conclus que, conformément au par. 3(1) du *Décret sur l'immunité de l'OPANO*, l'OPANO bénéficie de l'immunité de juridiction à l'égard des réclamations de l'appelant, sauf en ce qui concerne la réclamation relative au paiement de l'indemnité de cessation d'emploi. Le pourvoi est donc accueilli en partie, avec dépens en faveur de l'appelant. L'affaire est renvoyée à la Cour suprême de la Nouvelle-Écosse pour que celle-ci statue sur la réclamation qui subsiste.

Pourvoi accueilli en partie avec dépens.

Procureur de l'appelant : David A. Copp, Halifax.

Procureurs de l'intimée : Stewart McKelvey, Halifax.

Procureurs de l'intervenante : Borden Ladner Gervais, Toronto.

This is an official version.

Important Information
(Includes details about the availability of printed and electronic versions of the Statutes.)

Table of Public Statutes **Main Site** **How current is this statute?**

Responsible Department

RSNL1990 CHAPTER I-19

INTERPRETATION ACT

Amended:

1992 c48 s16; 1994 c28 s11; 1999 c22 s14; 2001 cN-3.1 s2;
2009 cR-10.01 s42; 2010 c30 s4; 2013 c16 s25

CHAPTER I-19

AN ACT RESPECTING THE INTERPRETATION OF STATUTES

Analysis

Short title

1. This Act may be cited as the *Interpretation Act.*

RSN1970 c182 s1

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Interpretation

2. (1) In this Act

(a) "public officer" includes a person in the public service of the province

(i) who is authorized to do or enforce the doing of an act or thing or to exercise a power, or

(ii) upon whom a duty is imposed by or under a public statute;

(b) "regulation" includes a rule, rule of court, order prescribing regulations, tariff of costs or fees, form, by-law, resolution, or order made in the execution of a power given by statute; and

(c) "repeal" includes revoke or cancel.

(2) For the purpose of this Act, an Act or a regulation that has expired or lapsed or otherwise ceased to have effect shall be considered to be repealed.

RSN1970 c182 s2

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Application of Act

3. (1) This Act extends and applies to every Act and every regulation enacted or made, except where a provision of this Act

(a) is inconsistent with the intent or object of the Act or regulation;

(b) would give to a word, expression, or clause of the Act or regulation an interpretation inconsistent with the context or the interpretation section of the Act or regulation; or

(c) is by the Act or regulation declared not applicable to it.

(2) The omission in an Act of a declaration that this Act applies to that Act shall not be construed to prevent it so applying, although the express declaration may be inserted in some other Act of the same session.

(3) Nothing in this Act excludes the application to an Act of a rule of construction applicable to that Act and not inconsistent with this Act.

(4) Where an Act or regulation contains an interpretation section or provision, it shall be read and construed as subject to the same exceptions as those contained in subsection (l).

RSN1970 c182 s3

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Act applies to itself

4. The provisions of this Act apply to the interpretation of this Act.

RSN1970 c182 s4

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Acts to be considered public

5. (1) Every Act shall, unless by express provision it is declared to be a private Act, be considered to be a public Act and may be declared on and given in evidence without being specially pleaded.

(2) Every proclamation shall be judicially noticed by all judges, justices, and others, without being specially pleaded.

RSN1970 c182 s5

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Rep. by 2010 c30 s4

6. [Rep. by 2010 c30 s4]

2010 c30 s4

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Date of operation

7. Where an Act or an order in council, order, warrant, scheme, letters patent, rule, regulation or by-law made, granted or issued under a power conferred by an Act is expressed to come into operation on a particular day or on a date fixed by proclamation or otherwise, it shall be construed as coming into operation immediately on the expiration of the previous day, and where it is expressed to expire, lapse or otherwise cease to have effect on a particular day it shall be construed as ceasing to have effect immediately on the commencement of the following day.

RSN1970 c182 s8

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Powers before commencement

8. Where an Act or a provision of the Act is not to come into force immediately on its being passed and confers power to

(a) make appointments;

(b) hold elections;

(c) make regulations;

(d) make, grant, or issue instruments;

(e) give notices;

(f) prescribe forms; or

(g) do any other thing,

that power may, for the purpose of making the Act or provision effective at the date of its coming into force, be exercised at a time after the passing of the Act, subject to the restriction that a regulation made under the power shall not, unless the contrary is necessary for making the Act or provision effective from its commencement, come into force until the Act or provision comes into force.

RSN1970 c182 s9

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Continuing Act

9. (1) Where a Bill is introduced in a session of the Legislature for the continuance of an Act that would expire in that session, and the Act expires before the Bill for continuing it receives the assent of the Lieutenant-Governor, the continuing Act shall be considered to take effect from the date of the expiration of the Act intended to be continued, as fully and effectually, as if the continuing Act had actually passed before the expiration of the Act intended to be continued, unless it is otherwise especially provided in the continuing Act.

(2) Nothing in this section shall extend, or be construed to extend, to affect a person with a punishment, penalty or forfeiture, by reason of anything done or omitted to be done by that person contrary to the Act so continued, between the expiration of it and the date on which the continuing Act receives the assent of the Lieutenant-Governor.

RSN1970 c182 s10

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Law always speaking

10. The law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense the provision shall be applied to the circumstances as they arise so that effect may be given to each Act and every part of the Act according to its true meaning.

RSN1970 c182 s11

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Interpretation of certain words

11. (1) The words "now" and "next" shall be interpreted as having reference to the time when the Act or the part of the Act containing the words or any of them came into force.

(2) The word "shall" shall be construed as imperative and the word "may" as permissive and empowering.

RSN1970 c182 s12

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Binding of Crown

12. No provision in an Act is binding on the Crown or affects the Crown or the Crown's rights or prerogatives unless it is expressly stated in it that the Crown is bound by it.

RSN1970 c182 s13

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Private Acts

13. Where an Act is of the nature of a private Act no provision of the Act affects the rights of a person save only as mentioned or referred to in the Act.

RSN1970 c182 s14

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Preamble

14. The preamble of an Act shall be considered a part of the Act intended to assist in explaining the purport and object of the Act.

RSN1970 c182 s15

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Marginal notes and headings

15. The marginal notes and headings in the body of an Act and the reference to former enactments do not form part of the Act and shall be considered to be inserted for convenience of reference only.

RSN1970 c182 s16

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Rule of construction

16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

RSN1970 c182 s17

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Words in regulations

17. Where an Act confers power to make regulations or to grant, make, or issue an order in council, proclamation, order, writ, warrant, scheme, or letters patent, expressions used in them have the same respective meanings as in the Act conferring the power.

RSN1970 c182 s18

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Proclamations

18. Where the Lieutenant-Governor is authorized to do an act by proclamation, the proclamation means a proclamation issued under an order of the Lieutenant-Governor in Council but it is not necessary to mention in the proclamation that it is issued under such an order.

RSN1970 c182 s19

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Powers of corporation

19. Words in an Act establishing a corporation

(a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold property for the purposes for which the corporation is constituted and to alienate all or part of the property at pleasure;

(b) vest in a majority of the members of the corporation the power to bind the others by their acts; and

(c) exempt from personal liability for its debts, obligations, or acts the individual members of the corporation who do not contravene the Act incorporating them.

RSN1970 c182 s20

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Term of office

20. Every public officer and functionary appointed by or under the authority of an Act or otherwise shall remain in office during pleasure only, unless it is otherwise expressed in the Act or in his or her commission or appointment.

RSN1970 c182 s21

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Public officers

21. (1) Words authorizing the appointment of a public officer or functionary include the power of

(a) removing or suspending him or her;

(b) reappointing or reinstating him or her;

(c) appointing another in his or her stead or to act in his or her stead; and

(d) fixing his or her remuneration and varying or terminating it,

in the discretion of the authority in whom power of appointment is vested.

(2) Words directing or empowering a public officer or functionary to do an act or thing, or otherwise applying to the public officer or functionary by his or her name of office, include his or her successor in the office and his, her or their deputy.

(3) Words directing or empowering a minister of the Crown to do an act or thing, or otherwise applying to the minister of the Crown by his or her name of office, include a minister acting for him or her, where the office is vacant, a minister designated to act in the office by or under the authority of an order in council, and also his or her successors in the office and his, her or their deputy.

(4) Where by an Act or regulation the signature of a minister is required to a document the document may be signed or countersigned,

(a) by a minister acting for or, where the office is vacant, in the place of the minister; or

(b) by his or her lawful deputy

with the same force and effect as if signed by the minister.

(5) Where a power is conferred or a duty imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

RSN1970 c182 s22; 1979 c5 s1

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Implied provisions

22. In an Act or regulation

(a) where anything is directed to be done by or before a public officer, a judge or a justice of the peace, it shall be done by or before one whose jurisdiction or power extends to the place where the thing is to be done;

(b) where power is given to the Lieutenant-Governor in Council or a public officer to do or enforce the doing of an act or thing, all those powers shall be considered to be also given as are necessary to enable him or her to do or enforce the doing of the act or thing;

(c) where an act or thing is required to be done by more than 2 persons, a majority may do it;

(d) where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires;

(e) where power is conferred to make regulations, the power shall be construed as including power, exercisable in like manner and subject to like consent and conditions, to rescind, revoke, amend, or vary the regulations and to make others;

(f) where a form is prescribed, deviations from the form not affecting the substance nor calculated to mislead, do not invalidate the form used;

(g) words importing the masculine gender or the feminine gender include corporations and other words of neuter gender;

(h) words in the singular include the plural and words in the plural include the singular;

(i) where a word is defined, other parts of speech and tenses of the same word have corresponding meanings;

(j) where the time limited for the doing of anything expires or falls upon a holiday, the time so limited shall be extended to and the thing may be done on the following day that is not a holiday;

(k) where a number of days not expressed to be "clear days" is prescribed the days shall be counted exclusively of the 1st day and inclusively of the last and where the days are expressed to be "clear days" or where the term "at least" is used both the 1st day and the last shall be excluded;

(l) where in an Act the future tense or words implying futurity are used, and there are already existing appointments or facts corresponding with what is provided for by the future tense or the words implying futurity, the appointments and facts shall be held to be intended by and to satisfy the requirements of the Act until new appointments or other proceedings are necessary;

(m) when bonds are required to be given by a public officer, they shall, unless otherwise stated, be taken in the name of the Crown.

RSN1970 c182 s23; 1975-76 No57 s4; 1979 c39 s8; 1981 c85 s7

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Quorum and vacancy

23. (1) Where a board, commission or other body, in this section called a "board", is constituted under an Act, a majority of the board is a quorum and the chairperson of the board has an equal vote with the other members.

(2) A vacancy in the membership of a board does not invalidate the constitution of a board or impair the right of the members in office to act, where the number of members in office is not less than a quorum.

1975-76 No57 s4

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Public Inquiries Act

24. Where in an Act a person, board, commission or other body is given the powers that are or may be conferred on a commissioner under the *Public Inquiries Act,* or those powers are conferred by a form of words in an Act, the *Public Inquiries Act* applies in respect of an inquiry, investigation or hearing carried out by that person, board, commission or body in like manner and with like effect as though that inquiry, investigation or hearing were an inquiry held by commissioners appointed

under the *Public Inquiries Act* and vested with all powers that can be conferred upon commissioners under that Act.

1977 c46 s6

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Reference includes amendment

25. A citation of or reference to an Act or regulation of the province or of another province or territory of Canada or of Canada shall be considered to be a citation of or reference to the Act or regulation as amended whether the amendment was made before or after the passing of the Act or regulation in which the citation or reference is made.

RSN1970 c182 s24

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References

26. (1) Reference by number or letter to a section, subsection, paragraph, subparagraph, clause, subclause or line of another Act shall be considered to be a reference to the section, subsection, paragraph, subparagraph, clause, subclause, or line of the other Act as printed by authority of law.

(2) Where reference is made by number or letter to 2 or more parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses, schedules or forms in an Act or regulation, the number or letter 1st mentioned and the number or letter last mentioned shall both be considered to be included in the reference.

(3) Where in an Act or regulation reference is made to a part, division, section, schedule, or form and there is nothing in the context to indicate that a part, division, section, schedule or form of some other Act is intended to be referred to, the reference shall be considered to be a reference to a part, division, section, schedule, or form of the Act or regulation in which the reference is made.

(4) Where in a section of an Act or regulation reference is made to a subsection, paragraph, subparagraph, clause, or subclause and there is nothing in the context to indicate that a subsection, paragraph, subparagraph, clause or subclause of some other section is intended to be referred to, the reference shall be considered to be a reference to a subsection, paragraph, subparagraph, clause or subclause of the section in which the reference is made.

(5) Where in an Act reference is made to regulations and there is nothing in the context to indicate that regulations made under some other Act are intended to be referred to, the reference shall be considered to be a reference to regulations made under the Act in which the reference is made.

RSN1970 c182 s25

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Definitions

27. (1) In an Act or regulation the expression

(a) "Act" or "statute" means an Act or statute of the Legislature of the province unless the context otherwise requires;

(b) "bank" or "chartered bank" means a bank to which the *Bank Act* (Canada) applies, and includes a branch, agency, and office of a bank;

(c) "Court of Appeal" means the Appeal Division of the Supreme Court of Newfoundland and Labrador referred to in section 3 and Part I of the *Judicature Act;*

(d) "Criminal Code" means the *Criminal Code of Canada* ;

(d.1) "Crown" means the Crown in right of the Province of Newfoundland and Labrador;

(e) "Gazette" means the *Newfoundland and Labrador Gazette;*

(f) "goods" means personal property;

(g) "Governor General" means the Governor General of Canada or other chief executive officer or administrator carrying on the Government of Canada on behalf and in the name of the Sovereign, by whatever title he or she is designated;

(h) "Governor General in Council" means the Governor General or person administrating the Government of Canada, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada;

(i) "grantor" includes every person from whom a freehold estate or interest passes by instrument in writing and "grantee" includes every person to whom the estate or interest passes in like manner;

(j) "Great Seal" means the Great Seal of the province;

(k) "Her Majesty", "His Majesty", "the Queen", "the King" or "the Crown" means the Sovereign of the United Kingdom, Canada and His or Her other Realms and Territories, and Head of the Commonwealth;

(l) "holiday" includes Sunday, New Year's Day, Good Friday, Easter Monday, Victoria Day, the birthday or the day appointed for the celebration of the birth of the reigning Sovereign, Labour Day, Remembrance Day, Armistice Day, Christmas Day, and a day appointed by an Act of the Parliament of Canada or by proclamation of the Governor General or of the Lieutenant-Governor for day of a general prayer or mourning or day of public rejoicing or thanksgiving or a public holiday, and whenever a holiday falls on a Sunday the expression "holiday" includes the following day;

(m) "justice" means a justice of the peace and includes 2 or more justices if 2 or more justices act or have jurisdiction;

(n) "Legislature" means the Lieutenant-Governor acting by and with the advice and consent of the House of Assembly of the province;

(o) "Lieutenant-Governor" means the Lieutenant-Governor of the province or other chief executive officer or administrator carrying on the Government of the province on behalf and in the name of the Sovereign, by whatever title he or she is designated;

(p) "Lieutenant-Governor in Council" means the Lieutenant-Governor or person administering the Government of the province acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Executive Council of the province;

(q) "month" means a calendar month;

(r) "Newfoundland and Labrador" means, unless the context otherwise requires, the Province of Newfoundland and Labrador;

(s) "oath" or "affidavit" includes affirmation and declaration and "swear" includes "affirm" and "declare";

(t) "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person;

(u) "proclamation" means a proclamation under the Great Seal;

(v) "province" means the Province of Newfoundland and Labrador except when used in reference to a part of Canada other than the Province of Newfoundland and Labrador in which case "province" includes the Yukon Territory, the Northwest Territories and Nunavut;

(w) "Provincial Court judge" means a Provincial Court judge appointed under the*Provincial Court Act,* and includes the Chief Provincial Court judge;

(w.1) "public trustee" means the public trustee appointed under the *Public Trustee Act, 2009* ;

(x) "registered mail" includes certified mail;

(y) "representatives" means executors and administrators;

(z) "security" means sufficient security;

(aa) "Supreme Court" means the Supreme Court of Newfoundland and Labrador, and, where the subject or context requires, the Court of Appeal or the Trial Division referred to in the *Judicature Act;*

(bb) "surety" means a sufficient surety;

(cc) "Trial Division" means the Trial Division of the Supreme Court of Newfoundland and Labrador referred to in section 3 and Part II of the *Judicature Act;*

(dd) "United Kingdom " means the United Kingdom of Great Britain and Northern Ireland;

(ee) "United States" means the United States of America;

(ff) "warrant" means warrant which is signed and sealed;

(gg) "will" includes codicil;

(hh) "writing", "written" or a term of like import includes words printed, painted, engraved, lithographed, photographed, or represented or reproduced by a mode of representing or reproducing words in a visible form; and

(ii) "year" means a calendar year.

(2) The words and phrases contained in Column 2 which appear in the Revised Statutes of Newfoundland and Labrador 1990 shall be interpreted as having the same meaning as the word or phrase contained in Column 1 which appeared in the Revised Statutes of Newfoundland 1970:

	Column 1	*Column 2*
1.	ad hoc	for this specific purpose
2.	administrator de bonis non	an administrator appointed to complete the administration of an estate
3.	age of majority	19 years of age
4.	bona fide	in good faith, genuine
5.	cestui que trust	beneficiary

6.	chose in action	thing in action
7.	de facto	in fact
8.	de novo	anew/over again
9.	deem	presume, consider
10.	ejusdem generis	of the same kind or nature
11.	en banc	as a full bench
12.	en ventre sa mere	in its mother's womb
13.	ex officio	by virtue of the office
14.	ex parte	unilateral/without notice to another person
15.	fee simple	absolutely
16.	guardian ad litem	guardian for the action
17.	in camera	in private
18.	in esse	actually existing
19.	in lieu	instead
20.	in loco parentis	instead of or in place of a parent
20.1	injurious affection, injuriously affected	detrimental effect, detrimentally affected
21.	inter alia	among others
22.	inter partes	with notice to another party
23.	inter vivos	between living individuals
24.	ipso facto	by the mere fact
25.	joint and several	joint and individual
25.1	lis pendens	pending lawsuits
26.	mutatis mutandis	with the necessary changes
27.	non compos mentis	mentally disabled
28.	parens patriae	the inherent jurisdiction of a superior court to make orders with respect to children
29.	pari passu	equally, without preference
30.	per diem	a day/daily
31.	post-mortem	after death
32.	prima facie	"presumptive proof", "in the absence of evidence to the contrary" "unless the contrary is proved"
33.	pro rata	proportionally
34.	pro tanto	to the extent, as far as it gives
35.	pro tempore	temporarily/for the time being
36.	rule decree/nisi	interim decree/rule
37.	sine die	indefinitely
38.	trial de novo	new trial
39.	viva voce	orally

(3) In an Act or regulation a name commonly applied to a country, place, body, corporation, society, officer, functionary, person, party, or thing means the country, place, body, corporation,

society, officer, functionary, person, party, or thing to which the name is commonly applied although the name is not its formal or extended designation.

RSN1970 c182 s26; 1974 No38 s2; 1974 No77 s36; 1975-76 No57 s4; 1979 c5 s2; 1979 c38 s6; 1982 c9 s4; 1986 c42 Sch B; RSN1990 cI-19 s27; 1992 c48 s16;1994 c28 s11; 1999 c22 s14; 2001 cN-3.1 s2; 2009 cR-10.01 s42; 2013 c16 s25

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Repeal and amendment

28. (1) An Act shall be construed as reserving to the Legislature the power of repealing or amending it and revoking, restricting, or modifying a power, privilege, or advantage vested in or granted to a person by that Act.

(2) An Act may be amended or repealed by an Act passed in the same session.

(3) An amending Act, so far as consistent with the tenor of the Act, shall be construed as part of the Act which it amends.

RSN1970 c182 s27

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Effect of repeal

29. (1) Where an Act or enactment is repealed in whole or in part or a regulation is revoked in whole or in part the repeal or revocation shall not

(a) revive an Act, enactment, regulation, or thing not in force or existing at the time at which the repeal or revocation takes place;

(b) affect the previous operation of an Act, enactment, or regulation so repealed or revoked or anything done or suffered under the Act, enactment or regulation;

(c) affect a right, privilege, obligation, or liability acquired, accrued, accruing or incurred under the Act, enactment, or regulation repealed or revoked;

(d) affect an offence committed against or a violation of the Act, enactment, or regulation repealed or revoked, or a penalty, forfeiture, or punishment which has been incurred;

(e) affect an investigation, legal proceedings, or remedy in respect of the right, privilege, obligation, liability, penalty, forfeiture, or punishment,

and the investigation, legal proceedings, or remedy may be instituted, continued, or enforced and the penalty, forfeiture, or punishment imposed as if the Act, enactment, or regulation had not been repealed or revoked.

(2) Where an Act or enactment is repealed in whole or in part or a regulation is revoked in whole or in part and other provisions are substituted

(a) a person acting under the Act, enactment, or regulation repealed or revoked shall continue to act as if appointed under the provisions so substituted until another is appointed in his or her stead;

(b) a bond and security given by a person appointed under the Act, enactment or regulation repealed or revoked shall remain in force, and all offices, books, papers and things made or used under the repealed or revoked Act, enactment, or regulation shall continue as before the repeal or revocation so far as consistent with the substituted provisions;

(c) a proceeding taken under the Act, enactment, or regulation repealed or revoked shall be taken up and continued under and in conformity with the provisions substituted, so far as it consistently may be;

(d) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights existing or accruing under the Act, enactment, or regulations repealed or revoked or in proceedings in relation to matters which have happened before the repeal or revocation, the procedure established by the substituted provisions shall be followed so far as it can be adapted;

(e) where a penalty, forfeiture, or punishment is reduced or mitigated by a provision substituted, the penalty, forfeiture, or punishment, where imposed or adjudged after the repeal or revocation, shall be reduced or mitigated accordingly.

RSN1970 c182 s28

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Regulations and references

30. (1) Where an Act or enactment is repealed in whole or in part and other provisions are substituted by way of amendment, revision, or consolidation

(a) all regulations made under the repealed Act or enactment shall remain in force in so far as they are not inconsistent with the substituted Act or enactment until they are annulled or others made in their stead; and

(b) a reference in an unrepealed Act or enactment or in a regulation to the repealed Act or enactment, shall, as regards a subsequent transaction, matter or thing, be construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as the repealed Act or enactment, and, where there are no provisions in the substituted Act or enactment relating to the same subject matter, the repealed Act or enactment shall be effective and be read and construed as unrepealed, but only so far as is necessary to maintain or give effect to the unrepealed Act, enactment, or regulation.

(2) Where an Act or enactment of another province or territory of Canada or of Canada is repealed in whole or in part and other provisions are substituted by way of amendment, revision or consolidation, a reference in an Act or enactment of the province or in a regulation to the repealed enactment shall, as regards a subsequent transaction, matter, or thing be construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as the repealed Act or enactment.

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Effect of repeal

31. (1) The repeal of an Act or enactment in whole or in part shall not be considered to be or to involve a declaration that the Act or enactment was or was considered by the Legislature to have been previously in force.

(2) The amendment of an Act or enactment shall not be considered to be or to involve a declaration that the law under the Act or enactment was or was considered by the Legislature to have been different from the law as it is under the Act or enactment as amended.

(3) The repeal of an Act or enactment in whole or in part or the amendment of an Act or enactment shall not be considered to be or to involve a declaration as to the previous state of the law.

(4) The Legislature shall not, by re-enacting an Act or enactment, or by revising, consolidating or amending an Act or enactment, be considered to have adopted the construction which has by judicial decision or otherwise been placed upon the language used in the Act or enactment, or upon similar language.

RSN1970 c182 s30

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Substituted provisions

32. Where a part of an Act is repealed and a provision which has been substituted is incorporated in the Act, the substituted provision shall, unless the contrary is expressly declared, take effect from the date of the commencement of the repealing Act.

RSN1970 c182 s31

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Application of penalties

33. A penalty, fine or sum of money or the proceeds of a forfeiture under a law of the province shall, where no other provision is made respecting it, belong to the Crown for the use of the province and form part of the Consolidated Revenue Fund.

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Administration of oaths

34. Where by an Act or by an order, regulation, or commission made or issued by the Lieutenant-Governor or Lieutenant-Governor in Council under a law authorizing him or her to require the taking of evidence under oath, an oath is authorized or directed to be made, taken or administered, the oath may be administered and a certificate of its having been made, taken or administered may be given by a person named in the Act, order, regulation, or commission or by a judge of a court, a notary public, justice of the peace or a commissioner of the Supreme Court having authority or jurisdiction in the place where the oath is administered.

RSN1970 c182 s33

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Effect of penalty

35. The imposition of a penalty does not relieve a person from liability to answer for damages to the person injured.

RSN1970 c182 s34

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Offence under 2 Acts

36. Where an act or omission constitutes an offence under 2 or more Acts, the offender is, unless the contrary intention appears, liable to be prosecuted and punished under either or any of those Acts but is not liable to be punished twice for the same offence.

RSN1970 c182 s35

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *Tuck v. Supreme Holdings*, 2016 NLCA 40
Date: August 4, 2016
Docket: 14/96

BETWEEN:

TANYA TUCK	APPELLANT

AND:

SUPREME HOLDINGS LTD.	FIRST RESPONDENT

AND:

DANIEL LAKE	SECOND RESPONDENT

AND:

MARLENE LAKE	THIRD RESPONDENT

AND:

CANDICE LAKE	FOURTH RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201201G1143
(2014 NLTD(G) 131)

Appeal Heard: February 8, 2016
Judgment Rendered: August 4, 2016

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Welsh and White JJ.A.

Counsel for the Appellant: Daniel Simmons Q.C. and Rebecca Marshall
Counsel for the Second, Third and Fourth Respondents: Veronica Dillon
Counsel for the First Respondent: No Appearance

Hoegg J.A.:

INTRODUCTION

[1] This appeal concerns the meaning of section 16(1)(b) of the *Limitations Act*, SNL 1995, c. L-16.1 and whether that section time-bars the Plaintiff, Tanya Tuck, from proceeding with her action against the Respondents.

BACKGROUND

[2] On December 28, 2009 Ms. Tuck was involved in a motor vehicle accident. The following month she retained a lawyer to represent her in a claim for resulting damages, and on February 28, 2012, two years and two months after the accident, her statement of claim was issued.

[3] The Respondents refused to entertain Ms. Tuck's claim on the basis that it was issued outside of the applicable limitation period. Ms. Tuck maintained that her claim was not time-barred, arguing that the Respondents had confirmed her cause of action under section 16(1)(b) of the *Act* which had the effect of resetting the limitation period such that her statement of claim was filed within time. There was an impasse, and Ms. Tuck applied to the Supreme Court under Rule 38 for a decision that her action was not time-barred.

[4] Evidence supporting Ms. Tuck's application was scant; the lawyer's paper file was lost in a fire and the insurer's file could not be found.

Nevertheless, the lawyer's firm's electronic back-up system contained some information which forms the evidentiary record:

1) The lawyer advised the Respondents' insurer, in correspondence sent in January 2010 and marked "without prejudice", that he had been retained to represent Ms. Tuck and that she was revoking any prior consent she had given to the insurer to obtain medical information;

2) The lawyer wrote to a named representative of the insurer on April 9, 2010, again on correspondence marked "without prejudice", advising that he was in possession of a doctor's report concerning Ms. Tuck which he would be pleased to forward upon receipt of the doctor's fee plus H.S.T.;

3) The Respondents' insurer subsequently forwarded a cheque in payment for the report which was receipted by the law firm on May 21, 2010; and

4) The lawyer forwarded the medical report to the insurer on that date or shortly thereafter.

There is no evidence of correspondence from the insurer covering the cheque sent by the insurer to the lawyer in May 2010, and no other evidence of communication between the lawyer and the insurer.

The Applications Judge's Decision

[5] The Judge ruled that Ms. Tuck's application was appropriate for a Rule 38 determination. He also ruled that the evidence did not support the Respondents' position that settlement privilege applied to the correspondence between the lawyer and the insurer. However, the Judge went on to rule that Ms. Tuck's cause of action had not been confirmed by the Respondents because the Respondents had not admitted liability, which he reasoned was required for confirmation under section 16(1)(b), and also because the insurer's reimbursement payment for the medical report was for the purpose of investigating Ms. Tuck's claim and not for the purpose of indemnifying her for damages caused by the collision and therefore was not a payment in respect of Ms. Tuck's cause of action as required. Consequently, the limitation period respecting Ms. Tuck's claim was not reset, and her claim, having been issued more than two years after the date of the accident, was time-barred.

The Appeal

[6] No challenge on appeal is made to the Judge's rulings respecting the appropriateness of the matter for determination under Rule 38 or the applicability of settlement privilege to the communications between the lawyer and the insurer.

[7] Ms. Tuck appeals the Judge's decision that section 16(1)(b) of the *Act* does not operate to confirm her cause of action. She argues that the Judge erred in his interpretation of the section and that he applied the wrong law to the facts of her case, causing him to reach the wrong result. She maintains that payment for the medical report constitutes an admission of liability within the meaning of section 16(1)(b) and also that it is a payment in respect of her cause of action. These conclusions, in her submission, would establish confirmation and reset the applicable two-year limitation period to run from May 21, 2010, when the Respondents' insurer paid for her doctor's medical report, thereby putting her claim within time.

[8] The Respondents maintain that the Judge correctly found Ms. Tuck's claim to be time-barred by section 5(a) of the *Act.* They argue that section 16(1)(b) requires an admission of liability which the Judge correctly found was not established on the facts, and also that the Judge was correct in ruling that the payment for the medical report was not a payment in respect of Ms. Tuck's cause of action because it was reimbursement of a cost related to the investigation of Ms. Tuck's claim and not indemnification for her damages arising from her cause of action.

ISSUES

[9] The central issue on appeal is whether the Judge erred in concluding that the insurer's payment for the medical report did not confirm Ms. Tuck's cause of action so as to reset the limitation period. Resolution of this issue requires deciding whether the Judge correctly interpreted section 16(1)(b) of the *Act* and whether he applied the correct interpretation to the facts. Two questions of interpretation arise with respect to whether confirmation obtains under section 16(1)(b):

1) Does section 16(1)(b) require an admission of liability in order to constitute confirmation? and

2) Was the Respondents' payment for the medical report respecting Ms. Tuck's injuries "a payment in respect of [her] cause of action" within the meaning of section 16(1)(b)?

STANDARD OF REVIEW

[10] The standard of review applied by an appellate court depends on the issues being reviewed. Pure questions of law are reviewed on a standard of correctness, and findings of fact are reviewed on a standard of palpable and overriding error. Questions of mixed fact and law, which can arise in the application of a statutory provision to a set of facts, are reviewed on the standard of palpable and overriding error unless the decision is based on an extricable error in principle, in which case the review standard is one of correctness. (*Housen v. Nikolaisen*, 2003 SCC 33, [2002] 2 S.C.R. 235, para. 33). Matters of statutory interpretation are questions of law for which the standard of review is correctness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, para. 33 and *Newfoundland (Minister of Forest Resources and Agrifoods) v. A.L. Stuckless and Sons Ltd.,* 2005 NLCA 11).

ANALYSIS

The Law

[11] Interpretation of a statutory provision involves more than a reading of its words. The particular provision must be considered in the context of the whole statute in which it appears and the purpose of the statute. Section 16 of the *Interpretation Act*, RSNL 1990, c. I-19 provides guidance in interpretation, and established rules and maxims of interpretation may also assist. The consequences of a proposed interpretation are also a relevant consideration (*Stuckless* and *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124).

[12] This modern approach is well described by Green J.A. (as he then was) in *Archean,* paras. 15 and 22-23:

...

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament.

> ... s. [of the *Interpretation Act*] 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise. ...
>
> In truth therefore, s. 16 enunciates a principle of harmonization in which the courts are directed, in cases of dispute, to adopt and apply an interpretation that fairly reconciles the language used in the enactment with the broader objects of the legislation so as to achieve the general goal, or to rectify the mischief, to which the legislative act appears to have been directed. ...

[13] Section 16 of the *Act* sets out two ways by which confirmation of a cause of action can occur:

> 16. (1) A confirmation of a cause of action occurs where a person
>
> (a) acknowledges that cause of action, right or title of another person; or
>
> (b) makes a payment in respect of that cause of action, right or title of another.

[14] Section 5 of the *Act* sets out the limitation period relevant to the cause of action in this appeal:

> 5. Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action
>
> (a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;

[15] Section 16 of the *Interpretation Act* reads:

> 16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal

> construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

The Legislation

[16] The *Act* contains no preamble or statement of purpose to assist in determining the legislature's intention in enacting it. However, it is apparent that its purpose is to define periods within which people must seek to enforce their legal claims. In *M.(K.) v. M(H.)*, [1992] 3 S.C.R. 6 at page 28, the Supreme Court stated the rationales for limitation periods to be certainty, evidentiary, and diligence. In Graeme Mew, *The Law of Limitations* (Markham: Butterworths Canada, 1990), four categories of reasons for limitation periods are listed: 1) peace and repose; 2) evidentiary concerns, 3) economic considerations; and 4) judgmental reasons (pp. 7-8). Suffice it to say that the reasons and rationales referenced above are all directed to the timely resolution of claims, disputes, and other grievances on the basis of reliable evidence in the context of the legal and social culture giving rise to them, so that potential plaintiffs and defendants can obtain closure, resume their normal affairs, and move on with their lives.

[17] That said, this province's legislature has acknowledged that in some cases, circumstances exist which relax the rigid application of a particular limitation period. Accordingly, several provisions of the *Act* address such circumstances. One of those sections, section 16, provides for the resetting of the commencement date of an applicable limitation period when confirmation of a cause of action occurs.

Confirmation under section 16 of the *Act*

[18] Confirmation is a concept known to limitations statutes in the provinces of Newfoundland and Labrador and British Columbia. It relates to when limitation periods begin to run. When confirmation is established, the applicable limitation period is reset to begin to run from the date of confirmation. (Graeme Mew, Debra Ralph and Daniel Zacks, *The Law of Limitations,* 3d ed. (Markham, ON: LexisNexis, 2016)).

[19] Section 16 of the *Act* sets out two ways by which confirmation of a cause of action can occur. Section 16(1)(a) provides that if a person, presumably a potential defendant, acknowledges that another person, presumably a potential plaintiff, has a cause of action, confirmation occurs and the limitation period is reset from the date of the acknowledgement.

[20] Section 16(1)(b) provides that confirmation occurs if a person, presumably a potential defendant, makes a payment in respect of a cause of action that another, presumably a potential plaintiff, has.

[21] By way of background, it is well established in the common law that acknowledgement and part payment are two ways which affect the commencement of a limitation period. (*The Law of Limitations, supra* and J.S. Williams, *Limitation of Actions in Canada*, 2nd ed., (Toronto, ON: Butterworths, 1980), pp. 215-219.) Section 16 of the *Act* has codified these common law principles.

Does section 16(1)(b) require an admission of liability in order to constitute confirmation?

[22] Acknowledgement in section 16(1)(a) has been held to require a written admission of liability (*Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 253). Both of the parties in this case seem to accept that section 16(1)(b) also requires an admission of liability. However, Ms. Tuck argues that the Respondents' payment for the medical report documenting her injuries is, by inference, an admission of liability. In other words, the act of making the payment constitutes an admission of liability. The Respondents argue that their payment for the medical report is not an admission of liability. They say that their payment for the cost of the medical report is merely reimbursement to Ms. Tuck's lawyer for a cost relating to the investigation of her claim, from which no inference of liability can be drawn.

[23] In my view, confirmation under section 16(1)(b) does not require an admission of liability. To the extent that it could be said to require one, I accept Ms. Tuck's argument that a payment in respect of her cause of action amounts to an admission of liability for the purposes of confirmation. Let me explain.

[24] When a potential defendant confirms a cause of action by acknowledgement or part payment, he or she has in effect renounced the need to rely on his or her right to the strict application of the limitation period, thereby enabling the potential plaintiff in such a situation to rely on the acknowledgement or part payment for purposes of when the applicable limitation period begins to run. This extension of time to file suit enables the parties to resolve their differences without resort to litigation should they desire to do so. A potential plaintiff does not have to delay issuing his or her Statement of Claim, but confirmation permits him or her to do so if he or she

chooses. In this way, confirmation promotes early settlement, decreases litigation, reduces expenses, and perhaps even enables parties to avoid embarrassment.

[25] There are any number of reasons why a potential defendant might make a payment to a potential plaintiff. A payment might be made to discourage further proceedings or to mitigate damages, or to discharge some moral or social obligation separate from legal liability. It might serve another purpose, such as public relations. Or a potential defendant might simply want to avoid the risk and expense of litigation by buying time to gather funds to pay a potential plaintiff's claim. Making such a payment simply resets the beginning of the limitation period, giving the parties more time to consider options other than imminent litigation. Whatever the motivation, the point is that while the action of making a payment may be suggestive of liability in certain circumstances, it does not determine liability. It simply resets the running of the clock by deferring the commencement of the limitation period.

[26] Ms. Tuck argues that section 16(1)(b), properly interpreted, means that the making of a payment in and of itself is an admission of liability. She says that the words of the two sections are different and that therefore they have different meanings and applications, and asserts that while sections 16(1)(a) and (b) can overlap, "[t]here are circumstances that would result in a confirmation only under 16(1)(b), which is where a payment made in respect of a cause of action is not accompanied by other evidence of admission", which make them different. She argues that the Judge erred in reasoning that section 16(1)(b) requires an admission of liability.

[27] A reading of the two subsections shows that they are indeed different. The words are different. Such a difference in wording implies a difference in meaning.

[28] The word "acknowledgement" in section 16(1)(a), interpreted to require an admission of liability, does not appear in section 16(1)(b). Instead, section 16(1)(b) contains the words "makes a payment in respect of [that] cause of action". The two sections are separated by the word "or". The completely different words in the two sections and use of the word "or" between them demonstrate that section 16 provides separate bases, independent of each other, on which confirmation can occur. Section 16(1)(a) involves the conveyance of a position; section 16(1)(b) involves

something different – an action, the doing of which can constitute confirmation.

[29] In considering the difference between the two sections, the well established presumption against tautology in statutory interpretation assists:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in the statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.

(Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto, ON: LexisNexis Canada, 2008), Appendix A, Tab 4, page 211.) If section 16(1)(b) required an admission of liability, then that section would not be necessary. Section 16(1)(b) would be superfluous because acknowledgement of liability would have already resulted in confirmation under section 16(1)(a).

[30] The notion that section 16(1)(b) requires an admission of liability arises, to my mind, from a misinterpretation of *Ryan v. Moore*. In *Ryan v. Moore*, an insurer wrote a cheque to a doctor for a medical report about the plaintiff's injuries. The insurer sent the cheque to the plaintiff's lawyer, who argued that it was a "part payment" of the plaintiff's cause of action so as to constitute confirmation and reset the applicable limitation period. The Court explained that it was not, saying:

> 47 ... [B]oth payments mentioned by Ryan, payments for Ryan's medical chart and Dr. Landells' medical report, were not evidence of liability by Cabot Insurance; nor did they indemnify Ryan, at least in part, for damages caused by the accident. Thus, they cannot be payments in respect of the "cause of action". ...

The Court held that the payment in *Ryan v. Moore* did not establish confirmation under either section 16(1)(a) or section 16(1)(b) because the payment was not an admission of liability nor a payment in respect of the plaintiff's cause of action. Bastarache J. explained the latter reason at paragraph 48:

> The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.

[31] The notion that confirmation under section 16(1)(b) includes an admission of liability presumes that liability for the cause of action has

already been determined to be successful, or that it will inevitably be adjudged to be so. (I note that according to Mews at pp. 216-217 and Williams at pp. 215-219, acknowledgements and part payments did not preclude all defences respecting the determination of ultimate liability.) The notion ignores the reality that evidence is required (as Justice Bastarache referenced in paragraph 47) and defences must be considered before ultimate liability is found in respect of a cause of action. In my view the Supreme Court did not determine that acknowledgement of a cause of action under section 16(1)(a) means that a potential defendant cannot defend a potential plaintiff's claim, given that the purpose of confirmation in section 16 of the *Act* is to reset the running of the limitation period. In any event, I read *Ryan v. Moore* as requiring that while there must be an admission of or at least some evidence respecting liability for acknowledgement to be established and confirmation to obtain under section 16(1)(a), payment in respect of the cause of action at issue is all that is required under section 16(1)(b). I see nothing in *Ryan v. Moore* which refutes the fact that payment is a separate basis on which confirmation can occur or that an admission of liability or evidence respecting same in addition to a payment is required for confirmation to occur under section 16(1)(b).

[32] I therefore conclude that admission of liability is not an additional hurdle that a plaintiff who seeks to establish confirmation under section 16(1)(b) must meet. In this result, I am accepting Ms. Tuck's argument that sections 16(1)(a) and 16(1)(b) have different meanings, and that the making of "a payment in respect of that cause of action", without more, can constitute confirmation so as to reset the applicable limitation period.

[33] In summary, section 16(1)(b) permits an applicable limitation period to be reset by the making of a payment "in respect of that cause of action" in issue. If this is done, 16(1)(b) permits an inference that the person making the payment, presumably a potential defendant, is prepared to defer the commencement of the limitation period within which the person receiving the payment, presumably a potential plaintiff, can file suit. This interpretation is consistent with the overall scheme of the *Act* which is about limitation periods and not about legal liability for claims, and is in harmony with the other provisions of the *Act,* which address circumstances affecting when limitation periods begin to run. Accordingly, to the extent that the judge interpreted section 16(1)(b) as requiring an admission of liability in addition to a payment in respect of that cause of action, he erred.

Was the Respondents' payment for the medical report respecting Ms. Tuck's injuries "a payment in respect of her cause of action?

[34] In order for Ms. Tuck's appeal to succeed it must be determined that by paying for her doctor's medical report, the Respondents "[made] a payment in respect of [her] cause of action" within the meaning of section 16(1)(b).

[35] On this point, Ms. Tuck urges the Court to interpret the words "payment in respect of a cause of action" in a broad fashion. She says that the payment for the doctor's report is a payment in respect of her cause of action because it is connected to her cause of action in the sense that the report would not exist and no payment for it would have been required but for her cause of action. She argues that the words "payment in respect of [her] cause of action" simply mean "payment in connection with her cause of action", and a connection is all that is required for such a payment to be "in respect of that cause of action".

[36] Ms. Tuck emphasizes that the payment for her doctor's report was the result of the Respondents' deliberate choice and action. She adds that the payment was not made on a "without prejudice" basis, and asserts that any insurer who wishes to obtain medical information respecting a potential claim without confirming a cause of action can simply submit payment to a plaintiff or his or her counsel on a "without prejudice" basis. I agree with Ms. Tuck that payment for a medical report on a "without prejudice" basis may avoid the payment being taken as confirmation of a cause of action. However, this does not determine whether payment for a medical report in the context of an accident victim's claim for damages is "a payment in respect of that cause of action" within the meaning of section 16(1)(b).

[37] In this context, the words "payment connected with that cause of action" convey a different meaning than the words "payment in respect of that cause of action". The words "in connection with" admit of wider and looser application. Connections can vary in degree, and a loose, tenuous, or tangential connection is still a connection. By contrast, the words "in respect of that cause of action", speak to the specifics of the cause of action at issue – in this case Ms. Tuck's right to claim damages caused by the negligence of the Respondents.

[38] In any event, the point was decided by the Supreme Court in *Ryan v. Moore*, wherein Justice Bastarache explained that the purpose of a payment

for a medical report respecting an injury claim is investigatory. At paragraph 47 he said that "payments for *Ryan's* medical chart and Dr. Landells' medical report did [not] indemnify *Ryan*, at least in part, for the damages caused by the accident". He went on to explain at paragraph 48 that the purpose for which these types of payments are made is to promote investigation and early resolution of certain aspects of a claim.

[39] Ms. Tuck argues that because the Court held in *Ryan v. Moore* that the section 16 confirmation provisions of the *Limitations Act* could not be used to restart the limitations period in the *Survival of Actions Act*, the comments in *Ryan v. Moore* about confirmation were *obiter* and not binding. However, the Court acknowledged its comments to relate to confirmation under section 16 of the *Act* and stated them as "a matter of principle". The Court has therefore given direct guidance respecting the purpose of payment for a medical report in the context of a personal injury action and section 16(1)(b). Moreover, I see no basis on which Ms. Tuck's case can or ought to be distinguished from the reasoning in *Ryan v. Moore*. The Court's statements are in accordance with the overall scheme of the *Act* and in harmony with the objective of section 16(1)(b).

[40] As referenced above, acknowledgements and part payments of debts at common law have been held to restart applicable limitation periods. It was well established that such a part payment had to be on account of the debt for which the action was or would be brought in order to gain the benefit of a deferred limitation period (*Tippets v. Heane* (1834), 1 Cr. M. & R. 251, 149 E.R. 1074). The relationship between the payment and the debt, or cause of action, was clear; it had to be part payment of the debt. In my view, this requirement underscores the interpretation that any payment in respect of a cause of action must be a payment in respect of the specific debt or damages arising from the cause of action in issue. Accordingly, payment for a medical report respecting a potential plaintiff's injuries respecting his or her cause of action is not a payment in respect of that cause of action.

[41] In this case, the Judge said "that payment for the medical report was not a payment in respect of Ms. Tuck's cause of action because it did not indemnify her for damages caused by the collision; rather, it was repayment of a cost of pursuing the claim only, just as legal fees are such a cost. Costs are not to be confused with damages". I agree. The Judge's reasoning in this regard is squarely within that of *Ryan v. Moore* and accords with the purpose of the *Act* and the objective of section 16(1)(b).

[42] By way of explanation, I would add that insurers, like those of the Respondents in this case, require medical and other information in order to set their reserves and act responsibly in handling claims of and against their insureds. Likewise, plaintiffs like Ms. Tuck and their counsel need medical and other information in order to evaluate and prosecute their claims. The expenses associated with these needs are costs related to the handling of claims, not payments in respect of a cause of action. The overall purpose of obtaining medical information respecting a claimant or a potential claimant in a personal injury action is investigatory, and absent unusual circumstances, actions taken to investigate claims, without more, should not operate to alter the applicable limitation periods.

[43] The Respondents alternatively argued that payments for lost wages and/or therapy in the context of a personal injury claim could constitute confirmation under section 16(1)(b) because such payments would be indemnification for damages in respect of the particular cause of action and not costs associated with pursuing or defending a cause of action. Given the above result, it is not necessary to decide this argument. However, I would caution that if and when such payments are made by a potential defendant or his or her insurers, consideration of whether they ought to be made on a "without prejudice basis" would be prudent.

[44] I add only that I also agree with the Judge's comment that payment for a medical report made directly to the author of the report as opposed to a potential plaintiff's counsel is a distinction without a difference.

SUMMARY AND DISPOSITION

[45] Confirmation under section 16(1)(b) occurs when a payment is made "in respect of that cause of action". No additional evidence of admission of liability is required in order for confirmation to obtain under section 16(1)(b). Payment for a medical report in the context of a personal injury action is not a payment "in respect of that cause of action" within the meaning of section 16(1)(b).

[46] Accordingly, the payment by the Respondents' insurers to Ms. Tuck's solicitor for the medical report concerning the injuries she sustained in the accident does not confirm her cause of action so as to reset the limitation period.

[47] I would dismiss Ms. Tuck's appeal, and grant the Respondents their costs on column 3.

_____

L. R. Hoegg J.A.

I concur: _____

B. G. Welsh J.A.

I concur: _____

C. W. White J.A.

Agreement Providing Key Terms and Conditions For the

FEDERAL LOAN GUARANTEE BY HER MAJESTY THE QUEEN IN RIGHT OF CANADA

FOR THE DEBT FINANCING OF THE LOWER CHURCHILL RIVER PROJECTS

PREAMBLE

Nalcor Energy ("Nalcor"), Emera Inc. ("Emera"), the Province of Newfoundland and Labrador ("NL"), and the Province of Nova Scotia ("NS") have informed Her Majesty the Queen in Right of Canada ("Canada") (all collectively called the "Parties") that Nalcor and Emera or their affiliates intend to develop, construct and operate, with the support of NL and NS, the Muskrat Falls Generation Facility, Labrador Transmission Assets, Labrador Island Link, and Maritime Link Projects (the "Projects"). Canada, NL, and NS subsequently signed a Memorandum of Agreement to support the Projects on August 19, 2011 (the "MOA").

It is essential to Canada that the Projects have national and regional significance, economic and financial merit, and significantly reduce greenhouse gas emissions. Canada's Guarantee of the Guaranteed Debt of each Project will significantly enhance the credit quality of the Financing of each Project. Canada hereby agrees to guarantee the Guaranteed Debt of each Project and will provide the Guarantees for the Projects as more fully described, and subject to the terms and conditions described herein.

The agreements of Canada hereunder are made solely for the benefit of Nalcor, Emera, and their affiliates including the Borrowers, and for the benefit of the Lenders ultimately selected by them to make the Financing available for the Projects and may be relied upon by all such persons but may only be enforced by Nalcor and Emera and affiliates including the Borrowers.

Once it has been accepted by all the Parties, this agreement may be disclosed publicly by or on behalf of any of Canada, Nalcor, Emera, their affiliates, NL and NS.

As regards the MF, LTA and LIL Projects, MFCo, LTACo, LILCo, LIL Opco,Nalcor, NL and Canada, this agreement shall be governed by, and construed in accordance with, the laws of the Province of Newfoundland and Labrador and the federal laws of Canada applicable therein and all actions, suits and proceedings arising will be brought in the courts of competent jurisdiction of NL. subject to any right of appeal to the Federal Court of Appeal or to the Supreme Court of Canada. As regards the ML, MLCo, Emera, NS and Canada, this agreement shall be governed by and construed in accordance with the laws of the Province of Nova Scotia and the federal laws of Canada applicable therein and all actions, suits and proceedings arising will be brought in the courts of competent jurisdiction of NS, subject to any right of appeal to the Federal Court of Appeal or the Supreme Court of Canada. This agreement sets forth the entire agreement among the Parties with respect to the matters addressed herein as regards the Projects and supersedes all prior communications, written or oral, with respect thereto including MOA. This agreement may be executed in any number of counterparts, each of which, when so executed, shall be deemed to be an original and all of which, taken together, shall constitute one and the same agreement. Delivery of an executed counterpart of this agreement by telecopier or electronically shall be as effective as delivery of a manually executed counterpart of this agreement.

Canada understands that Nalcor and Emera, or their affiliates, will be soliciting offers for the Financings from a range of Lenders. Given the importance of a Federal Loan Guarantee to the Financing for each Project, Canada hereby acknowledges and agrees that upon request by Nalcor or Emera within a reasonable period of time prior to any proposed meeting, it shall make available senior representatives of Canada, and its legal advisors and financial consultants as appropriate, responsible for the provision and oversight of the Federal Loan Guarantee, for participation in meetings with credit rating agencies and potential Lenders to respond to queries concerning the Federal Loan Guarantee.

TERMS AND CONDITIONS

1. THE PROJECTS AND THE TRANSACTION PARTIES	
1.1 Projects:	The Muskrat Falls Generation Facility ("MF"), the Labrador Transmission Assets ("LTA"), the Labrador-Island Link ("LIL") and the Maritime Link ("ML"), each as more fully described as follows: MF: an 824-MW hydro-electric generation facility in the vicinity of Muskrat Falls, Labrador, which Nalcor will develop. LTA: a 345-kV HVac transmission interconnection between Muskrat Falls and Churchill Falls, which Nalcor will develop. LIL: a HVDC transmission line connecting the Island of Newfoundland to generation facilities in Labrador which Nalcor will develop but in which Emera Inc., via a Newfoundland and Labrador corporate entity, will have an opportunity to invest. ML: a transmission line connecting the Island of Newfoundland to the Province of Nova Scotia, which will be developed by Emera. Each of (i) MF and LTA together; (ii) LIL; and (iii) ML is referred to herein as a "Project" and together as the "Projects".
1.2 Guarantor:	Her Majesty the Queen in Right of Canada ("Canada" or "Guarantor").
1.3 Proponents:	Nalcor Energy ("Nalcor"), acting on its own behalf and not as agent of the Province of Newfoundland and Labrador ("NL Crown"), and Emera Inc. ("Emera.
1.4 Borrowers:	MFCo: a special purpose wholly-owned subsidiary of Nalcor.

	LTACo: a special purpose wholly-owned subsidiary of Nalcor. LILCo: a special purpose limited partnership controlled by Nalcor and held by it alone or together with Emera ("LILCo"). The obligations of LILCo will be guaranteed by LIL OpCo, a special purpose wholly-owned subsidiary of Nalcor ("LIL OpCo"). MLCo: a special purpose wholly-owned subsidiary of Emera. Each a "Borrower" and collectively, the "Borrowers".
1.5 Lenders:	Subject to the form of Financing Structure selected by the Borrower, with respect to each Borrower, a financial institution or a group of financial institutions or financiers that will purchase debt securities to be issued by such Borrower or make credit facilities available to such Borrower, which will be guaranteed by Canada pursuant to the Federal Loan Guarantee, defined herein (the "Lender" or "Lenders"). Lenders shall include a Guarantee Agent and Collateral Trustee for the benefit of the Lender, where applicable.
2. TRANSACTIONS	
2.1 Federal Loan Guarantee:	The Federal Loan Guarantee ("FLG") shall, in respect of each Project, be an absolute, continuing, unconditional and irrevocable guarantee of payment (not collection) when due of the Guaranteed Debt of the relevant Borrower to the Lenders. The Lenders shall not be bound to pursue or exhaust their recourses against the relevant Borrower or any security held by them before demanding payment from the Guarantor. Subrogation - Canada shall be subrogated in the rights of the Lenders for any Project in respect of and at the time of each and every particular payment made by the Guarantor. Acceleration - It shall be a term of any Financing Document for any Project that in the event of default by a Borrower thereunder, the Lenders shall not accelerate the loan. With respect to MF, LTA and LIL, "FLG Agreement" means the agreement among the Guarantor, MFCo, LTACo, LILCo and Nalcor containing their respective rights and obligations as contained in this Term Sheet. With respect to ML, "FLG Agreement" means the agreement among the Guarantor, ML and Emera containing their respective rights and obligations as contained in this Term Sheet.
2.2 Transaction Structure:	Canada, the Borrowers and the Proponents will work to agree on a Transaction Structure that in conjunction with the FLG Agreement will result in the Project debt achieving Canada's AAA credit rating. The parties agree that the credit rating agencies will be asked to confirm that the FLG Agreement and Transaction Structure would achieve this objective. The Parties agree that they will work together to finalize the Transaction Structure and form of

	Guarantee, including obtaining confirmation from the credit rating agencies, by January 31, 2013 in order to facilitate the start of the financing process.
2.3 Financing Structure:	Following the execution and delivery of all Financing Documents (defined in Section 3.5), ("Financial Close"), the Borrowers intend to pay for Project costs which would include construction costs, interest, fees and other related costs, using a combination of equity to be provided by the Proponents and debt to be made available by the relevant Lenders. The Parties agree that Financial Close for ML must occur by the later of 90 days after the Nalcor Projects, or December 31, 2013. The Financing Structure will be flexible enough to allow each Borrower to raise debt , by way of: (i) bank credit facilities; (ii) a commercial paper program; (iii) a single bond or a series of bonds with staggered short-term maturity dates or a single maturity date issued and maturing within the Construction Period (the period between Financial Close and Commercial Operations Date (defined herein)); (iv) a single long-term bond or a series of long-term bonds issued during the Construction Period; or (v) a combination of one or more of the foregoing options, together with any related hedging instruments. The Guaranteed Debt incurred during the Construction Period for each Project may be refinanced by way of loans, bonds or a combination thereof, provided that: (a) the principal amount of such refinancing does not exceed the then outstanding principal amount of the Guaranteed Debt; and (b) the term thereof does not extend beyond the end of the FLG Term, it being expressly agreed that any loan or bond that matures on or after the earlier of: (i) 2 years after COD; or (ii) 7 years after Financial Close, may not be further refinanced. All of the foregoing is hereinafter collectively referred to as the "Financing". As may be required by the nature of the Financing, a hedging program shall be put in place for each Borrower at Financial Close. In order to ensure certainty in the cost of the Financing for each of the Projects, any interest expense risk will be hedged. The Project hedging principles will be agreed to with the Guarantor prior to Financial Close. Canada, the Borrowers and the Proponents will work to agree on a Financing Structure for the Projects, it being acknowledged that a range of financing structures may be considered. "Commercial Operations Date" ("COD"), in respect of each Project, shall be the date upon which construction is certified by the Borrowers' Engineer to be complete and confirmed by the Independent Engineer, which is currently expected to be July, 2017.
3. FLG TERMS	

3.1 Guaranteed Debt:	A. The total maximum amount of borrowing and hedging obligations (including principal, interest, fees, and costs) under the Financing to be guaranteed by Canada ("Guaranteed Debt") shall be the lesser of the following for each of the Projects: i. A fixed dollar-based cap of $6.3 billion, allocated among the Projects as follows: a. MF/LTA: up to $2.6 billion, b. LIL: up to $2.4 billion; and c. ML: up to $1.3 billion; herein called "Individual Project Debt Caps". ii. The amount of debt implied by the maximum Debt to Equity Ratios ("DER") for each Project as follows: a. MF/LTA: 65:35 b. LIL: 75:25 c. ML: lower of Nova Scotia Utility and Review Board (UARB) approval or 70: higher of UARB approval or 30; or iii. The amount of debt that provides a minimum Debt Service Coverage Ratio ("DSCR") of 1.40x for each Project throughout the Term of the FLG. B. The terms and conditions of the Guaranteed Debt shall be those commonly used in similar commercial transactions, shall be subject to Canada's approval, acting reasonably, and shall include the following: (i) Rate of Interest that is no greater than that which would be offered by Lenders to an entity with a "AAA" credit rating; (ii) The proceeds from the Guaranteed Debt and the Additional Debt shall be used for the sole purpose of the Project; and (iii) Any long-term bond issued in connection with the Guaranteed Debt may carry a call feature.
3.2 Term of the FLG:	The FLG Term shall begin on Financial Close and shall terminate on the earlier of: (a) payment in full of the Guaranteed Debt; or (b) the Maximum Term for each Project, as follows: (i) MF/LTA: 35 years after Financial Close; (ii) LIL: 40 years after Financial Close; and (iii) ML: 40 years after Financial Close.
3.3 FLG Amortization Profile:	The Guaranteed Debt shall be repaid in accordance with the following amortization profile: MF/ LTA : simple mortgage-style amortization, ending no later than 35 years after Financial Close; LIL : level amortization, ending no later than 55 Years after Financial Close; and

	ML : level amortization, ending no later than 40 years after Financial Close. The Amortization period is to begin on the earlier of: (i) Commercial Operations Date, and (ii) seven (7) years after Financial Close. The Amortization Profile shall be such that there is no principal outstanding at the end of each amortization period for each Project. In each case, save if bullet maturity bonds are used, there shall be at least one payment a year. Bullet maturity bonds may be used instead of amortizing bonds. Bullet maturities will be matched as closely as possible to the relevant FLG Amortization Profile.
3.4 FLG Maximum Exposure:	The maximum exposure to the Guarantor under the FLG at any given time shall be the actual amount outstanding on the Guaranteed Debt at such time based on the FLG Amortization Profile.
3.5 FLG Conditions Precedent:	A. The following conditions precedent (the "FLG Conditions Precedent") must be satisfied in form and substance acceptable to the Guarantor prior to the execution and delivery of the FLG for all Projects: (i) Confirmation by Credit Rating Agencies of indicative credit ratings for each of MF, LTA, and LIL (prepared on a non-guaranteed basis) equal to or higher than investment grade; (ii) Provision by Credit Rating Agencies of indicative credit ratings for the ML (prepared on a non-guaranteed basis and based on information provided in the application to the UARB) equal to or higher than investment grade; (iii) Enactment of legislation, and execution of formal agreements between the NL Crown and Nalcor (or related entities), which put into legally binding effect the commitments made by the NL Crown as outlined in Schedule "A", both the legislation and the agreements being to the Guarantor's satisfaction.; (iv) The formalization of a regulatory framework by the Province of Nova Scotia ("NS") in legislation and/or regulations; (v) Execution of an inter-governmental agreement (the "IGA") between Canada and the NL Crown in which NL Crown: (a) makes the commitments outlined in Schedule "A" to Canada; (b) indemnifies Canada for any costs that it may incur under the FLG as a result of a regulatory decision or regulatory change (including through legislation or policy) that prevents a Borrower from recovering Project costs and fully servicing the Guaranteed Debt; and (c) guarantees completion of the MF, LTA and LIL Projects to COD such that, where non-completion is due to NL Crown's failure to comply with the commitments outlined in Schedule "A", NL Crown shall indemnify Canada for any costs Canada may incur as a result of those Projects not achieving COD. (vi) Execution of an agreement between Canada and NS in which NS

	indemnifies Canada for any costs it may incur under the FLG as a result of a regulatory decision or regulatory change (including through legislation or policy) that prevents a Borrower from recovering Project costs and fully servicing Guaranteed Debt; (vii) Sanction of all Projects, including ML; (viii) Execution of an agreement (the "Emera Guarantee Agreement") between Canada and Emera, wherein Emera shall guarantee: (a) the payment of $60 million to the Guarantor in the event that Financial Close is not achieved by the date set out herein or funds are not drawn from Guaranteed Debt within a reasonable time after Financial Close; and (b) following the first draw of Guaranteed Debt, Emera will guarantee to complete the ML or to provide required funds to complete the ML; (ix) That all necessary environmental legal and policy authorities have been complied with to the satisfaction of the Guarantor; and (x) That all necessary aboriginal consultation obligations have been complied with to the satisfaction of the Guarantor. B. The following conditions precedent (the "FLG Conditions Precedent") must be satisfied by the applicable Borrower in form and substance acceptable to the Guarantor prior to the execution and delivery of the FLG for each Project of such Borrower: (i) Execution of the FLG Agreements and all other relevant documents necessary to effect Financial Close ("Financing Documents"); (ii) Provision by Credit Rating Agencies of indicative credit ratings for the ML (prepared on a non-guaranteed basis) equal to or higher than investment grade in the event that the UARB decision differs from the application submitted by MLCo; (iii) Satisfaction, in the sole discretion of the Guarantor, of any and all Project-related due diligence deemed necessary by the Guarantor, including satisfactory review of all required revenue-producing agreements and other agreements including the MF PPA, TFA, LIL Assets Agreement; (iv) Approval by the Guarantor, acting reasonably, of the Financing, Financing Structure, Financing Documents, and the Transaction Structure; (v) A report provided by an independent expert that the Projects have sufficient insurance coverage in place that is customary in projects of this nature and size; (vi) As required by the nature of the Financing, an interest rate hedging program be in place to hedge expected interest expense with respect to the Guaranteed Debt; (vii) All necessary permits, approvals, land-use agreements and other authorizations required at Financial Close have been obtained;

	(viii) Execution and delivery of the indemnity referred to in Section 4.9; (ix) Review of technical aspects of the Projects, including engineering, water resource and any other required due diligence by the Independent Engineer (as defined herein), and preparation and finalization (as confirmed by the Guarantor and Lenders, acting reasonably) of a technical due diligence report (the "IE DD Report") confirming that the Project execution plans are commercially reasonable, and consistent with Good Utility Practice; and (x) Other Conditions Precedent customarily included in commercial project financing transactions.
Date: _____ 3.6 Costs Incurred by Guarantor:	All reasonable third-party costs incurred by the Guarantor in relation to an FLG shall be at the expense of the Borrower for the benefit of which such FLG has been issued.
3.7 Guarantee Fee:	No fees shall be payable to the Guarantor in respect of the provision of any FLG.
3.8. Commitment Fees:	Any fees paid to the Lenders under the Project Financing, such as commitment fees or up-front fees, shall be commercially reasonable.

4. PROJECT DEBT

4.1 Debt Service Coverage Ratio Definition and Test:	Definition: The Debt Service Coverage Ratio ("DSCR") in respect of any Borrower, and in respect of any 12-month period shall be calculated as follows: DSCR = Base Cash Flow / Debt Service, where: Base Cash Flow = Liquidity Reserves plus Contracted Revenues less Cash Operating Costs Debt Service = Amortization plus Interest Expense Amortization = The amortization amount corresponding to the FLG Amortization profile in respect of each Borrower Interest Expense = The interest expense for the period Contracted Revenues: (i) MF: (a) For purposes of Initial Debt Sizing, DSCR shall include only the Base Block Revenue plus Liquidity Reserve; and (b) For all other purposes, DSCR shall include the Base Block Revenue plus Liquidity Reserve, plus revenue from power purchase agreements with investment grade parties, based on total annual energy sales not to exceed (P50) energy production for MF. (ii) LTA: For all purposes, DSCR shall include LTA Tariff Revenue plus Liquidity Reserve. (iii) LIL: For all purposes, DSCR shall include revenue from NL Hydro under

	the LIL Assets Agreement plus any Liquidity Reserve. (iv) ML: For all purposes, DSCR shall include revenues collected from ratepayers under the cost-recovery framework imposed by the Nova Scotia Utility and Review Board plus any Liquidity Reserve. Cash Operating Costs includes all cash costs of the Borrower, excluding interest and principal on any Guaranteed Debt. <u>Test:</u> The DSCR Test shall apply both prospectively and retrospectively except as follows: (a) The DSCR Test shall apply prospectively in the context of the maximum Guaranteed Debt as defined in 3.1; and (b) The DSCR Test shall apply prospectively in the context of the Additional Debt. For purposes of the ML, the prospective calculation of the DSCR shall be based on the UARB-approved return on equity. DSCR will be calculated monthly on a rolling 12-month basis. "Base Block Revenue" means amounts paid by NL Hydro to MF in respect of the Base Block Energy purchase commitments as set out in the MF power purchase agreement and as described in the Memorandum of Principles.
4.2 Debt Service Coverage Ratio:	The DSCR for each Project shall be a minimum of 1.40x.
	If the DSCR falls below 1.40x, then a 30-day consultation process between the Guarantor and the relevant Borrower is triggered during which time information shall be provided to Canada to advise it of the reasons for such a decline and how the Borrower proposes to increase the DSCR. If it falls below 1.20x, then there shall be no distribution to equity holders. If it falls below 1.10x, it shall constitute an Event of Default.
4.3 Cross-Default Provisions:	MF, LTA, and LIL will have cross-default provisions such that an event of default of any one Borrower will represent an event of default of each of the other two Borrowers. There shall be no cross-default provisions in respect of Maritime Link.
4.4 FLG Events of Default:	The following is a non-exhaustive list of Events of Default in respect of each Project for purposes of the FLG: (i) Failure to satisfy any covenants in the Financing Documents or FLG Agreement, and to cure same within 30 days of notice of default; (ii) Misrepresentation, fraud, or breach of material representation; (iii) Bankruptcy, restructuring, and insolvency of a Proponent or a Borrower; (iv) Termination (other than a scheduled termination), invalidity, unenforceability or default (by any party to such agreement) of any key project agreement (eg. the MF PPA, TFA, LIL Assets Agreement, ML revenue collection agreement) that is not cured within any applicable grace period in that agreement (or within 30 days of the date of occurrence of such event if there is no applicable grace period), or replaced by an equivalent agreement within 30 days. This will be an Event of Default for the defaulting Party only; (v) Sale or Change of Control of Nalcor or the Borrowers, other than

	among the Parties, or non-permitted assignment of any key contracts; (vi) Insufficient funding of Cost Overruns or Cost Escalations that continues for 90 days after being identified by the Independent Engineer; (vii) Abandonment of a Project by the owner of the Project; (viii) Breach or termination of any contract of the Borrowers, including the commercial agreements between Nalcor and Emera, that is not cured within any applicable grace period in that agreement, (or within 30 days of the date of occurrence of such event if there is no applicable grace period) or replaced by an equivalent agreement within 30 days. This will be an Event of Default for the defaulting Party only; (ix) Unauthorized sale of any material Project assets; (x) Failure to provide certificate of the Independent Engineer confirming that budgeting and maintenance of the Project is being conducted in conformity with Good Utility Practice and such failure is not cured within 30 days; (xi) The DSCR falls below 1.10x; (xii) Failure to fund or maintain the Debt Service Reserves or the Liquidity Reserves as required in Section 4.16 and to cure same within 5 business days of payment therefrom; (xiii) Failure to pay principal or interest within 5 business days of due date; and (xiv) Other Events of Default customarily included in commercial financing documents.
4.5 Lenders' Events of Default:	The only Lenders' Event of Default in respect of the Guaranteed Debt shall be the failure by a Borrower and the Guarantor to pay a scheduled principal and interest payment. Upon the occurrence of a Lender's Event of Default, Lenders shall have all available remedies.
4.6 Security:	The security for the Guaranteed Debt shall include the following: (i) the assets of the Borrowers (including Liquidity and Debt Service Reserves); (ii) all contracts of the Borrowers, including key project agreements, as identified by the Guarantor; and (iii) the shares of the Borrowers provided that the shares of MFCo, LTACo and LILCo, may only be pledged to Canada or an agent of Canada. For greater certainty, the priorities of Security taken by the Guarantor shall be determined by the Financing Structure agreed upon, and in any event shall be subject in priority only to Security taken by a Lender, if any. The Borrowers shall take all actions necessary, in the opinion of the Guarantor, to maintain the validity, enforceability, and priority of the Guarantor's security.
4.7 Permitted Liens:	The Borrowers shall not be permitted to create or suffer to exist any lien on their assets except liens that are customary in project financing transactions including, without limitation: (i) liens for assessments or governmental charges or levies which are not delinquent (taking into account any relevant grace periods) or, if overdue, the

	validity or amount of which is being contested diligently and in good faith by appropriate proceedings and in respect of which adequate reserves in accordance with the accounting standard that has been adopted by the Borrower, that is, International Financial Reporting Standards, US GAAP or another recognized reporting standard, have been recorded on the balance sheet of such Borrower; (ii) construction, mechanics', carriers', warehousemen's, storage, repairers' and materialmen's liens but only if the obligations secured by such liens are not due and delinquent and no lien has been registered against title to any assets of such Borrower, or if a lien has been registered, same does not affect the Guarantor's priority in the Security and is being defended diligently and in good faith by appropriate proceedings and in respect of which adequate reserves in the amount of the lien plus 20% have been recorded on the balance sheet of such Borrower; (iii) easements, encroachments, rights of way, licences, reservations, covenants, restrictive covenants or other similar rights in land granted to or reserved by other persons provided that they are reasonable and have been complied with and can be assigned to the Guarantor; (iv) any lien securing purchase money obligations permitted to be outstanding, provided that each such lien affects only the property with respect to which the purchase money obligation it secures was incurred; and (v) any lien securing Additional Debt (defined in Section 4.8) permitted to be outstanding.
4.8 Permitted Debt:	The Borrowers shall not incur debt during the Construction Period and the FLG Term except for: (i) Guaranteed Debt (also known as "Project Debt"); (ii) Additional Debt (as described in 4.8(a)); (iii) Debt secured by a lien which is a Permitted Lien (other than a lien securing purchase money obligations); (iv) Trade payables or similar debt incurred in the ordinary course of business and for the purpose of carrying on same, representing the deferred purchase price of property or services; (v) Debt under purchase money obligations provided, however, that the aggregate principal amount of purchase money obligations outstanding at any time shall not exceed at any time: (i) for MF/LTA $15 million; (ii) for LIL $15 million; and (iii) for ML $15 million.
4.8(a) Additional Debt:	No additional debt may be incurred by the Borrowers during the term of the FLG, other than: (i) for an operating line of credit to a maximum of $10 million for MF/LTA, for LIL, and for ML; and (ii) additional debt to finance cost increases from the DG3 capital cost estimates provided to the Guarantor and the final estimates at Financial Close ("Cost Escalations"), to finance cost increases after Financial Close ("Cost Overruns"), and to finance costs associated with major repairs and refurbishments after COD, (collectively called "Additional Debt").

	Additional Debt shall be subject to the following conditions: (a) It shall not be covered by the FLG; (b) It may be secured provided that it is subordinate to the Guaranteed Debt; and (c) It must satisfy the Debt Equity Ratios and DSCR-based tests on a prospective, aggregate basis (taking into account the Guaranteed Debt and the Additional Debt) throughout the term of the Additional Debt. Additional Debt with bullet maturities will be subject to a deemed periodic amortization profile in order to preserve the validity of the DSCR-based test.
4.9 Independent Engineer:	An engineer (the "Independent Engineer" or "IE") shall have been appointed to permit each Lender and the Guarantor to complete their due diligence and to ensure compliance with the terms of the FLG Agreements and all Financing Documents required to effect Financial Close. The Independent Engineer will represent the Guarantor and the Lenders. The Borrowers shall provide written confirmation, that has been confirmed in writing by the IE, that they have no contractual or other relationship with the IE other than the obligation to pay the fees of the IE. The IE shall review the Project documents and any information provided in support of any drawdown requested by a Borrower and shall make a recommendation to the Lender by way of an IE certificate. The Independent Engineer shall be assigned a scope of responsibility designed to ensure the Projects are developed, maintained, and operated in a manner which is consistent with Good Utility Practice (as defined herein). The Independent Engineer shall have full access to all information related to the Projects and access to management and employees of the Proponents or Borrowers as required. The cost of the Independent Engineer shall be borne by the Borrowers. The Borrowers shall indemnify and save the Guarantor harmless from and against any liability that the Guarantor incurs solely by virtue of being found, in respect of the Projects, liable as a partner or joint venturer.
4.10 Expected Costs to Complete:	Cost Overruns for a Project must be funded with Equity and/or Additional Debt (subject to the provisions of section 4.8(a)) as follows: (i) Equal annual amounts calculated by dividing such Cost Overrun amount by the number of years remaining until COD. Each annual payment shall be funded no later than the date of the first advance of Guaranteed Debt in each year prior to COD, and the first annual amount shall be funded prior to the first advance under Guaranteed Debt after such calculation is made; (ii) The Independent Engineer will confirm the Borrower's revised estimates of Expected Costs to Complete and any related changes to the construction schedule, all by way of an IE certificate; and (iii) Adjustments may be made to such funding requirements from time to time as estimates of Expected Costs to Complete (and related date at which COD is expected to be achieved) are updated or

	revised, all as confirmed by the Independent Engineer. The foregoing shall not in any way limit the enforceability of the provisions of Sections 3.1 or 4.8. The expected costs to complete ("Expected Costs to Complete") in respect of any Borrower at any given time shall be determined by the Borrowers and reviewed and confirmed by the IE by way of an IE certificate to be provided in connection with any drawdown requests prior to COD. The DG3 Capital Cost Estimates shall form the basis for the Independent Engineer's review of and confirmation of any proposed changes to such estimates on an ongoing basis as construction proceeds. Expected Costs to Complete shall include contingencies and escalation. Expected Costs to Complete shall also include any interest during construction and costs associated with the Financing prior to COD, calculated on a pro forma basis.
4.11 Change of Control:	There shall be,no sale or change of control of any Borrower or subsidiaries, except as among the Parties, and no sale of any material Project assets. There shall be no sale or change of control of Nalcor.
4.12 Independent Engineer Certificate post COD::	On each anniversary following COD, and until the end of the FLG Term, the Borrower or the IE shall provide an Independent Engineer's certificate, in form and substance acceptable to the Guarantor, acting reasonably, confirming that budgeting and maintenance of the Project are being conducted in conformity with Good Utility Practice. Failure of the Borrower to budget and maintain in accordance with Good Utility Practice that results in the IE being unable to provide such certification shall constitute an Event of Default subject to a 30-day cure period.
4.13 Good Utility Practice:	"Good Utility Practice" means those project management design, procurement, construction, operation, maintenance, repair, removal and disposal practices, methods and acts that are engaged in by a significant portion of the electric utility industry in Canada during the relevant time period, or any other practices, methods or acts that, in the exercise of reasonable judgment in light of the facts known at the time a decision is made, could have been expected to accomplish a desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be the optimum practice, method or act to the exclusion of others, but rather to be a spectrum of acceptable practices, methods or acts generally accepted in such electric utility industry for the project management, design, procurement, construction, operation, maintenance, repair, removal and disposal of electric utility facilities in Canada. Notwithstanding the foregoing references to the electric utility industry in Canada, in respect solely of Good Utility Practice regarding subsea HVdc transmission cables, the standards referenced shall be the internationally recognized standards for such practices, methods and acts generally accepted with respect to subsea HVdc transmission cables. Good Utility Practice shall not be determined after the fact in light of the results achieved by the practices, methods or acts undertaken but rather shall be determined based upon the consistency of the practices, methods or acts when undertaken with the standard set forth in the first two sentences of this definition at such time.

4.14 Debt-Equity Contributions:	Construction costs shall be funded only with equity prior to Financial Close. Subject to the conditions provided herein (including, without limitation, the Individual Project Debt Caps in respect of any Guaranteed Debt, and the funding of Cost Overruns), following Financial Close, debt and equity funds shall be invested as follows: (i) 100% debt until such time as the target Debt Equity Ratio is achieved; and (ii) thereafter, debt and equity shall be invested on a *pro rata* basis in accordance with the targeted Debt Equity Ratio for each Project.
4.15 Distributions:	There shall be no distribution to shareholders by the Borrowers: (i) Where the DSCR is below 1.20x; (ii) During the Construction Period; and (iii) Where an Event of Default has occurred which has not been cured during the cure period if same has been provided.
4.16 Debt Service Reserves and Liquidity Reserves:	Each Borrower shall at all times maintain Debt Service Reserves in a dedicated reserve account. The Debt Service Reserves will, at all times, be funded in an amount at least equal to the debt service (principal and interest) obligations of such Borrower for the forward-looking 6-month period. The Debt Service Reserve is for the benefit of the Guarantor and in the event that the Guarantor is required to make payment to the Lenders under the FLG, then it shall be entitled to immediate reimbursement of such amount from the Debt Service Reserve. MFCo and LTACo shall, for the MF/LTA Project, also fund with equity and maintain a Liquidity Reserve in a dedicated reserve account that permits MFCo and LTACo to maintain a DSCR of no less than 1.40x for a period of ten (10) years after COD. LIL and ML may each establish a Liquidity Reserve in connection with the DSCR.
4.17 Prepaid Rent Reserve for LIL:	During the Construction Period all prepaid rent received by LILCo from LIL Opco under the LIL Assets Agreement shall be kept in a reserve account and upon completion and receipt of the first rental payment from LIL Opco the amounts in the prepaid rent reserve shall be released and applied in accordance with the waterfall established under the LIL Project Financing Documents. During the Construction Period, distributions equal to the investment returns on the capital invested in the prepaid rent reserve account may be made to the Nalcor LIL limited partner provided no default or Event of Default exists.

4.18 Reports:	The Guarantor shall be entitled to regular financial and operational reports for the Projects at the expense of the Borrowers. This will include all customary reports and all rights to access and audit as are provided to the Lenders.
4.19 Covenants:	Customary affirmative and negative covenants to be provided by the Borrowers.
4.20 Representations and Warranties:	Customary Representations and Warranties are to be provided by the Borrowers.

SCHEDULE "A"

NL Crown commits to do the following:

1. Approve the creation of those subsidiaries or entities controlled by Nalcor which are required in order to facilitate the development and operation of MF, the LIL and the LTA, and to ensure Nalcor and existing and new subsidiaries or entities have the authorized borrowing powers required to implement the Projects and meet any related contractual or reliability obligations.

2. Provide the base level and contingent equity support that will be required by Nalcor to support successful achievement of in-service for MF, the LTA and the LIL, in cases with and without the participation of Emera.

3. Ensure that, upon MF achieving in-service, the regulated rates for Newfoundland and Labrador Hydro ("NLH") will allow it to collect sufficient revenue in each year to enable NLH to recover those amounts incurred for the purchase and delivery of energy from MF, including those costs incurred by NLH pursuant to any applicable power purchase agreement ("PPA") between NLH and the relevant Nalcor subsidiary or entity controlled by Nalcor that will provide for a recovery of costs over the term of the PPA and relate to:

    a) initial and sustaining capital costs and related financing costs (on both debt and equity), including all debt service costs and a defined internal rate of return on equity over the term of the PPA;

    b) operating and maintenance costs, including those costs associated with transmission service for delivery of MF power over the LTA (as described further in 5 below);

    c) applicable taxes and fees;

    d) payments pursuant to any applicable Impact & Benefit agreements;

    e) payments pursuant to the water lease and water management agreements; and

    f) extraordinary or emergency repairs.

4. Ensure that, upon the LIL achieving in-service, the regulated rates for NLH will allow it to collect sufficient revenue in each year to enable NLH to recover those amounts incurred for transmission services, including those costs incurred by NLH pursuant to any applicable agreements between NLH, the LIL operating entity and/or the entity holding ownership in the LIL assets, that will provide for a recovery of costs over the service life of the LIL and relate to:

    a) initial and sustaining capital costs of the LIL and related financing and debt service costs, including a specific capital structure and regulated rate of return on equity equal to, at least, a minimum value required to achieve the debt service coverage ratio agreed to in lending agreements by the LIL borrowing entity;

b) operating and maintenance costs;

c) applicable taxes and fees; and

d) extraordinary or emergency repairs;

5. Ensure that, upon LTA achieving in-service, the regulated rates for the provision of transmission service over the LTA will provide for a recovery of costs over the service life of the LTA including initial and sustaining capital costs, operating and maintenance costs, extraordinary or emergency repairs, applicable taxes and fees and financing costs (on both debt and equity), including all debt service costs and a defined internal rate of return on equity over the term of any applicable agreement.

This agreement shall ensure to the benefit of Nalcor and Emera and their affiliates including the Borrowers and their respective permitted successors and assigns and shall be binding on the Parties. The Parties represent and warrant that once this agreement is accepted by the Parties as herein provided, it shall constitute the irrevocable, legal, valid and binding obligation of the Parties, enforceable in accordance with its terms.

IN WITNESS WHEREOF each of the Parties has executed this agreement as of the date set forth below.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by The Right Honourable Prime Minister of Canada,

Per: _____

The Honourable Stephen Harper

Date: _____

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR, as represented by the Premier

Per: _____

The Honourable Kathy Dunderdale

Date: _____

HER MAJESTY IN RIGHT OF NOVA SCOTIA, as represented by The Premier

Per: _____

The Honourable Darrell Dexter

Date: _____

NALCOR ENERGY

Per: _____

Name:

Title:

Date:

I / we have authority to bind the Corporation

EMERA INC.

Per: _____

Name:

Title:

Date:

I/we have authority to bind the Corporation

NOV 30 2012

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First Session, 47th General Assembly
61 Elizabeth II, 2012

BILL 61

AN ACT TO AMEND THE ELECTRICAL POWER CONTROL ACT, 1994, THE ENERGY CORPORATION ACT AND THE HYDRO CORPORATION ACT, 2007

Received and Read the First Time.....

Second Reading.....

Committee.....

Third Reading.....

Royal Assent.....

HONOURABLE JEROME P. KENNEDY, Q.C.
Minister of Natural Resources

Ordered to be printed by the Honourable House of Assembly

EXPLANATORY NOTES

This Bill would amend the *Electrical Power Control Act, 1994,* the *Energy Corporation Act* and the *Hydro Corporation Act, 2007* to advance the implementation of the Muskrat Falls Project.

The Bill would amend the *Electrical Power Control Act, 1994* to

- expand the scope of the direction that the Lieutenant-Governor in Council may give to the Public Utilities Board as relates to the Muskrat Falls Project;
- provide to Newfoundland and Labrador Hydro the exclusive right to supply, distribute and sell electrical power or energy to a retailer or an industrial

customer in respect of the business or operations of that retailer or industrial customer on the island portion of the province, subject to certain exceptions; and

- require that a retailer or an industrial customer buy electrical power or energy from Newfoundland and Labrador Hydro in respect of the business or operations of that retailer or industrial customer on the island portion of the province.

The Bill would amend the *Energy Corporation Act* to

- define the Muskrat Falls Project;
- clarify the Crown agency status of the corporation as relates to the Muskrat Falls Project; and
- exempt borrowing for the Muskrat Falls Project from the limit currently prescribed in the Act for the corporation and its subsidiaries.

The Bill would also amend the *Hydro Corporation Act, 2007* to clarify the Crown agency status of the corporation as relates to the Muskrat Falls Project.

A BILL

AN ACT TO AMEND THE ELECTRICAL POWER CONTROL ACT, 1994, THE ENERGY CORPORATION ACT AND THE HYDRO CORPORATION ACT, 2007

Analysis

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

ELECTRICAL POWER CONTROL ACT, 1994

SNL1994 cE-5.1
as amended

1. (1) Section 2 of the *Electrical Power Control Act, 1994* is amended by adding immediately after paragraph (j) the following:

(j.1) "Muskrat Falls Project" means the Muskrat Falls Project as defined in the *Energy Corporation Act*;

(2) Section 2 of the Act is amended by adding immediately after paragraph (o) the following:

(o.1) "public utility" means a public utility as defined in the *Public Utilities Act;*

2. Section 5.1 of the Act is amended by renumbering it as subsection 5.1(1) and by adding immediately after that subsection the following:

(2) Notwithstanding a provision of this Act or the *Public Utilities Act,* for the purpose of the Muskrat Falls Project the Lieutenant-Governor in Council may direct the public utilities board to implement policies, procedures and directives respecting the exercise of powers and the performance of the duties of the public utilities board under this Act or the *Public Utilities Act*, including policies, procedures and directives respecting

(a) the costs, expenses and allowances that are to be included in the rates, tolls and charges approved for a public utility, and the terms of that inclusion;

(b) the terms of the interim orders, orders or approvals determining rates, tolls and charges of a public utility;

(c) the criteria to be applied by the public utilities board for the approval or confirmation of an approval by the public utilities board;

(d) the annual rate of return of a public utility;

(e) whether or not a hearing shall be held;

(f) the commencement, suspension, continuation or termination of a hearing or process; and

(g) the parameters, criteria and timing of the exercise or restraint from exercise of a power or performance of a duty of the public utilities board under this Act or the *Public Utilities Act.*

(3) The public utilities board shall implement the policies, procedures and directives of the Lieutenant-Governor in Council as directed under subsection (2).

3. The Act is amended by adding immediately after section 14 the following:

PART II.1
EXCLUSIVE RIGHT

Exclusive right to supply, transmit, distribute and sell

14.1 (1) Notwithstanding another provision of this Act or another Act,

(a) Newfoundland and Labrador Hydro shall have the exclusive right to supply, distribute and sell electrical power or energy to a retailer or an industrial customer in respect of the business or operations of that retailer or industrial customer on the island portion of the province; and

(b) a retailer or an industrial customer shall purchase electrical power or energy exclusively from Newfoundland and Labrador Hydro in respect of the business or operations of that retailer or industrial customer on the island portion of the province.

(2) Notwithstanding another provision of this Act or another Act, a retailer or an industrial customer shall not develop, own, operate, manage or control a facility for the generation and supply of electrical power or energy either for its own use or for supply directly or indirectly to or for the public or an entity on the island portion of the province.

(3) Subsection (1) does not apply to an industrial customer if that industrial customer is purchasing electrical power or energy in respect of its business or operations on the island portion of the province exclusively from a retailer to whom subsection (1) applies.

(4) Subsections (1) and (2) do not apply to generation facilities owned, operated, managed or controlled by a retailer or an industrial customer where the electrical power or energy generated is used by the retailer or industrial customer exclusively in emergency circumstances.

(5) Subsection (2) does not apply to generation facilities owned, operated, managed or controlled by a retailer or an industrial customer where those facilities existed on December 31, 2011, including the refurbishment of those facilities.

(6) A contract or arrangement entered into before or after the coming into force of this section which is contrary to this section is unenforceable.

(7) Notwithstanding another provision of this section, the Lieutenant-Governor in Council may, by order, exempt a retailer or an industrial customer from the application of this section or a subsection of it.

No liability

14.2 (1) A person is not entitled to compensation or damages from the Crown or a minister, employee or agent of the Crown arising from, resulting from or incidental to the operation of this Part.

(2) An action or proceeding does not lie or shall not be instituted or continued against the Crown or a minister, employee or agent of the Crown based on a cause of action arising from, resulting from or incidental to the operation of this Part.

(3) For the purpose of this section, the corporation established by the *Energy Corporation Act* and Newfoundland and Labrador Hydro are agents of the Crown.

ENERGY CORPORATION ACT

SNL2007 cE-11.01 as amended

4. The *Energy Corporation Act* is amended by adding immediately after paragraph 2(f) the following:

(f.1) "Muskrat Falls Project" means the Muskrat Falls

Project as described in section 2.1;

5. The Act is amended by adding immediately after section 2 the following:

Muskrat Falls Project

2.1 (1) For the purpose of this Act, "Muskrat Falls Project" means a project by the corporation, a subsidiary of the corporation, Newfoundland and Labrador Hydro and Emera Inc., whether individually or by any combination of them, for

(a) the design, engineering, planning, construction, commissioning, ownership, operation, maintenance, management and control of equipment and facilities, to be comprised of

(i) the new hydroelectric plant to be constructed at Muskrat Falls on the Churchill River, and all associated facilities, including the intake structures, penstock, powerhouse, dams and spillways,

(ii) a new HVdc transmission line and all related components to be constructed between the Muskrat Falls hydroelectric plant on the Churchill River and Soldier's Pond, including

(A) foundations, underground services, subsea services, roads, buildings, erections and

structures, whether temporary or permanent,

(B) all other facilities, fixtures, appurtenances and tangible personal property, including inventories, of any nature whatsoever contained on or attaching to the transmission line, and

(C) all mechanical, electrical and other systems and other technology installed under or upon anything referred to in clause (A) or (B),

(iii) new transmission facilities to be constructed between the Muskrat Falls hydroelectric plant on the Churchill River and the generating plant located at Churchill Falls,

(iv) new transmission facilities to be constructed by Emera Inc. between the island portion of Newfoundland and Labrador and Cape Breton, Nova Scotia including

(A) foundations, underground services, subsea services, roads, buildings,

erections and structures, whether temporary or permanent,

(B) all other facilities, fixtures, appurtenances and tangible personal property, including inventories, of any nature whatsoever contained on or attaching to them, and

(C) all mechanical, electrical and other systems and other technology installed under or upon anything referred to in clause (A) or (B), and

(v) any associated upgrades to the bulk electrical system or related control facilities on the island portion of the province required as a result of subparagraphs (i) to (iv);

(b) the production, generation, storage, transmission, delivery or provision of electrical power and energy from the facilities in paragraph (a);

(c) the negotiation, conclusion, execution and performance of agreements for activities referred to in paragraphs (a) and (b), and in

particular agreements respecting the

(i) construction, operations, maintenance and administration,

(ii) acquisition of easements, rights-of-way, permits, licences, certificates, consents and other authorizations,

(iii) engineering and procurement,

(iv) arrangements with aboriginal peoples,

(v) demobilization and decommissioning, and

(vi) any agreements, contracts or instruments necessary or incidental to any activity described in this paragraph; and

(d) raising and securing equity or debt financing and any related derivative contracts necessary to construct the facilities and otherwise engage in the activities referred to in paragraphs (a) to (c), including without limitation the negotiation, conclusion and execution of agreements and security documentation with a lender providing that financing or refinancing to the projects.

(2) The Lieutenant-Governor in Council may designate any activities, agreements and amendments in connection with or in respect of subsection (1) entered into by the corporation, a subsidiary of the corporation, Newfoundland and Labrador Hydro, and Emera

Inc., whether individually or by any combination of them

(a) to be included as part of the Muskrat Falls Project where that activity, agreement or amendment may not otherwise qualify under this section; and

(b) to be excluded from the Muskrat Falls Project, notwithstanding another provision of this section.

(3) For the purpose of this section, "Emera Inc." includes all affiliates, subsidiaries, successors and assigns of that corporation.

6. The Act is amended by adding immediately after section 3 the following:

Crown agency status

3.1 (1) Notwithstanding subsections 3(5), (6) and (7), where the corporation enters into contracts and ancillary arrangements relating to the Muskrat Falls Project, the corporation shall be considered to have entered into those contracts and ancillary arrangements in its own capacity and not as an agent of the Crown, and the Crown shall not be liable as principal in contract, tort or otherwise at law or equity for the liabilities of the corporation created directly or indirectly by those contracts or arrangements.

(2) Notwithstanding subsection (1), the corporation may execute contracts relating to the Muskrat Falls Project as an agent of the Crown where

(a) the Lieutenant-Governor in Council has approved the contract; and

(b) the contract explicitly states that the corporation signs the contract as an agent of the Crown.

7. Paragraph 14(1)(a) of the Act is repealed and the following substituted:

(a) where it is an agent of the Crown, on behalf of the Crown, or where it is not an agent of the Crown, in its own capacity, enter into contracts or other agreements and acquire and dispose of and otherwise deal with real and personal property and all rights of all kinds in the name of the corporation;

8. Section 16 of the Act is repealed and the following substituted:

Application of Acts

16. Whether or not the corporation is an agent of the Crown

(a) the *Mechanics' Lien Act* applies in respect of the corporation and all property to which title is vested in the name of the corporation; and

(b) the *Workplace Health, Safety and Compensation Act* applies in respect of the corporation and its employees.

9. Section 27 of the Act is amended by renumbering it as subsection 27(1) and by adding immediately after that subsection the following:

(2) Notwithstanding subsection (1), in respect of the Muskrat Falls Project, a payment or advance that the Crown may approve in the exercise of a power conferred by this Act or be required

to make under this Act shall be paid by the Minister of Finance out of the Consolidated Revenue Fund.

10. Section 28 of the Act is repealed and the following substituted:

Total amount of loan

28. (1) The total amount of money to be raised by the corporation and its subsidiaries in the aggregate by loans shall not exceed $600 million in Canadian currency or its equivalent in the currency of another country.

(2) The total of all loans to the corporation and its subsidiaries in the aggregate to be guaranteed by or on behalf of the Crown shall not exceed $600 million in Canadian currency or its equivalent in the currency of another country.

(3) In calculating the maximum amount of money raised by way of loans by the corporation and its subsidiaries and of guarantees given under this Act, no account shall be taken of amounts raised by way of loan

(a) that have been repaid or a part of the proceeds of a loan to be raised for, or that has been spent on, the repayment, refinancing, refunding, redemption, retirement or purchase of the whole or a part of loans or securities of the corporation; or

(b) by the corporation or its subsidiaries in respect of the Muskrat Falls Project.

HYDRO CORPORATION ACT, 2007

SNL2007 cH-17

11. Section 2 of the *Hydro Corporation Act, 2007* is amended by adding immediately after paragraph (f) the following:

(f.1) "Muskrat Falls Project" means the Muskrat Falls Project as defined in the *Energy Corporation Act;*

12. The Act is amended by adding immediately after section 3 the following:

Crown agency status

3.1 Notwithstanding subsections 3(4), (5) and (6), where the corporation enters into contracts and ancillary arrangements relating to the purchase of electrical energy, capacity and transmission services including contracts providing for direct cost reimbursement to the Muskrat Falls Project, the corporation shall be considered to have entered into those contracts and ancillary arrangements in its own capacity and not as an agent of the Crown, and the Crown shall not be liable as principal in contract, tort or otherwise at law or equity for the liabilities of the corporation created directly or indirectly by those contracts or arrangements.

13. Subsection 5(2) of the Act is repealed and the following substituted:

(2) Notwithstanding subsection (1), the corporation may engage in those activities that the Lieutenant-Governor in Council may approve.

14. Paragraph 14(1)(a) of the Act is repealed and the following substituted:

(a) where it is an agent of the Crown, on behalf of the Crown, or where not

an agent of the Crown, in its own capacity enter into contracts or other agreements and acquire and dispose of and otherwise deal with real and personal property and all rights of all kinds in the name of the corporation;

15. Section 18 of the Act is repealed and the following substituted:

Application of Acts

18. Whether or not the corporation is an agent of the Crown

(a) the *Mechanics' Lien Act* applies in respect of the corporation and all property to which title is vested in the name of the corporation; and

(b) the *Workplace Health, Safety and Compensation Act* applies in respect of the corporation and its employees.

16. Section 29 of the Act is amended by renumbering it as subsection 29(1) and by adding immediately after that subsection the following:

(2) Notwithstanding subsection (1), in respect of the Muskrat Falls Project, a payment or advance that the Crown may approve in the exercise of a power conferred by this Act or be required to make under this Act shall be paid by the Minister of Finance out of the Consolidated Revenue Fund.

Commencement

17. This Act, or a section, subsection, paragraph or subparagraph of this Act, comes into force on a day or days to be

proclaimed by the Lieutenant-Governor in Council.

The House met at 1:30 p.m.

MR. SPEAKER (Wiseman): Order, please!

Today, before we start the proceedings, I want to welcome to the public galleries representatives from the sealing industry: Dion Dakins from Carino Processing Limited, and Jennifer and Kerry Shears of Natural Boutique.

Welcome to our Assembly.

SOME HON. MEMBERS: Hear, hear!

Statements by Members

MR. SPEAKER: Today we will have members' statements from the Member for the District of Fortune Bay – Cape La Hune; the Member for the District of Baie Verte – Springdale; the Member for the District of St. John's Centre; the Member for the District of Lake Melville; the Member for the District of Lewisporte; and the Member for the District of Cartwright – L'Anse au Clair.

The hon. the Member for Fortune Bay – Cape La Hune.

MS PERRY: Thank you, Mr. Speaker.

I rise in this hon. House today to applaud three outstanding individuals from my district who were recently awarded the Queen's Diamond Jubilee Medal: Mr. Jim Sheppard, Chief Warrant Officer, retired; Saqamaw Misel Joe; and Mayor Steward May.

Mr. Jim Sheppard, a veteran who served our country for over thirty-two years with the Queen's Own Rifle, Princess Patricia's Light Infantry, and the Canadian Military Engineers, has established a military museum in Rencontre East, his hometown, preserving a remarkable era in our veterans' history.

Saqamaw Misel Joe was recognized for his exemplary leadership on behalf of and in conjunction with his fellow band members, in promoting and preserving the language, culture, and traditions of his people.

Mayor Stewart May is yet another truly remarkable person who has spent his life going over and above the call of duty as a community leader to help make life better for others. He has served with over thirty volunteer organizations and is extremely dedicated, reliable, and committed, a true example of leadership and volunteerism at its very best.

Mr. Speaker, I ask all members of this hon. House to join me in congratulating these well-deserving recipients of the Queen's Diamond Jubilee Medal in Fortune Bay – Cape La Hune.

Thank you, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Member for Bay Verte – Springdale.

SOME HON. MEMBERS: Hear, hear!

MR. POLLARD: Thank you, Mr. Speaker.

I rise in this hon. House today to acknowledge the accomplishments of four outstanding summer club swimmers from the Springdale Blue Fins.

Brady Huxter, Ben Melindy, Andrew Goudie, and Scott Pynn smashed the Summer Club under-eighteen Boys 200-metre medley relay with a time of 2:11.24.

Ever since they were tiny tots, they converged upon the Gander pool to attend the Summer Club Provincial Championships. This past summer they were on a mission to set a new record and they did it.

For over forty years, Gander pool has been the site for this fun-filled event. Many records have been broken and many memories have been made.

For the past twenty-four years, my wife and I have attended and can attest that this event is the highlight of all Summer Club swimmers. The team play, the stamina, and the sheer determination displayed by these four athletes was a joy to experience as they splashed and pulled themselves to record-breaking speed.

I invite all hon. colleagues to join me in applauding Brady, Ben, Andrew, and Scott, not only for providing us with nail-biting entertainment, but also for their outstanding achievement.

Thank you, Mr. Speaker.

Mr. Speaker, I think the key thing here, as I said, we have to keep in mind that this current contract expires late in 2014. The industrial rate is something that we need to establish. We have to do it right. It is important that we look at this, as mentioned in this bill, on an annual basis so that we can make sure that we are getting the proper return on our investment, and indeed, that the industrial users in Lab West will be getting power at a reliable and at a competitive rate.

Mr. Speaker, right now we do not have a current published industrial rate in Labrador West, so this will be something that is new; as I understand through our briefing, the mining companies themselves are looking for this. As I said, they need to create this degree of certainty around their exposure to what is really a significant expense in their operations.

Mr. Speaker, it is the importance of being competitive, but it is based on two principles: we need to be competitive, but then again, we need to make sure that we bring the value back to the Province as a whole. We do appreciate what it means to the overall economy in the Province, but with that said, we have to make sure that indeed we get the return from this so that we can continue to support other programs which would support the communities that are in Lab West.

We encourage industrial development. We as an Opposition will be supporting this, even though the sense of urgency has been discussed by some members, saying that people are indeed looking for this now; we also know that these customers are under contract until 2014 and there is time to make sure that we get this policy right.

Mr. Speaker, as I conclude my comments right now, I will say: as an Opposition we will be supporting this particular policy, the importance of industrial rates generating economic activity, but we cannot underestimate and we must deal with the significant gap that we have right now in getting power from Muskrat Falls into Labrador West; of course, that is the transmission which is something that we need to get established.

The development block, being 239 megawatts of power layered onto this, will be the market block, Mr. Speaker. This will feed into the industrial rate, the establishment of the industrial rate. I really look forward to further debate on this and getting the feedback from the communities and the companies that depend on the reliable and competitive rates for further economic development in Labrador West.

Mr. Speaker, I will just take a few seconds as I clue up here. As an Opposition we will be supporting this bill and we look forward to the debate. We look forward to the growth of the mining in Lab West. It is important to all of us as members from all parties, but we have to make sure that the industrial rate is not only to get the maximum benefit for the companies in Lab West, but also for the many residents in the Province who rely on the revenue that is generated by the mining industry for all the services that we enjoy.

With that said, Mr. Speaker, I conclude my comments. Thank you for the time.

MR. SPEAKER (Littlejohn): The hon. the Government House Leader.

MR. KING: Thank you, Mr. Speaker.

Mr. Speaker, I move, seconded by the Minister of Innovation, Business and Rural Development, that we adjourn debate at this point in time on this bill.

MR. SPEAKER: It is moved by the Government House Leader, seconded by the Minister of Innovation, Business and Rural Development, that we adjourn debate on this bill.

All those in favour, 'aye'.

SOME HON. MEMBERS: Aye.

MR. SPEAKER: All those against, 'nay'.

Carried.

MR. KING: Mr. Speaker, I call from the Order Paper, Order 11, second reading of a bill, An Act To Amend The Electrical Power Control Act, 1994, The Energy Corporation Act and The Hydro Corporation Act, 2007. (Bill 61)

MR. SPEAKER: The hon. Government House Leader calls Order 11 from the paper.

MR. KING: Thank you, Mr. Speaker.

Mr. Speaker, I move, seconded by the Minister of Natural Resources, that An Act To Amend The Electrical Power Control Act, 1994, The Energy Corporation Act and The Hydro Corporation Act, 2007, Bill 61, be now read the second time.

Motion, second reading of a bill, "An Act To Amend The Electrical Power Control Act, 1994, The Energy Corporation Act and The Hydro Corporation Act, 2007". (Bill 61)

MR. SPEAKER: The hon. the Minister of Natural Resources.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: Thank you, Mr. Speaker.

Mr. Speaker, in 2007 our government released its first Energy Plan to guide our decisions and actions as we develop the vast potential of our Province's natural resources. A central tenet of that provincial Energy Plan is our commitment to invest a portion of our non-renewable resource revenue into a clean, renewable energy future for the people of Newfoundland and Labrador.

Mr. Speaker, when the Upper Churchill was built in 1969, we saw a significant change in the way energy was delivered to the world around 1972. Energy then had been – the provision of energy, and I talk about all forms of energy. It was fairly stable until we saw the spike in oil prices in the mid-2000s. Our Province has benefited significantly from the development of our oil resources and also from the increase in prices which have gone with that.

When I spoke at a conference in Toronto a couple of weeks ago, Mr. Speaker, the Canadian Association of Petroleum Producers, people were quite surprised at the vast resources in terms of our producing oil fields and the fact that we produce 32 per cent of Canada's light crude. What we have seen over the last number of years, Mr. Speaker, have been significant developments in shale gas in the United States, which has led to natural gas being used to fuel electricity.

Now we are seeing significant changes in producing shale oil in Bakken and other areas in North Dakota. We have seen China explode and the Chinese economy having such an impact on the world. We have seen the BRIC economies; the emerging economies have such a significant impact on the world.

What we have also seen in this Province is very significant growth, Mr. Speaker. We have seen this Province, in certain areas of the Province – and I particularly talk about parts of Labrador and the Avalon Peninsula – explode. We have a vibrant economy, Mr. Speaker. We have a situation where there is phenomenal growth.

In the past, I have talked about the number of increased ratepayers we have in our Province, Mr. Speaker. It is interesting that even though we have had a decrease in our population, we have had 28,800 new homes constructed in the Province from 2002 to 2011. We have had, Mr. Speaker, approximately 2,800 housing starts a year in that decade, 80 per cent of those being typically single-detached homes, with 85 per cent of those homes choosing electric heat.

Since 2006, the number of housing starts has increased, averaging over 3,000 new homes annually, with housing starts peaking in 2010 at over 3,600 new homes. We have, even though there has been a decrease in population, 18,000 new residential customers on the Island since 2006. We have seen our GDP grow and our personal disposable income grow. The outlook continues to be positive, even though right now with our rigs being down and the production down, there is less revenue coming into the coffers, into the Treasury.

As a government, we are looking at: What can we do to ensure a sustainable future for our Province, knowing that the oil will not last forever? Now, Mr. Speaker, I believe – and this is just a belief on my part, I have no hard evidence at this point – there is a lot more oil out there to be discovered.

MR. MARSHALL: (Inaudible).

MR. KENNEDY: Yes, as my colleague the Minister of Finance says, on the West Coast also.

The difficulty with finding oil is it costs a lot of money. There is huge risk and there is huge expense. We have looked at: How do we develop our resources to coincide with what is projected now to be the decrease in oil revenues?

We know that Hebron, when it starts producing in 2017, will produce approximately, it is estimated right now 700 million barrels of oil up to 2037. We know Hibernia, which was originally expected to produce 600 million barrels of oil, will produce oil until 2040. Hibernia is one of the big oil fields that have been discovered in the world with more than a billion barrels, an element being more than a billion barrels of oil.

Muskrat Falls, in 2010, it was decided that that is the way we would go right now. We have heard members criticize today – well, it started out to get around Quebec, then it was export markets, then it was mining, but nothing is ever changed, Mr. Speaker. What has changed? The world has changed, and in a number of years we have seen significant changes.

Those export markets that exist in the United States are not quite as open right now in terms of long-term contracts. On power purchase agreements, and over the next week or two I will get into discussing how these power purchase agreements allow us to make money off our energy, how the deal with Emera allows us to get energy to the United States. It will only cost approximately $10 a megawatt, leaving profit, whether that power is sold for $40 or $50 a megawatt hour.

We have all of this growth projected. We have growth in the domestic, commercial industrial use. Then what happened because of the Chinese situation, the need for iron ore became paramount. All of these companies – and we talked about this earlier today. Labrador Iron Mines is the first mine to produce iron ore in Labrador, I think since 1965. Now we have all of these other companies. We have Alderon Resources, we have Tata Steel, we have Grand River Ironsands, and we have the Julienne Lake development, all potentially ready to be developed.

When I became Minister of Natural Resources in November, 2011 – it seems like a long time ago, Mr. Speaker, it is only a year. In November, 2011, right away I recognized that Labrador mining is going to require power. You cannot mine iron ore – and I think the minister from the area talked about that earlier today, the power required.

How can we develop Muskrat Falls so that it is in the best interest of the people of our Province? We start out, do we need the power? Now, what has happened – again, in all the hyperbole and all of the criticisms in the last week or two, we forgot basic principles. That is where I challenge the members opposite. Someone please tell me if we need power, or do you accept we need power? Because if you do not, you are living in a different world than the one the people on this side

of the room live in.

If we need the power, which is clear that by 2020 the provincial load forecast indicates that we will need – and I am looking at Schedule A to the Natural Resources paper, Electricity Demand Forecast: Do We Need the Power? –that by 2017 we will need almost 200 megawatts of power, at peak, more than we have today, and that in 2020 we will need more than 200 megawatts at peak.

We need power. We have to do something. Do we refurbish Holyrood? We havelooked at that. Do we develop large wind? We have looked at that. Do we develop natural gas either through the LNG or importation or building of a pipeline from the Grand Banks? We have looked at that.

At the end of the day we know we need the power. Secondly, Muskrat Falls is $2.4 billion cheaper. It is cheaper without taking into account any of that 40 per cent of the power that is left over to sell, whether it be to mining companies or export on the spot markets until such time as it is needed.

When you get to the stage as we did yesterday where Muskrat Falls was sanctioned by both Nalcor and Emera, how do we get to the stage where we put the best financing terms in place?

What Muskrat Falls does, before I get to that, is it takes us off the volatility of oil. Mr. Speaker, at peak, Muskrat Falls burns 18,000 barrels a day.

In the last number of years, Muskrat Falls – again, I am going from memory, Mr. Speaker; in the last couple of years Muskrat Falls is used 15 per cent to 25 per cent of the time. What we have had, we have had to integrate the power from Stephenville and Grand Falls-Windsor. We have had to integrate that into the system. By 2014, all that power will be used, so we will need to use Holyrood more. We are not even talking about the environmental impacts; we are simply talking about the economic aspect. We have to use it more, which will cost more money.

The price of oil in the short term as we have seen is very volatile. The volatility can be affected, Mr. Speaker, by geopolitical issues and it can be affected by issues of supply and demand. It can be affected by, for example, the differential we see today between Brent and West Texas Intermediate, by simplythe inability to get the West Texas Intermediate from Cushing to the markets.

It is up and down in the short term. When we get to the long term – and again, I invite anyone to read the report that was prepared by Dr. Mark Schwartz at PIRA, an internationally recognized oil forecasting company that we have put on our Web site and was released to the public. Have a look at what Dr. Schwartz says about the long term. What he says is in the long term the principles of supply and demand will rule.

At present, Mr. Speaker, the world burns approximately ninety million barrels of oil a day. The Americans are burning approximately twenty, the Chinese, ten. It is expected that the Chinese, if they continue at a growth of 5 to 7 per cent, will overtake the Americans in terms of the amount of oil burnt, but, as we have seen recently – and this is happening all very quickly – the Bakken oil play, the shale oil, is resulting now in the Americans moving towards self-sufficiency, but that does not mean that the price of oil is going to go down.

There is, again, a very fundamental principle at play. First, the OPEC countries, who provide most of the oil, have to have a certain price. The cost of developing it – again, this is in one of the papers that we provided; Wood Mackenzie, our energy advisor out of Edinburgh and New York, indicate that to develop a barrel of oil on the oil sands is costing approximately, I think it is $80 to $85 a barrel. So, in order for that oil to be developed, it has to be more than $80 to $85 a barrel.

The shale oil is still a little bit more. Dr. Schwartz talks about this in his paper: shale oil could be at $60 to $70 to $75 a barrel. So again, companies have to get that. What we are seeing now is a movement away from the shale gas into the shale oil, because the shale oil is the more expensive commodity; it is where you make more money.

So, we have a decision to make in this Province. We have made a decision, actually. We made the decision yesterday. We can either remain tied to thevolatility of oil, remain tied to the oil markets, remain tied to dirty fuel and poison the environment, or we can move forward with clean, renewable energy, Mr. Speaker, from Muskrat Falls.

The federal loan guarantee; the Prime Minister committed during the election – I guess it was in 2011 in the spring – to provide a federal loan guarantee. That federal loan guarantee, Mr. Speaker, let me tell you one thing: the rigorous economic analysis that was undertaken by the federal government was frustrating to behold at some times, but also amazing to behold in terms of they left no stone unturned. So, the federal loan guarantee was looked at; well, what does it mean to the people of the Province?

Over the next week or two, Mr. Speaker, I will have a chance to speak. As every question is raised I will try to answer it, but in terms of electricity rates forecast, you build in the cost of the loan guarantee, because ultimately, the price we pay in 2017 – and I am looking at our Natural Resources paper now, Electricity Rates Forecasting – and the average ratepayer will pay in 2017 and 2020 will include all of the costs. It will include the capital costs, it will include the operating and maintenance, it will include financing costs, it will include interest during construction, and it will include whatever costs there are. So it is one figure.

What the federal loan guarantee does is it reduces the cost of borrowing. Now, the Leader of the Opposition is a businessman who knows when you are out there and you are trying to negotiate a business deal, you are negotiating financing – you think of when you get a 1 per cent decrease on your mortgage for your house, the money that saves you. You think of 1 per cent to 2.5 per cent on billions of dollars, Mr. Speaker, and it only makes sense.

So as discussions are ongoing, how do we get the loan guarantee? What kind of financing? Nalcor has been and has extensive discussions with the bond rating agencies. I only wish I could disclose the result of those discussions, but I cannot because they are very commercially sensitive. That is not where we can go

tonight, but let me tell you they are very positive.

As one Open Line host said today, and perhaps I should not be quoting Open Line hosts, but every now and then you have to: he does not expect – and I am talking about top-shelf Paddy – there will be any problem obtaining money for Muskrat Falls. Let me tell you one thing, Mr. Speaker: he is right.

Now, obtaining money is one thing, and the Minister of Finance I am sure will have a chance to talk about this a little later himself. Obtaining it at the best possible rate is going to be the issue.

AN HON. MEMBER: (Inaudible).

MR. KENNEDY: Now, I hear some mumbling on the other side about paying it back. Let me tell you: you have to pay electricity bills. Whether we are paying those electricity bills to offshore oil companies or we are paying those electricity bills to ourselves, you will have to continue to pay electricity bills. It is not going to be free.

Although, in Labrador today, I must say, when you look at the rest of this country, it is not bad. I think it is at 3.4 or 3.5 cents a kilowatt hour if you are on the interconnected grid. I do acknowledge – as the member opposite has raised on occasion – we have issues on the Coast. The ratepayers of the Island have subsidized the rates on the Coast of Labrador by a $40 million infusion of money.

We still have some work to do on the diesel rates and the commercial. I have indicated during debate here that we will be looking at that. The Premier and myself have made a commitment that we do not want people burning diesel if there is a cheaper way. We will look at providing run-of-the-river hydro. We will look at providing wind, or a combination of both.

Do we give $6 billion to oil companies and see no result other than the poisoning of our people in Holyrood, or do we take that $6 billion and build a revenue-generating asset that we will own, Mr. Speaker, that future generations of our Province will own, and they will own forever? Because in the building of this asset it is the capital outlay up front that is significant. Once you build it, the water flows, electricity flows, Mr. Speaker, and the money will flow with it.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: That is why I have no doubt that the money from Muskrat Falls that we borrow will be paid back.

What has happened here, and I expect will continue to happen over the next couple of weeks, is that the Opposition will try to confuse the issues, taking the poor PUB out of it, and you are not giving us briefings, you are not telling us answers. Let's just look at facts. The facts are we need the power. The facts are Muskrat Falls is the best deal. The fact is Muskrat Falls has been sanctioned along with the Maritime Link, and the fact is we are proceeding.

If they want to stay here for however long to prove whatever point it is they are proving, let them, but, Mr. Speaker, make no mistake, this legislation will pass. This legislation will pass and will pass before we leave this House –

PREMIER DUNDERDALE: Because it is the right thing to do.

MR. KENNEDY: Because it is, as the Premier has indicated, the right thing to do.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: What we have is a situation where, as indicated by the Minister of Finance, there will be a combination of cash and equity going into the debt.. The project breaks down as follows: $6.2 billion will be the current cost to build the Muskrat Falls Generating Station and the Labrador-Island link. Emera will be investing $800 million – I think it is close to $800 million into the Labrador-Island link. We will then be putting equity money into it, which will be paid back, which is an investment for the Province.

There will be a return on equity. I think it is approximately 8 per cent. It could be 8.4 per cent. As revenues are generated and as Nalcor receives the revenue, there will be a dividend paid to the Province. What will happen is that we will certainly, Mr. Speaker, have income coming in from 2017, and I think I indicated one day in this House by approximately 2020-2022 there will be $120 million profit.

There is lots of money to pay the debt. There is lots of money to do other things with. We can have the doom and gloom forecast or, Mr. Speaker, we can do what we have to do and this bill is part of it.

Let me tell you why we should do what we do. Let me read you, Mr. Speaker, a couple of excerpts from a letter written by a businessman in St. John's by the name of Mark Dobbin. Mr. Dobbin, as many people remember, is one of the members of the board, the former wannabe Leader of the Liberals – Dean MacDonald being the other – who walked away from the Grimes deal in 2000. That is going to be a subject of some discussion as we talk about the PUB and the Liberal's decision to exempt the Lower Churchill Project from the PUB.

Let us look at what Mr. Dobbin had to say, "However, I believe the biggest change from the past is the change in the attitude and spirit of the people of Newfoundland and Labrador." Mr. Dobbin goes on to state, "The only thing that can stop us now is fear and a lack of confidence. That was yesterday's can't let it be today's. Anyone can find a reason not to do something."

Mr. Dobbin concludes, "It is not always comfortable to make big decisions but there comes a time when they must be made. That time is now. We have to grasp the opportunity, make the right decision to secure our energy needs and leave future generations the legacy that they deserve."

Mr. Speaker, those words define what we are doing with Muskrat Falls.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: We will not live in fear of the past, Mr. Speaker, comingback to haunt us as the Upper Churchill, or fear of the future. While no one can tell what the future will bring – and we have to recognize and we do accept that there is risk. You will never eliminate risk but what you try to do, Mr. Speaker, is to identify it, to assess it, to minimize it, to ensure that as best as possible we rely upon the experts. Those experts who in this case, Mr. Speaker, come from all around the world, have the opportunity to do what they do and examine the project.

The Premier has said on many occasions that no project has been examined like this one. In fact the Lower Churchill has been looked at since the 1970s. I think the Lower Churchill Development Corporation came into being in 1976, Mr. Speaker.

Vic Young, then the Chair of Newfoundland and Labrador Hydro wrote a paper in1980 where he suggested that we develop Muskrat Falls first – the only one out there who really looked at the development of Muskrat Falls. Every Premier since 1972 has looked at the development of the Lower Churchill. It is this Premier, Mr. Speaker, our current Premier, who has brought it home and has made MuskratFalls a reality.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: Now we are going to proceed. We need a financing structure. The federal loan guarantee is worth $1 billion approximately to the people of this Province. One of the conditions of the federal loan guarantee is that there has to be a guaranteed revenue stream.

The Prime Minister of Canada in the announcement in Happy Valley-Goose Baywhen he announced the federal loan guarantee was asked a number of questions in the scrum after. He was asked about risk to the taxpayers of Canada because it is a guarantee. What it is, is that if we were to default then the people of Canada would be at risk. The Prime Minister was asked about the risk.

In one question he said there was minimal risk. He talked about there being minimal risk. The very next question, he said in his opinion there is zero risk to the people of Canada, thus expressing the economic confidence required by the federal government to take a bold step whereby they would risk alienating all of those seats in Quebec so they can ensure fairness to the Province of Newfoundland and Labrador. They did not do that, Mr. Speaker, simply becausethat is the way it is. They did their economic analysis and they required a revenue stream.

Mr. Speaker, that is the main thing this act will bring here. It will be a guaranteed revenue stream, which means we have to do a couple of things. Last week, or this week – I am getting confused in the weeks and I am sure I will get more confused as this week goes on – one of the things we looked at doing here with the Labrador industrial rates: We have the generation rate, which will be made of the development block or the TwinCo block of 225 megawatts of energy, we take that and we combine that with the market block or the new energy that will be used by mining companies in Labrador, and we come up with our generation rate. Then we are directing the PUB that this is the generation rate.

What we are doing here today, this piece of legislation is directing the PUB that you are not to tinker with the costs of Muskrat Falls. The PUB will still look at the cost of energy on the Island. They will still do the things they do, but in order to guarantee the revenue stream. I was asked earlier today: Why would you not allow the PUB to be involved? Well, is it worth $1 billion to the people of this Province to allow the PUB to be involved; or, as a condition of the loan guarantee, we take that $1 billion and we say: Yes, we will ensure the revenue stream?

Mr. Speaker, I am going to come to this because I have lots of good information on what the Liberals did with the Lower Churchill. I am going to read them something that they said at the time. One of the things was they could not risk the PUB interfering with the cost of the Lower Churchill. They went a step further than we are going with 5.1 of the Electrical Power Control Act. They exempted the PUB. They took the PUB out of the process altogether.

Here we are, in a situation where in order to get this guarantee – and to be fair, Mr. Speaker, in order to obtain non-recourse financing, which my – I was going to call him learned friend, but I guess we are not in court – friend, my colleague, the Minister of Finance, will talk about, and the importance of non-recourse financing; he will also talk about coming back from recent meetings with the finance ministers and how, even though you think there is doom and gloom in this Province, we are riding high.

This is not just Newfoundland and Labrador where these problems exist. It is throughout the world. We are riding this storm as good as we can. All throughout the world right now they are calling for new infrastructure. They are calling for stimulus packages. We have our own stimulus package. It is called Muskrat Falls, and not only will it stimulate the economy today and tomorrow, it will stimulate the economy thirty and forty years down the road, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: As Nalcor goes to the markets in order to borrow the money – this is a multi-year finance-raising process – they have to establish a business case. In establishing your business case you say: these are the revenues that we will have coming in, this will be our cost, and at the end of the day this is how much money we expect to make.

The Premier could have done the easy thing here, could have said politically: okay, all of the profits in Muskrat Falls will go back to the ratepayer; but the profits

here – and I think it was the Minister of Finance the other day who said that the profits of Muskrat Falls will be $20 billion over the life of the project – $20 billion.

We are here ensuring that the project proceed. The legislative amendments look at securing the financial agreement, ensuring that we have non-recourse borrowing, which protects the Province and Nalcor and restricts then the ability on default to act upon the assets that are the subject of the guarantee.

AN HON. MEMBER: Not the others.

MR. KENNEDY: Not the others. We have a number of companies set up here, and again, my colleague, the Minister of Finance, as a former corporate and commercial lawyer, will explain in great detail the subsidiary structure of Muskrat Falls.

We are financing Muskrat through a combination of equity and debt. The debt will be paid back; the interest during construction will be paid back.

What is happening, to my understanding – and the minister will speak to this – is you build a house, you borrow the money up to a certain point, and then when you get your mortgage, you roll it into one.

This money will be paid back as a dividend to the Province. The non-recourse financing, I understand, is commonly used in the energy and infrastructure sectors. There are many benefits to the financing structure, but mostly what I talked about a few minutes ago.

In order to achieve the non-recourse debt structure, we have to show lenders that the rates charged to Island ratepayers will be sufficient to cover the cost of the generation and transmission of Muskrat Falls power. That is all we are saying to the PUB. We have to ensure that there are sufficient revenues coming in, that the revenues are sufficient to cover the cost, and that it will flow unfettered to the lenders to satisfy debt repayment.

The amendment here – unlike what the Liberals did when they exempted the Lower Churchill Project from scrutiny, we will be directing the PUB that they will not be able to allow or disallow project costs when setting the rates for Newfoundland and Labrador Hydro. As such, Mr. Speaker, the amounts charged to Newfoundland and Labrador Hydro by the entities responsible for the Labrador-Island Transmission Link and the Muskrat Falls generation will have to be accepted by the PUB.

That is what we did last week, so I am a little bit confused as to why everyone is so up in arms today, when the Liberals agreed. They have all said they support that piece of legislation. As for the NDP, I do not know what they support. I am not sure it really matters.

The Liberals have said that they support the project. You support the project, you are supporting us directing the PUB to use this generation. That is what we are doing here.

There seems to me that the Liberals are going to make their point; the NDP are making some kind of point also. We are going to do a dance for the next number of days. I will just remind the members opposite the sanction has occurred and that this legislation will go through.

I am going to especially ask the Leader of the Opposition and his members: look at what we are doing here. Just look at it very sensibly. Is it as bad as it is made out to be? Or is it simply what you have to do to secure $1 billion for the people of the Province that will go directly to their rates and result in savings to them? Isn't that a good thing? By directing the PUB we are doing what we did last week.

Now, let us talk for a second. I am going to come back to this in more detail, but let us talk for a second about what took place with the Labrador Hydro Project or the Lower Churchill Project, because we are directing the PUB. The previous exemptions – which meant they could not look at it at all – by previous Liberal governments, were at Star Lake, Granite Canal – and I have copies of the PUB orders, I have copies of the Orders in Council – and the previous configuration of the Lower Churchill Project.

In the previous Labrador Hydro Project, Newfoundland and Labrador Hydro was exempted from the Electrical Power Control Act and the Public Utilities Act for activities related to the planning for – including discussions with potential purchasers or partners – the environmental, economic, and engineering study of, and where approved, the design and construction of some or all of the generation transmission and other associated facilities at Churchill Falls, Gull Island, and Muskrat Falls.

This was all based on the fact, by the way – because there are no details of this deal out there; the only details I have been able to find have been in relation to an interview done with Dean MacDonald by John Samms, a law student-blogger, who indicated that Mr. MacDonald resigned because the Grimes' government was going to make $100 million.

They forgot one thing: all of the cost overruns would be borne by the people of the Province of Newfoundland and Labrador. You cannot say this was simply an export project, therefore it did not matter to exempt it. The Province would have ended up – this is Mr. MacDonald's words according to Mr. Samms, and I encourage you to read his blog; what happened was the Province would have gotten nothing because the overruns would have resulted in more than the $100 million, Quebec would have owned it all again, and the Upper Churchill would have been replicated.

Now these are the people across the way, who stand, in umbrage, today, who are going to criticize and keep us in the House because we have done a deal where we have secured $1 billion for the people of this Province; meanwhile, we have to direct the Pub, as we did last week, and they are in agreement with it.

I am going to talk a little bit further, because there are some interesting details on the Lower Churchill exemption. You cannot distinguish it on the fact that it is

export versus import. The people of the Province would have ended up with nothing. Now what are the people of the Province going to end up with in Muskrat Falls? They are going to end up with a generating station that will produce electricity forever.

Now, Mr. Speaker, as I indicated earlier, the energy world is changing. Thereis no question. We have natural gas being accessed all over the world; we have deep-water exploration and Arctic exploration. We have shale gas and shale oil. We have not seen the potential yet of the South American countries.

What we do know, I think, from what I have read and what I can see – I am interested in the Member for St. John's East. If he is going to be honest with us here now and not play politics today, because he does know his stuff when it comes to it, if he is going to be honest, he is going to agree with me that oil is still going to be the number one commodity for at least the next couple of decades. The world needs oil; and two, we need electricity.

There will be changes. We are going to see significant changes in the Northeast US, but a recent report prepared by Navigant for the Atlantic Energy Gateway meetings in PEI indicated exactly what we have been saying. The spot markets are there, but what you will see is it will take a decade because the Americans – and I did not realize the amount of coal they burn is still very significant. The number of coal-fired plants they have is very significant. Some of them will convert to natural gas, despite the very significant coal lobbying in the United States. We have a situation where they have a lot of nuclear plants. Some of them are reaching the end of their age, so they have to be either phased out or replaced.

By the time we get to the early 2020s, there will certainly be export markets. We know Quebec has recently signed a significant deal with Vermont inthe last year or so. For us, we are not looking for long-term power purchase agreements at present because, as indicated, and I say to the members opposite, we want that power to be available for mining industries in Labrador who are going to produce significant amounts of iron ore. With it, Mr. Speaker, comeseconomic growth.

The mining industry is not like the oil industry in terms of the royalty scheme. The royalty scheme set up in our oil industry results in significant amounts of money coming to the Treasury directly. I think last year or in the last couple of years, we made in one year $343 million in direct taxation. As Dr. Locke has outlined in his report on the economic impacts of Labrador mining and Lab West mining, the indirect benefits are huge. We are talking hugebenefits, not only to the people of Labrador.

I say to the Member for Cartwright – L'Anse au Clair: We want those benefits to predominantly benefit the people of Labrador, but also we want them to benefit the people of Newfoundland and Labrador. We have structured –

PREMIER DUNDERDALE: The same way the oil does.

MR. KENNEDY: The same way the oil does, as the Premier has pointed out.

Mr. Speaker, what we are trying to do here is to ensure the project is financed at the best possible rate. The reality is even without the loan guarantee this project is a viable project. Even without this kind of financing, I am sure we could obtain financing for the project. The interest is so significant in terms of the amount of monies it will save, and the Minister of Finance will certainly speak to that.

I see I have twenty-two minutes left in this round. I am going to talk for a second about the PUB because there seems to be some misunderstanding that we are the only ones in the world, the big bad government in Newfoundland and Labrador excluding the PUB. How could we dare do that?

Well, let me tell you about a couple of projects in BC. BC has a regulated market structure; their main utility is BC Hydro. The BC Utilities Commission is their independent regulator. These rates are set. BC Hydro's rates are set by the BC Utilities Commission and new generation projects are required to obtain a Certificate of Public Convenience and Necessity from the Utilities Commission.

The Utilities Commission may decide to hold a hearing prior to granting certificate –and I will talk about the UARB hearing in Nova Scotia over the next few days when I am given the opportunity. Site C, a 900 megawatt, estimated $7.9 billion project in BC does not require a Certificate of Public Convenience and Necessity. Essentially, it is exempted from oversight by the BC Utilities Commission.

They do that pursuant to section 7.(1) of the Clean Energy Act. There is also, Mr. Speaker, a number of other exemptions which I will talk about as we move along, but I just thought I would give an example here of how what we are doing is not that unusual. The Liberals did it with the Lower Churchill. BC is doing it with that project. There is nothing nefarious here. There is nothing conspiratorial. All we are doing is trying to ensure that we get the best deal for the people of this Province.

Let's look at where our PUB came from and what their role is. They were established in 1949 and they report to the Minister of Justice, administratively. They submit an annual report. They deal with more than electricity. I know that as a lawyer a number of years ago I appeared in front of them on the car insurance issue, whether or not we would move towards the no-fault insurance.

Mr. Speaker, they deal with petroleum product prices. They supervise rates byautomobile insurers. They have limited regulatory authority of the motor carrier industry in relation to certain passenger and ambulance operations and they can be assigned the role of arbitrator in certain circumstances.

We have the Electrical Power Control Act, 1994 which is an act that was brought in by former Premier Wells, and I find it interesting that our former Premier and chief justice who uses the word should on four different occasions – that the Member for St. Barbe was over there criticizing the former chief justice for use of the word should. That is a battle of the legal titans I will tell you that.

What we have is a situation where the former Premier brought in the Electrical Power Control Act. One of the reasons I understand that act was brought in was

to look at the possibility of recall, legitimizing the ability to recall power from the Upper Churchill. The Electrical Power Control Act, it sets out the power policy of the Province and grants authorities and powers to the PUB in implementing the power policy.

Our Energy Plan sets out the – and I do know, does anyone have a copy of the Energy Plan? I think the Leader of the NDP said earlier today that there was no reference to Muskrat Falls in the Energy Plan. I thought it might have been around page 43 there is reference to Muskrat Falls. We have only talked about developing the Upper Churchill since 1976 or earlier so –

AN HON. MEMBER: The Lower Churchill.

MR. KENNEDY: The Lower Churchill, yes. When you talk about the Lower Churchill Project, you talk about Gull Island and you talk about Muskrat Falls. The Electrical Power Control Act provides the Lieutenant-Governor in Council, Cabinet, the right to direct the PUB.

We did not bring in this legislation. This is former Premier Wells, the Liberal government, brought in legislation which allows the Lieutenant-Governor in Council the right to direct the PUB on rates policy and procedures, issue exemptions for a public utility under the act. The same authority under the Public Utilities Act, as well as refer matters to the PUB.

We are not making this up; this is not new legislation on our part. In 1994, the legislation brought in by the government of Premier Clyde Wells allowed for; one, the directing of the PUB of setting up rates; two, the exemptions. We are not using the more draconian exemption. We are using the direction and still saying to the PUB: You have a role to play, you look at the other rates, you look at issues, but do not interfere with the guaranteed revenue stream.

The PUB has authority under the Electrical Power Control Act to look at adequate planning for future production. In the case of power emergencies the Lieutenant-Governor in Council may appoint an emergency controller with authority. This is the act we are talking about today. Under the industrial rates act, in which we are in third reading here now – excuse me, the industrial rates policy; we have to amend a number of acts. That act, we are amending 5.1 to direct the PUB on generation rates. We are also amending the act so it should consider industrial development in Labrador.

What we are doing now to ensure that Muskrat Falls, for greater clarity, we are amending the act here in Bill 61. What we are saying in Bill 61 is that it is amended by adding 5.1(1): Notwithstanding a provision of the Public Utilities Act, for the purpose of the Muskrat Falls Project – which is defined – the Lieutenant-Governor in Council, which is us, may direct – well, some of us or whatever part of us – may direct the Public Utilities Board to implement policies, procedures, and directives respecting the exercise of powers. That is the same thing that is in 5.1, we are just giving greater clarity to it.

We are not amending section 5.2. We are not exempting this bill, as the Liberals did. We are not excluding the PUB. We are simply saying to them this is the role we want you to play, as the 1994 act of Premier Clyde Wells – which the Liberals acted on at least three or four separate occasions with exemptions – allows us to do.

When we get to the Public Utilities Act, it defines a public utility in the Province as an entity that owns, operates, manages, or controls equipment; provides the Lieutenant-Governor in Council the right to issue exemptions for a public utility under the act; sets out the appointment of PUB commissioners and staff; the LGIC has authority under the Public Utilities Act to appoint a Consumer Advocate, and so on.

When we get to the role of the PUB under Muskrat Falls, we are amending this act, the Hydro Corporation Act, the Energy Corporation Act. So, we are expanding the scope of the direction of the authority that the Lieutenant-Governor in Council can give, but only as it relates to Muskrat Falls. We are not doing anything else. It is only as it relates to Muskrat Falls, and it is in relation to the Liberal act of 1994.

A primary purpose of the amendment will allow us to direct the PUB that Newfoundland and Labrador Hydro's cost for the purchase and delivery of power from the Muskrat Falls Project will be included in Newfoundland and Labrador Hydro's Island revenue requirement without review and approval by the PUB. While that is the primary purpose of the amendment, the LGIC will have added authority on what it can direct the PUB, including the terms of orders and approvals on rates and tolls, criteria for approval by the PUB, et cetera, but they only relate to Muskrat Falls.

PREMIER DUNDERDALE: Which they budget (inaudible). We have had to direct that as well.

MR. KENNEDY: Thank you, Premier. I do not know if Hansard picked that up but it was very well said.

The PUB will be directed to include all Muskrat Falls Project costs. This will not affect the PUB authority, including retaining oversight and approval authority of Newfoundland and Labrador Hydro's other existing Island costs, as well as any future Newfoundland and Labrador hydro costs and capital plans.

Let me give you example of how it works, Mr. Speaker. We know that to produce a kilowatt of energy today at Holyrood it costs approximately 18.5 cents a kilowatt hour. We know that the power produced at Bay d'Espoir is much cheaper. You take all of that power, you put it together and that is where we get our 12.6 cent a kilowatt hour which ties us, I think at present, for the fourth lowest in the country for electricity rates. That is simple. You blend the two and that is what you come up with.

There have been discussions of Soldiers Pond, and what I indicated last week is that – again, I am going by memory, so excuse me, I could be a little bit off here. My understanding is that Soldiers Pond, in 2017, will cost 20.3 cents a kilowatt hour. You take that, you combine it with the power at Bay d'Espoir and that is where we get our 15.2 cents. However, that same kilowatt of energy to be produced at Holyrood will be 3.5 cents more expensive.

What we see is a chart that will go with Muskrat Falls and the isolated Island. In fact, I think it might be the average ratepayer who burns approximately 1,517

kilowatt hours of energy a month will pay approximately $2 more in 2017, 15.1 cents versus 15.2 cents. Then that chart will go up and eventually Muskrat Falls power, the increase will be half of that without Muskrat Falls.

What is ironic about all of this when it comes to rates is that between 2000 and 2011, we had the biggest increase and no one even noticed it. Between 2011 and 2016 rates are going up again, not because of Muskrat Falls but because of oil.

The PUB will still look at the Island costs. They will retain authority on the Newfoundland and Labrador Hydro electricity service because we are saying to the PUB: you can deal with the cost of service of transmission in Labrador. Weare directing you on generation rates, and you will continue to regulate residential, commercial customers in Labrador.

The way you would hear it on the other side is almost as if we are taking the PUB, we are casting them to the wind and saying: You are no more. What we are doing is that which the act allows us to do, an act that was brought in by a former Liberal Administration. We could have done what the Liberals have done, we could have exempted Muskrat Falls totally from the PUB. We did not do that. We looked at an in-between. We wanted to maintain a role for the PUB.

When I talk about the PUB, I am not talking about the present PUB. I am not talking about the people who are there. I am talking about the PUB as an entity as it should exist in theory. They have authority. They retain authority over allocating Newfoundland and Labrador Hydro's cost to customer classes and approving rates, including the allocation of Muskrat Falls' power costs. They retain regulatory authority over Newfoundland Power and approving that utility's own cost. The PUB will allocate Newfoundland Power's cost. There is still a role for the PUB.

The Premier has said on a number of occasions, when the Leader of the New Democratic Party does her dance of righteous indignation, pointing her finger and jumping up and down over there about the death of democracy – what the Premier has said on a number of occasions: You ask questions on process because you cannot raise a substantive issue. That is what this is all about, Mr. Speaker. There are no substantive issues on this project.

Let's make the PUB the bogeyman, not the government. The death of democracy is removing the PUB. Directing the PUB to do that which a previous Liberal government brought legislation that allows us to do, by taking a step that is not as draconian as what the Liberal legislation was back in the 2000 exemptions, which we will talk about in great detail as we move along.

Now, let's look at the project. Let's look at the substance. Show us. Electricity demand, have I heard anyone over there say: You do not need the power? You might say it, but show us. Here is the provincial load forecast. Here is Manitoba Hydro's chapter on load forecast. Here are the electricity rates. Are we that far off? Show us. We challenge people. These have been out two months now.

Here is the Labrador mining and power paper. Show us where we are wrong. Show us substantive issues. There is Manitoba Hydro and their review of the Decision Gate 3 numbers. Show us where they are wrong. Here is Dr. Locke's economic analysis. Show us where he is wrong. Here is the project the NDP jumped up and down about on large wind. Show us where we are wrong.

We heard all these discussions on legal options, how we could recall power, how we could proceed with the good faith action, and how we could go through Quebec. Here is the paper, show us. Have anyone heard anyone tell us where we are wrong here? Have you heard criticisms of these papers?

The Upper Churchill, can we wait until 2041? Where is energy 2041 on this? Has anyone heard us say this paper is wrong? Have we heard the Opposition? No. What do they do with it? You have not given us briefings. We do not have enoughtime.

The environmental benefits of closing Holyrood, does anyone disagree with that? The Minister of Child, Youth and Family Services talked last week about those same NDP over there with their little signs jumping up and down waving them: close Holyrood, close Holyrood. Well, where are they today?

AN HON. MEMBER: (Inaudible).

MR. KENNEDY: Yes, keep it open. That is exactly where they are today, isn't it?

There is natural gas. We looked at the options. Other than one person, has anyone said we were wrong in natural gas? In fact, Wood Mackenzie confirmed that Ziff Energy was right on natural gas. PIRA's forecast methodology – and with all due respect to members opposite, these companies are used by over 500 companies in over sixty countries.

"Our clientele includes all of the world's major private integrated oil companies, nearly all of the largest state-owned national oil companies, and over 80% of both the oil producers and oil refiners in North America. Outside of the oil business, we also provide services to over 80% of the U.S. gas and electric companies and over 90% of the gas and power marketers."

Here is it. They have outlined their methodology. It is not enough to say they are wrong. Show us where they are wrong. Have we heard anything there? No, we have not.

Gull Island, why not develop Gull Island first? Well, the NDP stance is we donot need Muskrat Falls but we need Gull Island. I think that is what they were saying last night, I am not sure. Show us. What do you want us to do? Develop Gull Island on the basis that all of these mining companies might come forward.

What the Premier has outlined, and this is what this is all about here today, is that where you have no substance, rely on process. When you say to us, do not do as we do, as we did, but do as we want you to do, or that we think you should do. When you look at what the people have done in the past, those who live in

glass houses should not throw stones, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: I am very interested because I see all of these little news releases that come out every day from the Leader of the Opposition that are inaccurate, and I suggest to you, Sir, that you stand up today and you justify what the Liberals did in the past. You justify how they exempted the PUB. Let's see what you are going to have to say to that.

AN HON. MEMBER: (Inaudible).

MR. KENNEDY: Oh, sorry, I will look back this way.

It is not parliamentary either to be putting out inaccurate statements day after day, I say to the Leader of the Opposition. I thought you were above that, Sir.

PREMIER DUNDERDALE: The NDP do not want to speak up –

MR. KENNEDY: I do not talk to them.

The difference between exemptions and direction –

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: I have absolutely no respect.

Mr. Speaker, let's get to the differences between exemptions and direction. I do have certain respect for the Liberals. I see them trying over there and I hear what they are saying in terms of their arguments. They have argued that they support the Labrador industry rates policy, and that is fair enough. They have raised certain issues. The Member for Cartwright – L'Anse au Clair raised certain issues; the Member for the Bay of Islands raised certain issues. They are legitimate issues. We do not agree but no one says we have to agree. What I hear coming from the NDP is basically uh-oh.

Mr. Speaker, I am going to talk for a second about the differences between exemption and direction. I only have four minutes left tonight at this stage. Mr. Speaker, what I would like to do is pursuant to Standing Order 43(1) dealing with the previous question, I move, seconded by the Minister of Justice, that the question be now put.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER (Wiseman): It has been moved and seconded that the question be now put with respect to Bill 61 in second reading. The debate will continue on second reading. What this provision provides for is a debate will continue on 61 in second reading.

All members of the House have an opportunity to speak to the bill. When the members are finished addressing the bill the question will be put. It provides for no amendments to Bill 61 during second reading.

The debate will now start. The Speaker will acknowledge anyone who stands.

The hon. the Minister of Natural Resources.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: Yes, thank you, Mr. Speaker.

I do want to spend some time on this issue of direction versus exemption. I think it is important to understand that we are not doing here exactly what everyone is making us out to do, Mr. Speaker. What we are doing here is we are directing.

Let us look at what an exemption is, Mr. Speaker. Under section 5.2 of the Electrical Power Control Act the Cabinet has the power to exempt a public utility from all or a portion of the EPCA, Mr. Speaker, where Cabinet feels the utility has engaged in activities that are in the best interests of the Province. This is a mirror provision in the Public Utilities Act in section 4.1. Typically, Mr. Speaker, where a need has been identified to exempt a publicutility, it is exempted under both of these sections.

The Public Utilities Act also, Mr. Speaker, provides for two other dispute exemptions. The first is where subject to certain exemptions a public utility generates electricity and sells it to another public utility to which the act applies. This is to avoid duplicating the regulation process. The second exemption is for small projects, under 1,000 kilowatts.

Mr. Speaker, we have, as I have indicated, a number of previous exemptions. In our Province we have had Granite Canal, Star Lake, and the Lower Churchill Project. Then, let us look at again - I am going to come back to BC for a second, because I want to talk about what they have done there in terms of exempted projects and programs.

The Northwest Transmission Line, a 344 kilometre, 287 kilovolt transmission line in Northwest BC was exempted; Mica Units 5 and 6, two additional approximately 500 megawatt generating units at the existing Mica hydro facility were exempted; Revelstoke Unit 6, a project to install an additional turbine at the Revelstoke hydro facility; and Site C, a project to build a third dam on the Peace River in Northeast British Columbia to provide 900 megawatts of capacity. That is an example of four projects in BC where there have been exemptions. We have examples of three here in our Province where there have been exemptions, Mr. Speaker.

So, we now come to 5.1 – I have talked about 5.2 of the Electrical Power Control Act, that is the power of exemption, and perhaps I think that is where the confusion might lie, and maybe some will argue that we are arguing semantics, but there is a clear distinction in this legislation between 5.2 exemptions and 5.1 direction. Under 5.1, Cabinet, as I have indicated, has the power to direct the PUB with respect to the policies and procedures to be implemented by the PUB regarding the determination of rate structures of public utilities.

Under that direction, Mr. Speaker, the PUB is still – and this is an important point – expected to carry out its mandate under both the EPCA and the Public Utilities Act, but in doing so it must comply with the direction given. So, it is not an exclusion and it is not an exemption, it is a direction.

Now, the acts are outlined, the sections of the act, what we are doing for a greater clarity, we are ensuring that the direction in 5.1(1), in Bill 61, will relate directly to the Muskrat Falls Project. So, in the financing bill, Mr. Speaker, related to Muskrat Falls what we are doing, we are adding an additional provision, and it will apply only to Muskrat Falls, as the existing authority, we feel, may not be sufficient. So, we could have simply left it alone, came in under 5.1 and directed it, do what the Liberals did with the 5.2 exemptions; but what we chose to do, to be open and transparent, and to ensure there is full debate in this House, we brought forward the amendment outlining for the people of this Province exactly what we intend to do, allowing it to be debated in this House.

Debate, Mr. Speaker, does not always mean that we agree on everything. It does not mean that the other side will agree with us. It means that we outline our positions, Mr. Speaker, and then at some point you move on. At some point, this government will vote in favour of this legislation. It is up to the Opposition when that happens.

As I have indicated earlier today, Mr. Speaker, we will do what we have to do. We believe in this project and the project yesterday, as outlined in our sanction decision. I would encourage the members of the Opposition to look at the words or listen to the words of our Premier yesterday when she talked about the future of this Province. She talked about the pride that our people have and she talked about, Mr. Speaker, how we are at a turning point, we are grasping and taking control of our own destiny as a government. We have tried to do it since 2003. What Muskrat Falls is, is now the pinnacle upon which we will go forward, Mr. Speaker, and be, to use that trite and overused term, masters of our own destiny.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: Mr. Speaker, we could do the easy thing here. We could have said: there is too much public pressure; let's walk away. We could have said: this is not worth it. This is not worth it from a political perspective. Let's not do it. We could have said: how can anyone predict the future? Therefore, let's not bother; but that is not the way we work as a government, Mr. Speaker. You are elected to make decisions. True leaders make tough decisions, and that is what our Premier has done here: made a tough decision. You know, when you live with it, as we have done for the last year, it is not that tough, because it is the right thing to do, Mr. Speaker.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: I heard the Premier today describe a situation, Mr. Speaker. It was very analogous to what we have tried to do with Muskrat Falls. If anyone thinks that this has been a love-in between the Premier, myself, and Nalcor over the last year, that I have been here anyway, in relation to Muskrat Falls, there have been a number of occasions where the Premier has had to exert her authority over me and indicate: now, do not get excited, sit back, do not panic here, let's look at everything. There are times when we have had to say to Nalcor: you have to get this done; we need this information and we need it now.

Mr. Speaker, I can confirm from own perspective, but also from the Premier's perspective, and she indicated up till 10:30 the night before the federal loan guarantee was signed that she was willing to walk away on principle, and that is what this government operates on: it is on principle.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: The principle here, Mr. Speaker, is that we were elected to make decisions which may not be that comfortable for us at times, especially in light of the Upper Churchill, but will ensure that future for our children that they deserve. That is why we are where we are today.

The Premier made a very interesting example. I do not know where she had heard it. When computers first came in, if you understand how – I cannot learn about computers. I cannot understand them. So you take it apart. You dismantle the computer totally and then piece by piece you put it back together. That is how you learn to do it.

That is what we did with Muskrat Falls, Mr. Speaker. We came into this and Nalcor provided us with a lot of good information. I have to say, there were times over the last few months I felt, personally, too much pressure. I am really putting a lot of pressure on people all around me. The Premier has always been the sane hand there who says: no, let us work our way through this.

We needed answers. For anyone who thinks we simply said: let us do this because we have to and because we need to, they are wrong in one way. We are doing it because we have to and we need to, but it is based on the right reason. That is the principle of which I just talked.

So now we get to the PUB. The PUB has been grief. There is no question about that. Two million dollars and nine months later, and what we got is a referral to MHI. That is the best I can say of what we got from them. That has been our criticism: no substance, move the process. That is all we have heard. Someone show me a question in Hansard where they have asked a substantive question, or you are wrong on wind, you are wrong on natural gas, or you are wrong on demand. It has been about the PUB.

We could have sat here. We could have done this under 5.1 and no one would have known anything different. The present legislation allowed us to direct the PUB, but we did not do that. What we have done is brought in the amendment which clearly puts it before the people of this Province why we feel this amendment is needed. It clearly relates to Muskrat Falls and we are open to debate in this House.

Did we ever consider going under 5.1? I did not, because that would not be the way to operate. We said we will amend it and make it clear. Do you avoid this issue simply because there could be political pressure or because we could spend Christmas Day in the House of Assembly; or do you lay it out there, do you debate it, and do you say to the other side if you have some good input?

Since I have been here in this House, there have been acts amended over the five years I have been here, but not this: let us amend everything. If you come forward with a decent amendment, something that could address the situation, we will consider it. Right now, we have to make a decision. Nalcor has to get on with doing this project because time is money.

Mr. Speaker, I heard the Member for St. John's North and he talked about consulting with Aboriginals. Absolutely, we agree with that, but there is a body of law, including our Court of Appeal, which defines consultation. Mr. Speaker, one of the most important aspects, one of the most significant aspects of that announcement yesterday was the fact of the Innu Nation being on that stage with us.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: We cannot underestimate the importance of that. The reason they were there with us, Mr. Speaker, is because it is their land. Historically it is their land. We negotiated the land claims with them, and they, I will tell you, did a very good job of negotiating.

I know that our federal Minister of Intergovernmental Affairs has come under a lot of heat at times, but I can tell you during those negotiations he was a stellar representative of the Innu Nation. He represented his people well, Mr. Speaker. He held out, along with the other members, including Prote Poker, the now Grand Chief, and the Grand Chief at the time, Mark Nui. They held out for the best deal that the Innu Nation could get. Mr. Speaker, they were there with us.

We have negotiated land claims with the Nunatsiavut Government, but their land claims do not extend into Muskrat Falls. Do they have a right of consultation? No question, we have indicated that in a certain zone there is a right of consultation; but consultation, Mr. Speaker, when you have opportunities to present – and again, I indicated to President Leo that we are willing to listen. I think we actually had a meeting set up, but I do not know if it will take place because of the House.

Then we have the NunatuKavut government. Mr. Speaker, we have been clear. When I was the Minister of Justice, I met with them. The Premier has been clear. The former Premier has been clear. If the Parliament of Canada gives you Aboriginal status under Section 35 – we will recognize it. If the courts give you Aboriginal status, we will recognize it. We cannot be expected simply to accept it because you say it.

There is a process that has to go through. The duty of consultation is on a spectrum. We recognize and respect the rights of Aboriginal peoples in Labrador, Mr. Speaker. In fact, there was a reconfiguration of the Muskrat Falls – not necessarily the dam, but in terms of part of it – as a result of Innu beliefs. We respect those rights, and that is referred to in the environmental assessment decision.

Mr. Speaker, when we go through all of this, we have tried to do everything, but it is like I said –and the member opposite, the Leader of the Opposition knows there is no perfect agreement. There is no perfect deal because you are always looking to the future, but if you do not take a chance we are going to be at a standstill here. Nothing will ever happen. The oil will run out and we will not have the economy that we are striving to create.

Let me tell you one thing, Mr. Speaker, and this is a criticism: Well, what does this government do for rural Newfoundland? We have heard the Minister of Fisheries stand up, we have heard the Minister of Innovation, Business and Rural Development stand up, and we have heard the Premier stand up. Once we start building these transmission lines down through communities in rural Newfoundland and Labrador, Mr. Speaker, what you are going to see is every hotel will be filled, because there is no camp being built.

Every hotel will be filled, every restaurant will be filled. There will be people hired in communities. There will be economic stimulus in these communities, and this is coming right across the Province, Mr. Speaker. At times it has been forgotten, the economic impact, which I am sure my colleague the Minister of Finance will talk about.

In an age of stimulus, we have a natural stimulus project, Mr. Speaker, that will employ up to 3,500 people. That will ensure the people of Labrador are given the opportunities to work on this project, Mr. Speaker, and will ensure, as best we can, that the benefits accrue to not only the people of Labrador but to the people throughout this Province. In order to ensure the project proceeds, we then have to look at making sure that we have the loan guarantee, making sure we can obtain financing.

Now, Mr. Speaker, another important point took place yesterday – I expected a couple of questions in the House of Assembly but I did not get any; yes, actually we did get one – was that I do not think the Opposition expected that sanction was going to happen the way it did. They expected that we were going to simply

sanction by ourselves and then everyone argue: How can you depend on what happens in Nova Scotia?

The UARB, their regulatory board, they cannot do anything with a decision. Well, Emera sanctioned yesterday. The definition, what we need for the federalloan guarantee is sanction. We have the federal loan guarantee which, Mr. Speaker, saves us money, but we have always maintained that the Maritime Link is an important component of this project.

If you look at the sanction agreement, which I understand the Opposition parties were also briefed on, the sanction agreement says that Emera is committed to building the Maritime Link. It outlines, even though they are low risk – I can tell you, there are times that the President of Emera and the President and CEO of Nalcor over the last period of weeks with their discussions as they try to identify every possible risk, there are times they have driven us almost crazy with their attention to detail; but, based on the professionalism of these two men and these two companies, I have absolutely no doubt that the Maritime Link will proceed.

The UARB will do whatever they are doing in terms of rates, but we said that, the Premier said that from day one. Do you know what is interesting? They are doing it based on Decision Gate 2 costs. They will not have their Decision Gate 3 costs. So the UARB, if they were to follow our PUB, will say: We cannot give you a decision, we do not have the final numbers. Well, I am not hearing any talk like that in Nova Scotia.

What is going to happen, Mr. Speaker, is that there could be some adjustments at the end of the day, but we have the loan guarantee. That has been confirmed by the federal government.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: Mr. Speaker, we can stay here until mid-January arguing these bills, but construction is taking place and will take place and monies will be released as Nalcor needs it, because the project has been sanctioned. It is time to move on.

You look at regulatory oversight in other jurisdictions – again, that is probably something I will discuss over the next week or two when I am given the opportunity, but what we are doing here is not that unusual. It is not some big conspiracy to exclude or to ensure that the ratepayer of this Province is held hostage. Is there an issue on overruns? There is always an issue on overruns. There is no question, but we are very cognisant of it. The amount of engineering that has been done by Nalcor at the Decision Gate 3 process gives us confidence as to where that is going.

We will, and as a government we have to, ensure as best we can the oversight but also the federal loan guarantee. The federal government decided they wanted a certain amount of oversight and an independent engineer was brought in. That is a good thing.

Earlier this year we heard arguments: Well, there is no oversight at the Muskrat Falls Project. Now I think the argument is: Why do you have the independent engineer there? Why do you have to provide these materials to the federal government? Oversight is good. That is what we want to see. We will be looking at ways we can be involved further, without interfering though with Nalcor's ability to do business because it is time to separate somewhat, Mr. Speaker, our involvement in the decision making.

One of the most difficult aspects of what Mr. Martin has had to do – he is a businessman. He comes from a business background where he makes decisions based on business. At Decision Gate 2, as tough as it is for some people to understand, he made a decision to not go with other options because business people do not waste money pursuing issues that are not real, but he got criticized for that.

Mr. Martin and his team have to be given the opportunity to make those decisions. I must say the Opposition House Leader's comment today about Mr. Martin's salary was certainly unwarranted, when we look at that he is probably the least paid executive in a utility in the country. The CEO of Emera makes a lot more. Mr. Martin has worked day and night. That sounds like a lot of money, but if you break that down by hour, I tell you, that man deserves a lot more than what he is being paid.

SOME HON. MEMBERS: Hear, hear!

MR. KENNEDY: Mr. Speaker, in my first go-round at this, we are simply directing. We are not excluding and we are not exempting, as the Liberals did in the past.

SOME HON. MEMBERS: Hear, hear!

MR. SPEAKER: The hon. the Leader of the Official Opposition.

MR. BALL: Thank you, Mr. Speaker.

(Inaudible) speak to the Electrical Power Control Act, 1994, The Energy Corporation Act and The Hydro Corporation Act, 2007.

Mr. Speaker, we just heard for about an hour a lot of discussion and a lot of chat about the concept of the Muskrat Falls power project. When we look back at this, and for me, the first day was back in November, 2010. I think I am on record as saying, when I listened to the announcement about the Muskrat Falls power project back in November, 2010 and the term sheet as it was discussed and as it was released, there was no question that when I listened to the words, like a lot of people in this Province, I was quite happy, actually.

There was always a sense growing up in the Province and doing business in the Province that at some point in our life we would actually see the development of

the Lower Churchill. I have lots of memories, actually, of growing up and seeing my father as he would sit with the *Books of Newfoundland*. He would read about the Churchill project and read about the history of the Province. Indeed, what a bad deal in 1969, what that has done to the psychology and the overall confidence of the people within the Province. We all grew up with that. It was part of our history.

Mr. Speaker, there was no question that what happened back at that time left us with a – what I would consider to be a bad taste in our mouth about the confidence that we had in developing the Lower Churchill.

In November 2010 we had a sense of confidence that this would change, that the direction and the development of the Lower Churchill would change and we would see the benefit of this. We were then told what happened in November 2010 would lead into the development of formal agreements between Emera, a publicly-traded company in Nova Scotia, and Nalcor, which is the our own energy corporation that was established, I believe, in 2008 following the Energy Plan in 2007.

In July 31, 2012, those formal agreements were signed; I believe there was about thirteen of them or so. Then of course just a few days ago, the sanction agreement on December 17 meant then, I think, we had our fourteenth agreement that was signed. In the midst of all of this, we saw at the end of November, 2012, the federal loan guarantee, which was included in the list.

These were all the milestones that we have seen with the Muskrat Falls development over the last number of years. At every step along the way I would have to say that there were milestones that were missed and there were deadlines that were missed. All along the way there were questions that were raised about the project and what it would mean.

After being elected in October 2011, and becoming Leader of the Opposition in January, we did start; we asked a lot of questions. I do say with the number of meetings that we had with the officials at Nalcor, there was a lot of information. I think most of the questions that were answered, they were forthcoming with the information that we asked for.

I will say that there is still a list of outstanding issues. We have moved on from that as we have now moved into this part of the project, into the sanctioning and then into the discussion that we are tonight on the two bills, Bill 60 and Bill 61.

This particular Bill, 61, deals with – when you get a sense of why this piece of legislation is required you just have to go back to the federal loan guarantee. The project itself was designed based on a growing demand on the Island and the closure of Holyrood. All of us, I believe, do know that Holyrood would have to be dealt with. We have to deal with that polluter and we have to deal with the oil consumption that happens at Holyrood.

We were also told that the mining companies in Labrador would actually need access to this power that it was important that we find a way to go around Quebec, although I will say that to sign any business contract or any mortgage, the motivation to go around Quebec, to me, is an afterthought; then, of course, the Muskrat Falls Project itself being 824 megawatts of power.

What does this all mean? I will speak, just for a minute or two, about the impact on Quebec and where this positions us. We have heard a lot of discussion over the last few years now. A lot has been said about the principles of the deal and what it is we want to do. There was no question: in many cases the impact of Muskrat Falls to me has been overplayed. I have heard members opposite, I have heard MHAs, and I have heard people that talk about the Muskrat Falls Project as if this would have some huge impact on the supply of energy, for instance, in the US.

Mr. Speaker, quite frankly, that is not the case. As an example, Quebec produces somewhere around 34,000 to 35,000 megawatts of power a year. In the Province of Newfoundland and Labrador we produce less than 2,000. Taking 824 megawatts of power and thinking that you are somehow going to compete with Quebec, and thinking that somehow you are going to satisfy a hungry US market, Mr. Speaker, is really not the case.

When you look at the project itself, 824 megawatts of power – one of the questions that we asked Nalcor: what does this mean? We do know that Muskrat Falls, for instance, has a very small reservoir. This poses a problem when it comes to generating firm energy. When we posed the question to the officials at Nalcor: if we had to run a Muskrat Falls generating plant for firm power with a customer who needed firm power at twenty-four hours a day – which is what that would mean – we could only depend on Muskrat Falls for 70 per cent. Therefore, Muskrat Falls as a generator of firm power is not 824 megawatts of power, but actually 70 per cent of those 824 megawatts. That puts us at less than 600 megawatts of power if we were dependent on that power twenty-four hours a day. This was important. We had to know exactly what we were getting for our money.

I just want to respond to some of the comments that were made by the minister. I will say he spoke a lot tonight about previous Administrations and the work that they had done in developing the Lower Churchill. There is no question back in 1998 – although I was not there and certainly had no part in the discussion at all, it has been my understanding from what I read that was a project that was being developed for economic development purposes and therefore no impact at all on the ratepayers. It was meant for export and the development of Gull Island and Muskrat; for some arrangements with the Province of Quebec, this power would then be sold into the US. That was the concept of the development of the Lower Churchill.

I find it interesting that the minister would even raise that; you could go through every single Administration, we can go back in our history, and we can find flaws, even within the seven or eight years. If we want to go back to decisions that have been made, well, there is no question we do not have to go back very far. We need to go back to 2007, for instance, with FPI. We can go back to just a few years ago with the expropriation of the Abitibi mill, and on and on it goes.

Mr. Speaker, the purpose of this debate tonight is not to look back in our history; I hope that at some point we can actually learn from all of that. There is no question that from time to time we will continue to remind each other about mistakes that Administrations make. The key to this is making sure that we get this

particular decision, that we get this right. That is one thing that we have always said, and I have heard the government on many particular occasions say that it was important, no matter what we do, that we get it right.

Mr. Speaker, the minister mentioned about the world demand for oil; he mentioned, I believe it was, 90 million barrels a day: 20 million of that being used in the US and 10 million being used in China. There is no question that we have an emerging economy in China, but we cannot underestimate, either, the creativity of a lot of those economies and what they will do to source oil for their own energy.

We also know that in the US right now they are becoming self sufficient because of the creativity that they have shown in extracting shale oil and shale gas and their own energy needs. They will become self sufficient and indeed this is something that has been truly happening in the last few years.

I look back at the initial crafting of the term sheet back in 2010. If you look at this and you look at the time that led into the development back in 2009 I would expect most of the work was done on this particular term sheet.

Things have changed. When we refer to the shale gas in the US, one of the things we said is this is in some ways a revolution. Indeed, it is not a revolution. Shale gas in the US is not a revolution at all. It is not even an evolution at all. Right now, Mr. Speaker, this is reality. What we are seeing inthe US right now is reality. Because of the creativity, as I said, with shale gas and shale oil, they are becoming self-sufficient. All reports coming out of the US are suggesting that by 2020 the US will be self-sufficient when it comes to their own oil reserves.

Mr. Speaker, as I said, we just got this bill yesterday. We did go to abriefing session this morning. I did mention one of the key elements to all of this and the reason why we are having this discussion today is because of how we actually pay for this particular project. The best way to approach this is when you work backward with some of the milestones we have seen and some of the agreements we have discussed.

I want to spend some time talking about the federal loan guarantee. As I mentioned earlier, this was a loan guarantee that was signed in November of this year. What it does is it actually breaks the project up into four different components: one is the Muskrat Falls Generating Station; two is the transmission line that leaves Muskrat Falls and connects to the Upper Churchill, and I will speak a little bit about that in a minute and why that is important; three is the Labrador-Island Link, which includes a subsea cable at the Strait of Belle Isle; and four is the Maritime Link, this being the responsibility of Emera. Those are the four components.

For the sake of the financing, what they have done is taken the generating station in Muskrat Falls and combined that with the transmission line feeding from the Upper Churchill. The reason for this is simply because there is a need to balance the power. I mentioned earlier about the idea of firm power. There will be a transfer of power from Upper Churchill. We will need this. This was the reason why.

We used the PUB, actually. I find it ironic the minister tonight spent a lotof his time in speaking about the PUB and the value they would bring, and indeed exempting the PUB. Back in 2009, it was the very same PUB and they must have put a lot of confidence in the PUB because it was this group they managed to establish the water management agreement for this particular project.

Now, the water management agreement which the minister did not touch on at all was put together by the PUB back in 2009. The very same group that the government really does not have the confidence in right now to go back and provide the oversight in this particular project. They really do not want to go back there now. One of the key elements of the water management agreement, which has been a source of debate in its own right by many people who have been asking questions on this, who has the right to the water because Muskrat Falls is a very small reservoir.

The importance of the water management agreement is significant. Even in their own annual reports from Nalcor you need just go back a few years and you will realize that Nalcor had addressed this as a very significant and a very serious concern. As a matter of fact, the Muskrat Falls Project would have been really just a very small project without a water management rights agreement in place. Who did the government rely on to develop and write a water management agreement? It was our own Public Utilities Board, the same group today that they have no confidence in to supply the oversight for this particular project.

Mr. Speaker, I spoke about the four components in the federal loan guarantee and what is it that the federal loan guarantee – why is it that it is financed this way? What they have done, the two proponents being Nalcor and Emera, Nalcor signing on behalf of the Government of Newfoundland and Labrador and Emera as a publicly-traded company. They signed and of course what they have decided to do with the Maritime Link now is to take the Maritime Link through the UARB. What will happen there is all the cost of construction inputs will go to the UARB in Nova Scotia which is really the same as our PUB. It is from there that there will be a determination on what it is the rates would be, what they could use for the inputs for those rates. That is the role of the UARB.

This brings us back to where we were yesterday when it comes to sanctioning and why things happen like they did. The Minister of Natural Resources is quite right. He did ask me yesterday what I thought was going to happen. I said: Well, in my opinion I think that you will see Emera in this particular case and Nalcor sanction on the same day. Really, that was not prophetic at all that was simplybecause in order for the loan guarantee – as a condition of the loan guarantee really sanction had to happen on both parties.

What I did realize was happening was that there was a so-called sanctioning agreement. I made mention to this as one of the thirteen or fourteen formal agreements that have been signed with Emera since July 31, 2012. So this sanctioning agreement – and we just really got some briefing on this this morning, so there is still quite a bit of work to be done, it is about a twenty-page document and it outlines a number of conditions for Emera and Nalcor, as the two proponents.

Nalcor actually in a question that was asked in the media session in Nova Scotia yesterday in Halifax – I believe it was at the Westin – Emera was actually asked: Why are we doing this today in advance of your UARB decision? Because that decision from the UARB may not be out for a good few months yet. They have

180 days once the submission is made. We understand the submission will be made to the UARB in January.

So, essentially we could be about six months here before we actually know the outcome of the UARB decision. When the question went to Emera: Why are you doing this today in advance of the UARB decision? Emera interestingly said: Well, the reason why we are doing this today is because Nalcor needs this. They want to be able to make sure that the cost and the federal loan guarantee applies to the project, so we are doing this because Nalcor needs it done. They did not have to do this yesterday. There was no on knocking on their doors or beating on their doors, the doors of Emera, yesterday to actually sanction the project.

So, what do we do in return? I have basically just taken a few minutes because we have been dealing with Bill 60 and Bill 61, and of course, the briefing sessions that we have been busy with this morning. One of the things, interestingly enough, that came out of this, and we actually asked a question a number of times in the briefing session today, because there is a difference between sanctioning, and I will just maybe speak to this for a few minutes.

The steps along the line that actually triggers the federal loan guarantee – and I had this discussion today for a few minutes too, is that sanctioning is, no question, a milestone in the development of the project. The bigger question and a significant milestone, though, is what is considered to be financial close. What happens there is when we get to financial close, the terms and conditions of the federal loan guarantee will be established, and it is then at the financial close position. For us, for Nalcor, financial close will be around September 2013. For Emera, that would be about three to four months later. That is when they are anticipating financial close. Emera really was not in the position – there was no sense of urgency yesterday to sanction the project.

One of the questions around Emera is that they need their rate of return established. They are a publicly traded company. We understand today from the briefing session the rate of return they looked for, for the shareholders, is somewhere around 9 per cent. One of the conditions of the sanctioning agreement, in discussion with Nalcor so that the project and the concept of the project stayed in place, is that Nalcor agreed to pay $25 million to Emera. What that would do, it would be used to offset cost and keeping the 9 per cent rate of return in place for Emera. This was an important piece and some of the questions around the sanctioning process just yesterday.

The other thing I think today in the briefing session was the question around, what happens if the Maritime Link is not built? There seemed to be – I would not want to say confusion, but there was a penalty that is outlined in the federal loan guarantee in the $60 million range. So, if Emera for some reason did not build the Maritime Link, well Nalcor has agreed to pay $30 million of that penalty. Of course, this keeping the federal loan guarantee in place; the value of the federal loan guarantee in place. These are some of things that have been included in the sanctioning agreement that we discussed today.

The other thing is going back to the federal loan guarantee and some of the terms around the financing and what this all means to us as a Province. The federal loan guarantee, as was mentioned by the minister, came out of an election commitment back in 2011 by current Prime Minister Harper – then as a candidate for the position of Prime Minister.

The federal loan guarantee quite clearly states – for us it outlines a number of debt-to-equity ratios and what it is that they would guarantee. For Muskrat Falls and the Labrador transmission line there is up to $2.6 billion. Labrador to the Island would be $2.4 billion, and the Maritime Link up to $1.3 billion.

Emera has taken a different approach. The minister in his comments said they were only at the DG2 position, but what is happening with Emera is they provide a range and they provide a level of probability of where they would fit in that range – the range being somewhere between $1.2 billion and $1.5 billion. We all know that based on our own experience here in the Province, going from DG2 to DG3 – as a matter of fact, the CEO of Emera, Chris Huskilson, has already said publicly that he expects the Maritime Link to be somewhere in the $1.5 billion range.

The federal loan guarantee quite clearly says that the fixed dollar amount of the range and certainly the cost of the project as a whole, being somewhere around – it is capped at $6.3 billion. This is allocated to the projects, as I just outlined. This is based on a debt-to-equity ratio that we will be responsible for. We are responsible for the equity position.

If you look at the three components as I have mentioned – the four components, but the generating station and the Labrador transmission line being one – that will be financed at a 65 per cent to 35 per cent ratio. The Labrador to Island line will be established at a 75 per cent to 25 per cent ratio, and the Maritime Link will be in the 70-30 range, but of course Emera will be responsible for that.

Except for some of the overruns on the Maritime Link, we will, through Nalcor, be responsible for 50 per cent of the overruns once we get past the 5 per cent. It would go like this, Emera would look after the first 5 per cent in overruns then we would pay through Nalcor or the subsidiaries the next 5 per cent. Essentially, we share the overruns with Emera.

The federal loan guarantee, in a section, quite clearly identifies this area of additional debt and what happens there. The federal loan guarantee will not – and it quite clearly says will not – cover any cost overruns or any additional money that will need to be put into this project. That is clearly the responsibility of the Province in this particular case through Nalcor.

This poses a bit of problem, because when you try and develop what they call the CPW, or the Cumulative Present Worth, it is very difficult to determine this when you look at where overruns could be. We have mentioned this many times over the last year or so, the impact of overruns and why is it a concern. We need not look any further than many of the large projects that have been done on the Island itself.

We look at Vale, for instance, a project that was first budgeted to be at $2.8 billion and now it is in excess of $4 billion. These are recent projects. We are living those projects today. The Hebron project, when it was first announced, is a project that we see now with cost estimates rising significantly. We have seen that budget balloon to around $8 billion, I believe it is now. We have even seen within the retrofitting and the renovating of the Confederation Building here, where this

has gone.

It is quite clear that we are getting – no matter what the project is, we can expect to see cost overruns. The question would be: What is an acceptable cost overrun? In this particular case, I have asked many estimators and engineers who deal with many megaprojects. I said: What is the number? What is a percentage that you would find acceptable? Many of them, quite frankly, say that 20 per cent is on the low range. Thirty per cent is usually where you see projects of this magnitude. Why is it a question?

When you think of the development of the Muskrat Falls Project and why – the overruns are certainly very risky in our opinion, is that you are working in a very harsh environment. You are working over a period of five years. It is going to be very difficult to keep this project on budget. You ask the question: How did the proponents respond to this? What is the contingency that is put into this project to offset expected cost overruns?

Well, in this particular case if you look at the budget of this project, it is, I think, $733 million based on the DG3 numbers, which are the cost overruns. Mr. Speaker, when you look at a project now that is at $7.7 billion just at the DG3 numbers, to have a contingency in the $730 million range is an extremely low contingency fund. That includes escalation over the five years of the project.

In my opinion, and I said this to the CEO of Nalcor, the biggest challenge for Nalcor and indeed for Emera throughout this whole project will be to keep this project on budget. That is a significant challenge. It is significant challenge for the ratepayers of this Province. Guess who takes that? It is the ratepayers in this Province. This Province, of course, will have to fund those cost overruns, dollar for dollar, without the impact of any federal loan guarantee.

When you look at the impact of cost overruns and what that would do to the CPW, the minister has also said that there is about $6 billion in oil that has been spent on the nearest other option, which would be the Isolated Island option. There will be $6 billion spent in oil over fifty years.

PIRA was used tonight, was mentioned as really the company that they would use for those projections. Even PIRA themselves in their own report quite clearly say that a fifty-year projection is something that they just do not do, that you really cannot; they do not have that kind of knowledge inside their consulting company. It is impossible to predict anything for fifty years. We know this now when we just look at the changes and the variables in everything we do today, Mr. Speaker.

To use the price of oil for fifty years, even your own consultants, your own experts are saying that a fifty-year projection is not a reliable number. As a matter of fact, even going from the Decision Gate 2 to Decision Gate 3, their opinion and definition of where they would see oil prices going dropped significantly. I think they were in the $105 range now as opposed to, I think it was, around $130. All of this has happened within two years.

On top of that they have also spoken about the likelihood of oil being on the downside when you look at those projections. They said now that the likelihood of oil dropping even further is more likely than seeing oil go up. When you look at how you establish the CPW for the two projects, it in our opinion raises some questions.

Mr. Speaker, I will circle back a little bit to the federal loan guarantee, and the reason that the federal loan guarantee has a number of different conditions in it basically making it quite clear that in order to fund this project, we have to have a power purchase agreement. Without the power purchase agreement, this federal loan guarantee is something that really it does not work.

SOME HON. MEMBERS: Oh, oh!

MR. SPEAKER (Littlejohn): Order, please!

MR. BALL: Thank you, Mr. Speaker.

This is not unusual. When you look at any business plan, what you want to do is establish your revenue stream. If you go looking for financing, if it is for whatever the business is, one of the things that they will ask you is: show me your business plan, show me your revenue, and show me your cost.

What is unusual about this particular case and this particular power purchase agreement that would be signed between the subsidiaries of Nalcor and Newfoundland and Labrador Hydro is just the length of it. Fifty years is the length of this; it is a set rate for fifty years that would feed into the other options that we have for power. So, what are we losing? What is the concern about a fifty-year commitment to this power?

Mr. Speaker, I mentioned just a few minutes ago about what is happening just south of the border and where we see the impact of things like shale gas and things like shale oil. To me, if we were to look back over the last fifty years and ask ourselves what changes have we seen in our own lives, there have been many changes. We have seen changes within industry. Back fifty years ago I do not think anybody would have realized the impact that you would see with thermal energy that it would have on new housing construction.

I know where I come from, heating pumps and those sorts of things are not unusual at all. I think we all anticipate that over the next fifty years, they will become even better; they will become cheaper and more affordable for people who are constructing new homes. What we do know, of course, too, is that people in the Province can be very creative in their own mind.

Mr. Speaker, the power purchase agreement in itself is actually the key element to this particular project. We talked about if you take the particular project, if you take the Muskrat Falls Project and you go looking for financing, the bond agencies out there would be hungry for this. Quite clearly, it is very easy that they would be hungry for this. When you have a power purchase agreement that actually guarantees you revenue for fifty years, you cannot miss with that; only because of the

NEWFOUNDLAND AND LABRADOR HYDRO

and

MUSKRAT FALLS CORPORATION

POWER PURCHASE AGREEMENT

November 29, 2013

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POWER PURCHASE AGREEMENT

THIS POWER PURCHASE AGREEMENT is made effective the 29th day of November, 2013 (the "**Effective Date**").

AMONG:

NEWFOUNDLAND AND LABRADOR HYDRO, a corporation continued pursuant to the *Hydro Corporation Act, 2007* (Newfoundland and Labrador) being Chapter H-7 of the *Statutes of Newfoundland and Labrador, 2007*, and a wholly-owned subsidiary of Nalcor ("**NLH**")

- and -

MUSKRAT FALLS CORPORATION, a corporation incorporated pursuant to the laws of the Province of Newfoundland and Labrador and a wholly-owned subsidiary of Nalcor ("**Muskrat**")

WHEREAS:

A. Muskrat intends to design, develop, finance, construct, commission, own, operate, maintain and sustain the MF Plant and make the MF Plant available for the generation of electricity; and

B. NLH and Muskrat have entered into this Agreement for the purchase and sale of Capacity, Energy, Ancillary Services and GHG Credits on the terms and conditions set forth in this Agreement;

NOW THEREFORE this Agreement witnesses that in consideration of the mutual covenants and agreements hereinafter contained the Parties, intending to be legally bound, agree as follows:

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Agreement, including the recitals, and subject to **Section 1.2(h)**, in the Schedules:

"**14.8 Notice**" has the meaning set forth in **Section 14.8(a)**;

"**156 Week Forecast**" has the meaning set forth in **Section 3.4(a)**;

"**Acquiror**" has the meaning set forth in the Step-In Agreement;

"**Actual Quarterly O&M Costs**" has the meaning set forth in **Section 4.2(c)(i)**;

"**Actual Quarterly O&M Cost Accounting**" has the meaning set forth in **Section 4.2(c)(i)**;

"**Adequacy**" means the ability of an electric system to reliably and safely supply electrical demand and energy requirements at all times in accordance with planning and operating criteria, taking into account scheduled and unscheduled outages of system elements;

"**Affiliate**" means, with respect to any Person, any other Person who directly or indirectly Controls, is Controlled by, or is under common Control with, such Person;

"**Agreement**" means this agreement, including all Schedules, as it may be modified, amended, supplemented or restated by written agreement between the Parties;

"**Ancillary Services**" means the services that are necessary to support the transmission of Energy and Capacity from generation to load while maintaining the Reliability of a transmission system, including operating reserves, reactive supply, voltage control, blackstart capability, and regulation and frequency response;

"**Annual Average Sales Price**" means the arithmetic average of the Net Sales Prices from sales of all Energy and Capacity to External Markets (excluding the NS Block and any sales within NL) in an Operating Year, expressed in dollars per MWh (a) contracted by Muskrat for sales it makes in External Markets outside NL or (b) contracted by an Affiliate of Muskrat for sales in External Markets outside NL assigned to Muskrat;

"**Annual Energy Report**" has the meaning set forth in **Section 4.5(b)**;

"**Annual Maintenance Plan**" means an annual maintenance plan for the MF Plant prepared by Muskrat and approved by the JOC setting out the O&M Activities to take place in each Operating Year, including required equipment outages and their durations and, where appropriate in accordance with Good Utility Practice, O&M Activities to take place in subsequent Operating Years, and containing such other information as may be required by the JOC, acting reasonably;

"**Applicable Law**" means, in relation to any Person, property, transaction or event, all applicable laws, statutes, rules, codes, regulations, treaties, official directives, policies and orders of, and the terms of all judgments, orders and decrees issued by, any Authorized Authority by which such Person is bound or having application to the property, transaction or event in question;

"**Authorized Authority**" means, in relation to any Person, property, transaction or event, any (a) federal, provincial, state, territorial, municipal or local governmental body (whether administrative, legislative, executive or otherwise), (b) agency, authority, commission, instrumentality, regulatory body, court or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government, (c) court, arbitrator, commission or body exercising judicial, quasi-judicial, administrative or similar functions, (d) private regulatory entity, self-regulatory organization or other similar Person, or (e) other body or entity created under the authority of or otherwise subject to the jurisdiction of any of the foregoing, including any stock or other securities exchange, in each case having jurisdiction over such Person, property, transaction or event;

"**Base Block Capital Costs Recovery**" has the meaning set forth in **Schedule 1**;

"**Base Block Energy**" means the annual amount of Energy forecasted at the Effective Date by NLH from the MF Plant to meet the anticipated requirements of the NL Native Load during each Operating Year, being the amount of Energy set forth in **Schedule 2**;

"**Base Block Payments**" has the meaning set forth in **Section 4.2(b)**;

"**Bulk Electric System**" means the NL electrical generation resources, transmission lines, interconnections with neighbouring systems and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition;

"**Business Day**" means any day that is not a Saturday, Sunday or legal holiday recognized in the City of St. John's, NL;

"**CFLCo**" means Churchill Falls (Labrador) Corporation Limited, a corporation incorporated pursuant to the laws of Canada and includes its successors;

"**CFLCo Plant**" means the hydroelectric generation facility owned and operated by CFLCo on the Churchill River in the vicinity of Churchill Falls, NL;

"**Capacity**" means the capability to provide electrical power, measured and expressed in MW;

"**Churchill Delivery Points**" means the points of interconnection between the CFLCo Plant and the LTA, as identified in the LTA Project Description;

"**Claiming Party**" has the meaning set forth in **Section 12.2(a)**;

"**Claims**" means any and all Losses, claims, actions, causes of action, demands, fees (including all legal and other professional fees and disbursements, court costs and experts' fees), levies, Taxes, judgments, fines, charges, deficiencies, interest, penalties and amounts paid in settlement, whether arising in equity, at common law, by statute, or under the law of contracts, torts (including negligence and strict liability without regard to fault) or property, of every kind or character;

"**Collateral Agent**" means the Toronto Dominion Bank, in its capacity as collateral agent under the Financing Documents, and includes any successor thereof in such capacity;

"**Commissioning Date**" means the date on which all of the following have occurred:

(a) the MF Plant Commissioning has been completed;

(b) the LTA Commissioning has been completed;

(c) the NLSO has accepted in writing that the LTA Commissioning has been completed; and

(d) the Financing Parties have accepted in writing that the MF Plant Commissioning has been completed and the financing parties with respect to the LTA have accepted in writing that the LTA Commissioning has been completed;

"**Commissioning Period**" means the period commencing on the First Power Date and ending on the Commissioning Date;

"**Commissioning Period Block**" means all Energy and Capacity associated with the MF Plant from time to time during the Commissioning Period;

"**Commissioning Period Payment**" has the meaning set forth in **Section 4.1(b)**;

"**Confidential Information**" means:

(a) all information, in whatever form or medium, whether factual, interpretative or strategic, furnished by or on behalf of a Disclosing Party, directly or indirectly, to the Receiving Party, including all data, documents, reports, analysis, tests, specifications, charts, lists, manuals, technology, techniques, methods, processes, services, routines, systems, procedures, practices, operations, modes of operation, apparatuses, equipment, business opportunities, customer and supplier lists, know-how, trade or other secrets, contracts, financial statements, financial projections and other financial information, financial strategies, engineering reports, environmental reports, land and lease information, technical and economic data, marketing information and field notes, marketing strategies, marketing methods, sketches, photographs, computer programs, records or software, specifications, models or other information that is or may be either applicable to or related in any way to the assets, business or affairs of the Disclosing Party or its Affiliates; and

(b) all summaries, notes, analysis, compilations, studies and other records prepared by the Receiving Party that contain or otherwise reflect or have been generated or derived from, in whole or in part, confidential information described in **Section (a)** of this definition;

"**Construction Period**" means the period which commenced on December 17, 2012 and terminates at the time commissioning occurs on the Commissioning Date;

"**Contracted Capacity**" means the MF Plant Capacity less the Capacity associated with the NS Block;

"**Contracted Commitments**" means firm commitments by or on behalf of Muskrat as permitted by this Agreement to sell Energy and Capacity in External Markets under contracts for prescribed amounts of such Energy and Capacity for fixed durations, and includes the NS Block;

"**Control**" of a Person means the possession, direct or indirect, of the power to elect or appoint a majority of such Person's board of directors or similar governing body, or to direct or cause the direction of the management, business and/or policies of such Person, whether

through ownership of Voting Shares, by contract or otherwise, and, without limiting the generality of the foregoing, a Person shall be deemed to "**Control**" any partnership of which, at the time, the Person is a general partner, in the case of a limited partnership, or is a partner who, under the partnership agreement, has authority to bind the partnership, in all other cases (and the terms "**Controlled by**" and "**under common Control with**" have correlative meanings);

"**Curtailment**" means any reduction in the delivery of Energy, Capacity or Ancillary Services as a result of the MF Plant being unable to provide such services at the MF Plant Capacity;

"**Delivered Capacity**" means the Capacity actually delivered by Muskrat to NLH at the Delivery Points;

"**Delivered Energy**" means the Energy actually delivered by Muskrat to NLH at the Delivery Points;

"**Delivery Points**" means the Muskrat Delivery Points and the Churchill Delivery Points;

"**Development Activities**" means all activities and undertakings necessary to design, engineer, procure and construct the MF Plant in accordance with the MF Project Description, including obtaining Regulatory Approvals, environmental and performance testing, demobilization, all related project management services and activities, all activities and undertakings that are O&M Activities and occur prior to the Commissioning Date, the products of such activities and undertakings and the resolution of all Claims and disputes related thereto, but for greater certainty excludes O&M Activities which occur after the Commissioning Date;

"**Development Capital Costs**" means the total of all costs incurred by or on behalf of Muskrat for the Development Activities, including IBA Payments during the Construction Period net of Commissioning Period Payments paid by NLH in accordance with **Section 4.1(c)**;

"**Development Financing Costs**" means, without duplication, all costs incurred with respect to debt and equity financing of the Development Capital Costs, as applicable in the following categories:

(a) interest expenses;

(b) costs associated with hedging, derivative or swap transactions;

(c) costs incurred that are directly attributable to each of the structuring, securing and arrangement of debt or equity financing, including costs associated with legal, tax, accounting, technical and other internal or third party advisors, fees and other costs payable pursuant to the Financing Documents;

(d) underwriting, standby, commitment and other fees;

(e) rating agency fees; and

(f) costs of financing cash reserves required by the Financing Parties;

"**Direct Claim**" has the meaning set forth in **Section 16.4(b)**;

"**Disclosing Party**" means a Party or an Affiliate of a Party that discloses Confidential Information to the other Party or an Affiliate of the other Party;

"**Dispute**" means any dispute, controversy or Claim of any kind whatsoever arising out of or relating to this Agreement, including the interpretation of the terms hereof, or any Applicable Law that affects this Agreement, or the transactions contemplated hereunder or the breach, termination or validity thereof;

"**Dispute Resolution Procedure**" has the meaning set forth in **Section 12.1(a)**;

"**ECA**" means the Energy and Capacity Agreement between Nalcor and Emera, dated July 31, 2012 relating to, among other things, the sale and delivery of the NS Block;

"**Effective Date**" has the meaning set forth at the top of Page 1 of this Agreement;

"**Emera**" means Emera Inc., a company incorporated pursuant to the laws of the Province of Nova Scotia, and includes its successors;

"**Energy**" means electrical energy measured and expressed in MWh or GWh;

"**Energy Control Centre**" means one or more energy control centres, as necessary, for the remote monitoring, control and coordinated operation of the Bulk Electric System;

"**Estimated O&M Costs**" means an amount that is the good faith estimate of Muskrat of the O&M Costs that it expects to incur in respect of a given Operating Month;

"**Excise Tax Act**" means the *Excise Tax Act* (Canada);

"**External Markets**" means wholesale markets outside the island portion of NL where Energy and Capacity may be bought or sold on a bilateral or bid basis;

"**External Market Day-Ahead Schedule**" has the meaning set forth in **Section 3.5(c)**;

"**Financing**" means the credit facilities granted or extended to, or invested by way of debt (or the purchase of debt) in Muskrat with respect to the MF Plant, whereby or pursuant to which money, credit or other financial accommodation (including by way of hedging, derivative or swap transactions) has been or may be provided, made available or extended to Muskrat by any Person by way of borrowed money, the purchase of debt instruments or securities, bankers acceptances, letters of credit, overdraft or other forms of credit and financial accommodation (including by way of hedging, derivative or swap transactions), in each case to finance or Refinance the Development Activities;

"**Financing Documents**" means all credit agreements, indentures, bonds, debentures, other debt instruments, guarantees, guarantee issuance agreements, other credit enhancement agreements and other contracts, instruments, agreements and documents evidencing any part of the Financing or any guarantee or other form of credit enhancement for the Financing and includes all trust deeds, mortgages, security agreements, assignments, escrow account agreements, ISDA Master Agreements and Schedules, guarantee agreements, guarantee issuance agreements, other forms of credit enhancement agreements, and other documents relating thereto;

"**Financing Parties**" means all lenders, bondholders and other creditors (including any counterparty to any hedging, derivative or swap transaction) providing any part of a Financing, and any guarantor of or other provider of credit enhancement for any part of such Financing which is not an Affiliate of Nalcor, and includes all agents, collateral agents and collateral trustees acting on their behalf;

"**First Power Date**" means the date which is the latest of:

(a) the date of the start-up and completion of testing activities required to demonstrate that one generation unit of the MF Plant is ready for safe and Reliable provision of Energy, Capacity and Ancillary Services;

(b) the date of completion of testing activities required to demonstrate that the first 315 kV transmission line of the LTA is ready for safe and Reliable transmission of Energy from a Muskrat Delivery Point to a Churchill Delivery Point; and

(c) the date on which the NLSO gives written approval for the commencement of commercial transmission operations of the LTA;

"**Force Majeure**" means an event, condition or circumstance (each an "**Event**") beyond the reasonable control and without fault or negligence of the Party claiming the Force Majeure, which, despite all commercially reasonable efforts, timely taken, of the Party claiming the Force Majeure to prevent its occurrence or mitigate its effects, causes a delay or disruption in the performance of any obligation (other than the obligation to pay monies due) imposed on such Party. Provided that the foregoing conditions are met, "**Force Majeure**" may include:

(a) an act of God, hurricane or similarly destructive storm, fire, flood, iceberg, severe snow or wind, ice conditions (including sea and river ice and freezing precipitation), geomagnetic activity, an environmental condition caused by pollution, forest or other fire or other cause of air pollution, epidemic declared by an Authorized Authority having jurisdiction, explosion, earthquake or lightning;

(b) a war, revolution, terrorism, insurrection, riot, blockade, sabotage, civil disturbance, vandalism or any other unlawful act against public order or authority;

(c) a strike, lockout or other industrial disturbance;

(d) breakage or an accident or inadvertent action or failure to act causing material physical damage to, or materially impairing the operation of, or access to the MF Plant or the NL Transmission System or any machinery or equipment comprising part of or used in connection with the MF Plant or the NL Transmission System;

(e) a revocation, amendment, failure to renew or other inability to maintain in force any order, permit, licence, certificate or authorization from any Authorized Authority, unless such inability is caused by a breach of the terms thereof or results from an agreement made by the Party seeking or holding such order, permit, licence, certificate or authorization;

(f) any unplanned partial or total Curtailment, interruption or reduction of the generation or delivery of the Energy Scheduled by NLH for delivery pursuant to this Agreement or the Energy or Capacity that is required by the NLSO for safe and Reliable operation of any plant or facility or that results from the automatic operation of power system protection and control devices;

(g) any event or circumstance affecting a contractor that constitutes a Force Majeure, excusable delay or similar relief event to the extent that such contractor is relieved from the performance of its obligations under a contract affecting a Party; and

(h) any lack of precipitation resulting in low water runoff into the Churchill River watershed upstream of the MF Plant;

but none of the following shall be a Force Majeure:

(i) lack of finances or changes in the economic circumstances of a Party;

(j) if the Event relied upon resulted from a breach of Good Utility Practice by the Party claiming Force Majeure; and

(k) any delay in the settlement of any Dispute;

"**Forgivable Event**" means any one of a Force Majeure, Planned Maintenance, a Safety Event or an action required to be taken by a Party to comply with Good Utility Practice unless such action is necessitated by or results from such Party's failure to comply with Good Utility Practice;

"**Four Week Schedule**" has the meaning set forth in **Section 3.4(b)**;

"**Funding Vehicle**" means the Muskrat Falls/Labrador Transmission Assets Funding Trust, a trust pursuant to the laws of NL settled by the MF/LTA Funding Trust Declaration dated November 1, 2013 between Nalcor, in its capacity as settlor, and BNY Trust Company of Canada, in its capacity as trustee;

"**GAAP**" means generally accepted accounting principles as defined by the Canadian Institute of Chartered Accountants or its successors, as amended or replaced by international financial reporting standards or as otherwise amended from time to time;

"**GHG Credits**" means greenhouse gas credits or allowances, including all attributes associated with renewable energy, associated with the displacement or avoidance of generation from greenhouse gas emitting facilities resulting from the Energy and associated Capacity produced by the MF Plant or any other renewable energy source used to provide Energy and Capacity pursuant to this Agreement;

"**GIA**" means the Generator Interconnection Agreement of even date herewith entered into among the NLSO, Muskrat and Labrador Transco;

"**GW**" means gigawatt;

"**GWh**" means GW hour;

"**Good Utility Practice**" means those project management, design, procurement, construction, operation, maintenance, repair, removal and disposal practices, methods, or acts that are engaged in by a significant portion of the electric utility industry in Canada during the relevant time period, or any other practices, methods or acts that, in the exercise of reasonable judgment in light of the facts known at the time a decision is made, could have been expected to accomplish a desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be the optimum practice, method, or act to the exclusion of others, but rather to be a spectrum of acceptable practices, methods, or acts generally accepted in such electric utility industry for the project management, design, procurement, construction, operation, maintenance, repair, removal and disposal of electric utility facilities in Canada. Good Utility Practice shall not be determined after the fact in light of the results achieved by the practices, methods or acts undertaken but rather shall be determined based upon the consistency of the practices, methods, or acts when undertaken with the standard set forth in the first two sentences of this definition at such time;

"**HST**" means all amounts exigible pursuant to Part IX of the Excise Tax Act, including, for greater certainty, the Taxes commonly referred to as the goods and services tax (GST) and the harmonized sales tax (HST);

"**Holder**" has the meaning set forth in the *Muskrat Falls Project Land Use and Expropriation Act* (Newfoundland and Labrador);

"**IBA Payments**" means all payments made by Muskrat to aboriginal peoples pursuant to impact and benefit agreements now or hereafter entered into by, or assigned to, Muskrat, including the Impact and Benefit Agreement dated November 18, 2011 among Nalcor, the Innu Nation and related Innu parties;

"**IRR**" has the meaning set forth in **Schedule 1**;

"**Income Tax Act**" means the *Income Tax Act* (Canada);

"**Indemnified Party**" has the meaning set forth in **Section 16.4(a)**;

"**Indemnitor**" has the meaning set forth in **Section 16.4(a)**;

"**Initial Financing**" means that portion of the Financing loaned by the Funding Vehicle to Muskrat;

"**Initial Load Forecast**" means the projected Load Forecast for each Operating Year estimated by NLH at the Effective Date, being the amount set forth in **Schedule 2**;

"**Insolvency Event**" means, in relation to any Party, the occurrence of one or more of the following:

(a) an order is made, or an effective resolution passed, for the winding-up, liquidation or dissolution of such Party;

(b) such Party voluntarily institutes proceedings for its winding up, liquidation or dissolution, or to authorize or enter into an arrangement under the *Corporations Act* (Newfoundland and Labrador) or similar legislation in any other jurisdiction affecting any of its creditors, *or* takes action to become bankrupt, or consents to the filing of a bankruptcy application against it, or files an assignment, a proposal, a notice of intention to make a proposal, an application, or answer or consent seeking reorganization, readjustment, arrangement, composition, protection from creditors, or similar relief under any bankruptcy or insolvency law or any other similar Applicable Law, including the *Bankruptcy and Insolvency Act* (Canada) and the *Companies' Creditors Arrangement Act* (Canada), or consents to the filing of any such application for a bankruptcy order, or consents to the appointment of an interim receiver, receiver, monitor, liquidator, restructuring officer or trustee in bankruptcy of all or substantially all of the property of such Party or makes an assignment for the benefit of creditors, or admits in writing its inability to pay its debts generally as they come due or commits any other act of bankruptcy or insolvency, or suspends or threatens to suspend transaction of its usual business, or any action is taken by such Party in furtherance of any of the foregoing;

(c) a court having jurisdiction enters a judgment or order adjudging such Party a bankrupt or an insolvent person, or approving as properly filed an application or motion seeking an arrangement under the *Corporations Act* (Newfoundland and Labrador) or similar legislation in any other jurisdiction affecting any of its creditors or seeking reorganization, readjustment, arrangement, composition, protection from creditors, or similar relief under any bankruptcy or insolvency law or any other similar Applicable Law, or an order of a court having jurisdiction for the appointment of an interim receiver, receiver, monitor, liquidator, restructuring officer or trustee in bankruptcy of all or substantially all of the undertaking or property of such Party, or for the winding up, liquidation or dissolution of its affairs, is entered and such order is not contested and the effect thereof stayed, or any material part of the

property of such Party is sequestered or attached and is not returned to the possession of such Party or released from such attachment within 30 days thereafter;

(d) any proceeding or application is commenced respecting such Party without its consent or acquiescence pursuant to any Applicable Law relating to bankruptcy, insolvency, reorganization of debts, winding up, liquidation or dissolution, and such proceeding or application (i) results in a bankruptcy order or the entry of an order for relief and a period of 30 days has elapsed since the issuance of such order without such order having been reversed or set aside or (ii) is not dismissed, discharged, stayed or restrained in each case within 30 days of the commencement of such proceeding or application; or

(e) such Party has ceased paying its current obligations in the ordinary course of business as they generally become due;

"**JDC**" has the meaning set forth in **Section 2.2**;

"**JOC**" has the meaning set forth in **Section 5.1**;

"**JOC Matters**" has the meaning set forth in **Section 5.3(a)**;

"**Knowledge**" means in the case of a Party, as applicable, the actual knowledge of any of the executive officers of such Party and other facts or matters that such executive officers could reasonably be expected to discover or otherwise become aware of in the course of performing their ordinary responsibilities as executive officers of such Party;

"**LIL**" means the Labrador-Island Link transmission facilities to be constructed by or on behalf of LIL LP from central Labrador to Soldiers Pond, NL;

"**LIL LP**" means Labrador-Island Link Limited Partnership, a limited partnership, established pursuant to the laws of NL by the Limited Partnership Agreement dated July 31, 2012, and includes its successors;

"**LIL Opco**" means Labrador-Island Link Operating Corporation, a corporation incorporated pursuant to the laws of NL, and a wholly-owned subsidiary of Nalcor, and includes its successors;

"**LTA**" means the transmission facilities to be constructed by or on behalf of Labrador Transco in Labrador including its interconnections with the MF Plant, the CFLCo Plant, the LIL and certain portions of the NL Transmission System in Labrador, as more particularly described in the LTA Project Description;

"**LTA Capital Costs Recovery**" has the meaning set forth in the GIA;

"**LTA Commissioning**" means the testing activities required to demonstrate that the LTA is ready for safe and Reliable commercial operation in accordance with the LTA Project Description;

"**LTA Payments**" has the meaning set forth in the GIA;

"**LTA Project Description**" has the meaning set forth in the GIA;

"**LTA Redemption Value**" has the meaning set forth in the GIA;

"**LTAMP**" means a long term asset management plan describing and quantifying the O&M Activities for each year of the Supply Period in sufficient detail to determine the estimated annual O&M Costs, including:

(a) a description of each activity, including routine annual O&M Activities, anticipated Sustaining Activities and retirements which do not occur annually;

(b) the expected year of the occurrence of each such activity; and

(c) estimates of the annual costs applicable to each such activity;

"**Labrador Transco**" means Labrador Transmission Corporation, a corporation incorporated pursuant to the laws of NL and a wholly-owned subsidiary of Nalcor, and includes its successors;

"**Legal Proceedings**" means any actions, suits, investigations, proceedings, judgments, rulings or orders by or before any Authorized Authority;

"**Load Forecast**" means the forecast of NL Native Load prepared by NLH at a given point in time in respect of the current or any future Operating Year, and includes any forecasts of NL Native Load for any period within such Operating Years, as applicable;

"**Losses**" means any and all losses (other than losses of Energy, normally incurred in the transmission of Energy), damages, costs, expenses, charges, fines, penalties and injuries of every kind and character;

"**MF Plant**" means the hydro-electric generation plant, including all apparatus and equipment to be constructed in accordance with the MF Project Description, to be owned and operated by Muskrat on the Churchill River in the vicinity of Muskrat Falls, NL for the production of Energy and Capacity and the provision of Ancillary Services;

"**MF Plant Capacity**" means the rated Capacity of the MF Plant that is sustainable for a continuous period of 60 minutes established in accordance with Reliability Standards;

"**MF Plant Commissioning**" means the start-up and testing activities required to demonstrate that all four generation units of the MF Plant are ready for safe and Reliable provision of Energy, Capacity and Ancillary Services in accordance with the MF Project Description;

"**MF Plant Service Life**" means the period of time immediately following the MF Plant Commissioning, as designated by an Authorized Authority from time to time, during which the MF Plant can continue to produce Energy and Capacity in accordance with Reliability Standards and the MF Project Description;

"**MF Project Description**" means a compilation of the fundamental engineering criteria, data and components which is the basis on which the MF Plant is to be constructed as set forth in **Schedule 3**;

"**MPPA**" means the Multi-Party Pooling Agreement to be entered into between the NLSO and the owners or operators of transmission facilities comprising the NL Transmission System pursuant to which the NLSO shall exercise Operational Control of, and provide transmission service over, the NL Transmission System;

"**MW**" means megawatt;

"**MWh**" means MW hour;

"**Maritime Link**" means the transmission facilities to be constructed in accordance with the Maritime Link Joint Development Agreement dated July 31, 2012 between Nalcor and Emera;

"**Measurement Canada**" means the agency of Industry Canada with that name, or any successor agency or entity performing similar functions;

"**Metering Equipment**" means all metering equipment necessary and used to measure Energy and Capacity, including instrument transformers, MWh-meters, data acquisition equipment, transducers and associated equipment;

"**Muskrat**" has the meaning set forth in the preamble to this Agreement, one of the Parties, and includes its successors and permitted assigns;

"**Muskrat Affiliate Assignee**" means an Affiliate of Muskrat to which all of the Muskrat Rights are assigned in accordance with the provisions of this Agreement;

"**Muskrat Default**" has the meaning set forth in **Section 14.1**;

"**Muskrat Delivery Points**" means the points of interconnection between the MF Plant and the LTA;

"**Muskrat Group**" has the meaning set forth in **Section 16.2(a)**;

"**Muskrat Material Default**" has the meaning set forth in **Section 14.6(a)**;

"**Muskrat Material Default Notice**" has the meaning set forth in **Section 14.6(a)**;

"**Muskrat Rights**" has the meaning set forth in **Section 19.1(a)**;

"**NL**" means the Province of Newfoundland and Labrador;

"**NL Crown**" means Her Majesty in Right of NL;

"**NL Customers**" means the wholesale and retail customers of electricity on the island portion of NL directly or indirectly connected to the NL Transmission System;

"**NL Native Load**" means the cumulative electricity consumption of NL Customers plus associated losses of Energy normally incurred in the transmission and distribution of Energy;

"**NL Native Load Day-Ahead Schedule**" has the meaning set forth in **Section 3.4(c)**;

"**NL Transmission System**" means electricity transmission assets in NL with a voltage level greater than or equal to 230 kV to be pooled under the MPPA;

"**NLH**" has the meaning set forth in the preamble to this Agreement, one of the Parties, and includes its successors and permitted assigns;

"**NLH Default**" has the meaning set forth in **Section 14.4**;

"**NLH Deferred Energy**" has the meaning set forth in **Section 3.1(c)**;

"**NLH External Market Sales**" has the meaning set forth in **Section 4.5(c)**;

"**NLH Group**" has the meaning set forth in **Section 16.1(a)**;

"**NLSO**" means NLH acting in its capacity as the Newfoundland and Labrador Systems Operator, being the system operations department of NLH, responsible for safe and Reliable operation of the Bulk Electric System, or a functionally separate division of NLH performing this function, and includes its successors;

"**NS Block**" means the amount of Energy and associated Capacity and GHG Credits to be supplied to Emera pursuant to the ECA;

"**Nalcor**" means Nalcor Energy, a corporation existing pursuant to the *Energy Corporation Act* (Newfoundland and Labrador) and includes its successors;

"**Net Sales Price**" means the net dollar amount received for a quantity of Energy or Capacity sold in External Markets (excluding the NS Block and sales within NL) by Muskrat or an Affiliate of Muskrat on behalf of NLH, and shall be calculated as the gross amount received by Muskrat or its Affiliate for the Energy or Capacity, less the amount of all expenses reasonably incurred by Muskrat or its Affiliate, as applicable, in the course of performing the sales transaction on NLH's behalf in the applicable External Market, including in respect of Tariff Charges, transmission losses as calculated and applied by applicable system operators, transaction fees applied by system operators or authorized market operators, and any marketing fees or commissions that are reasonably incurred by Muskrat or its Affiliate in connection with the transaction;

"**New Taxes**" means:

(a) any Tax exigible pursuant to Applicable Law which comes into force after the Effective Date; and

(b) any change to a Tax exigible pursuant to Applicable Law which comes into force after the Effective Date;

"**Notice**" means communication required or contemplated to be given by either Party to the other under this Agreement, which communication shall be given in accordance with **Section 21.1**;

"**O&M Activities**" means all activities and undertakings performed by or on behalf of Muskrat that are required (considering the remaining MF Plant Service Life) to operate, maintain and sustain the MF Plant, including the Sustaining Activities, administration and reporting, but for greater certainty excludes the Development Activities;

"**O&M Costs**" means, without duplication, with respect to each Operating Month in each Operating Year, costs incurred for:

(a) O&M Activities;

(b) Operating Financing Costs;

(c) IBA Payments;

(d) payments pursuant to the Water Lease;

(e) payments pursuant to the WMA;

(f) payments pursuant to any real property leases, licences or easements necessary for access to lands on which the MF Plant is located, which are not otherwise Development Capital Costs;

(g) Taxes (net of any Taxes recovered);

(h) any amount payable by Muskrat arising from an indemnity obligation under the Financing Documents; and

(i) LTA Payments;

"**O&M Debt**" means the credit facilities granted or extended to, or invested by way of debt (or the purchase of debt) in Muskrat with respect to the MF Plant, whereby or pursuant to which money, credit or other financial accommodation (including by way of hedging, derivative or swap transactions) has been or may be provided, made available or extended to Muskrat by any Person by way of borrowed money, the purchase of debt instruments or securities, bankers acceptances, letters of credit, overdraft or other forms of credit and financial accommodation (including by way of hedging, derivative or swap transactions), in

each case to finance O&M Costs exclusive of the Financing, which are associated with an operating line of credit;

"**O&M Standards**" means the standards or requirements established or adopted by the JOC for the operation and maintenance of the MF Plant in accordance with Good Utility Practice for a long-term, low cost, Reliable generation facility, including monitoring and reporting on asset performance, frequency and scope of major inspections, applicable industry standards to apply in asset operation and maintenance, completion of the LTAMP, and the maintenance of appropriate critical spares, and includes standards or criteria established by the Standards Authority which are applicable to the MF Plant;

"**Operating Financing Costs**" means, without duplication, all costs incurred during the Supply Period with respect to debt and equity financing of the O&M Costs as applicable, in the following categories:

(a) interest expenses;

(b) return on equity;

(c) costs associated with hedging, derivative or swap transactions;

(d) costs incurred that are directly attributable to each of the structuring, securing and arrangement of debt or equity financing, including costs associated with legal, tax, accounting, technical and other internal or third party advisors and fees and other costs payable pursuant to financing documents in respect of the O&M Debt;

(e) underwriting, standby, commitment and other fees;

(f) rating agency fees; and

(g) costs of financing cash reserves required by applicable financing parties;

"**Operating Month**" means:

(a) in the case of the first Operating Month, the period of time commencing at the time commissioning occurs on the Commissioning Date and ending immediately prior to 12:00 noon, Newfoundland prevailing time, on the last day of the calendar month in which the day after the Commissioning Date occurs;

(b) in the case of the last Operating Month, the period of time commencing 12:00 noon, Newfoundland prevailing time, on the last day of the previous calendar month and ending upon the termination or expiry of the Term; and

(c) otherwise, each period of time during the Supply Period commencing 12:00 noon, Newfoundland prevailing time, on the last day of the previous calendar month and ending immediately prior to 12:00 noon, Newfoundland prevailing time, on the last day of such calendar month;

"**Operating Requirements**" means the applicable operating policies, standards and guidelines established for the Bulk Electric System, as may be revised from time to time;

"**Operating Year**" means (a) a calendar year of Operating Months during the Term except that the first Operating Year will commence at the time commissioning occurs on the Commissioning Date and end at 12:00 noon, Newfoundland prevailing time, on December 31 of the calendar year in which the day after the Commissioning Date occurs, and the last Operating Year will end upon the termination or expiry of the Term; or (b) such other 12 month period as may be mutually agreed to in writing by the Parties;

"**Operational Control**" means the authority to perform, direct or authorize security monitoring, adjustment of generation and transmission resources, coordinating and approval of changes in transmission status for maintenance, determination of transmission status for Reliability, planning assessments, coordination with control area operators, voltage reductions and load shedding;

"**PPA Services**" means the delivery of Energy, Capacity and Ancillary Services by Muskrat to NLH in accordance with this Agreement;

"**PUB**" means the Board of Commissioners of Public Utilities established pursuant to the *Public Utilities Act* (Newfoundland and Labrador) and any successor;

"**Paid in Full**" means, in relation to any indebtedness that is or may become owing to any Person, the permanent, indefeasible and irrevocable payment in cash to such Person in full of such indebtedness in accordance with the express provisions of the agreements creating or evidencing such indebtedness, without regard to any compromise, reduction or disallowance of all or any item or part thereof by virtue of the application of any laws relating to Insolvency Events or fraudulent conveyance or any similar laws affecting creditors' rights generally or general principles of equity and, if applicable, the cancellation or expiry of any commitment or obligation of such Person to lend or otherwise extend credit or pay any indebtedness;

"**Parties**" means NLH and Muskrat, and "**Party**" means one of them;

"**Person**" includes an individual, a partnership, a corporation, a company, a trust, a joint venture, an unincorporated organization, a union, a government or any department or agency thereof and the heirs, executors, administrators or other legal representatives of an individual;

"**Planned Maintenance**" means work that is necessary for the inspection, testing, repair, maintenance or overhaul of, or modifications to, a component of the MF Plant where appropriate and in accordance with Good Utility Practice, which in and of itself will result in the unavailability of all or part of the MF Plant Capacity or a restriction in MF Plant Capacity due to Reliability Standards requirements, which may otherwise restrict the delivery of all or a part of the Energy Scheduled by NLH for delivery pursuant to this Agreement;

"**Planned Maintenance Period**" means a period of planned total or partial outage of the MF Plant Capacity for the execution of Planned Maintenance;

"**Prime Rate**" means the variable rate of interest per annum expressed on the basis of a year of 365 or 366 days, as the case may be, established from time to time by The Bank of Nova Scotia, or any successor thereto, as its reference rate for the determination of interest rates that it will charge on commercial loans in Canadian dollars made in Canada;

"**Qualified Assignee**" means a Person which is:

(a) an administrative or security agent of a Financing Party; and

(b) with respect to the Muskrat Rights, an Affiliate or Affiliates of Muskrat, or a Holder, provided

(i) Muskrat and its Affiliate(s) or Muskrat and a Holder, as applicable, enter into an agreement with NLH substantially in the form of **Schedule 4**; and

(ii) there is a concurrent assignment to the same Person of the GIA and this Agreement;

"**Quarter**" means the three Operating Month periods corresponding to calendar quarters (or portion thereof, as applicable) during the Supply Period;

"**Receiving Party**" means a Party or an Affiliate of a Party that receives Confidential Information from the other Party or an Affiliate of the other Party;

"**Recipient Party**" has the meaning set forth in **Section 12.2(a)**;

"**Redemption Value**" means, at any time, a dollar value which is the sum of the following:

(a) the costs of making all payments as are required to cause the Initial Financing to be Paid in Full, inclusive of outstanding principal, accrued interest, and any premium applicable under the Financing Documents;

(b) all legal, advisory, transaction and administrative costs associated with **Section (a)** of this definition; plus

(c) the LTA Redemption Value;

"**Refinance**" means to extend, renew or refinance any indebtedness where the amount of such indebtedness outstanding on the date of such extension, renewal or refinancing is not increased;

"**Regular Business Hours**" means 8:30 a.m. through 4:30 p.m. local time on a Business Day;

"**Regulatory Approval**" means any approval required by any Authorized Authority, including any regulatory, environmental, development, zoning, building, subdivision or occupancy permit, licence, approval or other authorization;

"**Reliability**" means the degree of performance of the electric power system that results in electricity being delivered in compliance with Reliability Standards and in the amount desired, taking into consideration Adequacy and Security and "**Reliable**" has a correlative meaning;

"**Reliability Standards**" means the criteria, standards and requirements relating to Reliability established or authorized by a Standards Authority;

"**Remedies Consultation Period**" has the meaning set forth in the Financing Documents;

"**Representatives**" means the directors, officers, employees, agents, lawyers, engineers, accountants, consultants and financial advisers of a Party;

"**Reserve**" is the generating capacity available to the NLSO within a short interval of time, not to exceed 10 minutes, to meet demand in case there is a disruption to supply;

"**Residual Block**" has the meaning set forth in **Section 3.1(e)**;

"**Residual Block Sales**" has the meaning set forth in **Section 4.5(b)(vii)**;

"**Safety Event**" means an event that causes Muskrat to suspend delivery of Energy, or an event that causes the NLSO or Labrador Transco to suspend receipt of Energy into or delivery over the NL Transmission System, or any part thereof, for the purpose of safeguarding life or property by making repairs to the MF Plant or the Bulk Electric System in accordance with Good Utility Practice;

"**Schedule**", "**Scheduled**" and "**Scheduling**" when used as a verb, means to take all acts necessary to schedule, or cause to be scheduled, the delivery of the Energy and Capacity to the Delivery Points, storage of Energy and provision for the Reserve in accordance with this Agreement;

"**Scheduling Protocol**" has the meaning set forth in **Section 3.5(f)**;

"**Security**" means the ability of an electric system to withstand disturbances such as electric short circuits or unanticipated loss of system elements;

"**Standards Authority**" means the Government of NL, the PUB, or any other NL agency which assumes or is granted authority over the Parties regarding standards or criteria applicable to the Parties relating to the Reliability of the MF Plant or the NL Transmission System;

"**Step-In Agreement**" has the meaning set forth in **Section 21.14**;

"**Supplemental Block Energy**" has the meaning set forth in **Section 3.1(b)**;

"**Supply Period**" means the period commencing at the time commissioning occurs on the Commissioning Date and ending January 1, 2068, as may be extended pursuant to **Section 13.3(a)**;

"**Sustaining Activities**" means all activities and undertakings of a capital nature occurring during the Supply Period to replace or overhaul major assets and major components of the MF Plant, which do not occur annually and are necessary to sustain the MF Plant's performance in accordance with Good Utility Practice, but for greater certainty excludes the Development Activities;

"**System Emergency**" means any abnormal system condition that requires automatic or immediate manual action to prevent or limit the failure of transmission facilities or generation supply that could adversely affect the reliability of the NL Transmission System;

"**Target NLH External Market Sales**" means NLH's target for sales of an amount of Energy equal to (a) Base Block Energy plus (b) NLH's estimated Supplemental Block Energy minus (c) Energy Scheduled by NLH for delivery under this Agreement minus (d) NLH's estimate of anticipated NLH Deferred Energy in the applicable Operating Year pursuant to **Section 3.4(a)(iii)**;

"**Tariff Charges**" means any charges arising pursuant to a tariff or other schedule of fees in respect of electricity transmission services;

"**Tax**" or "**Taxes**" means any tax, fee, levy, rental, duty, charge, royalty or similar charge including, for greater certainty, any federal, state, provincial, municipal, local, aboriginal, foreign or any other assessment, governmental charge, imposition or tariff (other than Tariff Charges) wherever imposed, assessed or collected, and whether based on or measured by gross receipts, income, profits, sales, use and occupation or otherwise, and including any income tax, capital gains tax, payroll tax, fuel tax, capital tax, goods and services tax, harmonized sales tax, value added tax, sales tax, withholding tax, property tax, business tax, ad valorem tax, transfer tax, franchise tax or excise tax, together with all interest, penalties, fines or additions imposed, assessed or collected with respect to any such amounts;

"**Term**" means the period that commences on the Effective Date and ends on the last day of the Supply Period;

"**third party**" means any Person that does not Control, is not Controlled by or is not under common Control with a Party;

"**Third Party Claim**" has the meaning set forth **in Section 16.4(b)**;

"**Voting Shares**" means shares issued by a corporation in its capital stock, or equivalent interests in any other Person, the holders of which are ordinarily, in the absence of contingencies, entitled to vote for the election of directors (or Persons performing similar functions) of such Person, even if such right to vote has been suspended by the happening of such contingency;

"**WMA**" means the water management agreement between CFLCo and Nalcor established by the PUB by Order No. P.U. 8 (2010) pursuant to the *Electrical Power Control Act, 1994* (Newfoundland and Labrador) and assigned to Muskrat by assignment dated November 29, 2013; and

"**Water Lease**" means the lease dated March 17, 2009, as amended from time to time, between the NL Crown and Nalcor and assigned to Muskrat by assignment dated November 29, 2013.

1.2 Construction of Agreement

(a) Interpretation Not Affected by Headings, etc. - The division of this Agreement into articles, sections and other subdivisions, the provision of a table of contents and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement. Unless otherwise indicated, all references to an "**Article**", "**Section**", "**Schedule**" or "**Appendix**" followed by a number and/or a letter refer to the specified article, section, schedule or appendix of this Agreement. The terms "**this Agreement**", "**hereof**", "**herein**", "**hereby**", "**hereunder**" and similar expressions refer to this Agreement and not to any particular Article or Section hereof.

(b) Singular/Plural; Derivatives - Whenever the singular or masculine or neuter is used in this Agreement, it shall be interpreted as meaning the plural or feminine or body politic or corporate, and vice versa, as the context requires. Where a term is defined herein, a capitalized derivative of such term has a corresponding meaning unless the context otherwise requires.

(c) Including - The word "**including**", when used in this Agreement, means "**including without limitation**".

(d) Accounting References - Where the character or amount of any asset or liability or item of income or expense is required to be determined, or any consolidation or other accounting computation is required to be made for the purposes of this Agreement, the same shall be done in accordance with GAAP, unless expressly stated otherwise.

(e) Currency - Unless otherwise indicated, all dollar amounts referred to in this Agreement are in lawful money of Canada.

(f) Trade Meanings - Terms and expressions that are not specifically defined in this Agreement, but which have generally accepted meanings in the custom, usage and literature of the electricity industry in Canada as of the Effective Date, shall have such generally accepted meanings when used in this Agreement, unless otherwise specified elsewhere in this Agreement.

(g) Statutory References - Any reference in this Agreement to a statute shall include, and shall be deemed to be, a reference to such statute and to the regulations made

pursuant thereto, and all amendments made thereto (including changes to section numbers referenced herein) and in force from time to time, and to any statute or regulation that may be passed that has the effect of supplementing or replacing the statute so referred to or the regulations made pursuant thereto, and any reference to an order, ruling or decision shall be deemed to be a reference to such order, ruling or decision as the same may be varied, amended, modified, supplemented or replaced from time to time.

(h) Terms Defined in Schedules - Terms defined in a Schedule or part of a Schedule to this Agreement shall, unless otherwise specified in such Schedule or part of a Schedule or elsewhere in this Agreement, have the meaning set forth only in such Schedule or such part of such Schedule.

(i) Calculation of Time - Where, in this Agreement, a period of time is specified or calculated from or after a date or event, such period is to be calculated excluding such date or the date on which such event occurs, as the case may be, and including the date on which the period ends.

(j) Time Falling on Non-Business Day - Whenever the time for doing something under this Agreement falls on a day that is not a Business Day such action is to be taken on the first following Business Day.

(k) No Drafting Presumption - The Parties acknowledge that their respective legal advisors have reviewed and participated in settling the terms of this Agreement and agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting Party shall not apply to the interpretation of this Agreement.

(l) Approvals, etc. - Except where otherwise expressly provided herein, whenever an action referred to in this Agreement is to be "**approved**", "**decided**" or "**determined**" by a Party or requires a Party's or its Representative's "**consent**", then (i) such approval, decision, determination or consent by a Party or its Representative must be in writing, and (ii) such Party or Representative shall be free to take such action having regard to that Party's own interests, in its sole and absolute discretion.

(m) Subsequent Agreements - Whenever this Agreement requires the Parties to attempt to reach agreement on any matter, each Party shall use commercially reasonable efforts to reach agreement with the other Party, negotiating in good faith in a manner characterized by honesty in fact and the observance of reasonable commercial standards of fair dealing. Any failure of the Parties to reach agreement where agreement is required shall constitute a Dispute and may be submitted by a Party for resolution pursuant to the Dispute Resolution Procedure.

(n) References to Other Agreements - Any reference in this Agreement to another agreement, other than the Water Lease, shall be deemed to be a reference to such agreement and all amendments made thereto in accordance with the provisions of such agreement (including changes to section numbers referenced herein) as of the Effective Date. Where a term used in this Agreement is defined by reference to the

definition contained in another agreement, the definition used in this Agreement shall be as such is defined in the applicable agreement as of the Effective Date.

1.3 Conflicts between Parts of Agreement

If there is any conflict or inconsistency between a provision of the body of this Agreement and that of a Schedule or any document delivered pursuant to this Agreement, the provision of the body of this Agreement shall prevail.

1.4 Applicable Law and Submission to Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of NL and the Federal laws of Canada applicable therein, but excluding all choice-of-law provisions. Subject to **Article 12**, each Party irrevocably consents and submits to the exclusive jurisdiction of the courts of NL with respect to all matters relating to this Agreement, subject to any right of appeal to the Supreme Court of Canada. Each Party waives any objection that it may now or hereafter have to the determination of venue of any proceeding in such courts relating to this Agreement or that it may now or hereafter have that such courts are an inconvenient forum.

1.5 Schedules

The following are the Schedules attached to and incorporated by reference in this Agreement, which are deemed to be part hereof:

Schedule 1	-	Base Block Capital Costs Recovery
Schedule 2	-	Initial Load Forecast and Base Block Energy
Schedule 3	-	MF Project Description
Schedule 4	-	Form of Assignment
Schedule 5	-	Dispute Resolution Procedure
Schedule 6	-	General Security Agreement
Schedule 7	-	Confidential Information
Schedule 8	-	Step-In Agreement

ARTICLE 2
CONSTRUCTION

2.1 Construction of MF Plant

Muskrat shall undertake all Development Activities using Good Utility Practice and in compliance with Applicable Law so as to be capable of delivering the MF Plant Capacity in accordance with Reliability Standards to the Muskrat Delivery Points.

2.2 Joint Development Committee

A Joint Development Committee ("**JDC**") shall be established to provide NLH with information for the design, engineering, procurement, construction and commissioning of the MF Plant to be undertaken by Muskrat, as follows:

(a) Composition - The JDC shall consist of two representatives appointed by each of Muskrat and NLH. A Muskrat representative shall be chair and a NLH representative shall be vice-chair. A quorum for JDC meetings shall be the chair and the vice-chair, or their delegates as authorized by this Agreement;

(b) Duration - The JDC shall be established immediately following the Effective Date and continue to exist until the later of (i) the day that is one year after the day MF Plant Commissioning is completed, and (ii) the day when all Claims with respect to Development Activities and associated costs are settled;

(c) Mandate - The JDC shall meet on a regular basis to provide a common understanding of project progress and to discuss issues related to the Development Activities and MF Plant Commissioning;

(d) Topics - The following topics shall be reported upon at meetings of the JDC:

(i) monthly construction report;

(ii) safety performance;

(iii) environmental assessment update, performance and compliance;

(iv) budget and monthly actual to budget variance reports with respect to Development Capital Costs;

(v) update on expected Base Block Capital Costs Recovery;

(vi) reports of forecasted funding requirements for the MF Plant for the upcoming calendar quarter;

(vii) activity status reports (percent of project completion compared to percent of budget spent to date);

(viii) changes to the MF Project Description;

(ix) financing updates;

(x) labour strategy and updates; and

(xi) other topics as the JDC may from time to time determine.

(e) Meetings - The JDC shall meet at least monthly until the day that is one year after the day MF Plant Commissioning is completed.

2.3 Regulatory Approvals, Applicable Law & Reliability Standards

(a) Muskrat shall at all times during the Construction Period comply with Applicable Law and undertake the Development Activities such that the MF Plant shall meet Reliability Standards upon MF Plant Commissioning.

(b) Muskrat shall at all times during the Term of this Agreement procure and maintain in full force and effect all necessary Regulatory Approvals required by all Applicable Law to design, engineer, procure, construct, commission, operate and maintain the MF Plant or which are otherwise required for the performance of its obligations under this Agreement.

ARTICLE 3
ENERGY AND CAPACITY MANAGEMENT

3.1 Energy Allocation

(a) Initial Load Forecast & Base Block Energy - **Schedule 2** sets forth, for each Operating Year, the Initial Load Forecast and the Base Block Energy.

(b) Supplemental Block Energy - The "**Supplemental Block Energy**" means, in each Operating Year until the end of the 50th Operating Year, an amount of Energy equal to the lesser of:

(i) the amount of Energy by which the actual NL Native Load for such Operating Year exceeds the Initial Load Forecast for such Operating Year; and

(ii) the then current estimated long term annual average Energy production of the MF Plant less the (A) Base Block Energy and (B) Contracted Commitments.

(c) NLH Deferred Energy - Throughout the Term, Muskrat shall maintain an account of Energy for NLH which shall never be less than zero (the "**NLH Deferred Energy**"), that:

(i) shall be increased (A) during the Commissioning Period, by the amount of Energy designated by NLH to be deferred pursuant to **Section 3.3(a)**, and (B) at the end of each Operating Year until the end of the 50th Operating Year, by the amount of Energy by which the Delivered Energy in such Operating Year is less than the aggregate of Base Block Energy and Supplemental Block Energy; and

(ii) shall be decreased (A) at the end of each Operating Year, by the amount of Energy by which the Delivered Energy in such Operating Year exceeds the aggregate of the Base Block Energy and the Supplemental Block Energy and (B) as and when determined, by the NLH External Market Sales.

Subject to **Section 3.2(a)**, the NLH Deferred Energy shall be available to NLH for forecasting and Scheduling during an Operating Year. After the 50th Operating Year and subject to **Section 3.2(a)**, NLH Deferred Energy shall be Scheduled by NLH and delivered by Muskrat in a manner that reduces NLH Deferred Energy to zero as soon as is commercially reasonable.

(d) Order of Delivery - Energy forecasted and Scheduled by NLH under this Agreement for delivery by Muskrat to NLH in each Operating Year until the end of the 50th Operating Year, shall come first from Base Block Energy, then from Supplemental Block Energy and then from NLH Deferred Energy. NLH may only forecast and Schedule Energy for delivery by Muskrat after the 50th Operating Year from then remaining NLH Deferred Energy, if any.

(e) Residual Block - The Parties acknowledge and agree that:

(i) Except to satisfy the NS Block, Muskrat may not enter into any Contracted Commitments in respect of any period for which NLH has not yet provided a 156 Week Forecast. Energy, Capacity and associated GHG Credits attributed to the MF Plant not otherwise forecasted or Scheduled by NLH in the then current 156 Week Forecast, Four Week Schedule and NL Native Load Day-Ahead Schedule (with the information in more recent 156 Week Forecasts, Four Week Schedules and NL Native Load Day-Ahead Schedules replacing the corresponding periods of prior 156 Week Forecasts, Four Week Schedules and NL Native Load Day-Ahead Schedules) shall be available for Scheduling and sale by Muskrat for the purpose of making non-firm sales and Contracted Commitments excluding the NS Block and shall be referred to as the "**Residual Block**".

(ii) Any forecasting and Scheduling of Residual Block by Muskrat shall be subject to the following restrictions and limitations: (A) the then current 156 Week Forecasts, Four Week Schedules and NL Native Load Day-Ahead Schedules, (B) Capacity of the MF Plant, (C) WMA limitations, (D) hydrological conditions, and (E) Forgivable Events. Any such Residual Block sold pursuant to Contracted Commitments shall no longer be available for future forecasting or Scheduling by NLH.

(iii) NLH shall have no interest in Residual Block Energy or associated Capacity or, except to the extent of NLH External Market Sales, the proceeds of sale thereof and Muskrat shall have the right to assign its rights to Residual Block Energy and associated Capacity to an Affiliate of Muskrat at any price determined by Muskrat in its sole discretion, including $1.00.

(f) Hydrological Risk - NLH shall operate its renewable energy resources in accordance with Good Utility Practice to satisfy the NL Native Load and manage hydrological risk. Provided that NLH operates its facilities and assets in accordance with Good Utility Practice, if due to dry conditions on the island portion of NL, NLH expects that it will be unable to satisfy NL Native Load using the Base Block Energy and the Supplemental Block Energy and its other facilities and assets, then:

(i) NLH may designate Base Block Energy from Operating Years subsequent to the current Operating Year to satisfy such shortfall; and

(ii) Muskrat will allocate Base Block Energy from such future Operating Years to address the Energy shortfall related to such hydrological conditions and the Base Block Energy so allocated will no longer be available to NLH in such future Operating Years.

Base Block Payments will not be varied by any such allocation, and all computations under **Schedule 1** shall continue as if the Base Block Energy had been delivered and sold to NLH as set forth in **Schedule 2**.

3.2 Forecasting and Scheduling Principles

(a) Restrictions on Forecasting & Scheduling - NLH shall only forecast and Schedule Energy and Capacity attributable to the MF Plant to serve NL Native Load in accordance with Good Utility Practice and subject to the following restrictions and limitations: (i) Contracted Commitments, (ii) Capacity of the MF Plant, (iii) WMA limitations, (iv) hydrological conditions, and (v) Forgivable Events.

(b) Availability Commitment - Subject to **Section 3.2(a)**, (i) all Energy and Capacity from the MF Plant that is forecasted or Scheduled by NLH in the 156 Week Forecast, Four Week Schedule or NL Native Load Day-Ahead Schedule shall be and remain available to NLH on a firm and priority basis, and (ii) NLH may at any time adjust the hourly Energy delivery requirements for NL Native Load in accordance with the Scheduling Protocol.

(c) Good Faith - NLH and Muskrat acknowledge and agree that while preparing forecasts and schedules for Energy delivery and deferral, each shall do so in good faith and NLH shall at all times exercise reasonable commercial efforts to ensure such forecasts and schedules are consistent with the anticipated NL Native Load.

(d) Plant Operations and Reservoirs - The Parties agree that in order to achieve the principles set forth in this **Section 3.2**, NLH shall have maximum flexibility in

Scheduling Energy and Capacity from the MF Plant for the purpose of meeting the NL Native Load provided that such flexibility shall be subject to the provisions of **Section 3.2(a)**. As a consequence, all forecasting and Scheduling in respect of the delivery of Delivered Energy shall be conducted to reflect the foregoing and Muskrat shall deliver to NLH from time to time, upon reasonable request:

(i) Operating Characteristics - all information available to Muskrat regarding operating characteristics of the MF Plant, including turbine/generator capability and efficiency, tailwater and headwater relationships, spillway characteristics, reservoir storage volume curves and all other information as may be reasonably requested by NLH for the purpose of modeling production scheduling of the MF Plant;

(ii) Hydrological Information - all historic, current and forecasted hydrological information available to Muskrat with respect to the Churchill River and its tributaries and other information as may be reasonably requested by NLH for the purpose of establishing current and long term forecasts for production scheduling of the MF Plant;

(iii) Water Management Agreement - all information available to Muskrat relevant to water management and the WMA, including quantities of stored Energy, upstream storage capability along the Churchill River, water spillage amounts and other information as may be reasonably requested by NLH to enable NLH to assess storage opportunities and spillage risks.

3.3 Commissioning Period

(a) NLH Right to Commissioning Period Block - During the Commissioning Period and subject to **Section 3.2(a)**, NLH may at its sole discretion, as set forth in the applicable 156 Week Forecasts, Four Week Schedules and NL Native Load Day-Ahead Schedules:

(i) take delivery of the Commissioning Period Block, in whole or in part, to meet the NL Native Load; and/or

(ii) request Muskrat to defer the Energy portion of the Commissioning Period Block, in whole or in part, causing such deferred portion to become NLH Deferred Energy provided Muskrat is able to do so acting reasonably and in accordance with Good Utility Practice.

(b) Muskrat May Designate Residual Block Deliveries - Subject to Muskrat's obligations pursuant to the ECA to supply the NS Block to Emera upon the commissioning of three generating units at the MF Plant, Muskrat may designate any Commissioning Period Block not delivered or deferred at the request of NLH pursuant to **Section 3.3(a)** to form part of the Residual Block.

(c) Ancillary Services - NLH shall be entitled to the Ancillary Services related to the Commissioning Period Block concurrently with the delivery thereof.

3.4 NLH Forecasting and Scheduling - Supply Period

(a) NLH 156 Week Forecast - Subject to **Section 3.2(a)** and taking into account the information provided by Muskrat pursuant to **Section 3.5(a)**, no later than seven days before the First Power Date and no later than three days before each calendar quarter thereafter to the end of the Supply Period, NLH shall deliver to Muskrat a rolling 156 week forecast (the "**156 Week Forecast**") that includes:

(i) Energy and Capacity required by NLH from Muskrat weekly on a firm basis and on a potential basis to service NL Native Load;

(ii) any changes to the Load Forecast;

(iii) NLH's good faith estimate of anticipated NLH Deferred Energy in each Operating Year of such 156 Week Forecast;

(iv) Target NLH External Market Sales for each Operating Year; and

(v) estimated Base Block Energy designated pursuant to **Section 3.1(f)(i)**.

(b) NLH Four Week Schedule - Subject to **Section 3.2(a)** and taking into account Muskrat's schedule in **Section 3.5(b)**, no later than seven days before the First Power Date and no later than three days before each calendar week thereafter to the end of the Supply Period, NLH shall deliver to Muskrat a schedule of NLH's firm and potential requirements for the next four weeks (the "**Four Week Schedule**") that includes:

(i) Energy in each hour required by NLH from Muskrat to be delivered to service NL Native Load; and

(ii) Capacity to be maintained available in each hour required by NLH from the MF Plant to meet NLH's Reserve requirements.

Each four week schedule shall replace any schedule previously delivered pursuant to this **Section 3.4(b)** and shall be replaced by the NL Native Load Day-Ahead Schedule for each day to which such NL Native Load Day-Ahead Schedule relates.

(c) NL Native Load Day-Ahead Schedule - Subject to **Section 3.2(a)** and taking into account Muskrat's schedule in **Section 3.5(c)**, no later than the day prior to the First Power Date and on each day of the Supply Period, NLH shall deliver to Muskrat a schedule of NLH's firm requirements of Energy and Capacity to service the NL Native Load for the next day ("**NL Native Load Day-Ahead Schedule**") in compliance with the Scheduling Protocol.

(d) Delivery by Muskrat and Acceptance by NLH - Subject to a Forgivable Event, Muskrat shall deliver and NLH shall accept at the Delivery Points the Energy Scheduled in accordance with the NL Native Load Day-Ahead Schedule and Muskrat shall maintain at the Delivery Points the Capacity Scheduled in accordance with the NL Native Load Day-Ahead Schedule, as each may be adjusted in accordance with **Sections 3.2(b)**.

(e) Ancillary Services - NLH shall be entitled to the Ancillary Services related to the Delivered Energy concurrently with the delivery thereof.

3.5 Muskrat Forecasting and Scheduling - Supply Period

(a) Contracted Commitments - Muskrat shall notify NLH of all information available to Muskrat regarding the timing and Scheduling of Contracted Commitments upon entering into contracts therefor.

(b) Muskrat Four Week Schedule - No later than eight days before the First Power Date and no later than four days before each calendar week thereafter to the end of the Supply Period or at a time determined in accordance with the WMA, Muskrat shall deliver to NLH a schedule that sets forth all Contracted Commitments required for the following four week period that includes:

(i) Energy in each hour required by Muskrat from the MF Plant to fulfill Contracted Commitments; and

(ii) Capacity to be maintained available in each hour required by Muskrat from the MF Plant to fulfill Contracted Commitments.

Each four week schedule shall replace any schedule previously delivered pursuant to this **Section 3.5(b)** and shall be replaced by the External Market Day-Ahead Schedule for each day to which such External Market Day-Ahead Schedule relates.

(c) Muskrat External Market Day-Ahead Schedule - On or before the day before the First Power Date and on each day of the Supply Period, Muskrat shall deliver to NLH a schedule of Contracted Commitments for the following day ("**External Market Day-Ahead Schedule**") in compliance with the Scheduling Protocol.

(d) MF Plant Limitations - Muskrat shall notify NLH at the earliest reasonable opportunity of any event or condition which would potentially or actually limit Muskrat's ability to deliver Energy and maintain Capacity reflected in the NL Native Load Day-Ahead Schedule whether caused by hydrological conditions, the WMA or otherwise.

(e) System Emergencies - Notwithstanding anything to the contrary herein, when a System Emergency occurs, Muskrat shall curtail deliveries of Residual Block sales which are not Contracted Commitments to the extent necessary, in order to utilize

as much of the MF Plant Capacity as is available to supply Energy and Capacity to NLH to enable NLH to meet the NL Native Load.

(f) Scheduling Protocol - At least six months prior to the anticipated First Power Date, Muskrat and NLH shall develop a protocol for Scheduling daily deliveries of Energy and Capacity pursuant to this Agreement (the "**Scheduling Protocol**").

3.6 Ancillary Services

In connection with its obligation to provide the Ancillary Services, Muskrat shall grant:

(a) control of the MF Plant generating units to the Energy Control Centre to allow the NLSO to use such units for automatic generation control and maintaining system Reserve requirements to the extent of the MF Plant Capacity, subject to the WMA, equipment and environmental constraints;

(b) control of the MF Plant generating units to the Energy Control Centre to allow the NLSO to use the full voltage regulation and reactive power supply capability of the MF Plant within the operating capability of the MF Plant equipment; and

(c) any other control of the MF Plant capability to the Energy Control Centre required by the NLSO to utilize such capability as required for Reliability of the interconnected electricity system for NL.

ARTICLE 4
PURCHASE AND SALE OF ENERGY

4.1 Commissioning Period Block

(a) Purchase and Sale of Commissioning Period Block - During the Commissioning Period, Muskrat shall deliver to NLH and NLH shall purchase from Muskrat that portion of the Commissioning Period Block which NLH Schedules for delivery and Muskrat shall defer for NLH and NLH shall purchase from Muskrat that portion of the Energy of the Commissioning Period Block designated by NLH pursuant to **Section 3.3(a)**.

(b) Commissioning Period Payment - On the 20th day of each Operating Month during the Commissioning Period, NLH shall pay to Muskrat for the Commissioning Period Block delivered to or deferred at the request of NLH during the previous Operating Month $1.00 or any greater amount designated by NLH ("**Commissioning Period Payment**") plus $1.00 for related Ancillary Services.

(c) Allocation of Commissioning Period Payment - Muskrat shall apply the Commissioning Period Payments towards payment of Development Capital Costs,

which shall have the effect of reducing the costs to be included in calculating the Base Block Capital Costs Recovery.

4.2 Base Block Energy

(a) Purchase and Sale of Base Block Energy - During the Supply Period, Muskrat shall sell to NLH and NLH shall purchase from Muskrat the Base Block Energy.

(b) Base Block Payments - NLH shall pay to Muskrat for the Base Block Energy on the first day of each Operating Month, as applicable, during the Supply Period ("**Base Block Payments**") an amount equal to the aggregate of:

(i) the Base Block Capital Costs Recovery (calculated and adjusted in accordance with **Schedule 1**); and

(ii) the Estimated O&M Costs in respect of such Operating Month.

(c) True Up of Estimated O&M Costs

(i) Within 60 days after the end of each Quarter during which Base Block Payments have been paid by NLH to Muskrat, Muskrat shall deliver a Notice (the "**Actual Quarterly O&M Cost Accounting**") setting out the total actual aggregate O&M Costs incurred by Muskrat in respect of the Operating Months comprising such Quarter (the "**Actual Quarterly O&M Costs**"). The Actual Quarterly O&M Cost Accounting shall set out the Actual Quarterly O&M Costs incurred by Muskrat by component part (using the definition of O&M Costs as a guide), together with such other detail and supporting documentation as reasonably required by NLH to review the calculation of the Actual Quarterly O&M Costs.

(ii) Should the Actual Quarterly O&M Costs exceed the Estimated O&M Costs recovered by Muskrat for the given Quarter pursuant to **Section 4.2(b)**, NLH shall pay to Muskrat within 15 days of receipt by NLH of the Actual Quarterly O&M Cost Accounting the amount by which the Actual Quarterly O&M Costs exceeded the Estimated O&M Costs for the applicable Quarter. Should the Actual Quarterly O&M Costs be less than the sum of the Estimated O&M Costs paid by NLH for the given Quarter pursuant to **Section 4.2(b)**, Muskrat shall within 15 days of delivery of the Actual Quarterly O&M Cost Accounting, at its option, either (i) pay to NLH the amount by which the Estimated O&M Costs for the applicable Quarter exceeded the Actual Quarterly O&M Costs, or (ii) deliver to NLH a Notice authorizing NLH to credit against the next immediate Base Block Payments the amount by which the Estimated O&M Costs for the applicable Quarter exceeded the Actual Quarterly O&M Costs.

(d) Base Block Payments (Irrevocable Obligation) - Notwithstanding any other provision of this Agreement, including **Section 15.1**, until the date on which the Initial

Financing is Paid in Full, NLH's obligations to make the Base Block Payments shall be absolute, unconditional and irrevocable, and shall not be subject to any reductions under any circumstances whatsoever.

(e) Base Block Payments (Pro Rata) - At all times subsequent to the date on which the Initial Financing is Paid in Full and until the end of the Supply Period, if NLH does not receive the entire Energy and Capacity provided for in the NL Native Load Day-Ahead Schedule and the NLH Deferred Energy is not otherwise deferred or sold in accordance with this Agreement, then NLH shall pay for only the pro rata portion of the Base Block Payments for such Energy received, deferred or sold.

4.3 Supplemental Block Energy

During the Supply Period, Muskrat shall sell to NLH and NLH shall purchase from Muskrat the Supplemental Block Energy for the consideration of $1.00 for each Operating Year, payable in advance on the first day of each Operating Year.

4.4 Ancillary Services

During the Supply Period, Muskrat shall sell to NLH and NLH shall purchase from Muskrat the Ancillary Services provided in connection with the Delivered Energy for the consideration of $1.00 for each Operating Year, payable in advance on the first day of each Operating Year.

4.5 External Market Energy Sales

(a) Maximizing Price - Muskrat shall use commercially reasonable efforts to maximize the price received when entering into Residual Block Sales outside NL.

(b) Annual Report - Within 30 days following the end of each Operating Year, Muskrat shall deliver to NLH a monthly summary ("**Annual Energy Report**") of the following for such Operating Year, in a format and providing such details as are reasonably required by NLH:

(i) Delivered Energy;

(ii) Delivered Capacity;

(iii) NLH Deferred Energy;

(iv) Contracted Commitments;

(v) the amount of Delivered Energy to NLH in excess of Base Block Energy including itemization of Base Block Energy designated pursuant to **Section 3.1(f)(i)**, Supplemental Block Energy and then accumulated NLH Deferred Energy for which NLH is required to pay in accordance with **Section 4.5(e)**;

(vi) Energy that was Scheduled by NLH pursuant to this Agreement which was not delivered, with reasons for such non-deliveries;

(vii) the amount of Residual Block Energy and Capacity sold into External Markets (the "**Residual Block Sales**");

(viii) the Annual Average Sales Price including the calculation thereof; and

(ix) any water spilled.

(c) NLH shall have the right, within five Business Days of receipt of the Annual Energy Report for an Operating Year, exercisable in good faith, to specify how much of the NLH Deferred Energy, not to exceed the lesser of (i) the Residual Block Sales and (ii) Target NLH External Market Sales, shall be deemed to have been sold on NLH's behalf ("**NLH External Market Sales**").

(d) Subject to the payment by NLH to Muskrat of the Base Block Payments for an Operating Year, Muskrat shall pay to NLH within 45 days after such Operating Year an amount equal to the sum of:

(i) the product of (A) NLH External Market Sales (excluding sales within NL) multiplied by (B) the Annual Average Sales Price, for such Operating Year, plus

(ii) the total of all amounts received by Muskrat for Residual Block Sales specified by NLH pursuant to **Section 4.5(c)** to have been sold by Muskrat within NL on NLH's behalf, less all reasonable costs incurred in respect of such sales,

to a maximum of the value of the Residual Block Sales in respect of Energy.

(e) NLH shall pay to Muskrat within 45 days of such Operating Year an amount equal to the product of (i) the amount by which Delivered Energy in such Operating Year from the MF Plant exceeds the aggregate of Base Block Energy (including Base Block Energy designated pursuant to **Section 3.1(f)(i)**), Supplemental Block Energy and then accumulated NLH Deferred Energy multiplied by (ii) the Annual Average Sales Price for such Operating Year.

4.6 **Risk and Responsibility**

(a) Muskrat shall indemnify NLH pursuant to **Article 16** for any Third Party Claim, and any Claims of any kind by the NLSO, caused by the generation, sale and delivery, or the failure to generate or deliver Energy, Capacity, Ancillary Services and GHG Credits required to be supplied by Muskrat hereunder to the Delivery Points.

(b) Subject to **Section 4.8**, NLH shall indemnify Muskrat pursuant to **Article 16**, for any Third Party Claim, and any Claims of any kind by the NLSO, caused by the purchase

and receipt by NLH, or the failure by NLH to take delivery of what would otherwise be Delivered Energy purchased hereunder and the transmission or failure to effect transmission of such Energy at and from the applicable Delivery Points.

4.7 GHG Emissions and Credits

(a) NLH Owns Delivered Energy, GHG Credits - NLH shall acquire from Muskrat and thereafter own all GHG Credits related to the Delivered Energy concurrently with the delivery of the Delivered Energy to NLH and NLH may in its sole and absolute discretion sell such GHG Credits in whole or in part to any Persons.

(b) Assignment to NLH of GHG Credits - To give effect to **Section 4.7(a)**, Muskrat hereby assigns to NLH, unconditionally and absolutely, all of its right, title and interest in and to all of the GHG Credits attributable to the Delivered Energy free and clear of any encumbrances. Such assignment shall be effective from time to time as and when such GHG Credits have been created and the associated Energy is delivered to NLH.

(c) Changes to GHG Credits Rules - If any Authorized Authority adopts one or more programs with respect to the certification or regulation of Energy delivered pursuant to this Agreement from the MF Plant based on greenhouse gas emissions or other environmental standards, at the request of NLH acting reasonably, Muskrat shall make commercially reasonable efforts to apply for and/or register the MF Plant under such certification or regulation, provided NLH shall reimburse Muskrat on a pro rata basis (based upon the proportionate entitlement of NLH to Base Block Energy relative to all Energy produced from the MF Plant for the first 50 Operating Years) for all expenses incurred by Muskrat in connection with any such application, certification or regulation.

4.8 Effect of Service Interruption

If (a) the NLSO discontinues the receipt of Energy and Capacity from Muskrat pursuant to Section 5.5 of the GIA, or (b) Labrador Transco or the NLSO discontinues the receipt of Energy and Capacity upon the request of Muskrat as a result of a System Emergency or for reasons of safety, such discontinuance shall not be construed as a breach of contract by NLH of its obligations to take delivery of or effect the transmission of Energy and Capacity from Muskrat.

4.9 Title

NLH shall take title to the Delivered Energy upon delivery to the Delivery Points and upon such delivery, NLH shall receive title to all associated Ancillary Services and GHG Credits associated with the Delivered Energy.

ARTICLE 5
JOINT OPERATIONS COMMITTEE

5.1 Establishment and Duration of JOC

Coincident with the First Power Date, a Joint Operations Committee ("**JOC**") for the MF Plant shall be established consisting of representatives appointed by each of Muskrat and NLH. From time to time Muskrat and NLH may appoint individuals to replace other representatives previously appointed.

5.2 JOC Composition, Quorum, Duration and Procedures

(a) Composition - The JOC shall at all times be composed of two representatives appointed by each of Muskrat and NLH. Each of Muskrat and NLH shall notify the other of the identity of its members and shall make reasonable efforts to maintain continuity of its members on the JOC. Each of Muskrat and NLH shall designate one of its representatives on the JOC to be the chair and vice-chair, respectively. Where the chair or vice-chair is unable to act, he or she may from time to time delegate his or her responsibilities to another JOC representative of, respectively, Muskrat or NLH.

(b) Quorum - Subject to **Section 5.4(k)**, the quorum for the transaction of business by the JOC shall be the chair and the vice-chair or their respective delegates.

(c) Duration - The JOC shall be established on the First Power Date and shall continue until the termination of this Agreement.

(d) Procedures - Except as otherwise provided for in this Agreement, the JOC shall establish procedures for the conduct of its affairs.

5.3 Mandate of and Information to JOC

(a) Mandate - The JOC shall coordinate, review and approve all O&M Activities. The following matters shall be submitted for JOC approval ("**JOC Matters**"):

(i) Muskrat's proposed Annual Maintenance Plan;

(ii) Muskrat's proposed LTAMP for the MF Plant, updated periodically;

(iii) for each Operating Year, annual operating and capital budgets for O&M Costs, including monthly cashflows;

(iv) other items to be approved by the JOC from time to time; and

(v) prior to implementation by Muskrat, any material changes or updates to any of the foregoing.

(b) Information to JOC - Muskrat shall, in a timely manner and on an ongoing basis from the First Power Date until the end of the Supply Period, submit to the JOC the following:

(i) copies of material communications with Authorized Authorities relating to O&M Activities, including communications with environmental regulators, periodic regulatory reports and correspondence relating to disputes with Authorized Authorities;

(ii) annually, within 30 days after policy renewal, certificates of insurance or other appropriate evidence that the insurance required by **Article 11** is in force;

(iii) reports of O&M Activities with scope and detail established by the JOC from time to time;

(iv) inspection and condition reports completed by Muskrat's engineers, original equipment manufacturers, operating and maintenance contractors, Financing Parties' engineers, insurance providers' engineers or other Persons completing such reports;

(v) updates and revisions of the LTAMP;

(vi) updates on O&M Costs; and

(vii) such other information as the JOC may reasonably require.

The JOC shall review, consider and endeavour to reach consensus as to the JOC Matters submitted by Muskrat pursuant to this **Section 5.3(b)**. If the JOC reaches consensus on a JOC Matter, either initially or after revisions requested by the JOC, the JOC Matters will be considered approved by the JOC and Muskrat shall implement the O&M Activities and other matters referred to in the JOC Matters in the manner approved by the JOC. If the JOC fails to reach consensus on a JOC Matter, the issues preventing consensus shall be resolved pursuant to the Dispute Resolution Procedure.

(c) O&M Standards - From time to time during the Supply Period, the JOC may determine the O&M Standards required by the JOC to be adopted, followed or maintained by Muskrat in carrying out the O&M Activities. Any such standards must comply with Good Utility Practice. Muskrat shall implement any such standards within such reasonable time as may be set by the JOC.

(d) Approval Conditions Permitted - The JOC may approve any matters for which its approval is required under this Agreement subject to such conditions as it may direct, and it may also direct that amendments be made to any matters submitted to it for approval.

(e) Support for Approvals - Muskrat shall cause all matters that are to be approved by the JOC under this Agreement to be brought before the JOC in a timely manner, and shall provide to the JOC all related background information and any other information requested by the JOC.

5.4 Meetings of JOC

(a) Regular Meetings - The JOC shall meet not less frequently than semi-annually during the Commissioning Period and the Supply Period in accordance with the schedule determined by the JOC, or at such more frequent intervals as the JOC may decide from time to time.

(b) Calling of Meetings - Either the chair or the vice-chair may call a meeting of the JOC by delivering a notice to the JOC members. Either Party may request a meeting of the JOC by delivering a notice to the chair or the vice-chair of the JOC to that effect. Upon receiving notice of a requested meeting, the chair or the vice-chair, as applicable, shall promptly call a meeting by delivering a notice of not less than five Business Days to the JOC members to that effect.

(c) Waiver of Notice - Except as otherwise provided for in this Agreement, including those circumstances described in **Section 5.4(d)**, the notice periods set forth in **Sections 5.4(b)** and **5.4(f)** may only be waived with the unanimous consent of the JOC.

(d) Abridgement of Notice Period - For any situations involving or potentially involving:

(i) the actual or imminent threat of loss of life or injury or damage to property or the environment; or

(ii) a required response to a notice contemplated by **Sections 5.4(b)** and **5.4(f)** that must be made prior to the expiry of such notice,

the advance notice period for calling a meeting of the JOC may be abridged to such period as is reasonable in the particular circumstances, and any such meeting shall be considered duly constituted.

(e) Meeting Notice Particulars - Each notice of a meeting of the JOC shall contain:

(i) the date, time and location of the meeting; and

(ii) an agenda of the matters to be considered at the meeting together with sufficient information to permit the JOC members to properly and effectively consider the matters to be discussed at such meeting.

(f) Additions to Agenda - A member of the JOC may, by notice to the other members given not less than three Business Days prior to a meeting of the JOC, add matters to the agenda for that meeting, provided sufficient information is provided with such

notice to permit the other JOC members to properly and effectively consider the matters referred to in such notice.

(g) Non-Agenda Matters - At the request of a member of the JOC, and provided both the chair and the vice-chair or their designates consent, the JOC may, at any meeting of the JOC, consider and decide on any matter not otherwise on the agenda for that meeting.

(h) Location of Meetings - Meetings of the JOC shall be held in St. John's, NL, or such other locations as may be determined by the JOC.

(i) Chair's Duties for Meetings - With respect to meetings of the JOC, the chair's duties shall include:

(i) timely preparation and distribution of the notices of meetings contemplated by **Sections 5.4(b)** and **5.4(f)**, with draft agendas and supporting material;

(ii) organization and conduct of the meetings; and

(iii) preparation of written minutes of the meetings.

If the chair fails to perform any of his or her duties, such duties may be performed by the vice-chair.

(j) Authority to Vote - The JOC shall operate on the basis of consensus, but in order to determine if consensus exists, votes may be required. The representatives of a Party on the JOC must be duly authorized to represent that Party with respect to any matter that is within the powers of and properly before the JOC. The Muskrat representatives and the NLH representatives shall separately determine the positions of Muskrat and NLH respectively, and each Party shall be entitled to one vote without any duty of care or fairness to the other Party. If the two positions are not or cannot be brought to agreement, consensus shall not have been achieved.

(k) Failure to Achieve Quorum - If a quorum for a meeting of the JOC is not present at an otherwise duly constituted meeting of the JOC, that meeting shall be adjourned, but may be reconvened upon not less than five days' prior Notice given by any member of the JOC to the other members of the JOC, and at such adjourned meeting the JOC members attending shall constitute a quorum.

(l) Advisors - Each Party may, at its cost, or as otherwise agreed by the Parties, invite to any JOC meeting such reasonable number of technical and other advisors it considers necessary or appropriate to address the matters being considered at the meeting.

(m) Telephone or Video Conference Meetings - Participation in JOC meetings for purposes of determining a quorum and otherwise may be by telephone or other electronic telecommunication or video conference device that permits all Persons

participating in the meeting to hear and communicate with each other simultaneously, and all Persons so participating shall be considered present at that meeting for all purposes.

(n) Minutes - The chair or the vice-chair presiding at a meeting of the JOC shall deliver to each member of the JOC draft minutes of each JOC meeting within 14 days following the meeting. The minutes shall be considered for approval at the next meeting of the JOC.

5.5 Resolution in Writing

An original, facsimile copy or other electronic image copy of a resolution of the JOC signed by the chair and the vice-chair or their respective designates (including by counterpart) shall be effective as if passed at a duly called meeting of the JOC.

5.6 Decisions of JOC Binding

Except as otherwise expressly provided in this Agreement, all decisions of the JOC shall be conclusive and binding on both Parties for all purposes.

5.7 LTA-JOC

NLH may, at its sole and absolute discretion, elect to require Muskrat to appoint a NLH delegate to the JOC-LTA as defined in and pursuant to the GIA. Upon NLH making such election, Muskrat shall appoint such NLH appointee to the JOC-LTA pursuant to Section 2.5 of the GIA.

ARTICLE 6
PERFORMANCE OF O&M ACTIVITIES

6.1 Muskrat's Responsibilities

From the First Power Date and thereafter until the end of the Supply Period Muskrat shall:

(a) perform the O&M Activities;

(b) exercise final Operational Control of the MF Plant, except as otherwise provided in this Agreement;

(c) in the conduct of all O&M Activities considering the remaining term of this Agreement:

(i) apply methods and practices customarily applied in other similar circumstances;

(ii) exercise that degree of care, skill and diligence reasonably and ordinarily exercised by experienced utility operators engaged in similar activities under similar circumstances and conditions;

(iii) comply with Reliability Standards;

(iv) comply with all regulatory requirements of the Authorized Authorities; and

(v) comply with Good Utility Practice;

(d) except in response to a Safety Event or as otherwise necessary and appropriate for the MF Plant in accordance with Good Utility Practice (in which case Muskrat may take immediate action outside the Annual Maintenance Plan provided it makes confirmatory reports to the JOC as soon as practical thereafter), ensure that all O&M Activities are performed pursuant to the Annual Maintenance Plan approved by the JOC;

(e) provide adequate, qualified, competent, and suitably experienced executive, professional, managerial, supervisory, technical and administrative personnel to perform its obligations, including professional engineers and procurement, project management and operation and maintenance personnel;

(f) obtain and maintain in good standing all required Regulatory Approvals;

(g) comply with all Applicable Law, Operating Requirements to the extent applicable, Reliability Standards and relevant Regulatory Approvals;

(h) protect the MF Plant from any damage caused by electrical faults or disturbances on the Bulk Electric System;

(i) comply with valid requests from Authorized Authorities to produce all information relating to the MF Plant and this Agreement;

(j) authorize NLH to test the MF Plant Ancillary Services and production Capacity in accordance with Reliability Standards from time to time upon reasonable notice; and

(k) maintain and operate, at all times, remote monitoring and control facilities to enable the NLSO to continuously monitor and control the MF Plant from the Energy Control Centre including the requirement for the provision of Ancillary Services on the NL Transmission System.

6.2 LTAMP

(a) Preparation and Approval of Plans - Muskrat shall prepare and maintain an LTAMP setting out the Sustaining Activities to take place in each Operating Year containing such information as may be reasonably required by the JOC.

(b) Coordination - Muskrat shall co-operate with the NLSO to ensure that any planned maintenance outages associated with the LTAMP for the MF Plant and the NL Transmission System are coordinated in order to obtain efficiencies and to minimize overall impact of all maintenance on Reliability.

6.3 Maintenance Planning

(a) On or before September 1 in each Operating Year in accordance with the NLH generation outage planning procedure, Muskrat shall deliver to NLH:

(i) a 10 Operating Year ahead maintenance outage plan for the MF Plant which may affect delivery of the Base Block Energy; and

(ii) its requirements for Planned Maintenance Periods that will result in the Contracted Capacity not being available in whole or in part and during which Reliability will be constrained.

(b) NLH and Muskrat shall coordinate Planned Maintenance Periods and, to the extent known, repairs required by reason of Safety Events.

(c) NLH shall, in accordance with its generation outage planning procedures, give notice to Muskrat of the periods in each Operating Year when the Contracted Capacity can be reduced to meet Muskrat's Planned Maintenance Periods requirements.

(d) Muskrat shall notify NLH of Muskrat's chosen final Planned Maintenance Periods in accordance with NLH's generation outage planning procedures.

(e) Muskrat shall deliver to NLH as soon as known, schedules of any unforeseen repairs required by reason of a Safety Event.

(f) Preparation and Approval of Plans - Muskrat shall prepare the Annual Maintenance Plan for:

(i) the first Operating Year, and submit it to the JOC for approval not later than 18 months prior to the anticipated Commissioning Date; and

(ii) each subsequent Operating Year, and submit it to the JOC for approval during the eighth month of the prior Operating Year.

(g) Coordination - Muskrat shall co-operate with the NLSO to ensure that the Annual Maintenance Plans for the MF Plant and the NL Transmission System are coordinated in order to obtain efficiencies and to minimize overall impact of all maintenance and Reliability.

ARTICLE 7
METERING AND DATA EQUIPMENT

7.1 Metering Responsibility

(a) Installation of Metering Equipment - Muskrat shall supply, install, maintain, and pay for the Metering Equipment which shall be utilized to measure and record the Energy produced by the MF Plant or the CFLCo Plant and delivered to the LTA, including power quality parameters specified by NLH. Muskrat shall comply with all Applicable Law regarding the supply, installation and maintenance of the Metering Equipment and such Metering Equipment shall meet the applicable requirements established by Measurement Canada. Applicable requirements include, but are not limited to, ensuring the meters are sealed by Measurement Canada and that the re-seal/re-test of the meters is completed when the seal period expires. The Metering Equipment shall be Measurement Canada approved and Muskrat shall deliver to NLH the notice of approval number issued by Measurement Canada. Muskrat shall install and maintain at its cost a back up meter with the capability to record at least 45 days of data. Muskrat shall advise NLH of any changes to the Metering Equipment in advance or, if advance notice cannot be provided, within 48 hours of the change being made.

(b) Adjustments If No Metering Equipment - If the Metering Equipment is not installed at a Delivery Point, appropriate adjustments shall be made for losses between the metering point and such Delivery Point in accordance with industry practice. Such losses shall be based on factory acceptance tests used to derive transformer resistance. If compensation for losses is used, such compensation method shall be agreed to by Muskrat and NLH and the resultant Energy losses calculated each Operating Month shall be itemized separately on the monthly invoice.

(c) NLH Access to Metering Equipment - Muskrat shall provide NLH access to the Metering Equipment for the purposes of inspection and verification as NLH may reasonably request from time to time. Muskrat shall provide copies of all material documentation and approvals received from Measurement Canada, with respect to the Metering Equipment.

(d) Approval of Metering Equipment - Muskrat shall submit the Measurement Canada notice of approval number and the specifications for the Metering Equipment to the NLSO for review and comment at least 60 calendar days prior to the anticipated First Power Date. If applicable, this shall include the calculation for the correction of Energy and Capacity losses between the metering point and the Delivery Point.

7.2 Verification

If either Party becomes aware of any deficiency in the proper operation of any Metering Equipment, it shall promptly notify the other. Muskrat shall be obligated to attend to such remedial measures regarding the Metering Equipment as may be required to rectify the deficiency, including the repair and replacement thereof. If the deficiency is of such a nature that

the amount of Energy and Capacity supplied and delivered is found to have been inaccurately measured or recorded, the Parties shall endeavour to reach an agreement as to the amount of Energy supplied during such period based on the reasonable estimates of each Party of the load conditions prevailing during such period.

ARTICLE 8
ACCESS, RECORDS, AUDITS, SAFETY & INTERCONNECTION

8.1 Access to the MF Plant

NLH shall have the right, upon reasonable advance notice to Muskrat, to access the MF Plant and the site thereof at all reasonable times for the sole purpose of examining the MF Plant or the construction thereof in connection with the performance of the respective obligations of the Parties under this Agreement, such reasonable advance notice to set forth the purpose of its intended access and the areas it intends to examine. Such access shall not unreasonably interfere with the activities at the MF Plant and shall not compromise the safety of Persons or property. While accessing the MF Plant, all Representatives of NLH shall follow all rules and procedures established by Muskrat for visitors to the site including safety and security. The inspection of the MF Plant or the exercise of any audit rights or the failure to inspect the MF Plant or to exercise audit rights by or on behalf of NLH shall not relieve Muskrat of any of its obligations under this Agreement. No Muskrat Default will be waived or deemed to have been waived solely by any inspection by or on behalf of NLH. In no event will any inspection by NLH hereunder be a representation that there has been or will be compliance with this Agreement and Applicable Law.

8.2 Records and Audits

Each Party shall keep and maintain complete and accurate records and all other data required by either of them for the purpose of proper administration of this Agreement. All such records shall be kept and maintained in accordance with Good Utility Practice and as required by Applicable Law. Records containing information reasonably contemplated to be useful throughout the Construction Period and the Supply Period, including major maintenance records, life cycle management records, hydrological records and design and commissioning records, shall be retained for such periods; all other documents shall be retained for at least seven years. Each Party shall provide or cause to be provided to the other Party reasonable access to the relevant and appropriate operating records or data kept by it or on its behalf relating to this Agreement reasonably required for the other Party to comply with its obligations to Authorized Authorities, to verify information provided in accordance with this Agreement or to verify compliance with this Agreement. Either Party may use its own employees or a mutually agreed third party auditor for the purposes of any such review of records provided that those employees or such auditor shall treat any information received as Confidential Information. Each Party shall be responsible for the costs of its own access and verification activities and shall pay the fees and expenses associated with use of its own third party auditor.

8.3 Communications with Authorized Authorities

Each Party, with respect to the MF Plant, shall, upon written request by the other Party and to the extent permitted by Applicable Law, provide such other Party with copies of all communications and correspondence to any and all Authorized Authorities.

8.4 Safety

Muskrat shall have the right to suspend the delivery, and NLH shall have the right to suspend the acceptance, of all or a part of the Energy Scheduled by NLH for delivery pursuant to this Agreement without breaching this Agreement or incurring liability to the other during a Safety Event, but all such suspensions shall be of a minimum duration as required given the circumstances and, when possible and when consistent with Good Utility Practice, be arranged for a time least objectionable to the Parties, acting reasonably. In the case of such suspension, Muskrat shall not be released of responsibility to deliver the undelivered portion of the Energy Scheduled by NLH pursuant to this Agreement as the amount of such undelivered Energy shall be NLH Deferred Energy, and be available to NLH as such.

8.5 GIA

Muskrat represents and warrants that it has entered into the GIA coincidently with this Agreement and shall maintain the GIA in full force and effect during the Supply Period without amendment, unless consented to by NLH.

8.6 Interconnection

Upon reasonable Notice from NLH, Muskrat shall require Labrador Transco to enter into agreements for the interconnection of the MF Plant with the LTA and the LTA with the NL Transmission System as required by NLH acting reasonably.

ARTICLE 9
INVOICING

9.1 Reports, Statements and Invoices

(a) Monthly Invoice - Muskrat shall prepare and deliver to NLH, on or before the fifth Business Day prior to the commencement of each Operating Month, an invoice for such Operating Month setting out the Base Block Payments to be paid by NLH in respect of such Operating Month. The invoice will include, as a separate line item, the Estimated O&M Costs for such Operating Month, and otherwise be accompanied by such detail and supporting documentation as reasonably required by NLH to review the calculations of the Estimated O&M Costs.

(b) Monthly Meter Data Report - Muskrat shall prepare and deliver to NLH, within one Business Day after the end of each Operating Month, the hourly meter data from the Metering Equipment in an electronic format for Delivered Energy during such Operating Month.

(c) Monthly Metering Statements - Muskrat shall prepare and deliver to NLH, on or before the second Business Day after the end of each Operating Month, a monthly metering statement for such Operating Month.

9.2 Error in Invoice

(a) If an error is found in any invoice rendered, the necessary adjustment shall be made in the next invoice. If either Muskrat or NLH disputes, in good faith, any part of an invoice, such dispute shall be resolved in accordance with the Dispute Resolution Procedure. Any payments that result from the resolution of such disputes shall be provided for in the next invoice following the date of such resolution. Absent manifest error in an invoice, NLH shall nevertheless pay to Muskrat the amount due as set forth in the invoice.

(b) Either Muskrat or NLH may give written notice to the other of an error, omission or disputed amount in an invoice within 24 months after the invoice was issued, together with reasonable detail to support its claim. Except in the case of wilful misstatement or concealment, a previously issued invoice shall be deemed accurate after it has been issued, unless a Party has issued a written notice to the other disputing such invoice prior to the end of such period.

9.3 Set-Off

Other than as expressly set forth in this Agreement, neither Party may withhold, set-off or deduct from any amount otherwise payable under this Agreement to another Party.

9.4 Interest on Overdue Amounts

If NLH fails to pay on the due date any payment or any other amount payable to Muskrat pursuant to this Agreement (or fails to pay within 20 Business Days of demand any sum which is expressed to be payable on demand), NLH shall pay interest to Muskrat on such unpaid amount from the due date or, as the case may be, the date of demand, to the date of actual payment (after as well as before judgment) at the default rate of interest set forth in the Financing Documents.

ARTICLE 10
TAXES

10.1 Supplies and Payments Exclusive of Taxes

(a) Payment of Taxes - Except as otherwise provided, each Party is separately responsible for, and shall in a timely manner discharge, its separate obligations in respect of the collection, payment, withholding, reporting and remittance of all Taxes in accordance with Applicable Law.

(b) Governmental Charges - Subject to **Section 10.1(c)**,

(i) Muskrat shall pay or cause to be paid all Taxes on or with respect to the Delivered Energy arising prior to the Delivery Point;

(ii) NLH shall pay or cause to be paid all Taxes on or with respect to the Delivered Energy at and from the Delivery Point;

(iii) if Muskrat is required by Applicable Law to remit or pay Taxes which are NLH's responsibility hereunder prior to the Initial Financing being Paid in Full, Muskrat shall pay such amounts and NLH shall promptly reimburse Muskrat for such Taxes. If all amounts under the Initial Financing are Paid in Full, Muskrat shall first offset the amount of Taxes so recoverable from other amounts owing by it to NLH under this Agreement, and NLH shall promptly reimburse Muskrat for such Taxes to the extent not so offset;

(iv) if NLH is required by Applicable Law to remit or pay Taxes which are Muskrat's responsibility hereunder prior to the Initial Financing being Paid in Full, NLH shall pay such amounts and Muskrat shall promptly reimburse NLH for such Taxes. If all amounts under the Initial Financing are Paid in Full, NLH shall first offset the amount of Taxes so recoverable from other amounts owing by it to Muskrat under this Agreement, and Muskrat shall promptly reimburse NLH for such Taxes to the extent not so offset; and

(v) nothing shall obligate or cause a Party to pay or be liable to pay any Tax for which it is exempt under Applicable Law.

(c) HST - Notwithstanding **Sections 10.1(a)** and **10.1(b)**, the Parties acknowledge and agree that:

(i) all amounts of consideration, or payments and other amounts due and payable to or recoverable by or from the other Party, under this Agreement are exclusive of any Taxes that may be exigible in respect of such payments or other amounts (including, for greater certainty, any applicable HST), and if any such Taxes shall be applicable, such Taxes shall be in addition to all such amounts and shall be paid, collected and remitted in accordance with Applicable Law;

(ii) if subsection 182(1) of the Excise Tax Act applies to any amount payable by one Party to the other Party, such amount shall first be increased by the percentage determined for "B" in the formula in paragraph 182(1)(a) of the Excise Tax Act, it being the intention of the Parties that such amount be grossed up by the amount of Taxes deemed to otherwise be included in such amount by paragraph 182(1)(a) of the Excise Tax Act;

(iii) if one Party is required to collect Taxes from another Party pursuant to this Agreement, it shall forthwith provide to that other Party such documentation required pursuant to **Section 10.3**;

(iv) if one Party incurs an expense as agent for the other Party pursuant to this Agreement, that Party shall not claim an input tax credit in respect of any Taxes paid in respect of such expense, and shall obtain and provide all necessary documentation required by the other Party to claim, and shall co-operate with the other Party to assist it in claiming, such input tax credit; and

(v) Muskrat is acting as agent for NLH for the purpose of making the supplies of the NLH External Market Sales pursuant to **Section 4.5(c)**, and the Parties shall, upon the request of one of the Parties, acting reasonably, make a joint election pursuant to section 177(1.1) of the Excise Tax Act for Muskrat to report all of the NLH External Market Sales and collect and remit all GST/HST applicable to such sales in accordance with the Excise Tax Act, and the Parties shall, upon the request of one of the Parties, acting reasonably, make any other elections required or beneficial under any other Applicable Law relating to Taxes applicable to the NLH External Market Sales.

(d) Changes in Taxes - Subject to **Sections 10.1(b)** and **10.1(c)**, any New Taxes shall be paid by the Party on whom such New Taxes are imposed by Applicable Law.

(e) Income Taxes and HST - For greater certainty:

(i) NLH is solely responsible for the payment of income taxes and HST payable by NLH; and

(ii) Muskrat is solely responsible for the payment of income taxes and HST payable by Muskrat.

10.2 Determination of Value for Tax Compliance Purposes

(a) Subject to the right of final determination as provided under **Section 10.2(b)**, the Parties agree to co-operate in determining a value for any property or service supplied pursuant to this Agreement for non-cash consideration.

(b) If a Party supplying a property or service under this Agreement for non-cash consideration is required to collect Taxes in respect of such supply, or if a Party acquiring a property or service under this Agreement for non-cash consideration is required to self-assess for Taxes in respect of such property or service, that Party shall determine a value expressed in Canadian dollars for such property or service for purposes of calculating the Taxes collectable or self-assessable, as applicable.

10.3 Invoicing Tax Requirement

All billing statements or invoices (in either case referred to herein as an "**invoice**"), as applicable, issued pursuant to **Article 9** shall include all information prescribed by Applicable Law together with all other information required to permit the Party required to pay Taxes, if any, in respect of such supplies to claim input tax credits, refunds, rebates, remission or other recovery, as

permitted under Applicable Law. Without limiting the foregoing, except as otherwise agreed to by the Parties in writing, all invoices issued pursuant to this Agreement shall include all of the following particulars:

(a) the HST registration number of the supplier;

(b) the subtotal of all HST taxable supplies;

(c) the applicable HST rate(s) and the amount of HST charged on such HST taxable supplies; and

(d) a subtotal of any amounts charged for any "exempt" or "zero-rated" supplies as defined in Part IX of the Excise Tax Act.

10.4 Payment and Offset

(a) Subject to **Section 10.4(b)**, Taxes collectible by one Party from the other Party pursuant to this Agreement will be payable in immediately available funds within 20 Business Days of receipt of an invoice.

(b) Provided all amounts due under the Initial Financing are Paid in Full, a Party may offset amounts of Taxes owing to the other Party under this Agreement against Taxes or other amounts receivable from the other Party pursuant to this Agreement, subject to reporting and remittance of such offset Taxes in accordance with Applicable Law.

10.5 HST Registration Status and Residency

(a) Muskrat represents and warrants that it is registered for purposes of the HST and that its registration number is 8312 27830 RT0001, and undertakes to advise NLH of any change in its HST registration status or number.

(b) NLH represents and warrants that it is registered for purposes of the HST and that its registration number is 1213 94928 RT0001, and undertakes to advise Muskrat of any change in its HST registration status or number.

(c) Muskrat represents and warrants that it is not a non-resident of Canada for the purposes of the Income Tax Act, and undertakes to advise NLH of any change in its residency status.

(d) NLH represents and warrants that it is not a non-resident of Canada for the purposes of the Income Tax Act, and undertakes to advise Muskrat of any change in its residency status.

10.6 Cooperation to Minimize Taxes

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the Parties to minimize all Taxes in

accordance with Applicable Law, so long as neither Party is materially adversely affected by such efforts. Each Party shall obtain all available exemptions from or recoveries of Taxes and shall employ all prudent mitigation strategies to minimize the amounts of Taxes required to be paid in accordance with Applicable Law in respect of this Agreement. If one Party obtains any rebate, refund or recovery in respect of any such Taxes, it shall immediately be paid to such other Party to the extent that such amounts were paid by such other Party (and not previously reimbursed).

10.7 Additional Tax Disclosure

Notwithstanding any other provision in this Agreement, unless otherwise agreed to by the Parties in writing, each of the Parties agrees to provide to the other Party, in writing, the following additional information for the purposes of assisting the other Party with the application of Taxes to the Parties in respect of this Agreement:

(a) whether a particular supply is, or is not, subject to HST or to any other Tax which a Party is required to pay to the supplier of such supply;

(b) whether the recipient of consideration or other form of payment under this Agreement is a non-resident of Canada for the purposes of the Income Tax Act, and, where such recipient is receiving such payment as agent for another Person, whether such other Person is a non-resident of Canada for the purposes of the Income Tax Act; and

(c) any other fact or circumstance within the knowledge of a Party which the other Party advises the Party, in writing, is relevant to a determination by the other Party of whether it is required to withhold and remit or otherwise pay a Tax to an Authorized Authority or other Tax authority in respect of such supply, consideration or payment.

In addition to the notification required under this **Section 10.7**, each Party undertakes to advise the other Party, in a timely manner, of any material changes to the matters described in **Sections 10.7(a)** through **10.7(c)**.

10.8 Prohibited Tax Disclosure

Except as required by Applicable Law, notwithstanding any other provision of this Agreement, each Party shall not make any statement, representation, filing, return or settlement regarding Taxes on behalf of the other Party to an Authorized Authority without the prior written consent of such other Party.

10.9 Withholding Tax

If required by the Applicable Law of any country having jurisdiction, a Party shall have the right to withhold amounts, at the withholding rate specified by such Applicable Laws, from any compensation payable pursuant to this Agreement by such Party, and any such amounts paid by such Party to an Authorized Authority pursuant to such Applicable Law shall, to the extent of such payment, be credited against and deducted from amounts otherwise owing to the other Party

hereunder. Such Party shall note on each applicable invoice whether any portion of the supplies covered by such invoice was performed inside or outside of Canada for the purposes of Canadian income tax legislation or such other information requested or required by the other Party to properly assess withholding requirements. At the request of the other Party, the Party shall deliver to the other Party properly documented evidence of all amounts so withheld which were paid to the proper Authorized Authority for the account of the other Party.

10.10 Tax Indemnity

Each Party (in this **Section 10.10** referred to as the "**First Party**") shall indemnify and hold harmless the other Party from and against any demand, claim, payment, liability, fine, penalty, cost or expense, including accrued interest thereon, relating to any Taxes for which the First Party is responsible under **Article 10** or relating to any withholding Tax arising on account of the First Party being or becoming a non-resident of Canada for the purposes of the Income Tax Act. Without limiting the generality of the foregoing, and subject to the obligation of the Parties to pay HST pursuant to **Section 10.1(c)**, each Party shall be liable for and defend, protect, release, indemnify and hold the other Party harmless from and against:

(a) any and all Taxes imposed by any Authorized Authority on the other Party in respect of this Agreement, and any and all Claims including payment of Taxes which may be brought against or suffered by the other Party or which the other Party may sustain, pay or incur in conjunction with the foregoing as a result of the failure by the First Party to pay any and all Taxes imposed as stated herein; and

(b) any and all Taxes imposed by any Authorized Authority in respect of the supplies contemplated by this Agreement, and any and all Claims (including Taxes) which may be brought against or suffered by the other Party or which the other Party may sustain, pay or incur in conjunction with the foregoing as a result of the failure by the First Party to pay any and all Taxes imposed as stated herein.

10.11 Additional Tax Indemnity

If one Party (in this **Section 10.11** referred to as the "**First Party**") is, at any time, a non-resident of Canada for the purposes of the Income Tax Act or the Applicable Law of a foreign jurisdiction, the First Party agrees to pay the other Party, and to indemnify and save harmless the other Party from and against any and all amounts related to any application or withholding of Taxes required by the laws of the jurisdiction outside of Canada in which the First Party is resident at such time (in this **Section 10.11** referred to as the "**Foreign Jurisdiction**") on payments made (or consideration provided) pursuant to this Agreement by the other Party to the First Party, provided that:

(a) any such amount payable by the other Party pursuant to this **Section 10.11** shall be reduced by the amount of such Taxes, if any, which the other Party is able to recover by way of a Tax credit or other refund or recovery of such Taxes; and

(b) for greater certainty, this **Section 10.11** shall only apply to any application or withholding of Taxes imposed by the Foreign Jurisdiction on amounts payable (or

consideration provided) by the other Party to the First Party under this Agreement, and shall not apply to any Taxes imposed by the Foreign Jurisdiction on the other Party (or any Affiliate thereof) that may be included in calculating any amounts payable under any other Section of this Agreement.

10.12 Assignment

Notwithstanding any other provision in this Agreement and only to the extent an assignment has been approved in accordance with this Agreement, a Party shall not assign any of its interest in this Agreement to another Person unless:

(a) the Person is registered for HST purposes and provides the other Party with its HST registration number in writing prior to such Assignment;

(b) if the Person has a tax residency status that is different than the tax residency status of the Party, the Party has obtained the prior written approval of the other Party of the proposed assignment to the Person; and

(c) the Person agrees, in writing, to comply with the provisions of this **Article 10** and **Article 19**.

ARTICLE 11
INSURANCE

11.1 Insurance Program

Muskrat shall, as it deems necessary, acting reasonably, place or cause to be placed for the duration of this Agreement operational property and liability insurances as are normally necessary for a facility of similar size and design to the MF Plant and Good Utility Practice, including:

(a) All Risk Course of Construction (Builder's Risk);

(b) All Risk Property & Equipment Insurance;

(c) Third Party Liability Insurance; and

(d) such other coverages as may be deemed appropriate in the opinion of Muskrat, acting reasonably, giving due consideration to the inherent risks of the MF Plant and the factors mentioned in **Section 11.2**.

11.2 Coverages, Limits, Deductibles and Exclusions

In each case, the insurance shall provide for coverages, limits, deductibles, exclusions and other terms and conditions as may be appropriate for the MF Plant, giving due consideration to:

(a) requirements of the Financing Documents;

(b) the values at risk and the maximum loss exposures reasonably anticipated at the time the insurance coverage is placed;

(c) exposures to third party liabilities;

(d) commercial availability and commercially reasonable cost of such insurance;

(e) the reasonable practices employed by similar entities and similar projects in Canada; and

(f) Muskrat's financial ability and desire to retain or self-insure certain risks.

11.3 Provisions to be Included in Insurance Policies

All insurance procured by Muskrat pursuant to this **Article 11** shall:

(a) name NLH, its Affiliates as appropriate, and their respective directors, officers and employees as named insureds with respect to the third party liability insurance policy referred to in this **Article 11**;

(b) be at Muskrat's expense and will be primary, non-contributing with, and not excess of, any other insurance available to NLH;

(c) provide for 30 days' prior notice to NLH in the event of cancellation or material change that reduces or restricts the Insurance provided that if insurers shall provide notice earlier than 30 days, Muskrat shall immediately advise NLH of same;

(d) remain in full force and effect at all times during the Term;

(e) be for the mutual benefit of Muskrat and NLH and their respective Affiliates; and

(f) include a severability of interest clause whereby such policy would cover claims of one named insured against another named insured.

11.4 Lender Requirements

NLH shall co-operate fully with Muskrat and shall assist Muskrat in complying with obligations imposed by the Financing Parties relating to the insurance coverage provided pursuant to this **Article 11**, including naming the Financing Parties as first loss payees, and the use of insurance proceeds in the event of a catastrophic loss.

11.5 Contractors

Contractors, to the extent their contracts require them to procure insurance, shall be required to comply with such insurance provisions as may be required.

11.6 Evidence of Insurance

If requested by NLH, Muskrat shall provide satisfactory evidence of insurance procured by it pursuant to this **Article 11** in the form of a certificate of insurance when obtained and thereafter annually upon renewal of such insurance.

11.7 Placement of Required Insurance

If Muskrat fails to obtain or maintain any insurance required to be maintained by it hereunder, NLH may place insurance on its behalf and all costs thereof or in relation thereto shall be for the sole account of Muskrat.

11.8 Effect of Failure to Insure

Notwithstanding **Section 11.7**, none of the obligations of Muskrat in this Agreement shall be reduced, or in any way affected, or diminished in any respect, by a failure of Muskrat to obtain insurance or to obtain adequate insurance coverage, either as agreed in this Agreement or otherwise or at all, or by a denial of coverage of any insurance, nor shall Muskrat be entitled to any indemnity or contribution as a result of any such failure to obtain insurance or to obtain adequate insurance coverage, either as agreed in this Agreement or otherwise or at all, or by any denial of coverage of any insurance.

11.9 Site Visits

NLH shall provide to Muskrat evidence of liability insurance and automobile liability insurance in anticipation of any visits to any Muskrat facility including the MF Plant. NLH shall provide to Labrador Transco evidence of liability insurance and automobile liability insurance in anticipation of any visits to any Labrador Transco facility including the LTA.

11.10 Corporate Policies

It is understood and agreed that Muskrat may provide the coverage provided for in this Agreement through policies covering other assets and/or operations operated by Nalcor.

ARTICLE 12
DISPUTE RESOLUTION

12.1 General

(a) Dispute Resolution Procedure - The Parties agree to resolve all Disputes pursuant to the dispute resolution procedure set forth in **Schedule 5** (the "**Dispute Resolution Procedure**").

(b) Disputed Payment - Subject to **Section 12.3**, if there is a Dispute concerning any amount payable by one Party to another Party, the Party with the payment obligation shall pay the undisputed portion of such payment.

(c) Performance to Continue - Each Party shall continue to perform all of its obligations under this Agreement during any negotiations or dispute resolution proceedings pursuant to this **Article 12**, without prejudice to any other Party's rights pursuant to this Agreement

12.2 Procedure for Inter-Party Claims

(a) Notice of Claims - Subject to and without restricting the effect of any specific Notice requirement in this Agreement, a Party (the "**Claiming Party**") intending to assert a Claim against the other Party (the "**Recipient Party**") shall give the Recipient Party prompt Notice of the Claim, which shall describe the Claim in reasonable detail and shall indicate the estimated amount, if practicable, of the Losses that have been or may be sustained by the Claiming Party. The Claiming Party's failure to promptly give Notice to the Recipient Party shall not relieve the Recipient Party of its obligations hereunder, except to the extent that the Recipient Party is actually and materially prejudiced by the failure of the Claiming Party to promptly give Notice.

(b) Claims Process - Following receipt of Notice of a Claim from the Claiming Party, the Recipient Party shall have 20 Business Days to make such investigation of the Claim as is considered necessary or desirable. For the purpose of such investigation, the Claiming Party shall make available to the Recipient Party the information relied upon by the Claiming Party to substantiate the Claim, together with all such other information as the Recipient Party may reasonably request. If both Parties agree at or prior to the expiration of such 20 Business Day period (or any mutually agreed upon extension thereof) to the validity and amount of such Claim, the Recipient Party shall immediately pay to the Claiming Party, or expressly agree with the Claiming Party to be responsible for, the full agreed upon amount of the Claim, failing which the matter will constitute a Dispute and be resolved in accordance with the Dispute Resolution Procedure

12.3 Base Block Payments Not Affected

If there is a Dispute concerning any Base Block Payments payable by NLH to Muskrat hereunder and at the time the Initial Financing has not been Paid in Full, NLH shall pay the whole of such Base Block Payments in full, prior to initiating any Dispute Resolution Procedure relating thereto, subject only to the right of NLH to be reimbursed by Muskrat if and as the Dispute Resolution Procedure may require. NLH agrees that any payment to be made to it as a result of a finding pursuant to Dispute Resolution Procedure that NLH should be reimbursed, shall be unsecured and fully subordinated in all respects to all amounts owed to the Financing Parties pursuant to the Financing Documents. All such amounts owing to NLH shall be subject to interest from the original due date to the date of actual payment (after as well as before judgment) at the Prime Rate plus 3%.

12.4 Directions Under Dispute Resolution Procedure

The Parties agree that the mediator, arbitrator, independent expert or tribunal, as applicable, pursuant to a Dispute under the Dispute Resolution Procedure shall, where the Dispute

is of a nature that could reoccur, be directed to include in its award a methodology and timelines to provide for an expedited and systematic approach to the resolution of future Disputes of a similar nature.

ARTICLE 13
TERM AND TERMINATION

13.1 Term

This Agreement shall become effective on the Effective Date and shall terminate on the date determined in accordance with **Section 13.2**.

13.2 Termination of Agreement

This Agreement shall terminate on the earliest to occur of the following:

(a) the end of the Supply Period; and

(b) subject to the approval of the Financing Parties, the date set forth in a written agreement of the Parties to terminate.

13.3 Extension of Supply Period

(a) The Supply Period shall be extended (i) to enable Muskrat to meet unfulfilled deliveries of the NLH Deferred Energy, (ii) by agreement of the parties, or (iii) to ensure that the Supply Period is not less than 50 years.

(b) Unless this Agreement has been earlier terminated and provided NLH is not in default under this Agreement, no later than five years prior to the end of the Supply Period NLH may notify Muskrat if it wishes to continue to receive Energy, Capacity, Ancillary Services and GHG Credits attributable to the MF Plant subsequent to the Supply Period. Muskrat and NLH will then negotiate in good faith to agree upon the terms under which Muskrat will provide and NLH will purchase Energy, Capacity, Ancillary Services and GHG Credits attributable to the MF Plant after the Supply Period, including the price to be paid by NLH therefor. Unless expressly provided in this Agreement, if no agreement is reached by Muskrat and NLH, this Agreement shall not be extended, other than as contemplated in **Section 13.3(a)** and the matter shall not be referred to resolution pursuant to the Dispute Resolution Procedure.

13.4 Effect of Termination of Agreement

When this Agreement terminates:

(a) each Party shall promptly return to the other Party all Confidential Information of the other Party in the possession of such Party, and destroy any internal documents that contain any Confidential Information of the other Party (except such internal documents as are reasonably required for the maintenance of proper corporate

records and/or to comply with Applicable Law, which shall continue to be held in accordance with the provisions of **Schedule 7**);

(b) neither Party shall have any obligation to the other Party in relation to this Agreement or such termination, except as set forth herein;

(c) the obligations of a Party outstanding at termination shall survive until satisfied, and those provisions of this Agreement which expressly survive termination of this Agreement shall survive as expressly stated; and

(d) Muskrat shall pay to NLH the fair market value of NLH Deferred Energy not yet delivered or sold.

ARTICLE 14
DEFAULT AND REMEDIES

14.1 Muskrat Events of Default

Except to the extent excused by a Forgivable Event, the occurrence of one or more of the following events shall constitute a default by Muskrat under this Agreement (a "**Muskrat Default**"):

(a) Muskrat fails to pay or advance any amount to be paid or advanced under this Agreement at the time and in the manner required by this Agreement, which failure is not cured within 10 days after the receipt of a demand from NLH that such amount is due and owing;

(b) Muskrat is in default or in breach of any term, condition or obligation under this Agreement, other than those described in **Section 14.1(a)**, and, if the default or breach is capable of being cured, it continues for 30 days after the receipt by Muskrat of Notice thereof from NLH, unless the cure reasonably requires a longer period and Muskrat is diligently pursuing the cure, and it is cured within such longer period of time as is agreed by NLH;

(c) any representation or warranty made by Muskrat in this Agreement is false or misleading in any material respect;

(d) Muskrat ceases to carry on all or substantially all of its business or, except as permitted hereunder, transfers all or substantially all of its undertaking and assets; or

(e) any Insolvency Event occurs with respect to Muskrat;

(f) default by Muskrat in the performance of its obligations pursuant to the GIA; or

(g) either Labrador Transco or Muskrat is in default or in breach of any term, condition or obligation under the Financing Documents, which results in a payment obligation

by Labrador Transco or Muskrat arising from an indemnity obligation set forth in the Financing Documents.

14.2 NLH Remedies upon Muskrat Default

(a) General - Subject to **Section 4.2(d)**, **13.4**, **14.6**, **14.9** and **Article 17**, upon the occurrence of a Muskrat Default and at any time thereafter, provided NLH is in material compliance with its obligations under this Agreement and provided a right, remedy or recourse is not expressly stated as being the sole and exclusive right, remedy or recourse:

(i) NLH shall be entitled to exercise all or any of its rights, remedies or recourses available to it under this Agreement, or otherwise available at law or in equity; and

(ii) the rights, remedies and recourses available to NLH are cumulative and may be exercised separately or in combination.

The exercise of, or failure to exercise, any available right, remedy or recourses does not preclude the exercise of any other rights, remedies or recourses or in any way limit such rights, remedies or recourses.

(b) Losses - Subject to **Section 4.2(d)**, **4.2(e)** and **Article 17**, NLH may recover all Losses suffered by NLH that result from a Muskrat Default, including, for the avoidance of doubt, any costs or expenses (including reasonable legal fees and expenses on a solicitor and own client basis) reasonably incurred by NLH to recover any amounts owed to NLH by Muskrat under this Agreement.

14.3 Failure to Defer

NLH's right to receive NLH Deferred Energy or to receive payment in accordance with **Section 4.5(d)** shall be NLH's sole and exclusive right, remedy or recourse for the failure by Muskrat to deliver or NLH to accept any part of the Energy Scheduled for delivery in accordance with this Agreement to which NLH is otherwise entitled resulting from a Forgivable Event.

14.4 NLH Events of Default

Except to the extent excused by a Forgivable Event, which Forgivable Event at all times shall not excuse NLH's obligation to make the Base Block Payments, the occurrence of one or more of the following events shall constitute a default by NLH under this Agreement (an "**NLH Default**"):

(a) NLH fails to pay or advance any amount to be paid or advanced under this Agreement at the time and in the manner required by this Agreement, which failure is not cured within 10 days after the receipt of a Notice from Muskrat that such amount is due and owing;

(b) NLH is in default or in breach of any term, condition or obligation under this Agreement, other than those described in **Section 14.4(a)**, and, if the default or breach is capable of being cured, it continues for 30 days after the receipt by NLH of Notice thereof from Muskrat, unless the cure reasonably requires a longer period and NLH is diligently pursuing the cure, and it is cured within such longer period of time as is agreed by Muskrat;

(c) any representation or warranty made by NLH in this Agreement is false or misleading in any material respect;

(d) NLH ceases to carry on all or substantially all of its business or, except as permitted hereunder, transfers all or substantially all of its undertaking and assets; or

(e) any Insolvency Event occurs with respect to NLH.

14.5 Muskrat Remedies upon NLH Default

(a) General - Subject to **Sections 13.4**, **14.3** and **14.8**, upon the occurrence of an NLH Default and at any time thereafter, provided Muskrat is in material compliance with its obligations under this Agreement and provided a right, remedy or recourses is not expressly stated in this Agreement as being the sole and exclusive right, remedy or recourse:

(i) Muskrat shall be entitled to exercise all or any of its rights, remedies or recourses available to it under this Agreement, or otherwise available at law or in equity; and

(ii) the rights, remedies and recourses available to Muskrat are cumulative and may be exercised separately or in combination.

The exercise of, or failure to exercise, any available right, remedy or recourse does not preclude the exercise of any other rights, remedies or recourses or in any way limit such rights, remedies or recourses.

(b) Losses - Subject to **Article 17**, Muskrat may recover all Losses suffered by Muskrat that result from an NLH Default, including, for the avoidance of doubt, any costs or expenses (including legal fees and expenses on a solicitor and his or her own client basis) reasonably incurred by Muskrat to recover any amounts owed to Muskrat by NLH under this Agreement.

14.6 Muskrat's Material Default

During the Supply Period, Muskrat grants to NLH the rights set forth in this **Section 14.6** provided that NLH assumes the obligations applicable to it in this **Section 14.6**.

(a) Each time during the Supply Period, if a default notice is provided under the Step-In Agreement or if as a result of a Muskrat Default, the PPA Services cannot be

provided, in whole or in part, to NLH for 24 consecutive hours or 24 non-consecutive hours in any seven day period (each a "**Muskrat Material Default**"), then, NLH may give Notice that it intends to invoke its rights under this **Section 14.6(a)** (each a "**Muskrat Material Default Notice**"). If, within two days from the delivery of a Muskrat Material Default Notice, the Muskrat Material Default is not cured to the satisfaction of NLH acting reasonably, NLH may, at the date specified in such Muskrat Material Default Notice, assume Operational Control of the MF Plant and if it does so, NLH shall be entitled to the corresponding rights and shall assume the corresponding obligations of Muskrat under this Agreement, in accordance with **Section 14.6(b)**. Notwithstanding any Dispute that may be initiated by Muskrat concerning the determination of a Muskrat Material Default, NLH shall be entitled to assume Operational Control of the MF Plant. If the Dispute Resolution Procedure determines that Muskrat had not committed a Muskrat Material Default, then NLH shall return, and Muskrat shall assume, Operational Control of the MF Plant in accordance with **Section 14.6(c)**, mutatis mutandis. NLH shall pay to Muskrat any Losses incurred by Muskrat resulting from NLH's improper assumption of Operational Control.

(b) If NLH assumes Operational Control pursuant to **Section 14.6(a)**, Muskrat shall immediately provide to NLH all necessary information, passwords, access and keys necessary for NLH to assume Operational Control of the MF Plant, and shall provide all assistance reasonably necessary to assist transition to NLH of Operational Control. Upon assumption by NLH of Operational Control of the MF Plant pursuant to **Section 14.6(a)**, and thereafter until NLH returns Operational Control of the MF Plant pursuant to **Section 14.6(c)**:

(i) NLH shall have the right to perform the O&M Activities if it so elects by Notice to Muskrat, and if it so elects, it shall perform the O&M Activities in accordance with Good Utility Practice;

(ii) NLH shall have the right to enforce and enjoy all of the rights that Muskrat has or may have under this Agreement in respect of such Operational Control in the place of Muskrat;

(iii) Muskrat shall continue to perform all its obligations under this Agreement which do not constitute Operational Control or which NLH does not elect to perform in accordance with **Section 14.6(b)(i)**;

(iv) subject to the limitations of the MF Plant, NLH shall perform Operational Control and the O&M Activities, to the extent it has elected to perform the O&M Activities pursuant to **Section 14.6(b)(i)**, in a manner which enables Muskrat to fulfill its obligations under the ECA and any energy supply contracts permitted pursuant to this Agreement as Muskrat may conclude from time to time;

(v) NLH shall be liable to and indemnify Muskrat for Muskrat's Losses resulting from NLH exercising Operational Control of the MF Plant or performing the

O&M Activities, during such period, but only to the extent that same result from (A) NLH's breach of **Section 14.6(b)(iv)** or (B) NLH's wilful acts or omissions or NLH's gross negligence;

(vi) Muskrat shall pay to NLH all of NLH's costs and expenses in performing O&M Activities while NLH has Operational Control of the MF Plant; and

(vii) in order to ensure non-interruption of the Base Block Payments prior to the Initial Financing being Paid in Full, costs and expenses paid to NLH pursuant to **Section 14.6(b)(vi)** shall be included in O&M Costs, which NLH shall continue to pay as part of the Base Block Payments.

(c) At any time following each Muskrat Material Default where NLH assumes Operational Control of the MF Plant and performs O&M Activities pursuant to this **Section 14.6**, NLH may return Operational Control of the MF Plant to Muskrat on not less than five Business Days Notice. Upon the date specified in each such Notice, NLH shall immediately provide Muskrat all necessary information, passwords, access and keys necessary for Muskrat to resume Operational Control of the MF Plant, whereupon Muskrat shall assume Operational Control of the MF Plant and perform all of its obligations under this Agreement, including the continued performance of those performed by NLH while it had assumed Operational Control of the MF Plant.

(d) Security Interest - As security for the obligations of Muskrat to NLH pursuant to this Agreement, Muskrat shall enter into a general security agreement in the form of **Schedule 6** and grant to NLH a security interest in the MF Plant within the meaning of the *Personal Property Security Act* (Newfoundland and Labrador). For clarity, the security interest granted by Muskrat shall in all respects be subject and subordinate to the security interests granted by the Financing Documents.

14.7 Defaults and Remedies under the GIA Affecting NLH

In consideration of the mutual covenants set forth below:

(a) Muskrat hereby assigns to NLH and NLH accepts the rights and obligations set forth in Sections 15.5, 15.6, 15.7 and 15.8 of the GIA to assume Operational Control of the LTA in the event of a default by Labrador Transco as set forth therein.

(b) Muskrat hereby assigns to NLH and NLH accepts a security interest in the LTA as set forth in Section 15.6(d) of the GIA to securitize Losses of Muskrat and NLH arising from the circumstances described in Section 15.6(a) of the GIA;

(c) Muskrat hereby assigns to NLH and NLH accepts the rights and obligations set forth in Section 15.8 of the GIA to pay the LTA Redemption Value portion of the Redemption Value to the benefit of Labrador Transco in the events described therein; and

(d) NLH acknowledges that failure to make payment in Section 15.8(a)(i) of the GIA may result in an agent of a financing party under the initial financing of the LTA exercising rights pursuant to one or more of the step-in agreements appended to the GIA.

14.8 Muskrat Specific Remedies upon NLH Failure to Make Base Block Payments

(a) Failure to make Base Block Payments - If NLH is in default of its obligation to make the Base Block Payments and provided Muskrat is in material compliance with its obligations under this Agreement, Muskrat may give Notice ("**14.8 Notice**") to NLH that it intends to invoke its rights under this **Section 14.8(a)**. If, within 10 days from the delivery of such 14.8 Notice, NLH has not cured such default and has not paid to Muskrat all Losses arising from such default:

(i) NLH shall pay to Muskrat as liquidated damages a lump sum amount equal to the Redemption Value (as at the date of payment of such amount) prior to the later of (A) 180 days following receipt of the 14.8 Notice, or (B) completion of any Remedies Consultation Period arising from such non-payment;

(ii) on receipt by Muskrat of the payment of the Redemption Value pursuant to **Section 14.8(a)(i)**:

(A) Muskrat shall immediately remit such payment to the appropriate Financing Parties with respect to the Initial Financing causing the Initial Financing to be Paid in Full;

(B) Muskrat shall recalculate the future Base Block Capital Costs Recovery pursuant to **Schedule 1** to reflect payment of the Redemption Value and the future Base Block Payments shall be adjusted accordingly;

(C) the payment of the Redemption Value by NLH to Muskrat shall be Muskrat's sole and exclusive right, remedy and recourse with respect Losses attributable to repayment of the Initial Financing portion of the Base Block Payments; and

(D) subject to **Section 14.8(a)(ii)(C)**, nothing in this **Section 14.8** shall limit or impair Muskrat's right at law, equity or under this Agreement to seek compensation for Losses arising from failure to pay the full Base Block Payments as provided for in this Agreement.

(iii) To the extent any damages required to be paid under this **Section 14.8(a)** are expressly stated to be liquidated damages, NLH and Muskrat have computed, estimated and agreed upon the amount of such damages as a reasonable forecast of anticipated or actual Losses in view of the difficulty in calculating or determining the consequences or amount of such Losses. Each of the Parties agree that such liquidated damages are a genuine pre-

estimate of damages, are not a penalty, and are intended to protect the Parties from uncertainties. The obligation of a Party to pay and of a Party to accept such liquidated damages, as applicable, shall be legally enforceable and binding on the Parties.

(b) NLH acknowledges failure to make payment pursuant to **Section 14.8(a)(i)** may result in an Agent Party (as such term is defined in the Step-In Agreement) exercising rights pursuant to the Step-In Agreement.

14.9 Equitable Relief

Prior to the Initial Financing being Paid in Full, no Party shall have any right, remedy or recourse to terminate this Agreement for any reason, without the consent of the Financing Parties. Subject to the foregoing sentence, nothing else in this **Article 14** will limit or prevent a Party from seeking equitable relief, including specific performance or a declaration to enforce another Party's obligations under this Agreement.

ARTICLE 15
FORCE MAJEURE AND CURTAILMENT

15.1 Effect of Invoking Force Majeure and Notice

(a) If by reason of a Force Majeure event, a Party is not reasonably able to fulfill an obligation, other than an obligation to pay or spend money including **Section 4.2(d)**, in accordance with the terms of this Agreement, then such Party shall:

(i) forthwith provide Notice to the other Party of such Force Majeure, or orally so notify such other Party (confirmed in writing), which Notice (and any written confirmation of an oral notice) shall provide reasonably full particulars of such Force Majeure;

(ii) subject to **Sections 14.4(a)** and **Article 17**, be relieved from fulfilling such obligation or obligations during the continuance of such Force Majeure but only to the extent of the failure to perform so caused, from and after the occurrence of such Force Majeure;

(iii) employ all commercially reasonable means to reduce the consequences of such Force Majeure, including the expenditure of funds that it would not otherwise have been required to expend, if the amount of such expenditure is not commercially unreasonable in the circumstances existing at such time, and provided further that the foregoing shall not be construed as requiring a Party to accede to the demands of its opponents in any strike, lockout or other labour disturbance;

(iv) as soon as reasonably possible after such Force Majeure, fulfill or resume fulfilling its obligations hereunder;

(v) provide the other Party with prompt Notice of the cessation or partial cessation of such Force Majeure; and

(vi) not be responsible or liable to the other Party for any loss or damage that the other Party may suffer or incur as a result of such Force Majeure.

(b) Notwithstanding **Section 21.1**, Notices given in respect of events of Force Majeure that are reasonably anticipated by the Parties with notification responsibility to be of a duration of less than 24 hours shall be given to an operational representative of the receiving Party. Each Party shall provide telephone and other electronic contact information to the other for the purposes of this Section prior to the Effective Date. Either Party may change such contact information from time to time by giving Notice of such change to the other Party in accordance with **Section 21.1**.

15.2 Allocation of MF Plant Output

If the MF Plant is unable because of a Forgivable Event to generate Energy and Capacity at the MF Plant Capacity in any hour during which Energy has been Scheduled by NLH for delivery pursuant to this Agreement, then to the extent the MF Plant is able to generate any Energy and Capacity during such hour, Muskrat shall allocate the available Energy output from the MF Plant on the basis of the following priorities:

(a) Energy deliveries in respect of all non-firm or interruptible sales from the MF Plant shall be curtailed first; and

(b) to the extent that the Curtailments described in **Section 15.2(a)** are insufficient to resolve a shortage in available Energy or Capacity, deliveries in respect of all firm or non-interruptible sales from the MF Plant, including those in respect of the Commissioning Period Energy, Base Block Energy, Supplemental Block Energy, the NS Block and Contracted Commitments, shall be curtailed next on a pro-rata basis, based on the scheduled delivery at the time of Curtailment for all subsequent hours.

15.3 No New Contracted Commitments During a Curtailment

Muskrat shall not Schedule or enter into any Contracted Commitments during the expected period of any Curtailment referred to in **Section 15.2** to the extent that such sales could affect the Curtailment priority and the consequential effect on the delivery of the Energy to the Delivery Points.

ARTICLE 16
LIABILITY AND INDEMNITY

16.1 Muskrat Indemnity

(a) Muskrat shall indemnify, defend, reimburse, release and save harmless NLH and its Representatives, and the successors and permitted assigns of each of them, ("**NLH Group**") from and against, and as a separate and independent covenant agrees to

be liable for, all Claims (including those that may be brought against any member of the NLH Group by or in favour of a third party (including those Claims arising in favour of or brought by or on behalf of any member of the Muskrat Group)) based upon, in connection with, relating to or arising out of:

(i) any inaccuracy or breach of any representation or warranty made by Muskrat in this Agreement or any other document or instrument delivered pursuant to this Agreement, in any material respect;

(ii) any breach or failure to perform or comply with any agreement, covenant or obligation of Muskrat in this Agreement or any other document or instrument delivered pursuant to this Agreement; or

(iii) any gross negligence or wilful misconduct by or on behalf of any member of the Muskrat Group occurring in connection with, incidental to or resulting from Muskrat's obligations under this Agreement or any other document or instrument delivered pursuant to this Agreement.

(b) Notwithstanding **Section 16.1(a)**, Muskrat shall have no obligation to indemnify, defend, reimburse, release or save harmless any member of the NLH Group in respect of, or to be liable for, Claims

(i) to the proportionate extent that such Claims result from the gross negligence or wilful misconduct of any member of the NLH Group; or

(ii) in respect of Losses to the personal property, facilities, equipment, materials or improvements of any member of the NLH Group.

16.2 **NLH Indemnity**

(a) NLH shall indemnify, defend, reimburse, release and save harmless Muskrat and its Representatives, and the successors and permitted assigns of each of them, ("**Muskrat Group**") from and against, and as a separate and independent covenant agrees to be liable for, all Claims (including those that may be brought against any member of the Muskrat Group by or in favour of a third party (including those Claims arising in favour of or brought by or on behalf of any member of the NLH Group)) based upon, in connection with, relating to or arising out of:

(i) any inaccuracy or breach of any representation or warranty made by NLH in this Agreement or any other document or instrument delivered pursuant to this Agreement, in any material respect;

(ii) any breach or failure to perform or comply with any agreement, covenant or obligation of NLH in this Agreement or any other document or instrument delivered pursuant to this Agreement; or

(iii) any gross negligence or wilful misconduct by or on behalf of any member of the NLH Group occurring in connection with, incidental to or resulting from NLH's obligations under this Agreement or any other document or instrument delivered pursuant to this Agreement.

(b) Notwithstanding **Section 16.2(a)**, NLH shall have no obligation to indemnify, defend, reimburse, release or save harmless any member of the Muskrat Group in respect of, nor to be liable for, Claims

(i) to the proportionate extent that such Claims result from the gross negligence or wilful misconduct of any member of the Muskrat Group; or

(ii) in respect of Losses to the personal property, facilities, equipment, materials or improvements of any member of the Muskrat Group.

16.3 Own Property Damage

For the avoidance of doubt, it is the Parties' intent that, subject to any right a Party may have to seek compensation from a third party who caused the Loss or from insurance, each Party shall be responsible for and bear the risk of Losses to its own personal property, facilities, equipment, materials and improvements on the site of the MF Plant (including, with respect to any member of the Muskrat Group, such property of such member of the Muskrat Group, and, with respect to any member of the NLH Group, such property of such member of the NLH Group), howsoever incurred.

16.4 Indemnification Procedure

(a) Generally - Each Party (each, an "**Indemnitor**") shall indemnify and hold harmless the other Parties and the other Persons as set forth in **Sections 16.1** or **16.2**, as applicable, (each an "**Indemnified Party**") as provided therein in the manner set forth in this **Section 16.4**.

(b) Notice of Claims - If any Indemnified Party desires to assert its right to indemnification from an Indemnitor required to indemnify such Indemnified Party, the Indemnified Party shall give the Indemnitor prompt Notice of the Claim giving rise thereto, which shall describe the Claim in reasonable detail and shall indicate the estimated amount, if practicable, of the indemnifiable loss that has been or may be sustained by the Indemnified Party. Such Notice shall specify whether the Claim arises as a result of a Claim by a third party against the Indemnified Party (a "**Third Party Claim**") or whether the Claim does not so arise (a "**Direct Claim**"). The failure to promptly give the Indemnitor Notice hereunder shall not relieve the Indemnitor of its obligations hereunder, except to the extent that the Indemnitor is actually and materially prejudiced by the failure of the Indemnified Party to promptly give Notice.

(c) Direct Claims - With respect to any Direct Claim, following receipt of Notice from the Indemnified Party of the Claim, the Indemnitor shall have 20 Business Days to make

such investigation of the Claim as is considered necessary or desirable. For the purpose of such investigation, the Indemnified Party shall make available to the Indemnitor the information relied upon by the Indemnified Party to substantiate the Claim, together with all such other information as the Indemnitor may reasonably request. If the Indemnified Party and the Indemnitor agree at or prior to the expiration of such 20 Business Day period (or any mutually agreed upon extension thereof) to the validity and amount of such Claim, the Indemnitor shall immediately pay to the Indemnified Party, or expressly agree with the Indemnified Party to be responsible for, the full agreed upon amount of the Claim, failing which the matter will constitute a Dispute and be resolved in accordance with the Dispute Resolution Procedure.

(d) Right to Participate - The Indemnitor shall have the right to participate in or, by giving Notice to the Indemnified Party, to elect to assume the defence of a Third Party Claim in the manner provided in this **Section 16.4** at the Indemnitor's own expense and by the Indemnitor's own counsel (satisfactory to the Indemnified Party, acting reasonably), and the Indemnified Party shall co-operate in good faith in such defence.

(e) Notice of Assumption of Defence - If the Indemnitor desires to assume the defence of a Third Party Claim, it shall deliver to the Indemnified Party Notice of its election within 30 days following the Indemnitor's receipt of the Indemnified Party's Notice of such Third Party Claim. Until such time as the Indemnified Party shall have received such Notice of election, it shall be free to defend such Third Party Claim in any reasonable manner it shall see fit and in any event shall take all actions necessary to preserve its rights to object to or defend against such Third Party Claim and shall not make any admission of liability regarding or settle or compromise such Third Party Claim. If the Indemnitor elects to assume such defence, it shall promptly reimburse the Indemnified Party for all reasonable third party expenses incurred by it up to that time in connection with such Third Party Claim but it shall not be liable for any legal expenses incurred by the Indemnified Party in connection with the defence thereof subsequent to the time the Indemnitor commences to defend such Third Party Claim, subject to the right of the Indemnified Party to separate counsel at the expense of the Indemnitor as provided in **Section 16.4(i)**.

(f) Admissions of Liability and Settlements - Without the prior consent of the Indemnified Party (which consent shall not be unreasonably withheld), the Indemnitor shall not compromise, make any admission of liability regarding, or enter into any settlement or compromise of any Third Party Claim that would lead to liability or create any financial or other obligation on the part of the Indemnified Party for which the Indemnified Party is not entitled to full indemnification hereunder or for which the Indemnified Party has not been fully released and discharged from all liability or obligations. Similarly, the Indemnified Party shall not make any admission of liability regarding or settle or compromise such Third Party Claim without the prior consent of the Indemnitor (which consent shall not be unreasonably withheld). If a firm offer is made to settle a Third Party Claim without

leading to liability or the creation of a financial or other obligation on the part of the Indemnified Party for which the Indemnified Party is not entitled to full indemnification hereunder or for which the Indemnified Party has not been fully released and discharged from further liability or obligations, and the Indemnitor desires to accept and agree to such offer, the Indemnitor shall give Notice to the Indemnified Party to that effect. If the Indemnified Party fails to consent to such firm offer within seven days after receipt of such Notice or such shorter period as may be required by the offer to settle, the Indemnitor may continue to contest or defend such Third Party Claim and, in such event, the maximum liability of the Indemnitor in relation to such Third Party Claim shall be the amount of such settlement offer, plus reasonable costs and expenses paid or incurred by the Indemnified Party up to the date of such Notice.

(g) Cooperation of Indemnified Party - The Indemnified Party shall use all reasonable efforts to make available to the Indemnitor or its representatives all books, records, documents and other materials and shall use all reasonable efforts to provide access to its employees and make such employees available as witnesses as reasonably required by the Indemnitor for its use in defending any Third Party Claim and shall otherwise co-operate to the fullest extent reasonable with the Indemnitor in the defence of such Third Party Claim. The Indemnitor shall be responsible for all reasonable third party expenses associated with making such books, records, documents, materials, employees and witnesses available to the Indemnitor or its representatives.

(h) Rights Cumulative - Subject to the limitations contained in this Agreement, the right of any Indemnified Party to the indemnification provided in this Agreement shall be cumulative of, and in addition to, any and all rights to which such Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall extend to the Indemnified Party's heirs, successors, permitted assigns and legal representatives.

(i) Indemnified Party's Right to Separate Counsel - If the Indemnitor has undertaken the defence of a Third Party Claim where the named parties to any action or proceeding arising from such Third Party Claim include the Indemnitor and an Indemnified Party and such Indemnified Party has reasonably concluded that counsel selected by the Indemnitor has a conflict of interest (such as the availability of different defences), then the Indemnified Party shall have the right, at the cost and expense of the Indemnitor, to engage separate counsel to participate in the defence of such Third Party Claim on behalf of the Indemnified Party, and all other provisions of this Section shall continue to apply to the defence of the Third Party Claim, including the Indemnified Party's obligation not to make any admission of liability regarding, or settle or compromise, such Third Party Claim without the Indemnitor's prior consent. In addition, the Indemnified Party shall have the right to employ separate counsel and to participate in the defence of such Third Party Claim at any time, with the fees and expenses of such counsel at the expense of the Indemnified Party.

16.5 Insurer Approval

In the event that any Claim arising hereunder is, or could potentially be determined to be, an insured claim in accordance with the insurance coverage requirements set forth in **Article 11**, neither the Indemnified Party nor the Indemnitor, as the case may be, shall negotiate, settle, retain counsel to defend or defend any such Claim, without having first obtained the prior approval of the insurer(s) providing such insurance coverage.

ARTICLE 17
LIMITATION OF DAMAGES

17.1 Limitations and Indemnities Effective Regardless of Cause of Damages

Except as expressly set forth in this Agreement, the indemnity obligations and limitations and exclusions of liability set forth in **Article 14** and **Article 16** of this Agreement shall apply to any and all Claims.

17.2 No Consequential Loss

Notwithstanding any other provision of this Agreement, in no event shall:

(a) Muskrat or any other member of the Muskrat Group or any of the respective Affiliates be liable to NLH or any other member of the NLH Group, or

(b) NLH or any member of the NLH Group be liable to Muskrat or any member of the Muskrat Group;

for a decline in market capitalization, increased cost of capital or borrowing, or for any consequential, incidental, indirect or punitive damages, for any reason with respect to any matter arising out of or relating to this Agreement except that such consequential, incidental, indirect or punitive damages awarded against a member of the Muskrat Group or the NLH Group, or any of their respective Affiliates, as the case may be, with respect to matters relating to this Agreement, in favour of a third party shall be deemed to be direct, actual damages, as between the Parties, for the purpose of this **Section 17.2**. For the purposes of this **Section 17.2**, lost revenues or profits shall be considered to be consequential, incidental or indirect damages.

17.3 Insurance Proceeds

Except as expressly set forth in this Agreement, a Claim by a Party shall be calculated or determined in accordance with Applicable Law, and shall be calculated after giving effect to (a) any insurance proceeds received or entitled to be received in relation to the Claim, and (b) the value of any related, determinable Tax benefits realized or capable of being realized by the affected Party in relation to the occurrence of such net loss or cost.

17.4 Net Present Value

Except as provided for in **Section 14.8**, in no other event shall NLH be required to pay the net present value of the Base Block Payments due to be paid by NLH to Muskrat pursuant to

the terms of this Agreement. To the extent that Base Block Payments at any time funds debt service of Muskrat or Labrador Transco, only such portion of debt service shall be so funded as constitutes interest, fees and the instalment of principal which are due or about to become due as at such time; and for greater certainty there shall be no accelerated principal payable.

ARTICLE 18
CONFIDENTIALITY

18.1 Obligations of Confidentiality

The provisions of **Schedule 7** shall apply to Confidential Information.

18.2 Disclosure of Agreement

Each Party hereby agrees to the other Party making this Agreement public at any time and from time to time after the Effective Date.

ARTICLE 19
ASSIGNMENT AND CHANGE OF CONTROL

19.1 Muskrat Assignment Rights

(a) General - Except to a Qualified Assignee and subject to **Section 19.1(d)**, Muskrat shall not assign its interest or rights under this Agreement, the GIA, any Claim or any other agreement relating to any of the foregoing (collectively, the "**Muskrat Rights**").

(b) Agreement to be Bound - No assignment may be made of the Muskrat Rights by Muskrat unless such assignment includes all of the Muskrat Rights and Muskrat obtains the written agreement of all Persons party to the assignment confirming that such Persons shall, from and after the date of the assignment, be bound by the provisions of the assigned Muskrat Rights.

(c) Change of Control - A change of Control of a Muskrat Affiliate Assignee that would result in such Muskrat Affiliate Assignee no longer being an Affiliate of Muskrat will be deemed to be assignment of the Muskrat Rights in contravention of this **Section 19.1**.

(d) Consent Requirement - An assignment of the Muskrat Rights to a Person other than an Affiliate of Muskrat, an Acquiror or an administrative or security agent of a Financing Party shall require the prior consent of NLH and Labrador Transco.

(e) Non-Permitted Assignment - Any assignment in contravention of this **Section 19.1** will be null and void.

19.2 NLH Assignment Rights

(a) General - NLH shall not assign this Agreement, its interest or rights hereunder, the GIA, any Claim or any other agreement relating to any of the foregoing.

(b) Non-Permitted Assignment - Any purported assignment in contravention of this **Section 19.2** will be null and void.

ARTICLE 20
REPRESENTATIONS AND WARRANTIES

20.1 Muskrat

Muskrat represents and warrants to NLH that, as of the Effective Date:

(a) it is duly organized and validly existing under the laws of NL and is qualified to conduct its business to the extent necessary in each jurisdiction in which it will perform its obligations under this Agreement;

(b) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary corporate action on its part and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Applicable Law;

(c) this Agreement has been duly executed and delivered on its behalf by its appropriate officers and constitutes its legally valid and binding obligation enforceable against it in accordance with its terms, except as the enforceability thereof may be limited by (i) bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity whether considered in a proceeding in equity or at law;

(d) no Insolvency Event has occurred, is pending or being contemplated by it or, to its Knowledge, threatened against it;

(e) there are no Legal Proceedings pending or, to its Knowledge, threatened against it that may materially adversely affect its ability to perform its obligations under this Agreement;

(f) no consent or other approval, order, authorization or action by, or filing with, any Person is required to be made or obtained by it for its lawful execution, delivery and performance of this Agreement, except for (i) such consents, approvals, authorizations, actions and filings that have been made or obtained prior to the date hereof, (ii) such consents, approvals, authorizations, actions and filings the failure of which would not have, or could not reasonably be expected to have, a material adverse effect on its ability to perform its obligations under this Agreement, and (iii) the Regulatory Approvals;

(g) it does not have any liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement; and

(h) it is not a "non-resident" within the meaning assigned by the Income Tax Act.

20.2 **NLH**

NLH represents and warrants to Muskrat that, as of the Effective Date:

(a) it is duly organized and validly existing under the laws of NL and is qualified to conduct its business to the extent necessary in each jurisdiction in which it will perform its obligations under this Agreement;

(b) the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary corporate action its part and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Applicable Law;

(c) each one of this Agreement has been duly executed and delivered on its behalf by its appropriate officers and constitutes its legally valid and binding obligation enforceable against it in accordance with its terms, except as the enforceability thereof may be limited by (i) bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity whether considered in a proceeding in equity or at law;

(d) no Insolvency Event has occurred, is pending or being contemplated by it or, to its Knowledge, threatened against it;

(e) there are no Legal Proceedings pending or, to its Knowledge, threatened against it that may materially adversely affect its ability to perform its obligations under this Agreement;

(f) no consent or other approval, order, authorization or action by, or filing with, any Person is required to be made or obtained by it for its lawful execution, delivery and performance of this Agreement, except for (i) such consents, approvals, authorizations, actions and filings that have been made or obtained prior to the date hereof, (ii) such consents, approvals, authorizations, actions and filings the failure of which would not have, or could not reasonably be expected to have, a material adverse effect on its ability to perform its obligations under this Agreement, and (iii) the Regulatory Approvals;

(g) it does not have any liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement; and

(h) it is not a "non-resident" within the meaning assigned by the Income Tax Act.

ARTICLE 21
MISCELLANEOUS PROVISIONS

21.1 Notices

Notices, where required herein, shall be in writing and shall be sufficiently given if delivered personally or by courier or sent by electronic mail or facsimile transmission, directed as follows:

(a) to NLH:

Newfoundland and Labrador Hydro
500 Columbus Drive
P.O. Box 12400, Station A
St. John's, NL A1B 4K7
Attention:
Fax:
Email:

(b) to Muskrat:

Muskrat Falls Corporation
500 Columbus Drive
P.O. Box 15000, Station A
St. John's, NL A1B 0M4
Attention:
Fax:
Email:

(c) with a copy to:

Lower Churchill Management Corporation
500 Columbus Drive
P.O. Box 15150, Station A
St. John's, NL A1B 0M7
Attention:
Fax:
Email:

Such Notice shall (i) if delivered personally or by courier, be deemed to have been given or made on the day of delivery, and (ii) if sent by electronic mail or facsimile transmission, be deemed to have been given or made on the day it was successfully transmitted as evidenced by automatic confirmation of receipt; provided however that if in any case such day is not a Business Day or if the Notice is received after Regular Business Hours (time and place of receipt), the Notice shall be deemed to have been given or made on the next Business Day. Either Party may change its address or fax number hereunder from time to time by giving Notice of such change to each other Party.

21.2 Prior Agreements

This Agreement supersedes all prior communications, understandings, negotiations and agreements between the Parties, whether oral or written, express or implied with respect to the subject matter hereof. There are no representations, warranties, collateral agreements or conditions affecting this Agreement other than as expressed herein.

21.3 Counterparts

This Agreement may be executed in counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute but one and the same instrument. Signatures delivered by facsimile or electronic mail shall be deemed for all purposes to be original counterparts of this Agreement.

21.4 Expenses of Parties

Except as otherwise provided herein, each Party shall bear its own costs and expenses in connection with all matters relating to this Agreement, including the costs and expenses of its legal, tax, technical and other advisors.

21.5 Announcements

No announcement with respect to this Agreement shall be made by a Party without the prior approval of the other Party. The foregoing shall not apply to any announcement by a Party required in order to comply with any Applicable Law; provided that such Party consults with the other Party before making any such announcement and gives due consideration to the views of the other Party with respect thereto. Each Party shall use reasonable efforts to agree on the text of any proposed announcement.

21.6 Relationship of the Parties

Each Party disclaims any intention to create by this Agreement any partnership, joint venture, association, trust or fiduciary relationship between them. Except as expressly provided herein, neither this Agreement nor any other agreement or arrangement between the Parties pertaining to the matters set forth herein shall be construed or considered as creating any such partnership, joint venture, association, trust or fiduciary relationship, or as constituting a Party as the agent or legal representative of the other Party for any purpose nor to permit a Party to enter into agreements or incur any obligations for or on behalf of the other Party.

21.7 Further Assurances

Each Party shall, from time to time, do all such acts and things and execute and deliver, from time to time, all such further documents and assurances as may be reasonably necessary to carry out and give effect to the terms of this Agreement.

21.8 Severability

If any provision of this Agreement is determined by a court of competent jurisdiction to be wholly or partially illegal, invalid, void, voidable or unenforceable in any jurisdiction for any reason, such illegality, invalidity or unenforceability shall not affect the legality, validity and enforceability of the balance of this Agreement or its legality, validity or enforceability in any other jurisdiction. If any provision is so determined to be wholly or partially illegal, invalid or unenforceable for any reason, each Party shall negotiate in good faith and execute a new legal, valid and enforceable provision to replace such illegal, invalid or unenforceable provision, which, as nearly as practically possible, has the same effect as the illegal, invalid or unenforceable provision.

21.9 Time of the Essence

Time shall be of the essence.

21.10 Amendments

No amendment or modification to this Agreement shall be effective unless it is in writing and signed by each Party. Until such time as the Initial Financing is Paid in Full, without the written consent of the Collateral Agent, no amendment may be made to:

(a) the definitions:

(i) in **Section 1.1** of "**Acquiror**", "**Base Block Capital Costs Recovery**", "**Base Block Energy**", "**Base Block Payments**", "**Collateral Agent**", "**Commissioning Date**", "**Financing**", "**Financing Documents**", "**Financing Parties**", "**Force Majeure**", "**Forgivable Event**", "**Funding Vehicle**", "**Initial Financing**", "**LTA Payments**", "**LTA Redemption Value**", "**Paid in Full**", "**Qualified Assignee**", "**Redemption Value**", "**Supply Period**", or

(ii) that are used in a definition referred to in **Section 21.10(a)(i)**; or

(b) **Articles 13**, **14**, **15**, **16**, **17** or **19**; or

(c) **Sections 2.1**, **4.2**, **21.10** or **21.14**; or

(d) **Schedules 1** or **2**.

21.11 No Waiver

Any failure or delay of a Party to enforce any of the provisions of this Agreement or to require compliance with any of its terms shall not affect the validity of this Agreement, or any part hereof, and shall not be deemed a waiver of the right of such Party thereafter to enforce any and each such provision. Any consent or approval given by a Party pursuant to this Agreement shall be limited to its express terms and shall not otherwise increase the obligations of such Party or otherwise reduce the obligations of the Party receiving such consent or approval.

21.12 No Third Party Beneficiaries

Except as otherwise provided herein or permitted hereby, this Agreement is not made for the benefit of any Person not a Party to this Agreement, and no Person other than the Parties or their respective successors and permitted assigns shall acquire or have any right, remedy or claim under or by virtue of this Agreement.

21.13 Survival

Notwithstanding the termination of this Agreement, the Parties shall be bound by the terms of this Agreement in respect of the final settlement of all accounts between the Parties, including the payment of any amounts due under **Article 4**, **Article 10**, **Article 11**, **Article 12**, **Section 13.4(d)** and **Section 14.8.** All provisions of this Agreement that expressly or by their nature are intended to survive the termination (however caused) of this Agreement, including covenants, warranties, guarantees, releases and indemnities, continue as valid and enforceable rights and obligations (as the case may be) of the Parties, notwithstanding any such termination, until they are satisfied in full or by their nature expire.

21.14 Step-In Agreement

On the written request of a Financing Party, the Parties agree to execute and deliver the step-in agreement in favour of the Financing Parties substantially in the form of **Schedule 7**. (the "**Step-In Agreement**").

21.15 Successors and Assigns

This Agreement shall be binding upon and enure to the benefit each of the Parties and their respective successors and permitted assigns.

21.16 Crown not an Affiliate

The NL Crown shall be deemed to not be an Affiliate of any Party hereto.

[Remainder of this page intentionally left blank.]

IN WITNESS WHEREOF the Parties have executed this Agreement as of the date first above written.

NEWFOUNDLAND AND LABRADOR HYDRO

By: _____
Name: Robert Henderson
Title: VP, Newfoundland and Labrador Hydro

By: _____
Name: Paul Humphries
Title: VP System Operations + Planning
We have authority to bind the corporation.

MUSKRAT FALLS CORPORATION

By: _____
Name: Derrick Sturge
Title: VP, Finance & CFO

By: _____
Name: Gilbert Bennett
Title: Vice President
We have authority to bind the corporation.

LABRADOR-ISLAND LINK LIMITED PARTNERSHIP

and

LABRADOR-ISLAND LINK OPERATING CORPORATION

and

NEWFOUNDLAND AND LABRADOR HYDRO

TRANSMISSION FUNDING AGREEMENT

November 29, 2013

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TRANSMISSION FUNDING AGREEMENT

THIS TRANSMISSION FUNDING AGREEMENT is signed the 29th day of November, 2013.

AMONG:

LABRADOR-ISLAND LINK LIMITED PARTNERSHIP, a limited partnership formed pursuant to the laws of NL, acting by its general partner Labrador-Island Link General Partner Corporation (the "**Partnership**")

– and –

LABRADOR-ISLAND LINK OPERATING CORPORATION, a corporation incorporated pursuant to the laws of NL, and a wholly-owned subsidiary of Nalcor ("**Opco**")

– and –

NEWFOUNDLAND AND LABRADOR HYDRO, a corporation continued pursuant to the *Hydro Corporation Act, 2007* (Newfoundland and Labrador) being Chapter H-7 of the *Statutes of Newfoundland and Labrador, 2007*, and a wholly-owned subsidiary of Nalcor ("**NLH**")

WHEREAS:

A. the Parties wish to ensure the development and improvement of the Bulk Electric System in order to provide safe, reliable and efficient electric service in NL in a prompt and cost effective manner;

B. the LIL is integral to NLH's planned purchase and delivery of Energy and Capacity from the MF Plant, will allow NLH to rely upon the MF Plant as a secure Energy supply serving NL Customers and will enable the closure of the Holyrood oil-fired generation plant;

C. the LIL will also provide NLH with the ability to (i) maximize the efficiency of its generation resources and the NL Transmission System in order to meet anticipated demand in NL, and (ii) meet NLH's Energy sale and delivery obligations under related commercial arrangements;

D. the direct cost reimbursement for the LIL by NLH will provide certainty in cost recovery for the purposes of the Financing of the LIL and will facilitate the design, engineering, construction, Commissioning, Financing, operation and maintenance of the LIL in a prompt and cost-effective manner;

E. pursuant to the LIL Assets Agreement and the LIL Lease, the Partnership shall provide Opco with all rights necessary to enable Opco to operate and maintain the LIL following the Commissioning Date, and Opco shall operate or cause to be operated the LIL consistently with the provisions of the LIL Lease and this Agreement; and

F. under the provisions of this Agreement, NLH will pay to Opco the TFA Payments, which amounts will pay for the Operating and Maintenance Costs and the Rent;

NOW THEREFORE this Agreement witnesses that in consideration of the mutual covenants hereinafter contained the Parties, intending to be legally bound, agree as follows:

ARTICLE 1
INTERPRETATION

1.1 Definitions

In this Agreement, including the recitals, and subject to **Section 1.2(h)**, in the Schedules:

"**Acquiror**" has the meaning set forth in the Opco Step-In Agreement;

"**Act**" means the *Limited Partnership Act* (Newfoundland and Labrador);

"**Actual Annual TFA Payment**" has the meaning set forth in **Section 3.3(d)**;

"**Actual Demobilization List Costs**" means the actual costs incurred to complete the work on all Demobilization List Items;

"**Actual Punch List Costs**" means the actual costs incurred to complete the work on all Punch List Items;

"**Actual Quarterly TFA Payment**" has the meaning set forth in **Section 3.3(b)**;

"**Actual Quarterly TFA Payment Invoice**" has the meaning set forth in **Section 3.3(b)**;

"**Actual Quarterly Rent Invoice**" has the meaning set forth in the LIL Lease;

"**Adequacy**" means the ability of an electric system to reliably and safely supply electrical demand and energy requirements at all times in accordance with planning and operating criteria and taking into account scheduled and unscheduled outages of system elements;

"**Affiliate**" means, with respect to any Person, any other Person who directly or indirectly Controls, is Controlled by, or is under common Control with, such Person;

"**Agreement**" means this agreement, including all Schedules, as it may be modified, amended, supplemented or restated by written agreement among the Parties;

"**Annual Depreciation on the LIL**" has the meaning set forth in the LIL LP Agreement;

"**Annual Depreciation on Sustaining Costs**" means, in any Operating Year, the Undepreciated Sustaining Costs divided by the remaining Service Life of the LIL, averaged as appropriate consistent with the then current regulatory practice in NL;

"**Annual Maintenance Plan**" means an annual maintenance plan for the LIL prepared by Opco and Approved by the JOC setting out the O&M Activities to take place in each Operating Year, including required equipment outages and their durations and, where appropriate in accordance with Good Utility Practice, O&M Activities to take place in subsequent Operating Years, and containing such other information as may be required by the JOC, acting reasonably;

"**Annual O&M Budget**" means the annual budget for O&M Activities related to the LIL prepared by Opco for an Operating Year based on the Annual Maintenance Plan for such Operating Year and the O&M Budget, and including the type of expenditure, the amount thereof and the schedule for making such expenditure;

"**Applicable Law**" means, in relation to any Person, property, transaction or event, all applicable laws, statutes, rules, codes, regulations, treaties, official directives, policies and orders of, and the terms of all judgments, orders and decrees issued by, any Authorized Authority by which such Person is bound or having application to the property, transaction or event in question;

"**Approved by the JOC**" means approved by a decision of the JOC made in accordance with Article 3 of the JOA, and "**Approves**", "**Approved**" and "**Approval**" in relation to the JOC have correlative meanings;

"**Authorized Authority**" means, in relation to any Person, property, transaction or event, any (a) federal, provincial, state, territorial, municipal or local governmental body (whether administrative, legislative, executive or otherwise), (b) agency, authority, commission, instrumentality, regulatory body, court or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government, (c) court, arbitrator, commission or body exercising judicial, quasi-judicial, administrative or similar functions, (d) private regulatory entity, self-regulatory organization or other similar Person, or (e) other body or entity created under the authority of or otherwise subject to the jurisdiction of any of the foregoing, including any stock or other securities exchange, in each case having jurisdiction over such Person, property, transaction or event;

"**Bulk Electric System**" means the NL electrical generation resources, transmission lines, interconnections with neighbouring systems and associated equipment, generally operated at voltages of 100 KV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition;

"**Business Day**" means any day that is not a Saturday, Sunday or legal holiday recognized in the City of St. John's, NL;

"**CFLCo**" means Churchill Falls (Labrador) Corporation, Limited, a corporation incorporated pursuant to the laws of Canada, and includes its successors;

"**CFLCo Plant**" means the hydroelectric generation facility owned and operated by CFLCo on the Churchill River, in the vicinity of Churchill Falls, NL;

"**Capacity**" means the capability to provide electrical power, measured and expressed in MW;

"**Capital Account**" has the meaning set forth in the LIL LP Agreement;

"**Claiming Party**" has the meaning set forth in **Section 8.2(a)**;

"**Claims**" means any and all Losses, claims, actions, causes of action, demands, fees (including all legal and other professional fees and disbursements, court costs and experts' fees), levies, Taxes, judgments, fines, charges, deficiencies, interest, penalties and amounts paid in settlement, whether arising in equity, at common law, by statute, or under the law of contracts, torts (including negligence and strict liability without regard to fault) or property, of every kind or character;

"**Collateral Agent**" means the Toronto Dominion Bank, in its capacity as collateral agent under the Financing Documents, and includes any successor thereof in such capacity;

"**Commissioning**" means the testing activities required to demonstrate the LIL is ready to transmit Energy and Capacity in accordance with the LIL Project Description, and "**Commission**" and "**Commissioned**" have a correlative meaning;

"**Commissioning Date**" means the date on which all of the following has occurred:

(a) the Commissioning has been completed;

(b) the NLSO has accepted in writing that the Commissioning has been completed; and

(c) the Financing Parties have accepted in writing that the Commissioning has been completed.

"**Confidential Information**" means:

(a) all information, in whatever form or medium, whether factual, interpretative or strategic, furnished by or on behalf of a Disclosing Party, directly or indirectly, to the Receiving Party, including all data, documents, reports, analysis, tests, specifications, charts, lists, manuals, technology, techniques, methods, processes, services, routines, systems, procedures, practices, operations, modes of operation, apparatuses, equipment, business opportunities, customer and supplier lists, know-how, trade or other secrets, contracts, financial statements, financial projections and other financial information, financial strategies, engineering reports, environmental reports, land and lease information, technical and economic data, marketing information and field notes, marketing strategies, marketing methods, sketches, photographs, computer programs, records or software, specifications, models or other information that is or may be either applicable to or related in any way to the assets, business or affairs of the Disclosing Party or its Affiliates; and

(b) all summaries, notes, analysis, compilations, studies and other records prepared by the Receiving Party that contains or otherwise reflect or have been generated or derived from, in whole or in part, confidential information described in **Section (a)** of this definition;

"**Control**" of a Person means the possession, direct or indirect, of the power to elect or appoint a majority of such Person's board of directors or similar governing body, or to direct or cause the direction of the management, business and/or policies of such Person, whether through ownership of Voting Shares, by contract or otherwise, and, without limiting the generality of the foregoing, a Person shall be deemed to "**Control**" any partnership of which, at the time, the Person is a general partner, in the case of a limited partnership, or is a partner who, under the partnership agreement, has authority to bind the partnership, in all other cases (and the terms "**Controlled by**" and "**under common Control with**" have a correlative meaning);

"**DER**" means the Debt for Borrowed Money of the Partnership compared to the value of the Capital Accounts of the Partnership, expressed as a ratio;

"**Debt for Borrowed Money**", with respect to any Person means, without duplication, such Person's:

(a) obligations for borrowed money;

(b) obligations under letters of credit or letters of guarantee or obligations to financial institutions who issued such letters of credit or letters of guarantee for the account of such Person;

(c) obligations under banker's acceptances, depository bills or depository notes (as these latter two expressions are defined in the *Depository Bills and Notes Act* (Canada));

(d) Purchase Money Obligations;

(e) obligations evidenced by bonds, debentures or promissory notes; and

(f) obligations under guarantees with respect to obligations referred to in **Sections (a)** through **(e)** of this definition inclusively;

"**Demobilization List Cost Deficiency**" has the meaning set forth in the LIL Assets Agreement;

"**Demobilization List Cost Estimate**" has the meaning set forth in the LIL Assets Agreement;

"**Demobilization List Cost Surplus**" has the meaning set forth in the LIL Assets Agreement;

"**Demobilization List Items**" has the meaning set forth in the LIL Assets Agreement;

"**Development Activities**" means all activities and undertakings necessary to design, engineer, procure and construct the LIL in accordance with the LIL Project Description, and to Commission the LIL, including obtaining Regulatory Approvals, environmental and performance testing, demobilization, all related project management services and activities, the products of such activities and undertakings, and the resolution of all Claims and disputes related thereto;

"**Direct Claim**" has the meaning set forth in **Section 11.4(b)**;

"**Disclosing Party**" means a Party or an Affiliate of a Party that discloses Confidential Information to another Party or an Affiliate of such other Party;

"**Dispute**" means any dispute, controversy or claim of any kind whatsoever arising out of or relating to this Agreement, including the interpretation of the terms hereof or any Applicable Law that affects this Agreement, or the transactions contemplated hereunder, or the breach, termination or validity thereof;

"**Dispute Resolution Procedure**" has the meaning set forth in **Section 8.1(a)**;

"**Distributions**" has the meaning set forth in the LIL LP Agreement;

"**Effective Date**" means the Commissioning Date;

"**Emera**" means Emera Inc., a company incorporated pursuant to the laws of NS, and includes its successors;

"**Energy**" means electrical energy measured and expressed in MWh;

"**Estimated Annual Rent**" has the meaning set forth in the LIL Lease;

"**Estimated Annual Rent Notice**" has the meaning set forth in the LIL Lease;

"**Estimated Monthly TFA Payment**" has the meaning set forth in **Section 3.2(c)**;

"**Estimated TFA Payment**" has the meaning set forth in **Section 3.2(c)**;

"**Estimated TFA Payment Invoice**" has the meaning set forth in **Section 3.2(c)**;

"**Excise Tax Act**" means the *Excise Tax Act* (Canada);

"**Financing**" means the credit facilities granted or extended to, or invested by way of debt (or the purchase of debt) in, the Partnership with respect to the LIL, whereby or pursuant to which money, credit or other financial accommodation (including by way of hedging, derivative or swap transactions) has been or may be provided, made available or extended to the Partnership by any Person other than any of the Partners or a Retired Limited Partner or their respective Affiliates, by way of borrowed money, the purchase of debt instruments or securities, bankers acceptances, letters of credit, overdraft or other forms of credit and

financial accommodation (including by way of hedging, derivative or swap transactions), in each case to finance or Refinance the Development Activities;

"**Financing Documents**" means all credit agreements, indentures, bonds, debentures, other debt instruments, guarantees, guarantee issuance agreements, other credit enhancement agreements, and other contracts, instruments, agreements and documents evidencing any part of the Financing or any guarantee or other form of credit enhancement for the Financing and includes all trust deeds, mortgages, security agreements, assignments, escrow account agreements, ISDA Master Agreements and Schedules, guarantee agreements, guarantee issuance agreements, other forms of credit enhancement agreements, and other documents relating thereto;

"**Financing Parties**" means all lenders, bondholders and other creditors (including any counterparty to any hedging, derivative or swap transaction) providing any part of a Financing and any guarantor of or other provider of credit enhancement for any part of such Financing which is not an Affiliate of Nalcor, and includes all agents, collateral agents and collateral trustees acting on their behalf;

"**Fiscal Year**" has the meaning set forth in the LIL LP Agreement;

"**Force Majeure**" means an event, condition or circumstance (each, an "**event**") beyond the reasonable control and without fault or negligence of the Party claiming the Force Majeure, which, despite all commercially reasonable efforts, timely taken, of the Party claiming the Force Majeure to prevent its occurrence or mitigate its effects, causes a delay or disruption in the performance of any obligation (other than the obligation to pay monies due) imposed on such Party. Provided that the foregoing conditions are met, "**Force Majeure**" may include:

(a) an act of God, hurricane or similarly destructive storm, fire, flood, iceberg, severe snow or wind, ice conditions (including sea and river ice and freezing precipitation), geomagnetic activity, an environmental condition caused by pollution, forest or other fire or other cause of air pollution, epidemic declared by an Authorized Authority having jurisdiction, explosion, earthquake or lightning;

(b) a war, revolution, terrorism, insurrection, riot, blockade, sabotage, civil disturbance, vandalism or any other unlawful act against public order or authority;

(c) a strike, lockout or other industrial disturbance;

(d) breakage or an accident or inadvertent action or failure to act causing material physical damage to, or materially impairing the operation of, or access to the MF Plant, the LIL, the LTA or the NL Transmission System, or any machinery or equipment comprising part of, or used in connection with the MF Plant, the LIL, the LTA or the NL Transmission System;

(e) a revocation, amendment, failure to renew or other inability to obtain or the revocation, failure to renew or other inability to maintain in force any order, permit,

licence, certificate or authorization from any Authorized Authority that is required with respect to the O&M Activities, unless such inability or amendment is caused by a breach of the terms thereof or results from an agreement made by the party seeking or holding such order, permit, licence, certificate or authorization;

(f) any unplanned partial or total curtailment, interruption or reduction of the generation or delivery of Energy or Capacity that is required by the NLSO for the safe and reliable operation of any plant or facility or that results from the automatic operation of power system protection and control devices; and

(g) any event or circumstance affecting an O&M Contractor that constitutes a Force Majeure, excusable delay or similar relief event to the extent that such O&M Contractor is relieved from the performance of its obligations under a contract affecting a Party;

but none of the following shall be a Force Majeure:

(h) lack of finances or changes in economic circumstances of a Party;

(i) if the event relied upon results from a breach of Good Utility Practice by the Party claiming Force Majeure; and

(j) any delay in the settlement of any Dispute;

"**GAAP**" means generally accepted accounting principles as defined by the Canadian Institute of Chartered Accountants or its successors, as amended or replaced by international financial reporting standards or as otherwise amended from time to time;

"**GP**" means Labrador-Island Link General Partner Corporation, a NL corporation and a wholly-owned subsidiary of Nalcor, in its capacity as general partner of the Partnership, or any Person who is a Qualified Partner and is admitted to the Partnership as a successor or assign of the GP;

"**Good Utility Practice**" means those project management, design, procurement, construction, operation, maintenance, repair, removal and disposal practices, methods, and acts that are engaged in by a significant portion of the electric utility industry in Canada during the relevant time period, or any other practices, methods or acts that, in the exercise of reasonable judgment in light of the facts known at the time a decision is made, could have been expected to accomplish a desired result at a reasonable cost consistent with good business practices, Reliability, safety and expedition. Good Utility Practice is not intended to be the optimum practice, method, or act to the exclusion of others, but rather to be a spectrum of acceptable practices, methods or acts generally accepted in such electric utility industry for the project management, design, procurement, construction, operation, maintenance, repair, removal and disposal of electric utility facilities in Canada. Notwithstanding the foregoing references to the electric utility industry in Canada, in respect solely of Good Utility Practice regarding subsea HVdc transmission cables, the standards referenced shall be the internationally recognized standards for such practices,

methods and acts generally accepted with respect to subsea HVdc transmission cables. Good Utility Practice shall not be determined after the fact in light of the results achieved by the practices, methods or acts undertaken but rather shall be determined based upon the consistency of the practices, methods or acts when undertaken with the standard set forth in the first two sentences of this definition at such time;

"**HSE**" means health, safety and the environment;

"**HST**" means all amounts exigible pursuant to Part IX of the Excise Tax Act, including, for greater certainty, the Taxes commonly referred to as the goods and services tax (GST) and the harmonized sales tax (HST);

"**Holder**" means "holder" as defined in the *Muskrat Falls Project Land Use and Expropriation Act* (Newfoundland and Labrador);

"**Income Tax Act**" means the *Income Tax Act* (Canada);

"**Indemnified Party**" has the meaning set forth in **Section 11.4(a)**;

"**Indemnitor**" has the meaning set forth in **Section 11.4(a)**;

"**Insolvency Event**" means, in relation to any Party, the occurrence of one or more of the following:

(a) an order is made, or an effective resolution passed, for the winding-up, liquidation or dissolution of such Party;

(b) such Party voluntarily institutes proceedings for its winding up, liquidation or dissolution, or to authorize or enter into an arrangement under the *Corporations Act* (Newfoundland and Labrador) or similar legislation in any other jurisdiction affecting any of its creditors, *or* takes action to become bankrupt, or consents to the filing of a bankruptcy application against it, or files an assignment, a proposal, a notice of intention to make a proposal, an application, or answer or consent seeking reorganization, readjustment, arrangement, composition, protection from creditors, or similar relief under any bankruptcy or insolvency law or any other similar Applicable Law, including the *Bankruptcy and Insolvency Act* (Canada) and the *Companies' Creditors Arrangement Act* (Canada), or consents to the filing of any such application for a bankruptcy order, or consents to the appointment of an interim receiver, receiver, monitor, liquidator, restructuring officer or trustee in bankruptcy of all or substantially all of the property of such Party or makes an assignment for the benefit of creditors, or admits in writing its inability to pay its debts generally as they come due or commits any other act of bankruptcy or insolvency, or suspends or threatens to suspend transaction of its usual business, or any action is taken by such Party in furtherance of any of the foregoing;

(c) a court having jurisdiction enters a judgment or order adjudging such Party a bankrupt or an insolvent person, or approving as properly filed an application or

motion seeking an arrangement under the *Corporations Act* (Newfoundland and Labrador) or similar legislation in any other jurisdiction affecting any of its creditors or seeking reorganization, readjustment, arrangement, composition, protection from creditors, or similar relief under any bankruptcy or insolvency law or any other similar Applicable Law, or an order of a court having jurisdiction for the appointment of an interim receiver, receiver, monitor, liquidator, restructuring officer or trustee in bankruptcy of all or substantially all of the undertaking or property of such Party, or for the winding up, liquidation or dissolution of its affairs, is entered and such order is not contested and the effect thereof stayed, or any material part of the property of such Party is sequestered or attached and is not returned to the possession of such Party or released from such attachment within 30 days thereafter;

(d) any proceeding or application is commenced respecting such Party without its consent or acquiescence pursuant to any Applicable Law relating to bankruptcy, insolvency, reorganization of debts, winding up, liquidation or dissolution, and such proceeding or application (i) results in a bankruptcy order or the entry of an order for relief and a period of 30 days has elapsed since the issuance of such order without such order having been reversed or set aside or (ii) is not dismissed, discharged, stayed or restrained in each case within 30 days of the commencement of such proceeding or application; or

(e) such Party has ceased paying its current obligations in the ordinary course of business as they generally become due;

"**Island Interconnected System**" means the bulk energy transmission system on the island portion of NL owned and operated by NLH but, for greater certainty, excluding any part of the LIL or the Maritime Link;

"**JOA**" means the Joint Operations Agreement between Nalcor and Emera dated July 31, 2012, relating, among other things, to the operation and maintenance of the LIL;

"**JOC**" means the Joint Operations Committee established pursuant to the JOA;

"**Knowledge**" means in the case of a Party, as applicable, the actual knowledge of any of the executive officers of such Party and other facts or matters that such executive officers could reasonably be expected to discover or otherwise become aware of in the course of performing their ordinary responsibilities as executive officers of such Party;

"**LIL**" means equipment and facilities comprising a HVdc transmission line and all related components, including converter stations, synchronous condensers, and terminal, telecommunications and switchyard equipment, constructed between the LTA and the Island Interconnected System including:

(a) foundations, underground services, subsea services, roads, buildings, erections and structures, whether temporary or permanent;

(b) all other facilities, fixtures, appurtenances and tangible personal property, including inventories, of any nature whatsoever contained on or attaching to the transmission lines; and

(c) all mechanical, electrical and other systems and other technology installed under or upon any of the foregoing;

"**LIL LP Agreement**" means the agreement between Labrador-Island Link General Partner Corporation, as general partner, and Labrador-Island Link Holding Corporation, as limited partner, dated July 31, 2012, which establishes the Partnership;

"**LIL Assets Agreement**" means the agreement of even date herewith between the Partnership and Opco relating, among other things, to the lease, assignment and licence, as applicable, of the LIL Assets and Rights by the Partnership to Opco, and the assumption by Opco of the operation and maintenance of the LIL;

"**LIL Assets and Rights**" has the meaning set forth in the LIL Lease;

"**LIL Lease**" means the agreement of even date herewith between the Partnership and Opco (and NLH for certain limited purposes) by which the LIL Assets and Rights are leased, assigned or licenced, as applicable, by the Partnership to Opco;

"**LIL Lease Term**" has the meaning set forth in the LIL Lease;

"**LIL Project Description**" means a compilation of the fundamental engineering criteria, data and components on the basis of which the LIL is to be constructed as set forth in **Schedule 1**;

"**LIL Remedies Agreement**" means the agreement of even date herewith among the Partnership, Opco and NLH setting forth certain specific remedies associated with this Agreement and the LIL Lease;

"**LTA**" means the transmission facilities to be constructed by or on behalf of Labrador Transco in Labrador including its interconnections with the MF Plant, the CFLCo Plant and the LIL;

"**LTAMP**" means a long term asset management plan describing and quantifying the O&M Activities for each Operating Year in sufficient detail to determine the estimated annual Operating and Maintenance Costs and Sustaining Costs, and including:

(a) a description of each activity, including at a minimum routine annual O&M Activities, anticipated Sustaining Activities, and retirements which do not occur annually;

(b) the expected year of occurrence of each such activity; and

(c) estimates of the annual costs applicable to each such activity;

"**Labrador Transco**" means Labrador Transmission Corporation, a corporation incorporated pursuant to the laws of NL and a wholly-owned subsidiary of Nalcor, and includes its successors;

"**Legal Proceedings**" means any actions, suits, investigations, proceedings, judgments, rulings or orders by or before any Authorized Authority;

"**Loan Guarantee**" means the Federal Loan Guarantee for the LIL given by Canada as part of the Financing;

"**Losses**" means any and all losses (other than losses of Energy normally incurred in the transmission of Energy), damages, costs, expenses, charges, fines, penalties and injuries of every kind and character;

"**MF Plant**" means a hydro-electric generation plant on the Churchill River in the vicinity of Muskrat Falls, NL, to be owned and operated by Muskrat;

"**MPPA**" means the Multi-Party Pooling Agreement to be entered into between the NLSO and the owners or operators of transmission facilities comprising the NL Transmission System pursuant to which the NLSO shall exercise operational control of, and provide transmission service over, the NL Transmission System;

"**MW**" means megawatt;

"**MWh**" means MW hour;

"**Maritime Link**" means the transmission facilities to be constructed between the Island Interconnected System and the transmission system in NS in accordance with the Maritime Link Joint Development Agreement;

"**Maritime Link Joint Development Agreement**" means the agreement between Nalcor and Emera dated July 31, 2012 relating to the development of the Maritime Link;

"**Muskrat**" means Muskrat Falls Corporation, a corporation incorporated pursuant to the laws of NL and a wholly-owned subsidiary of Nalcor, and includes its successors;

"**NL**" means the Province of Newfoundland and Labrador;

"**NL Crown**" means Her Majesty in Right of NL;

"**NL Customers**" means the wholesale and retail customers of electricity throughout NL directly or indirectly connected to the NL Transmission System;

"**NL Transmission System**" means electricity transmission assets in NL with a voltage level greater than or equal to 230 KV to be pooled under the MPPA;

"**NLH**" has the meaning set forth in the preamble to this Agreement, one of the Parties, and includes its successors and permitted assigns;

"**NLH Default**" has the meaning set forth in **Section 10.3**;

"**NLH Indemnified Party**" has the meaning set forth in **Section 11.1(a)**;

"**NLSO**" means NLH acting in its capacity as the Newfoundland and Labrador Systems Operator, being the system operations department of NLH responsible for the safe and reliable operation of the Bulk Electric System or a functionally separate division of NLH performing this function, and includes any of its successors;

"**NS**" means the Province of Nova Scotia;

"**Nalcor**" means Nalcor Energy, a corporation existing pursuant to the *Energy Corporation Act* (Newfoundland and Labrador), and includes its successors;

"**Nalcor LP**" means Labrador-Island Link Holding Corporation, a corporation incorporated pursuant to the laws of NL and a wholly-owned subsidiary of Nalcor, and includes its successors;

"**New Taxes**" means:

(a) any Tax exigible pursuant to Applicable Law which comes into force after the Effective Date; and

(b) any change to a Tax exigible pursuant to Applicable Law which comes into force after the Effective Date;

"**Notice**" means a communication required or contemplated to be given by a Party to another Party under this Agreement, which communication shall be given in accordance with **Section 16.1**;

"**O&M Activities**" means all activities and undertakings performed by or on behalf of Opco after the Commissioning Date that are required to operate, maintain and sustain the LIL in accordance with Good Utility Practice, including administration and the replacement or overhaul of major components which do not extend the Service Life and, for greater certainty, includes Sustaining Activities;

"**O&M Budget**" means the budget prepared by Opco for the LIL based on the LTAMP and setting forth the Operating and Maintenance Costs and Sustaining Costs required to be made for each Operating Year during the LIL Lease Term, including the type of expenditure, the amount thereof and the schedule for making such expenditure;

"**O&M Contract**" means a contract to perform work or provide services, equipment, materials, facilities or supplies forming part of or procured in connection with O&M Activities;

"**O&M Contractor**" means a Person who enters into an O&M Contract;

"**O&M Standards**" means the standards or requirements established or adopted and Approved by the JOC for the operation and maintenance of the LIL in accordance with Good Utility Practice for a long-term, low cost, reliable transmission facility, including monitoring and reporting on asset performance, frequency and scope of major inspections, applicable industry standards to apply in asset operation and maintenance, completion of the LTAMP, and the maintenance of appropriate critical spares, and includes standards or criteria established by the Standards Authority which are applicable to the LIL;

"**Opco**" has the meaning set forth in the preamble of this Agreement, one of the Parties, and includes its successors and permitted assigns;

"**Opco Affiliate Assignee**" means an Affiliate of Opco to which all of the Opco Rights are assigned in accordance with the provisions of this Agreement;

"**Opco Default**" has the meaning set forth in **Section 10.1**;

"**Opco Indemnified Party**" has the meaning set forth in **Section 11.2(a)**;

"**Opco Rights**" has the meaning set forth in **Section 14.1(a)**;

"**Opco Step-In Agreement**" has the meaning set forth in **Section 16.14**;

"**Operating and Maintenance Costs**" means, without duplication, all costs and expenses incurred for operation and maintenance of the LIL in accordance with the LIL Lease after the Commissioning Date, including costs of O&M Activities which are not Sustaining Activities, administration costs for Opco, any Taxes payable by or on behalf of Opco or in respect of amounts payable to Opco (including for greater certainty, any Taxes payable by Opco and required to be withheld by a Person on the payment of an amount to Opco), net of any such Taxes which are recovered, but grossed up and adjusted to the extent necessary so that the amount of any amounts payable to Opco which are retained by Opco, net of any such Taxes, shall equal the amount which Opco would have retained if such Taxes were not payable by or on behalf of Opco or in respect of amounts payable to Opco, any costs and expenditures related to insurance, including any deductibles, any amount payable on account of a penalty imposed by Applicable Law or contract, any amount payable on account of a judgment rendered against Opco, and expressly excluding in all instances Rent and any costs, expenses or other amounts included in Rent;

"**Operation and Maintenance Manual**" means a document or collection of documents describing the LIL Project Description and each of the major components of the LIL, the design engineer's recommendation for operating procedures and parameters, routine preventative maintenance, HSE procedures and periodic inspections, and containing references to each original equipment manufacturers manual for operating and maintenance of their provided equipment, spare parts requirements, and special tools and equipment;

"**Operating Year**" means (a) a calendar year during the TFA Term, except that the first operating year will commence on the Commissioning Date and end on December 31 of the

calendar year in which such date occurs, and the last operating year will end on the date of termination or expiry of the TFA Term, or (b) such other 12 month period as may be mutually agreed to in writing by the Parties;

"**PUB**" means the Board of Commissioners of Public Utilities established pursuant to the *Public Utilities Act* (Newfoundland and Labrador) and any successor;

"**Paid in Full**" means in relation to any indebtedness that is or may become owing to any Person, the permanent, indefeasible and irrevocable payment to such Person in full of such indebtedness in accordance with the express provisions of the agreements creating or evidencing such indebtedness, without regard to any compromise, reduction or disallowance of all or any item or part thereof by virtue of the application of any laws relating to Insolvency Events or fraudulent conveyance or any similar laws affecting creditors' rights generally or general principles of equity and, if applicable, the cancellation or expiry of any commitment or obligation of such Person to lend or otherwise extend credit or pay any indebtedness;

"**Parties**" means the Partnership, Opco and NLH, and "**Party**" means one of them;

"**Partners**" has the meaning set forth in the LIL LP Agreement;

"**Partnership**" has the meaning set forth in the preamble of this Agreement, one of the Parties, and includes its successors and permitted assigns;

"**Partnership Affiliate Assignee**" means an Affiliate of the Partnership to which all of the Partnership Rights are assigned in accordance with the provisions of this Agreement;

"**Partnership Default**" has the meaning set forth in **Section 10.5**;

"**Partnership Indemnified Party**" has the meaning set forth in **Section 11.3(a)**;

"**Partnership Rights**" has the meaning set forth in **Section 14.2(a)**;

"**Partnership Step-In Agreement**" has the meaning set forth in **Section 16.14**;

"**Permits**" means permits, licences, Regulatory Approvals and permissions held by the Partnership in connection with Development Activities or otherwise held by the Partnership or Opco in connection with an activity or undertaking involving the LIL or any part of it but, for greater certainty, excluding LIL Real Property Rights;

"**Person**" includes an individual, a partnership, a corporation, a company, a trust, a joint venture, an unincorporated organization, a union, a government or any department or agency thereof and the heirs, executors, administrators or other legal representatives of an individual;

"**Prime Rate**" means the variable rate of interest per annum expressed on the basis of a year of 365 or 366 days, as the case may be, established from time to time by The Bank of

Nova Scotia, or any successor thereto, as its reference rate for the determination of interest rates that it will charge on commercial loans in Canadian dollars made in Canada;

"**Punch List Cost Deficiency**" has the meaning set forth in the LIL Assets Agreement;

"**Punch List Cost Estimate**" has the meaning set forth in the LIL Assets Agreement;

"**Punch List Cost Surplus**" has the meaning set forth in the LIL Assets Agreement;

"**Punch List Items**" has the meaning set forth in the LIL Assets Agreement;

"**Purchase Money Obligations**" means, with respect to any Person, any indebtedness assumed as part of, or issued or incurred in respect of, the cost of acquisition, including by way of conditional sales contract or leasing by way of a capital lease, of any property (including shares of capital stock) or of the cost of construction, improvement or extension of any property acquired, constructed, improved or extended or leased by way of a capital lease, which indebtedness existed at the time of acquisition, construction, improvement or extension or was created, issued, incurred, assumed or guaranteed contemporaneously with the acquisition, construction, improvement or extension or leasing by way of a capital lease or within 90 days after the completion thereof, and includes any extension, renewal or refinancing of any such indebtedness if the amount thereof outstanding on the date of such extension, renewal or refinancing is not increased, it being expressly understood that Purchase Money Obligations shall not include any trade payables incurred in the ordinary course of business and for the purpose of carrying on same or any indebtedness incurred in connection with any sale and leaseback transaction;

"**Qualified Assignee**" means a Person which is:

(a) an administrative or security agent of a Financing Party;

(b) with respect to the Opco Rights, an Affiliate or Affiliates of Opco, or a Holder, provided

  (i) Opco and such Affiliate(s) or Opco and such Holder, as applicable, enter into an agreement with the Partnership and NLH substantially in the form of **Schedule 2**; and

  (ii) there is a concurrent assignment to such Affiliate(s) or such Holder of the LIL Lease, the MPPA, the LIL Remedies Agreement, this Agreement and all of Opco's right, title and interest in the LIL Assets and Rights; and

(c) with respect to the Partnership Rights, an Affiliate or Affiliates of the Partnership, or a Holder, provided

  (i) the Partnership and such Affiliate(s) or the Partnership and such Holder, as applicable, enter into an agreement with Opco and NLH substantially in the form of **Schedule 2**; and

(ii) there is a concurrent assignment to such Affiliate(s) or such Holder of the LIL Lease, the MPPA, the LIL Remedies Agreement, this Agreement and all of the Partnership's right, title and interest in the LIL Assets and Rights;

"**Qualified Partner**" has the meaning set forth in the LIL LP Agreement;

"**Quarter**" means a calendar quarter (or portion thereof, as applicable) in an Operating Year;

"**RROE**" has the meaning set forth in the LIL LP Agreement, and as determined in accordance with **Section 3.9**;

"**Receiving Party**" means a Party or an Affiliate of a Party that receives Confidential Information from another Party or an Affiliate of another Party;

"**Recipient Party**" has the meaning set forth in **Section 8.2(a)**;

"**Refinance**" means to extend, renew or refinance any indebtedness where the amount of such indebtedness outstanding on the date of such extension, renewal or refinancing is not increased;

"**Regular Business Hours**" means 8:30 a.m. through 4:30 p.m. local time on a Business Day;

"**Regulatory Approval**" means any approval required by any Authorized Authority, including any regulatory, environmental, development, zoning, building, subdivision or occupancy permit, licence, approval or other authorization;

"**Reliability**" means the degree of performance of the electric power system that results in electricity being delivered in compliance with Reliability Standards and in the amount desired, taking into consideration Adequacy and Security;

"**Reliability Standards**" means the criteria, standards and requirements relating to Reliability established or authorized by a Standards Authority;

"**Rent**" means for each Operating Year, an annual amount equal to:

(a) applicable operating expenses to administer the Partnership calculated on an annual basis; plus

(b) Annual Depreciation on the LIL (prorated if necessary); plus

(c) Annual Depreciation on Sustaining Costs (prorated if necessary); plus

(d) the Tax Adjustment Amount calculated on an annual basis; plus

(e) any Taxes payable by the Partnership (excluding any Taxes which are or will be included in the Tax Adjustment Amount but including, for greater certainty, any Taxes payable by the Partnership and required to be withheld by Opco on the payment of Rent), grossed up to the extent necessary so that the amount of Rent

retained by the Partnership, net of any such Taxes, shall equal the amount of the Rent the Partnership would have retained if such Taxes were not payable by the Partnership; plus

(f) annual return on the Undepreciated Capital Asset and the Undepreciated Sustaining Costs,

(i) calculated as a percentage, that is equal to:

(A) the actual annual cost of the debt owed by the Partnership as a percentage, being interest expense divided by the debt principal value, averaged as appropriate; plus

(B) the RROE applicable from time to time, averaged as appropriate and subject to a minimum value to achieve the debt service coverage ratio agreed in the Financing Documents;

both weighted according to the DER; multiplied by

(ii) the sum of the Undepreciated Capital Asset plus Undepreciated Sustaining Costs; plus

(g) annual recovery of cost of capital (without duplication) associated with Reserves as determined by the GP or required by a Restrictive Agreement; plus

(h) without duplication, any amount payable by the Partnership arising from an indemnity obligation under the Financing Documents; plus

(i) without duplication, any amount payable by Opco arising from an indemnity obligation under the Financing Documents,

all averaged as appropriate consistent with the then current regulatory practice in NL;

"**Representatives**" means the directors, officers, employees, agents, lawyers, engineers, accountants, consultants and financial advisers of a Party;

"**Reserves**" has the meaning set forth in the LIL LP Agreement;

"**Restrictive Agreement**" means any agreement which imposes limitations and conditions on the capacity of the Partnership to make Distributions to the Partners, and includes for avoidance of doubt, any Financing Documents;

"**Retired Limited Partner**" has the meaning set forth in the LIL LP Agreement;

"**Return on Equity**" has the meaning set forth in the LIL LP Agreement;

"**Security**" means the ability of an electrical system to withstand disturbances such as electric short circuits or unanticipated loss of system elements;

"**Service Life**" means the period of time immediately following the Commissioning Date, as designated by an Authorized Authority, from time to time, during which the LIL can continue to transmit Energy and Capacity in accordance with Reliability Standards and the LIL Project Description;

"**Standards Authority**" means the Government of NL, the PUB, or any other NL agency which assumes or is granted authority over the Parties regarding standards or criteria applicable to the Parties relating to the Reliability of the LIL;

"**Sustaining Activities**" means, with respect to O&M Activities, those activities and undertakings of a capital nature which Opco determines after the Commissioning Date are necessary to sustain the LIL in proper operating condition during its Service Life;

"**Sustaining Costs**" means the costs incurred as a result of Sustaining Activities, including an allowance for funds used during construction consistent with the then current regulatory practice in NL;

"**TFA Payments**" has the meaning set forth in **Section 3.1**;

"**TFA Term**" has the meaning set forth in **Section 9.1**;

"**Tariff Charges**" means any charges arising pursuant to a tariff or other schedule of fees in respect of electricity transmission services;

"**Tax**" or "**Taxes**" means any tax, fee, levy, rental, duty, charge, royalty or similar charge including, for greater certainty, any federal, state, provincial, municipal, local, aboriginal, foreign or any other assessment, governmental charge, imposition or tariff (other than Tariff Charges) wherever imposed, assessed or collected, and whether based on or measured by gross receipts, income, profits, sales, use and occupation or otherwise, and including any income tax, capital gains tax, payroll tax, fuel tax, capital tax, goods and services tax, harmonized sales tax, value added tax, sales tax, withholding tax, property tax, business tax, ad valorem tax, transfer tax, franchise tax or excise tax, together with all interest, penalties, fines or additions imposed, assessed or collected with respect to any such amounts;

"**Tax Adjustment Amount**" has the meaning set forth in the LIL LP Agreement;

"**Third Party Claim**" has the meaning set forth in **Section 11.4(b)**;

"**Undepreciated Capital Asset**" has the meaning set forth in the LIL LP Agreement;

"**Undepreciated Sustaining Costs**" means, in any Operating Year, the accumulated Sustaining Costs at the end of such Operating Year plus Reserves associated with Sustaining Costs less accumulated Annual Depreciation on Sustaining Costs; and

"**Voting Shares**" means shares issued by a corporation in its capital stock, or equivalent interests in any other Person, the holders of which are ordinarily, in the absence of

contingencies, entitled to vote for the election of directors (or Persons performing similar functions) of such Person, even if such right to vote has been suspended by the happening of such contingency.

1.2 Construction of Agreement

(a) Interpretation Not Affected by Headings, etc. - The division of this Agreement into articles, sections and other subdivisions, the provision of a table of contents and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Agreement. Unless otherwise indicated, all references to an "**Article**", "**Section**", "**Schedule**" or "**Appendix**" followed by a number and/or a letter refer to the specified article, section, schedule or appendix of this Agreement. The terms "**this Agreement**", "**hereof**", "**herein**", "**hereby**", "**hereunder**" and similar expressions refer to this Agreement and not to any particular Article or Section hereof.

(b) Singular/Plural; Derivatives - Whenever the singular or masculine or neuter is used in this Agreement, it shall be interpreted as meaning the plural or feminine or body politic or corporate, and vice versa, as the context requires. Where a term is defined herein, a capitalized derivative of such term has a corresponding meaning unless the context otherwise requires.

(c) Including - The word "**including**", when used in this Agreement, means "**including without limitation**".

(d) Accounting References - Where the character or amount of any asset or liability or item of income or expense is required to be determined, or any consolidation or other accounting computation is required to be made for the purposes of this Agreement, the same shall be done in accordance with GAAP, unless expressly stated otherwise.

(e) Currency - Unless otherwise indicated, all dollar amounts referred to in this Agreement are in lawful money of Canada.

(f) Trade Meanings - Terms and expressions that are not specifically defined in this Agreement, but which have generally accepted meanings in the custom, usage and literature of the electricity industry in Canada as of the Effective Date, shall have such generally accepted meanings when used in this Agreement, unless otherwise specified elsewhere in this Agreement.

(g) Statutory References - Any reference in this Agreement to a statute shall include, and shall be deemed to be, a reference to such statute and to the regulations made pursuant thereto, and all amendments made thereto (including changes to section numbers referenced herein) and in force from time to time, and to any statute or regulation that may be passed that has the effect of supplementing or replacing the statute so referred to or the regulations made pursuant thereto, and any reference to an order, ruling or decision shall be deemed to be a reference to such order,

ruling or decision as the same may be varied, amended, modified, supplemented or replaced from time to time.

(h) Terms Defined in Schedules - Terms defined in a Schedule or part of a Schedule to this Agreement shall, unless otherwise specified in such Schedule or part of a Schedule or elsewhere in this Agreement, have the meaning set forth only in such Schedule or such part of such Schedule.

(i) Calculation of Time - Where, in this Agreement, a period of time is specified or calculated from or after a date or event, such period is to be calculated excluding such date or the date on which such event occurs, as the case may be, and including the date on which the period ends.

(j) Time Falling on Non-Business Day - Whenever the time for doing something under this Agreement falls on a day that is not a Business Day such action is to be taken on the first following Business Day.

(k) No Drafting Presumption - The Parties acknowledge that their respective legal advisors have reviewed and participated in settling the terms of this Agreement and agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting Party shall not apply to the interpretation of this Agreement.

(l) Approvals, etc. - Except where otherwise expressly provided herein, whenever an action referred to in this Agreement is to be "**approved**", "**decided**" or "**determined**" by a Party or requires a Party's or its Representative's "**consent**", then (i) such approval, decision, determination or consent by a Party or its Representative must be in writing, and (ii) such Party or Representative shall be free to take such action having regard to that Party's own interests, in its sole and absolute discretion.

(m) Subsequent Agreements - Whenever this Agreement requires the Parties to attempt to reach agreement on any matter, each Party shall use commercially reasonable efforts to reach agreement with the other Party, negotiating in good faith in a manner characterized by honesty in fact and the observance of reasonable commercial standards of fair dealing. Any failure of the Parties to reach agreement where agreement is required shall constitute a Dispute and may be submitted by a Party for resolution pursuant to the Dispute Resolution Procedure.

(n) References to Other Agreements - Any reference in this Agreement to another agreement shall be deemed to be a reference to such agreement and all amendments made thereto in accordance with the provisions of such agreement (including changes to section numbers referenced herein) as of the Effective Date. Where a term used in this Agreement is defined by reference to the definition contained in another agreement, the definition used in this Agreement shall be as such is defined in the applicable agreement as of the Effective Date.

1.3 Conflicts between Parts of Agreement

If there is any conflict or inconsistency between a provision of the body of this Agreement and that of a Schedule or any document delivered pursuant to this Agreement, the provision of the body of this Agreement shall prevail.

1.4 Applicable Law and Submission to Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of NL and the Federal laws of Canada applicable therein, but excluding all choice-of-law provisions. Subject to **Article 8**, each Party irrevocably consents and submits to the exclusive jurisdiction of the courts of NL with respect to all matters relating to this Agreement, subject to any right of appeal to the Supreme Court of Canada. Each Party waives any objection that it may now or hereafter have to the determination of venue of any proceeding in such courts relating to this Agreement or that it may now or hereafter have that such courts are an inconvenient forum.

1.5 Effectiveness of Agreement

Notwithstanding the execution of this Agreement by the Parties, the provisions of this Agreement shall only become effective on the Effective Date.

1.6 Schedules

The following are the Schedules attached to and incorporated by reference in this Agreement, which are deemed to be part hereof:

Schedule 1 - LIL Project Description

Schedule 2 - Form of Assignment

Schedule 3 - Dispute Resolution Procedure

Schedule 4 - Confidential Information

Schedule 5 - Opco Step-In Agreement

ARTICLE 2
PURPOSE

2.1 Purpose

The purpose of this Agreement is to establish a mechanism by which NLH shall pay to Opco the TFA Payments during the TFA Term as consideration for:

(a) Opco's commitment to:

(i) enter into the LIL Assets Agreement, the LIL Lease, the LIL Remedies Agreement and the MPPA; and

(ii) operate and maintain the LIL following the Commissioning Date in accordance with the provisions of this Agreement, the LIL Lease and the MPPA; and

(b) the Partnership's commitment to:

(i) design, engineer, construct, Commission and obtain and service the Financing for the LIL in a timely manner;

(ii) enter into the LIL Assets Agreement, the LIL Lease, the LIL Remedies Agreement and the MPPA;

(iii) interconnect the LIL with the LTA and with the existing transmission facilities of NLH, each in accordance with Good Utility Practice and applicable interconnection procedures; and

(iv) pay all Sustaining Costs.

ARTICLE 3
TFA PAYMENTS

3.1 NLH Obligation to Make TFA Payments

NLH agrees, as of and from the Commissioning Date and at all times thereafter during the TFA Term, to pay to Opco in accordance with the provisions of this Agreement (a) Operating and Maintenance Costs, (b) Rent, and (c) $30,000 per Operating Year (collectively the "**TFA Payments**"). NLH also agrees to pay to Opco in accordance with the provisions of this Agreement a Punch List Cost Deficiency and a Demobilization List Cost Deficiency.

3.2 TFA Payments Information

(a) Rent - Opco shall deliver to NLH within two Business Days after receipt from the Partnership each and every Estimated Annual Rent Notice and revised Estimated Annual Rent Notice.

(b) Operating and Maintenance Costs - Opco shall:

(i) not later than 18 months prior to the anticipated Commissioning Date (as set forth in the then current master project schedule for the Development Activities) deliver to NLH the O&M Budget;

(ii) not later than 120 days prior to the commencement of an Operating Year deliver to NLH the Annual O&M Budget;

(iii) within 30 days of receipt of any information which would increase or decrease the Annual O&M Budget by $1,000,000 or more, deliver to NLH a revised Annual O&M Budget; and

(iv) deliver the budget information as set forth in this **Section 3.2(b)** in sufficient detail for NLH to plan for cost recovery.

(c) TFA Payments - Opco shall not later than 18 months prior to the anticipated Commissioning Date (and thereafter not later than 120 days prior to the commencement of each Operating Year) deliver to NLH a Notice (the "**Estimated TFA Payment Invoice**") setting out Opco's estimate of the Operating and Maintenance Costs, the amount of Rent and the $30,000 (or portion thereof) payable to Opco, in each case, for the following Operating Year (the "**Estimated TFA Payment**"). The Estimated TFA Payment Invoice shall set out the monthly payment due for each calendar month (or part thereof) in the applicable Operating Year (the "**Estimated Monthly TFA Payment**").

3.3 Payment

(a) Estimated TFA Payment - NLH shall pay the first Estimated Monthly TFA Payment to Opco on the Commissioning Date and thereafter shall pay the Estimated Monthly TFA Payment to Opco monthly in advance on the first Business Day of each and every calendar month during the TFA Term.

(b) Actual TFA Payment - Within 15 days after the end of each Quarter or partial Quarter during which Estimated Monthly TFA Payments have been paid by NLH to Opco, Opco shall deliver to NLH a Notice (the "**Actual Quarterly TFA Payment Invoice**") setting out the actual TFA Payments payable for the previous Quarter (the "**Actual Quarterly TFA Payment**"). The Actual Quarterly TFA Payment Invoice shall contain a copy of the Actual Quarterly Rent Invoice received by Opco from the Partnership pursuant to the LIL Lease, a summary of the Operating and Maintenance Costs paid during the applicable Quarter, and such other detail and supporting documentation as reasonably required by NLH to review the calculation of the Actual Quarterly TFA Payment.

(c) Quarterly Adjustment - Should the Actual Quarterly TFA Payment exceed the sum of the Estimated Monthly TFA Payments paid during the applicable Quarter, NLH shall pay to Opco within 10 days of receipt by NLH of the Actual Quarterly TFA Payment Invoice the amount by which the Actual Quarterly TFA Payments exceed the sum of the Estimated Monthly TFA Payments paid for the applicable Quarter. Should the Actual Quarterly TFA Payments be less than the sum of the Estimated Monthly TFA Payments paid by NLH for the applicable Quarter, Opco shall within 10 days of delivery by Opco of the Actual Quarterly TFA Payment Invoice either (i) pay to NLH the amount by which the sum of the Estimated Monthly TFA Payments paid for the applicable Quarter exceeds the Actual Quarterly TFA Payments, or (ii) deliver to NLH a Notice authorizing NLH to credit against future Estimated Monthly TFA Payments, the amount by which the sum of the Estimated Monthly TFA Payments paid for the applicable Quarter exceeds the Actual Quarterly TFA Payment.

(d) Annual Adjustment - Within 30 days after the final determination of the Tax Adjustment Amount for the prior Operating Year, Opco shall deliver to NLH a Notice

setting out the actual amount of the TFA Payment ("**Actual Annual TFA Payment**") which was required to be paid by NLH to Opco for the prior Operating Year, addressing in detail and with supporting documentation, any discrepancies from the total sum of Actual Quarterly TFA Payments paid by NLH over such Operating Year. The amount (whether positive or negative) by which the Actual Annual TFA Payment differs from the total sum of the Actual Quarterly TFA Payments paid for such Operating Year shall be adjusted between Opco and NLH such that, if the Actual Annual TFA Payment is more than the total sum of the Actual Quarterly TFA Payments paid for the Operating Year, NLH shall within 10 days of delivery by Opco of the applicable Notice pay the difference to Opco, and if the Actual Annual TFA Payment is less than the total sum of the Actual Quarterly TFA Payments paid for the Operating Year, Opco shall within 10 days of delivery by Opco of the applicable Notice either (i) pay the difference to NLH, or (ii) deliver to NLH a Notice authorizing NLH to credit the difference against future Estimated Monthly TFA Payments.

(e) Further Adjustments - After the annual adjustment is made pursuant to **Section 3.3(d)**, should a Party discover or obtain written evidence of an overpayment or an underpayment of TFA Payments for a previous Operating Year, such Party shall forthwith provide Notice of the overpayment or underpayment and the supporting documentation in its possession to the other Party. On verification of the overpayment or underpayment by the other Party or, if applicable, pursuant to the Dispute Resolution Procedure, the payment of funds to address such overpayment or underpayment shall be made by the applicable Party within 10 days.

3.4 Changes to Timing of Payment

The Parties agree to exchange information and, if necessary, to adjust the timing of payment of TFA Payments as provided for in this Agreement to enable the timing of Estimated Monthly TFA Payments to align as closely as is reasonably possible to the timing of payments required under the Financing Documents.

3.5 Nature of NLH's Obligation to Pay

Notwithstanding any other provision of this Agreement, including **Section 10.8**, until such time as the Financing is Paid in Full, NLH's obligation to pay the TFA Payments, a Punch List Cost Deficiency and a Demobilization List Cost Deficiency shall be absolute, unconditional and irrevocable, and shall not be subject to any reductions under any circumstances whatsoever (except for the crediting permitted under **Sections 3.3(c)** and **(d)**, **3.7(a)(ii)** and **3.7(b)(ii)**).

3.6 Interest on Overdue Amounts

(a) NLH - If NLH fails to pay on the due date any amount payable to Opco pursuant to this Agreement, including the adjustment provisions set forth in **Sections 3.3(c)**, **(d)** and **(e)**, NLH shall pay interest to Opco on such unpaid amount from the due date or, as the case may be, the date of demand to the date of actual payment (after as

well as before judgment) at a rate equal to the default rate of interest set forth in the Financing Documents.

(b) Opco - If Opco fails to pay on the due date any refund amount payable to NLH pursuant to the adjustment provisions set forth in **Sections 3.3(c)**, **(d)** and **(e)**, Opco shall pay interest to NLH on such unpaid amount from the due date or, as the case may be, the date of demand to the date of actual payment (after as well as before judgment) at a rate equal to the default rate of interest set forth in the Financing Documents.

3.7 Commissioning Adjustments

(a) Punch List Items - On receiving notice from Opco:

(i) of a Punch List Cost Deficiency, NLH shall include the amount of such deficiency in the Estimated Monthly TFA Payment for the calendar month immediately following the calendar month in which such notice was received; or

(ii) of a Punch List Item Surplus, NLH shall reduce, by the amount of such surplus, the Operating and Maintenance Costs portion of the Estimated Monthly TFA Payment for the calendar month immediately following the calendar month in which such notice was received. If the Punch List Cost Surplus is greater than the Operating and Maintenance Costs portion of the Estimated Monthly TFA Payment of the applicable month, the remaining portion of the Punch List Cost Surplus shall be offset against subsequent Estimated Monthly TFA Payments until it has been applied in full.

(b) Demobilization List Items - On receiving notice from Opco:

(i) of a Demobilization List Cost Deficiency, NLH shall include the amount of such deficiency in the Estimated Monthly TFA Payment for the calendar month immediately following the calendar month in which such notice was received; or

(ii) of a Demobilization List Cost Surplus, NLH shall reduce, by the amount of such surplus, the Operating and Maintenance Costs portion of the Estimated Monthly TFA Payment for the calendar month immediately following the calendar month in which such notice was received. If the Demobilization List Cost Surplus is greater than the Operating and Maintenance Costs portion of the Estimated Monthly TFA Payment of the applicable month, the remaining portion of the Demobilization List Cost Surplus shall be offset against subsequent Estimated Monthly TFA Payments until it has been applied in full.

3.8 Notice of TFA Payment to the NLSO

Forthwith on receiving any payments from NLH pursuant to the provisions of this Agreement, Opco shall provide written notice of receipt to the NLSO in order for the NLSO to account for such payments through credits against NLH's payment obligations arising under any transmission service agreements to which NLH may be a party.

3.9 RROE

(a) The RROE to be earned by the Partnership in respect of any Fiscal Year shall be determined in accordance with the following principles and shall be changed whenever a reference rate of return is made effective by the PUB or other Authorized Authority, with the prior reference rate of return applying during the part of the Fiscal Year before the change and the new reference rate of return applying during the portion of the Fiscal Year after the change:

(i) if during such Fiscal Year there is only one privately-owned regulated electrical utility in NL, the RROE shall be equal to the rate of after tax-return on equity approved by the PUB in respect of such utility for such Fiscal Year; and

(ii) if during such Fiscal Year there is more than one privately-owned regulated electrical utility in NL, the RROE shall be the average of the rates of after-tax return on equity approved by the PUB in respect of all such utilities for such Fiscal Year.

(b) If during such Fiscal Year there are no privately-owned regulated electrical utilities in NL, the RROE shall be the average of the rate of after-tax return on equity approved for such Fiscal Year for the four largest (measured by asset base), privately-owned regulated electrical utilities in Canada (but excluding both Nalcor and Emera and their Affiliates), provided that if there are fewer than four such utilities, the average referred to above shall be the average of all such utilities.

3.10 Opco Indemnity Obligations under the Financing Documents

In the event that the Rent portion of TFA Payments are increased due to there being any amount payable by Opco arising from an indemnity obligation under the Financing Documents, as contemplated by **Section (i)** of the definition of Rent in **Section 1.1**, then such amount shall be paid directly to the Collateral Agent immediately upon receipt by Opco.

ARTICLE 4
OTHER OBLIGATIONS

4.1 General Covenants of Opco

As of and from the Commissioning Date, Opco covenants and agrees to:

(a) provide adequate, qualified, competent and suitably experienced executive, professional, managerial, supervisory, technical and administrative personnel to perform its obligations under this Agreement, including professional engineers and procurement, project management and operating and maintenance personnel;

(b) obtain and maintain in good standing all Regulatory Approvals required for the O&M Activities;

(c) pay Rent to the Partnership; and

(d) complete and pay for the Punch List Items and the Demobilization List Items in accordance with the provisions of the LIL Assets Agreement.

4.2 Operations and Maintenance Covenants

As of and from the Commissioning Date, Opco covenants and agrees to keep the LIL in a good and reasonable state of repair consistent with Good Utility Practice and to that end, Opco shall:

(a) perform, or cause to be performed, all O&M Activities in accordance with the O&M Standards and this Agreement;

(b) ensure that all O&M Activities are conducted pursuant to the Annual Maintenance Plan, with only those variations as are necessary and appropriate for the operation and maintenance of the LIL in accordance with Good Utility Practice;

(c) in the conduct of all O&M Activities, considering the remaining Service Life:

(i) apply methods and practices customarily applied by experienced utility operators in other similar circumstances;

(ii) exercise that degree of care, skill and diligence reasonably and ordinarily exercised by experienced utility operators engaged in similar activities under similar circumstances and conditions;

(iii) comply with all regulatory requirements of all Authorized Authorities; and

(iv) comply with Good Utility Practice;

(d) comply with all Applicable Law (including rules governing the operation of the NL Transmission System to the extent applicable), Reliability Standards, as required by all Authorized Authorities in NL, and relevant Regulatory Approvals;

(e) comply with all operating and maintenance requirements applicable to the LIL under the MPPA;

(f) maintain and keep updated the Operation and Maintenance Manual;

(g) prepare the O&M Budget and an Annual O&M Budget;

(h) not do or suffer any waste or damage to the LIL (other than reasonable wear and tear), nor permit operation of the LIL outside the design parameters of the LIL;

(i) enter or cause to be entered into O&M Contracts as are reasonably necessary to carry out the O&M Activities;

(j) perform or cause to be performed the O&M Activities in a manner that is in compliance with all Applicable Law pertaining to HSE and that is designed to avoid material adverse impacts on the safety or health of people, property and the environment; and

(k) prepare, and provide updates and revisions to, the LTAMP.

4.3 Ancillary Agreements

Opco shall enter into the LIL Lease, and assume and perform certain of the obligations of the Partnership in:

(a) the interconnection agreement for the LIL and the LTA between the Partnership and Labrador-Transco;

(b) the interconnection agreement for the LIL and the transmission facilities of NLH between the Partnership and NLH; and

(c) the MPPA.

ARTICLE 5
INFORMATION, ACCESS AND REPORTING

5.1 Records and Audits

Each Party shall keep complete and accurate records and all other data required by either of them for the purpose of proper administration of this Agreement. All such records shall be maintained in accordance with Good Utility Practice and as required by Applicable Law. Records containing information reasonably contemplated to be useful throughout the TFA Term shall be maintained for the TFA Term; all other documents shall be retained for the longer of (a) any period prescribed by Applicable Law, and (b) at least seven years after the year in which they were created. Each Party shall provide or cause to be provided to the other Parties reasonable access to the relevant and appropriate financial and operating records or data kept by it or on its behalf relating to this Agreement reasonably required for the other Parties to comply with their respective obligations to Authorized Authorities, to verify billings, to verify information provided in accordance with this Agreement or to verify compliance with this Agreement. Each Party may use its own employees or a mutually agreed third party auditor for purposes of any such review of records provided that those employees are, or the auditor is, bound by the confidentiality requirements provided for in this Agreement. Each Party shall be responsible for the costs of its own access and

verification activities and shall pay the fees and expenses associated with use of its own third party auditor.

5.2 Access to the LIL

Each Party shall have the right, from the Effective Date through to the date which is one year after end of the TFA Term, upon reasonable advance Notice to the other Parties, to access the LIL for the sole purpose of examining the LIL or the conduct of the O&M Activities in connection with the performance of the respective obligations of the Parties under this Agreement, such reasonable advance Notice to set out the purpose of its intended access and the areas it intends to examine. Such access shall not unreasonably interfere with the activities at the LIL and shall not compromise the safety of persons or property. While accessing the LIL, the Parties and their Representatives shall follow all rules and procedures established for visitors to the site which are related, but not limited, to safety and security. The inspection of the LIL or the exercise of any audit rights or the failure to inspect the LIL or to exercise audit rights by or on behalf of a Party shall not relieve another Party of any of its obligations under this Agreement. No Opco Default, NLH Default or Partnership Default will be waived or deemed to have been waived solely by any inspection by or on behalf of a Party. In no event will any inspection by a Party hereunder be a representation that there has been or will be compliance with this Agreement and Applicable Law.

5.3 Communications with Authorized Authorities

Each Party, with respect to the LIL, shall, upon request by another Party, provide such other Party with copies of all communications and correspondence to and from Authorized Authorities.

ARTICLE 6
RESERVATION

6.1 Control of LIL

The Parties hereby agree and acknowledge that NLH's absolute, unconditional and irrevocable agreement to directly pay Opco the TFA Payments under this Agreement does not grant NLH any control over the operation of the LIL or any right to receive transmission service offered over the LIL by virtue of this Agreement. Notwithstanding the foregoing, the Parties acknowledge that the LIL shall be integrated into the NL Transmission System and NLH shall acquire any transmission service rights over the LIL through the execution of transmission service agreements with the NLSO.

ARTICLE 7
TAXES

7.1 Supplies and Payments Exclusive of Taxes

(a) Payment of Taxes - Except as otherwise provided, each Party is separately responsible for, and shall in a timely manner discharge, its separate obligations in

respect of the collection, payment, withholding, reporting and remittance of all Taxes in accordance with Applicable Law.

(b) Governmental Charges - Subject to **Section 7.1(c)**,

(i) if Opco is required by Applicable Law to remit or pay Taxes which are NLH's responsibility hereunder, Opco shall first offset the amount of Taxes so recoverable from other amounts owing by it to NLH under this Agreement, and NLH shall promptly reimburse Opco for such Taxes to the extent not so offset;

(ii) if Opco is required by Applicable Law to remit or pay Taxes which are the Partnership's responsibility hereunder, Opco shall first offset the amount of Taxes so recoverable from other amounts owing by it to the Partnership under this Agreement, and the Partnership shall promptly reimburse Opco for such Taxes to the extent not so offset;

(iii) if NLH is required by Applicable Law to remit or pay Taxes which are Opco's responsibility hereunder, NLH shall first offset the amount of Taxes so recoverable from other amounts owing by it to Opco under this Agreement, and Opco shall promptly reimburse NLH for such Taxes to the extent not so offset;

(iv) if NLH is required by Applicable Law to remit or pay Taxes which are the Partnership's responsibility hereunder, NLH shall first offset the amount of Taxes so recoverable from other amounts owing by it to the Partnership under this Agreement, and the Partnership shall promptly reimburse NLH for such Taxes to the extent not so offset;

(v) if the Partnership is required by Applicable Law to remit or pay Taxes which are NLH's responsibility hereunder, the Partnership shall first offset the amount of Taxes so recoverable from other amounts owing by it to NLH under this Agreement, and NLH shall promptly reimburse the Partnership for such Taxes to the extent not so offset;

(vi) if the Partnership is required by Applicable Law to remit or pay Taxes which are Opco's responsibility hereunder, the Partnership shall first offset the amount of Taxes so recoverable from other amounts owing by it to Opco under this Agreement, and Opco shall promptly reimburse the Partnership for such Taxes to the extent not so offset; and

(vii) nothing shall obligate or cause a Party to pay or be liable to pay any Tax for which it is exempt under Applicable Law.

(c) HST - Notwithstanding **Sections 7.1(a)** and **7.1(b)**, the Parties acknowledge and agree that:

(i) all amounts of consideration, or payments and other amounts due and payable to or recoverable by or from another Party, under this Agreement are exclusive of any Taxes that may be exigible in respect of such payments or other amounts (including, for greater certainty, any applicable HST), and if any such Taxes shall be applicable, such Taxes shall be in addition to all such amounts and shall be paid, collected and remitted in accordance with Applicable Law;

(ii) if subsection 182(1) of the Excise Tax Act applies to any amount payable by one Party to another Party, such amount shall first be increased by the percentage determined for "B" in the formula in paragraph 182(1)(a) of the Excise Tax Act, it being the intention of the Parties that such amount be grossed up by the amount of Taxes deemed to otherwise be included in such amount by paragraph 182(1)(a) of the Excise Tax Act;

(iii) if one Party is required to collect Taxes from another Party pursuant to this Agreement, it shall forthwith provide to that other Party such documentation required pursuant to **Section 7.3**; and

(iv) if one Party incurs an expense as agent for another Party pursuant to this Agreement, that Party shall not claim an input tax credit in respect of any Taxes paid in respect of such expense, and shall obtain and provide all necessary documentation required by such other Party to claim, and shall cooperate with such other Party to assist it in claiming, such input tax credit.

(d) Changes in Taxes - Subject to **Sections 7.1(b)** and **7.1(c)**, any New Taxes shall be paid by the Party on whom such New Taxes are imposed by Applicable Law.

(e) Income Taxes and HST - For greater certainty:

(i) NLH is solely responsible for the payment of income taxes and HST payable by NLH;

(ii) Opco is solely responsible for the payment of income taxes and HST payable by Opco; and

(iii) the Partnership is solely responsible for the payment of income taxes and HST payable by the Partnership.

7.2 Determination of Value for Tax Compliance Purposes

(a) Subject to the right of final determination as provided under **Section 7.2(b)**, the Parties agree to co-operate in determining a value for any property or service supplied pursuant to this Agreement for non-cash consideration.

(b) If a Party supplying a property or service under this Agreement for non-cash consideration is required to collect Taxes in respect of such supply, or if a Party

acquiring a property or service under this Agreement for non-cash consideration is required to self-assess for Taxes in respect of such property or service, that Party shall determine a value expressed in Canadian dollars for such property or service for purposes of calculating the Taxes collectable or self-assessable, as applicable.

7.3 Invoicing Tax Requirement

All invoices, as applicable, issued pursuant to **Article 3** shall include all information prescribed by Applicable Law together with all other information required to permit the Party required to pay Taxes, if any, in respect of such supplies to claim input tax credits, refunds, rebates, remission or other recovery, as permitted under Applicable Law. Without limiting the foregoing, except as otherwise agreed to by the Parties in writing, all invoices issued pursuant to this Agreement shall include all of the following particulars:

(a) the HST registration number of the supplier;

(b) the subtotal of all HST taxable supplies;

(c) the applicable HST rate(s) and the amount of HST charged on such HST taxable supplies; and

(d) a subtotal of any amounts charged for any "exempt" or "zero-rated" supplies as defined in Part IX of the Excise Tax Act.

7.4 Payment and Offset

(a) Subject to **Section 7.4(b)**, Taxes collectable by one Party from another Party pursuant to this Agreement will be payable in immediately available funds within 30 days of receipt of an invoice.

(b) A Party may offset amounts of Taxes owing to another Party under this Agreement against Taxes or other amounts receivable from such other Party pursuant to this Agreement, subject to reporting and remittance of such offset Taxes in accordance with Applicable Law.

7.5 HST Registration Status and Residency

(a) Opco represents and warrants that it is registered for purposes of the HST and that its registration number is 8394 61779 RT0001, and undertakes to advise NLH and the Partnership of any change in its HST registration status or number.

(b) NLH represents and warrants that it is registered for purposes of the HST and that its registration number is 1213 94928 RT0001, and undertakes to advise Opco and the Partnership of any change in its HST registration status or number.

(c) The Partnership represents and warrants that it is registered for purposes of the HST and that its registration number is 8063 71100 RT0001, and undertakes to advise Opco and NLH of any change in its HST registration status or number.

(d) Opco represents and warrants that it is not a non-resident of Canada for the purposes of the Income Tax Act, and undertakes to advise NLH and the Partnership of any change in its residency status.

(e) NLH represents and warrants that it is not a non-resident of Canada for the purposes of the Income Tax Act, and undertakes to advise Opco and the Partnership of any change in its residency status.

(f) The Partnership represents and warrants that it is a Canadian partnership for the purposes of the Income Tax Act, and undertakes to advise Opco and NLH of any change in its status as a Canadian partnership.

7.6 Cooperation to Minimize Taxes

Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the Parties to minimize all Taxes in accordance with Applicable Law, so long as a Party is not materially adversely affected by such efforts. Each Party shall obtain all available exemptions from or recoveries of Taxes and shall employ all prudent mitigation strategies to minimize the amounts of Taxes required to be paid in accordance with Applicable Law in respect of this Agreement. If one Party obtains any rebate, refund or recovery in respect of any such Taxes, it shall immediately be paid to such other Party to the extent that such amounts were paid by such other Party (and not previously reimbursed).

7.7 Additional Tax Disclosure

Notwithstanding any other provision in this Agreement, unless otherwise agreed to by the Parties in writing, each of the Parties agrees to provide to the other Parties, in writing, the following additional information for the purposes of assisting the other Parties with the application of Taxes to the Parties in respect of this Agreement:

(a) whether a particular supply is, or is not, subject to HST or to any other Tax which a Party is required to pay to the supplier of such supply;

(b) whether the recipient of consideration or other form of payment under this Agreement is not resident in Canada for the purposes of the Income Tax Act, and, where such recipient is receiving such payment as agent for another Person, whether such other Person is not resident in Canada for the purposes of the Income Tax Act; and

(c) any other fact or circumstance within the knowledge of a Party which another Party advises the Party, in writing, is relevant to a determination by such other Party of whether it is required to withhold and remit or otherwise pay a Tax to an Authorized Authority or other Tax authority in respect of such supply, consideration or payment.

In addition to the notification required under this **Section 7.7**, each Party undertakes to advise the other Parties, in a timely manner, of any material changes to the matters described in **Sections 7.7(a)** through **7.7(c)**.

7.8 Prohibited Tax Disclosure

Except as required by Applicable Law, notwithstanding any other provision of this Agreement, each Party shall not make any statement, representation, filing, return or settlement regarding Taxes on behalf of another Party to an Authorized Authority without the prior written consent of such other Party.

7.9 Withholding Tax

If required by the Applicable Law of any country having jurisdiction, a Party shall have the right to withhold amounts, at the withholding rate specified by such Applicable Laws, from any compensation payable pursuant to this Agreement by such Party, and any such amounts paid by such Party to an Authorized Authority pursuant to such Applicable Law shall, to the extent of such payment, be credited against and deducted from amounts otherwise owing to another Party hereunder. Such Party shall note on each applicable invoice whether any portion of the supplies covered by such invoice was performed inside or outside of Canada for the purposes of Canadian income tax legislation or such other information requested or required by the other Party to properly assess withholding requirements. At the request of another Party, a Party shall deliver to such other Party properly documented evidence of all amounts so withheld which were paid to the proper Authorized Authority for the account of such other Party.

7.10 Tax Indemnity

Each Party (in this **Section 7.10** referred to as the "**First Party**") shall indemnify and hold harmless the other Parties from and against any demand, claim, payment, liability, fine, penalty, cost or expense, including accrued interest thereon, relating to any Taxes for which the First Party is responsible under **Article 7** or relating to any withholding Tax arising on account of the First Party being or becoming a non-resident of Canada for the purposes of the Income Tax Act. Without limiting the generality of the foregoing, and subject to the obligation of the Parties to pay HST pursuant to **Section 7.1(c)**, each Party shall be liable for and defend, protect, release, indemnify and hold the other Parties harmless from and against:

(a) any and all Taxes imposed by any Authorized Authority on another Party in respect of this Agreement, and any and all Claims including payment of Taxes which may be brought against or suffered by another Party or which another Party may sustain, pay or incur in conjunction with the foregoing as a result of the failure by the First Party to pay any and all Taxes imposed as stated herein; and

(b) any and all Taxes imposed by any Authorized Authority in respect of the supplies contemplated by this Agreement, and any and all Claims (including Taxes) which may be brought against or suffered by another Party or which another Party may sustain, pay or incur in conjunction with the foregoing as a result of the failure by the First Party to pay any and all Taxes imposed as stated herein.

7.11 Additional Tax Indemnity

If one Party (in this **Section 7.11** referred to as the "**First Party**") is, at any time, a non-resident of Canada for the purposes of the Income Tax Act or the Applicable Law of a foreign jurisdiction, the First Party agrees to pay the other Parties, and to indemnify and save harmless the other Parties from and against any and all amounts related to any application or withholding of Taxes required by the laws of the jurisdiction outside of Canada in which the First Party is resident at such time (in this **Section 7.11** referred to as the "**Foreign Jurisdiction**") on payments made (or consideration provided) pursuant to this Agreement by another Party to the First Party, provided that:

(a) any such amount payable by such other Party pursuant to this **Section 7.11** shall be reduced by the amount of such Taxes, if any, which such other Party is able to recover by way of a Tax credit or other refund or recovery of such Taxes; and

(b) for greater certainty, this **Section 7.11** shall only apply to any application or withholding of Taxes imposed by the Foreign Jurisdiction on amounts payable (or consideration provided) by such other Party to the First Party under this Agreement, and shall not apply to any Taxes imposed by the Foreign Jurisdiction on such other Party (or any Affiliate thereof) that may be included in calculating any amounts payable under any other Section of this Agreement.

7.12 Assignment

Notwithstanding any other provision in this Agreement and only to the extent an assignment has been authorized in accordance with this Agreement, a Party shall not assign any of its interest in this Agreement to another Person unless:

(a) the Person is registered for HST purposes and provides the other Parties with its HST registration number in writing prior to such Assignment;

(b) if the Person has a tax residency status that is different than the tax residency status of the Party, the Party has obtained the prior written approval of the other Parties of the proposed assignment to the Person; and

(c) the Person agrees, in writing, to comply with the provisions of this **Section 7.12** and **Article 14**.

ARTICLE 8
DISPUTE RESOLUTION

8.1 General

(a) Dispute Resolution Procedure - The Parties agree to resolve all Disputes pursuant to the dispute resolution procedure set out in **Schedule 3** (the "**Dispute Resolution Procedure**").

(b) Disputed Payment - Notwithstanding any other provision of this Agreement, if the amount or timing of any payment is disputed by a Party, the Party liable to pay shall make the payment in full on the date such payment is required, prior to initiating any Dispute Resolution Procedure relating thereto. The Parties further agree that any payment to be received by it from another Party as a result of a Dispute Resolution Procedure shall be unsecured and fully subordinated in all respects to all amounts owed to the Financing Parties pursuant to the Financing Documents.

(c) Performance to Continue - Each Party shall continue to perform all of its obligations under this Agreement during any negotiations or dispute resolution proceedings pursuant to this **Article 8**, without prejudice to their rights pursuant to this Agreement.

(d) Directions under Dispute Resolution Procedure - The Parties agree that the arbitrator, tribunal or independent expert, as applicable, pursuant to a proceeding under the Dispute Resolution Procedure shall, where the Dispute is of a nature that could reoccur, be directed to include in his or her or its award or determination a methodology and timelines to provide for an expedited and systematic approach to the resolution of future Disputes of a similar nature.

8.2 Procedure for Inter-Party Claims

(a) Notice of Claims - Subject to and without restricting the effect of any specific Notice requirement in this Agreement, a Party (the "**Claiming Party**") intending to assert a Claim against another Party (the "**Recipient Party**") shall give the Recipient Party prompt Notice of the Claim, which shall describe the Claim in reasonable detail and shall indicate the estimated amount, if practicable, of the Losses that have been or may be sustained by the Claiming Party. The Claiming Party's failure to promptly give the Recipient Party Notice shall not relieve the Recipient Party of its obligations hereunder, except to the extent that the Recipient Party is actually and materially prejudiced by the failure of the Claiming Party to promptly give Notice.

(b) Claims Process - Following receipt of Notice of a Claim from the Claiming Party, the Recipient Party shall have 20 Business Days to make such investigation of the Claim as is considered necessary or desirable. For the purpose of such investigation, the Claiming Party shall make available to the Recipient Party the information relied upon by the Claiming Party to substantiate the Claim, together with all such other information as the Recipient Party may reasonably request. If both Parties agree at or prior to the expiration of such 20 Business Day period (or any mutually agreed upon extension thereof) to the validity and amount of such Claim, the Recipient Party shall immediately pay to the Claiming Party, or expressly agree with the Claiming Party to be responsible for, the full agreed upon amount of the Claim, failing which the matter will constitute a Dispute and be resolved in accordance with the Dispute Resolution Procedure.

ARTICLE 9
TERM AND TERMINATION

9.1 TFA Term

The term of this Agreement (the "**TFA Term**") shall commence on the Effective Date and shall terminate in accordance with **Section 9.2**. For greater certainty, the Parties hereby acknowledge and agree that NLH shall have no obligation to make any payment of any amount under this Agreement until the Commissioning Date.

9.2 Termination

This Agreement shall terminate on the first to occur of:

(a) the date which is five years after the date on which the Financing is Paid in Full;

(b) the date which is 15 years following the date on which the Loan Guarantee is released or expires, as applicable;

(c) such date as may be provided pursuant to the LIL Remedies Agreement; and

(d) subject to the approval of the Financing Parties, the date set forth in a written agreement of the Parties to terminate.

9.3 Effect of Termination

(a) Obligations on Termination - When this Agreement terminates:

(i) each Party shall promptly return to the other Parties, as applicable, all Confidential Information of the other Parties in the possession of such Party, and destroy any internal documents that contain any Confidential Information of the other Parties (except such internal documents as are reasonably required for the maintenance of proper corporate records and to comply with Applicable Law which shall continue to be held in accordance with the provisions of **Section 13.1**); and

(ii) a Party shall not have any obligation to the other Parties in relation to this Agreement or the termination hereof, except as set out in this **Section 9.3**.

(b) Survival - Notwithstanding the termination of this Agreement, the Parties shall be bound by the terms of this Agreement in respect of:

(i) the final settlement of all accounts between the Parties;

(ii) the readjustment of any accounts as a result of the settlement of insurance claims or third party claims after the date of termination;

(iii) any rights, liabilities and obligations arising or accruing under the terms of this Agreement prior to the date of termination or which are expressly stated to survive the termination of this Agreement;

(iv) information and access as set forth in **Sections 5.1** and **5.2**; and

(v) any other obligations that survive pursuant to **Section 16.13**.

ARTICLE 10
DEFAULT AND REMEDIES

10.1 Opco Events of Default

The occurrence of one or more of the following events shall constitute a default by Opco under this Agreement (an "**Opco Default**"):

(a) Opco fails to pay or advance any amount to be paid or advanced under this Agreement at the time and in the manner required by this Agreement which failure is not cured within five days after the receipt of Notice from NLH or the Partnership that such amount is due and owing;

(b) Opco is in default or in breach of any term, condition or obligation under this Agreement, other than those described in **Section 10.1(a)** and **10.1(f)**, and, if the default or breach is capable of being cured, it continues for 30 days after the receipt by Opco of Notice thereof from NLH or the Partnership, unless the cure reasonably requires a longer period of time and Opco is diligently pursuing the cure, and it is cured within such longer period of time as is agreed by NLH and the Partnership, as applicable;

(c) any representation or warranty made by Opco in this Agreement is false or misleading in any material respect;

(d) Opco ceases to carry on all or substantially all of its business or, except as permitted hereunder, transfers all or substantially all of its undertaking and assets;

(e) any Insolvency Event occurs with respect to Opco;

(f) the Partnership is in default or in breach of Section 3.10 of the LIL Lease; or

(g) Opco is in default or in breach of any term, condition or obligation under the Financing Documents, which results in a payment obligation by the Partnership or Opco arising from an indemnity obligation set forth in the Financing Documents.

10.2 NLH and the Partnership Remedies upon an Opco Default

(a) General - Upon the occurrence of an Opco Default and at any time thereafter, provided a right, remedy or recourse is not expressly stated in this Agreement or the LIL Remedies Agreement as being the sole and exclusive right, remedy or recourse:

(i) NLH and the Partnership, as applicable, shall be entitled to exercise all or any of their respective rights, remedies or recourse available to them under this Agreement, the LIL Remedies Agreement or otherwise available at law or in equity; and

(ii) the rights, remedies and recourse available to NLH and the Partnership are cumulative and may be exercised separately or in combination.

The exercise of, or failure to exercise, any available right, remedy or recourse does not preclude the exercise of any other rights, remedies or recourse or in any way limit such rights, remedies or recourse.

(b) Losses - Subject to this **Section 10.2** and **Article 12**, NLH and the Partnership, as applicable, may recover all Losses suffered by them that result from an Opco Default, including, for the avoidance of doubt, any costs or expenses (including legal fees and expenses on a solicitor and his or her own client basis) reasonably incurred by NLH or the Partnership, as applicable, to recover any amounts owed to them by Opco under this Agreement.

10.3 NLH Events of Default

The occurrence of one or more of the following events shall constitute a default by NLH under this Agreement (a "**NLH Default**"):

(a) NLH fails to pay or advance any amount to be paid or advanced under this Agreement at the time and in the manner required by this Agreement, which failure is not cured within five days after the receipt of Notice from Opco or the Partnership that such amount is due and owing;

(b) NLH is in default or in breach of any term, condition or obligation under this Agreement, other than those described in **Section 10.3(a)**, and, if the default or breach is capable of being cured, it continues for 30 days after the receipt by NLH of Notice thereof from Opco or the Partnership, unless the cure reasonably requires a longer period of time and NLH is diligently pursuing the cure, and it is cured within such longer period of time as is agreed by Opco and the Partnership, as applicable;

(c) any representation or warranty made by NLH in this Agreement is false or misleading in any material respect;

(d) NLH ceases to carry on all or substantially all of its business or, except as permitted hereunder, transfers all or substantially all of its undertaking and assets; or

(e) any Insolvency Event occurs with respect to NLH.

10.4 Opco and the Partnership Remedies upon a NLH Default

(a) General - Upon the occurrence of a NLH Default and at any time thereafter, provided a right, remedy or recourse is not expressly stated in this Agreement or the LIL Remedies Agreement as being the sole and exclusive right, remedy or recourse:

(i) Opco and the Partnership shall be entitled to exercise all or any of their respective rights, remedies or recourse available to them under this Agreement, the LIL Remedies Agreement, or otherwise available at law or in equity; and

(ii) the rights, remedies and recourse available to Opco and the Partnership are cumulative and may be exercised separately or in combination.

The exercise of, or failure to exercise, any available right, remedy or recourse does not preclude the exercise of any other rights, remedies or recourse or in any way limit such rights, remedies or recourse.

(b) Losses - Subject to this **Section 10.4** and **Article 12**, Opco and the Partnership may recover all Losses suffered by them that result from a NLH Default, including, for the avoidance of doubt, any costs or expenses (including legal fees and expenses on a solicitor and his or her own client basis) reasonably incurred by Opco or the Partnership, as applicable, to recover any amounts owed to them by NLH under this Agreement, provided however, in no circumstances other than as set forth in the LIL Remedies Agreement shall NLH be required to pay the net present value of the Rent portion of the TFA Payments to be paid pursuant to the provisions of this Agreement.

10.5 Partnership Events of Default

The occurrence of one or more of the following events shall constitute a default by the Partnership under this Agreement (a "**Partnership Default**"):

(a) the Partnership fails to pay or advance any amount to be paid or advanced under the LIL Lease at the time and in the manner required by the LIL Lease which failure is not cured within five days after the receipt of Notice from NLH or Opco that such amount is due and owing;

(b) the Partnership is in default or in breach of any term, condition or obligation under this Agreement, other than those described in **Section 10.5(a)**, and, if the default or breach is capable of being cured, it continues for 30 days after the receipt by the Partnership of Notice thereof from NLH or Opco, unless the cure reasonably requires a longer period of time and the Partnership is diligently pursuing the cure, and it is cured within such longer period of time as is agreed by NLH and Opco, as applicable;

(c) any representation or warranty made by the Partnership in this Agreement is false or misleading in any material respect;

(d) the Partnership ceases to carry on all or substantially all of its business or, except as permitted hereunder, transfers all or substantially all of its undertaking and assets;

(e) any Insolvency Event occurs with respect to the Partnership; or

(f) the Partnership is in default or in breach of any term, condition or obligation under the Financing Documents, which results in a payment obligation by the Partnership or Opco arising from an indemnity obligation set forth in the Financing Documents.

10.6 NLH and Opco Remedies upon a Partnership Default

(a) General - Upon the occurrence of a Partnership Default and at any time thereafter, provided a right, remedy or recourse is not expressly stated in this Agreement or the LIL Remedies Agreement as being the sole and exclusive right, remedy or recourse:

(i) NLH and Opco shall be entitled to exercise all or any of their respective rights, remedies or recourse available to them under this Agreement, the LIL Remedies Agreement, or otherwise available at law or in equity; and

(ii) the rights, remedies and recourse available to NLH and Opco are cumulative and may be exercised separately or in combination.

The exercise of, or failure to exercise, any available right, remedy or recourse does not preclude the exercise of any other rights, remedies or recourse or in any way limit such rights, remedies or recourse.

(b) Losses - Subject to this **Section 10.6** and **Article 12**, NLH and Opco may recover all Losses suffered by them that result from a Partnership Default, including, for the avoidance of doubt, any costs or expenses (including legal fees and expenses on a solicitor and his or her own client basis) reasonably incurred by NLH or Opco, as applicable, to recover any amounts owed to them by the Partnership under this Agreement.

10.7 Equitable Relief

Prior to the Financing being Paid in Full, no Party shall have any right, remedy or recourse to terminate this Agreement for any reason without the consent of the Financing Parties. Subject to the foregoing sentence, nothing else in this **Article 10** will limit or prevent a Party from seeking equitable relief, including specific performance or a declaration to enforce another Party's obligations under this Agreement.

10.8 Force Majeure

Other than an obligation to pay or spend money including **Section 3.1**, in the event that a Party is delayed, hindered or prevented from the performance of any act required by this Agreement by reason of Force Majeure, then performance of such act shall be postponed for a period of time equivalent to the time lost by reason of such Force Majeure.

10.9 Conflicts or Inconsistency

If there is any conflict or inconsistency between this **Article 10** and the LIL Remedies Agreement, the LIL Remedies Agreement shall prevail.

ARTICLE 11
LIABILITY AND INDEMNITY

11.1 NLH Indemnity

(a) NLH shall indemnify, defend, reimburse, release and save harmless Opco, the Partnership, the GP, their respective Representatives, and each of their successors and permitted assigns (each such Person, a "**NLH Indemnified Party**") from and against, and as a separate and independent covenant agrees to be liable for, all Claims (including those that may be brought against any NLH Indemnified Party by or in favour of a third party) based upon, in connection with, relating to or arising out of:

(i) any inaccuracy or breach of any representation or warranty made by NLH in this Agreement or any other document or instrument delivered pursuant to this Agreement, in any material respect;

(ii) any breach or failure to perform or comply with any agreement, covenant or obligation of NLH in this Agreement or any document or instrument delivered pursuant to this Agreement; or

(iii) any gross negligence, wilful misconduct or fraud by or on behalf of NLH occurring in connection with, incidental to or resulting from NLH's obligations under this Agreement or any document or instrument delivered pursuant to this Agreement;

(iv) subject to the provisions of the Remedies Agreement, any failure by NLH to duly and punctually pay in full all amounts claimed under any invoice as and when provided under **Section 3.3** or any other amounts payable by NLH under the terms hereof; or

(v) any loss of any right of any NLH Indemnified Party against NLH in respect of any amounts payable by NLH hereunder for any reason whatsoever, including by operation of any bankruptcy, insolvency or similar such laws, any laws affecting creditors' rights generally or general principles of equity.

(b) Notwithstanding the foregoing, NLH shall have no obligation to indemnify, defend, reimburse, release or save harmless any NLH Indemnified Party in respect of, or to be liable for, Claims to the proportionate extent that such Claims result from the gross negligence, wilful misconduct or fraud of any such NLH Indemnified Party.

11.2 Opco Indemnity

(a) Opco shall indemnify, defend, reimburse, release and save harmless NLH, the Partnership, the GP, their respective Representatives, and each of their successors and permitted assigns (each such Person, an "**Opco Indemnified Party**") from and against, and as a separate and independent covenant agrees to be liable for, all Claims (including those that may be brought against any Opco Indemnified Party by or in favour of a third party) based upon, in connection with, relating to or arising out of:

(i) any inaccuracy or breach of any representation or warranty made by Opco in this Agreement or any other document or instrument delivered pursuant to this Agreement, in any material respect;

(ii) any breach or failure to perform or comply with any agreement, covenant or obligation of Opco in this Agreement or any other document or instrument delivered pursuant to this Agreement; or

(iii) any gross negligence, wilful misconduct or fraud by or on behalf of Opco occurring in connection with, incidental to or resulting from Opco's obligations under this Agreement or any other document or instrument delivered pursuant to this Agreement.

(b) Notwithstanding the foregoing, Opco shall have no obligation to indemnify, defend, reimburse, release or save harmless any Opco Indemnified Party in respect of, or to be liable for, Claims to the proportionate extent that such Claims result from the gross negligence, wilful misconduct or fraud of any such Opco Indemnified Party.

11.3 Partnership Indemnity

(a) The Partnership shall indemnify, defend, reimburse, release and save harmless NLH and Opco, their respective Representatives, and each of their successors and permitted assigns (each such Person, a "**Partnership Indemnified Party**") from and against, and as a separate and independent covenant agrees to be liable for, all Claims (including those that may be brought against any Partnership Indemnified Party by or in favour of a third party) based upon, in connection with, relating to or arising out of:

(i) any inaccuracy or breach of any representation or warranty made by the Partnership in this Agreement or any other document or instrument delivered pursuant to this Agreement, in any material respect;

(ii) any breach or failure to perform or comply with any agreement, covenant or obligation of the Partnership in this Agreement or any document or instrument delivered pursuant to this Agreement; or

(iii) any gross negligence, wilful misconduct or fraud by or on behalf of the Partnership occurring in connection with, incidental to or resulting from the Partnership's obligations under this Agreement or any document or instrument delivered pursuant to this Agreement;

(b) Notwithstanding the foregoing, the Partnership shall have no obligation to indemnify, defend, reimburse, release or save harmless any Partnership Indemnified Party in respect of, or to be liable for, Claims to the proportionate extent that such Claims result from the gross negligence, wilful misconduct or fraud of any such Partnership Indemnified Party.

11.4 Indemnification Procedure

(a) Generally - Each Party (each, an "**Indemnitor**") shall indemnify and hold harmless the other Parties and the other Persons as set forth in **Sections 11.1**, **11.2** and **11.3**, as applicable, (each, an "**Indemnified Party**") as provided therein in the manner set forth in this **Section 11.4**.

(b) Notice of Claims - If any Indemnified Party desires to assert its right to indemnification from an Indemnitor required to indemnify such Indemnified Party, the Indemnified Party shall give the Indemnitor prompt Notice of the Claim giving rise thereto, which shall describe the Claim in reasonable detail and shall indicate the estimated amount, if practicable, of the indemnifiable loss that has been or may be sustained by the Indemnified Party. Such Notice shall specify whether the Claim arises as a result of a Claim by a third party against the Indemnified Party (a "**Third Party Claim**") or whether the Claim does not so arise (a "**Direct Claim**"). The failure to promptly give the Indemnitor Notice hereunder shall not relieve the Indemnitor of its obligations hereunder, except to the extent that the Indemnitor is actually and materially prejudiced by the failure of the Indemnified Party to promptly give Notice.

(c) Direct Claims - With respect to any Direct Claim, following receipt of Notice from the Indemnified Party of the Claim, the Indemnitor shall have 20 Business Days to make such investigation of the Claim as is considered necessary or desirable. For the purpose of such investigation, the Indemnified Party shall make available to the Indemnitor the information relied upon by the Indemnified Party to substantiate the Claim, together with all such other information as the Indemnitor may reasonably request. If the Indemnified Party and the Indemnitor agree at or prior to the expiration of such 20 Business Day period (or any mutually agreed upon extension thereof) to the validity and amount of such Claim, the Indemnitor shall immediately pay to the Indemnified Party, or expressly agree with the Indemnified Party to be responsible for, the full agreed upon amount of the Claim, failing which the matter will constitute a Dispute and be resolved in accordance with the Dispute Resolution Procedure.

(d) Right to Participate - The Indemnitor shall have the right to participate in or, by giving Notice to the Indemnified Party, to elect to assume the defence of a Third

Party Claim in the manner provided in this **Section 11.4** at the Indemnitor's own expense and by the Indemnitor's own counsel (satisfactory to the Indemnified Party, acting reasonably), and the Indemnified Party shall co-operate in good faith in such defence.

(e) Notice of Assumption of Defence - If the Indemnitor desires to assume the defence of a Third Party Claim, it shall deliver to the Indemnified Party Notice of its election within 30 days following the Indemnitor's receipt of the Indemnified Party's Notice of such Third Party Claim. Until such time as the Indemnified Party shall have received such Notice of election, it shall be free to defend such Third Party Claim in any reasonable manner it shall see fit and in any event shall take all actions necessary to preserve its rights to object to or defend against such Third Party Claim and shall not make any admission of liability regarding or settle or compromise such Third Party Claim. If the Indemnitor elects to assume such defence, it shall promptly reimburse the Indemnified Party for all reasonable third party expenses incurred by it up to that time in connection with such Third Party Claim but it shall not be liable for any legal expenses incurred by the Indemnified Party in connection with the defence thereof subsequent to the time the Indemnitor commences to defend such Third Party Claim, subject to the right of the Indemnified Party to separate counsel at the expense of the Indemnitor as provided in this **Section 11.4**.

(f) Admissions of Liability and Settlements - Without the prior consent of the Indemnified Party (which consent shall not be unreasonably withheld), the Indemnitor shall not compromise, make any admission of liability regarding, or enter into any settlement or compromise of any Third Party Claim that would lead to liability or create any financial or other obligation on the part of the Indemnified Party for which the Indemnified Party is not entitled to full indemnification hereunder or for which the Indemnified Party has not been fully released and discharged from all liability or obligations. Similarly, the Indemnified Party shall not make any admission of liability regarding or settle or compromise such Third Party Claim without the prior consent of the Indemnitor (which consent shall not be unreasonably withheld). If a firm offer is made to settle a Third Party Claim without leading to liability or the creation of a financial or other obligation on the part of the Indemnified Party for which the Indemnified Party is not entitled to full indemnification hereunder or for which the Indemnified Party has not been fully released and discharged from further liability or obligations, and the Indemnitor desires to accept and agree to such offer, the Indemnitor shall give Notice to the Indemnified Party to that effect. If the Indemnified Party fails to consent to such firm offer within seven days after receipt of such Notice or such shorter period as may be required by the offer to settle, the Indemnitor may continue to contest or defend such Third Party Claim and, in such event, the maximum liability of the Indemnitor in relation to such Third Party Claim shall be the amount of such settlement offer, plus reasonable costs and expenses paid or incurred by the Indemnified Party up to the date of such Notice.

(g) Cooperation of Indemnified Party - The Indemnified Party shall use all reasonable efforts to make available to the Indemnitor or its Representatives all books, records, documents and other materials and shall use all reasonable efforts to provide access to its employees and make such employees available as witnesses as reasonably required by the Indemnitor for its use in defending any Third Party Claim and shall otherwise co-operate to the fullest extent reasonable with the Indemnitor in the defence of such Third Party Claim. The Indemnitor shall be responsible for all reasonable third party expenses associated with making such books, records, documents, materials, employees and witnesses available to the Indemnitor or its representatives.

(h) Rights Cumulative - Subject to the limitations contained herein, the right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which such Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall extend to the Indemnified Party's heirs, successors, permitted assigns and legal representatives.

(i) Indemnified Party's Right to Separate Counsel - If the Indemnitor has undertaken the defence of a Third Party Claim where the named parties to any action or proceeding arising from such Third Party Claim include the Indemnitor and an Indemnified Party, and such Indemnified Party has reasonably concluded that counsel selected by the Indemnitor has a conflict of interest (such as the availability of different defences), then the Indemnified Party shall have the right, at the cost and expense of the Indemnitor, to engage separate counsel to participate in the defense of such Third Party Claim on behalf of the Indemnified Party, and all other provisions of this **Section 11.4** shall continue to apply to the defence of the Third Party Claim, including the Indemnified Party's obligation not to make any admission of liability regarding, or settle or compromise, such Third Party Claim without the Indemnitor's prior consent. In addition, the Indemnified Party shall have the right to employ separate counsel and to participate in the defence of such Third Party Claim at any time, with the fees and expenses of such counsel at the expense of the Indemnified Party.

11.5 Insurer Approval

In the event that any Claim arising hereunder is, or could potentially be determined to be, an insured claim, neither the Indemnified Party nor the Indemnitor, as the case may be, shall negotiate, settle, retain counsel to defend or defend any such Claim, without having first obtained the prior approval of the insurer(s) providing such insurance coverage.

ARTICLE 12
LIMITATION OF DAMAGES

12.1 Limitations and Indemnities Effective Regardless of Cause of Damages

Except as expressly set forth in this Agreement, the indemnity obligations and limitations and exclusions of liability set forth in **Article 11** and **Article 12** of this Agreement shall apply to any and all Claims.

12.2 No Consequential Loss

Notwithstanding any other provision of this Agreement, in no event shall a Party be liable to another Party for a decline in market capitalization or increased cost of capital or borrowing, or for any consequential, incidental, indirect or punitive damages, for any reason with respect to any matter arising out of or relating to this Agreement, except that such consequential, incidental, indirect or punitive damages awarded against a Party with respect to matters relating to the LIL, in favour of a third party, shall be deemed to be direct, actual damages, as between the Parties, for the purpose of this **Section 12.2**. For the purposes of this **Section 12.2**, lost revenues or profits shall be considered to be consequential, incidental or indirect damages.

12.3 Insurance Proceeds

Except as expressly set forth in this Agreement, a Claim by a Party shall be calculated or determined in accordance with Applicable Law, and shall be calculated after giving effect to:

(a) any insurance proceeds received or entitled to be received in relation to the Claim; and

(b) the value of any related, determinable Tax benefits realized or capable of being realized by the affected Party in relation to the occurrence of such net loss or cost.

12.4 Net Present Value

Except as set forth in the LIL Remedies Agreement,

(a) in no event shall NLH be required to pay the net present value of the Rent portion of the TFA Payment due to be paid by NLH to Opco pursuant to the terms of this Agreement; and

(b) to the extent that the Rent portion of the TFA Payment at any time funds debt service of the Partnership only such portion of debt services shall be so funded as constitutes interest, fees and the instalment of principal which are due or about to become due as at such time. Any accelerated amount of principal is expressly excluded.

ARTICLE 13
CONFIDENTIALITY

13.1 Obligations of Confidentiality

The provisions of **Schedule 4** shall apply to Confidential Information.

13.2 Disclosure of Agreement

Each Party hereby agrees to the other Parties making this Agreement public at any time and from time to time after the Effective Date.

ARTICLE 14
ASSIGNMENT AND CHANGE OF CONTROL

14.1 Opco Assignment Rights

(a) General - Except to a Qualified Assignee and subject to **Section 14.1(d)**, Opco shall not assign its interest or rights under this Agreement, the LIL Remedies Agreement, any Claim or any other agreement relating to any of the foregoing (collectively, the "**Opco Rights**").

(b) Agreement to be Bound - No assignment may be made of the Opco Rights by Opco unless such assignment includes all of the Opco Rights and Opco obtains the written agreement of all Persons party to the assignment confirming that such Persons shall, from and after the date of the assignment, be bound by the provisions of the assigned Opco Rights.

(c) Change of Control - A change of Control of an Opco Affiliate Assignee that would result in such Opco Affiliate Assignee no longer being an Affiliate of Opco will be deemed to be an assignment of Opco Rights in contravention of this **Section 14.1**.

(d) Consent Requirement - An assignment of the Opco Rights to a Person other than an Affiliate of Opco, an Acquiror or an administrative or security agent of a Financing Party shall require the prior consent of NLH and the Partnership.

(e) Non-Permitted Assignment - Any assignment in contravention of this **Section 14.1** will be null and void.

14.2 Partnership Assignment Rights

(a) General - Except to a Qualified Assignee and subject to **Section 14.2(d)**, the Partnership shall not assign its interest or rights under this Agreement, the LIL Remedies Agreement, any Claim or any other agreement relating to any of the foregoing (collectively, the "**Partnership Rights**").

(b) Agreement to be Bound - No assignment may be made of the Partnership Rights by the Partnership unless such assignment includes all of the Partnership Rights and

the Partnership obtains the written agreement of all Persons party to the assignment confirming that such Persons shall, from and after the date of the assignment, be bound by the provisions of the assigned Partnership Rights.

(c) Change of Control - A change of Control of a Partnership Affiliate Assignee that would result in such Partnership Affiliate Assignee no longer being an Affiliate of the Partnership will be deemed to be an assignment of the Partnership Rights in contravention of this **Section 14.2**.

(d) Consent Requirement - An assignment of the Partnership Rights to a Person other than an Affiliate of the Partnership, an Acquiror or an administrative or security agent of a Financing Party shall require the prior consent of Opco and NLH.

(e) Non-Permitted Assignment - Any assignment in contravention of this **Section 14.2** will be null and void.

14.3 NLH Assignment Rights

(a) General - NLH shall not assign this Agreement, its interests or rights hereunder, the LIL Remedies Agreement, any Claim or any other agreement relating to any of the foregoing.

(b) Non-Permitted Assignment - Any purported assignment in contravention of this **Section 14.3** will be null and void.

ARTICLE 15
REPRESENTATIONS AND WARRANTIES

15.1 Opco Representations and Warranties

Opco represents and warrants to NLH and the Partnership that, as of the Effective Date:

(a) it is duly organized and validly existing under the laws of NL and is qualified to conduct its business to the extent necessary in each jurisdiction in which it will perform its obligations under this Agreement and the LIL Remedies Agreement;

(b) the execution, delivery and performance of this Agreement and the LIL Remedies Agreement are within its powers, have been duly authorized by all necessary corporate action on the part of Opco and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Applicable Law;

(c) each one of this Agreement and the LIL Remedies Agreement has been duly executed and delivered on its behalf by its appropriate officers and constitutes its legally valid and binding obligation enforceable against it in accordance with its terms, except as the enforceability thereof may be limited by (i) bankruptcy,

insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity whether considered in a proceeding in equity or at law;

(d) no Insolvency Event has occurred, is pending or being contemplated by it or, to its Knowledge, threatened against it;

(e) there are no Legal Proceedings pending or, to its Knowledge, threatened against it that may materially adversely affect its ability to perform its obligations under this Agreement or the LIL Remedies Agreement;

(f) no consent or other approval, order, authorization or action by, or filing with, any Person is required to be made or obtained by Opco for Opco's lawful execution, delivery and performance of this Agreement and the LIL Remedies Agreement, except for (i) such consents, approvals, authorizations, actions and filings that have been made or obtained prior to the date hereof, (ii) such consents, approvals, authorizations, actions and filings the failure of which would not have, or could not reasonably be expected to have, a material adverse effect on Opco's ability to perform its obligations under this Agreement or the LIL Remedies Agreement, and (iii) the Regulatory Approvals; and

(g) it does not have any liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement or the LIL Remedies Agreement.

15.2 **NLH Representations and Warranties**

NLH represents and warrants to Opco and the Partnership that, as of the Effective Date:

(a) it is duly created and validly existing under the laws of NL and is qualified to conduct its business to the extent necessary in each jurisdiction in which it will perform its obligations under this Agreement and the LIL Remedies Agreement;

(b) the execution, delivery and performance of this Agreement and the LIL Remedies Agreement are within its powers, have been duly authorized by all necessary corporate action on the part of NLH and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Applicable Law;

(c) each one of this Agreement and the LIL Remedies Agreement has been duly executed and delivered on its behalf by its appropriate officers and constitutes its legally valid and binding obligation enforceable against it in accordance with its terms, except as the enforceability thereof may be limited by (i) bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity whether considered in a proceeding in equity or at law;

(d) no Insolvency Event has occurred, is pending or being contemplated by it or, to its Knowledge, threatened against it;

(e) there are no Legal Proceedings pending or, to its Knowledge, threatened against it that may materially adversely affect its ability to perform its obligations under this Agreement or the LIL Remedies Agreement;

(f) no consent or other approval, order, authorization or action by, or filing with, any Person is required to be made or obtained by NLH for NLH's lawful execution, delivery and performance of this Agreement and the LIL Remedies Agreement, except for (i) such consents, approvals, authorizations, actions and filings that have been made or obtained prior to the date hereof, (ii) such consents, approvals, authorizations, actions and filings the failure of which would not have, or could not reasonably be expected to have, a material adverse effect on NLH's ability to perform its obligations under this Agreement or the LIL Remedies Agreement, and (iii) the Regulatory Approvals; and

(g) it does not have any liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement or the LIL Remedies Agreement.

15.3 **Partnership Representations and Warranties**

The Partnership represents and warrants to Opco and NLH that, as of the Effective Date:

(a) it is a limited partnership duly organized, validly existing and in good standing under the laws of NL;

(b) the GP is duly organized, validly existing and in good standing under the laws of NL;

(c) the execution, delivery and performance of this Agreement and the LIL Remedies Agreement are within its powers, have been duly authorized by all necessary action on the part of the GP and the Partnership and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Applicable Law;

(d) each one of this Agreement and the LIL Remedies Agreement has been duly executed and delivered on its behalf by the GP and constitutes a legally valid and binding obligation enforceable against it in accordance with its terms, except as the enforceability thereof may be limited by (i) bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity whether considered in a proceeding in equity or at law;

(e) no Insolvency Event has occurred, is pending or being contemplated by it or, to its Knowledge, threatened against it;

(f) there are no Legal Proceedings pending or, to its Knowledge, threatened against it that may materially adversely affect its ability to perform its obligations under this Agreement or the LIL Remedies Agreement;

(g) no consent or other approval, order, authorization or action by, or filing with, any Person is required to be made or obtained by the Partnership for the Partnership's lawful execution, delivery and performance of this Agreement and the LIL Remedies Agreement, except for (i) such consents, approvals, authorizations, actions and filings that have been made or obtained prior to the date hereof, (ii) such consents, approvals, authorizations, actions and filings the failure of which would not have, or could not reasonably be expected to have, a material adverse effect on the Partnership's ability to perform its obligations under this Agreement or the LIL Remedies Agreement, and (iii) the Regulatory Approvals; and

(h) it does not have any liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement or the LIL Remedies Agreement.

ARTICLE 16
MISCELLANEOUS PROVISIONS

16.1 Notices

Notices, where required herein, shall be in writing and shall be sufficiently given if delivered personally or by courier or sent by electronic mail or facsimile transmission, directed as follows:

(a) to Opco:

Labrador-Island Link Operating Corporation
500 Columbus Drive
P.O. Box 15050, Station A
St. John's, NL
A1B 0M5
Attention: Corporate Secretary
Fax: (709) 737-1782

(b) with a copy to:

Lower Churchill Management Corporation
500 Columbus Drive
P.O. Box 15150, Station A
St. John's, NL
A1B 0M7
Attention: Corporate Secretary
Fax: (709) 737-1782

(c) to NLH:

Newfoundland and Labrador Hydro
500 Columbus Drive
P.O. Box 12400, Station A
St. John's, NL
A1B 4K7
Attention: Corporate Secretary
Fax: (709) 737-1782

(d) to the Partnership:

Labrador-Island Link General Partner Corporation, as General Partner of Labrador-Island Link Limited Partnership.
500 Columbus Drive
P.O. Box 13000, Station A
St. John's, NL
A1B 0M1
Attention: Corporate Secretary
Fax: (709) 737-1782

(e) with a copy to:

Lower Churchill Management Corporation
500 Columbus Drive
P.O. Box 15150, Station A
St. John's, NL
A1B 0M7
Attention: Corporate Secretary
Fax: (709) 737-1782

Such Notice shall (i) if delivered personally or by courier, be deemed to have been given or made on the day of delivery, and (ii) if sent by electronic mail or facsimile transmission, be deemed to have been given or made on the day it was successfully transmitted as evidenced by automatic confirmation of receipt; provided however that if in any case such day is not a Business Day or if the Notice is received after Regular Business Hours (time and place of receipt), the Notice shall be deemed to have been given or made on the next Business Day. Each Party may change its address or fax number hereunder from time to time by giving Notice of such change to each of the other Parties.

16.2 Prior Agreements

This Agreement supersedes all prior communications, understandings, negotiations and agreements between the Parties, whether oral or written, express or implied with respect to the subject matter hereof. There are no representations, warranties, collateral agreements or conditions affecting this Agreement other than as expressed herein.

16.3 Counterparts

This Agreement may be executed in counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute but one and the same instrument. Signatures delivered by facsimile or electronic mail shall be deemed for all purposes to be original counterparts of this Agreement.

16.4 Expenses of Parties

Except as otherwise provided herein, each Party shall bear its own costs and expenses in connection with all matters relating to this Agreement, including the costs and expenses of its legal, tax, technical and other advisors.

16.5 Announcements

No announcement with respect to this Agreement shall be made by a Party without the prior approval of the other Parties. The foregoing shall not apply to (a) disclosure of this Agreement pursuant to **Section 13.2**, and (b) any announcement by a Party required in order to comply with Applicable Law; provided that such Party consults with each of the other Parties before making any such announcement and gives due consideration to the views of each of the other Parties with respect thereto. Each Party shall use reasonable efforts to agree on the text of any proposed announcement.

16.6 Relationship of the Parties

Each Party hereby disclaims any intention to create by this Agreement any partnership, joint venture, association, trust or fiduciary relationship with another Party. Except as expressly provided herein, neither this Agreement nor any other agreement or arrangement between the Parties pertaining to the matters set forth herein shall be construed or considered as creating any such partnership, joint venture, association, trust or fiduciary relationship, or as constituting any Party as the agent or legal representative of another Party for any purpose nor to permit a Party to enter into agreements or incur any obligations for or on behalf of another Party.

16.7 Further Assurances

Each of the Parties shall, from time to time, do all such acts and things and execute and deliver, from time to time, all such further documents and assurances as may be reasonably necessary to carry out and give effect to the terms of this Agreement.

16.8 Severability

If any provision of this Agreement is determined by a court of competent jurisdiction to be wholly or partially illegal, invalid, void, voidable or unenforceable in any jurisdiction for any reason, such illegality, invalidity or unenforceability shall not affect the legality, validity and enforceability of the balance of this Agreement or its legality, validity or enforceability in any other jurisdiction. If any provision is so determined to be wholly or partially illegal, invalid or unenforceable for any reason, the Parties shall negotiate in good faith and execute a new legal,

valid and enforceable provision to replace such illegal, invalid or unenforceable provision, which, as nearly as practically possible, has the same effect as the illegal, invalid or unenforceable provision.

16.9 Time of the Essence

Time shall be of the essence.

16.10 Amendments

No amendment or modification to this Agreement shall be effective unless it is in writing and signed by all of the Parties. Until such time as the Financing is Paid in Full, without the written consent of the Collateral Trustee no amendment may be made to:

(a) The definitions in **Section 1.1** (i) of "**Acquiror**", "**Collateral Trustee**", "**Commissioning Date**", "**Financing**", "**Financing Documents**", "**Financing Parties**", "**Force Majeure**", "**Paid in Full**", "**Qualified Assignee**", "**Rent**" and "**TFA Payments**"; or (ii) that are used in a definition referred to in **Section 16.10(a)(i)**;

(b) **Sections 16.10** or **16.14**; or

(c) **Articles 3, 6, 9, 10, 11, 12** or **14**.

16.11 No Waiver

Any failure or delay of a Party to enforce any of the provisions of this Agreement or to require compliance with any of its terms shall not affect the validity of this Agreement, or any part hereof, and shall not be deemed a waiver of the right of such Party thereafter to enforce any and each such provision. Any consent or approval given by a Party pursuant to this Agreement shall be limited to its express terms and shall not otherwise increase the obligations of such Party or otherwise reduce the obligations of the Party receiving such consent or approval.

16.12 No Third Party Beneficiaries

Except as otherwise provided herein or permitted hereby, this Agreement is not made for the benefit of any Person not a Party to this Agreement, and no Person other than the Parties or their respective successors and permitted assigns shall acquire or have any right, remedy or claim under or by virtue of this Agreement.

16.13 Survival

Notwithstanding the termination of this Agreement, the Parties shall be bound by the terms of this Agreement in respect of the final settlement of all accounts between the Parties arising out of this Agreement. All provisions of this Agreement that expressly or by their nature are intended to survive the termination (however caused) of this Agreement, including covenants, warranties, guarantees, releases and indemnities, continue as valid and enforceable rights and obligations (as the case may be) of the Parties, notwithstanding any such termination, until they are satisfied in full or by their nature expire.

16.14 Step-In Agreements

On the written request of a Financing Party, the Parties shall execute and deliver the step-in agreements in the form attached as **Schedule 5** (the "**Opco Step-In Agreement**") and Schedule 5 to the LIL Assets Agreement (the "**Partnership Step-In Agreement**"), as applicable.

16.15 Waiver of Sovereign Immunity

A Party that now or hereafter has a right to claim sovereign immunity for itself or any of its assets hereby waives any such immunity to the fullest extent permitted by Applicable Law. This waiver includes immunity from (a) any proceedings under the Dispute Resolution Procedure; (b) any judicial, administrative or other proceedings to aid the Dispute Resolution Procedure; and (c) any confirmation, enforcement or execution of any decision, settlement, award, judgment, service of process, execution order or attachment (including pre-judgment attachment) that results from the Dispute Resolution Procedure or any judicial, administrative or other proceedings commenced pursuant to this Agreement. Each Party acknowledges that its rights and obligations under this Agreement are of a commercial and not a governmental nature.

16.16 Successors and Assigns

This Agreement shall be binding upon and enure to the benefit of the Parties and their respective successors and permitted assigns.

16.17 Affiliates of Nalcor

Notwithstanding any other provision of this Agreement, the NL Crown shall be deemed to not be an Affiliate of Nalcor, Opco, NLH, the Partnership, the GP or Nalcor LP.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF the Parties have executed this Agreement as of the date first above written.

LABRADOR-ISLAND LINK PARTNERSHIP, by its general partner, **LABRADOR-ISLAND LINK GENERAL PARTNER CORPORATION**

By: _____
Name: Gilbert Bennett
Title: Vice President

By: _____
Name: Derrick Sturge
Title: VP, Finance & CFO

We have authority to bind the general partner; the general partner has authority to bind the Partnership.

LABRADOR-ISLAND LINK OPERATING CORPORATION

By: _____
Name: Derrick Sturge
Title: VP, Finance & CFO

By: _____
Name: Robert Hull
Title: GM (Commercial & Financing) & CRO

We have authority to bind the corporation.

NEWFOUNDLAND AND LABRADOR HYDRO

By: _____
Name: Robert Henderson
Title: VP, Newfoundland and Labrador Hydro

By: _____
Name: Paul Humphries
Title:

We have authority to bind the corporation.