

BACKGROUNDER
**Update on the Progress of Recommendations from the
Commission of Inquiry into the Muskrat Falls Project**
July 2020

Commission of Inquiry

On November 20, 2017, the Government of Newfoundland and Labrador announced that it would be proceeding with a public inquiry into the Muskrat Falls Project.

Justice Richard D. LeBlanc was appointed the Commissioner of Inquiry, in accordance with Part I of the *Public Inquiries Act, 2006*.

A terms of reference was established, including a requirement for delivery of a final report to be submitted to the Minister of Natural Resources.

The aim of the Muskrat Falls Inquiry was to provide a greater understanding of:

- Whether all options were considered at the time of sanctioning the project;
- Why there are significant differences between the actual cost of the project and the estimated cost at the time of sanction; and,
- Whether it was justified and reasonable for the project to be excluded from oversight by the Board of Commissioners of Public Utilities.

The Muskrat Falls Inquiry process included 140 days of public hearings in three phases with 134 witnesses giving testimony and 4,559 public exhibits and 119 in camera exhibits.

On March 5, 2020, Justice LeBlanc delivered his final report in six volumes to the Minister of Natural Resources. On March 10, 2020, government released the report to the public.

Government's Work Since 2015

When elected in late 2015, the Liberal government inherited the Muskrat Falls Project. In his report, Commissioner LeBlanc concluded that it was too late at that point to cancel the project.

“Considering the extent of construction completed and the contractual and other obligations in place at the time, the Project had clearly reached the point of no return when the Ball government was elected (late 2015). The real point of no return was at Financial Close of the FLG in November 2013.” (Volume 1, page 47)

Successive Progressive Conservative governments did not have a plan to manage the impact of additional billions of dollars that the Muskrat Falls Project would cost the people of Newfoundland and Labrador.

Since 2015, the Liberal Government has taken action to address the challenges created by the misguided Muskrat Falls Project. Government:

- Required Nalcor, in 2016, to open the books on the Muskrat Falls Project so that government and the public could know the actual costs and schedule;
- Took steps necessary to bring the Public Utilities Board back into the Muskrat Falls Project and to use its proven track record to identify ways to reduce the increases in electricity rates caused by the project;
- Appointed a world class CEO for Nalcor;
- Strengthened the board of directors of Nalcor;
- Strengthened government's oversight committee by appointing independent members;
- Negotiated an additional federal loan guarantee; and,
- Announced in February 2020, with the Government of Canada, a sustainable, long-term solution to protect ratepayers from the negative impacts of the Muskrat Falls Project.

One of key findings made by Commissioner LeBlanc in his final report was that the Williams' government and successive Progressive Conservative governments failed to protect the interests of the people of the province.

"GNL failed in its obligations to the citizens of the province to provide appropriate oversight of Nalcor at all stages of the Project up to the change in government in 2016." (Volume 1, page 46)

In the final report, Commissioner LeBlanc recognized the steps that the Liberal government has taken to establish oversight of Nalcor and the Muskrat Falls Project.

"On November 29, 2015, a Liberal Government was elected under the leadership of Dwight Ball. On January 14, 2016, consultant Ernst & Young LLP (EY) and GNL signed a contract under which EY would conduct a full review of the Project's cost and schedule. EY brought in an international team to complete the work under this contract. EY prepared a report entitled Muskrat Falls Project: Review of project cost, schedule and related risks, dated April 8, 2016. The work done to produce this EY report was the first time that Nalcor had been subjected to a comprehensive, independent review of the Project's cost, schedule and risk. Nalcor did not fare well in that 2016 review, but EY found significant performance improvement in a further report that was prepared in 2017." (Volume 1, page 44)

Commissioner LeBlanc also recognized that the steps taken by the Liberal government have led, for the first time since the project was proposed, to real and meaningful oversight of Nalcor and the Muskrat Falls Project.

"There is now a strong indication that Nalcor has changed its attitude and is providing a reasonable level of co-operation to the Oversight Committee." (Volume 1, page 44)

Implementation of Inquiry's Recommendations

Below are responsibilities and timelines for implementing the 17 key and ancillary recommendations outlined in Volume 1 of the commissioner's report, as assigned by the deputy ministers' steering committee. In addition to working on these 17 recommendations, government is advancing other recommendations noted throughout the various volumes of the final report. Also, the report's findings have been carefully reviewed and considered. The findings will be relied upon as recommendations are implemented.

Note:

Short Term: Up to 6 months
 Medium Term: 6 months to 12 months
 Long Term: 12 months to 24 months

KEY RECOMMENDATION 1	ACCOUNTABLE	TIMELINE
<p>The Government of Newfoundland and Labrador should never undertake, on its own or through one of its Crown corporations or agencies, the planning, approval or construction of any large project (meaning a project with a budget of \$50 million or more) without:</p> <ul style="list-style-type: none"> a. Engaging independent external experts to provide robust review, assessment and analysis of the project b. Providing well-defined oversight after consideration of oversight processes instituted in other jurisdictions 	Cabinet Committee on Infrastructure	Medium Term (to develop policy)
<p>PROGRESS: Cabinet Committee on Infrastructure will adopt recommendations to current risk assessment methodology for construction of large projects.</p>		

KEY RECOMMENDATION 2	ACCOUNTABLE	TIMELINE
<p>The Public Utilities Board should review the proposed business case, reliability, cost and schedule of any large project that could potentially impact Newfoundland and Labrador electricity ratepayers. Following this review, the Public Utilities Board should report its findings to the government and the public.</p>	Departments of Natural Resources and Justice and Public Safety	Medium Term
<p>PROGRESS: Requires amendments to legislation including Public Utilities Act and Electrical Control Act. Currently under review to determine the appropriate amendments.</p>		

KEY RECOMMENDATION 3	ACCOUNTABLE	TIMELINE
The Government of Newfoundland and Labrador should amend s. 5.4 of the <i>Energy Corporation Act</i> to authorize the Information and Privacy Commissioner to determine if Nalcor is required to disclose information it wishes to withhold on the grounds of “commercial sensitivity.”	Department of Justice and Public Safety	Short Term
PROGRESS: Retired Justice David B. Orsborn has been selected to undertake a statutory review of the ATIPPA. This will be addressed as part of that review.		

KEY RECOMMENDATION 4	ACCOUNTABLE	TIMELINE
<p>a) Nalcor should not be entitled to withhold information from the Premier, the Minister of Natural Resources, the Minister of Finance or the Clerk of the Executive Council on the grounds of legal privilege or commercial sensitivity.</p> <p>b) Persons holding the aforementioned government positions should only be entitled to withhold this information from public disclosure if such action is permitted pursuant to the <i>Access to Information and Protection of Privacy Act</i> or the <i>Energy Corporation Act</i>.</p>	<p>Department of Natural Resources</p> <p>Department of Justice and Public Safety</p>	Short Term
<p>PROGRESS:</p> <p>a) Commissioner LeBlanc acknowledged that “... Nalcor has changed its attitude and is providing reasonable level of cooperation to the Oversight Committee”. The Department of Natural Resources is reviewing to determine if further actions required.</p> <p>b) Retired Justice David B. Orsborn has been selected to undertake a statutory review of the ATIPPA. How commercially sensitive information is treated under ATIPPA will be addressed as part of that review.</p>		

KEY RECOMMENDATION 5	ACCOUNTABLE	TIMELINE
The Government of Newfoundland and Labrador should proceed to fund large projects using a probability value of not less than P85. As well, recognizing the likelihood of bias in any cost and schedule estimate, government should require the project proponent to provide a range of cost estimates in order to establish the project's budget, so that government can determine its own risk appetite. Amounts for tactical and strategic risks should be included in the overall budget but should not be specifically identified or quantified when disclosure is made to the public. Government should authorize the release of dollar amounts for tactical and strategic risks only on pre-determined, structured and well-defined terms.	Cabinet Committee on Infrastructure	Medium Term
PROGRESS: Cabinet Committee on Infrastructure will adopt recommendations to current risk assessment methodology for construction of large projects.		

KEY RECOMMENDATION 6	ACCOUNTABLE	TIMELINE
The Department of Finance and Treasury Board should oversee the financing negotiations, cost control and cost review of any large project. Prior to project approval, the Department of Finance and Treasury Board should conduct a full assessment of the impact of the project on the financial position of the Province.	Department of Finance	Medium Term
PROGRESS: Finance and Treasury Board will adopt recommendations to current risk assessment methodology for construction of large projects. This may require amendments to legislation. This is currently under review to determine the appropriate amendments.		

KEY RECOMMENDATION 7	ACCOUNTABLE	TIMELINE
In preparation for 2041, government should appoint an expert panel with a mandate to determine the best approach to be taken by the Province in its attempt to ensure maximum long-term benefits from the Churchill Falls generating station and other potential generation sites on the Churchill River. This panel should be properly funded, non-political and include experts who are best able to assist government in preparing for the negotiations with Québec. The panel should be required to report its progress to Cabinet on a regular basis.	Departments of Natural Resources and Justice and Public Safety	Long Term
PROGRESS: Natural Resources and Justice and Public Safety will review and make recommendations.		

ANCILLARY RECOMMENDATION 8	ACCOUNTABLE	TIMELINE
Upon completion of the Muskrat Falls Project, government should direct the Public Utilities Board to conduct a full review of all costs used to determine the amount to be recovered from Island ratepayers pursuant to the Power Purchase Agreement. The present legislative framework and the formal commitments in place related to the financing of this Project are legally binding and the Public Utilities Board will be curtailed from disallowing, reducing or altering such costs. Nevertheless, this recommended review will enhance transparency and accountability. The Public Utilities Board's work should include a review of the financial arrangements between Nalcor and Emera regarding the Labrador-Island Link and the financial and equity allocations involved. Government should make any necessary amendment to the <i>Electrical Power Control Act, 1994</i> or other applicable legislation to authorize this review.	Department of Natural Resources	Medium Term
PROGRESS: Reference to be made to Public Utilities Board to review reasonableness of costs for purposes of transparency on completion of the project and subsequent to negotiations with Canada.		

ANCILLARY RECOMMENDATION 9	ACCOUNTABLE	TIMELINE
<p>Unless and until government directs that all profits from export sales of electricity accrue to the benefit of ratepayers, it should direct Nalcor to identify and allocate all costs that it incurs to support the marketing and export of electricity from the Project in order that these costs are not borne by this province's ratepayers. Additionally, where transmission occurs over the Labrador Transmission Assets or the Labrador-Island Link for the purposes of exports (not including the Nova Scotia Block and energy sold to Emera under the Energy Access Agreement), some allocation of cost for the use of the Labrador Transmission Assets and the Labrador-Island Link to support such sales should be recovered for the benefit of ratepayers. The Public Utilities Board should be authorized to determine this allocation.</p>	Department of Natural Resources	Medium Term
<p>PROGRESS: Government has committed to directing that profits from export sales will benefit ratepayers by reducing rates. This commitment has been made in government's rate management plan and forms part of the negotiations with Canada.</p>		

ANCILLARY RECOMMENDATION 10	ACCOUNTABLE	TIMELINE
<p>Government should direct Nalcor to work with Newfoundland Power Inc. to develop and implement a plan to enhance reliability of the electrical supply to the Island portion of the province prior to any closure of the Holyrood generating station. The Public Utilities Board should be authorized and directed to review and approve any such plan.</p>	Department of Natural Resources	Short Term
<p>PROGRESS: In December 2019, after the inquiry hearings ended, the Public Utilities Board commenced a review (Reliability and Resource Adequacy Study Review). It will address both near-term and long-term reliability and supply adequacy for the province's electrical system before and after the integration of the Muskrat Falls Project.</p>		

ANCILLARY RECOMMENDATIONS 11	ACCOUNTABLE	TIMELINE
<p>Government should amend the <i>Energy Corporation Act</i> to ensure the following in respect of Nalcor's board:</p> <ul style="list-style-type: none"> a. The Nalcor board has a minimum of nine and a maximum of eleven members b. Nalcor's CEO cannot be a voting member or acting chair of the board c. Directors are chosen by an independent appointment process that is established by government d. The process of appointing Nalcor's directors is guided by its skills competency matrix, which should be reviewed and updated annually to ensure that the board is properly equipped to exercise its challenge function and to oversee the lines of business of Nalcor e. Nalcor directors are appointed for an initial term of three years and are allowed to serve for a maximum of nine years f. Vacancies on the Nalcor board are filled on a timely basis by government, with no vacancy lasting more than 45 days g. Directors are reasonably compensated: government should obtain a report on board compensation for Nalcor from an expert consultant within six months of the date of the filing of this Report and thereafter, within three months, government should consider the resulting recommendations in setting an appropriate level of compensation for the Nalcor board members 	Department of Natural Resources	Medium Term
<p>PROGRESS: Recommendations a, c and d have been implemented. There are currently 11 Board members and appointments are made through the Independent Appointments Commission based upon a skills matrix. Further governance changes are under active review and may require legislative amendments.</p>		

ANCILLARY RECOMMENDATION 12	ACCOUNTABLE	TIMELINE
<p>Government should take immediate steps to ensure appropriate tracking, monitoring and follow-up of the recommendations accepted by government from the Joint Review Panel, as well as the commitments made by Nalcor as part of the environmental assessment process. Appropriate measures should be taken by government and Nalcor regarding environmental, mitigation and monitoring measures, including potential methylmercury contamination both in the Churchill River and Lake Melville. Such measures are not only important for health and safety reasons, they are necessary to assist in restoring the faith and trust of many people living in Labrador who are affected by the Project's construction and operation.</p>	Department of Municipal Affairs and Environment	Short Term and ongoing through life of project
<p>PROGRESS: Municipal Affairs and Environment has created a new position to track Joint Review Panel's recommendations and environmental assessment release conditions generally. Government is monitoring methylmercury and is establishing a Monitoring and Health Management Oversight Committee. Government continues to review safety and health issues arising from the project.</p>		

ANCILLARY RECOMMENDATION 13	ACCOUNTABLE	TIMELINE
<p>The Government of Newfoundland and Labrador should immediately commission an independent study to determine the views of current and recently employed members of the public service about the actual or perceived constraints, if any, felt by public servants in regard to communicating differing viewpoints, opinions and rationales to their superiors, including politicians. This study should also investigate record-keeping practices, and the rationale for such practices, within the public service in response to the current requirements under the <i>Access to Information and Protection of Privacy Act, 2015</i> and the <i>Management of Information Act</i>. The results of such a study should inform government about areas that require improvement and changes.</p>	Executive Council	Short Term
<p>PROGRESS: Executive Council developing a Terms of Reference and engaging a consultant.</p>		

ANCILLARY RECOMMENDATION 14	ACCOUNTABLE	TIMELINE
<p>Government should take steps to ensure that civil servants are empowered to speak truth to politicians, so that they may provide complete and objective advice. Once government makes a decision on an issue, civil servants must then be expected to loyally implement such a decision. Politicians must understand that civil servants should be able to provide advice without fear of adverse consequences, that voicing such advice is a responsibility of their work and that it does not affect their ability to carry out policy directives.</p>	Executive Council	Medium Term
<p>PROGRESS: Executive Council developing a Terms of Reference and engage a consultant per Recommendation 13. The precise action will be instructed by the conclusions contained in the report.</p>		

ANCILLARY RECOMMENDATION 15	ACCOUNTABLE	TIMELINE
<p>Government should legislate and fully implement a “duty to document” policy within six months of the submission of this Report. The duty to document should also apply to Crown corporations and agencies.</p>	OCIO	Medium Term
<p>PROGRESS: In the short term, government is advancing legislation to address this recommendation. Implementation of the legislation will occur in the medium term as it is rolled out through core government and its entities.</p>		

ANCILLARY RECOMMENDATION 16	ACCOUNTABLE	TIMELINE
<p>To improve the ability of future Commissions of Inquiry to fulfill mandates given pursuant to the <i>Public Inquiries Act, 2006</i>, the Act should be amended to provide for the following:</p> <ul style="list-style-type: none"> a. A Commission should be exempted from the <i>Access to Information and Protection of Privacy Act</i> legislation so that its investigations can be conducted fully and without potential interference or influence. This exemption should continue at least until each Commission files its final report. b. Documents received from third parties on a confidential basis should be returnable to those third parties without the Commission retaining copies, if such is determined necessary by the Commissioner. c. Documents that have been entered at Commission proceedings as “Confidential Exhibits” or that have been sealed by the Commissioner should not be subject to further disclosure, even subsequent to the fulfilment of the Commission’s mandate. 	Department of Justice and Public Safety	Medium Term
<p>PROGRESS: Government will amend <i>Public Inquiries Act, 2006</i>. Until amendments are passed in the House of Assembly, government will exempt inquiries from the operation of ATIPPA pursuant to current legislative processes.</p>		

ANCILLARY RECOMMENDATION 17	ACCOUNTABLE	TIMELINE
Cabinet minutes, as well as Cabinet Committee meeting minutes, should contain far more detail than those disclosed to this Commission of Inquiry.	Executive Council	Completed and ongoing
<p>PROGRESS: Cabinet documents are more robust and minutes include more detail than was included in those recorded during the period reviewed by Commissioner LeBlanc.</p>		