



OFFICE OF THE AUDITOR GENERAL



REVIEW OF SEVERANCE MR. EDMUND J. MARTIN

February 2017

Office of the Auditor General Newfoundland and Labrador



The Auditor General reports to the House of Assembly on significant matters which result from the examinations of Government, its departments and agencies of the Crown. The Auditor General is also the independent auditor of the Province's financial statements and the financial statements of many agencies of the Crown and, as such, expresses an opinion as to the fair presentation of their financial statements.

VISION

The Office of the Auditor General is an integral component of Government accountability.

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REVIEW OF SEVERANCE

MR. EDMUND J. MARTIN

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Overview

Terms of Engagement

On May 29, 2016, the Lieutenant-Governor in Council requested that, pursuant to section 16 of the *Auditor General Act* and in accordance with Order-in-Council 2016-071, the Auditor General inquire into and report on the appropriateness of the severance benefits received by Mr. Edmund J. Martin upon cessation of his employment as Chief Executive Officer of Nalcor Energy.

Conclusion

The severance benefits received by Mr. Edmund J. Martin upon cessation of his employment as Chief Executive Officer of Nalcor Energy were appropriate.

Summary of Findings

Employment of Mr. Edmund J. Martin

Appointment of Mr. Martin as Chief Executive Officer of Nalcor

1. Mr. Martin's appointment as Chief Executive Officer of Nalcor Energy was in accordance with the legislation and the Executive Employment Agreement between him and Nalcor, as of May 1, 2009, is a valid and enforceable contract.

Executive Employment Agreement

Termination

2. Mr. Martin did not initiate any of the resignation provisions of his Executive Employment Agreement by giving the required notice.
3. Mr. Martin was not terminated for "just cause".
4. The Executive Employment Agreement does not contemplate termination without just cause by anyone other than Nalcor.

Cessation of Employment

April 17, 2016 Meeting – Premier and Mr. Martin

5. At a meeting on April 17, 2016, Mr. Martin presented the Premier with 2 options: (i) either Mr. Martin would stay on as Chief Executive Officer of Nalcor Energy, provided the Premier would publicly support Mr. Martin and his leadership team, or, (ii) the Premier may want Mr. Martin to leave.

April 18 and 19, 2016

6. During the days following the April 17, 2016 meeting, no assessment, legal or otherwise, was conducted by provincial officials to consider the potential implications, consequences and obligations arising from Mr. Martin leaving his position as Chief Executive Officer of Nalcor Energy.
7. At an April 18, 2016 meeting with the Premier, Mr. Stan Marshall agreed to accept the position of Chief Executive Officer of Nalcor Energy if Mr. Martin was to leave.

April 19, 2016 Meeting – Premier and Mr. Martin

8. On April 19, 2016, both the Premier and Mr. Martin understood that Mr. Martin's employment had come to an end and that his employment contract had to be dealt with. There was no discussion of the specific elements of the contract or amounts which would be due.

Nature of the Cessation of Employment

Assessment of the Options

9. The only explicit decision made by the Premier at the April 19, 2016 meeting was that he could not provide the public support asked by Mr. Martin. This did not, by default, constitute choosing that Mr. Martin leave his employment.

Voluntary Resignation and Constructive Dismissal

10. Mr. Martin had no intention to voluntarily resign from his position as Chief Executive Officer of Nalcor Energy.
11. The events which occurred in the months leading up to Mr. Martin's cessation of employment and which culminated in the wording in the Budget speech on April 14, 2016 and subsequent comments to the media by Government officials were tantamount to constructive dismissal.
12. The meeting between the Premier and Mr. Martin on April 19, 2016, confirmed and solidified the constructive dismissal of Mr. Martin.
13. Mr. Martin was entitled to severance payments. The severance payments Mr. Martin would be entitled to in a situation of constructive dismissal would be no less than those severance payments and benefits he would be entitled to under his Employment Agreement if he had been dismissed without cause.

Board Assessment of the Cessation of Mr. Martin's Employment

Board Assessment of the Outcome of the April 19, 2016 Meeting

14. Prior to the Nalcor Energy Board of Directors meeting on April 20, 2016, there was no communication from the Province to the Board regarding the outcome of the April 19, 2016 meeting between the Premier and Mr. Martin which resulted in the termination of Mr. Martin's employment.

15. A telephone conversation occurred between the Premier and the Chair of the Board of Directors of Nalcor Energy on April 20, 2016, to discuss the termination of Mr. Martin's employment.

- The Chair of the Board recalls that he understood an agreement had been reached whereby Mr. Martin's employment had ended and that he would be entitled to the severance provided under the terms of the Executive Employment Agreement.
- The Premier recalls that he indicated the administration of the contract rested with the Board and that Mr. Martin would be entitled to whatever was provided for under the terms of his employment contract.

16. As the Board understood that an agreement had been reached that Mr. Martin would receive his severance package, the Board did not seek a formal legal opinion regarding the circumstances of Mr. Martin's departure.

Giving Effect to the Cessation of Mr. Martin's Employment

17. The Board Minutes and the Settlement Agreement were constructed in a manner to ensure consistency between what the Board understood to have occurred at the April 19, 2016 meeting and the provisions of the Employment Agreement. The Board understood the Premier had terminated Mr. Martin's employment and that severance payments would apply. However, the Employment Agreement only provided for termination of Mr. Martin by Nalcor.

18. Given that Mr. Martin was constructively dismissed, adopting the severance provisions, as provided for in article 16 (c) of Mr. Martin's Employment Agreement, in the Settlement Agreement was reasonable and the payment of the severance benefits was appropriate.

19. Given the significance of the decision by the Board, the fact that each Board member was resigning and the absence of clear direction in writing from the Province or formal legal consultation in respect of the circumstances of Mr. Martin's cessation of employment, the Board could have considered deferring the action on April 20, 2016 and allow a new board to conclude a settlement with Mr. Martin.

Benefits Received by Mr. Martin

Pay in Lieu of Notice

20. Pay in lieu of notice received by Mr. Martin was determined in accordance with the terms of his Executive Employment Agreement and is appropriate.

Public Service Pension Plan

21. Mr. Martin's pension benefits were determined by the Department of Finance using practices consistent with the determination of benefits for other Public Service Pension Plan members.

Supplemental Executive Retirement Plan

22. The lump sum (commuted value) of the Supplemental Executive Retirement Plan paid to Mr. Martin was appropriate and consistent with the provisions of the Executive Employment Agreement.

Retirement Allowance

Retirement Allowance as Part of the Employment Agreement

23. Mr. Martin's Executive Employment Agreement provided for the payment of a retirement allowance.

Eligibility for Retirement Allowance

24. Mr. Martin was eligible to receive the retirement allowance and the determination of the retirement allowance benefits was appropriate.

2016 Performance Pay (Bonus)

25. The estimate of the 2016 bonus for Mr. Martin was appropriate.

Vehicle allowance

26. The vehicle allowance paid to Mr. Martin was consistent with the provisions of the Executive Employment Agreement and was appropriate.

Health benefits

27. The continued provision of health benefits is consistent with the provisions of the Executive Employment Agreement.

Outplacement services

28. Mr. Martin would be eligible for outplacement services of up to \$25,000 should he wish. To date, no services have been billed to Nalcor.

Scope and Considerations

Scope

Severance pay can be defined as an amount of money owed by an employer upon the employee's termination, as payment in lieu of notice. Generally, severance pay is offered in exchange for an immediate termination of the employment relationship and releases the employer from any further liability.

Mr. Edmund J. Martin (**Mr. Martin**) had an employment contract with Nalcor Energy (**Nalcor**) which outlined the benefits he would receive under a variety of termination scenarios.

Upon the cessation of his employment, Mr. Martin received the following benefits:

- Salary and bonus for the two-year notice period
- Pension benefits
- Payment of the commuted value of the Supplementary Executive Retirement Plan
- Retirement allowance
- Estimated performance pay for 2016
- Vehicle allowance
- Health benefits
- Outplacement services

We examined each of these items as part of our review.

Considerations

In order to determine the appropriateness of the severance benefits, we considered a number of factors, including:

- the Executive Employment Agreement between Mr. Martin and Nalcor dated November 2, 2009, with effect from May 1, 2009 (**Appendix A**)
- the relationship that existed between Mr. Martin and the Province, the shareholder of Nalcor
- public commentary
- discussions and other communications between Mr. Martin and the Province
- the actions of the Board of Directors of Nalcor (the **Board**) in relation to the cessation of Mr. Martin's employment
- relevant Board meeting minutes
- the Settlement Agreement between Mr. Martin and Nalcor dated as of April 20, 2016 (**Appendix B**)
- legal advice related to the cessation of Mr. Martin's employment
- documentation received from the Province, Nalcor and others
- interviews with relevant individuals

Documentation and Interviews

Documentation

In June 2016, the Office of the Auditor General received the following information from the Clerk of the Executive Council:

- the Executive Employment Agreement between Nalcor and Mr. Martin dated as of November 2, 2009
- notes prepared by the Premier's Chief of Staff of meetings between Mr. Martin, the Premier, the Minister of Natural Resources and the Premier's Chief of Staff held on April 17 and 19, 2016
- excerpt of minutes - 97th Nalcor Energy Board Meeting held on April 20, 2016
- emails between the Premier and the former Chair of the Board dated April 20, 2016
- the Settlement Agreement between Nalcor and Mr. Martin dated as of April 20, 2016
- emails between Department of Justice and Public Safety officials and other Government representatives dated May 8 and 9, 2016
- a letter from the Minister of Natural Resources to the new Chair of the Board dated May 10, 2016
- a letter from the General Counsel and Corporate Secretary of Nalcor to the Minister of Natural Resources dated May 13, 2016
- an email from the Assistant Deputy Minister, Department of Justice and Public Safety to the Chief of Staff, Premier's Office dated May 23, 2016
- legal opinions from the Assistant Deputy Minister, Department of Justice and Public Safety to the Clerk of Executive Council dated May 28, 2016

On June 29, 2016, we requested additional information from the Clerk of the Executive Council, the current Chief Executive Officer, the Chair of the Board and the Corporate Secretary of Nalcor.

We requested that all information provided be in the form of a statutory declaration.

We received statutory declarations and records from 25 officials and former officials from the Office of the Premier and the Departments of Justice and Public Safety and Natural Resources. Statutory declarations and records were also received from 3 individuals at Nalcor.

We received additional information from the former Chair of the Board, the Premier's former Chief of Staff and other Government and Nalcor officials.

Government provided a limited waiver of solicitor-client privilege to the Office of the Auditor General.

Interviews

We conducted interviews with 20 individuals. All interviews were conducted under oath or affirmation.

Table 1

List of Interviewees

	Name	Position	Department/Entity	Date of Interview
1	Leo Abbass	Former Board Member	Nalcor Energy	August 17, 2016
2	Kenneth Marshall	Former Board Chair	Nalcor Energy	August 17, 2016
3	Siobhan Coady	Minister	Natural Resources	August 17, 2016
4	Gerald J. Shortall	Former Board Member	Nalcor Energy	August 18, 2016
5	Charles Bown	Deputy Minister	Natural Resources	August 18, 2016
6	Stan Marshall	CEO and Board Member	Nalcor Energy	August 18, 2016
7	Peter Hickman	General Counsel and Corporate Secretary	Nalcor Energy	August 18, 2016
8	Edmund J. Martin	Former CEO and Board Member	Nalcor Energy	August 18, 2016
9	Todd Stanley	Assistant Deputy Minister	Justice and Public Safety	August 19, 2016
10	Heather Jacobs	Deputy Minister	Justice and Public Safety	August 19, 2016
11	John Green	Board Chair and former external legal counsel	Nalcor Energy	August 25, 2016
12	Michael Roberts	VP Human Resources	Nalcor Energy	August 25, 2016
13	Derrick Sturge	CFO	Nalcor Energy	August 25, 2016
14	Tim Murphy	Former Deputy Chief of Staff	Premier's Office	August 25, 2016
15	Kelvin Parsons	Former Chief of Staff	Premier's Office	August 26, 2016
16	Denise Woodrow	Solicitor	Justice and Public Safety	August 26, 2016
17	Tom Clift	Former Board Member	Nalcor Energy	September 14, 2016
18	Cathy Bennett	Minister	Finance	September 20, 2016
19	Julia Mullaley	Former Clerk and Secretary to Cabinet	Executive Council	September 26, 2016
20	Dwight Ball	Premier	Premier's Office	September 26, 2016

Use of Experts

Legal

The Office of the Auditor General engaged the services of legal counsel to provide advice in connection with the review.

Actuarial

The Office of the Auditor General engaged the services of an actuary to provide advice in connection with the review.

Employment of Mr. Edmund J. Martin

Introduction

Nalcor is incorporated as a Crown corporation. The sole shareholder of Nalcor is the Province of Newfoundland and Labrador (the **Province**).

Governance and oversight of Nalcor is provided by the Board. At the time of Mr. Martin's cessation of employment, the Board consisted of five people:

- | | |
|----------------------|--------------------|
| • Kenneth Marshall | Director and Chair |
| • Gerald J. Shortall | Director |
| • Tom Clift | Director |
| • Leo Abbass | Director |
| • Edmund J. Martin | Director and CEO |

Appointment of Mr. Martin as Chief Executive Officer (CEO) of Nalcor

Initial Appointment – 2005

Mr. Martin started work with Newfoundland and Labrador Hydro (**NL Hydro**) as CEO in 2005. Section 6(3) of the *Hydro Corporation Act*, which was in place at that time, stated:

There shall be a chief executive officer of the corporation, to be appointed by the shareholders by a special resolution, who shall, subject to the terms of appointment that may be established by the shareholders by a special resolution or in an agreement made under section (8), and subject to the directions of the board, be charged with the general direction, supervision and control of the business of the board and the corporation.

A Minute-in-Council (record of a Cabinet decision) issued in 2005 gave approval to the Minister of Finance, as sole shareholder of NL Hydro, to execute a shareholder's resolution to appoint Mr. Martin as CEO of NL Hydro and to authorize the company to enter into a service contract with Mr. Martin. The shareholder's resolution was provided and a service contract (**the 2005 Employment Agreement**) was executed on July 21, 2005, between NL Hydro and Mr. Martin. The 2005 Employment Agreement was for a term of five years with an option to renew.

The *Hydro Corporation Act, 2007* replaced the *Hydro Corporation Act*. The new act did not provide for the appointment of the CEO in the same manner. However, the *Interpretation Act* states that when an act is repealed, a person in a position under the repealed act can continue as if they had been appointed under the new act, until another person is appointed.

Mr. Martin was appropriately appointed as CEO of NL Hydro in 2005 and his employment continued under the *Hydro Corporation Act, 2007*.

Assignment of 2005 Employment Agreement

The *Energy Corporation Act* (the *Act*), which created Nalcor, came into effect on October 11, 2007. It states that, until a CEO is appointed under the *Act*, the CEO of NL Hydro is the CEO of Nalcor. An assignment agreement, effective January 1, 2008, transferred the rights, benefits and obligations of the 2005 Employment Agreement to Nalcor.

Renewal of 2005 Employment Agreement

The 2005 Employment Agreement was renewed with Nalcor, effective May 1, 2009, for an additional nine year period.

The *Act* provides that the CEO is to be appointed by the Lieutenant-Governor in Council (LGIC) and that the LGIC can grant Nalcor approval to enter into a service contract with the CEO. However, there was no LGIC appointment of Mr. Martin as CEO of Nalcor in 2009.

The 2005 Employment Agreement provided for a renewal. The Executive Employment Agreement in 2009 (the **Employment Agreement**) did not result from a new appointment or from a re-appointment. Mr. Martin had been appointed in 2005 as Chief Executive Officer of Nalcor in accordance with the legislation and therefore no approval of the LGIC was required.

Finding

1. Mr. Martin's appointment as Chief Executive Officer of Nalcor Energy was in accordance with the legislation and the Executive Employment Agreement between him and Nalcor, as of May 1, 2009, is a valid and enforceable contract.

Executive Employment Agreement

The following provisions of the Employment Agreement were relevant to our review:

Remuneration

The Employment Agreement established a base salary at the start of the agreement and the process for periodic salary reviews. It also provided for the payment of an annual bonus of up to 30% of the current base salary, as determined by the Board.

Benefits

The Employment Agreement provided for certain employment benefits, including:

- a vehicle and payment of operating expenses
- participation in health, life and other insurance plans
- annual vacation leave and payment of unused vacation leave upon the expiry or termination of the Employment Agreement
- the receipt of other employee benefit plans in effect with respect to the executives of Nalcor

Pension Benefits

The Employment Agreement stated that Mr. Martin shall participate in the Public Service Pension Plan (PSPP). It also provided that Nalcor would fund a Supplemental Executive Retirement Plan (SERP) to provide additional retirement income to Mr. Martin.

The Employment Agreement set out details around the SERP, including provisions regarding:

- the determination of payments on termination of employment
- indexation
- the option to receive a commuted value
- the process for establishing that commuted value

Termination

The Employment Agreement contemplated termination by either the employee or the employer and specified related entitlements.

Table 2

Termination Provisions – Executive Employment Agreement, Edmund J. Martin

Circumstance	Entitlement
Death	<ul style="list-style-type: none"> - PSPP entitlements - SERP Survivor benefit - Medical insurance benefits
Just Cause	<ul style="list-style-type: none"> - PSPP entitlements - SERP benefits
Sole Discretion of Nalcor (without cause)	<ul style="list-style-type: none"> - PSPP entitlements - Salary and all benefits for the equivalent of 2 years in lieu of notice - Equivalent of the highest annual bonus received in the best compensation year for each of the 2 year pay in lieu of notice period

Circumstance	Entitlement
	<ul style="list-style-type: none"> - All other benefits as if Mr. Martin had continued working - SERP benefits - Outplacement services up to \$25,000
<p>Sole discretion of Mr. Martin upon the occurrence of either of a number of specific events:</p> <ul style="list-style-type: none"> - Material reduction in the mandate of Nalcor - Material erosion or reduction in the role and the responsibilities of Mr. Martin - Transfer, sale, merger or acquisition of Nalcor - Medical reasons 	<ul style="list-style-type: none"> - PSPP entitlements - Salary and all benefits for the equivalent of 2 years in lieu of notice - Equivalent of the highest annual bonus received in the best compensation year for each of the 2 year pay in lieu of notice period - All other benefits as if Mr. Martin had continued working - SERP benefits - Outplacement services up to \$25,000
<p>Sole discretion of Mr. Martin upon providing 6 months' notice or retirement after age 60</p>	<ul style="list-style-type: none"> - PSPP entitlements - All other benefits as if Mr. Martin had continued working - SERP benefits

Termination Initiated By the Employee:

- Death

This circumstance is not applicable.

- Retirement

The Employment Agreement contemplated retirement at or after age 60. At the time Mr. Martin's employment ended he had not reached age 60. This circumstance is not applicable.

- Resignation

The Employment Agreement outlined five circumstances where Mr. Martin could resign:

- Upon giving at least 30 days' notice
 - a material reduction in the mandate of Nalcor
 - a material erosion or reduction in the role and the responsibilities of the CEO
 - a transfer or sale of Nalcor to, merger with, or acquisition by private enterprise
 - a leave of absence from work for six months due to medical leave

- Upon giving 6 months' written notice
 - at the sole discretion of the CEO to terminate the agreement or to retire at or after age 60

Mr. Martin considered that a change had occurred in the relationship between himself and the Province. However, he did not initiate any of the resignation provisions of his Employment Agreement by giving the required notice.

Finding

2. Mr. Martin did not initiate any of the resignation provisions of his Executive Employment Agreement by giving the required notice.

While Mr. Martin did not give notice to initiate the resignation provisions of his Employment Agreement, we still had to consider whether he voluntarily left his employment.

Termination Initiated By the Employer:

- Just Cause

The Employment Agreement states that the CEO can be terminated for “just cause”. If Mr. Martin had been terminated for cause, we would expect to see correspondence outlining the justification for the termination. There is no evidence to indicate that Mr. Martin’s employment was terminated for cause.

Finding

3. Mr. Martin was not terminated for “just cause”.

- Without Cause

The Employment Agreement provided for the payment of severance for the equivalent of two years’ salary and two years’ annual bonus in lieu of notice if Nalcor terminated the agreement without just cause. It does not contemplate termination by anyone other than Nalcor.

Finding

4. The Executive Employment Agreement does not contemplate termination without just cause by anyone other than Nalcor.

Cessation of Employment

Events Leading Up to Cessation of Employment

In the months leading up to the cessation of employment, a number of events occurred which we considered relevant:

- In January 2016, the Province engaged a consultant to assess the reasonableness of the cost and schedule forecast of the Muskrat Falls project, and identify opportunities to address any material/critical risks. The consultant's interim report was released on April 12, 2016
- There were concerns with the performance of the main contractor at the Muskrat Falls site. Nalcor was preparing to negotiate a resolution with the contractor and the Province had asked the consultant to assist Nalcor management with the process
- In March 2016, the Minister of Natural Resources requested a copy of the Employment Agreement between Mr. Martin and Nalcor from the Chair of the Board. The Employment Agreement was provided and was forwarded to the Premier's Chief of Staff
- On April 14, 2016, the Province tabled its 2016-17 budget (the **Budget**). The Budget speech had commentary related to Nalcor regarding the level of the provincial investment in the corporation, the lack of payment of dividends, its organizational structure, and the growth of its compensation and benefits
- Subsequent comments from Government representatives, in response to questions from the media related to the Budget speech, did not indicate support for Mr. Martin

Following the Budget, Mr. Martin requested a meeting with the Premier. Mr. Martin returned early from vacation to attend the meeting which occurred on the evening of April 17, 2016. Also in attendance were the Minister of Natural Resources and the Premier's Chief of Staff. A second follow-up meeting occurred on April 19, 2016, with the same participants.

The substance of the discussion at these meetings was determined from interviews with those who participated in the meetings and from notes taken by the Chief of Staff during the meeting.

April 17, 2016 Meeting – Premier and Mr. Martin

Mr. Martin outlined the concerns he felt were having a negative impact on his reputation and on his ability to effectively do his job. These included the consultant's involvement in the active negotiations with the main Muskrat Falls contractor, the comments in the budget speech, comments from the Premier to the media and, what Mr. Martin described as, the deafening silence from the Minister of Finance in response to media questions regarding Government support for Mr. Martin.

He presented two options to the Premier:

1. Mr. Martin would stay as CEO of Nalcor with the appropriate public support from the Premier for him and his leadership team, or,
2. The Premier may want Mr. Martin to go now in which case his contract had to be dealt with.

A third alternative was also presented - Mr. Martin would stay on for a year. He and the Premier agreed that this was not an option.

Mr. Martin's preference was to remain as CEO of Nalcor.

There was discussion around whether there should be some changes to Mr. Martin's management team and the need for independent oversight and to strengthen the Board. The Premier indicated that he had a lot of respect for Mr. Martin personally, however, his biggest concern was the management of the Muskrat Falls schedule and cost overruns.

Other than a reference by Mr. Martin that his contract had to be dealt with in case the Premier wanted him to go, no specifics of his contract were discussed.

The Premier agreed to consider the options and there was a commitment to meet again to discuss further.

Finding

5. At a meeting on April 17, 2016, Mr. Martin presented the Premier with 2 options: (i) either Mr. Martin would stay on as Chief Executive Officer of Nalcor Energy, provided the Premier would publicly support Mr. Martin and his leadership team, or, (ii) the Premier may want Mr. Martin to leave.

April 18 and 19, 2016

There is no evidence of any substantive discussion regarding the April 17, 2016 meeting between the Premier and members of his staff during the two day period following the meeting. Senior provincial officials were not consulted to provide advice related to the options put forward by Mr. Martin or the potential consequences.

The Department of Justice and Public Safety was not asked to undertake a legal assessment of the implications, consequences and obligations of Mr. Martin leaving or of the terms of his Employment Agreement.

Finding

6. During the days following the April 17, 2016 meeting, no assessment, legal or otherwise, was conducted by provincial officials to consider the potential implications, consequences and obligations arising from Mr. Martin leaving his position as Chief Executive Officer of Nalcor Energy.

Prior to April 14, 2016, a meeting had been arranged between the Premier and Mr. Stan Marshall for April 18, 2016. The purpose of this meeting had been to discuss the possibility of Mr. Marshall becoming involved in the Board of Directors of Nalcor. This meeting occurred and evolved into a discussion which eventually led to Mr. Marshall agreeing to assume the role of CEO of Nalcor if Mr. Martin was to leave.

Finding

7. At an April 18, 2016 meeting with the Premier, Mr. Stan Marshall agreed to accept the position of Chief Executive Officer of Nalcor Energy if Mr. Martin was to leave.

April 19, 2016 Meeting – Premier and Mr. Martin

On the evening of April 19, 2016, the Premier, Mr. Martin, the Minister of Natural Resources and the Chief of Staff met again.

Meeting notes indicate the Premier thought the options provided by Mr. Martin put him in an awkward spot and that the point had been reached of not having Ed Martin stay around.

The Premier was not at the point of having the level of confidence regarding the status of the Muskrat Falls project that was required to provide the support requested by Mr. Martin on April 17, 2016.

There was some subsequent discussion at the meeting around potential strengthening of the Nalcor management team. The Premier indicated in his interview that he was still trying to resolve the situation and asked Mr. Martin whether he was really comfortable with the group around him. Mr. Martin indicated that he was comfortable with them and that he supported the team around him.

By the end of the meeting, both the Premier and Mr. Martin understood that Mr. Martin's employment had come to an end.

In his interview, the Premier stated that he considered it was Mr. Martin's decision to step down as he (the Premier) could not accept Mr. Martin's two options.

In his interview, Mr. Martin stated that he asked whether the Premier was saying he wanted him to leave now and that he would be paid out, to which, Mr. Martin indicated, the Premier answered “yes”.

Meeting notes indicate that the employment contract was mentioned, however, there was no discussion of the specific elements or amounts which would be due.

The meeting included a discussion of when Mr. Martin’s departure would be effective and how the departure of Mr. Martin would be communicated. It was agreed that Mr. Martin’s departure would be communicated on April 20, 2016.

In March 2016, a copy of the Employment Agreement was provided to the Premier’s Chief of Staff. We found no evidence that the details of the Employment Agreement had been discussed with the Premier or that he had reviewed the agreement.

Finding

8. On April 19, 2016, both the Premier and Mr. Martin understood that Mr. Martin’s employment had come to an end and that his employment contract had to be dealt with. There was no discussion of the specific elements of the contract or amounts which would be due.

Nature of the Cessation of Employment

While Mr. Martin’s employment as CEO of Nalcor effectively ended on April 19, 2016, we still had to determine how his employment ended. Only the facts and circumstances surrounding Mr. Martin’s departure as CEO of Nalcor can determine the nature of the cessation of his employment.

Mr. Martin considered that the decision for him to leave his employment was made by the Premier and the Premier considered that the decision for Mr. Martin to leave his employment was made by Mr. Martin.

There is no letter of resignation from Mr. Martin invoking any of the resignation provisions of his Employment Agreement and there is no letter of termination from the Province or from Nalcor.

Assessment of the Options

Mr. Martin outlined two options for the Premier's consideration on April 17, 2016 – in essence, either you support me and I stay or if you don't support me then you want me to leave. The notes of the April 19, 2016 meeting indicate that the Premier decided he could not agree to the first option, to publicly support Mr. Martin and his team. This is supported by the interviews of the Premier and Mr. Martin.

We have considered whether, by deciding he could not agree to the first option, this, in effect, resulted in the Premier choosing option two by default. In our view, this is not the case. Just because a person decides not to choose one of two options presented to him by another person, does not necessarily imply that he has decided to take the remaining option. Neither option may be acceptable to that person.

In this case, the evidence from the Premier is that he chose neither option, but that he reached out to find another solution. The only explicit decision made by the Premier was that he could not provide the public support asked by Mr. Martin. This did not, by default, constitute choosing option two.

Finding

9. The only explicit decision made by the Premier at the April 19, 2016 meeting was that he could not provide the public support asked by Mr. Martin. This did not, by default, constitute choosing that Mr. Martin leave his employment.

Voluntary Resignation and Constructive Dismissal

We still had to determine whether Mr. Martin voluntarily resigned or whether the Premier, by not accepting the first option of publicly supporting Mr. Martin and his team, terminated, without just cause, the employment of Mr. Martin.

This is a significant determination, as an employee who is dismissed without just cause has as a remedy, a wrongful dismissal action, including a claim of not having received reasonable notice or payment in lieu of such notice. An employee who voluntarily ends the employment relationship has no remedy by way of a wrongful dismissal action.

From a legal perspective, voluntary resignation refers to a consensual termination between the employer and the employee or a termination that is initiated by the employee.

To find that an employee has voluntarily resigned, one must show that the employee had an intention to resign and acted on that intention. A reasonable person would have to understand from the employee's words and actions that the employee terminated the employment contract. This requires a consideration of the employee's actions, discussions that took place between relevant parties and the overall context of the resignation, including events leading up to it.

In determining whether there has been a voluntary resignation, one must also consider whether the circumstances amounted to constructive dismissal.

Constructive dismissal occurs when an employer makes substantial changes to an element of the employment relationship or acts in a manner which is incompatible with continued employment of the employee. It is necessary to assess whether a reasonable person would understand from the employer's words and actions that they had terminated the employment relationship. If there is "constructive dismissal", then this constitutes dismissal and the employee would be entitled to payment in lieu of reasonable notice.

Mr. Martin felt that a constructive dismissal situation had been occurring over several weeks, if not months, culminating with the Budget speech and the subsequent lack of public support for him by the Minister of Finance and the Premier in answers to media questions. This prompted him to seek the meeting with the Premier on April 17, 2016. Mr. Martin outlined the significant matters which he felt were impacting his ability to effectively do his job, in effect, the elements which he felt were creating a constructive dismissal situation.

Mr. Martin did not want to leave. He indicated that it was important for him to stay on with Nalcor to get "us through the next while". He felt that he had built a very experienced team and that, in his view, this was best for the Province. However, he felt the circumstances had created a constructive dismissal situation and he had no choice but to seek the Premier's support and, therefore, provided the two options on April 17, 2017.

The events in the months leading to Mr. Martin's cessation of employment culminated with the 2016 Budget speech on April 14, 2016. The wording used in the speech in respect of Nalcor, as well as the subsequent lack of responses by Government officials to the media when asked specifically about confidence in Mr. Martin, indicated a lack of support for Mr. Martin. In our view, this was tantamount to the constructive dismissal of Mr. Martin. The inability of the Premier and the Minister of Finance to publicly support Mr. Martin created a situation which compromised Mr. Martin in his role as CEO of Nalcor. This was incompatible with the continued employment of Mr. Martin.

We find that Mr. Martin had no intention to voluntarily leave. It follows that there was also no mutual agreement between Mr. Martin and the Premier for him to resign, as one of the necessary elements, Mr. Martin's agreement, was missing. Mr. Martin's actions to seek public support from the Premier for him and his team were intended to determine whether the situation was salvageable.

If there was any question whether these events constituted constructive dismissal, the meeting between the Premier and Mr. Martin on April 19, 2016, confirmed and solidified the constructive dismissal of Mr. Martin. In the April 19, 2016 meeting, the Premier stated that he could not put the confidence behind public support for Mr. Martin and his team. This statement by the Premier was incompatible with the continued employment of Mr. Martin as the CEO of Nalcor.

We have concluded that Mr. Martin was constructively dismissed. This would entitle Mr. Martin to severance payments in lieu of reasonable notice. The Employment Agreement provides for the severance benefits payable to Mr. Martin in the event of a termination without just cause. These provisions outline the severance benefits Mr. Martin would receive under those circumstances and, in particular, specify that the severance payments in lieu of notice will be based on a period of two years.

As constructive dismissal is dismissal, the severance benefits Mr. Martin is entitled to, would be no less than what he would have been entitled to under his Employment Agreement in the event Nalcor had terminated him without just cause.

Findings

10. Mr. Martin had no intention to voluntarily resign from his position as Chief Executive Officer of Nalcor Energy.
11. The events which occurred in the months leading up to Mr. Martin's cessation of employment and which culminated in the wording in the Budget speech on April 14, 2016 and subsequent comments to the media by Government officials were tantamount to constructive dismissal.
12. The meeting between the Premier and Mr. Martin on April 19, 2016, confirmed and solidified the constructive dismissal of Mr. Martin.
13. Mr. Martin was entitled to severance payments. The severance payments Mr. Martin would be entitled to in a situation of constructive dismissal would be no less than those severance payments and benefits he would be entitled to under his Employment Agreement if he had been dismissed without cause.

Board Assessment of the Cessation of Mr. Martin's Employment

Board Assessment of the Outcome of the April 19, 2016 Meeting

A Board meeting, already scheduled to deal with a number of issues other than Mr. Martin's employment, took place on April 20, 2016. Mr. Martin's departure from Nalcor and the resulting contractual consequences were added to the agenda for the meeting. All five Board members were present at the start of the meeting.

After the April 19, 2016 meeting, Mr. Martin called the Chair to advise him of his understanding of the outcome, that his employment had been effectively terminated and that his contract had to be dealt with. On April 20, 2016, before the start of the Board meeting, Mr. Martin informed the rest of the Board of his understanding of the April 19, 2016 meeting, that the Government wanted him to leave and that he would receive his full severance package.

Prior to the April 20, 2016 Board meeting, there was no communication from any representative of the Province to any member of the Board regarding the outcome of the meeting on April 19, 2016.

Finding

14. Prior to the Nalcor Energy Board of Directors meeting on April 20, 2016, there was no communication from the Province to the Board regarding the outcome of the April 19, 2016 meeting between the Premier and Mr. Martin which resulted in the end of Mr. Martin's employment.

On April 20, 2016, the Board did a number of things, including the following:

1. The Chair emailed the Premier an outline of the Board meeting agenda items
2. The Chair emailed the Premier to advise of the Board's pending action
3. The Chair telephoned the Premier.

Email to Premier - Outline of Board Meeting

Before the start of the Board meeting, the Chair emailed the Premier an outline of the items to be discussed at the meeting. The email indicated that the Chair understood an agreement had been reached the previous evening regarding the CEO's departure from Nalcor. It also stated that the Employment Agreement rested squarely with the Board and that they would be meeting on this matter and the resultant employment contractual obligations. The Premier acknowledged receipt.

Mr. Martin excused himself from the Board meeting before the discussion regarding the cessation of his employment. He did not participate in, nor was he present during, any further discussions. The other four Board members were present for, and participated in, the remainder of the meeting.

Email to Premier - Pending Board Action

The Board had Mr. Martin's understanding of the outcome of the April 19, 2016 meeting with the Premier. The Board decided it needed to receive confirmation from the Government that there was an agreement between the Premier and Mr. Martin that he would receive his full severance package despite it being publicly announced that Mr. Martin was resigning. The Chair sent the following email to the Premier at 11:25am on April 20, 2016:

Premier, we have taken pause in the Nalcor meetings to advise action and pending action of this morning.

As per your meeting with the CEO on April 19, 2016 the Board is terminating the employment of the CEO without cause and the provisions of article 16 subset c will be fully honoured, and corresponding severance implications. Your notes from this mornings press release indicate resignation, however the Board understands this was agreed that this was and is a termination without cause.

There was no response to the Chair's email. The series of emails of April 20, 2016 between the Chair and the Premier are included as **Appendix D**.

Telephone Call - Board Chair to Premier

At 11:55am, the Chair telephoned the Premier to discuss Mr. Martin's cessation of employment. Both participants confirmed that the phone call lasted less than 2 minutes. There is no clear view as to the substance of the conversation between the Chair and the Premier.

The Chair took from the conversation with the Premier that an agreement had been reached whereby Mr. Martin's employment had ended and that he would be entitled to the severance provided under the terms of the Employment Agreement.

The Premier's recollection of the conversation is that he gave no explicit direction as to how Mr. Martin's employment was terminated. He recalls indicating that administration of Mr. Martin's employment contract rested with the Board, that he did not want to interfere with that process and that Mr. Martin would be entitled to whatever was provided for under the terms of the employment contract.

Interview evidence from external legal counsel is that he understood, after the telephone call between the Chair and the Premier that everyone understood Mr. Martin was leaving and that Government agreed he would get his severance package.

Evidence indicates there was some discussion in the Board meeting around the possibility of receiving something in writing from the Government regarding Mr. Martin's severance package. The Chair did not think that receiving confirmation in writing was going to happen and no written confirmation was sought.

The evidence indicates that there was some discussion with external legal counsel that the circumstances of Mr. Martin's departure might constitute constructive dismissal. However, no formal legal opinion was provided by external legal counsel to the Board of Directors, nor did the Board seek a formal legal opinion regarding the circumstances of Mr. Martin's departure.

Interview evidence from external legal counsel indicates that, once the Chair reported back after his telephone call with the Premier that the Premier confirmed or affirmed that it was Government's intention that Mr. Martin receive his severance package, this ended any discussion whether or not it was constructive dismissal. External legal counsel further stated that the justification for the severance package didn't really matter, as Mr. Martin "was getting it".

The legal advice provided was primarily related to the process the Board should follow to give effect to Mr. Martin's departure.

Findings

15. A telephone conversation occurred between the Premier and the Chair of the Board of Directors of Nalcor Energy on April 20, 2016, to discuss the termination of Mr. Martin's employment.

- The Chair of the Board recalls that he understood an agreement had been reached whereby Mr. Martin's employment had ended and that he would be entitled to the severance provided under the terms of the Executive Employment Agreement.
- The Premier recalls that he indicated the administration of the contract rested with the Board and that Mr. Martin would be entitled to whatever was provided for under the terms of his employment contract.

16. As the Board understood that an agreement had been reached that Mr. Martin would receive his severance package, the Board did not seek a formal legal opinion regarding the circumstances of Mr. Martin's departure.

Giving Effect to the Cessation of Mr. Martin's Employment

The Board understood it was their responsibility to deal with the Employment Agreement. At the same time they were challenged with how to legally fit, as they understood it, the termination of Mr. Martin's employment by the Premier and the promise from the Premier that Mr. Martin would receive his severance package.

The Employment Agreement does not contemplate termination by the Premier, only Nalcor. Outside legal counsel advised that, under the circumstances, the Board should enter into a settlement agreement with Mr. Martin.

Each Board member had decided to resign their positions effective April 22, 2016. All Board members felt they had a responsibility to finalize the settlement of Mr. Martin's departure prior to their resignations.

The process of drafting the Board Minutes and the Settlement Agreement started on April 20, 2016 and was completed in the days after the Board meeting. Internal and external legal counsel for Nalcor assisted in the development of both documents.

The Board Minutes were completed by April 22, 2016 and were reviewed by the resigning Board members. Interviews with Board members indicate that the minutes accurately reflect what occurred at the Board meeting.

A draft of the Settlement Agreement was reviewed by the Board members before their resignation on April 22, 2016. After that, those Board members had no further involvement with finalizing the Settlement Agreement. The Board Minutes of April 20, 2016 authorized two officers of Nalcor to approve and execute the Agreement. The Settlement Agreement was finalized on April 25, 2016 by legal counsel for Mr. Martin and legal counsel for Nalcor and was made effective as of April 20, 2016.

The Board Minutes state that a representative of the Province (the Premier) confirmed that Mr. Martin would receive severance payments in accordance with his Employment Agreement as if he had been dismissed at the discretion of the Board. The Premier states that he was not that explicit and that he only confirmed with the Chair of the Board that the contractual obligations to Mr. Martin would be honoured.

Article 16 (c) of the Employment Agreement deals with the termination of Mr. Martin at the discretion of the Board. In particular, it provides for severance payments equivalent to two years' salary and two years' annual bonus in lieu of notice plus a number of other benefits.

The Board Minutes and the Settlement Agreement were constructed in a manner to ensure consistency between what the Board understood to have occurred at the April 19, 2016 meeting and the provisions of the Employment Agreement. The Board understood the Premier had terminated Mr. Martin's employment and that severance payments would apply. However, the Employment Agreement only provided for termination of Mr. Martin by Nalcor.

Finding

17. The Board Minutes and the Settlement Agreement were constructed in a manner to ensure consistency between what the Board understood to have occurred at the April 19, 2016 meeting and the provisions of the Employment Agreement. The Board understood the Premier had terminated Mr. Martin's employment and that severance payments would apply. However, the Employment Agreement only provided for termination of Mr. Martin by Nalcor.

We have determined that Mr. Martin was constructively dismissed. The severance benefits to which Mr. Martin was entitled in a circumstance of constructive dismissal would be, at least, equal to those as if Mr. Martin had been dismissed without cause. We therefore find that adopting the severance provisions, as provided for in article 16 (c) of Mr. Martin's Employment Agreement, in the Settlement Agreement was reasonable and the payment of the severance benefits was appropriate.

Finding

18. Given that Mr. Martin was constructively dismissed, adopting the severance provisions, as provided for in article 16 (c) of Mr. Martin's Employment Agreement, in the Settlement Agreement was reasonable and the payment of the severance benefits was appropriate.

In the interviews, the Board members expressed that they felt they had exercised appropriate due diligence and had a clear understanding of how Mr. Martin had been terminated and that he would receive severance based on the telephone conversation between the Chair and the Premier. External legal counsel to Nalcor stated in his interview that the justification for the termination of Mr. Martin's employment didn't really matter, as he understood that Government had agreed that he would get his severance benefits.

Given the significance of the decision by the Board, the fact that each Board member was resigning and the absence of clear direction in writing from the Province or formal legal consultation in respect of the circumstances of Mr. Martin's cessation of employment, the Board could have considered deferring the decision on April 20, 2016 and allow a new board to conclude a settlement with Mr. Martin.

Finding

19. Given the significance of the decision by the Board, the fact that each Board member was resigning and the absence of clear direction in writing from the Province or formal legal consultation in respect of the circumstances of Mr. Martin's cessation of employment, the Board could have considered deferring the action on April 20, 2016 and allow a new board to conclude a settlement with Mr. Martin.

Benefits Received by Mr. Martin

After execution of the Settlement Agreement, Mr. Martin received the following:

Table 3

Termination Benefits Received – Edmund J. Martin

Benefit	Amount	Comment
<u>Payment in Lieu of Notice</u> - 2 Year's Salary - 2 Year's Highest Bonus	\$1,052,714 \$309,622	Lump sum payments
Public Service Pension Plan	\$92,234	Annual amount based on formula and employee/employer contributions
Supplemental Executive Retirement Plan	\$4,698,200	Lump sum payment
Retirement Allowance	\$128,654	Lump sum payment based on years of service
2016 Performance Pay (bonus)	\$52,636	Estimated 2016 performance pay earned from January to April, 2016
Vehicle Allowance	\$25,480	Lump sum payment to cover vehicle lease and other operating costs during the 2 year notice period
Health Benefits		Continuation of eligibility for cost shared extended health, drugs and life insurance
Outplacement services	\$25,000	To be invoiced to Nalcor Energy within the notice period if used

Source: Nalcor Energy and the Department of Finance

Pay in Lieu of Notice

The Employment Agreement specified that, upon termination at the sole discretion of Nalcor, Mr. Martin was entitled to receive two years' salary in lieu of notice. In addition, he was to receive the equivalent of the highest annual bonus received in his best total compensation year for each year of the pay in lieu of notice period.

Finding

20. Pay in lieu of notice received by Mr. Martin was determined in accordance with the terms of his Executive Employment Agreement and is appropriate.

Public Service Pension Plan

The Employment Agreement provided that Mr. Martin participate in the PSPP. Employee and employer contributions to the PSPP are managed through the Department of Finance, as are the determination and payment of benefits.

Finding

21. Mr. Martin's pension benefits were determined by the Department of Finance using practices consistent with the determination of benefits for other Public Service Pension Plan members.

Supplemental Executive Retirement Plan (SERP)

The Employment Agreement stated that Nalcor would fund a SERP to provide additional retirement income to Mr. Martin. It provided details around the SERP including:

- provisions dealing with the determination of the SERP payment on termination of employment
- indexation
- the option to receive the commuted value of the SERP
- the process for establishing the commuted value of the SERP

When Mr. Martin's employment ended, he chose to receive the SERP benefit in an actuarially equivalent alternative payment (commuted value). Nalcor engaged the services of an actuary to determine the commuted value. He received this as a lump sum payment.

Finding

22. The lump sum (commuted value) of the Supplemental Executive Retirement Plan paid to Mr. Martin was appropriate and consistent with the provisions of the Executive Employment Agreement.

Retirement Allowance

Nalcor personnel policy allows for the payment of a retirement allowance in the event of normal retirement at age 65 with a minimum of 5 years of service or, in the event of early retirement, under a number of circumstances (**the Retirement Allowance Policy**). One of these circumstances is if the employee is between the age of 60 and 64 and has 5 years of service. The Retirement Allowance Policy provides one week's salary for each year of completed permanent employment, to a maximum of 26 weeks.

Retirement Allowance as Part of the Employment Agreement

The Retirement Allowance Policy has been in effect since 1978 and applies to all employees of Nalcor.

Mr. Martin's Employment Agreement entitled him to all salary and benefits for a period of 2 years if he was terminated at the sole discretion of Nalcor.

While it does not specifically provide for the payment of a retirement allowance, a section of the Employment Agreement that sets out various medical and health insurance benefits states:

The Executive shall also receive such other employee benefit plans in effect with respect to the executives of Nalcor.

Although the reference to other forms of benefit plans is included in a health benefits clause, this does not preclude the application of any plans that are not health benefits plans. In particular, this could include a retirement allowance which applies to all employees of Nalcor, including executives.

All employees of Nalcor have written employment contracts and none of them contain provisions on eligibility for retirement benefits. Nalcor employees are made aware of these benefits through information sessions and they have access to Nalcor policies through the company intranet.

Nalcor has applied the Retirement Allowance Policy consistently to departing employees, provided the employee has met the eligibility criteria. Employees expect to receive this benefit as part of their employment terms.

Finding

23. Mr. Martin's Executive Employment Agreement provided for the payment of a retirement allowance.

Eligibility for Retirement Allowance

Mr. Martin was 58 years old and had accumulated approximately 10 years and 9 months of service at the time his employment ended. Ordinarily, he would not be entitled to a retirement allowance since he was not yet 60. Nalcor added the 2 year notice period to his age for purposes of determining eligibility.

An essential component of an employment contract is that each party is entitled to reasonable notice from the other when terminating the employment relationship. Payment in lieu of notice is a substitute for an employer not giving reasonable notice to the employee. It is intended to provide employees with the same benefits they would have been entitled to had they worked for that period of time.

Mr. Martin's Employment Agreement states that the notice period is 2 years. Had Mr. Martin worked the 2 year notice period, he would have reached age 60, the minimum age required for eligibility of retirement allowance benefits.

Finding

24. Mr. Martin was eligible to receive the retirement allowance and the determination of the retirement allowance benefits was appropriate.

2016 Performance Pay (Bonus)

Annual performance pay amounts are normally approved by the Board prior to being paid and are based on a combination of individual and corporate targets. As part of the Settlement Agreement, Mr. Martin was paid an estimate of the performance pay he could have been expected to earn for 2016, pro-rated for the period January to April 2016. The estimate was based on an assumption that the maximum bonus of 30% of salary would have been achieved during the year.

The 2015 bonuses were reduced by 25% for all eligible employees by the Board, *"to reflect performance issues at the corporate level in 2015"*. There was no similar reduction to bonuses in prior years.

The Employment Agreement provided for Mr. Martin's entitlement to an annual bonus, therefore, he was eligible for a bonus for the period January 1, 2016 to April 20, 2016.

It is common for terminated employees to receive lump sum settlements from their employers upon termination of employment. A necessary part of this often involves estimating the employee's bonuses.

Courts have determined that the method of calculating a bonus will be based on the normal practice of the company. Estimating the amount and including that as part of the lump sum paid to the terminated employee has been deemed by the courts to be a proper approach.

Nalcor has had limited experience in these situations. Nalcor officials indicated that in a previous incidence where an employee left before the end of the year, the company estimated the bonus amount based on the maximum eligible and included the payment as part of the settlement. Nalcor relied on this past practice in determining an estimate of Mr. Martin's 2016 bonus.

Mr. Martin's 2016 bonus was determined based on a pro-ration of 4 months while he ceased employment on April 20. Nalcor practice, in these circumstances, is to round up to the nearest full month if the employee has worked for more than half the month.

Finding

25. The estimate of the 2016 bonus for Mr. Martin was appropriate.

Vehicle allowance

The Employment Agreement stated that if employment was terminated at the sole discretion of Nalcor, Mr. Martin would be eligible for “...all other available benefits upon the same cost sharing arrangement that the Executive would be entitled had he continued working.”

Nalcor policy for employees eligible for a vehicle is to either provide a suitable vehicle plus operating costs or provide the employee with a vehicle allowance equivalent to \$490 per pay period.

Mr. Martin was provided with a vehicle as part of his employment. Upon cessation of employment, the vehicle lease was transferred to Mr. Martin and he was paid a lump sum cash amount equivalent to the \$490 per pay period for the two years in lieu of notice.

Finding

26. The vehicle allowance paid to Mr. Martin was consistent with the provisions of the Executive Employment Agreement and was appropriate.

Health benefits

Mr. Martin is eligible for continuation of extended health, drugs, life insurance and dental for the two year notice period on the same cost shared basis as when he was working. Mr. Martin will be eligible for retiree benefits at the end of the notice period.

Finding

27. The continued provision of health benefits is consistent with the provisions of the Executive Employment Agreement.

Outplacement services

The Employment Agreement states that Mr. Martin would be eligible to receive outplacement services up to \$25,000. These services would be invoiced to Nalcor by the service provider. To date, no outplacement services have been invoiced to Nalcor.

Finding

28. Mr. Martin would be eligible for outplacement services of up to \$25,000 should he wish. To date, no services have been billed to Nalcor.

APPENDIX

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EXECUTIVE EMPLOYMENT AGREEMENT 2009

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COPY

**EXECUTIVE EMPLOYMENT AGREEMENT
(FIRST RENEWAL)**

BETWEEN:

NALCOR ENERGY

AND

EDMUND MARTIN

EXECUTED November 2, 2009

41368.v3

**EXECUTIVE EMPLOYMENT AGREEMENT
(FIRST RENEWAL)**

THIS AGREEMENT made at St. John's, in the Province of Newfoundland and Labrador, as of the 2 day of November, 2009.

BETWEEN:

NALCOR ENERGY,

(hereinafter called "Nalcor")

OF THE ONE PART

AND:

EDMUND MARTIN, of the City of St. John's, in the Province of Newfoundland and Labrador,

(hereinafter called the "Executive")

OF THE SECOND PART

WHEREAS by an Agreement of Assignment made as of the 1st day of January, 2008, all rights, benefits and obligations under the Executive Agreement between Newfoundland and Labrador Hydro ("Hydro") and the Executive herein and executed the 21st day of July, 2005 (the Initial Employment Agreement) were assigned to Nalcor Energy;

AND WHEREAS Nalcor Energy has accepted said assignment upon the understanding and agreement that the assignment places it in the same position that Newfoundland and Labrador

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Hydro would be under the Initial Employment Agreement had Newfoundland and Labrador Hydro continued as the employer of the Executive.

WITNESSETH for and in consideration of the mutual covenants and agreements hereinafter contained and all other considerations hereinafter mentioned, the parties hereto agree to renew the Executive Employment Agreement executed the 21st day of July, 2005, upon the following terms:

APPOINTMENT AND TERMS OF EMPLOYMENT

1.1 Nalcor shall continue to employ the Executive as:

- (a) President and Chief Executive Officer of Nalcor Energy;
- (b) President, and Chief Executive Officer of Nalcor Energy – Oil and Gas Inc.;
- (c) President, and Chief Executive Officer Nalcor Energy – Bull Arm Fabrication Inc.;

1.2 It is also understood and agreed that an integral part of the consideration for the Executive entering into this Renewal Agreement is his continuing appointment as:

- (a) President, and Chief Executive Officer of Newfoundland and Labrador Hydro;
- (b) President, and Chief Executive Officer of Churchill Falls (Labrador) Corporation Limited;
- (c) President and Chief Executive Officer of Lower Churchill Development Corporation Limited; and

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(d) President and Chief Executive Officer of Gull Island Power Company Limited;

Subject to the further terms and conditions hereinafter mentioned.

2. In his capacity as President and Chief Executive Officer of Nalcor, the Executive shall continue to be a member of the Board of Directors of Nalcor (the "Board"), and in further consideration of entering into this Renewal Agreement the Executive must continue to be a member of the Board of Directors of each of the above named enterprises described in paragraphs 1.1(b) and (c) and 1.2 (a), (b), (c) and (d).
3. Subject to the by-laws of Nalcor and regulations passed or approved by the Board, the Executive shall perform such duties and exercise such powers commensurate with his office as may, from time to time, be determined by the Board, and, without limitation, the Executive shall:
 - (a) well, faithfully, honestly and diligently serve Nalcor and use his best efforts to promote the interests of Nalcor and devote his full time, skill and attention to the operation of Nalcor, except during holidays, or in the case of illness or accident;
 - (b) report to the Board and shall observe all reasonable directions of the Board; and
 - (c) not acquire, directly or indirectly, an interest in any firm, partnership, association, entity or corporation, the business or operations of which would in any manner, directly or indirectly, compete or conflict with the business or operations of Nalcor and without limiting the generality of the foregoing, neither the Executive nor any member of his family (this term having the same meaning as defined in Newfoundland and Labrador's *Conflict of Interest Act*, 1995) shall directly hold any shares in the Fortis Inc. group of companies including Newfoundland Power

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excepting however interests acquired in a publicly traded corporation through retirement mutual fund(s) investment vehicles.

4. The Executive may, with the approval of the Board, serve as a director or member of service clubs, charitable, recreational and community organizations and may also serve as a director of publicly traded entities which would not in any manner, directly or indirectly, compete or conflict with the business or operations of Nalcor having first obtained the approval of the Board.

TERM OF EMPLOYMENT AND REMUNERATION

5. The Executive shall be paid, commencing on the renewal commencement date as hereinafter established, a base salary of \$418,209.00 in respect of the first year of employment under this Renewal Agreement. The Executive shall be entitled to an annual base salary review for the purpose of determining the appropriate increase in accordance with the practice of Nalcor as it pertains to other executive positions of Nalcor. Upon the fifth anniversary of this Renewal Agreement the Executive may request and Nalcor shall cause a comprehensive labour market salary review to be undertaken to determine the relative position of the Executive's salary among executives with comparable experience and responsibilities in the Canadian market. Where the current base salary of the Executive is below that which would be considered the going market rate for relatively equivalent positions, to recommend to Nalcor what increase to the then current base salary would be necessary to make Nalcor's compensation competitive in that market. Any adjustment to the Executive's compensation flowing from such recommendation shall remain at the discretion of Nalcor.

Sign!

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6. The Executive shall also be eligible for an annual bonus of up to thirty percent (30%) of the then current annual base salary as determined by the Board through an incentive plan.
7. This renewal contract shall commence as of May 1, 2009, herein called the “renewal commencement date”, and the Executive shall hold the offices of President and Chief Executive Officer of Nalcor and the other offices mentioned in paragraphs 1.1 (b), (c) and 1.2 (a), (b), (c) and (d) for a period of nine (9) years from the commencement date.
8. On or before the eighth (8th) anniversary of the commencement date, the Executive shall advise the Chairman of the Board of Nalcor if he wishes to renew his employment with Nalcor. Within thirty (30) days of receiving notice from the Executive of his desire to renew his employment with Nalcor, Nalcor shall advise the Executive whether it wishes to renew such employment. In the event both parties wish to renew such employment, Nalcor through its Chairperson or a committee established for the purpose and the Executive will meet within a further thirty (30) days to negotiate the second renewal of this Agreement and such second renewal shall not include a reduction of those benefits, terms and conditions contained herein. In any event, the negotiation of the second renewal of this Agreement shall be concluded on or before six (6) months prior to the ninth (9th) anniversary (May 1, 2018), of the renewal commencement date. The Executive will be able to attend employment interviews and to pursue alternate employment as his schedule dictates during the last six (6) months of his employment and shall be entitled to outplacement services as provided for in clause 15(c)(iv) herein.

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BENEFITS

9. Nalcor shall reimburse the Executive for all reasonable travel and other expenses incurred by him in connection with the execution of his duties under this Agreement. The Executive shall provide Nalcor with statements and receipts in respect of such expenses as required by Nalcor's policies in effect from time to time.

10. Nalcor shall provide to the Executive an automobile of a type commensurate with his office and shall pay all operating expenses associated with such automobile or alternatively, as its sole discretion, shall pay him a monthly car allowance in an amount that will provide for an automobile of a type commensurate with his office. In addition, Nalcor shall provide to the Executive a parking space at Nalcor's Head Office at Hydro Place in St. John's aforesaid. For the purposes of this Clause "automobile of a type commensurate with his office" shall mean a vehicle of a style and type similar to that currently provided to the Executive with a value of at least the then current dealer market value of such a vehicle or its equivalent should the current model or type be discontinued or unavailable in the Province.

11. The Executive shall be entitled to participate, on the same basis and subject to the same qualifications, terms and conditions as other executives of Nalcor in any life insurance, accidental death and dismemberment insurance, voluntary personal accident insurance, disability insurance provided that where a cap on monthly disability insurance benefits exists such cap shall not be less than \$25,000.00 per month after income taxes, (with appropriate medical justification, if required by the policy), dental insurance, hospitalization and other medical benefit insurance. It is understood that long term disability coverage will be 60% of pre-existing earnings (base salary plus the best year

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incentive bonus) plus payment of Executive's PSPP contributions to determine the maximum of the allowable monthly benefit which must not be less than the cap amount of \$25,000.00. The Executive shall also receive such other employee benefit plans in effect with respect to the executives of Nalcor.

12. The Executive shall be entitled to thirty (30) days annual leave or that number of days prescribed by Nalcor's policy, whichever is greater, in each year during the term of this Agreement. It is understood and agreed that the Executive may carry forward any unused vacation which may be banked. The Board may approve the use of up to ten (10) days of banked unused annual leave in addition to annual leave in any year and all unused vacation, without a limitation, shall be paid out upon termination or expiry of this Agreement or any renewal thereof.

For purposes of this Clause the renewal date shall be the date this Renewal Agreement is executed by the Executive.

13. The Executive shall be entitled to all statutory holidays observed by Nalcor and made available to the other Executives of Nalcor.

PENSION BENEFITS

14.
 - (a) The Executive shall participate in the Public Sector Pension Plan (PSPP) and shall be entitled to all the benefits to be derived therefrom.

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- (b) Nalcor will assume and continue to fund the Supplemental Executive Retirement Plan (SERP) created by Newfoundland and Labrador Hydro to provide supplemental retirement income to the Executive in accordance with the following provisions:

Definitions:

- (i) "Term of Employment" shall include the period of actual employment commencing at the commencement date referred to in the Initial Employment Agreement plus the actual employment period hereunder including any period of absence for any reason whether with or without pay, unused vacation entitlement and any period in lieu of notice with the term expressed in years, months and days under both the Initial Employment Agreement and this Renewal Employment Agreement.

"Spouse" shall have the same meaning as that contained in the *Public Service Pensions Act, 1991*, as at the date of the Executive Employment Agreement.

"Surviving Spouse" shall mean the spouse of the Executive who is alive at the time of death of the Executive and the Executive has not, in writing, expressed a contrary intention as to the person he declares to be his spouse.

"Child (or Children) of the Executive" shall mean a child (or children) of the Executive who is alive at the time of death of the Surviving Spouse and who is under the age of eighteen (18) years, or under the age of twenty

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four (24) years while in full time attendance at a recognized school or post-secondary institution.

- (ii) Nalcor, upon termination of employment or expiry and non-renewal of the Executive's Contract of Employment, or such other events of termination such as are specified herein (excluding death of the Executive) shall cause to be paid to the Executive annual a pension being a sum equivalent to 2% of the Executive's best year base salary plus 2% of the Executive's best year annual incentive bonus times years of service included in the Term of Employment with any incomplete years being prorated on the basis of completed months with the last month, if incomplete, being deemed complete if the Executive's Term of Employment end date exceeds the 15th of the month. The amount so calculated is herein referred to as the SERP payment. Such amount to be paid in twelve (12) equal monthly instalments on the first of each month from and including the month immediately following the end of the Term of Employment to and including the month in which the Executive dies and shall be paid without any setoff or deduction by Nalcor unless otherwise specified herein.
- (iii) In the event of death of the Executive, Nalcor shall pay to the Surviving Spouse, or, in the event there is no Surviving Spouse, or the Surviving Spouse subsequently dies, the Children of the Executive, an annual payment equal to 60% of the SERP payment to be paid in twelve (12) equal monthly instalments on the first day of each month commencing the first day of the month following the date of death of the Executive up to

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and including the death of the Surviving Spouse or the last child of the Executive has reached the age of 18 years (or the age of 24 years while such Child of the Executive is in full time attendance at a recognized school or post secondary institution).

- (iv) The SERP payment shall be indexed and increased annually in accordance with the CPI rate of inflation for Canada, commencing on the anniversary date of the initial instalment of SERP payments as provided for herein.
- (v) In the event of disability causing a leave of absence that exceeds six (6) months with no evidence of imminent return to work, this Employment Agreement may be terminated by either party as provided for in clause 16 hereof in which event the Term of Employment shall be deemed “notwithstanding the definition of Term of Employment” to be Thirteen (13) years and the SERP payment so triggered will be adjusted to deduct from the payment any amounts received through or from the Long Term Disability insurer after the Term of Employment and such payment shall be made to the Executive as per 14(b)(ii) above, provided however, that this clause shall not affect survivor benefits to the Surviving Spouse or a Child of the Executive.
- (vi) The Executive acknowledges that the SERP payments contemplated arise on termination and are not intended to form part of “total compensation” during employment, but are payable as part of stand alone pension compensation payable once the termination / expiry provisions of this Employment Agreement are fulfilled.

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- (vii) In lieu of the SERP payment to which the Executive is entitled pursuant to this Agreement, the Executive may elect at or about the date the Executive becomes entitled to such payment, to receive the SERP benefit in an actuarially equivalent alternative payment that is acceptable to the Executive and Hydro as provided below in clause 14(b)(viii).
- (viii) On the date to which the Executive is entitled to the SERP benefit or as soon as the commuted value has been established in accord with this Article 14, he may elect to receive as a lump sum or series of payments (not to exceed five (5), at such times as the Executive directs) which in total are equal to the commuted value of the SERP benefit based on a calculation performed by a firm of actuaries retained by Nalcor. Provided however, that the Executive may, at the expense of Nalcor retain his own firm of actuaries to perform the same actuarially equivalent calculation. In the event the calculations of the two firms of actuaries are within 10% of each other, Nalcor and the Executive agree that the payment/payments will equal the average of the two calculations.
- (ix) In the event the difference between the calculations is more than 10%, the two firms of actuaries shall appoint a third firm of actuaries to review and present its calculation, which such calculation shall be adopted by the parties as correct. Any reviews undertaken under this clause or costs associated with such reviews shall be paid by Nalcor.
- (x) The payment of the SERP benefit in accordance with clauses 14(b)(vii), 14(b)(viii) and 14(b)(ix) shall terminate all obligations and liability of

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Nalcor to the Executive, his Surviving Spouse, a Child of the Executive or his designated beneficiary or his estate.

- (xi) In the event of a combined term of employment with Hydro and Nalcor of five (5) years or more, including any notice periods or pay in lieu (Total Years of Service) and the employment of the Executive has ended or ends in accordance with Clause 16 hereof and the Executive, at age fifty-six, is not entitled to receive an annual unreduced pension under the PSPP of Total Years of Service times 2% of the Base Salary at the time of termination (the "expected benefits") the SERP payments to the Executive or his Spouse or Children as the case may be, will commence, upon latter of the Executive reaching (or would have reached) age 56 or the effective date of termination, adjusted upward to bridge any shortfall in the said expected benefits until the shortfall is eliminated by payments to the Executive, or, his Surviving Spouse, or, his Children under the PSPP.

CONFIDENTIALITY

15.

- (a) "Confidential Information" means any trade secrets or other information however communicated, disclosed to the Executive or obtained by the Executive through observation or examination of Nalcor's policies, procedures or materials related to its business or operations which derives economic value from not being generally

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known to or readily ascertainable by other persons who can obtain value from its disclosure or use.

- (b) The Executive acknowledges that irreparable injury or damage will result to Nalcor upon the disclosure of Confidential Information to third parties or utilization of same for any purpose other than as contemplated by this Agreement.
- (c) The Executive will not, without the prior written consent of Nalcor, disclose any Confidential Information to any third party and will not use the Confidential Information except pursuant to and in the course of the Executive's association with Nalcor for the benefit of Nalcor, provided however, that the Executive shall have no liability to Nalcor for any disclosure of any Confidential Information if the Executive can establish that such Confidential Information:
 - (i) is publicly known, available or published, without breach of this Agreement by the Executive, or
 - (ii) has become known lawfully by or has become lawfully known to the Executive prior to Nalcor's disclosure of such information to the Executive, as evidenced by written documents received by the Executive prior to Nalcor's disclosure to the Executive, or
 - (iii) has been rightfully and lawfully received by the Executives from third parties, or
 - (iv) has been independently developed without reference to or use of the Confidential Information, or

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- (v) has been disclosed in accordance with the law.
- (d) The Executive agrees that all restrictions and covenants contained in this Clause 15 are reasonable and valid and all defences to the strict enforcement thereof by Nalcor which are founded upon reasonableness or validity of the restrictions and covenants are hereby waived by the Executive.

TERMINATION

- 16. The employment of the Executive may be terminated:
 - (a) upon death of the Executive, in which event the Executive's named Surviving Spouse, or, in the event there is no Surviving Spouse or the Surviving Spouse dies, the Children of the Executive or his designated beneficiary or his estate shall be entitled to immediately receive the survivor benefit of the SERP commencing in the month next after death and the Surviving Spouse, if any, shall continue to enjoy and receive the hospitalization and other medical benefit insurance benefits which shall include unreduced extended health, drugs and dental coverage provided for in Clause 11 until the death of the Surviving Spouse.
 - (b) for just cause, by written notice by Nalcor, in which event the Executive shall be entitled to receive the SERP, payable in accordance with paragraph 14(b); or
 - (c) at the sole discretion of Nalcor, including the absence from duties due to medical reasons for more than six (6) months, with no imminent return anticipated at the date the leave of absence extends beyond six (6) months, in which event the Executive shall be entitled to receive without setoff, deduction (except statutory), or, any consideration of the duty to mitigate or actual re-employment (except in

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the case of termination for just cause) in full and final settlement of all claims and demands arising out of any such termination the following:

- (i) salary and all benefits for the equivalent period of two (2) years (twenty four (24) months) in lieu of notice plus the equivalent of the highest annual bonus received in the Executive's best total compensation year prior to the date of termination for each year of the two year pay in lieu of notice period. Such amounts shall be paid to the Executive in lump sum within thirty (30) days of the termination of this Agreement subject only to Executive's direction for payment for tax sheltering purposes;
 - (ii) all other available benefits upon the same cost sharing arrangement that the Executive would be entitled had he continued working, including extended health, drugs, life insurance and dental coverage under such plans or programs that apply to executives while employed for Nalcor;
 - (iii) the SERP benefits payable in accordance with paragraph 14(b) unless Executive and Nalcor agree to conversion to a lump sum payment or some other suitable arrangement;
 - (iv) outplacement services up to \$25,000.00 as invoiced to Nalcor by the service provider;
- (d) at the sole discretion of the Executive upon the happening of one or more of the following events the Executive may give notice of termination amounting to not less than thirty (30) days and thereupon shall be entitled to the benefit of all the

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provisions of clause 16(c) as if Nalcor had exercised its discretion and terminated this agreement:

- (i) a material reduction in the mandate of Nalcor, as outlined generally in the advertised position (which such ad is attached as Appendix "A") and includes the base business of Nalcor under its constating legislation as of May 1, 2009, where the reduction or change in mandate of Nalcor has occurred without the support of the Executive;
- (ii) a material erosion or reduction in the role and the responsibilities of the Executive;
- (iii) a transfer or sale of Nalcor to, merger with, or acquisition by private enterprise;
- (iv) a leave of absence of six (6) months due to medical leave during which the Executive qualifies for Long Term Disability and there is no imminent ability to return to work; or
- (e) At the sole discretion of the Executive, at any time, upon providing to Nalcor six (6) months written notice to terminate this agreement, or, to retire at/or after age 60 when the Executive, in either event, shall be entitled to the benefits of Clause 16(c)(ii) and 16(c)(iii).

MISCELLANEOUS

17. For a period of two years after the termination of the employment of the Executive pursuant to this Agreement for any reason whatsoever or five years from the date of this

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Agreement, whichever period is the longer, the Executive shall not, on his own behalf or on behalf of any other person, partnership, association, corporation or other entity, hire or solicit or in any manner attempt to influence or induce any employee of Nalcor or its affiliates (within the meaning of the *Corporations Act*) to leave the employment of Nalcor or such affiliates, and he shall not use or disclose to any person, partnership, association, corporation or other entity any information obtained while an employee of Nalcor concerning the names and addresses of Nalcor's employees.

18. Any written notice or request by Nalcor may be delivered personally to the Executive or sent by registered mail addressed to the Executive's last address in Nalcor's personnel records. If mailed, in the absence of proof of earlier receipt, such notice or request shall be deemed to have been given on the second day following, excluding Saturday, Sunday and statutory holidays, but including the day such notice or request was mailed. Any written notice or request by the Executive may be delivered personally to the Corporate Secretary of Nalcor or sent by registered mail addressed to Nalcor's Head Office at Nalcor Energy, Attn: Corporate Secretary, Hydro Place, 500 Columbus Drive, PO Box 12800, St. John's, NL A1B 0C9. If mailed, in the absence of proof of earlier receipt, such notice or request shall be deemed to have been given on the second day following, excluding Saturday, Sunday and statutory holidays, but including the day such notice or request was mailed.
19. No delay or omission of either of the parties to exercise any right or power accruing upon any default or breach under this Agreement shall impair any such right or power or shall be construed to be an acquiescence therein or waiver of any such default or breach or of

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any right or power accruing upon any such default or breach or on any subsequent default or breach under this Agreement.

20. This Agreement may be executed in counterparts, each of which so executed shall be deemed to be an original, and all such counterparts shall constitute but one and the same instrument.
21. Neither of the parties shall assign, in whole or in part, this Agreement or its rights or obligations hereunder, without the prior consent in writing of the other party.
22. None of the conditions, covenants, or agreements contained in this Agreement may be waived in whole or in part unless such waiver be in writing and signed by the party in whose favour the representations, warranties, conditions, covenants, or agreements so waived operate.
23. This Agreement constitutes the entire agreement between the parties hereto and neither of the parties hereto is bound by any representation, warranty, promise, discussion, agreement or inducement not embodied or contained in this Agreement.
24. 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 subject to the provisions respecting mediation and arbitration set out herein the Courts of the Province of Newfoundland and Labrador shall have jurisdiction to entertain any action or other legal proceedings based on any provisions of this Agreement. Each party hereto does hereby attorn to the jurisdiction of the Courts of Newfoundland and Labrador.

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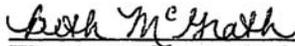
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25. This Agreement may be amended by the mutual consent of the parties as evidenced by a written instrument signed by both parties.
26. The illegality, invalidity or unenforceability of any provisions of this Agreement shall not affect the illegality, invalidity, or unenforceability of any other provision or a part hereof unless the latter is contingent or dependent upon the former.
27. This Agreement and everything contained herein shall enure to the benefit of and be binding upon each of the parties hereto and their respective successors, personal representatives and permitted assigns as fully and as effectually as if the same had been mentioned herein.
28. The Executive acknowledges that he has read and understands this Agreement, and acknowledges that he has had the opportunity to obtain legal advice concerning this Agreement.
29. Any dispute arising out of the interpretation or application of this Agreement may be referred by either party to a sole arbitrator, knowledgeable of employment law, and agreed to by the parties within thirty (30) days of the issue arising. Failing agreement on arbitrator, the parties agree to abide by the terms and conditions of appointing a sole arbitrator as are contained in the *Arbitration Act*, NL. The arbitrator selected by agreement or by operation of the *Arbitration Act* shall not have the power to amend or modify the Agreement without consent of both parties and shall, in the exercise of jurisdiction conferred by the parties, be bound by the *Arbitration Act* aforesaid. The fees and expenses of the arbitration shall be jointly paid by the parties equally.

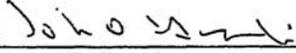
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IN WITNESS WHEREOF this Agreement has been executed by the parties hereto the day and year first before written.



Witness as to the execution by Nalcor

NALCOR


Chairman of the Board



Witness as to the execution by
Edmund Martin



EDMUND MARTIN

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**APPENDIX
B
SETTLEMENT AGREEMENT**

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THIS SETTLEMENT AGREEMENT made as of April 20, 2016.

BETWEEN:

NALCOR ENERGY
(hereinafter called "Nalcor")

OF THE ONE PART

AND:

EDMUND MARTIN, of the City of St. John's,
in the province of Newfoundland and Labrador
(hereinafter called the "Executive")

OF THE OTHER PART

WHEREAS the Executive has announced he is stepping down as President and Chief Executive Officer of Nalcor and its subsidiaries effective the date hereof;

AND WHEREAS the Board of Directors of Nalcor have been advised by the Government of Newfoundland and Labrador that in all the circumstances it has agreed that the Executive is entitled to receive the severance and pay in lieu of notice payments and benefits as if the Executive been released by the Board of Directors under clause 16 without cause pursuant to the Executive Employment Agreement between the parties hereto dated as of November 2, 2009 (the Contract")

NOW THEREFORE THIS AGREEMENT WITNESSES THAT in consideration of these presents and the mutual covenants herein set forth, Nalcor and the Executive agree as follows:

1. **Nalcor shall pay and grant to the Executive:**
 - (a) Severance – (i) salary and all benefits (including extended health, drugs, life insurance and dental coverage under such plans or programs that apply to executives while employed for Nalcor), cost shared where applicable, for the equivalent period of two (2) years (twenty four (24) months) in lieu of notice plus the equivalent of the highest annual bonus received in the Executive's best total compensation year prior to the date of termination for each year of the two year pay in lieu of notice period. This amount(s) shall be paid to the Executive in lump sum upon execution of this Agreement subject only to the Executive's direction for payment for tax sheltering purposes; (ii) outplacement services up to \$25,000.00 as invoiced to Nalcor by the service provider;
 - (b) Other provisions – (i) as agreed by the Executive and the Board of Directors, a lump sum payment of the SERP benefits to which the Executive is entitled under the terms of the Contract; (ii) any other payments to which any employee of Nalcor would be entitled upon the termination of their employment with Nalcor including, but not limited to, any earned but unused annual leave; and access to benefits generally available to retirees; (iii) The Executive shall be entitled to retain the benefit of his currently assigned automobile for the two year notice

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period upon the same (so far as practicable) conditions as if he continued in active employment.

2. **Survivor Benefits**

Should the Executive die within the two year notice period any benefits or payments required hereby and which were not paid or provided to Executive prior to his death shall be paid or provided to the Spouse of the Executive or upon the death of the Spouse to the children of the Executive.

3. **Confidentiality**

(a) "Confidential Information" means any trade secrets or other information however communicated, disclosed to the Executive or obtained by the Executive through observation or examination of Nalcor's policies, procedures or materials related to its business or operations which derives economic value from not being generally known to be or readily ascertainable by other persons who can obtain value from its disclosure or use.

(b) The Executive acknowledges that irreparable injury or damage will result to Nalcor upon the disclosure of Confidential Information to third parties or utilization of same for any purpose other than as contemplated by this Agreement.

(c) The Executive will not, without the prior written consent of Nalcor, disclose any Confidential Information to any third party and will not use the Confidential Information for any purpose whatsoever, provided however, that the Executive shall have no liability to Nalcor for any disclosure of any Confidential Information if the Executive can establish that such Confidential Information:

(i) is publicly known, available or published, without breach of this Agreement by the Executive;

(ii) has become known lawfully by or has become lawfully known to the Executive prior to Nalcor's disclosure of such information to the Executive, as evidenced by written documents received by the Executive prior to Nalcor's disclosure to the Executive;

(iii) has been rightfully and lawfully received by the Executive from third parties;

(iv) has been independently developed without reference to or use of the Confidential Information; or

(v) has been or is required to be disclosed in accordance with law.

(d) The Executive agrees that all restrictions and covenants contained in this Section 3 are reasonable and valid and all defences to the strict enforcement thereof by Nalcor which are founded upon reasonableness or validity of such restrictions and covenants are hereby waived by the Executive.

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4. **No Solicitation of Nalcor Employees**

For a period of two years after the date hereof, the Executive shall not, on his own behalf or on behalf of any other person, partnership, association, corporation or other entity, hire or solicit or in any manner attempt to influence or induce any employee of Nalcor or its affiliates (within the meaning of the *Corporations Act*, Newfoundland and Labrador) to leave the employment of Nalcor or such affiliates, and he shall not use or disclose to any person, partnership, association, corporation or other entity any information obtained while an employee of Nalcor concerning the names and addresses of Nalcor's employees.

5. **Non-Competition**

- (a) The Executive hereby covenants with Nalcor that he shall not, for a period beginning at the date of this Agreement and ending on April 30, 2017, anywhere in the provinces of Quebec, New Brunswick, Nova Scotia, Prince Edward Island, or Newfoundland and Labrador, directly or indirectly, either alone or jointly with or on behalf of any third party:
- i. be employed in a senior executive position, offer consulting services, serve as a director of, or in any way aid with the carrying on of any business which operates in competition with the business of Nalcor, including but not limited to business engaged in the generation, distribution, transmission and sale of electrical energy, or the exploration, extraction and production of renewable or non-renewable oil and gas it being understood that mining for minerals is excluded;
 - ii. canvass, solicit or approach or induce or attempt to induce any customer, contractor or supplier to cease doing business with Nalcor, or in any way interfere with the relationships between any customer, contractor or supplier and Nalcor;
 - iii. engage in, carry on, or otherwise be concerned with, employed by, associated with, or in any other manner connected with, or have any interest in, manage, advise, lend money to, guarantee the debts or obligations of, render services or advice to any business which is substantially the same or similar to, or in direct competition with the business of Nalcor.
- (b) Notwithstanding anything in this Section, the ownership by the Executive as a passive investor of less than five percent of the outstanding publicly traded capital stock of any entity which competes with the business of Nalcor shall not be a violation of this Agreement.
- (c) The covenants in this Section are given by the Executive acknowledging that he has specific knowledge of the affairs of Nalcor and its subsidiaries and affiliates, and that Nalcor and its subsidiaries and affiliates carry on and attempt to carry on business such that the terms herein are reasonable. In the event that any clause or portion of any such covenant should be unenforceable or be declared invalid for any reason whatsoever, such unenforceability or invalidity shall not affect the enforceability or validity of the remaining portions of the covenants of this Section, and such unenforceable or invalid portions shall be severed from the remainder of this Section. The Executive hereby acknowledges and agrees that

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all restrictions contained in this Section are reasonable and valid and that all defences to the strict enforcement of this Section by Nalcor which are founded upon reasonableness or validity of such restrictions and covenants are hereby waived by the Executive.

- (d) Without intending to limit the remedies available to Nalcor, the Executive acknowledges that damages at law will be an insufficient remedy to Nalcor in view of the irrevocable harm which will be suffered if the Executive violates the terms of this Section and agrees that Nalcor may apply for and have injunctive relief in any court of competent jurisdiction, specifically to enforce any of such covenants upon the breach or threatened breach thereof, or otherwise specifically to enforce any such covenants, and hereby waives all defences to the strict enforcement thereof by Nalcor.
- (e) Nalcor and the Executive each acknowledge and agree that the covenants of the Executive in this Section are essential elements of the agreed upon terms of the Executive's termination of employment, and that if the Executive had not made such covenants, Nalcor would not have agreed to the terms of this Agreement.

6. The SERP Calculation

For the purposes of determining the SERP lump sum as referenced in clause 1(c) above the following provisions shall be considered and applied.

Definition:

"Term of Employment" shall include the period of actual employment commencing at the commencement date referred to in the Initial Employment Agreement dated July 21, 2005 plus the actual employment period under the Contract including any period of absence for any reason whether with or without pay, unused vacation entitlement and any period in lieu of notice with the term expressed in years, months and days under both the Initial Employment Agreement and the Contract.

Supplemental Executive Retirement Plan Payment

- (i) A sum equivalent to 2% of the Executive's best annual salary plus 2% of the Executive's best year annual incentive bonus times years of service included in the Term of Employment with any incomplete years being prorated on the basis of completed months with the last month, if incomplete, being deemed complete. This lump sum shall be the SERP payment adjusted pursuant to the following provisions;
- (ii) The Executive acknowledges that the SERP payments contemplated arise on termination and are not intended to form part of "total compensation" during employment, but are payable as part of stand alone pension compensation payable on termination.
- (iii) The SERP payment to which the Executive is entitled as a lump sum will be the commuted value of the SERP payment if taken as a monthly benefit but in an actuarially equivalent alternative payment that is

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calculated in a manner acceptable to the Executive and Nalcor as set out below.

- (iv) The actuaries are directed to calculate the commuted value of the SERP payment as if indexed and increased annually in accordance with the CPI rate of inflation for Canada, commencing on May 20, 2016 and in accord with generally accepted principles of their profession;
- (v) On the date to which the Executive is entitled to the SERP benefit or as soon as the commuted value has been established in accord with this clause, the Executive may elect to receive as a lump sum which in total is equal to the commuted value of the SERP benefit based on a calculation performed by a firm or actuaries retained by Nalcor. Provided however, that the Executive may, at the expense of Nalcor retain his own firm of actuaries to perform the same actuarially equivalent calculation. In the event the calculations of the two firms of actuaries are within 10% of each other, Nalcor and the Executive agree that the payment/payments will equal the average of the two calculations.
- (vi) In the event the difference between the calculations is more than 10%, the two firms of actuaries shall appoint a third firm to actuaries to review and present its calculation, which such calculation shall be adopted by the parties as correct. Any reviews undertaken under this clause or costs associated with such reviews shall be paid by Nalcor.
- (vii) The payment of the SERP benefit (commuted value) in accordance herewith shall terminate all obligations and liability of Nalcor to the Executive, his Surviving Spouse, a Child of the Executive or his designated beneficiary or his estate.
- (viii) Where the Executive is at least 56 years old but is not entitled to receive an annual unreduced pension under PSPP of Total Years of Service times 2% of Base Salary at the time of termination (the "expected benefits") the SERP payment to the Executive will be adjusted upward effective the date of termination to bridge any shortfall in the said expected benefits until the shortfall is eliminated.

7. General

- (a) This Agreement may be executed in counterparts, each of which so executed shall be deemed to be an original, and all such counterparts shall constitute but one and the same instrument.
- (b) Neither of the parties shall assign, in whole or in part, this Agreement or its rights or obligations hereunder, without prior consent in writing of the other party.
- (c) 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 subject to the provisions respecting mediation and arbitration set out herein the Courts of the Province of Newfoundland and Labrador shall have jurisdiction to entertain any action or other legal proceedings based on any provisions of this Agreement. Each party hereto does attest to the jurisdiction of the Courts of Newfoundland and Labrador.

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- (d) This agreement and everything contained herein shall inure to the benefit of and be binding upon each of the parties hereto and their respective successors, personal representatives and permitted assigns as fully and as effectually as if the same had been mentioned herein.
- (e) The Executive acknowledges that he has read and understands this Agreement, and acknowledges that he has had the opportunity to obtain legal advice concerning this Agreement.
- (f) Any dispute arising out of the interpretation or application of this Agreement may be referred by either party to a sole arbitrator, knowledgeable of employment law, and agreed to by the parties within thirty (30) days of the issue arising. Failing agreement on arbitrator, the parties agree to abide by the terms and conditions of appointing a sole arbitrator as are contained in the *Arbitration Act*, Newfoundland and Labrador. The arbitrator selected by agreement or by operation of the *Arbitration Act* shall not have the power to amend or modify the Agreement without consent of both parties and shall, in the exercise of jurisdiction conferred by the parties, be bound by the *Arbitration Act* aforesaid. The fees and expenses of the arbitration shall be paid entirely by Nalcor.

8. **Termination of the Contract**

Upon receipt of the benefits provided for Section 1 hereof, the Executive hereby forever releases and discharges Nalcor from the obligations of Nalcor under the Contract and acknowledges that Nalcor no longer has any further obligations to the Executive under the Contract or any other obligations relating to his employment with Nalcor.

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APPENDIX

C

**MINUTES OF THE 97TH MEETING OF THE
BOARD OF DIRECTORS OF NALCOR ENERGY
(APRIL 20, 2016)**

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MINUTES OF THE NINETY-SEVENTH MEETING OF THE BOARD OF DIRECTORS OF NALCOR ENERGY HELD IN THE BOARDROOM, SIXTH LEVEL, HYDRO PLACE, ST. JOHN'S, NEWFOUNDLAND AND LABRADOR ON WEDNESDAY, APRIL 20, 2016 AT 10:00 A.M.

Present in Person: K. Marshall, Chair
E. Martin, Member
L. Abbass, Member
T. Clift, Member
G. Shortall, Member

Present by Invitation: M. Roberts, Vice-President HROE
J. Green, McInnis Cooper

Secretary: P. Hickman

1259. CONSTITUTION OF THE MEETING

Notice for the meeting was sent on April 5, 2016. A quorum of members being present, the meeting was declared duly called and validly constituted for the transaction of business.

1260. 2015 PERFORMANCE CONTRACTS

The Chair reported to the Board that discussions had been held over the previous few weeks with representatives of the Government of Newfoundland and Labrador with respect to the payout of the 2015 performance contract payments. He stated that Government requested that the Board not approve the payout on these contracts.

Mr. Marshall stated that opinions provided by internal and external legal counsel are consistent in stating that non-payment of the payouts under those contracts would be a breach of the contracts and would expose the Corporation to legal challenge, which in all likelihood would be successful.

The Chair stated that he advised the Government that in light of the advice received from legal counsel, and in the absence of a written directive from Government not to make the payments, the Board would proceed with approval of the payout of the 2015 performance contract payments.

The Board discussed the amount of the payouts and it was agreed that given the fact that there were some performance issues in 2015, specifically with respect to financial performance and safety, that there would be a 25% reduction in each employee's payout. The Board were of the opinion that it is within their discretion to reduce the payments in this manner given these performance issues. With respect to Mr. Martin, it was agreed that his payout would be based on an average of the level of performance achieved versus targets by all other employees who entered into a Performance Contract for 2015.

On motion duly made by G. Shortall, seconded by T. Clift and unanimously carried, with Mr. Martin abstaining, it was resolved:

THAT the payout of the 2015 Performance Contract payments to the President and CEO, Vice-Presidents, General Counsel and Corporate Secretary and their direct reports and other eligible managers, at a reduction of 25% to reflect performance issues at a corporate level in 2015, be and it is hereby approved.

Mr. Martin left the meeting at this time.

1261. CESSATION OF MR. MARTIN'S EMPLOYMENT

John Green, McInnes Cooper Law Firm, joined the meeting by phone at this time.

The Board discussed the cessation of Mr. Martin's employment with the Corporation. The Chair stated that the Board is of the understanding that an

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April 20, 2016
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agreement was reached between the Government and Mr. Martin with respect to his severance pay upon his termination of employment with the company.

The meeting was adjourned at 11:30am.

The meeting reconvened at 2:00pm with Messrs Marshall, Abbass, Clift and Shortall in attendance, as well as Mr. Green (by phone), Mr. Roberts and Mr. Hickman. Mr. Martin did not re-join the meeting.

The Chair reported that he had had a discussion with a representative of the Government of Newfoundland and Labrador and it was confirmed that there was an agreement between the Government and Mr. Martin that he would receive severance payments upon the cessation of his employment with the Corporation. The severance payment was to be in accordance with his employment contract as if he had been dismissed at the discretion of the Board.

Mr. Green left the meeting at this time.

On motion duly made by L. Abbass, seconded by T. Clift and unanimously carried, it was resolved:

WHEREAS Ed Martin has stepped down as President and Chief Executive Officer of Nalcor Energy and its subsidiaries effective close of business April 20, 2016;

AND WHEREAS Mr. Martin is to receive the severance provisions that he would be entitled to under the terms of his Employment Contract dated November 2, 2009 as if terminated at the discretion of the Board of Directors;

THEREFORE BE IT RESOLVED THAT the Board of Directors hereby authorizes the Corporation to enter into a Settlement Agreement with Mr. Martin to provide him with the following:

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April 20, 2016
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1. Severance - (a) salary and all benefits, cost shared where applicable, for the equivalent period of two (2) years (twenty four (24) months) in lieu of notice plus the equivalent of the highest annual bonus received in Mr. Martin's best total compensation year prior to the date of termination for each year of the two year pay in lieu of notice period; (b) outplacement services up to \$25,000.00 as invoiced to Nalcor by the service provider.
2. Other provisions – (a) as agreed by Mr. Martin and the Board of Directors, a lump sum payment of the SERP benefits to which he is entitled under the terms of the aforementioned Employment Contract; (b) any other payments to which any employee of Nalcor would be entitled upon the termination of their employment with the Corporation.

AND BE IT FURTHER RESOLVED THAT the Settlement Agreement include confidentiality, non-solicit and non-compete (1year) clauses.

AND BE IT FURTHER RESOLVED THAT any two of the officers of Nalcor be and are hereby authorized and directed to (a) approve the Settlement Agreement and (b) execute and deliver the Settlement Agreement and the execution by such officers shall be conclusive proof that they have approved the Settlement Agreement and that Nalcor has authorized such officers and directors to execute the Settlement Agreement in the form in which it has been executed.

1262. RESIGNATION OF THE BOARD

On motion duly made by G. Shortall, seconded by L. Abbass and unanimously carried, it was resolved:

WHEREAS it has become apparent that the Government of Newfoundland and Labrador does not have confidence in the members of the Board of Directors to oversee the activities of the Corporation;

THEREFORE BE IT RESOLVED THAT the all of the members of the Board of Directors of the Corporation hereby resign effective 5:00pm Friday, April 22, 2016.

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April 20, 2016
Page 5 of 5

Mr. Hickman advised the Board members that they should in addition to the resolution, submit individual letters of resignation.

1263. TERMINATION

There being no further business, the meeting was terminated.



Secretary

Adopted at a meeting held on

~~June 14~~, 2016


Chairperson

**APPENDIX
D
APRIL 20, 2016 E-MAILS**

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Ball, Dwight

From: ken marshall [REDACTED]
Sent: Wednesday, April 20, 2016 8:55 AM
To: Premier; Ball, Dwight; Coady, Siobhan [REDACTED]
Cc: EMartin [REDACTED]; Tom Clift; g.shortall [REDACTED]; labbass [REDACTED]
Subject: Nalcor

Premier and Minister

As I advised last week I have convened a meeting of the Nalcor Board this morning, and all members have travelled to be in attendance

I understand that in your meeting with the Nalcor CEO last night that an agreement was reached regarding the CEO's departure from Nalcor and associated entities. Given that as proper governance would dictate, the CEO's employment contract rests squarely with the Board, the Board will be meeting on this matter and the resultant employment contract obligations as one of the items of business this morning.

Second, as we discussed, the Board will be reviewing and voting on the Short Term Incentive program for 2015. As I advised, the Board has a responsibility to the organization. Yes to the shareholder, yes to the employees, yes to the public, and over arching to the Corporation. As such, the matter of contractual obligations with compensation matters have to be dealt with by the Board. Should government, in its capacity as shareholder disagree with the Board, government will presumably take the requisite steps to amend, however in the interest of the organization we will make what we feel is the just and proper decision

Third, the Board will be discussing an en masse resignation in light of these matters. Clearly, by reaching directly through to the CEO and deciding employment continuation, and from the recent Budget speech, government does not have proper confidence in the Board to continue in its duties and role. I can speak for all individuals on the Board that to a member, all have acted with proper and due care for the long term benefit of the organization and the people of this province.

I trust we will further discuss these matters either prior to or after our Board meeting. If there is anything you wish me to bring to the meeting scheduled for 10am this morning, please advise

Ken

Ball, Dwight

From: Ball, Dwight
Sent: Wednesday, April 20, 2016 9:27 AM
To: ken marshall
Cc: siobhancoadynl [REDACTED]
Subject: RE: Nalcor

Hi Ken

We can discuss after your meeting

Dwight

-----Original Message-----

From: ken marshall [REDACTED]
Sent: Wednesday, April 20, 2016 8:55 AM
To: Premier, <Premier@gov.nl.ca>; Ball, Dwight <DwightBall@gov.nl.ca>; Coady, Siobhan <SiobhanCoady@gov.nl.ca>
Cc: EMartin@n [REDACTED] Tom Clift <tclift [REDACTED]> g.shortall [REDACTED] labbass [REDACTED]
Subject: Nalcor [REDACTED]

Premier and Minister

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Ken

Ball, Dwight

From: ken marshall [REDACTED]
Sent: Wednesday, April 20, 2016 11:25 AM
To: Ball, Dwight
Cc: siobhancoady@nl.ca [REDACTED] g.shortall [REDACTED] Tom Clift; labbass [REDACTED]
Subject: Re: Nalcor

Follow Up Flag: Follow up
Flag Status: Completed

Premier, we have taken pause in the Nalcor meetings to advise action and pending action of this morning.

As per your meeting with the CEO on April 19, 2016 the Board is terminating the employment of the CEO without cause, and provisions of article 16 subset c will be fully honoured, and corresponding severance implications. Your notes from this mornings press release indicate resignation, however the Board understands this was agreed that this was and is a termination without cause.

Nalcor Board

ent from my iPhone

> On Apr 20, 2016, at 9:27 AM, Ball, Dwight <DwightBall@gov.nl.ca> wrote:

>

> Hi Ken

>

> We can discuss after your meeting

>

> Dwight

>

> -----Original Message-----

> From: ken marshall [REDACTED]

> Sent: Wednesday, April 20, 2016 8:55 AM

> To: Premier, <Premier@gov.nl.ca>; Ball, Dwight <DwightBall@gov.nl.ca>; Coady, Siobhan <SiobhanCoady@gov.nl.ca>

> Cc: EMartin@ [REDACTED] Tom Clift [REDACTED] g.shortall [REDACTED] labbass [REDACTED]

> Subject: Nalcor

>

> Premier and Minister

>

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>
>
> "This email and any attached files are intended for the sole use of the primary and copied addressee(s) and may contain privileged and/or confidential information. Any distribution, use or copying by any means of this information is strictly prohibited. If you received this email in error, please delete it immediately and notify the sender."

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