



COMMISSION OF INQUIRY
RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Phase 2

Volume 1

Commissioner: Honourable Justice Richard LeBlanc

Tuesday

22 January 2019

CLERK (Mulrooney): All rise.

This Commission of Inquiry is now open.

The Honourable Justice Richard LeBlanc
presiding as Commissioner.

Please be seated.

THE COMMISSIONER: All right, good
afternoon.

Welcome to 2019. It looks like it's going to be a
promising year in more ways than one.

So, this afternoon, we're having a special
hearing now to consider an application that has
been filed by Nalcor Energy with regards to
commercial sensitivity and disclosure;
specifically, as regards a report – of the Grant
Thornton report that has been prepared for Phase
2.

I've had an opportunity now to review the
submissions of the parties. Nalcor has – for the
purposes of the public knowledge, Nalcor has
provided a form of application that is public and
is on our website. As well, there is a confidential
application that has been filed that provides
more detail with regards to specific areas of the
Grant Thornton report, that they are seeking the
– found to be commercially sensitive.

That document – both those documents – have
been shared with the Government of
Newfoundland and Labrador; the Government of
Newfoundland and Labrador, obviously, being
the shareholder in Nalcor. So the government
was asked to – obviously given an opportunity
to review it and provide a view. There have also
been submissions made by a few of the other
parties to this. And if any other of the parties
today want to add any comments or discussion
with regards to the application, I'd be prepared
to hear them this afternoon.

I think, though, before we begin this afternoon,
what I'd like to do is I'd like to ask Commission
counsel to advise me as to what discussions –
what has been going on between Commission
counsel and Nalcor Energy with regards to the
issue of redactions or disclosure issues, because
I've always assumed that we would be trying to
work things out amicably between – by all

parties, obviously, bearing in mind the needs of
the Inquiry.

So before we start I'd like to know exactly
where – what has been ongoing and what
conclusions have been reached and why are we
here?

Ms. O'Brien?

MS. O'BRIEN: Thank you, Commissioner.

So we received, as Commission counsel, a – the
– Grant Thornton's construction-phase report
just prior to the Commission's Christmas break.
Upon receipt, we just about immediately
provided it to Nalcor for a commercial
sensitivity review. And that had always been our
arrangement with Nalcor Energy, that we would
provide it to them so they'd have a chance to
review and give us their thoughts on commercial
sensitivity.

Obviously, Christmas took place; it wasn't until
– I don't believe until last week that we were
able to meet with Nalcor's counsel and go over –
we did have some detail from them at that point
as to what redactions that they were looking for.

We – in coming to our position, my – Mr.
Learmonth and I, as well as the other lawyers in
your legal team – we were guided by three major
things; one, of course, we were guided by your –
the guidelines. And we realize they were only
guidelines that you produced with respect to
commercial sensitivity. We also took a detailed
look at the decision you had made on November
17, 2018, on a previous application with respect
to Nalcor on commercial sensitivity, to see what
guidance we could get from that.

We also looked at the jurisprudence case law
that has been developed on the area of public
inquiries. And various texts of leading authors
who have written on this subject, public
inquiries and the effects that information coming
forward in those inquiries can have on other
legal proceedings.

So that's what we looked at. We were – we did
have some agreement with Nalcor and the area
where we came to agreement really had to do
with current forecasts to the completion of
ongoing contracts. So that was one area that, as

you know, Nalcor has raised in their application and Mr. Learmonth and I were really in agreement with Nalcor's counsel that that was an area of commercial sensitivity.

But we had put forward to Nalcor Energy we believe that there might be a way for us to protect the details of those current estimates while still conveying the order of magnitude of the forecasts. And we discussed with Nalcor Energy's counsel the possibility of perhaps rounding those numbers, say, to the nearest hundred million, just as an example, or providing some sort of range on those numbers – say, a range of 200 to 400 million. Again, Commissioner, I'm just using those as examples, but some sense so we could get the order of magnitude without revealing that detail that we agreed would be commercially sensitive.

Nalcor's counsel didn't say no to that, but I think because we could not come to terms on so many of the other pieces of what they were looking for, they just decided to, you know, go forward with this application now. So we didn't really get to explore all the possibilities with them of how that information may be blurred, I'm going to say, as opposed to redacted.

We – areas where we had disagreement, Commissioner, is we did not consider the DG3 estimates to be commercially sensitive. We didn't consider the bid and tender documents to be in the – information around the bid and tendering process to be commercially sensitive and we didn't consider the Astaldi package management – you know, the documents around the Astaldi package to be commercially sensitive.

I am able to give you, if you'd like, Commissioner, a little bit of what our thinking was, if you want that, but I would indicate that your Commission counsel are taking no position on this application. We are very happy to get your guidance and your response to what we – how we should proceed from here.

So I can certainly tell you what was in our minds at that time, but I don't want it to be seen as us advocating for a particular outcome. We are only – given the role that we have, we're only so comfortable in agreeing to redactions, there's certain areas where when we feel comfortable

that we will, but it got to a point that we weren't willing to go that any further without you telling us to, so to speak.

So if you want to hear our reasonings, I'll let you know but I just wanted them in that light.

THE COMMISSIONER: Well, I think I'd like to know what the basis of your decisions were, particularly with regards to the three areas that you just outlined.

MS. O'BRIEN: Okay.

THE COMMISSIONER: I think, I should – I think, I should be aware of that because obviously, you're – both you and Mr. Learmonth are leading the investigation, so to speak, in the sense of preparing for the hearings. And I think, I need to know what the importance of these particular items are with regards to how this Inquiry moves forward. So yes, I'd like to hear that.

MS. O'BRIEN: Okay, thank you.

So with respect to the DG3 estimates, and in particular – it's Nalcor's not taking a position, obviously, with the global DG3 estimate. They're claiming commercial sensitivity over other breakdown of the DG3 estimates, say per package or contract.

From our perspective, that information is very dated – it's six to seven years old – it's coming back to, as we know, prior to sanction. And ultimately, it is well known that the – as time has played out, the DG3 estimates as were not ultimately proven to be accurate. And so, we didn't see how the revealing of that information in 2019 would cause any commercial harm.

And one of the key things we are looking at here is the reasonableness of Nalcor in creating the estimates and how the cost overruns – the DG3 estimate is really the baseline when we're looking at the cost overruns. And that's where we're looking at cost increases from that point – the 6.2 billion announced at sanction.

So, we felt that it would be important for us on the key – we're not looking at every package that was – that Nalcor did in detail. But we are looking at a number of the most important

packages, particularly the key ones that led to cost overruns. And if we can't explore the baseline for those particular packages, we thought that would be – if we need to work around it, we certainly will, but we felt that that information would be our starting point.

THE COMMISSIONER: Can I just get a clarification on that? Because initially, I understood that you had indicated that both you and Mr. Learmonth had agreed that with regards to ongoing contracts, you know, you would be looking at ranging or whatever. If information related to the DG3 estimate is given for those ongoing contracts, does that basically impede what it is you are trying to do with regards to – what you just told me about initially?

MS. O'BRIEN: So you're asking specifically –

THE COMMISSIONER: So for instance, if we have a contract that exists and it's ongoing right at the moment, and if the idea was is that we – that my understanding of what you were saying what that we would have the total number for the overages but there would be some sort of ranging with regards to the various contract packages. So if the DG3 number is given for those, would that not basically impair what it is you were trying to do with regards to those ongoing packages?

MS. O'BRIEN: We didn't believe so. So our thinking is two separate – so understand that we're talking about two different estimates here. So the DG3 estimates were the estimates that were used at the time of sanction, so back in 2012.

More recently, as Nalcor has been moving through the project, of course, they have been updating their estimates and they do have more current estimates for some of the packages, and in particular, those packages that are still ongoing, in other words, there's still work ongoing, there's still money to be – to pass hands. It's their current estimates that we – we did completely agree with would be commercially sensitive. But we didn't see it for that – that the estimate that they had put on that package prior to that package ever being tendered, prior to the contract ever being awarded back at DG3. For those – for the work between the contractors and Nalcor, we would

think that as between those two parties, their starting point might be at what the contract was initially issued at. That would come, of course, after the DG3 estimates.

Does that clarify for you, Commissioner?

THE COMMISSIONER: Not fully, but –

MS. O'BRIEN: Okay.

Tell me how I can help further.

THE COMMISSIONER: Well, okay.

So, if we – no – I'm obviously concerned about ongoing contracts and I think there is a – like you and Mr. Learmonth, I see a basis upon which there may be some degree of commercial sensitivity for that.

What I'm trying to do is find a mechanism by which we can, at least, allow the evidence to proceed in a way that the public and ourselves basically get enough information upon which we can assess why it is that the cost increased from 6.2 to whatever it is at this particular point in time.

So my concern is that, and I – because I think the argument might well be that: Okay, if a contractor who is – who has work presently ongoing is aware of what the DG3 estimate was, that that somehow will assist them with regards to potentially making an additional claim – for instance, if that DG3 estimate was greater than what the contractor bid – some additional claim to complete the work.

So, and I understand there's revised estimates and they were done and I see the point there. But does that argument extend to the issue of the original DG3 – the original estimate for that particular package? And I realize too that some – for some packages – there was work transferred, there was changes made to the packages and stuff like that.

But I'm just wondering whether or not I need to think about the possibility of potential harm if the DG3 number is given on those ongoing contracts.

MS. O'BRIEN: Okay.

So, obviously, you'll be hearing, you know, Nalcor's best placed it to give you their arguments and position. I can tell you the way we considered it.

So, Grant Thornton generally – when they looked at – when they did their report, they did analyze certain particular packages. And what they did was they said: This was the original estimate for this package. They made some, you know, they made – accounted for some moving of money, say between packages. But they started with the baseline. They say: Either this is the completed contract price or this is the forecasted cost of completion. We therefore, have a difference in these numbers in all cases – it's a – the numbers have increased. And then they take that global number and they break down to explain what caused that increase. Okay?

So, your – if your question, I think, is getting: What advantage might it be to a current contractor to know certainly what their current estimate to completion is – that's where we agree that there could be – that could be commercially sensitive. What advantage would there be to a contractor to know what the estimate was to that package prior to their contract being awarded back – really at the time of sanction?

We didn't see, in particular, any big advantage or any advantage there. I think it's well known that all the money that was there – the \$6.2 billion that was there in the DG3 estimate – however it was broken up – has all now been well accounted for and spent. And that – we didn't see how knowing what had been done way back in 2012 would be of any advantage to a contractor who – if they are – if they are making a claim, I would assume they're making a claim because of additional work on their current contract packages – places where they believe they have a damage or either an entitlement to further moneys from Nalcor.

So, we didn't see it. And of course, Nalcor can explain to you their position.

THE COMMISSIONER: Okay.

MS. O'BRIEN: With respect to the bid and tender packages, it's very clear to us – looking at

the terms or reference– that one of the – one of the pieces that you're being asked to inquire into is – is Nalcor's relationships with the contractors. And we believe that would include looking at how packages were bid and tendered.

So, I think it's important to note here that, while Nalcor, and they – I think they believe they pointed this out in their public submission, that in the private sector, a company going through a bid and tender process ultimately awards the contract, and the unsuccessful bidders – what happened with those bids and tenders is not normally disclosed to them or made public.

It is a different situation, usually, when we're dealing with public entities who are typically governed by what is now the *Public Procurement Act*, or the *Public Tender Act* as some of us might still think of it. The – under that legislation for public entities, there is much greater transparency. There can be access to documents through ATIPPA and whatnot, and it is much more of a transparent process.

We know that Nalcor was exempt from that legislation. Nalcor didn't have to go through the same process. We know that. However, when we look that – when we consider that Nalcor is still a Crown corporation, and the fact that a public Inquiry has been called into what Nalcor did on the Muskrat Falls Project, to Mr. Learmonth and I that indicated a high level of transparency, including a high level of transparency into the details of the bid and tender process.

THE COMMISSIONER: And that includes evaluation.

MS. O'BRIEN: That includes evaluation.

And, again, we won't be – our intention is not to look at every single contract, but we will be looking at certain of the packages, and in certain of the packages we will be – our intention is to look a little further – a little more detail – into the process that Nalcor did in awarding the contract.

If there's nothing further on that, I can go to the Astaldi?

THE COMMISSIONER: All right.

MS. O'BRIEN: So, with respect to the Astaldi, I think our position would have been very different had Astaldi still been on the job.

We know that Astaldi's contract has been terminated, and Astaldi is no longer working on the project. We know there are a number of disputes that ultimately still have to be resolved between either Nalcor and Astaldi, or Nalcor and Astaldi and some of the other subcontractors.

These disputes, to our knowledge, are already the subject of arbitration in the case of disputes between Nalcor and Astaldi. And for some of the other subcontractors, we understand, there's ongoing litigation, particularly under the *Mechanics' Lien Act*, that will be before the courts of this province.

Those processes and the disputes between those parties will all be, ultimately, resolved in the processes – those other forums. All of those forums do have discovery procedures that will be followed. We are well aware of what they are before the Supreme Court and our rules that govern litigation for the Supreme Court, but we also understand that even in the arbitration proceeding, there is – there are tools and procedures in place for the parties to get relevant and material documents from the other side.

So, the position that Mr. Learmonth and I landed on with this is that any relevant material information that is needed to resolve those disputes will come out in those other forums by the procedures that are already established by those other forums, and we didn't see that our process here would have any significant impact on those processes or interfere with those processes.

So, that's the position that we took. Again, once you've heard from all parties here and heard more detail from Nalcor, whatever decision you give –

THE COMMISSIONER: So –

MS. O'BRIEN: – we'll be happy to have it.

THE COMMISSIONER: So, in that regard, one of the things that I've been thinking about is that there are presently ongoing litigation

involvement – or is ongoing litigation involvement – with regards to the arbitration involving Astaldi. There are a number of claims, as I understand it, related to subcontractors, mechanics' liens, things of that nature.

So, the way I'm looking at the Astaldi piece, one of the things that I'm thinking about is that there is already the existence of potential harm – nothing to do with the Inquiry whatsoever. It was already – there is already risk for Nalcor with regards to increased cost, potentially.

And so, I'm trying to figure out, is there any greater risk created by virtue of having a – having matters ongoing in the Inquiry? I'm not gonna be determining a civil claim as between any party. I'm just interested in what's in the Terms of Reference.

Is that what's behind some of the thinking that you have? Because that's, sort of, the way that – as I'm hearing it, that's what I'm sort of hearing.

MS. O'BRIEN: It is, very much so.

And understand that what – we have not looked, in detail, at what the particular disputes are between Astaldi or Nalcor or any of the subcontractors claiming. You know, we're not – we know what issues that we are looking into, and we're only interested in putting before you evidence relevant to the issues that you need to determine with respect to your Terms of Reference.

There may be issues in those other pieces of, in the arbitration of the litigation, other issues that we really won't be looking at, at all. It's possible. But there's – also possible that there is – that there may be some overlap.

But given that, under those other procedures, that the parties do have rights to disclosure to documents that are relevant and material, we – it wasn't apparent to us that our process would increase any risk to any of the parties – that they may be successful, they may not be successful, other than what they already have, even if the Inquiry weren't continuing.

So...

THE COMMISSIONER: Yeah. All right, anything else you'd like to add?

MS. O'BRIEN: No, thank you.

THE COMMISSIONER: All right, thank you very much.

Mr. Simmons.

MR. SIMMONS: Good afternoon, Commissioner.

THE COMMISSIONER: Good afternoon.

MR. SIMMONS: The – just a few comments at first on how we end up here today, on some of the background that led us to this application.

As Inquiry counsel have described, we – Nalcor – appreciated very much being given the opportunity to do an initial review of the Grant Thornton report for the purpose of identifying commercially-sensitive areas that might have an impact on the cost of the project. And that review was undertaken very seriously – fairly wide consultation within the organization in order to try to make sure that the most limited set of redactions was put forward that we could develop, which was done.

We met with Commission counsel – had provided a copy in advance of the redactions that were requested with some rationale and explanation for them, generally along the lines of the categories that we've had – heard identified already.

And it – I think it became apparent very quickly that both sides recognize that this was an issue where we do need some guidance from you, as Commissioner, 'cause fundamentally there's two interests at stake here, which don't have to be competing, but in some senses they are.

One is the Inquiry's interest in conducting as much of the proceeding as possible in public – the highest degree of transparency and openness that's possible. But because this is an Inquiry into cost of an ongoing project, and an Inquiry that's been called before the project is completed, there is the potential for the Inquiry processes to have an impact on that cost. And, on the Nalcor side, it's a very high priority to

control the final cost of the project as much as possible.

So I think it's understandable that Commission counsel would have an inclination to lean towards the side of public disclosure, and on the Nalcor side there would be an inclination to want to protect against the cost growth as much as possible.

So, we – the application has then been brought at the – and the process that was suggested was that there would be a two-part submission from Nalcor and then an opportunity for other Parties with Standing to respond to the public portion.

In the public portion, we've endeavoured to describe Nalcor's position and what the issues are. The private – the confidential portion just deals more specifically with particular passages in the report in the context of the general principles that are dealt with in the public submission.

So, next I'd just like, for the sake of the public record, I think it's really important to understand that this particular application is not about what gets disclosed to the Commission or what information is available to the Commission. So, the public should be aware that nothing is being withheld from the Commission here, and there's no argument that anything should be withheld from the Commission. And, in fact, with the exception of Astaldi, which is a party with standing, we are not proposing that any part of the report be withheld from Parties with Standing, where Nalcor consents and agrees that the full report can be given to those Parties with Standing, other than Astaldi, which I'll speak about a bit more in a minute.

Those Parties with Standing, of course, are subject to undertakings that have been given to the Commission that restrict their ability to further disclose the information, but for their own participation in the Inquiry, we're not saying anything should be held back from them.

So, this is more a matter of, not so much disclosure by Nalcor, as how the Commission manages the information and the use of it in the public forum.

There are some categories of information that are discussed in the report that Nalcor believes has a real risk and potential to cause financial harm by encouraging claims to be made by contractors, or giving contractors additional information that they could use strategically or otherwise to pursue claims that have already been made.

So, the application is not about not wanting to disclose information to the public at large. It is about the concern that contractors, generally, those who have not completed their work and have open contracts with uncompleted work and the commercial arrangements not closed off at the ends of those contracts, those are contractors that have the ability to bring further claims. Those, and Astaldi in particular, are the parties that Nalcor has the concern about.

So, just to summarize what the position is, is that the Commission, of course, has the full report and can determine what use it wants to make of it. And a full un-redacted copy of the report can be disclosed to all Parties with Standings, save Astaldi, and the report – we anticipate the intention would be to release the report publicly as an exhibit at the first day of – when hearings resume in February in Goose Bay on the 18th. And our request is to have the identified passages redacted from the report that's released publicly, and as well that Astaldi should not be disclosed – the passages in the report that deal with the Astaldi contract because of the potential impact on Astaldi's ability to pursue claims against Nalcor, which I'll speak a little bit more about.

But with respect to that, the other legal processes that are underway with Astaldi are the arbitration – that we're aware of – in which there's an outstanding claim for at least \$500 million, which would be added to the cost of the project. The arbitration is a private arbitration in the sense that it's not conducted in public. There are also claims that have been started as litigation in the Supreme Court arising out of the filing of the mechanic liens that are in various stages of proceeding. And both of those processes, the civil litigation claims and the arbitration, have their own rules for disclosure of documentation and information that in due course will play out and information will be exchanged.

And this is a point we hadn't addressed in our submission, but I can state that Nalcor is agreeable that if and when information that would presently be considered commercially sensitive becomes disclosed in either of those proceedings, then we'd acknowledge commercial sensitivity in this context would be lost as well and information would then be subject to being disclosed according to the Commission's determination at the time.

So, we're not asking – so there would be no impact on those proceedings, and if those proceedings progress to where – in the natural course – information gets disclosed it would be disclosed and be available to be disclosed publicly here as well.

So, of the – the competing interests that are at play, one is the imperative to encourage openness to the public of the Commission's proceedings, but that is not an absolute requirement. We had already in Phase 1 one issue, which was identified as having potential consequences, that was moved in camera for a one-day hearing. And aside from the hearings themselves, and the exhibits that are released publicly by the Commission, much of the work of the Commission is actually investigation. And that is conducted in private under the direction of Commission counsel. There's a tremendous amount of documentation, information gathered and interviews conducted. And the Commission Inquiry process does involve there being screening and selection and use of discretion by staff and counsel in order to determine what parts of the investigation make their way into the public forum.

So, while we certainly acknowledge that, when we get to the hearing, that it's preferable not to do things in camera, or outside of the public eye, it's not completely inconsistent when you look, overall, with the way that inquiries are conducted. And ultimately, Mr. Commissioner, it's your determination, in your discretion, to determine where those limits are ultimately drawn.

Now, the competing interest, of course, is control of the project cost. And, in a way, the root cause of the problem here is that the Inquiry has been called before the project is completed. It would be a different matter if it was done, if

contracts were closed, work was completed and commercially closed. Some contracts are. And, in fact, some of the examination of contracts by Grant Thornton is of situations where the work has been completed.

And in the specific redactions identified in our confidential report, there's no claim of any commercial sensitivity in relation to contracts where the – that – where the work has been completed and they're commercially closed and, in the ordinary course, the ability of contractors to bring new claims is closed off.

It is also challenging – a challenging issue to deal with because it's not always to anticipate just what a contractor will choose to do. Contractors can be very ingenious in finding opportunities to look for extra payment when work is performed, for a whole variety of reasons.

This is – there's always some tension between owners and contractors around that. It is very, very difficult to say with specificity at this stage that we – that anyone can identify, for ongoing and open contracts, what it is that is potentially subject to a claim and what is not.

So, for that reason, there are general categories of things that we can talk about a little bit where – which are the areas where claims are normally more likely to arise, and pieces of information that can be held closely in order to limit the opportunity for that to happen.

Now, in November, we had a hearing to do with some commercial sensitivity issues in Phase 1. Phase 2 is obviously going to be more challenging. At that time, Commissioner, you raised with counsel for Government of Newfoundland and Labrador that there was an issue here concerning how commercial sensitivity would be dealt with around the cost issues arising in Phase 2.

We now have a submission from government which we received this morning. And I know counsel for government may speak to that, but I do note that on page 3 of their submission – and I'll just read this paragraph: "The province's priority is clear in the terms of reference; we wish to know what transpired, specifically why there are significant differences between the

estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this Inquiry together with reliable estimates of the costs to the conclusion of the project. This is to be balanced against the priority to complete the project on the current schedule and on the present budget in the best interests of the ratepayers and taxpayers of the Province.

"The intent for the Inquiry is to be public; however, where Nalcor satisfies the Commission there is a rational connection between potentially released commercially sensitive information and substantial harm to the Muskrat Falls Project schedule or budget, the Province supports redactions and/or in camera hearings where the necessity is demonstrated."

So although, of course, the Terms of Reference stand as originally promulgated by government when the Inquiry was set up, we do have a statement of position from the government that does recognize that there are two competing interests here, and that appropriate weight, I'd submit, should be given to the objective of trying to prevent any unnecessary cost growth on the project.

Now, the way that we are proposing that that objective be recognized is not to limit the work of the Commission in any way. The Commission's work can be done and all issues can be fully explored and all evidence can be made fully available, but not necessarily by public release of all that information. At the end of the process, Commissioner, you'll still be in a position to deliver your report to the minister, which is the ultimate last step of this process, and then it's for the minister, I think, to determine what happens with it after then and how it's treated. Our concern right now is limited to trying to control the dissemination of that information which has a present potential to have an impact on the growth and cost of the project.

So the written submissions address the three areas of budget estimates and forecasts, bids and bid evaluations and the impact on the Astaldi situation. I'm not going to go through all that in a lot of detail because it's in the submission. I'll be happy to deal with your questions. I'll make a few comments on each.

So for the budget estimates, forecasts, package contingencies, as Ms. O'Brien has said, the concern is not for aggregate numbers. We've already had a lot of information released about the DG3 estimates on larger than – on aggregate terms or larger terms than narrowed down to specific work packages, because a work package corresponds to a contract given to a single contractor, generally. So it is work package information that allows contractors to gain more insight into strategic approaches of analysis on the part of Nalcor into that particular work.

And as I say, it is those work packages for which the work's not being completed that are the concern. In the Grant Thornton report there's focus on six different packages: two of them Nalcor asks for no redaction of any information whatsoever, the other four are contracts of significant value and cases where, in some cases, there are current claims and certainly cases where there's significant work left to be done on those.

The kinds of information that is specifically called out in the confidential information, it starts with the estimates for each work package that were prepared prior to the contract being awarded. And then there are forecast costs for the completion of that work which are confidential to Nalcor, not disclosed to the contractor and include estimations of what the value of current or future claims might be. As well as in the current budgeting, there are elements in the budgeting that have allowances built in for the potential resolution of existing claims or for other claims that might be anticipated.

So the latter two categories in particular – forecasts that had been prepared subsequent to the contract being awarded and current estimates of what the total cost of the contract might be – clearly have significant commercial sensitivity attached to them. That's the area where, as Ms. O'Brien said, I think, we've agreed there is commercial sensitivity, certainly for some of that. The idea of developing ranges was put forward in our discussion due to the time frame then, to get this application filed two days after we had that discussion. We haven't advanced that discussion any further about how to deal with that.

The concern is that the best outcome, of course, is to not release any information about whether there even are reserves held on contracts. And once you start to give ranges, it still creates expectations on the part of contractors and insight into the sort of strategic analysis that Nalcor may have performed on their claims.

The package estimate numbers from before contract award, I'll agree, are not of the same level of consequence or risk as current estimates, but there still is risk that contractors can gain insight from that. The area of real concern with pre-contract award estimates, of course, is the Astaldi claim.

The – Mr. Commissioner, you have Astaldi's notice of arbitration. Astaldi's position is that the entire contractual arrangements that were in place with – it's actually Muskrat Falls Corporation – should be thrown out and it should go back to getting its complete cost for performance of the work with profit. And part of that claim, inevitably, is going to involve an assessment of information that was known to Nalcor before the contract was let, how Nalcor – what Nalcor's views were of the cost of performing the work and such related information.

That claim is half a billion dollars. So regardless of how significant the risk may be that releasing those estimates would impact the claim, the consequences of any impact on the claim are so large that our submission is that there should be great care and wariness taken about giving Astaldi any kind of strategic or informational or procedural advantage that it would not have if that information were not released publicly by the Commission.

Again, it does not impair the ability for the Commission to use and explore that information, but it would not be in a manner in which it would be disclosed to Astaldi.

For bids and bid evaluations –

THE COMMISSIONER: Sorry, just before we move on off of the issue of the estimated forecast costs. So one of the things that was discussed, as I understand it, was the issue of – and Nalcor has agreed that with regards to the table on page 11 of their report –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – and I don't want to say too much more about this, but that you're – you have no issue with regards to the subtotal, correct?

MR. SIMMONS: Correct.

THE COMMISSIONER: You have no issue with regards to the total piece?

MR. SIMMONS: Correct.

THE COMMISSIONER: So, again, aggregate numbers. There was discussion between the parties, which has not yet concluded that would either involved some sort of arranging or something out of these costs. So that's something that Nalcor is still prepared to enter into.

MR. SIMMONS: Certainly to have discussion about it and we haven't advanced our thinking on that, to this point. It's – because it's not an issue that we've actively pursued since the discussion. We had – I think it was a Tuesday, we had our meeting and on Thursday we had to file the application so – Ms. O'Brien?

MS. O'BRIEN: Thank you.

I just want to clarify. Our discussions of that type didn't relate to the page 11 because page 11 is the historical where we had – where – our position had been we were looking at risking and ranging would if you went to page 24 it would be on the latter three columns of page 24 but not the first column. I just want to clarify that.

THE COMMISSIONER: Okay.

MR. SIMMONS: Thank you.

THE COMMISSIONER: So what about – one thought to, you know, seeing guidance seems to be a big word here. One thought might be to look at – you know, I do think it's important and I think there is public information out there already with regards to aggregate numbers –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – to some degree.

MR. SIMMONS: Correct.

THE COMMISSIONER: I think the subtotal number is actually a number that has to be included, but the other option, aside from considering the idea of ranging, might be the issue of ranking those particular contracts that were over the – you know, on which there are so-called overruns or overages. I don't want to say too much more about that because I've – you know, I have obviously had a look at the GT report because I needed to see what I'm dealing with here.

And I'm just wondering, you know, I can fairly say now, subject to what I hear from other counsel, that, you know, this is an area of concern for me –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – with regards to trying to ensure that we don't do anything that opens the flood gates with regards to additional costs to the project for ongoing contracts, and here I'm not talking about Astaldi at all.

So, I'm just trying to figure out, you know, if I was going to give some sort of direction or guidance today, like, would it be better for me to allow – assuming that, at the end of the day, I'm still of the view that this is an area of concern, that would allow Nalcor and Commission counsel to continue to have discussion with regards to trying to resolve that issue to some degree.

That's my query. I guess, I'm just trying to figure out where I go from here –

MR. SIMMONS: Right.

THE COMMISSIONER: – because we need to get some things done quickly –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – because, obviously, the hearings are coming. And I –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – full bet on us getting started when we’re supposed to get started.

MR. SIMMONS: Certainly.

Concerning the table that’s been referred to on page 11 –

THE COMMISSIONER: Mm-hmm.

MR. SIMMONS: – ranking may very well be a feasible way to do it, as we’ve provided a bit more information in the confidential submission as to what we understand the purpose of that table to be and our understanding was the purpose would have been achieved by the subtotal and total amounts alone.

But if there’s a desire to provide some more information about the relative sizes of changes in budget contract performance amounts for those contracts, ranking them may very well be a feasible way to –

THE COMMISSIONER: Well, ranking and –

MR. SIMMONS: – approach it.

THE COMMISSIONER: – arranging, either way –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – but – so my query is whether or not, you know, at the end of the day, just on this issue of the estimated and forecast cost of the individual work packages for ongoing contracts, I wanna be very clear.

I’m just trying to figure out, at the end of the day, what – you know, should I dictate what the response will be, or would it be better for counsel from Nalcor and Commission counsel to try to put together what – ’cause I’m not fully sure, exactly, what Commission counsel are doing with regards to the presentation that they intend to present to me.

MR. SIMMONS: One approach might be to hear from everybody today –

THE COMMISSIONER: Mm-hmm.

MR. SIMMONS: – and then allow us a limited time to see if we can work out some resolution on finer points that can be proposed to you without convening another hearing. And if that’s satisfactory, fine; if it’s not, then you can make your rulings, I guess –

THE COMMISSIONER: Well, the biggest concern is time.

MR. SIMMONS: – based on what we say today.

THE COMMISSIONER: The biggest concern right now is time.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: I think that somebody’s got to make a decision soon, so ...

All right, anyway, I’ve heard that. So –

MR. SIMMONS: Okay.

THE COMMISSIONER: – let’s move on to the bids and evaluation.

MR. SIMMONS: Yeah.

So, there’s really two – and, once again, for bidding and bid evaluation information, there’s only a couple areas in the Grant Thornton report – a couple contracts where that’s dealt with in any kind of detail. And for contracts that are completed and closed off, no objection to full release of any comments on the competing bids received and on how those bids were evaluated.

Generally, while in – where public sector rules apply, public tendering and so on, of course there’s clear understanding of what’s released and what’s not, but that does not apply here. And if it doesn’t apply, it doesn’t apply.

So, the – normally, the details of competing bids – especially where it’s not just a price bid alone, where in many cases there’s many other features to a bid for something as complex as this that have to be considered and evaluated – that those details are not shared and also the process of evaluation is not shared, particularly with the successful bidder.

The risks that exist here are of two types. One is where a bidder is successful and gets the work, access to bid evaluation information, analysis of things such as areas where the bid is perceived to be high, areas where it's perceived to be low, give again contractors more insight into where their bid may be potential to make successful claims for extra payment.

And for unsuccessful contractors, you can search legal cases and find thousands of cases where unsuccessful contractors sue, where they claim they haven't been treated fairly because they found out something about the way the bid evaluation process took place. And any time that sort of information is released, generally, there is a risk that a contractor will perceive an unfairness and start a process which has to be defended. Any legal process or claim, of course, always creates some risk of liability.

Those are unnecessary outcomes in our view because that sort of information can be dealt with and evaluated by the Commissioner without necessarily having to release the detail in a public part of the proceeding. And the other significant area, then, concerns the Astaldi claim.

So, first of all, let me say that no one's asking for this Commission to make any kind of ruling that's going to interfere with what happens in the arbitration or in any of the litigation. So we're not asking for anything here that's going to limit or restrict whatever access Astaldi gets to documentation in those processes. So, it's not – we can't assess this on the basis that Astaldi's rights in those processes are going to be undermined or affected in any way.

So, the concern is not that Nalcor is somehow going to use the Commission process to prevent disclosure to Astaldi or harm it in the arbitration or in other litigation. The real concern now is the opposite. Astaldi is off the job. They're no longer performing any work; the contract's been terminated. Their skin in the game now is the arbitration; it's the claim for half a billion dollars. That's Astaldi's current dominant interest. So Nalcor's concern is that Astaldi gets the opportunity to take advantage of Inquiry processes to further its other interests, and that may be because the Inquiry disclosure process may be broader or more different – or different

than the disclosure processes in those other proceedings, and it's a fair conclusion to reach.

But also the timing and nature of disclosure may very well be different. Disclosure in the other processes is going to happen; their rights are not going to be affected in those processes. But neither should they gain any advantage – whether it's currently identifiable or potential, whether it's a legal advantage or a strategic advantage just from knowledge that they gain in those processes – because the potential consequences are very high. So –

THE COMMISSIONER: But those consequences, Mr. Simmons, they apply – like, they're there whether we're sitting here today or not – they're there. There's an existing – that contract, as you just said, that contract is terminated; there's no ongoing contract between the parties. So there is litigation that is underway – whether it's arbitration or other litigation in the courts. And as you said, they're going to get disclosure pursuant to either the Rules of the Supreme Court, for those matters that are before the Supreme Court, or alternatively the rules that are set by the arbitrator. And you've provided – thank you very much – some documentation on the issue of the clauses related to arbitration, but what I do see there is the arbitrator has the right to order disclosure of relevant material. So in those circumstances, it seems to me – it could be argued that no matter what, at some point in time, disclosure is going to be had.

So you're telling me today that the fact that the Inquiry may well mean that information is provided to – you know, they use – our process is, basically, give them the information without going through the formal channels of an arbitration or whatever – somehow creates further harm to Nalcor?

MR. SIMMONS: Well, the arbitration is an adversarial process and the rules are there in order to ensure, of course, that each party gets treated fairly, but in an arbitration there's also a degree of expedition that goes into how the rules are set up and how an arbitration is carried out. The – when the arbitrators make decisions on relevance they're expressly not bound by legal rules of evidence.

THE COMMISSIONER: Correct.

MR. SIMMONS: It's a different animal the way it proceeds.

THE COMMISSIONER: But relevance –

MR. SIMMONS: And –

THE COMMISSIONER: But relevance is relevance. I mean, you know, us lawyers, we can –

MR. SIMMONS: Yes.

THE COMMISSIONER: – sort of finagle that word “relevant” in many ways.

MR. SIMMONS: Yes.

THE COMMISSIONER: I've seen many good arguments over the years about different perspectives on what is relevant.

MR. SIMMONS: Right.

THE COMMISSIONER: But in a non – in an arbitration-type proceeding, always my understanding is that the rules of evidence are not applied similar to an inquiry, whatever the scenario is, but relevance is a pretty broad – is pretty broadly viewed as long as it's connected to the issue at hand.

MR. SIMMONS: Right.

THE COMMISSIONER: So what I'm trying to figure out with the whole Astaldi piece, to be quite frank, is – and there's another issue that I'm going to raise with you in a few minutes on this and again only because I want to get your, you know, your view on it.

MR. SIMMONS: Hmm.

THE COMMISSIONER: Is that, you know, from my perspective, I'm looking at what further harm could come to the taxpayer, the ratepayer of the province by virtue of the fact that somehow something is disclosed in this proceeding that gives somebody an advantage. But if there's already existing proceedings on which eventually, at some point in time, disclosure is likely going to be had of relevant information, I'm only looking for relevant information myself, not irrelevant information.

I'm having a hard time trying to figure out what further damage – if I can utilize that terminology – or alleged harm, basically, is going to come as a result of the Inquiry proceeding.

MR. SIMMONS: So a couple of points about the arbitration process. As the rules of procedure that we provided show, the initial starting point for document disclosure in the arbitration is each party selects –

THE COMMISSIONER: (Inaudible.)

MR. SIMMONS: – its (inaudible) documents –

THE COMMISSIONER: Right.

MR. SIMMONS: – the documents that we'll (inaudible) and disclose them. It's then a second stage where someone can apply – either party can apply for additional disclosure of documents that are relevant. So the presumption is different than saying, at the outset, each party has an obligation to disclose everything that is relevant.

Now, when the arbitrators determine relevance the fact that legal rules and rules of evidence don't apply is significant and also, there is certainly no guarantee that what the arbitrators will determine as relevant in the circumstances, once the parties in their adversarial capacity have had an opportunity to make submissions and argue it out, would be the same as the information that this Commission may make available, publicly, to Astaldi. And because the arbitration is adversarial, each party has the right to strategically manage the way it presents its case to its best advantage in order to protect its interests. And on the Nalcor side that interest is not paying out any more money to Astaldi, because ultimately that finds its way back to the ratepayers and the taxpayers.

So while we say: Yes, ultimately, there will be disclosure in the arbitration and there will be disclosure in court. The timing of it may not be the same, the extent of the disclosure may not be the same, and that has the potential to have an impact on the way those other matters are resolved. And not every case makes it all the way through to some final adjudication: there can be many other steps, as we all know, along the way. And those steps and the positions parties are able to take can be influenced by the

way the procedure unfolds and the way disclosure takes place in those proceedings. So it's not like we can, right now, put our finger and say: This piece of information is the one Astaldi will get that will tip the scales and will cost \$100 million. It's a matter of wanting to preserve Nalcor's ability to have all the rights available to it in that arbitration and in that litigation that it would otherwise have to protect its interests which becomes the interests of the government and the taxpayers and the ratepayers. So this is an area, obviously, where guidance from you, as Commissioner, is going to be important. And I was pleased to see, actually, that government in its submission acknowledged that these are issues that require a fair balance to be performed.

We think the right balance is to make a full disclosure as possible to everybody, Astaldi included, but for information that has any potential to be useful to Astaldi in the arbitration – in the first instance, they don't get it. If and when that information becomes available through the arbitration or other litigation, obviously then they are entitled to it. And at that same point, then, it would be subject to being introduced publicly if Commission counsel chooses to introduce that as an exhibit. So that's where we think the line can be drawn to balance the interests of making as much as possible available publicly and have it happen in a public form and still try and protect those interests which are potentially at risk.

THE COMMISSIONER: So that leads me to another more practical issue for me. You are proposing that while disclosure would be full and complete to all of the parties with standing –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – that it would not be to Astaldi and that there would be no public disclosure of the redacted information, correct?

MR. SIMMONS: Correct.

THE COMMISSIONER: So, ultimately, that means – and, you know, part of the – obviously, one of the big parts of Phase 2 of the Inquiry is to assess why there's such a difference between the estimated cost and the – what might be the final cost.

MR. SIMMONS: Mmm.

THE COMMISSIONER: So assuming that Commission counsel and parties with standing basically get all of that information, the next question is: How do they put their point of view before me? And I think you're suggesting that with regards to that confidential information that – or that commercially sensitive information that you – you state exists, that what would happen would be, there would be an in-camera hearing without the public's participation and without the participation of Astaldi, correct?

MR. SIMMONS: That is a logical step past this application here.

THE COMMISSIONER: Right. That's where I'm –

MR. SIMMONS: And one nuance on that –

THE COMMISSIONER: – I'm looking for the step forward.

MR. SIMMONS: Yeah, one –

THE COMMISSIONER: Go ahead, I'm sorry, go ahead.

MR. SIMMONS: Yes. And a nuance on that is there might very well be hearings where Astaldi would be present and Nalcor not.

THE COMMISSIONER: Correct.

MR. SIMMONS: Also.

THE COMMISSIONER: Okay.

So like – let's just stick with the Nalcor information. So we have a – potentially, an in-camera hearing because it can't be in the public. Because the only reason it can't be in the public is because you don't want Astaldi to know about it. That's basically the reason.

So, let's assume for a moment – and I don't think this is a large jump from what might actually take place – that there is evidence that relates to Astaldi's work or lack of work or lack of diligence or whatever the scenario is with regards to the project. Now, I have Nalcor and I have all of the other parties withstanding, but I

don't have anybody from Astaldi to basically question that in this in camera hearing.

I am worried that that type of approach basically, very directly impacts procedural fairness. And I'm very concerned about the aspect of, you know, the need – and certainly there is a need, and the case law is very clear with regards to public inquiries – you talked about skin in the game – they have a reputational risk here as well – and in the circumstance, to deny them the ability to participate, even with regards to some, but not all – I query the procedural fairness to that. And I think they raise this in their –

MR. SIMMONS: Right.

THE COMMISSIONER: – in their brief anyway. And I'd like you to address that for me.

MR. SIMMONS: Part of the answer to that is the role of Commission Counsel, who have a role of standing somewhat apart from being advocates for one side or another on any of these issues, but I'm sure that all information fully and fairly comes out and is fully tested. It would be Commission Counsel's role to ensure that in the questioning of witnesses and the examination of evidence in those circumstances, that those sorts of positions would be fully explored. And I have confidence, based on – their standing performance in Phase 1, that the Commission counsel are well capable of doing that.

I acknowledge that it is something less than giving Astaldi the full participation. But all parties with standing – to one extent or another – participate subject to, Commissioner, your discretion, either whether they are parties with standing or the extent – or what rights are. And those are – those decisions are made by balancing different interests right from the start. This is really another instance of where there has to be balancing of those different interests. Whichever way we go, there's going to be some interests that's not going to be, perhaps, fully protected as much as parties would like. If Astaldi has full participation in all that, then we would say that Nalcor's interests are not being fully respected here.

So, I recognize it's a difficult decision. For the purpose of this applications, it's really only the

Grant Thornton report we're dealing with. But, I recognize as well that it's – we need to think about – as you're doing – how we deal with this during the rest of the inquiry.

THE COMMISSIONER: Okay.

MR. SIMMONS: So, Commissioner, unless you have any other questions, are we just relying on submissions?

THE COMMISSIONER: So, I do have some other questions. I'm concerned about how those questions.

One of the things of it – last night, as I was sitting here is I have confidential –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – submission and I have a public submission. So, the reason for the confidential submission, I assume, is that the public aren't – and really what it is is Astaldi order ongoing contractors – where there's ongoing work – aren't aware of what it is that Nalcor is seeking, what it is specifically that Nalcor is seeking to exclude.

So, it's very difficult for me to frame questions when I have specific questions – and I do have specific questions – about some of the things that are there.

One of the areas I do want to canvas with you is an area of – related to – because I need to try to understand exactly what Nalcor is saying. So, I'm assuming that as part of the mandate under 4B of the Terms of Reference, one of the things that I need to do is to look at what is the cause of the increase in cost.

You know, it's publicly known the Astaldi contract is a contract that involved an extremely large amount of overrun. So, one of the things that I believe is necessary for me to consider is, you know: What oversight was being given of that particular contract package throughout? Why decisions were made, as they were, with regards to continuation with Astaldi, the eventual termination of Astaldi, that sort of thing?

And, you know, there is – and you’ll know what I’m talking about, you know – there was work done by Nalcor with regard to that. And I’m trying to understand exactly what it is that you’re seeking be excluded from the prevue of the public with regard to that particular work, you know – whether it’s a consultants report or whatever the situation is, you know. Like, for instance: Is it all of the consultants report that you are seeking to have redacted? Is it a reference, is it solely just the fact that there was a reference to it in the GT report? Because ultimately, there will be other evidence that might talk about other consultants reports or other things that were done by Nalcor as things went along.

I’m trying to be as vague as I can –

MR. SIMMONS: Yeah.

THE COMMISSIONER: – but I think you know what I’m talking about.

MR. SIMMONS: At this stage, it is the references in the Grant Thornton Report to internal Nalcor information that we believe Astaldi is not aware of.

THE COMMISSIONER: Okay. But that doesn’t – that would be a short-term answer for another longer-term issue –

MR. SIMMONS: Yes, right.

THE COMMISSIONER: – that will arise.

MR. SIMMONS: Right.

THE COMMISSIONER: And, I need to get my head around what it is actually that – what it is you’re proposing?

I think, Ms. O’Brien and Mr. Learmonth, you likely are thinking, I’m hoping I’ve said enough that you are aware of what I’m talking about here. And I think – I’m hopeful that you are as well.

MR. SIMMONS: Yes.

THE COMMISSIONER: And I’m going to suggest: At some point in time this afternoon, I want the two of you to sit down and to have a

chat about that. Because I want to know exactly what it is that you’re asking me to do. And, there’s issues of litigation privilege that you have raised as well, and in more specificity –

MR. SIMMONS: In relation to documents but not the report.

THE COMMISSIONER: Correct.

And – well, that’s what I’m trying to figure out, now. Whether or not I accept the document was for the dominant purpose of litigation, whatever – that’s another story altogether. But I’m just trying to get my head around exactly what it is you’re talking about there. And I don’t have enough information to be quite honest with you to make that determination. So I need you and Commission counsel to sit down and spend a few minutes just talking about the extent of what it is you’re asking for there. Because it may be an area where, you know – it may be an area where I can give this further consideration at this stage of the game. So that’s one thing.

You also – I’m really hem strung as to what I can ask about. Anyway, maybe I won’t ask any more –

MR. SIMMONS: It is challenging, Commissioner. Because the difficulty is that in order to discuss these points – we found as well in the submission – it inevitably involves having to disclose what’s in the Grant Thornton Report in order to –

THE COMMISSIONER: Right.

MR. SIMMONS: – to make the specific type of submissions. And it’s a chick and an egg, really –

THE COMMISSIONER: Right.

MR. SIMMONS: – as well.

THE COMMISSIONER: Okay.

Is there anything else you’d like to add?

MR. SIMMONS: Nothing, Commissioner.

THE COMMISSIONER: All right.

MR. SIMMONS: Thank you.

THE COMMISSIONER: All right.

Government of Newfoundland and Labrador.

MR. LEAMON: Good afternoon,
Commissioner.

Nick Leamon appearing on behalf of Her
Majesty in Right of Newfoundland and
Labrador.

The province's position on commercial sensitivity was, in essence, outlined when the Terms of Reference were created in November 2017. The province, at that time, understood and was comfortable that the decisions of commercial sensitivity would be at the discretion of the Commissioner of the Inquiry, and remains comfortable of that today.

Though, the context of the project's sensitive state have changed and the commercial sensitivity – we believed the commercial sensitivity principles that should apply remain the same. The province submits the Commissioner analyze the current context of the project as it relates to Nalcor's application, while utilizing the principles the province has outlined within its submission, including the statements that Mr. Simmons has outlined as part of his oral submissions.

The province is merely reiterating principles that the Commission has used throughout the disclosure procedure that has happened, thus far, at the Inquiry. This includes the interpretation of the Terms of Reference decision that the Commissioner authored in March of 2018, Commissioner guidelines – and, of course, they are guidelines, they aren't definitive principles. But the principles that the government has outlined within its submission focus on those principles and believe they should apply on a case-by-case basis to redactions being proposed by any party in this particular application by Nalcor.

The focus of the submission of the province essentially is stating that the onus is upon Nalcor to demonstrate that their – to show that a rational connection is applicable to the disclosure of the information and that substantial harm is likely to

follow to the project cost or schedule. When this occurs, the province supports non-disclosure to the public where the necessity is demonstrated.

To reiterate, the onus is on Nalcor to demonstrate this. And what the province highlighted within the submission is the reiteration of principles that you highlighted, Commissioner, within your decision in March, stating that with – what the province has highlighted within its submission was specifically paragraphs 14. And there are a number of principles, obviously, guiding the Inquiry.

The principle that was highlighted specifically within the province's submission was the openness to the public, which states – and I'll just read out for the record: "That the Inquiry be conducted in a transparent and an open manner subject to the need to respect any applicable legal privilege claims as well as to ensure that commercially sensitive material not be made public where such could negatively impact the overall construction and costs of the Project."

And at paragraph 15 it follows that you "acknowledge that the Government of Newfoundland and Labrador has decided that the Project will continue to its completion. As such, it is in the public interest that the Inquiry, in fulfilling its mandate, cause the least possible disruption to the continued construction of the Project as well as the least possible impact on the ultimate costs" of the Project.

The province, as you have referenced, is the sole shareholder of Nalcor Energy and, therefore, has a vested interest in the project coming in on its current schedule and at its current budget. These are the same as the principles you have outlined within this – within your decision of the interpretation of the Terms of Reference and you have stated publicly throughout Phase 1 of the Inquiry. However, the province, as outlined in this submission, wants – wishes the Commission to focus that the onus is upon Nalcor to demonstrate that substantial harm would result to – upon if a particular redaction is disclosed to the public.

This means that the province is not comfortable with a blanket statement being given regarding different subjects saying that if – essentially, for

lack of a better phrase, if something is involving a certain subject, that it should be redacted. The province believes that the Commission should undertake the same procedure that it undertook during Phase 1 and analyze documents through a case-by-case basis, as this is the best manner to ensure that the Inquiry achieves the particular objectives that the province has outlined for it within the Terms of Reference, and also protects the province and the ratepayers and the taxpayers of the province from unnecessary costs or the schedule being added onto of the actual project itself.

The principle – now, the province understands when the Terms of Reference, as outlined earlier – when the Terms of Reference were created, the province understood that these type of decisions may become forward as an issue, and understood that the Commissioner had the discretion to make the decisions as he saw fit.

The province has submitted, in order to aid the Commission in making its decision on Nalcor's application, to – has outlined a number of factors for the Commission to balance when undertaking this balancing exercise: That the province has suggested that the Commission look towards the probative value of the specific redaction or information being proposed to be withheld, essentially stating how relevant it is for the purposes of the Inquiry and how important it is to ensure that the Inquiry achieves the objectives that are outlined for it within the Terms of Reference; the public interest in disclosure of the information; and the likelihood of financial harm that Nalcor has demonstrated relating to the proposed redaction.

So related to the government's specific submissions relating to Nalcor's application, these comments are offered to assist the Commission in making its decision. Regarding category one, there's been a number of comments. And the province would agree that individual contractor amounts for outstanding contracts would qualify as commercially sensitive information. And we are encouraged to hear that there may be able to be some type of compromise reached relating to this information.

The province itself has suggested using the aggregate totals of certain outstanding contracts and had left that at the discretion of what would

satisfy the Commission. But the province believe that the probative value of the information could be achieved without the disclosure of the individual contracts – or the outstanding individual contracts – as this would (inaudible) this harm the – this would harm the negotiating position of Nalcor going forward in its efforts to conclude the project.

Regarding categories two and three, the province just wishes to reiterate that the onus is on Nalcor to demonstrate that substantial harm to the project would occur if this, the information proposed to be withheld, is redacted, and that the Commission consider this, combined with the balance of the probative value to the Inquiry of the information, along with the public interest in disclosure of the information.

The Inquiry's intent is to be public. The province had other means to analyze these issues, but chose to have a public inquiry because it wished to have these decisions answered in an open and transparent manner. The province simply wants to know what transpired; however, the province is the sole shareholder of Nalcor and where there is a rational connection between potentially commercially sensitive information and substantial harm to the project schedule or budget, as demonstrated by Nalcor, the province supports redactions and/or in camera hearings, or whatever is at the discretion – there are a number of avenues under the Rules of Procedure available to the Commissioner – where the necessity has been demonstrated by Nalcor.

The province encourages the co-operation of all parties relating to disclosure to the Commission, as this is not intended to be an adversarial process, as one of the principles outlined within your interpretation of the Terms of Reference. And the province takes comfort in the fact that you have the ability to look – you have the avenues looking at confidential exhibits and in camera hearings, and you are able to utilize all the information you deem necessary in order to create your final report and provide your recommendations to the province.

THE COMMISSIONER: So, Mr. Leamon, let's just go over a little bit of that because I do have some comments.

The Government of Newfoundland and Labrador, unlike any other party in this room other than Nalcor and Commission counsel, has had the full package. In other words, both package number one, which is publicly available, and package number two, which is more detailed and is private.

Now, you have indicated, and quite correctly, that the province is – has a vested interest in this as it is the sole shareholder of Nalcor. Based upon our discussions in November, I think my expectation was, or at least my interest was in trying to ensure that I would get the province's perspective with regards to potential claims for commercial sensitivity.

I appreciate your comments with regards to the issue of estimated cost and forecasted costs.

I am troubled – not troubled, that's probably not the right word – I'm concerned that, you know, as the shareholder of Nalcor, that you're not, you know – and notwithstanding the fact you have detailed information – you're not prepared to say one way or the other whether the province considers the information so commercially sensitive that it should be, basically, withheld from the public. And I'm trying to figure out exactly why that happened.

MR. LEAMON: Well, the province's position would be that when it created the Terms of Reference, it understood that these type of issues may very well come forward.

THE COMMISSIONER: Right.

So, I'm not asking you to tell me what to do. I'm asking you – I'm asking the province, because I – it's my duty, ultimately, at the end of the day, to assess what goes in and what stays out, or what is public and what is not public. I, you know, I clearly understand my responsibility here.

But what I would have liked – or what I would like – is a recommendation or a submission, either in support or against, basically, some of the claims that are being – for commercial sensitivity, some of the redactions that are being claimed.

And I'm just wondering why, as the sole shareholder with – you know, you're in a unique position. You're – you called the Inquiry; the province has called the Inquiry, a public Inquiry. You said in your document it's to open, transparent – that was the intent.

So, in line with that, having full information, being the shareholder – being, you know, the recipient of whatever potential harm might exist – an indication from the province as to their thinking with regards to the various redactions that were being sought, I think, would be very helpful to me.

It's not gonna dictate what my result would be, but it would have been very helpful – or it would be very helpful to me – to sort of think about as I decide whether or not I'm going to allow redaction or not.

MR. LEAMON: Commissioner, I understand your point.

The province would suggest that Nalcor is in the best position to illustrate if there is a likelihood of substantial harm to result from the –

THE COMMISSIONER: You're the –

MR. LEAMON: – disclosure of the information.

THE COMMISSIONER: I understand that Nalcor can do that. But I would – I'd like to think that the shareholder would also have a similar ability because you get, you know, as the shareholder, you obviously have information. You have a right to information, you get information, you can assess information.

You know, like, I just, like, I don't quite understand why, particularly based on my comments from November, why it is that I don't have something a little bit more definitive with regards to at least the government's position on what Nalcor is seeking.

One of the reasons I assume Commission counsel saw to it that the government received the full – the package number two, the private package, was so that you could do just that.

And I'm just wondering why that – you know, is it going to be done? Is – can I expect some sort of an indication as to what the province's position – maybe it's, you know, I might be – you might be in the same predicament that I'm in in the sense that I can't say what I – I, like, can't ask questions with regards to specifics because it defeats the whole purpose. It's the chicken and the egg situation.

But, can I understand whether or not it's the intention of the government to actually comment on some of the – at least some of the suggested redactions that are being made to the Grant Thornton Report?

MR. LEAMON: The intention of the province with – in response to Nalcor's application was to provide a response to the category-one redactions as we've outlined within our submission. It's a public submission.

Regarding the remainder of the redactions in the categories, the province's position is simply that it's comfortable with whatever decision the Commissioner makes if it – in assuring that it's – as it's assured, 'cause of the outlined principles that the Commission has published, the province is able to accept – or willing to accept and comfortable accepting – the Commissioner's decision relating to those specific redactions, as Nalcor is in the best position to present whether there is substantial harm likely to result.

And the Commissioner can then balance with the probative value of the specific information, along with the public's interest in disclosure with those specific redactions.

THE COMMISSIONER: Hmm.

Well, I appreciate the fact that the province will have comfort in my decision, but it doesn't answer my query because I would even be more comfortable with my decision if I had, basically, the government's position with regards to some of these points that are being taken by Nalcor and seeking redactions.

That would have been helpful to me, at least, when I consider making a decision, so that hopefully the comfort that the province thinks they have in me will be – will even be furthered.

As I say, I'm a little surprised that I don't have a bit more from the province with regards to that; I expected more. And I'd appreciate if, you know, if I don't make my decision today, if that further thought can be given to what I've just said.

You know, I think the perspective of the shareholder, who is acting on behalf of the public here, would have been very helpful to me in trying to assess what it is that I'm being asked to do, and I didn't get that fully from the government. I have to say it.

MR. LEAMON: Commissioner, I'm happy to bring that back to my client, but today that's the instructions I have and that's the position of the province.

If you are – if you do defer your decision on this particular application, or if there are further applications, I'll communicate your response today back to my client.

THE COMMISSIONER: All right.

Good, thank you.

MR. LEAMON: Thank you.

THE COMMISSIONER: All right.

I'm just gonna go in line. Concerned Citizens Coalition next. Mr. Budden.

MR. BUDDEN: Good afternoon, Mr. Commissioner.

Geoff Budden for the Concerned Citizens Coalition.

Just as – by way of introductory remarks, unlike most counsel here – and I know you're aware of this, obviously, but I think it's important to state publicly, that we have not ourselves seen the Grant Thornton report at issue. All we have is the first application, the publicly-available one. We don't have either the report or the second application, so our submissions are made with that fairly significant limitation on what we can offer.

UNIDENTIFIED MALE SPEAKER:
(Inaudible.)

MR. BUDDEN: Our position – my client’s position – is it’s very skeptical as to the likelihood that disclosure of information at this Inquiry would either delay the project or increase its cost, with the possible exception, which Commission counsel has noted, the narrow exception of current forecast estimates with respect to presently uncompleted contracts.

So, we acknowledge that there may be some validity to that submission by Nalcor. The rest of it we take issue with.

The – we believe, and again I’m repeating what I’ve said in my brief, but we believe it’s essential to distinguish between harm caused by this Commission and harm that flows from actions or inactions by Nalcor or other parties, as revealed through the public hearings of this Commission.

And the first one, obviously the Commission has to be vigilant not to cause harm. But the second, what has happened has happened, and this Inquiry is here for a purpose; it’s to disclose and reveal issues that – problems that have occurred, and perhaps inform the public and learn from those.

So, that is the distinction, I think, that always has to be in your mind between causing harm and revealing harm that the actions of other people, perhaps, have caused.

Public inquiries – and other counsel, Mr. Burgess in particular, have provided you authorities with respect to public inquiries, but just by way of general comments, they almost always unfold against a background of civil litigation between and among the parties.

I gave several examples in my brief, but all of the ones that I’m aware of – all the high profile ones that have recently occurred in Newfoundland – have gone hand in hand with litigation between and among the parties, to which usually the Government of Newfoundland, or its agencies, is a defendant.

And it is plain and obvious – I’m not giving evidence here, I’m trying not to, but anybody familiar with those inquiries, it’s plain and obvious that certain parties have benefitted greatly from the public hearings, from the

information that has been revealed through an inquiry.

So, this is nothing new what we’re faced with here today. There’s nothing novel about an inquiry and civil litigation being somewhat intermingled. And, in fact, if anything, it’s probably less of an issue in this litigation than we sometimes see.

The – again, I would suggest that it is incumbent on Nalcor to offer evidence – which, at least in the public submission, it has not – that this Inquiry will somehow convert a claim lacking merit into a claim that has merit. The – if information is relevant and material, presumably it will come out or should come out through the litigation process.

If a person has a claim and discovers that claim through this process – this Inquiry process, so be it. That’s not increasing the cost in any undue or unfair way. That is just the normal flow of information and people becoming informed as to their rights.

So, this Inquiry is not a shield, I would suggest, in any respect, to protect Nalcor or any other party from the consequences of what it did or didn’t do.

The – this also – this is a public Inquiry, as everybody has acknowledged. And it’s also important to acknowledge the degree of public engagement. We’ve had media present from all the major Newfoundland media outlets from the beginning. We’ve had – this has been a part of the public discourse. We are in an election year where the – Muskrat Falls and how to deal with the consequences of some of what this Inquiry is delving into will be a major issue.

And now, in the middle of all of that, the screen is going to go blank if we are to follow Nalcor’s submission – at least partially blank.

And I suggest that really – if it is done unduly, it’s an affront to the democratic process. This Inquiry has been called; it has been called for a purpose. It is a public Inquiry and, unless Nalcor meets a very high standard – and we acknowledge, perhaps in one area, as we’ve acknowledged, it has, but by and large it is a very high standard and the Commission should – I would suggest the Commissioner should and

must be cognizant of both of that standard and of the harm that will result – perhaps necessary harm, if the Commissioner so concludes. But harm will result to the democratic process by, as I said a moment ago, the screen going blank at key moments of this Inquiry.

So what we – again, we are speaking not from an informed position but from a position of – having an application, nothing else. But from what we have seen and what we have heard, the submission – not the submission but the comments of Commission counsel as to the position that they took in the – in their dealings with Nalcor, I would suggest are, perhaps as a starting point, a fair and reasonable starting point for yourself, Commissioner, to weigh what is to happen in these proceedings. That is, to give, perhaps, deference to current estimates for contracts that are ongoing, but otherwise to have the report released un-redacted and to have a public inquiry as was intended.

Thank you.

Unless you have questions, those are my submissions.

THE COMMISSIONER: No. Thank you, Mr. Budden.

I've had a chance to read your submission in advance. I appreciate it.

Thank you.

MR. BUDDEN: Thank you.

THE COMMISSIONER: Consumer Advocate?

MR. HOGAN: Thank you, Commissioner.

John Hogan on behalf of the Consumer Advocate.

First, I'll just point out the Consumer Advocate essentially supports the arguments and positions that Ms. O'Brien put forward with regards to the three categories when she started – when you questioned her for some more detail on that this afternoon when she began her presentation. I think her arguments for why these items need to

be disclosed are the same positions that the Consumer Advocate has.

You do have my written submission. I just wanna highlight some points in that. And the first one obviously being the overarching presumption that everything has to be disclosed. Mr. Budden just touched on that. This is a public inquiry, and the purpose of the Inquiry is for the public to find out what, if anything, went wrong with regard to the Muskrat Falls Project. Doing it in camera will not achieve the point of a public inquiry.

There is balancing that comes into play with regards to documents that are not commercially sensitive, but that are commercially sensitive and will cause harm, if disclosed. And we note, as Mr. Budden did as well, the burden is on Nalcor to prove that harm will arise if these documents are disclosed. Again, it's hard to argue this in a vacuum. I don't know what the specific numbers are, what the specific allegations are regarding what harm will be caused, other than general statements that if contractors have them, will take advantage of these numbers and increase the claims.

On its face there's no proof that that is going to happen, there's no proof that it has happened, so it's hard for me to say that Nalcor has met that burden that's been established by the Commission to show that harm will arise if these documents are disclosed. I think Mr. Budden put it a good way. I don't know why the disclosure of certain documents will turn an illegitimate claim into a legitimate claim against Nalcor.

I also note – in your interpretation note, it does talk about having least possible disruption and least possible cost impact to the project. It doesn't talk about no impact and no cost. So, nobody wants any extra cost in the project, but the fact of the matter is: A public inquiry was called, and your interpretation was that you will limit any damage and extra cost that will be done to the project. But, obviously, you bore in mind and the government bore in mind that that is a possibility. And I would suggest that the public inquiry is what takes precedent here. This is what the mandate is, the terms of reference are by the shareholder, by the government and by all counsel and parties here with standing throughout this Inquiry.

Finally, I guess, I'll note that – I'm not going to try to put words in the government's mouth, but if they're not taking position on anything that they've seen, not taking the position that it is commercially sensitive to the point that it will cause harm to Nalcor, then, perhaps, the Commissioner can assume that it won't.

Unless you have any further questions, Commissioner, any questions, Commissioner?

THE COMMISSIONER: No, that's fine. Thank you, Mr. Hogan.

Former Provincial Government Officials '03-'15? Any submissions?

MR. T. WILLIAMS: We take no position with the (inaudible) of the matter, Mr. Commissioner.

THE COMMISSIONER: Okay.

MR. T. WILLIAMS: Mr. Commissioner.

THE COMMISSIONER: Kathy Dunderdale?

UNIDENTIFIED MALE SPEAKER: No submissions.

THE COMMISSIONER: All right.

Ed Martin?

MR. SMITH: No submissions.

THE COMMISSIONER: Okay.

Charles Bown and Julia Mullaley?

MR. FITZGERALD: Thank you.

Thank you, Commissioner.

Initially, it wasn't my intention to make submissions on the point because I really didn't know where this was going to go this afternoon. As Mr. Budden has pointed out, we do not have a copy of the Grant Thornton report, which I do find concerning, given that Nalcor has indicated that it can be provided to counsel.

I do find it concerning because the Inquiry is supposed to start February 18. I do expect a lot of documents to come my way and the way of

counsel. And the sooner we get that information, the more procedurally fair it is for all of our clients – separate and apart from Nalcor, separate and apart from the government.

That being said with submissions, they're somewhat in the abstract as I haven't seen the confidential application that's before you. And I think the point needs to be made, and it hasn't been, that it's not just about procedural fairness to Astaldi. I represent the current Auditor General. I represent a deputy minister, current employee of the Crown. And they have significant interest in this Inquiry, and significant reputations to protect.

And I have some concerns, and it's even evidenced here today, when the Commissioner can't ask a question at the hearing, it's – you are concerned about potentially breaching a commercially-sensitive issue.

I have concerns for my clients, when I go into a hearing, that it should not be handcuffed by these technicalities and I should be able to represent my clients in a thorough and clear fashion.

I have some concerns that if it's not done ex parte, it's going to be very difficult for our clients to – all of our clients to – have procedural fairness if that's the road this is going. But I don't think we necessarily need to go there.

Mr. Simmons indicated that while Nalcor – the ATIPPA didn't apply, or it was a bit of a different regime when all this was going on. But guidance in terms of the interpretation of how a justice or a court should deal with business interests or commercially-sensitive information of a third party has been provided by our Court of Appeal. Our Court of Appeal has dealt with this in the Corporate Express decision, which is found at 2015 NLCA 52.

That had a – to do with a bidding and tendering process between the university and a – competitors were looking for information – Dicks & Company and Corporate Express. The point being is that that had to do with section 27 of the ATIPPA, which has to do with commercially-sensitive information; now it's section 39.

But in that case, the court said that in order for the information to fall within the exception to disclosure, there needed to be a reasonable expectation of probable harm. It also stated, and it supported the decision of Justice Whalen, as he was then, that mere speculation is not enough.

And I'm concerned that we're in here in a public Inquiry, and my clients have interest obviously, and I haven't seen your application, but there doesn't seem to be a whole lot of evidence except trust me, trust us; well, this could cause a problem.

And that's not enough to meet the burden. And, by the way, you will find the same jurisprudence at the Supreme Court of Canada on the examination of that issue. You may get some guidance from that.

My point is, if you're gonna go down that road, and look at, on a case-by-case basis, the documents – whether or not they're commercially sensitive or not – it would help counsel in terms of not being handcuffed because we would know the specific documents and the specific issues that we're arguing over.

And secondly, it would hold Nalcor to the burden of having to demonstrate that the evidence has more than a speculative result. And you would have to demonstrate that it could reasonably be expected to cause probable harm. I don't believe that that burden has been met, despite not having seen the application, and I think that should guide you.

There's guidance from our Court of Appeal on that type of analysis and that's what should guide this Commission.

THE COMMISSIONER: Right.

One of the issues, Mr. Fitzgerald, is that, you know, it's one thing to talk about or review on a case-by-case basis. If I did that, I'd probably be here in this forum trying to decide on issues of what should go in and what shouldn't go in far more than what the public will ever want to see me do.

And so, you know, I hear what you are saying here and that's why I've tried to, in some of the

questions I've asked Mr. Simmons, for instance, with regards to the actual impact of making a decision, for instance, that a party not be present for –

MR. FITZGERALD: Mmm.

THE COMMISSIONER: – the hearing that I've said – look, you know, there are other practical considerations down the road. I have to think about, well, how then does – is this evidence going to be presented to me?

It's one thing for Commission counsel to be able to look at something, or for you to look at something. That doesn't mean that I've seen it, and it doesn't mean that I can use it, basically, to make my decision. So, it's what is presented to me at the Inquiry that, basically, is what I make my decision based upon. Correct?

MR. FITZGERALD: And I accept that –

THE COMMISSIONER: Right.

MR. FITZGERALD: – but I don't want to be handcuffed in questioning witnesses.

THE COMMISSIONER: I understand.

MR. FITZGERALD: That's my concern. And that only – was only triggered this afternoon, Justice, in the exchange that you had with Mr. Simmons.

I'm like, I can just foresee myself being in the middle of a hearing and every second question – Justice, I'd like to go here; I don't know if I should go –

THE COMMISSIONER: Right.

MR. FITZGERALD: – here. And I don't really think that's fair to the parties.

THE COMMISSIONER: Right.

So, I think what you're asking is the same thing that Mr. Simmons asked me, and I assume Commission counsel, is that you want definitive guidance with regards to where I'm going on these issues.

MR. FITZGERALD: I would like definitive guidance, and I'm not – I will request definitive guidance, but in terms of my submission here this afternoon, I think it's just important that the factors that I've highlighted are not lost upon the Commissioner and that those things should be considered when we're dealing with this issue.

THE COMMISSIONER: Right. Okay. Fair enough.

MR. FITZGERALD: Thank you.

THE COMMISSIONER: Thank you, Mr. Fitzgerald.

Mr. – I'm sorry, Robert Thompson.

MR. COFFEY: I have nothing to add to what Mr. Fitzgerald had to say.

THE COMMISSIONER: Thank you.

MR. COFFEY: Thank you.

MS. G. BEST: I have no submissions –

THE COMMISSIONER: Nalcor Board Members.

MS. G. BEST: – thank you.

THE COMMISSIONER: I see. I'll wait for you, Mr. Burgess.

You're here for the Trades Council and –

MR. LENEHAN: We have no comment.

THE COMMISSIONER: Okay.

And I believe the only other party present – I'm hopeful I haven't missed anybody – is Astaldi. Correct? So let me hear from you, Mr. Burgess.

MR. BURGESS: Good afternoon, Mr. Commissioner. It's Paul Burgess on behalf of Astaldi Canada, Inc.

As the Commissioner is aware, we have provided a detailed written submission. But this afternoon I wanted to take the opportunity to address a couple of the points and highlight some of those points for you.

As has also been said, and I reiterate, that we haven't had the benefit of seeing the Grant report – Grant Thornton report, so it's in a bit of a vacuum that we give our comments, but it's more on principles than anything else.

I do want to start out though, at the outset, to respond that one of the comments that was made by Nalcor in its submissions was the comment that we had – the skin in the game was the arbitration, and the monetary reward.

And that, I think, is ignoring the real reason why Astaldi is here and why, in fact, it was granted standing by the Commissioner. The skin in the game is Astaldi's reputation and that is the key point why we're here and for the submissions that we will make.

In our written submissions that we made to the Commission, we set forward and did a bit of a twist on a potential test that could be applied. And we submitted that Nalcor, to be granted its request, must prove to the Commission with convincing and solidly substantial evidence that the risk that poses a serious threat to the commercial interests of Nalcor, which risk outweighs the rights of the public and Astaldi, respectively, to an open and transparent proceeding.

Now the words I want to focus on for purposes of the submissions this afternoon is convincing and solidly substantial evidence, because I think it takes more than just a few vague and unsubstantiated comments to meet that test.

And what I've heard from Nalcor in its submissions is at page 2; there is a sentence that says what they're trying to do is to minimize the premature disclosure of the contents of the Grant Thornton report. So that acknowledges there will be ultimately a disclosure, presumably, because it says the premature disclosure.

So it's not saying that the parties or Astaldi won't ultimately get the contents or the information that they are trying to suppress.

And at page 5 of their submission, they say that if this information is given to Astaldi, it will give Astaldi procedural advantages concerning timing and scope of disclosure, which would increase the risk to Nalcor and the province. And

we see nothing more. And I respectfully submit that whatever the test this Commission applies, it has not been met. If there is something less accepted by this Commission as to the test of convincing and solidly substantial evidence, it hasn't been met.

Now, let me briefly deal with category 1 and 2 because I think that's fairly simple from the standpoint of Astaldi's interest. The basis that Nalcor has to suppress those two categories is because it would encourage claims, they are concerned.

In Astaldi's case the contract has been terminated, which Astaldi maintains was wrongly terminated, but terminated nevertheless. Nothing in the Grant Thornton report – I haven't seen it – but nothing in the Grant Thornton report can change the facts, and I think has been acknowledge, the claim by Astaldi has already been asserted and they are no longer on site. So whatever has happened is done. The ship has sailed. So for those reasons I don't think, and would submit, that there's no basis for the request regarding category 1 and 2 as they relate to Astaldi.

Now, let's look a little closer on category 3 that Astaldi says that those passages should be suppressed, and it's, essentially everything related to Astaldi. And, essentially, if you boil down the request, it's really asking this Commission to revoke Astaldi's standing and conduct a large part of phase 2 behind closed doors.

Now, while our written submission addresses the impact of conducting the Inquiry in camera on the public, my oral submissions will focus on the impact to Astaldi, and I'll leave the public interest to others.

When Astaldi was granted standing it was recognized explicitly that Astaldi may be adversely affected by the Commission's findings, and now the request by Nalcor to exclude Astaldi, a party who has – to use the words – skin in the game with its reputation, I am not aware, in my review, of any precedent for any such far-reaching requests.

If Nalcor's request is granted, Astaldi won't even be aware of the allegations that are being

made against it, much less the opportunity to respond, and I think we all can tell that there is potential significant damage to the reputation of Astaldi.

Astaldi's written submission includes support for the principle that recognizes potential damages to reputations in public inquiries is the overarching factor, which suggests a high degree of procedural fairness. I think then we have to look briefly at the arbitration process. This process is not yet determined.

As was put in our submission, the laws, it would appear, of either Newfoundland or Ontario will apply. I don't think it's a significant difference in either event. And likely the documentation production will be analogous to the scope of production in an ordinary action. There may be differences, but I go back to the burden of proof, which we all say is on Nalcor. And for Nalcor to come in and simply say there's a process, an arbitration process, which has not developed to the point where the process for document production has been established is some way going to prohibit Astaldi from participating in the Inquiry, let alone have the Inquiry conducted in a public manner.

Astaldi, because it hasn't seen the Grant Thornton Report, it's not aware of what documents Nalcor is attempting to hide. So we don't know, but we can't imagine what wouldn't be relevant because as we – as you've heard and as you've discussed, there is no indication or no submission that somehow relevant documentation won't be produced whether it be in arbitration or whether it be in Supreme Court of Newfoundland and Labrador.

If the Commission – we haven't provided any details on the arbitration because it is a confidential public process, but if there is any documentation or, in particular, there has been some document production at the arbitration, if the Commissioner wishes to have that or copies of any pleadings of the actions before the Supreme Court of Newfoundland and Labrador, we would gladly do that.

So, we submit that for these reasons Nalcor has not met the burden, as it has not put forward a convincing and solidly substantial evidence of the risk, and we submit that the procedural

fairness, as you indicated in your responses to Nalcor's legal counsel, that the procedural fairness necessitates Astaldi's full and open participation.

Now, Nalcor, in its submissions, has indicated, well, maybe there might be times when Nalcor could be excluded and Astaldi present. I fail to see how that could possibly happen when everything that has happened at Muskrat Falls and all the books and documents have been opened by Astaldi to Nalcor.

Astaldi has come before this Commission, both in its submissions that it made in November with respect to disclosure and is making it today, to say we are going to be open and transparent, and our purpose, we have been told clearly when we last appeared before the Commissioner – it is related only to protecting the reputation of Astaldi and not to further any other litigation purpose.

As was stated expressly in our submission, it is Astaldi's submission that Nalcor's institutional interests as a Crown corporation should parallel those of this Commission in terms of public accountability, and that Nalcor's attempt to proceed shrouded in secrecy, as it has suggested, would have a significant adverse impact on Astaldi and be contrary to the principles of fairness and natural justice.

So, Commissioner, we request that Nalcor's request and application be dismissed, that the Grant Thornton report be released un-redacted to all parties withstanding, including Astaldi. As was also pointed out as well – and I'm sure it's known to both the Commissioner and all of the other parties – the sooner this happens, the better.

Nalcor, I understand, has had the Grant Thornton report prior to Christmas. That's about a month ago or more. And while I certainly understand and appreciate that that was a necessary part of the process, the most relevant thing is not how long they've had it, but how long Astaldi will have it so that we can prepare, because these hearings will commence in less than four weeks and that is an integral part of the preparation.

Those are submissions for Commission. I'd be more than happy to answer any questions.

THE COMMISSIONER: That's fine.

Thank you, Mr. Burgess.

Any response from Nalcor Energy?

MR. SIMMONS: Commissioner, only one small point. Mr. Burgess had referred to a passage in the Nalcor submission which referred to premature release of the Grant Thornton report. I think you've got to read that in context and the context of the entire submission.

And we've clearly taken the position regarding information that it's not a forgone conclusion that all information will find its way into the disclosure that takes place, either in the arbitration or in any other legal proceedings. So that single point is not one that I think carries any particular weight.

THE COMMISSIONER: All right, I think what I've decided what I'm going to do is – I'm likely going to give some direction today with regards to my thinking here, and I need just a few minutes to put that together in my mind.

In the meantime, I would like for you and – yeah, Ms. O'Brien, Mr. Learmonth and you, Mr. Simmons, and co-counsel, to sit down and just consider the other issue that I did raise because I do need clarification for that and I'm not sure how I'm going to get that before I come back in. But maybe what I can do is if, with your agreement, if once it's been discussed, then maybe Commission counsel could at least advise me what the gist of the discussion was?

MR. SIMMONS: No objection, Commissioner.

THE COMMISSIONER: All right, I'm going to take 10 or 15 minutes here now then, so just give me ...

CLERK: All rise.

(Break.)

CLERK: All rise.

Please be seated.

THE COMMISSIONER: All right, I've decided this afternoon to give an oral – some oral reasons and some oral direction with regards to this matter. I may well follow this up with some additional written reasons, it just depends on how things are going from my schedule and whatever, but I may – and I may well do it, in any event, to provide – to be of some assistance to the parties.

Clearly here this afternoon what I'm specifically dealing with is an application by Nalcor Energy regarding information. It ceases being – as being commercially sensitive that's contained in the Grant Thornton report for Phase 2 for this Inquiry.

Having said that, I think that everyone would agree here with some knowledge of this matter that it has other repercussions. Because it's far greater than just a limited review for the purposes of the GT report, although that's specifically what I'm doing. I think the direction I'm about to give is going to have some bearing on where things go in future for this Inquiry on other documents and things of that nature.

I see there being a significant urgency at this stage for me to decide this. I had mentioned back in November how if there was going to be an application, it needed to be done early because this Inquiry is on a tight timeline and we have an awful lot of work left to do. On the basis of that urgency, I think it's important now that I give some – make some decisions and give some direction on this, because these hearings are going to start in the week of February 17 in Happy Valley-Goose Bay and the first item of business is going to be the Grant Thornton report.

That is a report that I think is important, it fits with the way we've conducted Phase number 1 in starting with the report, and I think it just makes good sense to proceed on the basis that the Grant Thornton report is the start of Phase 2. So it's very important, now that we get this moving and that we're ready for Phase 2.

I very much take to heart the comments of Mr. Fitzgerald with regard to the need to be prepared on behalf of his clients. I think that is true and I'm very much aware of that. And I would further add that we also need to get moving

ourselves in the sense of ensuring that Commission counsel are up to date and have their work done so that this matter can be fairly presented as well – with them as well as all other counsel before me.

I do want to start off by saying this, and because it should not be lost on anyone that, generally speaking, up to now, I have to say that I've been very appreciative of the efforts of counsel here for Nalcor and for the Government of Newfoundland and Labrador with regards to dealing with Commission counsel on issues of commercial sensitivity, privilege, redactions that relate to irrelevant matters, other issues that require redactions.

I think – I have to say that, for the most part, the vast majority of the part, that has worked extremely well and I'm very appreciative of the efforts of everyone to make that happen. It's only on the basis of that, that we're able to start Phase 2 on time. And it's on the basis of that continuing that we're going to be able to conclude this Inquiry as required within the Inquiry's mandate and schedule.

Now, this Inquiry is not supposed to be an adversarial process, it's not a trial, and for the most part I've been trying to ensure that we proceed on that basis. The responsibility of Commission counsel is to provide information fairly to me as the Commissioner and for the other parties to supplement that with additional information by way of questioning, documentation, things of that nature that are provided.

It's important to note that I have no legal ability to impose legal consequences here. I'm not, basically, making a finding related to criminal liability or civil liability. That is not the responsibility of a Commission of Inquiry. As a judge, I'm very used to making decisions affecting the rights of parties.

That's not what I'm doing here. I'm inquiring and reporting and it's a very different scope altogether. An inquiry is a public – it's a public inquiry, so it's obviously meant to be public. It has a scope to it that involves basically ensuring that the issue at hand needs to be investigated within the mandate given and then the report has to be given on the facts in a fair and public

manner for the public's benefit. That is the general purpose of a Commission of Inquiry.

It is not unique that in this particular Inquiry, there are proceedings ongoing in the shadows. I think of, for instance, the events of the Krever inquiry, the recent Charbonneau commission in Quebec and even our own Cameron inquiry here in this province. Notwithstanding the existence of ongoing civil disputes involving liability in those circumstances, those inquiries proceeded, generally unhindered by the need to consider what was going on in the civil and/or criminal sphere.

In this case, I'm dealing with a request for commercial sensitivity. And, you know, when I started looking at commercial sensitivity, there was no ability on my part to find any sort of definition that by consensus as to what is commercially sensitive information. It's generally understood to be information that has economic value or that could cause potential economic harm.

In that regard, in trying to provide direction specifically to Commission counsel and Commission staff, but also to the parties because it was made public, I did draft some guidelines for the purposes of determining what might be commercially sensitive; however, I will repeat what I said earlier, these are guidelines only. They were not meant to be a definitive definition of what was commercially sensitive or even a definitive approach with regards to commercially sensitive information.

For the most part, the presumption that all information should be made public, unless there's a valid reason not to do so, I think that holds the fact that there is a burden on the applicant to show that disclosure would reasonably be expected to result in significant financial harm or negatively impact the party's ongoing or future negotiations could be material or prejudicial to the economic interest of the party. These are the sorts of thresholds that have to be met in order to establish that information should not be disclosed or that information should be redacted or, alternatively, even that there be in camera hearings for the purposes of ensuring that matters can be dealt with in private.

And I want to be clear here that it is not for the applicant to establish absolutely that there will be harm. I believe that what I need to look at is the evidence that is presented to establish that there's a reasonable expectation that economic or financial harm will result by virtue of the disclosure of that particular information. It's – to some degree, and some of the parties have mentioned this, it's like the probative value versus the prejudicial effect to some degree.

The fact that there may be some harm does not necessarily mean that there will be no public disclosure. The issue is that where there is – where there's a reasonable expectation, in my view, of significant harm to the party, then in the circumstances that, you know, I think it's incumbent upon the Inquiry to do what it can to protect that party.

I would also add, in this particular case, that the way I look at this is that what I'm really doing is looking at the harm caused by the Inquiry. So, in this particular case, it's already been discussed that there are ongoing proceedings involving Astaldi, whether they be arbitration in nature or alternatively within the courts. And in the circumstances there is risk to Nalcor as a result of those ongoing applications. That has nothing to do with this Inquiry per se; it has more to do with what, perhaps, has led to the Inquiry.

In the circumstances here, the issue of potentially that – the issue of disclosure potentially occurring in those particular proceedings is not something that I can lose sight of. And while it's been suggested to me that, you know, for strategic reasons or other reasons, disclosure, premature disclosure, or whatever may result in harm, I'm not satisfied that ultimately the holding of the Inquiry, or the provision of the information in the Inquiry itself is adding any additional risk to creating harm on behalf of Nalcor Energy to some significant degree.

Having said that, I have accessed this application, both the public part and the private part. As I said earlier, I have some questions about some of the issues raised in the private part that I just felt constrained to ask more specific questions about, but I'm hopeful the direction that I'm about to give will respond to that in any event. And I certainly considered the

submissions that have been filed by all the parties here and the verbal submissions of those who have spoken. I'm going to deal with this based upon the three general categories, as I feel that this would be sufficient to provide direction that is needed here.

On the issue of estimated and forecasted costs and individual work packages, I am satisfied that Nalcor has established for me that there is a reasonable prospect for significant harm, financial harm, to Nalcor should disclosure – full disclosure – be made of all information that relates to ongoing contracts presently in place, leading to the conclusion of the construction of the Muskrat Falls Project.

So as a result, I am prepared to restrict, to some degree, the contents of the Grant Thornton report. And it should be direction for future with regards to other documents – documentation related to these ongoing contracts. As I stated earlier in my interpretation decision, it's not the intent of this Commission of Inquiry to cost the public any more money than what is already being paid if, in fact, it can be avoided and if I can continue to meet the mandate that has been provided.

So I'm accepting Nalcor's proposal, first of all, that we will use aggregate numbers – that aggregate numbers will be made available. So, again, the subtotal column on page – I'm referring specifically now to page 11 of the report, but this is just as an indicator because I do know that there's further information later in the report. The subtotal column as well as the total column will be used. And then it's my expectation that what will happen is this: That the rest of the contracts that have overages, that they will be ranked from one to seven, because there are seven of those, with one being the contract with the greatest overage and the last being the one with the least overage.

There are additional contracts that have come in under budget. I think, in fairness, what I am prepared to do is indicate that those – that the total of those contracts that came under budget, the total amount of those should be made known to the Commission of Inquiry what that total amount is and how it impacts the total cost – or the total overage on the project from the DG3 numbers.

With regards to DG3 numbers – and I'm not talking here now about the revised DG3 numbers or, alternatively, work transfers, additional work that was added, scope changes, things of that nature, revised numbers, what I'm talking about is the original DG3 number at sanction. Having listened to the comments of the parties with regards to that, including Commission counsel, and as well Nalcor, I'm not satisfied that the disclosure of the actual DG3 number at sanction, that it's been established that there is any risk of substantial harm as a result of the release of those, so therefore they will be able to be disclosed.

With regard to the issue of – and I'm going to deal with Astaldi separately, so I'm not going to specifically speak to the Astaldi issues for that issue or alternatively the bid contents and evaluations.

On the issue of bid contents and the evaluations, I reviewed what is contained in the Grant Thornton report, obviously, but that's not the basis upon which I'm making my decision. In the circumstances, bid contents and evaluations are historical in nature. The mandate of this Inquiry, particularly for Phase 2, is to look into the reasons why the costs have increased. And in order to do so, to suggest that the bid contents or how those bids were evaluated would not be within the sphere of the Commission would be incorrect. And, furthermore, I've not been satisfied, based upon what is put before me at present, that disclosure of that information to the public would, in fact, amount to possible significant harm to Nalcor Energy.

I'm just not satisfied that exclusion is required on the basis of it being commercially sensitive in the circumstances. I do note that Nalcor has already indicated it has no concerns with two of the contracts that are basically concluded. So it really has concerns with regards to the Astaldi contract and those contracts that remain in place. I've considered the information and the application of Nalcor with regards to that and I'm not satisfied that they've established that it should not be made public.

Finally, and I think most significantly with regards to this application, is the whole Astaldi question. And I have given very careful consideration to this and I have some comfort

with regards to my approach to this, based upon the fact that, from my point of view, I am not satisfied that the holding of this Inquiry or that the provision of the documentation required by way of disclosure for this Inquiry is going to add to any potential risk of harm to Astaldi – to Nalcor Energy at this particular point in time.

I have – no, I'm well aware of the fact that there is an ongoing dispute. There are processes in place in those disputes to resolve those that will involve disclosure of documentation. Whether or not the disclosure occurs here first or there first, to my mind does not ultimately, basically, cause me to conclude that it raises additional harm or financial harm to Nalcor Energy.

The risk of harm already exists by virtue of the events that have taken place and it will be up to those forums to determine whether or not that risk is actually there or, alternatively, there is no risk at all. That's not for this Inquiry to determine.

Significantly, as well, in my decision on the issue of Astaldi – in my view that all of the Astaldi information will be disclosed – is the fact that if I were to order otherwise, I have grave problems in trying to figure out how we could continue to conduct this preliminary inquiry in a way that provides procedural fairness to all parties, and as well gives the public a full view of what is needed – what they need to see.

Nalcor's proposal was that they had no difficulty with the information being provided to all of the parties, subject to the undertakings, and that there would be, likely, in camera sessions. Astaldi would not receive that documentation, and nor would it have the right to appear for at least part of those in camera sessions where information that it considered to be commercially sensitive would be presented.

That, to me, is gravely problematic because I agree with Mr. Burgess that while Astaldi has a – quote, unquote – skin in the game with regards to its ongoing applications and arbitration, it's more significantly because of my finding at the standing hearing that there was a potential that they could be adversely affected by the findings of this Commission, particularly with regards to reputation.

It is very difficult for me to find a mechanism by which I could provide the necessary procedural fairness to Astaldi. Astaldi needs to know what the basis of any claims are with regards to its work and what has transpired, and they need to have the opportunity to respond to that in order to – and to do so publicly in order to protect its reputation.

Now, I recognize – some people may say: Well, you know, Astaldi is probably insolvent or whatever. I don't have evidence of that at that this particular point in time. I understand that they – based upon the fact that they continue to appear before standing that they are a party and that they continue to be an active company. So the result of which is, is that, obviously, in the circumstances, they have a reputation to protect and I don't think it would be fair for them not to be given that opportunity to do so.

The suggestion that has been made by Nalcor as to how we could deal with that is very problematic from my point of view, and I have tried to consider how I could deal with it if I did find that it should not be disclosed. And I just have not been able to determine a way that would be fair to all parties and, as well, to the public.

So, in the circumstances here, I have decided that all information related to the Astaldi claim should be made known and should be made public and will be dealt in the public. The Astaldi matter is not an ongoing contract. That contract has been terminated. It's far different from the other ongoing contracts, which I accept have some commercial sensitivity and potential for significant harm – financial harm.

I also want to say this – and I'll repeat what I said the last time, and I'm very definite on this – this – as a result of my decision, obviously, there's going to be some disclosure of some documents and evidence that would come before me related to this. I want to make it very clear to counsel for Nalcor Energy, and as well for Astaldi Canada and any other party, that this not a trial to determine the liability of or the lack of liability on anybody's part for what's went on.

So you will be confined to what would normally be thought to be seen as cross-examination at this Inquiry. I have even toyed with the possibly

of saying to Nalcor's counsel and to Astaldi's counsel that neither will be able to cross-examine the other; however, that is a pretty drastic approach and I'm not going to take it unless I need to take it. So, at this particular stage I just basically, sort of, fire a shot over the bow to indicate that I'll be watching very carefully to ensure that the correct ambit of cross-examination is followed.

Finally, I'll make a comment with regards to what I asked counsel to discuss subsequent to my leaving here this afternoon earlier on. And as I understand it, and I'm sure I can be – will be corrected on this, is that there is no claim for litigation privilege before me at this particular point in time. And even if there was, to be quite frank, I would not have the jurisdiction to decide that. That is a matter that would have to be decided in the court.

So with regards to the issue of the disclosure in the Grant Thornton report based upon commercial sensitivity, you know, my view is that I'm not dealing in any way with any possible litigation privilege, and that the directions that I have given should certainly respond to those areas where those issues arose. And I can't be any more specific than that, I know I'm being very vague, but I know counsel, know Commission counsel and Mr. Simmons well knows what I'm talking about. So I just wanted to add that.

So as I said, there's a lot of work that needs to be done now. I'm sure not everybody is happy with this and I can appreciate that. And I just want to say that I've given this a great deal of thought over the last week or so in particular, although I've been thinking about it for quite some time because I knew it was going to arise. And from my perspective, based upon my assessment of the situation, the directions that I'm giving I think are the most appropriate directions that I can give at this time.

As I say, I may well follow this up with some more better-worded written decision. I'm talking off the top of my head right at the moment, but I think there's a need to do so because we need to get this disclosure going. And as a result of this I am going to direct Commission counsel as well to get that Grant Thornton – make the changes,

the necessary changes, that I've directed to the report.

I have no problems with Nalcor Energy having a second look at that, as well as GNL. And in the circumstances, I want to get that GT report out to the parties ASAP. So as soon as that can happen I'm going to assure the other parties they will get a copy of the Grant Thornton report.

Anything else from anyone?

All right, so we're adjourned then until our first day in Happy Valley-Goose Bay which, I think, is the 17th of February.

UNIDENTIFIED FEMALE SPEAKER: 18th.

THE COMMISSIONER: 18th of February, rather. Right, I'm flying up there the 17th.

CLERK: All rise.

This Commission of Inquiry is concluded for the day.