# COMMISSION OF INQUIRY
# RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Phase 2 Volume 50

*Commissioner: Honourable Justice Richard LeBlanc*

Monday 10 June 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.

All right. Good morning.

Mr. Learmonth.

**MR. LEARMONTH:** Okay. There's a number of exhibits I want to enter in, but they're not in an easy order, so I'm just gonna read them out to you, one after the other. It might take a little longer, but they're not in consecutive order because they're from all over, different collections. So P-00664, P-00675, P-00681 and 00682, P-00684, P-00687 and 00688, P-01677, P-01822, P-01828, P-01831, P-02290, P-02412, P-02510, P-02531, P-02533, P-02549, P-04021, P-04054 and P-04055.

Now, I guess these have been previously entered into evidence, but I wanted to refer to them anyway. The new Exhibits are P-04054 and P-04055.They are the only two Exhibits, but I wanted to refer to those because I'll be – there in the binders for Mr. Marshall.

**THE COMMISSIONER:** All right. So, the – Exhibits 04054, 04055 will be marked as entered. The others have already been entered.

**MR. LEARMONTH:** Okay. Could Mr. Marshall be sworn?

**THE COMMISSIONER:** All right. Mr. Marshall, if you could stand, please.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** And if you take the Bible in your hand, please?

**CLERK:** Do you swear that the evidence you shall give to this Inquiry shall be the truth, the whole truth and nothing but the truth so help you God?

**MR. K. MARSHALL:** I do.

**CLERK:** Please state your name.

**MR. K. MARSHALL:** Ken Marshall.

**CLERK:** Thank you.

**MR. LEARMONTH:** Mr. Marshall, you're a resident of St. John's, are you?

**MR. K. MARSHALL:** Yes, I am.

**MR. LEARMONTH:** Yeah. And what is your present position of employment?

**MR. K. MARSHALL:** I'm semi-retired. I just left Rogers two weeks ago.

**MR. LEARMONTH:** You're semi-retired? Yeah. All right.

And you gave evidence in your – in Phase1, so I'm not going to go over your educational background and so on. But I wanted to confirm that you were on the Nalcor board of directors from 2004 until late April, I think it's April 20, 2016. Correct?

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** And that you were the chair from 2014 until you resigned on or about April 20, 2016?

**MR. K. MARSHALL:** Yeah, sometime in mid-2014, I think, I started to be chair.

**MR. LEARMONTH:** I think it was December, but you were acting chair before –

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** – you were appointed. Those – that's correct, is it?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Now I'd like to turn to tab 1 in your list of documents, that's Exhibit P-00664. If you could turn to page 4, this is a – well, the document, actually, on page 1, this is the Minutes of the fifty-third meeting of the board of directors of Nalcor, held in St. John's on Thursday, August 23, 2012 at 9 a.m. So this is before sanction, correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** All right.

Now if we go to page 4, the third full paragraph says: "The Board of Directors discussed its involvement in the approval to sanction the Muskrat Falls Project and its involvement subsequently, during the construction of the Project. Mr. Martin stated that he sees the Board as providing the approval to sanction the Project. This approval would involve the approval of the AFE for the full period of construction and the involvement of the Board after the initial approval would be if any significant issues arise which require the input of the Board, with regular project updates and presentations to the Board on an ongoing basis."

That's a statement of policy, is it? That you're gonna be provided with these updates?

**MR. K. MARSHALL:** Yes, I would believe so.

**MR. LEARMONTH:** Yeah.

And do you agree – can you confirm that an AFE is an authorization for expenditure, and includes a cost estimate projected out to the end of construction?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yes.

And that's always been the – your understanding.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Is that correct? Okay.

Now if we just turn to tab 11, which is Exhibit P-04055.

**MR. K. MARSHALL:** Zero, five, five?

**MR. LEARMONTH:** Yes.

**THE COMMISSIONER:** Zero, five, four would be –

**MR. K. MARSHALL:** Zero, five, four – in my book.

**THE COMMISSIONER:** – tab 11.

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** I don't have a 055.

**MR. LEARMONTH:** Okay, this is heading Lower Churchill Project – Master AFE's.

**MR. K. MARSHALL:** I have 04055 as tab 20.

**MR. LEARMONTH:** Okay. Well, mine is in tab 11. On my list, I guess it's wrong. Yeah, mine is – okay.

Well, anyway, you've got the Exhibit 04055, do you?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** All right.

**THE COMMISSIONER:** It's at tab 20.

**MR. LEARMONTH:** Yeah. Just let's go to the top. So this is the Lower Churchill Master AFEs. You're familiar with this document, are you?

**MR. K. MARSHALL:** So, yes, we would see –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – the AFEs as they were presented to the board. I'm just wondering what date this –

**MR. LEARMONTH:** Yeah, well, this one, if you go to page 3 you'll see this was signed off, I think, on January 10, 2013.

**MR. K. MARSHALL:** Okay, so –

**MR. LEARMONTH:** Am I correct in that?

**MR. K. MARSHALL:** – right after sanction.

**MR. LEARMONTH:** Yeah. You can see that in there?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** So, once again, it refers to the second paragraph – or the second paragraph under heading 1 on page 1: "Approval of these Master AFE's by the Board of Directors will release the necessary funding, the allocation of which will be managed by the President and CEO, for execution of work scope leading to in-service …."

So, once again, that confirms that the AFE is for the full – the total cost of construction right to the in-service date. Is that correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** It is. Okay, thank you.

**MR. K. MARSHALL:** Now, that is – what I could recall and understand is that this was the estimate to complete the project at that point in time. And there would be some elements would be known with more specificity than others. But this contained the estimates at that point in time as was known therein, subject to potential changes down the road, of course. There was always elements which had not yet been fully bid or negotiated, et cetera.

**MR. LEARMONTH:** And there were revised AFEs?

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** And that's what you're speaking of, is it?

**MR. K. MARSHALL:** Yes, yes.

**MR. LEARMONTH:** But what I'm saying is in each AFE, whether it was the original one or the revised one, is it correct that the understanding was that the revised AFE at that point in time was intended to cover the full cost of construction to the in-service date?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay. Thank you.

The next item I'd like you to refer to is at tab 18, which is Exhibit P-01828. Tab 18, in your binder, Mr. Marshall.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. Now, just to set the timing of this, that you'll agree, I think, that the documents for financial close were signed on November 29, 2013?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And that the bonds were priced on or about December 10 and that Nalcor received the proceeds of the financing on December 13. Is that your understanding?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** That is. Okay.

So do you agree that at the – I think you said in your interview that once the financial close had been completed, like, the horse had left the barn?

**MR. K. MARSHALL:** Well, yeah, the horse –

**MR. LEARMONTH:** Those were the words you used.

**MR. K. MARSHALL:** Yeah, yeah, the barn doors were open because we committed, I think, several hundred million dollars to site prep in the period between sanction and financial close.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** But the horse had left the barn in December of 2013, yes.

**MR. LEARMONTH:** And that – another reason for that, I would ask you to comment, is that once the financial arrangements were in place for the financial guarantee, the federal government had extensive rights to come in and finish the project if there was default. There was going to be serious consequences if the project didn't – wasn't completed. Do you agree with that –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – as a general statement?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** So the – do you agree that it would be important for not only the board of directors and management, but for the government to know as best as possible what the cost estimate – final cost estimate was – would be at November 29?

**MR. K. MARSHALL:** Certainly.

**MR. LEARMONTH:** Yeah. Okay.

Now, the document I just drew your attention to, P-01828, this is a July 2013 "Contract Advisory Committee deck and CEO briefing $7.0B." Now, we know that the DG3 estimate was $6.2 billion. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And I'm just going to read from the first page of this exhibit: "This deck was focused on the high value contracts and invited commentary on the Project teams strategy and mitigations."

July 2013 final forecast deck represented the project team to CEO – presented by project team to CEO of $7 billion.

"This deck was providing leadership with some early indications and concerns about the project cap costs, specifically the contractor bids being greater than the budget and estimate developed by SNC at DG3. The contractors assumptions on productivity were significantly misaligned with those used by SNC resulting in much higher contract costs.

"The Project team identified mitigating actions" that "they were actively taking to drive the bid costs down."

Now, when – did you – were you aware of the existence of this July 2013 document at the time of sanction? When I say the time of sanction now, I mean any time up to December 13, 2013.

**MR. K. MARSHALL:** A couple of things, and I guess my first comment would be I can't recall specifically this document. My second would be at that point in time – while I had served for a long period of time on the board, I was not the chair. So I'm here today representing my recollection as a board member, in some instances, without the benefit – the last time I was here with the chair of the Governance Committee, the chair of the Audit Committee and the chair of the board at the time that this was –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – this deck would have been in consideration. So my comments have to be somewhat qualified by that, that I was in a board member capacity and not necessarily in the chair's capacity in terms of having some involvement in what would be coming before the full board.

My third comment would be that I don't recall if this – that this was presented to the board. I wouldn't necessarily – and this is not just with respect to my period with the Nalcor board, but also with respect to my 28 years in work environment – that I wouldn't think that an FFC presented by the project team to the CEO would necessarily make it to the board.

And when we were – at this point in time I think we were dealing with a figure of 6.2 that was released publicly. This document referred to $7 billion and it would be my estimation, if I was chair at the time, it would have been my recommendation that this was a document that the CEO and the executive team had to work with the management team to make sure it was pressed, that it was stressed, that it was as locked down as possible before it goes to the board.

And so I can't necessarily say that I don't think this came to the board; I don't recall the $7 billion figure coming to the board – but nor would I suggest that the FFC document per se would come to the board at this stage of the game.

**MR. LEARMONTH:** Well –

**MR. K. MARSHALL:** But that's just, again –

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** – I don't recall the board considering the $7 billion, no.

**MR. LEARMONTH:** Yeah, well, don't you think the board should have received this document?

**MR. K. MARSHALL:** That's a matter of complete speculation. From a governance perspective – and, again, I was asked coming in to here – and I don't know if it's – it's not in the exhibits, but to also review Dr. Richard [sp. Guy] Holburn's testimony with respect to board governance.

And one of the documents – I actually reviewed it last night – was the November 2014 board deck. There was 400 pages in that deck and that was a typical board deck that would have seen – and a couple of things from Mr. Holburn's testimony were that you have to – the funnel that works with a board, in any organization, is that information has to be succinct, has to be clear, has to be, you know, deliberate and concise and it has to be action-oriented when it gets to the board.

As we saw that November 2014 deck, there was a lot of information and a lot of decisions that had to be taken and your board meeting is scheduled for two to four hours or however long it takes. So if I say the board should've seen this, in my experience, in my role as a senior executive at Rogers as an example, I present something to the CEO, that doesn't go to the board. That gets pressed and stressed internally before it goes to the board and there's a number that everybody agrees on.

So I can't necessarily say that this should've come to the board. Would the board, in hindsight, have liked to have seen the range? I would think that in the board deliberations – and I can say quite confidently that in the board deliberations, that we discussed, you know, what are the ranges? What are the worst case scenarios? What are the risks? What are the – but I don't know this specific document because it hadn't been fully stressed.

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** So I can't answer your question in the hypothetical because I would not necessarily think –

**MR. LEARMONTH:** No.

**MR. K. MARSHALL:** – that in the sea of information that was presented to the board that this would, by nature, you know, add to that 400 pages and be a proper document to go to the board, because they're not asked to approve it.

**MR. LEARMONTH:** Okay but I'm not – just to clarify, I'm not asking about, like – I'm asking about you as an individual director.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** You can't speak for the others. I'm asking –

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** – about you, Ken Marshall as a director.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** And the question I asked you is whether you recall this document ever being presented to the board.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** No, never.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** And do you think that this document should've been presented to the board, given the fact that it showed a – you know, up to an $800-million increase from DG3 and there was some disturbing information here about the contracts coming in higher?

Do you believe that this document should've been presented to the board of directors so the board of directors could've reviewed it?

**MR. K. MARSHALL:** It's very difficult to say, Counsellor. I mean it's – personally, me, I would've liked to have seen it, yes.

**MR. LEARMONTH:** That's what I'm talking about, you.

**MR. K. MARSHALL:** Yes. Yes, I would've liked to have seen it, but I prefer to see more information than less. But proper governance would dictate that, no, because it was not a finalized, stressed, fully documented, fully tested set of assumptions that, no, it wouldn't go to the board at that point in time. But me, personally, yeah, sure, I would've liked to have seen it.

**MR. LEARMONTH:** So you're saying then that you don't think that this is a document that was prepared through a lot of work from project controls department. It showed a huge – a big increase in the capital costs and you, as a director, are saying now that you don't think that this document should've been shown to the board in or about July 2013. Is that what you are saying?

**MR. K. MARSHALL:** What I said is from a governance –

**MR. LEARMONTH:** Well, do you think it should've been?

**MR. K. MARSHALL:** Personally, yes.

**MR. LEARMONTH:** Okay. Well, I'm just asking about –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – personally.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. You can only speak for yourself.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Because you're a little more definitive in your interview then you are today. You said, for example, on page 11 of your transcript that: We never saw that $7-billion figure.

**MR. K. MARSHALL:** No, I said that we didn't.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** I don't recall –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – ever seeing that $7-billion figure.

**MR. LEARMONTH:** On page 12 of your transcript you said: It's the first time I've seen it. And that's when I referred to it in the Grant Thornton –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – report at your interview on February 3. Correct?

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** Yeah.

And on page 82 and 83 of your transcript you said: The board should've been aware of the $7 billion. Now, you don't seem to be saying that now.

**MR. K. MARSHALL:** Well, because, again, since my interview I've been asked to review Dr. Holburn's testimony with respect to proper board governance. And as Dr. Holburn said, sometimes trying to provide too much information to the board is as difficult as providing too little information to the board.

And I can tell you that as a board member we were provided copious amounts of information and from a questioning perspective, you know, I can't – I cannot say that because it was done in question and not necessarily in discussion and not necessarily in written form and presentation format, that we didn't have a broad-ranging discussion with respect to the risks.

But as I did say just then in testimony, which matches my testimony from February, that I would like to have seen this document because I personally like to see more information rather than less. That's just me, as I consider it in light of best governance practice. And, again, having had the experience at Rogers that I've had is that all of the management documentation does not go the board, it goes in pretty succinct fashion and when it's fully stressed.

**MR. LEARMONTH:** Now, I'm not talking about Rogers, I'm talking about your – when you served as a –

**MR. K. MARSHALL:** I understand.

**MR. LEARMONTH:** – director of Nalcor. So there's no point talking about Nalcor.

**MR. K. MARSHALL:** I understand.

**MR. LEARMONTH:** I'm asking you some pretty straightforward questions –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – and I don't think you're answering them. But –

**MR. K. MARSHALL:** Oh no, I'm trying to answer.

**MR. LEARMONTH:** Well, at page 82 of your transcript – and I can read it out to you. I'll just read it out to you so you understand what you said, because what you're saying now is a little bit different from that.

On page 82, the question – okay: Financial close. The communication of that to the executive was – email Paul Harrington to Gilbert Bennett, July 22, 2013. Here is the deck that has been produced for you and Ed. An excerpt from the presentation was we are forecasting the FFC – that's the forecast final cost – to be $7 billion which is 12 per cent beyond the DG3. Exposure – if mitigations are successful, FFC would be reduced to $6.8 billion.

The question is: Now, I'm suggesting to you, Mr. Marshall, that that information should've been provided to the board. There may have been some explanation or some qualification, but do you agree with me?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Your answer: Sure.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. Now, you didn't say that earlier, you had made some qualification that you personally think it should've been, but …

So are you changing your evidence?

**MR. K. MARSHALL:** I – you asked me whether I personally think it should have been reviewed and I said, yes.

**MR. LEARMONTH:** No, but then you qualified it and you said: I'm not sure whether it should – that would be my personal position, but I'm not sure whether it should've been sent to the board.

**MR. K. MARSHALL:** Because I'm qualifying it based on the evidence that I was asked to review in preparation for today with respect to what Dr. Holburn had recommended is best practice.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** So my feeling, as a board member at the time, this should have been discussed with the board. Yes, I have not seen this document – we had not seen this document. And, again, I would think you'd have to ask the management team as to why it wasn't presented to the board because from my perspective it would be purely speculative and hypothetical, but I agree with you. Yes.

**MR. LEARMONTH:** No, no, no. No, no. Don't – no, look, it's not – I'm asking you for your views. Other people can –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – speak for themselves, okay?

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** So you say here in the question: Now, I'm suggesting to you, Mr. Marshall, that the – that information should have been provided to the board. There may have been some questions or some qualifications, but do you agree with me? Your answer: Sure.

So you're saying you're sure that it should have been provided to the board. Later on, on page 82, at the bottom you say: Yeah, so the board should have been aware of that. Yeah. You're not saying you, as an individual director, you're saying the board. Now, you seem to be saying something different.

**MR. K. MARSHALL:** I'm not saying anything different.

**MR. LEARMONTH:** Oh, you're not? Okay.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** So you agree –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – that the board should have received this document. And why do you think the board should have received this document in July 2013?

**MR. K. MARSHALL:** Because it would have presented a fuller reflection – and, again, of some of the risks and some of the cost elements with respect to the project. The board, again, did a lot of things in discussion and discussed the risks and the elements. When we spoke in preliminary, this was fairly late in the test – in the interview period as opposed to fairly early here today, and we had been through the previous discussion with respect to the 6.5 and whether or not that was aware at the board level or not.

So, why should we have seen it? Again, personal opinion, I would like to have seen it because I like more detail rather than less and like to know the risks associated therein. Whether or not those risks are real, whether or not those risks are fully vetted, explained, fleshed out and detailed, they can all be qualified in discussion.

But, as a – and I have to make sure that you understand – as a rule, I do not feel that management presentations to the CEO should go to the board. This one is with respect to that $7-billion element. You know, do I feel that something was withheld from the board? No, I can't say that. Again, I was a board member at the time, not the chair. Did I have a sense that this was withheld? No. Do I feel –

**MR. LEARMONTH:** Well, if it wasn't withheld, why didn't you receive it?

**MR. K. MARSHALL:** I'm suggesting to you –

**MR. LEARMONTH:** No, but if you have – you're saying that it wasn't withheld. If you didn't receive it – if the board didn't receive it, then it was withheld. Because it existed.

**MR. K. MARSHALL:** It – the –

**MR. LEARMONTH:** What are you saying?

**MR. K. MARSHALL:** The question becomes – it's a matter of funnelling the information to the board that is relevant to the decision-making necessities, the timelines, the constraints with respect to the board. What I said is – I would like to have seen it, as a board member, based on the way that I operate as a board member and –

**MR. LEARMONTH:** And you said the board would like to have seen it, too – should have seen it.

**MR. K. MARSHALL:** That's my impression.

**MR. LEARMONTH:** Yes.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Well –

**MR. K. MARSHALL:** Because it represented a risk –

**MR. LEARMONTH:** Okay. Well, how do you say it wasn't withheld if – you know, this is very simple stuff. If a document exists, and you feel that the board should have received the document, and the board didn't receive the document, then it follows basic logic, common sense that it was withheld.

**MR. K. MARSHALL:** Whether or not there was –

**MR. LEARMONTH:** Do you agree?

**MR. K. MARSHALL:** Well –

**MR. LEARMONTH:** Do you agree or not?

**MR. K. MARSHALL:** Depends on your definition of withheld – if it was something that was –

**MR. LEARMONTH:** Well, you used the word. What did you mean by it?

**MR. K. MARSHALL:** I meant something that was – let's look at this document; no, that can't go to the board because the board shouldn't see that. That's – it's not something nefarious. It's what is the necessary information to go to the board, and we have all of this sea of information as I explained to you – a 400-page set of documents.

**MR. LEARMONTH:** Mm-hmm.

**MR. K. MARSHALL:** We were working with a public figure of 6.2. We were discussing a 6.5. We were – the CEO and the management team were pressed with making sure that the bids were negotiated as strenuously as they possibly could. There was estimates that were in there from SNC that had to be fleshed out considerably due to productivity and assumption issues.

So I don't think that there was anything nefarious, let's say – put it that way. You're asking me for my opinion in hindsight, and hindsight is perfect vision. You're asking me for my opinion as to whether there was anything (inaudible) –

**MR. LEARMONTH:** I didn't ask you that.

**MR. K. MARSHALL:** No, no, no, no, no. I'm saying –

**MR. LEARMONTH:** You're making this up.

**MR. K. MARSHALL:** – I'm giving you my definition.

**MR. LEARMONTH:** I didn't ask you that question.

**MR. K. MARSHALL:** I'm telling you my definition of withheld; you asked me to do that.

**MR. LEARMONTH:** Well, then do that.

**MR. K. MARSHALL:** Yeah, and I'm saying there was nothing in my mind nefarious in withholding this information from the board. I think it was a matter of bringing to the board the necessary documentation and what was known and firm and final was the discussions of the 6.2, which had been released publicly, and the discussions around – and I can't tell you exactly the dates with respect to when the discussion of the 6.5 started, but we were aware of the 6.5 with some puts and takes to that 6.5 –

**MR. LEARMONTH:** I'm not talking –

**MR. K. MARSHALL:** – which actually brought it back –

**MR. LEARMONTH:** – about the 6.5.

**MR. K. MARSHALL:** I understand.

**MR. LEARMONTH:** I'm talking about 7 –

**MR. K. MARSHALL:** I understand.

**MR. LEARMONTH:** – let's stick to the –

**MR. K. MARSHALL:** I understand.

**MR. LEARMONTH:** – subject that I'm asking you about.

**MR. K. MARSHALL:** I understand.

**MR. LEARMONTH:** Well, we got lots of time to talk about all the other matters.

**MR. K. MARSHALL:** Okay.

**MR. LEARMONTH:** I'm talking about this $7-billion report. We'll take lots of time, whatever you need, to discuss about the other things.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** So let's just confine your answers – please confine your answers to the specific question. And we were talking about – I think you agreed that this document was in existence, that it could've been provided to the board but it wasn't, and I questioned you as to how you could say that it wasn't withheld, and you went into this long explanation. Just answer that question: why – on what basis do you say it wasn't withheld if management had it and didn't present it to the board when you've acknowledged they should have.

**MR. K. MARSHALL:** They didn't deem it was necessary for the board. That's all I can say. I mean, I'm – again –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – I'm having to assume and presuppose what they were thinking when they sent information to the board. That's –

**MR. LEARMONTH:** Well, withheld doesn't mean – I mean, I – you're suggesting that the word withheld carries with it a connotation that it was nefarious?

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** That's what you're saying?

**MR. K. MARSHALL:** Yeah.

No, no, that was my thinking when I said it, so …

**MR. LEARMONTH:** Yeah.

Well, to start off with, you don't know the reason it wasn't presented to the board.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** So you're just speculating, aren't you?

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah, okay, that's fair enough.

You see, at this time, you've got – the government and the board of directors are facing a very serious question, and you've got a report that suggests that subject to possible mitigation of $200 million, that the cost has jumped from 6.2 to 7. And I don't understand the – what I would describe as the sort of semi-qualified comments you're making.

And I suggest that the board of directors' reaction, if it was doing its job properly, should had been the same as Julia Mullaley's, which was she was angry and very unhappy when she saw this $7-billion figure, that it wasn't presented to government. So there seems to be quite a different attitude expressed by Ms. Mullaley and you, as a director, and I want to ask you were you angry when you found out about this $7-billion report that you didn't know about until you read it at the February 3, 2019, interview? Were you angry?

**MR. K. MARSHALL:** I can't say that I was angry at this report, per se, but as I testified in Phase 1, we were very angry at the – a number of requests that came forward for incremental costs, because it was of significant concern to us.

As I said, there was two elements with respect to those costs, and we'll get into later. The one was you know labour productivity issues, and one was just some enhancements. And we more amenable to one versus than the other. But I cannot say that I was angry at this document based on my history of a board's responsibility and the information that a board receives, that if this was not necessarily fully fleshed out, fully baked, that it was a presentation by the project team that had not been fully stressed, and even with that $200 million down to 6.8, I cannot say because I was not in the room to deliberate as to whether or not that was fully stressed and fully tested and fully baked. So, I was not as angry as Ms. Mullaley may have been – and I did not see her testimony, which you referenced –

**MR. LEARMONTH:** Well, she said she was angry.

**MR. K. MARSHALL:** Yeah, but I did not see it, so I don't know how angry – I mean, I was not –

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** – I cannot qualify myself as angry when I saw this because I felt, as a board member at the time, that we – any questions that we had with respect to the risks and the costs and the upper end and the mitigation measures and what contracts were left to negotiate and how we could potentially mitigate those – it was a very open, free flowing – there was never any sense that any question or any information was not being provided or available to the board, so –

**MR. LEARMONTH:** Well, if you didn't get the $7-billion figure, how can you say what you just said –?

**MR. K. MARSHALL:** We didn't get the $7-billion figure in this format; I can't say we didn't get the $7-billion figure as a range of worst case scenarios in discussion format.

So, again, was this presented to the board? As I said to you, in my recollection, no. In terms of the discussion around the risks of the project, I can't say that it wasn't discussed, but (inaudible).

**MR. LEARMONTH:** Well, you did at your interview.

**MR. K. MARSHALL:** No, I –

**MR. LEARMONTH:** Page 11 of your interview, you said: Yeah, but we never saw that $7-billion figure.

**MR. K. MARSHALL:** That's what I said, I did not see it. I just said that. I agreed with you. We did not see –

**MR. LEARMONTH:** So you weren't aware of it.

**MR. K. MARSHALL:** – that $7-billion figure.

What I said is in our discussion at the board, if we asked questions: What is the upper-end estimate here? There could have been things like eight, nine, $10 billion that were discussed at the time if all went the wrong way. So, we did not see this. Would I have liked to have seen it? Yes – to answer your question in simple format. Why was it not presented to the board? I have no idea. You'd have to ask others as to why it was not presented to the board.

**MR. LEARMONTH:** Yeah.

Well, anyway, you weren't aware – if your evidence is correct at your – the interview, you said that it was the first time you saw it –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – when – at the interview, and you'd never – and you said: We never saw that $7-billion figure –

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** – at page 11. And page 83, you had no recollection of the 7 billion. So, you know, I think you're –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Are you attempting to change the evidence –

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** – you gave in your interview?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** No.

Okay. So we know that you believe that this document should have been presented to –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – the board and that it wasn't. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** But at – when you read on February 3, 2019, when you were interviewed and you first became aware of this $7-billion figure, were you angry?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** Why not?

**MR. K. MARSHALL:** As I explained, because it was an internal document presented to the CEO and that had to be fleshed. Did I feel that we were getting – and, again, whether or not I was angry, I'm not sure if that's a – and I won't say a relevant question 'cause, obviously, any question you ask is a relevant question. Was I concerned? Yes. Was I angry? I can't say I was angry. What I – we had discussed, again –

**MR. LEARMONTH:** Okay.

So you can just say, I wasn't angry.

**MR. K. MARSHALL:** Mmm.

**MR. LEARMONTH:** Okay.

But you were concerned, right?

**MR. K. MARSHALL:** Yes, yes.

**MR. LEARMONTH:** Because it's something that you –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – should – that the board –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – should have been provided.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay. So you were concerned.

**MR. K. MARSHALL:** Yep.

**MR. LEARMONTH:** Yeah.

And you were surprised, too, weren't you?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Because you didn't know about it. Okay, that's fine.

Now, I just wanted to ask you, too. You made some comment about, like, you know, the figures have to be firm and so on and – before you consider them. Did you say something like that?

**MR. K. MARSHALL:** Well, I did. And I can tell you that in one of the documents – and I can't remember if it was in this – I don't think it was in this 7 billion, it might've been in another, and there was a figure to the tune of – one of the line items was 680 or $700 million and it was bracketed with best guess. And, you know, if a document comes to the board with the words best guess in it, you know, I can tell you that's pretty – that's pretty limp and that's – that would be –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – something that I'd expect in a management document for – up for consideration.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** But if that went to Gerry Shortall, as the chair of the audit committee, it would've been challenged and sent back in a Minnesota second.

So, again, these management documents are designed to stimulate discussion, to be pressed, to be firmed up, to be nailed down before they get to the board because the process to approve and to get to a new AFE was a lengthy process and involved not just the Nalcor board, but the boards of the subsidiary organizations that had to approve those sub-AFEs that rolled up to the master.

**MR. LEARMONTH:** Yeah, but I – you know, I don't really understand what you're saying because, to be very clear, as we go through the – the least reliable of the documents were the AFEs. They were completely unreliable. The final forecast costs were much more reliable.

I'll give you an example. You started off with an – at 6.2 billion, then you went to 6.99, then 7.65 and on and on to 9.1. So if you're suggesting that you considered the AFEs to be reliable when compared to the forecast final cost, I suggest that you're misunderstanding the whole issue.

**MR. K. MARSHALL:** Well, I have to take a couple of exceptions. Number one is, in a question about five minutes ago you suggested if the board was doing its job, and I can tell you unequivocally and unqualified the board takes exception, and I can speak for the board on that –

**MR. LEARMONTH:** Well, I –

**MR. K. MARSHALL:** – Barry –

**MR. LEARMONTH:** I'm not –

**MR. K. MARSHALL:** – 'cause I think –

**MR. LEARMONTH:** I'm not concerned –

**MR. K. MARSHALL:** – we were doing our job.

**MR. LEARMONTH:** – if you take exception. I'll –

**MR. K. MARSHALL:** Second –

**MR. LEARMONTH:** You can take exception if you want –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – but I'm putting facts to you –

**MR. K. MARSHALL:** Yeah, second of all, when you reference the AFEs being inconsistent, and it was the practice to approve AFEs on a known – with more definition, and as things were getting – moving along, that they were known with more clarity and definition.

You raise the issue of the AFE getting to 9.1, we were long gone by the time it got to 9.1, and you'll have to ask others how it – how and why and when it got to 9.1

**MR. LEARMONTH:** Well, talk about the ones when you were there –

**MR. K. MARSHALL:** So –

**MR. LEARMONTH:** – 6.99.

**MR. K. MARSHALL:** – when we left the board, the FFC at 7.7 was matching the AFE at 7.7.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** And so through the process, those AFEs – as we were in early stages with respect to the 6.2 and the 6.99 and the 7.7, the FFCs did not match the AFEs because construction was either ongoing or in a heavy negotiation mode.

So, again, I was a board member for part of it, I was the chair for part of it, but I cannot say that those FFCs should, in all instance, equal the AFEs. Because what you're suggesting is that: Yes, they were accurate and they proved to be true, but if you go down through the line items, I don't think, necessarily, that all elements of those line items – it might be, yes, they, ultimately, came out to be more similar. And by the time we left the board they were exactly alike at 7.7, and we recognized, as a board, that we had one big issue to resolve thereafter.

**MR. LEARMONTH:** Well, we'll get into the – yes, but I'm – I didn't say that they were accurate. I said that they were more accurate than the AFEs. That if you consider the FFCs, and I'll look at some of them, and then you consider the AFEs, the AFEs were – which were intended to be cost to the end of construction – were terribly unreliable, and that's why they kept on going up, up and up.

Just before we get into more details here, I'll give you an example of what I'm talking about. This July 2013 final forecast cost, right?

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Okay.

This was in July 2013. The revision – first revision to the 6.2 AFE was in June 2014. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And what was it – what was the revised figure?

**MR. K. MARSHALL:** 6.99.

**MR. LEARMONTH:** Pretty close, isn't it?

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** Now, whether or not all the line items matched up, I –

**MR. LEARMONTH:** No, but I'm talking about it in a –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – global sense –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – it's pretty close.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah.

And I think you're mischaracterizing what these forecast final costs are. These are documents that are prepared by a skilled group of people who get together, and they meet –

**MR. K. MARSHALL:** Oh, yeah.

**MR. LEARMONTH:** – and they debate, and they spend a lot of time on it. And so, you know, I think you're dismissing them.

**MR. K. MARSHALL:** Not in the least.

**MR. LEARMONTH:** They're –

**MR. K. MARSHALL:** Not in the least.

**MR. LEARMONTH:** – important documents that, as it – not just because, eventually, they turned out to be true, but they're important documents that took considerable time to prepare. And, you know, if they're not something that one can put some reliance on, why do they bother going to the cost and taking the time to prepare them?

**MR. K. MARSHALL:** Once –

**MR. LEARMONTH:** I mean, what's the point of them?

**MR. K. MARSHALL:** So, once again, if you're suggesting that I felt that the preparation and the professionalism behind the FFCs was something less than it was, I would suggest that is an incorrect assertion, that I, as a board member – and I would suggest to you that all the other board members recognized the level of diligence and effort and preparation that went into them.

But I would also say the function of – and again – referencing back to Dr. Holburn's testimony – the function on how it works is that the project management team would put together and do all of their excellent, professional work and bring it to the VP and to the CEO, and they would debate and they would negotiate and they would figure out what the next steps were to make sure that that was as stressed and tested as possible, and then it goes to the board. Information gets funnelled to the board.

Now, as I said to you – and it's funny; I used the same word, I think, in my testimony back in February as Dr. Holburn used in his testimony, and that is, you don't know what you don't know. And if that did not get to us in that particular form, then how were we know that it existed? I don't know. But information –

**MR. LEARMONTH:** I agree 100 per cent.

**MR. K. MARSHALL:** – by its very nature –

**MR. LEARMONTH:** I agree 100 per cent.

**MR. K. MARSHALL:** The information, by its nature, to get to the board, has to be funnelled in order to facilitate because –

**MR. LEARMONTH:** Right.

**MR. K. MARSHALL:** – this Inquiry has a real, you know, benefit and, I guess, a luxury in being able to focus exclusively on Muskrat Falls. The board did not have that luxury. The board had CF(L)Co. The board had Hydro-Québec. The board had Bull Arm. The board had oil and gas. The board had investments in seismic activity. The board had a whole series of other things to get through.

So, when I suggested to you, earlier, that that November 2014 board book had over 400 pages – when you include the redactions that were noted in the version that was sent to me – there was a sea of information that was going to the board on a regular basis, and harkening back to Dr. Holburn's testimony, the over-provision of information can be as dangerous as the under-provision.

**MR. LEARMONTH:** Yeah. But this is critical information.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Please don't – are you trying to say that this was not relevant –

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** – material information?

**MR. K. MARSHALL:** No, no, no, no. I was responding to –

**MR. LEARMONTH:** I think everyone agrees that –

**MR. K. MARSHALL:** – your indication –

**MR. LEARMONTH:** – there has to be a limit.

**MR. K. MARSHALL:** I was responding to your indication that I was minimizing the work that went into the FFC –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – and I did not.

**MR. LEARMONTH:** Yeah. But –

**THE COMMISSIONER:** Just if I can, just for a second. I think what we need to think about here is the fact that aside from Nalcor having other lines of business, this particular line of business involved billions of dollars –

**MR. K. MARSHALL:** Oh, we –

**THE COMMISSIONER:** – an expenditure of $6-billion dollars. Like, it would seem to me – just listening to this discourse this morning, it would seem to me that if you were dealing with a $6-billion expenditure on behalf of the province, it would be one of those things that would likely make the top of the list.

**MR. K. MARSHALL:** It was the top of the list, trust me –

**THE COMMISSIONER:** Yeah.

**MR. K. MARSHALL:** – at all occasions.

**THE COMMISSIONER:** All right.

**MR. LEARMONTH:** Well, if it was at the top – it was at the top of the list?

**MR. K. MARSHALL:** It was the top of the list.

**MR. LEARMONTH:** Yeah. But you didn't get the document so you couldn't – you weren't aware, right?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** Yeah. But – well, anyway we've already acknowledged that you should have received it, so I'll leave that point.

Now, if we turn to the Grant Thornton report, Mr. Marshall, that's tab 13, Exhibit P-01677.

And you've reviewed this now, you hadn't reviewed it in detail at the interview, but you've reviewed it now I take it?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Now, on page 12, lines 1 to 10, there's reference to the fact that in April 2013, Nalcor management knew that the $368-billion [sp. million] tactical contingency was gone; it was blown. It didn't exist. It was taken out by contract CH0007, the Astaldi contract.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Do you want to take your time to read page 1 to 10 –

**MR. K. MARSHALL:** Okay.

**MR. LEARMONTH:** – line 1 to 10, page 12.

**MR. K. MARSHALL:** Yeah, I read it last night and again this morning.

**MR. LEARMONTH:** Yeah.

Now, were you – was the board made aware of that fact, that the $368-billion [sp. million] contingency had been exhausted?

**MR. K. MARSHALL:** In those specific terms, I cannot recall.

**MR. LEARMONTH:** Well, don't you think that's an important piece –

**MR. K. MARSHALL:** Well –

**MR. LEARMONTH:** – of information that the board – that, you know, you should have recalled if you had been told about it? I mean, that's a serious position, isn't it?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** You got contracts coming in; you got a budget, and it's an obvious sign that there's something wrong with the estimates. I would think that this information is critical information, that in that early stage, that the $368-million tactical reserve is blown. It's gone.

**MR. K. MARSHALL:** The information that the cost risk was there, that the contingency amount was exhausted, again, as I said to you, I do not feel that it was put in those words. The other element is that, again, exceptionally early in the process, we had not finalized those contracts, and there was still some activity which had to happen to try to firm that up. So this is, again, looking back in hindsight that this is the presumption or the conclusion that Grant Thornton had reached. It's presented in a different format than we would've seen it at the time, and in the context of, you know, 200 contracts coming in from 80 countries around the world and having to get finalized and nailed down and sharpened, this is bringing it all together after the fact and assuming that those contracts were finalized.

So was it presented to the board that, sorry, we have no contingency left? No, I don't think that that discussion was held. Should it have been? Again, I can only speculate and go back and hypothesize with respect to what should have been done. You'd have to ask those that presented it.

**MR. LEARMONTH:** Well, no, no I don't think so. I want you to – see, you're dodging.

**MR. K. MARSHALL:** I'm not dodging at all.

**MR. LEARMONTH:** What I'm asking you is whether this information should have been presented to the board of directors by management. Yes or no. And if yes, that's fine. If no, tell me why not.

**MR. K. MARSHALL:** This information – and again, I think you're referring to –

**MR. LEARMONTH:** The information – just to make it easier for you – that the – by April 2013 – the sentence beginning on line 6: "… Nalcor should have known that by April 2013 when the … amount was exhausted."

Now, assuming Nalcor knew or ought to have known by April 2013 that the $368-million contingency had been exhausted – you can assume that – do you not agree that the board should've been informed of this fact?

**MR. K. MARSHALL:** The –

**MR. LEARMONTH:** Yes or no?

**MR. K. MARSHALL:** Yeah, no, I'm trying to get context. So –

**MR. LEARMONTH:** Well, what do you need context for to answer that question?

**MR. K. MARSHALL:** Not every question is a yes-or-no answer, and I'd like to – I just want to turn back one page to see – you're referring to the table that's on page 11, I trust. And that's – the information that you're drawing your numbers from is coming from the table on page 11.

**MR. LEARMONTH:** Well, you take your time to look at whatever you want.

**MR. K. MARSHALL:** But the value that's darkened out here, the totals up to 1.972. My point is I do not know, and you will have to ask others rather than me. I was a board member at that point in time and, again, I have to ask whether others should be called with respect to this, from the board at the time, because I seem to be the representative here for a lot of people, covering a broad span, and I was the chair for a brief period of that time.

But the value that is blacked out in here, I do not know, with definitiveness, how much of those were nailed-down, finalized contract estimates that had yet to be hardened and sharpened. So you would have to ask the management team, you would have to ask those that were responsible for those contracts, not necessarily the board.

If that risk was there at that point in time, then I will agree with you. Yes –

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** – that risk should have been presented to the board, subject to us finalizing, negotiating and hardening these contracts.

**MR. LEARMONTH:** Thank you very much.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** I'm not suggesting that the reporting of this information would be just a simple line – it's exhausted. There could be and there would be discussion. But it should have been – I suggest, and I think you've agreed, it should have been disclosed to you. If there was an explanation that probably softened the effect of that, that's fine.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** But anyway, you do agree –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – that in –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – April 2013 –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – that the board should have been informed of that. Okay.

Now if we turn to page 19, please, Mr. Marshall. This is a summary – beginning of page 19 of this Exhibit P-01677, it's a summary of the various forecast final cost documents that we referred to earlier. For example, under line 13, we've got a summary of the July 2013, and the – just PMT comments July – well, that's a document, we've just said, and then –

**MR. K. MARSHALL:** Sorry, you're on page?

**MR. LEARMONTH:** Nineteen.

**MR. K. MARSHALL:** Okay.

**MR. LEARMONTH:** Under line 13.

**MR. K. MARSHALL:** Oh, yes. Okay.

**MR. LEARMONTH:** Okay. July 2013 –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** "*July 2013 Final Forecast*" – final – "*Cost deck* …." That's what we referred to earlier, and this was presented to the management. Excerpt from Presentation, "*We are forecasting the FFC to be ~$7.0B which is 12% beyond the DG3* …." That was in the earlier document, this is just a summary of that earlier document, Mr. Marshall?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

And then: "*Exposure if mitigations are successful … FFC would be reduced to* …."

So we got, you know, 12 per cent beyond DG3. I would suggest that that would jump out at the board of directors if they saw that in this early stage.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Do you agree?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. Okay.

Then if we turn the page, please. Page 20, and I just want to let you know that this isn't just one report. This is the beginning, the July 2013 report is the beginning of a series of reports. Did you get the August 2013 forecast final cost?

**MR. K. MARSHALL:** I can't recall specifically, and again, I can only reference what was presented. And we went through in great detail back in February, the board decks and the information that I was asked to review. I did – reviewed them for that preliminary testimony and with the – all of the information that was there, did not review them again prior to this testimony, but if they were not in that documentation, I can only presume that the FFC documents were not shown to the board, but I can say that Mr. Harrington was in some board meetings, to discuss costs and risks. And again, cannot recall specifically whether or not those figures were mentioned. And I think Mr. Harrington testified last week, whether or not he would've or wouldn't have presented that to the board.

**MR. LEARMONTH:** Yeah. But once again, just like the July 2013, do you –

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** – agree that the August 2013 forecast final cost, and then the September 2013 forecast final cost should've been presented to the board –

**MR. K. MARSHALL:** Um.

**MR. LEARMONTH: –** for a review and discussion?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yes, okay. Thank you very much.

Because we know that – just to go back to Phase 1 when you testified, all the board members – you, Mr. Styles, Mr. Clift and Mr. Shortall – all expressed surprise that before sanction, that you did not receive the Westney report, which indicated – suggested $497 billion in management reserve – million dollars in management reserve, strategic risk and a P1 schedule, you were all surprised by that.

Do you remember that, remember saying that?

**MR. K. MARSHALL:** Um.
**MR. LEARMONTH:** I'll show you it in your transcript –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – if you don't.

**MR. K. MARSHALL:** No. Yes, and I will also, again, reference the fact that when I reviewed a lot of information for this, that I think that there's a lot of – and again, during the Phase 1 testimony, there was a lot of internal management decks that hadn't been seen by the board, that were stress-testing and delivering worst-case scenarios under difficult assumptions, and then they get presented to the board and said: Should you have seen this.

**MR. LEARMONTH:** That's exactly the questions, yes.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** So, I do not feel, necessarily, that those documents should automatically be presented to the board. However, I would say that the summary and the risk element, the resultant potential implications should be discussed with the board. But the purpose of those documents, if it was to ensure that management was aware of the worst-case scenario that – the full detail, that report necessarily shouldn't go to the board, but the resultant risks should be made aware to the board. Yes.

**MR. LEARMONTH:** Well, then you're changing your evidence from what –

**MR. K. MARSHALL:** I'd have to go back and see –

**MR. LEARMONTH:** – what you said in Phase 1.

**MR. K. MARSHALL:** – I'd have to go back and see the evidence, but I –

**MR. LEARMONTH:** – I'll show it to you later. But, you expressed surprise and you said –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – the report showing the P1 schedule and the 497 strategic risk –

**MR. K. MARSHALL:** If –

**MR. LEARMONTH:** –should've been shown to the board.

**MR. K. MARSHALL:** – if the P1 schedule was –

**MR. LEARMONTH:** Mmm.

**MR. K. MARSHALL:** – something that was prepared as to, here is what you are likely to expect, if that P1 schedule was prepared under the context of let's really make this a horrible winter, let's take the shift down to a number of days, let's assume productivity is low, let's assume we have problems with this, that and the other thing, then I would say today, and I probably would've said then that: No, that full document shouldn't go to the board.

Again, getting back to the volume and the sea of information that the board was asked to review. And there wasn't just – again, at the time that this was being discussed, there would've been more board members as well. In that period of time, I think there would've been Al Hawkins, Erin Breen and some others.

**MR. LEARMONTH:** So, I don't wanna dwell on Phase 1, but I suggest that what you just said is a little bit different from the sworn evidence you gave sitting in that very chair, in Phase 1.

**MR. K. MARSHALL:** I don't think so.

**MR. LEARMONTH:** Oh, I'll show you later. Okay?

**MR. K. MARSHALL:** Okay.

**MR. LEARMONTH:** Now, Mr. Marshall, do you acknowledge that prior to financial close, there were two meetings of the board of directors, one on November 14 and one on November 15?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And that – do you agree that, you know, most of the main business and document presentation was done on November 14?

**MR. K. MARSHALL:** Again, if that's what I testified in – from going through the …

**MR. LEARMONTH:** No. I don't think you testified, I'm just asking whether that's –

**MR. K. MARSHALL:** I'd have to see –

**MR. LEARMONTH:** – your recollection?

**MR. K. MARSHALL:** – I'd have to see. Are they in here in the Exhibits?

**MR. LEARMONTH:** Okay. Well, the –

**MR. K. MARSHALL:** The November 14 was the one that –

**MR. LEARMONTH:** – the November –

**MR. K. MARSHALL:** – I went through last night, the 400 page –

**MR. LEARMONTH:** Now, the –

**MR. K. MARSHALL:** – yes.

**MR. LEARMONTH:** – November 14 minutes is at tab 6 of your documents, P-00681, and there's documentation I can refer you to if necessary, but this meeting was – started at one and I don't – it was scheduled to end at 5 p.m.

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** Do you remember that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

And Ed Martin wasn't present, right? He was – he went – came by telephone?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay. This is November 14.

And then if we go – turn to the next tab, that's tab 7, P-00682. Do you agree that that's the – those are the minutes of the November 15 meeting, which began at 8:30 and I think ended around 9?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

So you knowledge those. Okay.

**MR. K. MARSHALL:** So – yeah, just to clarify, if I could. As I look at these, the November 14 meeting was – I guess it was a bit of a special meeting. And it was – I don't actually recall being in the Bay d'Espoir conference room for the meeting, but it says I was there in person; unless Mr. Martin was there at the Bay d'Espoir conference.

**MR. LEARMONTH:** No, I think he was in Grand Falls by telephone –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – November 14.

**MR. K. MARSHALL:** But this was a meeting of, as you see, by present – by invitation. We had a number of board members: Rick Daw, for example, Chris Loomis, Des Whelan, Chris Woodford, a number of others that were there representing the boards of Muskrat Falls, LIL, and LTL [sp. LITL], which were coming about as a result of the finance.

So it was a bit of a – it was not a typical Nalcor board meeting. It was designed to show the overall requirements for governance, regulation requirements of the federal government, FLG. So it was more to talk about the governance, the structure, the requirements therein. So it was very detailed and maybe not necessarily as financial oriented as was required the following day, which is when we approved the financing agreements as a Nalcor board.

**MR. LEARMONTH:** Well, I think it's – you got it reversed. I think November 14 is where all the documents were presented.

**MR. K. MARSHALL:** It was a –

**MR. LEARMONTH:** November 15 was a short meeting.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah, okay.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** So I've got that right, do I?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

And do you agree that at this time there were four new directors on the board –

**MR. K. MARSHALL:** On –?

**MR. LEARMONTH:** – of Nalcor?

**MR. K. MARSHALL:** No.

Four new directors?

**MR. LEARMONTH:** Four new directors.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** Newly appointed directors. That's the information we have.

**MR. K. MARSHALL:** Four newly appointed directors?

**MR. LEARMONTH:** Yeah. At the November 14, 15 meeting.

**MR. K. MARSHALL:** Present in person: Terry Styles, Leo Abbass, Al Hawkins, Ken Marshall, Gerry Shortall. They were all members before.

Absent: Erin Breen, Tom Clift. They were members before.

Present by telephone: Ed Martin.

**MR. LEARMONTH:** Okay.

Well, okay, now, who –

**MR. K. MARSHALL:** So, who – I'm not sure –

**MR. LEARMONTH:** – (inaudible).

**MR. K. MARSHALL:** – who you're referring to –

**MR. LEARMONTH:** (Inaudible) correction, that –

**MR. K. MARSHALL:** – the 4th of November.

**MR. LEARMONTH:** – four new board members had been appointed.

**MR. K. MARSHALL:** Not to Nalcor, but to the subsidiary –

**MR. LEARMONTH:** But wasn't Erin Breen appointed around that time?

**MR. K. MARSHALL:** No, she was well before that, I think.

**MR. LEARMONTH:** Okay.

Anyway, if you could turn to tab 4, Exhibit P-02531.

**MR. K. MARSHALL:** Tab 4 – it was tab which, sorry?

**MR. LEARMONTH:** Tab 4, please. P-02531.

**MR. K. MARSHALL:** P-02531, yes.

**MR. LEARMONTH:** Do you have that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Now, this is an email from Auburn Warren to Ed Martin and copied to Derrick Sturge. Board deck, November 13, 2013.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Board briefing. Mr. Warren says: "Hi Ed, Attached please find the current draft of the board presentation for your review and feedback."

Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Now, if you turn to page 13, in the top right-hand corner, not the bottom one. The top right-hand corner.

**MR. K. MARSHALL:** Page 13?

**MR. LEARMONTH:** Yes. This number –

**MR. K. MARSHALL:** Okay.

**MR. LEARMONTH:** It says: "Update with final model data."

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Now, you see the – there's a reference to the 6.5.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Do you see that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Then, if you turn, Mr. Marshall, to page 46 of the document, there's another reference to the 6.5.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And there's – this – the total length of this document is 120 pages, isn't it?

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Am I right?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** I got – yeah.

**MR. LEARMONTH:** 120. Okay.

Then if you go back just to – and I'll explain the relevance of this later – page 3 of this document, this is "Outstanding Review Items."

Do you see that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

So we've got 120 pages, and there's two references that I showed you anyway to the 6.5. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Now, next, please, go to tab 5, which is Exhibit P-02533. Do you have that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

This is an email from Ed Martin on the same day as the earlier; Ed Martin to Derrick Sturge. "Just to confirm, I assume this is the deck to the board you and I have been emailing back and forth about, with the 2 slides we were discussing removed?

Do you see that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

And then if you turn to the end of this, we'll see that it's 117 pages. Correct?

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Okay.

Now, just go back to the exhibit that I referred you to earlier, at your tab 4, P-02531. Do you see that?

**MR. K. MARSHALL:** (Inaudible.)

**MR. LEARMONTH:** Okay.

Once again, that's 120 pages, right? So there are 3 pages in the difference.

**MR. K. MARSHALL:** Yeah, I know. I went through it last night and I had to find the pages myself.

**MR. LEARMONTH:** Okay.

Well, anyway, I just want for the record to show –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – the pages that were missing were page 3, this one: "Outstanding Review Items." Right?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And then page 13, which is a reference to the 6.5. Right?

**MR. K. MARSHALL:** (Inaudible.)

**MR. LEARMONTH:** And then page 46 –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH**: – which is a reference to the 6.5. Those are the three pages that were removed. Okay?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Now, do you know why – now Mr. – I can show you the references if you want, and I'd be happy to do that.

Mr. Martin instructed Mr. Sturge to remove those two slides dealing with the 6.5 reference.

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** You aware of that?

**MR. K. MARSHALL:** I was when I read this.

**MR. LEARMONTH:** Yeah. But Mr. Martin directed Mr. Sturge to do it.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Okay.

Do you know why?

**MR. K. MARSHALL:** Again, I was not the Chair. I can only – so I don't have direct discussion with respect to why, but as I said in my preliminary testimony, the discussion of 6.5 was pretty clear with the board that we had been discussing that 6.5 number as a real possibility –

or as the real number, I should say, as we headed into financial close.

And, again, first of all, you'll have to ask Mr. Martin as to why. Because I don't why as a board member; I don't know why. We don't see a draft version of the board deck and then the final version. So you'd have to ask Mr. Martin. But I can tell you quite clearly that the 6.5 was discussed. The 6.2 was still the publicly released number that was out in the public and that we had bringing in all of the boards, the subsidiary boards that were tied to the financing agreements and the federal loan guarantee was trying to be sure that we were focused on the core elements from a governance perspective, the requirements perspective.

But as I recall, the 6.5 was discussed – either at that meeting or with the Nalcor board – and there were offsets with the 6.5 which effectively still brought it to 6.2. It's – again, you'd have to as Mr. Martin as to why they were removed or why he instructed them to be removed. I wasn't party to that.

**MR. LEARMONTH:** Okay. Well, you're saying the 6.5 was discussed.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** When?

**MR. K. MARSHALL:** Through the late fall of 2013 as we were –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – heading into financial close.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** I said that in my testimony back in –

**MR. LEARMONTH:** You can't give a date, right? You weren't able to give a date.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** You don't know.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** So, the late fall, sometime before the end of 2013?

**MR. K. MARSHALL:** Certainly, this period of time, prior to financial close, we had discussed the 6.5. And, again, the 6.5, came with it, through the federal loan guarantee, an incremental $300-million benefit over and above what we had previously anticipated from the federal loan guarantee as a result of the sharpening of the lender's rates and the impact of the guarantee.

So, it effectively brought it back down to 6.2. But from a communication perspective, the 6.2 was the number that was still out in the public. So, again, as – and I went back through my discussion with you from February 3, I think it was, last night, and I was pretty clear that I recall – but not specific with respect to what meeting – that 6.5. And, in fact, I would offer my commentary because as I was reviewing documentation back in January, as I explained – sorry, back in – for the February appearance –

**MR. LEARMONTH:** Interview.

**MR. K. MARSHALL:** The interview.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** As I explained at the time, I was a little bit – and, again, I was quizzical with respect to: Wait a minute, we're going from 6.2 to 6.99, but I recall a 6.5. And I contacted one of my former board members, Gerry Shortall, who was the chair of the Audit Committee, and – just to say: Gerry, am I missing something here? Because as I'm reviewing the documentation in our formal board minutes that the 6.2 jumped to 6.99, but I recall something about the 6.5 and that we had actually discussed the 6.5.

And so it wasn't – I was just trying to, again, not seeking evidence from my – or consulting people with respect to my evidence. But he did indicate to me, quite clearly, that: No, no, we discussed the 6.5 in a couple of those meetings prior to the FLG close because it was known, but it was offset by the – and again, it was clearer in his memory than in mine, but not specific with respect to the meeting minutes or the meeting presentations.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** So I can't tell you which meeting it was discussed, but it was certainly prior to the federal loan guarantee.

**MR. LEARMONTH:** Okay, well, do you have any idea why Mr. Martin directed Mr. Sturge – who was very uncomfortable with this by the way. Mr. Sturge was. He didn't think it was right and he said so when he testified.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Do you have any knowledge, or can you offer any comment, as to what would motivate Mr. Martin to remove two slides –

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** – the only two slides referring to the 6.5 on November – for the November 14, 2013, meeting?

**MR. K. MARSHALL:** No, I do not.

**MR. LEARMONTH:** Okay.

Does it bewilder you?

**MR. K. MARSHALL:** It would bewilder me if, in fact, the 6.5 wasn't discussed with the board and there was an offset of that $300 million. So it's – it would – and again, I think during Phase 1, we testified that sometimes you had to make sure that the information that was in writing, documented and in the minutes was for commercial sensitivity and for proper timing of release of information to the public, was – it might've been discussed as opposed to presented?

So, it would bewilder me if the 6.5 wasn't discussed with the board. It doesn't bewilder me because of the fact that the 6.2 was still the publicly released information. And even though that this was effectively a net 6.2, it still changed the capital cost to 6.5.

So, again, you'd have to ask Mr. Martin as to why it was removed. It didn't bewilder me, and again, Mr. Styles was the chair; whether or not he had discussions with Mr. Martin, I don't know. I was a board member at the time. You could ask other board members, but the fact that –

**MR. LEARMONTH:** I'm asking you.

**MR. K. MARSHALL:** Yeah, no, the fact that it was discussed with the board, and knowing that there was a story around the 6.5 still becoming 6.2 with the interest benefit, I did not feel that it was withheld and kind of understood. But again, I didn't know that it was in the deck to begin with, but it wouldn't have been uncommon, for example, to present something – these documents that are presented and were in our iPad decks, if we were on iPad at that point in time, that there would be a paper-based something to come for discussion at the board and then taken back at the end of that meeting to make sure that there were no copies left around because it – if wasn't out in the public yet.

It would have bewildered me, as I – to clarify – if, in fact, it wasn't discussed with the board. But it concerned me less because it was discussed with the board.

**MR. LEARMONTH:** But you don't know when.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** No.

Well, I put to you that when – the 6.5 we know is a figure that was used for the – for financial close, right? 6.531, we know that's a figure. It's in a deck; it's going to a board of directors meeting on November 14. I suggest to you it's very suspicious as to why those decks would be intentionally removed, especially if there was an intention to discuss the 6.5 at the meeting. Do you agree with me?

**MR. K. MARSHALL:** Not necessarily, no. I –

**MR. LEARMONTH:** Okay. Well, why not?

**MR. K. MARSHALL:** Because, as I said, if the 6.2 was the public document that was out there, and now you're presenting something which shows 6.5, even though there's a story to bring it back to 6.3 with the additional benefits, there is still a risk that there's a gotcha. We had a whole series of new boards that had to be presented, appointed and socialized with respect to the costs and the issues.

But I don't necessarily agree – and again, getting back to our earlier testimony – that it was, I guess, anything other than trying to protect the confidentiality of information, the ongoing series of negotiations and the ability to make sure it's properly communicated in a timely fashion to the public.

**MR. LEARMONTH:** Yeah, but all the directors have signed confidentiality agreements. Are you suggesting –?

**MR. K. MARSHALL:** Absolutely.

**MR. LEARMONTH:** Are you suggesting –

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** – that there's an issue – a legitimate issue that I can't tell this information or give this information to the board of directors because it might be leaked?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** Well, what are you saying then?

**MR. K. MARSHALL:** I'm –

**MR. LEARMONTH:** I think that –

**MR. K. MARSHALL:** I'm suggesting that at that meeting, there was a whole series of new directors for this was their first time, so to –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – subject them to that would have been difficult, but –

**MR. LEARMONTH:** Why?

**MR. K. MARSHALL:** – again, you'll have to ask Mr. Martin.

**MR. LEARMONTH:** Why would it be difficult to subject to that information, to simply say: It's not 6.2 anymore; it's 6.5. Why would that be – it's such a simple point.

**MR. K. MARSHALL:** Our understanding was it was 6.5, but it was effectively still 6.2 because of the interest rate benefit that was –

**MR. LEARMONTH:** Why would you reduce the capital cost estimate by a realization of a saving in interest? The interest is not included in the 6.2 –

**MR. K. MARSHALL:** I know.

**MR. LEARMONTH:** So why –

**MR. K. MARSHALL:** You'll have to ask Mr. Martin that question –

**MR. LEARMONTH:** Oh, no, but –

**MR. K. MARSHALL:** I can't, because I wasn't –

**MR. LEARMONTH:** – you've said that twice.

**MR. K. MARSHALL:** – part of the discussion to remove it; I wasn't part of the decision to remove it –

**MR. LEARMONTH:** But –

**MR. K. MARSHALL:** – so I can't –

**MR. LEARMONTH:** – does that make sense to you that if the project cost is 6.2 plus, say, I think it was 1.2 in financing, that when you get a reduction of $300 million in the financing, that you don't take it off the interest amount of 1.2, you take it off the base estimate. What's the logic in that?

**MR. K. MARSHALL:** You'll have to ask Mr. Martin.

**MR. LEARMONTH:** Well, what's your understanding of the logic, because you've referred to that twice?

**MR. K. MARSHALL:** My – no – my logic –

**MR. LEARMONTH:** How does that line up?

**MR. K. MARSHALL:** – was that you have to carefully time and execute the release of new cost information to the public. And, again, that's where I was – that's where I validated my question to say: Where was the 6.5 from a public communication perspective? And that would've been between Mr. Martin and the premier or the minister at the time in terms of when that information would've been released. Ultimately –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – it got to the 6.99.

**MR. LEARMONTH:** Yeah. But, what does that have to do with communicating the information to the board of directors?

**MR. K. MARSHALL:** As I said to you, I would have been concerned if it wasn't communicated to the board. I recall that it was communicated to the board in verbal form or possibly – and, again, not definitively – in a sheet that was taken back. That was – and that's fairly common on any board I've ever served in for sensitive – commercially sensitive information.

**MR. LEARMONTH:** But you're speculating, aren't you? You don't have any recollection of that?

**MR. K. MARSHALL:** No, I'm not speculating. I'm telling you that I recall and I validated it with a fellow board member, who has laser-like precision in these matters, that the $6.5 billion was discussed before financial close. And this would've been just before financial close.

**MR. LEARMONTH:** Yeah. Well, you didn't – well, okay – well, you didn't say that quite in that way at your interview, but anyway …

Let's go – let's turn to – do you agree that the – by the way that the $300 million is a material, important piece of information that the board should be aware of?

**MR. K. MARSHALL:** Yes, and I would also suggest that the board was aware of it.

**MR. LEARMONTH:** Okay.

Was the board informed of it at the November 14 meeting?

**MR. K. MARSHALL:** Somewhere around that period of time, yes.

**MR. LEARMONTH:** Okay.

Well, just have a look at the minutes of the meeting, and that's at tab 6, P-00681.

**MR. K. MARSHALL:** Yep.

**MR. LEARMONTH:** Can you just flip through that and see if you can find any reference to the $300 million increase?

**MR. K. MARSHALL:** No. And, again, getting back to my earlier comments that – and also comments from Phase 1 that minutes sometimes have to be – ensure that they are focused on the decision-making that happens and the discussion that goes around them, but also sensitive to what information has already been released and the timing of information to be released.

So, two things: Again, I remind you, I was a board member. I'm being asked here now today to speak as if I was the chair through all of this period and not necessarily just as –

**MR. LEARMONTH:** No, no, no.

**MR. K. MARSHALL:** – board member.

**MR. LEARMONTH:** Mr. Marshall, I've told you that before –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – I know that you weren't the chair –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – and I'm asking you to speak based on your sole –

**MR. K. MARSHALL:** Knowing –

**MR. LEARMONTH:** – your own recollection –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – as a director.

**MR. K. MARSHALL:** Knowing the – over my 12-year period with the board and reviewing minutes from prior to that, there's always sensitive information that is not necessarily – the discussion is not fully – the minutes are not fully reflective of the discussion if there is sensitive information that hasn't been fully released to the public but it will be done. Just like our in camera sessions are not minuted, as an example, but there are – there's information that, if it's not decision-oriented, didn't make it to the minutes.

So does it surprise me that it's not there? No, because the information that was out in the public, at that point in time, was 6.2, but there was discussion around the 6.5, the $300 million, was an additional element that had to be considered. There were benefits surrounding the federal loan guarantee over and above what we had earlier estimated to be and the board was comfortable that those benefits effectively, while not directly, but effectively mitigated that risk of the $300 million. The board – and again, I know that there's been, just because I've been here for the last 10 days and I've seen some of the testimony and the issues around the $300 million discussion.

But there was, I guess, a comfort level at the board, (a), that it was discussed, (b), that there was a mitigation and a benefit from the federal loan guarantee and there was confusion around who in the province was aware of the $300 million and who wasn't, but there was evidence, I think, that indicated that some were and some claimed that they were not and that the federal government was advised. Regardless, the intent was to head in and to make sure that we could get to financial close for the $5 billion and the benefits that it brought to the project and to the interest rate therein.

**MR. LEARMONTH:** Okay. So are you saying that there was an issue, in your mind anyway, that that this – a full and frank disclosure could not be made to the board of directors and recorded in the minutes because of commercial sensitivity?

**MR. K. MARSHALL:** Well, that's just my impression, that's not necessarily – I wasn't involved in that decision.

**MR. LEARMONTH:** Does that make any sense to you that the board of directors wouldn't have this important information and that they would record it in the minutes?

**MR. K. MARSHALL:** What I said is that the board did have this information –

**MR. LEARMONTH:** But you don't know –

**MR. K. MARSHALL:** – it's just not recorded in the minutes – it's just not recorded in the minutes.

**MR. LEARMONTH:** No. And you don't know why it isn't recorded in the minutes?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** I suggest it because it wasn't discussed.

**MR. K. MARSHALL:** It's an incorrect – that's an incorrect suggestion

**MR. LEARMONTH:** Okay. What do you base that statement on that I just made an incorrect statement?

**MR. K. MARSHALL:** As I indicated

**MR. LEARMONTH:** Do you have any notes?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** No.

**MR. K. MARSHALL:** I have my memory and I have my discussion with my fellow board member, and I only contacted one. I did not contact others because I'm trying to respect the rules of the Commission with respect to not discussing evidence with others. And I would suggest you can call other board members and their memory may be a little more foggy or a little more clear than mine, but I can recall us discussing that 6.5 and the benefits therein.

I cannot say to you with absolute certainty that it was at this November 14 meeting or it was at the November 15 meeting, but these were the meetings held prior to financial close and we were aware of them prior to financial close. So, I would take exception to a suggestion that the reason they are not in the minutes is because they weren't discussed.

**MR. LEARMONTH:** Oh, I'm going to make that suggestion and I will explain it to you.

**MR. K. MARSHALL:** No, but I'd have to say that I don't agree with that suggestion.

**MR. LEARMONTH:** Okay. Well, can we just listen to some information that I am going to give you on that?

**MR. K. MARSHALL:** Yep.

**MR. LEARMONTH:** Derrick Sturge, the CFO, attended these meetings, okay? And he was uncomfortable about the fact that the two slides had been removed. He felt uncomfortable about that. He didn't think that was right, all right? He went to the November 14 meeting and he took notes, and there is no mention of the 300-million-dollar increase in its notes – in his notes.

And I put it to him when he testified that because you are uncomfortable with this, Mr. Sturge, isn't it true that if there had been a mention of the 300, you would have been very happy that it had been discussed and that you definitely would have made a reference to it in his notes, and he agreed with that. He said that – and he also said that – well, after confirming that he didn't agree with the removal of the 300 – of the decks. That if the $300 million had been mentioned he would've recorded it in his notes, and there's nothing in the notes and there's nothing in the minutes.

**MR. K. MARSHALL:** I –

**MR. LEARMONTH:** So you say – you know, Mr. Sturge has documents on this; you don't have any. So how do you say with confidence that the suggestion that it wasn't discussed at the meeting was incorrect?

**MR. K. MARSHALL:** As I said to you, you can call others and –

**MR. LEARMONTH:** No, I'm asking you.

**MR. K. MARSHALL:** No, you can – but you're asking me as to whether or not I'm a less credible witness than Mr. Sturge because I don't have notes in that regard.

**MR. LEARMONTH:** I didn't ask you that.

**MR. K. MARSHALL:** And –

**MR. LEARMONTH:** I didn't ask you that.

**MR. K. MARSHALL:** – I wasn't here for Mr. Sturge's commentary –

**MR. LEARMONTH:** Well –

**MR. K. MARSHALL:** – I cannot speak – the only thing that I heard from Mr. Sturge's commentary is that he felt out of the loop, and I can tell you that I never saw that as a board member. I also think that Mr. Sturge is in a difficult position – with all due respect to him – that he's got to walk back in and continue to do his job today and referencing back to previous administration in this document – in this project.

But all I can suggest to you is that me as a board member – which I semi-validated with another board member who was chair of the Audit Committee and who has the memory for numbers like I've never seen before – is that that $300 million was discussed with the board. Whether or not we had any notes, again, I didn't take many notes at the meeting and if I did they would've been on my iPad or turned back in with my board documents at the time because these things piled up.

So you can cite Mr. Sturge's testimony to me all you want, I can't necessarily say that I have the same recollection. If Mr. Sturge had an issue with respect to removing that, then I would also suggest to you that from a governance perspective – and Mr. Sturge was well aware – that we developed whistle-blower legislation for areas whereby people felt if they were uncomfortable being asked to do things, that there was either a procedure that was not yet put in place or a procedure that he had worked with the Governance Committee to make sure that it was well aware that he could have raised that suggestion and it would've gone for appropriate investigation and validation.

**MR. LEARMONTH:** Yeah. But – okay, that's fine.

But getting back to the point that – about Mr. Sturge's notes – you recall what I – and I didn't make up what I said to you. I took this evidence – this from Mr. Sturge's evidence, so it's correct. You can take that to the bank, what I've told you. He did not have it in his notes and he took notes. You didn't take any notes. As far as I know, Mr. Shortall didn't take any notes.

Don't you believe that a written record, when we're going back this far, is important evidence in determining certain questions?

**MR. K. MARSHALL:** Certainly.

**MR. LEARMONTH:** Yeah. And you don't have any.

**MR. K. MARSHALL:** But I also, I think – I swore on a Bible here this morning; that sworn testimony is also important evidence to make sure that this gets addressed properly as well.

**MR. LEARMONTH:** Yeah, okay.

Well, if you want to go back to the fact that you're sworn – so are you swearing that – under oath – that the 6.5 figure was mentioned at the November 14, 2013, meeting or the November 2015? Just state your evidence.

**MR. K. MARSHALL:** I am swearing that the $6.5-million figure as – a billion-dollar figure, as I indicated in our preliminary interview back in February, that it was socialized and communicated with the board prior to the financial close – at meetings prior to financial close.

Can I say that it was done at the November 14 meeting? No, I cannot.

**MR. LEARMONTH:** Can you say it was done at the November 15?

**MR. K. MARSHALL:** No, I can say it was done in meetings prior to financial close on more than one occasion. That is my recollection. And that is my very clear recollection, which I validated with Mr. Shortall, so …

**MR. LEARMONTH:** Well – and you're saying that when it was communicated to the board, it was communicated in a way that suggested that it was offset by a $300-million savings because of the federal loan guarantee?

**MR. K. MARSHALL:** No, it was communicated by way of saying it's $6.5 billion; that's not been released to the public yet. That's got to be fully socialized and the process for preparing that information with respect to – within Nalcor, communication to the shareholder and alignment with government had to be done, as all project cost changes were, and there was mitigation that came along with the benefits of getting to the federal loan guarantee of the $300 million.

And as I recall – in the ideal world, Counsellor – the ideal world would've seen sanction, financial close and Emera approval all happen at the same time, and this all would've come together in one fell swoop. The reality is – to what happened is, as you know, and we've testified, that sanction came in December of 2012, the Emera approval came within and then the environmental assessment approval came in just days before this and we had a meeting on that, and then we got to financial close; regrettably that they were separated. But through that period, there was that benefit.

And the other thing is that through the negotiations with Emera, there was also seemed to be an increase in potential excess sales revenue that was also – I can't recall the exact figure, but there was also incremental benefit as a result of the arrangement with Emera in terms of getting to that Emera approval by the time we got to financial close. So – but that was more – excess sales was always considered to be something that could be used for rate mitigation or could be used to soften the impact of the project itself, and that didn't necessarily go toward this. That $300 million was direct benefit to the project cost and to the project itself.

**MR. LEARMONTH:** Okay.

Now, the next document I would ask you to look at is tab 8 of your binder, P-00684.

**MR. K. MARSHALL:** That's the minutes of December 18.

**MR. LEARMONTH:** That's correct.

**MR. K. MARSHALL:** Okay.

**MR. LEARMONTH:** Okay. And then we go to page 9.

So this is after financial close, and in paragraph 926, under the heading Lower Churchill, the last sentence says – and "he" is a reference to Mr. Martin – "He reviewed the status with respect to costs and schedule and noted that approximately $4 billion of the budget is committed which reduces the cost risks and that the remaining $2.2 billion has some risk but continues to be managed."

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** So why are we still referring to the 6.2 on December 18.

**MR. K. MARSHALL:** As I said, the 6.5 netted down to effective 6.2, and 6.2 was still the number that was communicated to the public. That again is my assumption. I did not write the minutes.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** I did not approve the minutes.

**MR. LEARMONTH:** Yeah. You're just assuming that, aren't you?

**MR. K. MARSHALL:** Yes. Yes.

**MR. LEARMONTH:** But if you knew the figure was 6.5 at that point, why wouldn't there be some record of that in the minutes?

**MR. K. MARSHALL:** Again, I would only be assuming because it hadn't been communicated to the public and the 6.5 was effectively 6.2.

**MR. LEARMONTH:** Well, it was never communicated to the public, the 6.5.

**MR. K. MARSHALL:** No. As I said to you, that's why I was shocked that we – it got to the 6.99. So that – again, you will have to, I guess through the process of the Commission, establish as to why the 6.5 was never communicated to the public. It became part of the 6.99.

**MR. LEARMONTH:** Yeah.

Now, please turn to tab 15, Exhibit P-04021.

**MR. K. MARSHALL:** That's again December 18.

**MR. LEARMONTH:** Yeah, it's a Nalcor – page 1, Nalcor Energy, 73rd Board of Directors Meeting, so this is the documentation – or some of the documentation, it's not all of it, but it's part of the package you received for the December 18 meeting that I just referred to. Is that correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

And you were in attendance, if you look – well, I don't think you were in attendance at this one actually.

**MR. K. MARSHALL:** The –

**MR. LEARMONTH:** No?

**MR. K. MARSHALL:** It's not there.

**MR. LEARMONTH:** You weren't there?

**MR. K. MARSHALL:** Well, no, the list is not there in terms of who was in attendance –

**MR. LEARMONTH:** Yes, it is. Page 167.

**MR. K. MARSHALL:** 167. Absent. Yeah.

**MR. LEARMONTH:** Yeah. So would you have participated by phone or just –?

**MR. K. MARSHALL:** No, not if I was absent. Somebody would have signed for me if I was absent.

**MR. LEARMONTH:** Okay. Well, anyway. This is the support documents, or part of the support documents for the December 18th meeting. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay. Now, if we turn to page 147 – do you see that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Now, this is the information you were talking about, isn't it? The facilities capital cost – 300 million.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** You referred to the financing –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – excess sales. That's exactly what you were referring to, right?

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** Okay, now, if you – if the board already knew about that before – was informed before financial close – why would there be a deck prepared for the purpose of outlining these figures for the December 18, 2013 meeting, which was after financial close?

**MR. K. MARSHALL:** I think you're asking me a question for which I wasn't in control of. I – so, I can't – I can't explain. I mean, it may have been to make sure that it got to documentation. I'd be – I'd be hypothesizing to indicate why it's there now and not was – not there previously.

**MR. LEARMONTH:** Yeah. Because you raised this point about some sensitivity about putting it in writing. So, if that – if what you said is true – well then why would this be put so clearly in writing, shortly after financial close?

**MR. K. MARSHALL:** You'll have to ask those that authored this document.

**MR. LEARMONTH:** Do you see the point?

**MR. K. MARSHALL:** Absolutely.

**MR. LEARMONTH:** Yeah. Okay. Thank you.

What I'm suggesting to you, Mr. Marshall, is the board was not informed of the 6.5 before financial close. The board was – received this information on December 18 at this meeting and that's why this one – page 147 –

**MR. K. MARSHALL:** Yeah, well –

**MR. LEARMONTH:** – contains all that information.

**MR. K. MARSHALL:** – you can suggest that, but I don't agree with it.

**MR. LEARMONTH:** You don't agree with it? But yet you have no record of when –

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** No. Okay. Fair enough. Now –

**MR. K. MARSHALL:** And again – and again, how would I be aware of the 6.5, as you say, if I wasn't at this meeting?

**MR. LEARMONTH:** (Inaudible.)

**MR. K. MARSHALL:** I didn't miss very many meetings. And this would have been a rarity.

**MR. LEARMONTH:** Well, you would have got the documents for it though. Right?

**MR. K. MARSHALL:** But I was aware of discussion around the 6.5 and I would have been there for the discussion. And I wasn't there at this meeting.

**MR. LEARMONTH:** But you don't know when. You can't tell us when.

**MR. K. MARSHALL:** No, Sir.

**MR. LEARMONTH:** No. Okay.

The next document, Mr. Marshall, is at your tab 9 and it's P-00687.

Now, we know that the – there was a revision to the AFE in late June 2014. Is that correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

And this is a – this document is a minute of the board meetings of June 20. And when I go through it, I don't see any reference to the 6.99 which is imminent. If we go to page 4, it says, "Mr. Bennett reviewed the key changes in cost and revenue components since Project sanction

… and provided … overview of the productivity and performance...”

Since there – this was just a little bit before the revision to 6.99, can you explain why there’s no reference in the minutes to this impending increase?

**MR. K. MARSHALL:** No, other than my previous comments with respect to what was out in the public and if there was work being done to ensure that that was being readied for communication to the public. As we talked about during Phase 1, sometimes the minutes didn’t fully reflect the numbers for sensitivity and public release information.

I signed this. I was acting chair at the time, so.

**MR. LEARMONTH:** Yeah.

So would the reason that there’d be no mention of it be the commercial sensitivity?

**MR. K. MARSHALL:** Commercial sensitivity and ensuring proper process and communication to the public.

**MR. LEARMONTH:** Okay, but why would the commercial sensitivity concern have been apparently ignored at the December 18 meeting where you had these documents showing the $300 million increase?

**MR. K. MARSHALL:** Again, as I indicated, the – I wasn’t at the December 18 meeting. I can’t comment; I was not the author of that document, per se, and it also indicated that there was a plus 300 and a negative 300 and a benefit of 100 from the excess energy sales. So the positioning was not to say: 6.5. The positioning was, here’s the impacts, and guess what, the impacts actually worked out favourably overall. So there was no reference to 6.5 in that document, either.

But, again, the importance – and, you know, to talk to the communications people and to talk to the shareholder – the importance of making sure that communication, the sensitivity around the communication of any new cost estimate was paramount and it was matched or exceeded only by the level of concern and angst around the board table with respect to why these increases were necessary, and why we were having to get to this stage. And the next one after this is when our blood was really starting to boil with respect to these increases.

**MR. LEARMONTH:** But isn’t it up to government to decide what information to release to the public? Not Nalcor.

**MR. K. MARSHALL:** It’s a very –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – again, the CEO was in –

**MR. LEARMONTH:** Mm-hmm.

**MR. K. MARSHALL:** – pretty constant communication with –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – with the minister. So it’s a joint responsibility with respect to that and government does determine, ultimately – if government says –

**MR. LEARMONTH:** Right.

**MR. K. MARSHALL:** – no, stand down, you got to wait. And this was also a period – this was a very tumultuous period from – with respect to government because – and I can’t recall the exact dates, but Premier Dunderdale had resigned in – sometime in the winter or spring. Premier Marshall came in, on an interim basis, and then it was – there was a discussion around Mr. Coleman coming in as premier, and then back to Mr. Marshall –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – and then back to – or Premier Marshall – and then over to Premier Davis. So there was a very tumultuous time from a political perspective and I would say that those premiers, in that short order, were drinking from the proverbial firehose, and public announcements may have been delayed as a result of that. But there were issues that were certainly beyond our control as a Nalcor board and as Nalcor as an organization.

But yes, you're right; the timing of the releases wasn't necessarily controlled by government, but it had to be agreed, coordinated, and planned with government.

**MR. LEARMONTH:** Well, it was controlled by government, because they had the final say.

**MR. K. MARSHALL:** Yes, as shareholder they would.

**MR. LEARMONTH:** Yeah.

So they had control. So anyway, I don't want to belabour this anymore, but I just want to leave this because, you know, the Commissioner will have to know your evidence.

**MR. K. MARSHALL:** Understood.

**MR. LEARMONTH:** Are you saying that there's an issue of commercial sensitivity that has to be taken into account when information is communicated from management to the board of directors?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** It is.

**MR. K. MARSHALL:** Because it's not necessarily risks of the board. There's also – we would get – and again, you can speak with, you know, former secretaries to the board and current secretary to the board, with respect to the number of ATIPP requests that they get for board minutes and information that gets sought.

**MR. LEARMONTH:** But they're not released are they?

**MR. K. MARSHALL:** Pardon me?

**MR. LEARMONTH:** They're not released, are they?

**MR. K. MARSHALL:** I wouldn't know, I haven't been on the board –

**MR. LEARMONTH:** Anyway.

**MR. K. MARSHALL:** – in three and a half years or so.

**MR. LEARMONTH:** Okay.

I just want to make sure that we all understand that you believe that there are situations where management would have information but it would be justified in not communicating this information to the board of directors on the grounds of commercial sensitivity, correct?

**MR. K. MARSHALL:** No, I – no, no, no, no. What I said is, it would be justified in not putting it in the minutes. Not that it's not communicated to the board. It would be – I would fully expect that it's communicated to the board of directors. But I would also at the time – and whether or not that's a recommendation of the Commission – that the minutes more fully reflect the entire level of detail that gets discussed, whether the meetings get recorded, whether the meetings get more fully minuted.

But I can tell you that it's long before my time on the board – and probably to this day, and certainly on other boards that I've been on – is that there's very careful consideration of what goes into minutes because they can get to the public in the wrong context.

And so there's – I guess, if you put everything that's discussed at a board meeting in the minutes, your minutes would be a whole lot longer and, again, you'd have to talk to the current secretary and former secretaries, with respect to the number ATIPP requests that they receive.

**MR. LEARMONTH:** But the – the public doesn't have access to the minutes of the board of directors, especially because Nalcor can claim commercial sensitivities.

**MR. K. MARSHALL:** It's not as simple as that that Nalcor –

**MR. LEARMONTH:** Yes, it is.

**MR. K. MARSHALL:** Well, again, I'm not – they can claim commercial sensitivity, but then it goes to the Privacy Commissioner and then he will rule whether or not that's accurate, inaccurate, and demand that certain things be released.

**MR. LEARMONTH:** But then it's ultimately –

**MR. K. MARSHALL:** So –

**MR. LEARMONTH:** – up to Nalcor, it comes –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – back to Nalcor.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah. So, you know, I just – you know, I'll give you one more opportunity, but I'll put this to you that there's no basis for this suggestion that management – or that the minutes cannot be a fulsome record of important matters discussed because if there's something in the minutes on an important matter, it could somehow go to the public.

I put it to you that that's an illogical position, and do you –

**MR. K. MARSHALL:** I –

**MR. LEARMONTH:** – agree or not?

**MR. K. MARSHALL:** – I can't fully agree. I have to – it's got to be –

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** – carefully considered, put –

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** – it that way.

**MR. LEARMONTH:** Okay. Well, that's your answer and it's in the record. Thank you.

Now if we go to tab 16, please. It's Exhibit –

**MR. K. MARSHALL:** Sixteen?

**MR. LEARMONTH:** Sixteen. P-01831.

Now when's the first time you saw this document? It's a May 23, 2014 Briefing deck presented by project team to CEO $7.27 to $7.5-billion range.

**MR. K. MARSHALL:** Was this a board presentation?

**MR. LEARMONTH:** No, I'm asking you when you first saw it. As far as I know, it wasn't – no, no, as far as I know, it wasn't a board presentation.

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** So you never saw this before you got it from the Commission?

**MR. K. MARSHALL:** Not that I can recall.

**MR. LEARMONTH:** Okay, so this is just a month before the AFE revision to 6.99. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay. Let's turn, please, to page 8. Have you got that?

**MR. K. MARSHALL:** Yup.

**MR. LEARMONTH:** Okay. So, this is: Current situation; Contracts with firm bid price 6.35; Contracts without firm bid price (best estimate). That gets you up to the 6.99, correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And that was, ultimately, the AFE revision. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Next line: Management reserve for short-term requirements 0.28 billion. And then if you look at number (4), the bottom: "Short term covers the period thru early 2016." You see that?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** So, that's – the subtotal there is 7.27, and that says: Management reserve for long-term requirements. Paragraph (5): Not required before 2016, mainly covers increase in owner's team cost – 0.23billion for a total of 7.5 billion. Correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** So you weren't aware of this document before you approved the AFE at 6.99, were you?

**MR. K. MARSHALL:** I don't think so. No.

**MR. LEARMONTH:** Yeah. Because –

**MR. K. MARSHALL:** Again, as we – as we spoke in Phase 1, the process – and it was a board supported process – is to not necessarily convey extensive reserves and contingencies. We would work within them through the process of seeking assistance from the province, with respect to cost overrun. And the principle of communicating this to the public, whether or not it be as a reserve or overall, was discussed very carefully to ensure that the contractors did not see: Oh, there's another $500 million that I can go after.

So, we would have focused on the 6.99, whether or not – and, again, as I indicated, whether or not we saw specifically the 280 million and the 230 million for short- and long-term reserve requests from management, no, I don't think that we saw that. But this would have been a document that would have been presented to the CEO and to the VP, at the time, and then they would've had to firm up and make sure that this was in fact how we wanted to present and get – but the fact that we didn't have contingencies in addition to the 6.99, was not inconsistent with how we did earlier allocations and AFEs.

**MR. LEARMONTH:** Yeah. But you said that the AFE was supposed to be projected cost to the in-service date to the end of the contract.

**MR. K. MARSHALL:** Yes. And –

**MR. LEARMONTH:** Well, if that's the case – if that's the case, and you said that very clearly at least once, on what basis could you not include in the AFE revision 1, these additional figures? Because these are best estimates, one is: Short term covers the period thru early 2016; Not required before 2016 – these are estimates of the projected cost.

So, based on the very clear way you stated your understanding about how AFEs are to cover projected cost to the end, why would it not be proper to include these figures in AFE revision 1?

**MR. K. MARSHALL:** And again, as I indicated –

**MR. LEARMONTH:** But you didn't know about them, I guess. Right?

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** Yeah. Okay. But, okay – once again, do you think that the board should've been –

**MR. K. MARSHALL:** The board –

**MR. LEARMONTH:** – made aware of these numbers?

**MR. K. MARSHALL:** – I would say the board should've been aware of them –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – but I also don't necessarily know if the board would've put them in, because they were, quote unquote, contingencies and subject to attraction by the contractors.

**MR. LEARMONTH:** But you're mixing up a few points, I think, to start off with.

**MR. K. MARSHALL:** That's your impression –

**MR. LEARMONTH:** To start –

**MR. K. MARSHALL:** – that's your like –

**MR. LEARMONTH:** – to start off with, just because the information is communicated to the board or communicated to the government, it doesn't mean that the information has to be released to the public. You seem to miss that point.

**MR. K. MARSHALL:** No. I actually recognize the reality of the level of inspection that was going on and the intensity of this project through the life – and through its continued life of construction on to completion. I think you're, you know, with all due respect, I – you know, I appreciate your comment. But I think you're simplifying the exercise that – oh yes, now we can approve this internally and the public will never see it and the contractors will never see it.

I don't think that that's necessarily –

**MR. LEARMONTH:** No, no, I'm not suggesting –

**MR. K. MARSHALL:** – the case.

**MR. LEARMONTH:** – I'm suggesting that – I'm suggesting that it doesn't follow that the board has to communicate everything to the public. And if the board had seen this, perhaps the board could have said: Well look, we're gonna keep this information, we see a trend here, were concerned about it, we have to notify the government –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – but we're just gonna go with the AFE, for the time being.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** And we'll notify the government of these figures because, you'll agree, there's no such – there's no management reserves, is there?

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** Yeah. So this is money coming from government.

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** So I suggest to you that if you had been provided this – with this information when it was prepared or available in May, that it would've been incumbent on the board of directors to ensure that the Province of Newfoundland was aware of this.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Do you agree?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And because you weren't provided with the information, you were denied an opportunity to do that.

**MR. K. MARSHALL:** Well –

**MR. LEARMONTH:** Is that right?

**MR. K. MARSHALL:** Yeah, if –

**MR. LEARMONTH:** Is that right?

**MR. K. MARSHALL:** If we weren't provided – I mean, again, as I indicated, from the board decks that I reviewed, we weren't provided. Whether or not there was other information that was provided to the board that I'm not in possession of and that you're not in possession of, that was kind of presented at a board meeting and taken back, again, they would be somewhere within Nalcor. But –

**MR. LEARMONTH:** Well –

**MR. K. MARSHALL:** – yes, I would agree with you.

**MR. LEARMONTH:** – we've got all the documents –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – it's not – there's no record of it whatsoever.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** So you'd agree with what I said, right?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** That it would've been incumbent on – that the board ensure that the government is aware –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – of this trend?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Because, Mr. Marshall, when you were interviewed – I mean, I think you said that, look, we're not expecting that management is going to tell us some blue-sky thoughts about the –

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** – possibilities. This is not blue sky, is it?

**MR. K. MARSHALL:** Well –

**MR. LEARMONTH:** This is a management reserved for short-term requirements and a management reserved for long-term requirements. It's still looking out to the future, but it looks like a pretty reliable type of estimate. Do you agree?

**MR. K. MARSHALL:** Yeah. If – well, it looks like it. But, yet again, it would have to go through the typical process that it gets presented to the CEO and the VP, and then it gets stressed to make sure that what can be managed within that 280 and that 230, that gets firmed down.

So I would – yes, I mean, I would still agree with you that if it was presented, then the risks should be there; however, the caveat would be: We still recommend to go with the 6.99 as a public number, acknowledging that the government understood that there was – if there was overruns that they would be –

**MR. LEARMONTH:** Yeah. Well, the government should know –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – that this 6.99, we're going with it, we're departing from our usual procedure –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – we're not going to put the expected cost to the end. This is exactly what we're doing. We're going to go with the 6.99. Well, there's good reasons for it, but we want you to know –

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** – about these things because you're –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – going to be on the hook for this.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Isn't that what should've happened?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

And it was this very document – slide that attracted anger by Julia Mullaley when she testified here. She's the Auditor General now, and at the time she was clerk. And she was very demonstrably passionate about her reaction to the fact that this information was not provided to the government –

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** – on May 2014. Do you agree that her reaction was appropriate?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yes, okay.

Thank you.

**THE COMMISSIONER:** I'm just wondering, it's almost 11:30. Is it a good place to take our break here, Mr. Learmonth?

**MR. LEARMONTH:** That's fine.

**THE COMMISSIONER:** Okay.

We'll take 10 then – 10 minutes.

**MR. K. MARSHALL:** Ten minutes?

**THE COMMISSIONER:** Yeah, 10 minutes.

Thank you.

**CLERK:** All rise.

**Recess**

**CLERK:** All rise.

Please be seated.

**THE COMMISSIONER:** All right.

Mr. Learmonth?

**MR. LEARMONTH:** Okay. Just before we leave this topic, I just wanted to put something to you that I (inaudible). Do you understand that the CEO of Nalcor has the final say on ATIPPA request? That if the Commissioner –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. So what concern could there be about commercial sensitivity, given that fact?

**MR. K. MARSHALL:** It's – and again, I think it's still – he may have the final say, but there's still noise and issues around the Privacy Commissioner ruling that something should be released and then if it's not released, there's – they're taken – and I know from my experience, so I can't speak to present day, but they're taken very seriously.

Again, that, I presume, will be a strong recommendation or position of this Inquiry, because the process of the minute taking predates my involvement with the board, and probably continues to this day. And it's not just necessarily with this board that I've been on but it's very careful ensuring minute taking is – reflects certain sensitivities. So, yes, I understand that the CEO has the final say.

**MR. LEARMONTH:** So I say that there shouldn't be any concern, that you're – the concern that you expressed has no foundation, it's entirely misplaced, given the power of the CEO.

**MR. K. MARSHALL:** I – I wouldn't necessarily agree with that, no. But I think –

**MR. LEARMONTH:** Why not?

**MR. K. MARSHALL:** – 'cause I think there's always got to be – and again, I – my position is: This one might be – or this one is going to be a little bit different because of, as the Commissioner indicated earlier, the extreme cost and public attention and interest in it. But there is still – in any board situation, got to be sensitivity around what goes in the minutes.

But I'm, again, long out of the role. And if it means that there's cameras in the boardroom and everything gets minuted, so be it. But I just think – for a good governance, and a good, proper governance – that as long as there's documentation, sensitivities are recorded, recognized, realized that they could – and certainly be more fulsome and complete. But again, as I said, that predates my time on the board and postdates my time on the board.

**MR. LEARMONTH:** Yeah. Okay.

Exhibit 00012 – excuse me, tab – binder 12, Exhibit P-02549. This is a February 12 Cost and Schedule Update. This is, once again, another document that I don't think you saw until you got these documents from the Commission. Is that correct?

**MR. K. MARSHALL:** Sorry, that was – can you repeat that, please?

**MR. LEARMONTH:** Okay. This document, P-02549, when's the first time you saw it?

**MR. K. MARSHALL:** I can't say. If it was in the board minutes, I would've seen it in the board meeting –

**MR. LEARMONTH:** Well, I –

**MR. K. MARSHALL:** – in that period of time but I –

**MR. LEARMONTH:** – are you suggesting it was in the board minutes?

**MR. K. MARSHALL:** No, I can't recall seeing it –

**MR. LEARMONTH:** You can't.

**MR. K. MARSHALL:** – until I prepared for this.

**MR. LEARMONTH:** Yeah. Well, we have – there's no record that it's in the board minutes, so I'm not suggesting it is. But anyway, this is dated February 12, 2017. So this is, you know, a little more than half a year plus a couple months after the AFE revision. Correct?

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** Okay. So then we go to page 7.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Okay. June 2014, this is a reference to the AFE revision I just referred to: Capital cost updated publicly to 6.99.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** "AFE rev 1 $6.99B for" – okay – "approved … 3 major contracts remaining …." And then – so this is a reference to the fact that it was done publicly.

But then if we go – later in this document, the bottom of page 7: February 2015, "Remaining 3 contracts bids received – total … AFE Rev 2 for $7.49B required to award upcoming contracts."

Do you see how that ties into that sort of triple-barrelled –?

**MR. K. MARSHALL:** The 7.5?

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** See, they're right on, aren't they?

**MR. K. MARSHALL:** I don't know if that's a coincidence or if it's fact, but yeah, they were bang on.

**MR. LEARMONTH:** Well, when coincidence happen –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – repeatedly –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – I think it shows the quality of the work that the project controls team is making. Do you agree?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. And you weren't given the benefit of receiving this document. Is that correct?

**MR. K. MARSHALL:** I don't know if we saw this – I don't think we saw this document. Certainly, there's nothing in the documents that you conveyed to me that indicated that we saw this document. I know that there was a subsequent AFE at 7.65, I think, that we did.

**MR. LEARMONTH:** Yeah.

So why is that the – given the policy of – or the protocol followed by Nalcor of making an AFE for the estimated cost to the end of completion, there seems to be a watering-down of this, as we go along. Is that correct?

**MR. K. MARSHALL:** I guess that's your perception. I think that the AFE process was the – the FFC, as I recall, was an iterative, daily, ongoing set of living, breathing changes that were happening on an ongoing basis. The –

**MR. LEARMONTH:** Okay, just wondering how do you know that? Because you never saw any.

**MR. K. MARSHALL:** No, no, just from discussions around the board –

**MR. LEARMONTH:** You never saw one, did you?

**MR. K. MARSHALL:** No. No.

**MR. LEARMONTH:** So you're guessing as to what was in it.

**MR. K. MARSHALL:** Discussions when we got to the AFE stage.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** And the AFEs were more formal; they were the requirement of the lenders; they were the – like, they were the board-sanctioned approved documents that stemmed from all of the analysis and all of the debate, and were finalized. So there was – I don't know if it was softened, per se. I think the AFEs were more timely and attempted to be more buttoned-down, locked-down with more precise, definitive knowledge. They were then approved by each of the three subsidiary boards and then rolled up with the master AFE, to Nalcor.

So I can't say whether they were softened. I can – I know that that discussion wasn't held at the board. That may have been a perception that you have, but it wasn't a perception of the board. The board dealt with these in pretty serious fashion but, again, didn't see all of the FFCs.

**MR. LEARMONTH:** Yeah. Well, that's what I'm saying. I mean, you –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – can only do with the evidence that –

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** – you have before you.

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** So, I, you know, acknowledge that the board believed that the AFEs that you approved – the revisions – were likely or intended to cover the cost to completion, correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** You did?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

But now with the information you're receiving, do you realize that that was a false assumption, given the contents of the FFCs that you've seen?

**MR. K. MARSHALL:** Only to the extent of the long-standing indication and discussion that we had earlier this morning that the board was supportive that contingencies were not necessarily a big flaming part of the estimates. They were still elements of contingencies therein, but not as large as what management may have suggested that they go – and that was a discussion during Phase 1 and also this morning.

So, yes, management – or the board was of the belief that that was the firm, known costs, but there was also the understanding that some of those contingencies wouldn't have been put in there because there was an understanding that overruns would have been kind of addressed through equity contributions if required.

**MR. LEARMONTH:** Yeah, well, of course you can't – you know, you can't – like, let's say you do one for 6.99. I understand that you can't take it to the bank, that that's going to be the end.

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** But that's the best estimate –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – that can come up to completion –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – based on all the information you have.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And, of course, things can change, it can get worse, it can get better, but the AFE is supposed to be an estimate of the cost to completion –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – or in-service.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

And you believed – the board, as far as you're aware, believed that that's what you're doing. But when you see all these FFCs now, I suggest that that would question – you know, bring into question the – not the correctness but the validity of the assumptions that the board was making with respect to the AFEs going to the end of the costs – end of the project. Do you agree?

**MR. K. MARSHALL:** I still have to ensure that the role of those FFCs being challenged by the CEO and the VP to ensure that they are as tight and as locked down and as not loose, best-guess estimates, that still – process still has to be done before it gets to the board. So –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – I agree, in many respects, that –

**MR. LEARMONTH:** Yes.

**MR. K. MARSHALL:** – they form a link –

**MR. LEARMONTH:** Yes.

**MR. K. MARSHALL:** – but there's still a role of the CEO and the VP before it gets to the AFE to challenge.

**MR. LEARMONTH:** Yeah and I suggest that the proper procedure to have been followed here – and I know we're talking in retrospect – is that the CEO should have brought the FFCs to the board and said, look, we're doing an AFE. Here's the information. I think it's high and the reason I'm recommending a lower number is such and I just want you to be completely in the loop.

Don't you think that would have been a good exercise? Because it doesn't take long –

**MR. K. MARSHALL:** Yeah, no, possibly.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah. Okay, thank you.

Now, if we go to tab 17, that's P-01822. This is Feb 13, 2015, briefing deck which indicated project costs between 7.5 and 7.77.

It says: "This briefing anchored back to the AFE rev 1 June 2014 of $6.99 … however Project management outlook of costs indicated they could rise to $7.5 … Furthermore the contract bids received in Feb 2015 drove that up a further …."

So it – once again, it appears that the project controls were right on – they were right on the money. Do you agree?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

And then the second paragraph says: "AFE rev 2 scope was identified as being enough to cover commitments until mid 2016." Now, the board didn't know that when it approved AFE revised 2, did it? The board believed that that was to cover the cost to the end of construction, in accordance with your policy that you –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yes, I'm correct in that, right?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

Don't you think that information should have been provided to you before you approved the AFE to 6.99? I mean –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yes, okay. You said, yes, did you?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah, okay.

And then next paragraph: "In addition it was clear that the $7.77B was based on certain assumptions, the key item being Astaldi were able to recover" their "schedule and maintain the costs within the fixed cost … (Lmax)." Now, that's an assumption, but you knew in February 2015 that there were serious problems with Astaldi in terms of their performance –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** –in the first year.

**MR. K. MARSHALL:** And that there was – February 2015 was in the middle of a pretty disastrous winter that we were experiencing and that –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – that was affecting their productivity. And the board actually had taken a – the board visited the site in the middle of that winter and experienced first-hand the hazards and the difficulties that they were experiencing.

**MR. LEARMONTH:** Yeah.

But were you aware that in the mind – and Mr. Martin has testified to this or I expect will – that at the end of – in December 2014 Mr. Martin knew very well that Astaldi – because of the Astaldi problems the project was lost – had lost six to nine months. Were you aware of that in –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – February 2015?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay, well, then why wouldn't – I mean, the – a delay of that duration would, obviously, in itself, increase the cost, right? Because not only for the – you know, the cost of money, like, the further you go out, but also the knock-off effect or knock-on effect for other contractors.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** The –

**MR. LEARMONTH:** So if you knew that, why wasn't some type of a provision made in this AFE to reflect that fact? If you knew it, why wouldn't you insist that there be something put in? Just an estimate, it may not be correct –

**MR. K. MARSHALL:** Well, I think –

**MR. LEARMONTH:** – but a reasonable estimate.

**MR. K. MARSHALL:** Yeah, no, I think that the board did have – and, again, when we got to this period there was a lot of heavy angst and concern and – two things; one is that the discussions started around this time or shortly after this time to get to the 7.65 AFE.

With respect to Astaldi, the board never did meet with Astaldi themselves, but we were on site and we saw the issues that they were experiencing. And as we tracked through when we started construction and really started the site, kind of, clearing work, and before we even got to financial close, I think we were into close to a billion dollars. I think it was around $900 million that had been expended up to the time we had gotten to financial close. But then through 2014 Astaldi clearly was off to a slow start.

And the board was very active in monitoring and managing and looking at the expenditures that were incurred to date against the budget, against the target. And while they were lower than what was expected, it was obvious that there was a slower than expected start. And Astaldi was further impacted by the harsh winter of 2014, 2015, it was impacted by some of the personnel that they had on site at the start.

And there was a lot of – again, I wasn't at these meetings but I can recall the discussions at the board table, is that there was still a lot of assurances from Astaldi that they could get this back on track. So even though, you know, their spending might have been only at 25 per cent, as an example – again, they're just illustrative – you know, the percentage of concrete that they had to pour was at – I think I said 16 per cent in my previous testimony.

So there was concern with Astaldi; there was concern with the transmission assets. They were both going slower than expected – a slower ramp-up for a whole host of reasons. But all contractors and all the belief was that this can be brought back on track. And Astaldi felt that and they had, at that point in time, the guarantees that they had placed, the change in work teams that they had put in, the change in management that they had put in. The improvement in productivity that they were starting to see through 2015 was illustrative of that fact.

And, regrettably, the Valard contract, the transmission, managed to really pull the rabbit out of the hat with respect to the slow start that they had in getting things back on track from a movement perspective, but Astaldi could never recover even though, despite their best assurances, despite their parental guarantees, the situation did not correct itself to this – to the extent that we felt and that they felt, quite frankly, as was conveyed to us, would have been appropriate. So how much we would have sought for a kind of a reserve – I know that just either around this time I think that there was discussion of a two-phase AFE and the board said no, no, we have to do this in one phase, you take your lump and we figure out what the firm cost is going to be, and I think that's when the 7.7 came into being for that summer.

**MR. LEARMONTH:** Yeah, but there was nothing in AFE revision 2 for Astaldi – for the delay and perhaps additional costs from Astaldi. And I point out to you that EY, when it did its audit, they had some expert people, they were very critical of Nalcor for not including something for schedule delay based on Astaldi's performance, but you seem to think that it was reasonable not to put in –

**MR. K. MARSHALL:** No, I think – I don't think it was reasonable, I think it was reasonable based on the assurances that Astaldi was providing us as we got into later that year and there was a transition between Premier Davis and then Premier Ball. But as we got into, in and around that time, that's when it got to critical stage – is that up until that point in time Astaldi, to my recollection – and again, as chair not having met with Astaldi, but through my numerous either phone conversations, board meetings, board discussions, in camera sessions and quite serious deliberations around the issue, Astaldi made every representation that they could get this back on track and there was no reason to disbelieve based on the guarantees that they had and the improvements that were being seen.

Then, in and around the time of the transition in government, it became clear that there was a request for more money in order to do this and there was a risk of bankruptcy from Astaldi, and that became the mission critical point.

**MR. LEARMONTH:** So who gave you all this information about Astaldi, Mr. Martin?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** All of it?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And you accepted it?

**MR. K. MARSHALL:** Mr. Martin, Mr. Harrington, Mr. Bennett, like they were the ones who were working with Astaldi on a daily basis.

**MR. LEARMONTH:** Yeah.

Okay, so if we go this Exhibit P-01822, turn to page 25, please. So here we have a statement: AFE revision 2 will suffice until mid-2016 and includes $188 million contingency; cost drivers, AFE revision 1 to AFE 2: 6.99 – but this is like a two-staged or double-barrelled approach, isn't it, to an AFE?

**MR. K. MARSHALL:** Yes

**MR. LEARMONTH:** And you would reject that out of hand, wouldn't you?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** It just – it's an oxymoron, isn't it?

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** It is supposed to be the – to the end of construction.

**MR. K. MARSHALL:** Correct.

**MR. LEARMONTH:** Okay, but anyway ...

I'd like you to turn to tab 19, please, and that's Exhibit P-02290.

**MR. K. MARSHALL:** Sorry, tab 19?

**MR. LEARMONTH:** Please.

This a letter – if you go to page 2, Mr. Marshall, this is a letter from Cassels Brock – Alison Manzer who is the lawyer for Canada, dealing with the federal loan guarantee.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** When was the first time you became aware of the issue that's described in this three-page letter from Ms. Manzer?

**MR. K. MARSHALL:** The issue being – sorry, you'll have to summarize it for me.

**MR. LEARMONTH:** Okay. Well, I'll tell you exactly what happened – I shouldn't say exactly – in a general sense, leave you a flavour for it. The – and this is based on the evidence of Mr. Meaney –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – and to – principally, that the independent engineer required that Nalcor provide, in its monthly cost updates, reasonable estimates of increases and cost. Correct? Okay?

**MR. K. MARSHALL:** Mmm.

**MR. LEARMONTH:** And what Nalcor was doing, instead, was just sticking with the 6.99; they weren't telling Canada about the increases, even though they knew they existed. And then, when the 7.65 revision became known to the independent engineer, the engineer Nik Argirov, and his words were he was very upset because he was being kept in the dark in terms of cost increases, and Nalcor was – were required to provide this information, and he was very upset.

And if you read the letter, you'll see that Ms. Manzer, in a very professional but firm way, is reading the riot act and saying this has to stop and, unless it stops, there's a threat that they probably won't get – the financing will be interrupted. And that's the second-to-last full paragraph on page 3.

So this a very serious situation, and Mr. Meaney acknowledged that in the months leading to October 2015, that Nalcor was providing inaccurate information, on a monthly basis, to the independent engineer. He acknowledged that.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Were you aware of this serious situation?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** Never?

**MR. K. MARSHALL:** No. I don't – I can't recall, no.

**MR. LEARMONTH:** But, I mean, there's – on page 3, the third-to-last paragraph says: "While we recognize this is an extensive agenda, we require that a meeting be set to review these matters on an as soon as possible basis, timely resolution of these matters is necessary to ensure that the cost overrun process, and funding, is suitably undertaken for the required December dates. In addition Canada is concerned that the incidents of delayed reporting of cost overrun build up does not occur in the future, and must have assurances as soon as reasonably possible, around these issues."

And then: "If this cannot be suitably done in this manner, then the Independent Engineer will need to take this into account in their approval of the monthly draws, their reporting of site and related visits …."

This is a pretty stern warning –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – isn't it?

And you never – you were never aware of that?

**MR. K. MARSHALL:** We were – I can't say we were or we weren't. I recall that there were issues around the COREA process. But again, I would have to refer to the board minutes in and around this time.

**MR. LEARMONTH:** Well – but you don't seem to have been –

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** – aware of this?

**MR. K. MARSHALL:** No.

**MR. LEARMONTH:** Don't you think you should've been?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. It's fairly serious, isn't it?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. So you didn't know that the – that Nalcor was providing inaccurate information to the independent engineer in the months leading up to October 2015? Is that what you're saying?

**MR. K. MARSHALL:** If indeed it was providing inaccurate information, no.

**MR. LEARMONTH:** Well, those aren't my words.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** That's what Mr. Meaney said.

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** Yeah. That's a grave situation, isn't it?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Do you agree?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

And in tab 14, it's Exhibit P-02412. This was a – it says – this was prepared by James Meaney, March 19, 2019. It was prepared as a cost update and it records, in summary form, all of the different cost increases. And I know that the board wasn't made aware of these, so I'm not going to go through it because I think we covered that enough. But just for the record I wanted to show this as a statement that Mr. Meaney made; even though it's a draft, he said it was accurate as far as he knew and that Mr. Sturge, I believe, said the same thing.

Now, we touched on this earlier, but I want to go over it again. You testified on here, at the same table, on October 15, 2018, along with the three other directors – Mr. Styles, Mr. Shortall and Mr. Clift – correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And as I told you, I don't think you realize this but I have the transcript if you want to see it, that you – all of you expressed surprise and concern that the Westney report, the risk report done in September 2012 –

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** – and contained the $497-million strategic risk recommendation and the P1 schedule. You expressed surprise and concern that this was not disclosed to you by Mr. Martin.

**MR. K. MARSHALL:** Right.

**MR. LEARMONTH:** Do you remember your evidence on that point?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah. And I've put it correctly, have I?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

And on – I believe it was November 29, your legal counsel, Glenda Best, cross-examined Gilbert Bennett on this point about the non-disclosure. And at page – I'm going to read a couple of excerpts from page 61 of Ms. – of the transcript –

**MR. K. MARSHALL:** So do I have this or –?

**MR. LEARMONTH:** No, you don't.

**MR. K. MARSHALL:** Okay.

**MR. LEARMONTH:** No, I'll read it to you.

**MR. K. MARSHALL:** Because I did not see Mr. Bennett's testimony so I'm going to be listening attentively.

**MR. LEARMONTH:** Well, okay, that's why I want to read it to you –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – so you will understand it. It's not too long. This is on –

**THE COMMISSIONER:** We can give you a copy of it if you – do you – would you prefer to have a copy?

**MR. K. MARSHALL:** No, I'm – I may request a copy after it's read.

**MR. LEARMONTH:** If you – I don't think it's complicated, but if you do –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – wanna look at it, you can.

Ms. Best says in cross-examination of Gilbert Bennett: "So in P-00271 at page 6 – we discussed this and you don't need to bring it up, Madam Clerk – the six principles of corporate core values of Nalcor were listed: Honestly, trust, open communication, respect, dignity and teamwork. And in your testimony you gave examples earlier this week of how those core values were conveyed to the employers and to the management team and to others.

"**MR. BENNETT:** Mm-hmm.

"**MS. G. BEST:** And those core values then, in your opinion, would they be equally applicable to the executive and to the board?" In terms of honesty and so on, and Mr. Bennett said: "Absolutely."

And then Ms. Best said: "And do you feel that the core values were followed by you or by Mr. Martin, if it was his responsibility in his dealings with the board? You know, you had information about significant risk that existed that weren't communicated to the board." So Ms. Best is, on your behalf and the others, raising this point.

Later, on page 62 of the transcript, Ms. Best says: "… then you don't believe or didn't you recognize that it was going to have an effect on their decision-making ability? That if it didn't have an effect at that point in time, down the road it was going to have an effect?" That's the non-disclosure, right?

"**MR. BENNETT:** It may, if those mitigation approaches that we had identified were unsuccessful.

"**MS. G. BEST:** And certainly between DG3 and financial close it was clear that you were not able to mitigate some of the …

"**MR. BENNETT:** Some of those were starting to show up.

"**MS. G. BEST:** Yeah and they were significant ones that were showing up. They weren't small risk, they were significant risk.

"**MR. BENNETT:** They were … in 2013 we were starting to see some of those risks, yes.

"**MS. G. BEST:** … And did you at any point in time realize that these board members were putting their reputations on the line when they were making these decisions that were going to impact all of the people that are in this province?

"**MR. BENNETT:** I think we're all on the same page there."

And then on page 63: "… because they did comment in their testimony about the significant amount of trust they had in you and in the executive of Nalcor and how important it was to them that you were all a skilled group of individuals who were carrying out this project. And I'm not so certain, I guess, with the testimony that we've heard here that that was appropriately placed." This is your lawyer putting this to Mr. Bennett.

And then she goes on to say: "I mean, did you not consider at any point in time that the trust that had been placed in you that you were putting that at risk by some of these decisions or some of these nondisclosures?

"**MR. BENNETT:** I never looked at that as being, sort of, cavalier. We had different analyses with different indications. I had reviewed it carefully. It had been reviewed with our CEO, with Mr. Martin, and from what I heard at the board I thought that that was – that the concept and the issue was being discussed."

So Ms. Best, in a very persuasive manner, raised this point with – of non-disclosure with Mr. Bennett. Do you agree that she did?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** Well, I read the testimony. I had actually not spoken to my counsel before that testimony to discuss that line of questioning. But it's in testimony and it's the first time I've actually heard it or seen it. So, yes, I agree she did.

**MR. LEARMONTH:** And the non-disclosure that we've discussed today and you've acknowledged it – non-disclosure on important items, correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Do you agree that the comments that your counsel so eloquently made when she cross-examined Mr. Bennett applied to the non-disclosure that we have seen from sanction up until April 20, 2016?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

**MR. K. MARSHALL:** And I would – I think I can speak – again, I'm here solo even though representing a number of people, and not just the four who were here back in November, but, you know, 30 or 40 who served on subsidiary boards and others and who were chair at the time of financial close and other periods. But as we indicated – you know, as Dr. Holburn indicated: You don't know what you don't know.

**MR. LEARMONTH:** Mm-hmm.

**MR. K. MARSHALL:** And that's a risk with respect to a board when things get funnelled up. And the board members – and, again, the – you know, the last standing four – myself and Mr. Shortall, Mr. Clift, Mr. Abbass and – you know, we continue to believe that we did place a lot of trust and faith in the management team, because we were, at various points in time, a fairly thin board who had made repeated representations to government to make sure that we were fully staffed, complemented.

We developed a skills matrix, we developed a competency matrix, we developed the board self-evaluations, we developed the whistle-blower legislation so that, you know, incidents like what you referenced earlier with Mr. Sturge and Mr. Bennett and others lower in the organization, would be able to ensure that they could raise concerns or objections if they were being asked to do things that were against the values of the organization.

So we feel proud at serving but we're always at the – having to trust the hired management and the information that they provide to the board because, as you say, we don't know what we don't know.

**MR. LEARMONTH:** Right.

**MR. K. MARSHALL:** Some of those pieces of information are a judgment call with respect to various people who feed that through, and some of those have to be explained through this process in this Commission.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** Some of those I understand, some of those I would prefer to have seen, either as an individual board member or speaking on behalf – as you indicated with the Westney report – for the entire board. I don't – you know, I still would say that, you know, things like, you know, extreme stress tests to indicate what the worst-case scenario is, that full report wouldn't go to the board, but the synopsis and the risk associated therein would go to the board.

So, you know, do we feel like we were a – because, again, I want to make sure that we're left with the impression of the board that was we took our roles seriously, diligently, honestly, fairly in a very hard-working manner. We continued to represent to government to make sure that where we had gaps and vacancies and issues that we had to fill, that we attempted to address that in a professional, timely and consistent manner. And at long last, I guess, back out to September of 2015, there finally seemed to be some movement with respect to making sure that that was going to happen.

So we were persistent, if nothing else, but we were short staffed at the best of times, but we never deemed ourselves or felt that we were incompetent or unqualified for our roles. But did we want additional expertise to make sure that we rounded out things that we felt were missing? Absolutely and we were continuing to be pressing in that regard.

So I appreciate your comment and make sure that, you know, I express the thanks and the value that I have for my fellow board members and the hard work that they put in.

**MR. LEARMONTH:** Okay. Well, thank you for saying that and I'll now end my questioning.

And thank you for coming in and other counsel will have questions for you.

**MR. K. MARSHALL:** Thank you.

**MR. LEARMONTH:** Thank you.

**THE COMMISSIONER:** All right, Province of Newfoundland and Labrador.

**MR. RALPH:** Good day, Mr. Marshall.

**MR. K. MARSHALL:** Good day.

**MR. RALPH:** Nice to talk to you again.

As you know, my name is Peter Ralph and I represent the Government of Newfoundland and Labrador. And I want to speak to you about a fairly precise area and that's regarding your understanding of the final forecast cost at the time of financial close of the federal loan guarantee. And I understand that you've testified this morning that you understand that number to be $6.5 billion.

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** Now, I understand that this was – the change in forecast cost was discussed or brought up by Mr. Bennett in a board hearing and we can find that at P-00684. This is a December 2013 meeting of the board and it's in the minutes.

**THE COMMISSIONER:** Tab 8.

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** And go to page 17. So under other business it said: "Mr. Bennett circulated a presentation on the Lower Churchill Project DG3 estimate compared to the current final forecast cost and advised that the information in the presentation was confidential and commercially sensitive. He noted that project management escalated slightly, environmental costs held their own" and "contingency was reduced by transferring work from smaller contracts to larger contracts where there was greater certainty to gain efficiencies and cost savings but expect that the contingency will be fully used upon completion of the project."

So he's advised the board –

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** – that now you've reduced the contingency.

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** And I understand that money that's been saved there has been transferred to specific scopes.

**MR. K. MARSHALL:** Correct.

**MR. RALPH:** So, at this time, the cost of the project has gone up $300 million. Is that correct?

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** But the contingencies have actually gone down.

**MR. K. MARSHALL:** The – yes, because they're expected to be used up where they've been transferred to other projects. Yes.

**MR. RALPH:** Which is kind of a strange decision.

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** Your costs are going up and your contingencies are going down,

**MR. K. MARSHALL:** Yeah. Well, it is and it isn't. It's – it would seem to be a strange decision, but if you are – if your contracts were more locked down, then your contingencies should go down as you firm up those contracts.

**MR. RALPH:** So, again, on this, perhaps – on obvious points, there's – certain amounts of money has been increased in certain scopes. You've added some money to certain pots. You've taken X number of million dollars from contingencies, you've taken them and you've distributed them within other scopes.

**MR. K. MARSHALL:** Right.

**MR. RALPH:** Is that right?

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** So, in a sense, this seems to be a new baseline.

**MR. K. MARSHALL:** I think that that was the line of questioning earlier with respect to the $6.5 billion, effectively became a new baseline wasn't – why wasn't it communicated as such.

**MR. RALPH:** So you agree that it is a new baseline?

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** Now, if we go now to P-02217.

**THE COMMISSIONER:** And you'll find that one at – 02217, actually, you're going to have to look at that one on your screen.

**MR. K. MARSHALL:** It's not listed here.

**THE COMMISSIONER:** Right, it's on your screen.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** Now, I don't know if you're familiar with this document.

So what's happening here is Mr. Meaney –

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** – is sending some documents to, I guess, the document handler at the law firm they're dealing with. And he's stating: Now, here's a couple of documents. Access needs to be given to Canada, Cassels Brock, but don't provide access to Newfoundland, BLG and Faskens. So you understand what's happening here?

**MR. K. MARSHALL:** Yeah, but I saw this yesterday, I think it was, or Wednesday when I was reviewing with my lawyer. But I understand what's happening but I have no idea why it's happening.

**MR. RALPH:** Fair enough.

So if we could look at page number 2, so in the left-hand column, this is DG3. OCB is operating budget, I believe. So the total is 6.202 and the contingency is $367 million.

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** And, now, as of the 19th of November 2013, we're operating only with $182 million in contingency.

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** So they've – you've taken out $184 million in contingencies and transferred those to scopes – that money. That's correct, isn't it?

**MR. K. MARSHALL:** It would seem to be, but I wasn't a recipient –

**MR. RALPH:** No.

**MR. K. MARSHALL:** – or an author –

**MR. RALPH:** Fair enough.

**MR. K. MARSHALL:** – of this document.

**MR. RALPH:** But that money is gone somewhere.

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** Now, I would suggest that this is the kind of decision that should be made by the board. You have now reduced basically in half – or more than half – the amount of contingency that you have in the budget.

**MR. K. MARSHALL:** I would say I would agree with you, but it would depend on how much of those changed numbers up top were – did they move from 60 per cent to 80 per cent guaranteed fixed and firm? And if they have, then you can probably reduce your contingency.

**MR. RALPH:** Fair enough, but I still think my point holds true, which is if that's the case, it still should be the board deciding on the level of risk that should be carried on the project.

**MR. K. MARSHALL:** Yes and, you know, this was, as we indicated earlier in testimony, the change in the capital cost from a board perspective. And, again, that would be one area where whether or not the consideration of the $300-million incremental interest savings as a result of financial close was enabled to be factored in here, that was comforting to the board to ensure they were more looking at – effectively we were still at 6.2.

**MR. RALPH:** Appreciate that.

Perhaps now we can go to page 3.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** And this is a spreadsheet. It's kind of hard to – I've got copies here if you – if it –

**MR. K. MARSHALL:** No, that's good. They got it sized here so I can see it.

**MR. RALPH:** And I think what this spreadsheet does, it provides an explanation of how Nalcor got to the 6.531 number.

**MR. K. MARSHALL:** Right.

**MR. RALPH:** So in this third column called package title, there's 17 rows. And go down right down to the 17th.

**MR. K. MARSHALL:** Mm-hmm.

**MR. RALPH:** And these are – you probably recognize most of these – construction of North and South Dam –

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** – excavation work. So we've got 17 contracts and then the 18th row here, which isn't numbered, is called balance of scope.

Now, if we could go to P-02230 and page 5.

**MR. K. MARSHALL:** P-02230. I don't know if I –

**MR. RALPH:** Probably don't have it.

**MR. K. MARSHALL:** – have that one either but –

**THE COMMISSIONER:** Well, it's going on your screen.

**MR. RALPH:** Page 5.

So what we have here is something of a description of what's happening in the first through 17 rows and the 18th row. So this is an email from Mr. Harrington who also did the spreadsheet.

**MR. K. MARSHALL:** Right.

**MR. RALPH:** And he says: "We know we have approx 2/3rds of the total Project estimate firmed up as completed contracts" –

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** – "delivered Po's or firm priced executed contracts or LNTP's. The net effect of this is a cost increase of ˜5% which results in the $6.531B – so there is $2.2B left to firm up with contracts and PO's – the cost to complete as far as we know today is $6.531B and we believe that the greatest budget hits are already behind us and even if in the worst case the 5% increase in cap cost we have seen continues to be experienced for the next $2.2B (which we do not expect at this time) the $6.531 would not exceed $6.641. So we are now out of the realm of estimating theory and into the world of fixed and firm contract and PO costs.

"So MWH" – it's – the independent engineer, that's the company that he worked for –

**MR. K. MARSHALL:** Right.

**MR. RALPH: –** that – "can be assessing actual fixed and firm costs that we have and then focus on the costs we have yet to firm up and again using their experience look at the cost situation and pass an opinion on the reasonableness of our revised budget of $6.531B."

Fair enough?

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** So, if you go back to the spreadsheet – so, the first 17 rows appear to be contracts where Nalcor believes they have a good idea of what it costs or –?

**MR. K. MARSHALL:** And that's the $2.2 billion that he's referring to –

**MR. RALPH:** No, that would be the –

**MR. K. MARSHALL:** No, no, no, no, but the balance of scope –

**MR. RALPH:** Oh, yes.

**MR. K. MARSHALL:** – he's referring to is –

**MR. RALPH:** Yes, that's right.

**MR. K. MARSHALL:** – is the remainder.

**MR. RALPH:** That's correct.

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** So, if we just go to the top and just go to the right, please. So, column A is the DG3 Base Estimate, and column B is the Escalation.

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** And then, column C is the Original Control Budget. And, as you can see, C is determined by adding A and B.

**MR. K. MARSHALL:** Mmm.

**MR. RALPH:** And, if we can go to the bottom of that column, the C column.

**CLERK:** (Inaudible.)

**MR. RALPH:** That's okay. It's the third page.

**MR. K. MARSHALL:** Three.

**MR. RALPH:** Bottom of –

**MR. K. MARSHALL:** Column C, I think you said.

**MR. RALPH:** That's right.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** So, you end up with – you see the figure, the 6.02?

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** And, the line above it, the 367, that's your contingency.

**MR. K. MARSHALL:** It's your original contingency.

**MR. RALPH:** That's right.

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** So, we can scroll over now, go right.

**MR. K. MARSHALL:** Yeah, I see where you're going.

**MR. RALPH:** So, now we have the new estimate, which is 6.531. See that?

**MR. K. MARSHALL:** Mm-hmm.

**MR. RALPH:** And, the contingencies now are $182 million – which kind of begs the question – you know, so, if you're reducing your contingencies, then, you know, where are your increases coming from?

So, if we can go to the top now, just scroll up to the top of this page. Oh, go back a bit, okay.

So, the final column, it's called Variance. And, so variance, as you can see, you take your final forecast cost –

**MR. K. MARSHALL:** Right.

**MR. RALPH:** – you subtract the original control budget and you also subtract transfers. Now, I don't think we have to concern ourselves with transfers because I think they're talking transfers from the 1st, 17th and the 18th, so that should be zero.

**MR. K. MARSHALL:** Right.

**MR. RALPH:** So, what's it saying? This is the amount of the variances from DG3 to the present. So we've got – let's go to the bottom here, there's –

**MR. K. MARSHALL:** So what this represents – sorry, is when you say "transfers" is they're pressing individual budget elements to say: Because we have this increase in cost, you're gonna have to trim your air marshalling or trim your –

**MR. RALPH:** I –

**MR. K. MARSHALL: –** snow removal or something –

**MR. RALPH: –** I'm not sure but I think what happened, basically he said: Look, it's more efficient if we have certain amounts in certain contracts.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** The bigger ones apparently are more efficient, so we're gonna put more money – we're gonna transfer from small ones to larger ones.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** So at the bottom here, we've got a number, $329 million.

**MR. K. MARSHALL:** Mm-hmm.

**MR. RALPH:** And if you add 329 million to 600 – I'm sorry –

**MR. K. MARSHALL:** 6.2.

**MR. RALPH:** – million, if you add to 6 billion, 6.202, you get the 6.531.

**MR. K. MARSHALL:** Right.

**MR. RALPH:** But just go above the 329, and it says $184 million. Now, if you add –

**MR. K. MARSHALL:** That's the change in your contingency.

**MR. RALPH:** That's where your contingency has gone down.

**MR. K. MARSHALL:** Yeah.

**MR. RALPH:** So if you add the 182 and the 184 together, you get 367, your original amount.

So what he's done in this spreadsheet, he's reduced the variances by the contingencies. And then he's saying, okay, well, the amount of – the final forecast costs right now is 6.5, which is an odd way to approach it, I suggest. Do you appreciate that?

**MR. K. MARSHALL:** Yeah, it's – you know, again, it's difficult for me seeing this at the time and without explanation of the author as to why they had done this –

**MR. RALPH:** Fair enough.

**MR. K. MARSHALL:** – so it's –

**MR. RALPH:** And there will be others testify – Mr. Bennett –

**MR. K. MARSHALL:** Right.

**MR. RALPH: –** will be through, and –

**MR. K. MARSHALL:** Right.

**MR. RALPH:** – so on and so forth.

But it appears – so, basically, you've got a new baseline and what the new baseline does, it says: Okay, we got larger amounts in certain scopes; therefore, in terms of net variances, they're smaller, those net variances are smaller. And the net variance here is only 329 –

**MR. K. MARSHALL:** Million.

**MR. RALPH:** – million. Now –

**MR. K. MARSHALL:** I don't use that term lightly.

**MR. RALPH:** – if you took them – if you didn't – if you ignored the 184 for a moment –

**MR. K. MARSHALL:** Right.

**MR. RALPH:** – then I would suggest you got increases of over $500 million.

**MR. K. MARSHALL:** Because your 184 should be added back in to keep your original contingency.

**MR. RALPH:** Right.

So, if that's the situation, you should be adding 514 to the DG3, which would give you 6.7.

**MR. K. MARSHALL:** Again, as a board member, I'm not here to craft, you know, what the – how the numbers were calculated. I'm not sure if there's a question or a – like, what –

**MR. RALPH:** I'm asking you: Don't you think that's the way you should do it? Should you be –

**MR. K. MARSHALL:** I would –

**MR. RALPH:** – you know, just taking – saying: Look, the increases so far are over $500 million?

**MR. K. MARSHALL:** Yeah, no, I think, as I indicated, if in fact those elements that were above the line of the $2 billion, kind of, balance of scope, if they were more firmed up and finalized, then I could see justification for reducing your contingency down to the 182. But I think as it – the minute from the meeting indicated the expected contingency would be fully used upon the completion of the project. I think that there was –

**MR. RALPH:** All right.

**MR. K. MARSHALL:** – an admittance that the contingencies had been spread around and are gonna be fully utilized.

**MR. RALPH:** Right.

But, I guess, what I'm putting to you is that it seems to me the 184 has been used inappropriately. It's been used to make it appear –

**MR. K. MARSHALL:** Yeah, I can't –

**MR. RALPH:** – as though your increases are only 329 as opposed to 514.

**MR. K. MARSHALL:** I can't necessarily say that without a more, kind of – again, without those who presented the document and to why – or prepared the document, but I can see how your –

**MR. RALPH:** Fair enough.

**MR. K. MARSHALL:** – your logic is there.

**MR. RALPH:** Now, if we could go – so this is just to make note – if we can go to the top of this document. So this document is dated the 19th of November 2013.

**MR. K. MARSHALL:** Yes.

**MR. RALPH:** Now, if we go to P-03779, page 3.

Are you familiar with this document? Maybe we can go back to page 1.

So this is a document prepared by McInnes Cooper –

**MR. K. MARSHALL:** I'm not familiar with this document.

**MR. RALPH:** – on behalf of Nalcor.

**MR. K. MARSHALL:** Yeah.

**UNIDENTIFIED MALE SPEAKER:** To McInnes Cooper.

**MR. RALPH:** Pardon?

**UNIDENTIFIED MALE SPEAKER:** It's to McInnes Cooper.

**MR. RALPH:** I'm sorry, it's to McInnes Cooper. Sorry.

It's to McInnes Cooper from Tanya Power, employee of Nalcor. And what – it summarizes information that was in the management outlook.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** One of which was the final forecast cost.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** And if we can go to page 3.

So here's October 2013 and it indicates – the fourth line down after the date, it says: "… 'FFC Review (Oct) 2013'" – and it says – "Date modified November 19, 2013." And it gives an FFC of 6.8.

**MR. K. MARSHALL:** Okay.

**MR. RALPH:** Which is the exact same date on the spreadsheet –

**MR. K. MARSHALL:** From the 6.5?

**MR. RALPH:** – when it gives a FCC of 6.5.

So, it begs the question, why wasn't that figure used – given to the Government of Canada and perhaps the board before financial close?

**MR. K. MARSHALL:** It's – again, I can't say. I'd be speculating because I haven't – I hadn't seen this document nor had I seen the detailed document referred earlier. But it gets back to the usage of the FCC and what the relevant information is. I think the figure that was used for the Government of Canada that was the 6.53 –

**MR. RALPH:** Yeah.

**MR. K. MARSHALL:** – I believe. Yeah, I can't comment. I don't know.

**MR. RALPH:** Fair enough.

Thank you very much.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** All right.

It's 12:30 and we have two witnesses on today, so I'm mindful of that. I think we do have a bit of time tomorrow.

But we will take our break. I'd like to come back at quarter to 2, if we could today. So we'll come back at 1:45.

**MR. K. MARSHALL:** Okay.

**CLERK:** All rise.

**Recess**

**CLERK:** All rise.

This Commission of Inquiry is now in session.

Please be seated.

**THE COMMISSIONER:** All right.

All right, Concerned Citizens Coalition.

**MR. BUDDEN:** Good day, Mr. Marshall.

**MR. K. MARSHALL:** Good day.

**MR. BUDDEN:** As you may recall, my name is Geoff Budden. I'm the counsel for the Concerned Citizens Coalition. And as you probably remember, as well, from Phase 1, the coalition is a group of individuals who for many years have been observers and critiques of the Muskrat Falls Project.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** So I have a few questions for you here today just to start – really just to recap evidence that came out in Phase 1. You were appointed to the Nalcor board in 2004 by Premier Williams, who you had worked with for many years and who is a friend of yours?

**MR. K. MARSHALL:** Correct.

**MR. BUDDEN:** Correct.

And in 2014, Ms. Dunderdale appointed you chair of the board, a position you held for approximately two years or so 'til you resigned in late April of 2016.

**MR. K. MARSHALL:** No, I think it was Premier Marshall appointed me as acting chair, and Premier Davis appointed me as chair.

**MR. BUDDEN:** Okay, so – yes, 'cause Premier Dunderdale would have resigned, really, at the beginning, I guess, of 2014 –

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** – so it's Premier Marshall who appointed you.

**MR. K. MARSHALL:** Correct.

**MR. BUDDEN:** Gotcha. Okay.

Gonna ask you a few questions about financial close. So just, I guess, by way of preamble, as we established in Phase 1, the board at that time – at the time leading up to sanction – recommended sanctioning the Muskrat Falls Project for reasons which we've gone into.

So that was the reality as of December 2014 or a little earlier – 2012, sorry. So, it was – financial close is approximately a year later. So a certain reality had existed at sanction, as I just mentioned, certain circumstances which led the board to recommend sanction.

It's now a year later, and some significant things have happened in that interval. And three things in particular I'm going to mention. The first thing, the 2010 term sheet – November 2010 term sheet, which was in place at sanction. Subsequently, it was rejected by the Nova Scotia power regulator, the UARB. And ultimately, in the summer of 2013, another term sheet was agreed to. So that was one change.

Another change was that Hydro-Québec in – I believe also in July of 2013 – took Nalcor to court based on a dispute in interpretation of the power contract.

And thirdly, another major change – there are others, no doubt, in any one-year period, but the third one I wish to focus on is that subsequent to sanction, the bids were – coming in on the project were significantly exceeding the estimated costs – the cost estimates.

So, I guess my question is, given that these events had happened subsequent to sanction and really in the period leading up to financial close, all of which, I would suggest, to one degree or another, perhaps made the project less viable than it might have appeared at sanction.

How were these factors weighed by the board in the decision to proceed with financial close?

**MR. K. MARSHALL:** Pretty broad question, but I'll attempt to address it and, again, with the same caveat that I had this morning, which was at that point in time of financial close, I was but a board member amongst –

**MR. BUDDEN:** Mm-hmm.

**MR. K. MARSHALL:** – I believe, it was seven at the time –

**MR. BUDDEN:** Yes.

**MR. K. MARSHALL:** – that we had – that were independents plus Mr. Martin, who was also a full board member.

The – and as I indicated this morning, in the perfect world, in what we had all hoped and envisioned and, I guess, wished would have happened is that the sanction, the financial close and the UARB approval would have all happened concurrently and at the same time.

I think, you know, the first one which you mentioned – the 2010 term sheet and the subsequent review by the UARB and the new term sheet and the new agreement with Emera – they were – that was certainly debated with the board. There was concern throughout that period of time, but it was still felt that even with that new term sheet, with that new agreement with Emera and with the new agreement with the UARB, that – and, again, I would suggest that the details of that would be better known by Mr. Martin because I was not a part of those negotiations or by, kind of, the regulatory council with Nalcor because they were reviewing this on a daily basis.

But it was actually largely felt that as a result of the discussions with Emera, while there was great trepidation and concern – and, quite frankly, if I was in Emera's shoes, I probably would have done the same thing to try to make sure that you could push to get the best deal possible on the Emera side of the house. But it was largely felt in the final analysis that the new term sheet, the new agreement with Emera, actually was a true win-win situation for both areas, and that is that what we were perceived to be giving up was actually replaced by some pretty strong benefits to the province, to Nalcor.

So, that one was discussed throughout the whole process, was very concerning through the whole process but, in the ultimate consideration, was deemed that we had better access to market; we had a kind of – we only paid as we flowed power, not on a permanent basis, which we had to do in the case of the recall in Hydro-Québec. And we also had planned to strengthen the line and see some additional export possibilities because of the changes in the transmission lines.

So, that was felt to be a concerning but actually a positive –

**MR. BUDDEN:** So just to stop you there.

**MR. K. MARSHALL:** Yeah.

**MR. BUDDEN:** So just to make sure I understand, so Mr. Martin advised the board that the July 2013 term sheet, if you will, was actually better for Nalcor than had been the 2010 term sheet?

**MR. K. MARSHALL:** The overall – and I won't say just the term sheet, but I will say the overall term sheet as well as the negotiations with Emera.

**MR. BUDDEN:** Produced a result that was better for Nalcor –

**MR. K. MARSHALL:** On the whole, yes.

**MR. BUDDEN:** Okay, fair enough.

**MR. K. MARSHALL:** Okay.

**MR. BUDDEN:** Continue to answer.

**MR. K. MARSHALL:** Second, with Hydro-Québec, it's difficult for me to say because I actually just was in Montreal for one day of that court hearing and certainly was not called as a witness, I was there merely as an observer. But we had filed one application, Hydro-Québec had filed a different application to the courts and I think that there's a long – there was a long and detailed and complicated history between Nalcor, its predecessors, CF(L)Co and Hydro-Québec and the Province of Quebec.

And while that was concerning – certainly more concerning for the folks at – for Nalcor and for CF(L)Co, it was not necessarily – it was seen as an issue but it was before the courts and the courts – if we didn't do things at Nalcor because they were before the courts with Hydro-Québec, then we'd never do anything with Nalcor with Hydro-Québec because we'd always be in court.

So we had to deal with that and realize that on the basis and on the whole, in terms of the way that we were managing and running CF(L)Co with respect to the headwater management, with respect to – and I know that these were issues that we couldn't talk about during Phase 1 and, quite frankly, they're so distant in my memory now that I wouldn't even feel qualified to talk about them today. But by and large if we took the view that because we're in a dispute with Hydro-Québec, then we can't do anything with Muskrat Falls, then we'd never do anything in Labrador ever again because we'll always be, until 2041, in dispute with Hydro-Québec.

The third element, which you indicate as bids changing – and that's a nature of – you know, as we did sanction, we had some estimates and bids largely done by SNC, which I can't quite get a sense. Sometimes I read some testimony and it seems like people think that we should've hired SNC to do everything, and then other things I look and say that the SNC bids – for example, that the $688 million for the spillway and construction, that ultimately changed to a whole lot higher than that. So their bids were actually substantially lower than what the project costs turned out to be.

So, yes, the bids were changing and the board was very concerned and followed that quite closely. And I think evidence will show that we followed that as closely as we could. As we've said this morning – in evidence this morning, we didn't know what we didn't know and we got information as it was deemed proper and just, to convey those concerns and issues to the board.

**MR. BUDDEN:** Sure.

That last point – and I'll get to sort of another question, too, but just to stop you at that last point. You're not challenging the evidence we've heard? That while the bids weren't only changing, they were increasing from where the estimates – the DG3 estimates had been. You're not disputing that?

**MR. K. MARSHALL:** No, no.

**MR. BUDDEN:** Okay. So when you say changing, you would acknowledge that the more appropriate word might be, on the whole, increasing?

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Okay.

So we have – and those are – you know, I appreciate your answers. And I guess where I'm going with this is: To what degree did the board look at this, sort of, collectively and have in its own mind, we have to do an independent weighing here? A decision was made a year ago and, as you say, in a perfect world all of these decisions would happen very close together. But it's not a perfect world; it's a year later.

**MR. K. MARSHALL:** Yeah.

**MR. BUDDEN:** Stuff had changed. Did the board sort of consciously weigh, at the board level, whether or not the project still made sense, whether the project should be revisited?

**MR. K. MARSHALL:** Very much so.

The one thing that has come up in – you know, that I've seen in the Grant Thornton report and other elements was: Did the board get its own outside advisor? And, quite frankly, at the time there was – and the board did, from time to time, get outside advisors in different areas. We did not get an outside advisor with respect to evaluating the costs and the bids with respect to this project.

And whether or not that was a – something that we should've done, will remain, you know, subject to the determination of the Commissioner as to something that should've happened. It was never actually advised to us. We were always aware that we could hire outside counsel, expertise, where it felt necessary and we did in certain areas, as I said, in legal and in compensation, in other matters.

But the board did do very heavy levels of analysis and soul searching and took no decision to proceed lightly. We were focused on a couple of main facts; number one, that we had a plant in Holyrood which was 50 years old. And we would actually do one board meeting a year, and while the plant and the infrastructure was exceptionally well maintained and was – there was a lot of pride, you could tell, by plant management, by plant workers, but you could tell that it was an aging infrastructure.

And it was also the subject of very considerable negative press with respect to it being a kind of a damaging, dangerous pollutant; one of the top 10 worst in the country. And it was at 50 years old, it was pretty much at the end of its useful life and there was plants like this that had to get refurbished, replaced and changed.

So the province as a whole needed the power. Holyrood was at an age that it had to be replaced or significantly enhanced and changed. And we had these outside opinions, estimates, we had internal, external. The Manitoba Hydro, the Navigant, the independent engineer all reviewed these studies and that magical $2.4 billion CPW differential to the next lowest cost alternative was kind of a point that we all hearkened back to, not as a magic number, because we wanted to make sure that this bid was coming in at 6.2, and at the time of financial close, the 6.53.

We never took a decision to increase it by a dollar lightly, but we did have comfort in the fact that: (a) we needed the power, (b) we wanted to respect that it was being done at the lowest cost possible. And that $2.4-billion differential was on the basis that we would actually spill all the water from Muskrat Falls and not have anything to utilize for export sales because it didn't contemplate at that analysis being inter-tied with Emera and being able to export.

But it was just the cost in those estimations that were validated, which is the subject of much debate by a number of outside parties. So the board, you know, having gone through the process that the federal government was satisfied, that the TD Bank was satisfied to lend $5 billion, that the independent engineer, that MWH, that Navigant: that all of these other, outside the project Oversight Committee, were satisfied that is there another independent evaluation. The board did continue, both before and after that, make repeated assertions and requests to government to add the skills and the competencies that we had requested –

**MR. BUDDEN:** Sure.

I'm going to stop you there because you covered a bit of ground.

**MR. K. MARSHALL:** Yeah.

**MR. BUDDEN:** I don't want to lose track of it all. So my key – I guess the key thing I'm getting out of that is we know there is a weighing done at sanction. We may challenge it but we know there's a weighing done. We can do a post facto weighing now.

**MR. K. MARSHALL:** Yeah.

**MR. BUDDEN:** But you're saying the kind of exercise that you just talked about the last five minutes or so, the board actually did that kind of weighing at the moment of financial close –

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** – or leading up to financial close.

**MR. K. MARSHALL:** Yes, I mean we – and, again, I can only speak as an individual board member, but I can tell you that as I discussed this morning, the feeling was that what we were presented was the 6.5 – or we discussed was the 6.5. As a result of financial close, as a result of the guarantee, we had the $300-million interest benefit that we had, so it kind of netted. But even if it was just $300 million, my only impression – I can't speak for the board and, again, not being the chair – is it wouldn't have been enough in my mind to stop me from voting to continue with the project.

**MR. BUDDEN:** Sure, so in your mind, you have this $2.4 billion –

**MR. K. MARSHALL:** Yeah, and I wasn't using that to get to that as an outer limit. It was still the lowest cost that we had, to go with the most reliable power, and still represented – you know, I think even – with or without, while we did the analysis, by spilling the power, the reality of getting the federal loan guarantee interest rate (inaudible), which wouldn't have been available during an Isolated Island situation. And it also brought Emera in as a partner and access to other markets strategically being able to go – to bring the Island onto the grid was huge. Even – it was a lot of more intangible benefits, so –

**MR. BUDDEN:** Again, I'm focusing my question on the analysis that took place in November 2013.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** And at that point – you mentioned in your longer answer a couple of points – a figure of $2.4 billion. I guess my question is a pretty simple one. Was that – at least in your mind, which I'll let you speak to – was that sort of a measure that when you looked at all these other issues, you say: Well, there might be an issue with Emera or there might be – the bids may be running over. But on the other hand, we have got a $2.4-billion differential. Was that always weighing in your mind?

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Okay.

And –

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** – did that emerge in the board discussions –

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** – around financial close?

**MR. K. MARSHALL:** As I recall, yes.

**MR. BUDDEN:** Okay, fair enough.

Okay, let's move on. Madam Clerk, could you please call up 01769, and while that is being done – I doubt you have it in front of you – but that is a document that was prepared by Nalcor, by the project management team really to present its version of how the cost overruns came about to this Commission. So it's a relatively recent document, it comes a couple of years after your involvement with the board ended.

But what I'm interested in, Madam Clerk, if you can turn to page 4, please. And there's a quote there.

**MR. K. MARSHALL:** Page – which, sorry? Page 4?

**MR. BUDDEN:** Yeah, I think that's the – yes.

So I'm gonna read that and then ask you a question or two. So – and really, I guess I'll ask my question before hand to have it in your mind. This is what Nalcor's saying now. I guess my question to you, is this the kind of sense of things that was presented to the board in the years 2013, 2016? So for the benefit of everybody, I'll read it.

"In the years following sanction, the Muskrat Falls … Project experienced a significant number of unexpected risks, each of which had varying consequences. The net result was that the manifestation of these risks resulted in increasing the cost to complete the Project. Contrary to many mega-projects, the cost growth realized up to mid-2016 was not a result of late engineering or scope change or the change in leadership/management within the Project Team" – and this is the key part – "rather it was significantly influenced by the realization of many unanticipated events, which are referred to a strategic risks and which were beyond the control of the Project Team."

So as I said a moment ago, and I'll just restate my question, is this the take on things that was presented to the board by the executive as you were confronted throughout these years leading up to the time you left the board with cost increase after cost increase? Is this the sort of justification that was given to you?

**MR. K. MARSHALL:** No, I'd actually have to say that when we started the project, the initial DG2 estimate was $6.2 billion as I recall and when –

**MR. BUDDEN:** DG2? DG3, you mean?

**MR. K. MARSHALL:** DG3, sorry.

**MR. BUDDEN:** Yes

**MR. K. MARSHALL:** And when we as a board ceased our involvement in April of 2016, it was formally at 7.7. So, if I take the differential between those two, as I recall – I don't know if I can say – "significantly influenced by the realization of many unanticipated events" – there was – they were really divided into two camps. Number one was conscious decisions to improve the – either the site, the facilities, the line infrastructure, the quality of the steel, the North Spur. So, these were strategic decisions to improve the quality, the technical elements and the engineering of the facility.

And, again, I'm in rough estimates here, but they were in the $600- to $700-million range. So as we go from 6.2 to 7.7, there is a billion-and-a-half different. There was about to $600 to $700 million in conscious design changes and improvements to improve the value, the life – new maintenance roads to be able to improve maintenance down the road. Then there was another $600 to $700 million, which were a result of productivity issues, kind of – harsh winter conditions, unanticipated events, like you say, which was poor productivity and poor management team that was deemed to be – and we had to make changes at the SNC level and request changes of Astaldi.

So, I think they would be divided roughly 40-60 or 60-40, however you want to split it. So I don't think that they would all be unanticipated; they were actually conscious. The board was much more amenable to the discussions around, you know, bolstering the North Spur and improving the quality of the steel and improving the transmission line from 330 to 350 because that improved the amount of energy that could flow; it improved the amount of energy that we could export; it improved the reliability; it improved the quality.

So, we were much more amenable to approving those and we were much more concerned and, I guess, animated around the others, which were the unanticipated events and strategic –

**MR. BUDDEN:** Sure.

**MR. K. MARSHALL:** – for which we felt should be (inaudible) –

**MR. BUDDEN:** Which is a little different than what this says, isn't it?

**MR. K. MARSHALL:** Yeah. This – I kind of read this as saying that everything was unanticipated and – but, some of those were conscious decisions to bolster. I mean, we could have not done that other billion dollars and left it with the original design, and it would have been okay and somebody else's problem to fix down the road. But the decision was made to say: No, we should make this investment now because it improves the value of the structure; it improves the value of the asset for down the road.

**MR. BUDDEN:** So, what this document is telling us is different than what you were being told as a board member in this time?

**MR. K. MARSHALL:** I guess. Now, again, this is my first time seeing this document, so I'd like to see it in its entirety before I could comment on one specific phrase that I get shown here, but –

**MR. BUDDEN:** Okay.

**MR. K. MARSHALL: –** but that was my interpretation to explain my recollection of this. This statement seems to indicate that all of those changes that we saw in the cost of the projects were not as a result of engineering or scope change, and a number of them were.

**MR. BUDDEN:** Okay.

Mr. Harrington testified a couple of days ago – last week, actually. Did you happen to see any of his evidence?

**MR. K. MARSHALL:** No, I did not.

**MR. BUDDEN:** Okay.

He spoke of Muskrat Falls having more than its share of what he called black swan events. And we – I think we all took a black swan event to be another way of saying an unanticipated event which was beyond the control of the project team, something totally –

**MR. K. MARSHALL:** Right.

**MR. BUDDEN:** – out of left field, totally unexpected. Were you getting that at the time – Ed Martin come to you guys saying, look – okay, was that term ever used that you recall?

**MR. K. MARSHALL:** The black swan was never – I can't – never recall the term black swan being used. I recall the – you know, the issues concerning Astaldi being the focus of a lot of conversation, and the productivity of Astaldi, the management team that was in place, the – kind of, the conflict that was going on, on site. The term black swan was never used, no. Not in my recollection.

**MR. BUDDEN:** Do you ever recall being told that Astaldi was having financial problems because it had gotten in – projects it was doing in Venezuela and Turkey had run into trouble because of problems in those countries.

**MR. K. MARSHALL:** Very late. Very late in the game, yeah.

**MR. BUDDEN:** That would've been – you do recall that from your time on the board?

**MR. K. MARSHALL:** Yes. Yes.

**MR. BUDDEN:** Being told that?

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Now, do you recall who told you that?

**MR. K. MARSHALL:** No, I do not.

**MR. BUDDEN:** Okay, but that – what I've just said to you, that rings a bell?

**MR. K. MARSHALL:** Yeah. Yes.

**MR. BUDDEN:** Okay.

The – do you feel confident that the board did the due diligence that a board should do on really, I guess, pursuing these questions, checking out their veracity? I'm not saying go off and do your own research on what's happening in Venezuela. But obviously somebody has come to you and said, look, this is what's going on.

Do you feel the board asked the right questions? Pushed back hard enough? What do you have to say about that?

**MR. K. MARSHALL:** I – a couple of things. Number one is, as I – I think, going back again we talked this morning a little bit about Dr. Holburn's opinion and all I can say is that he indicated that a board typically would spend between eight to 15 hours a month at board duties. And there is just no way that we spent that little time. We spent a lot of time going through – as we indicated, we looked at one set of documents this morning that was 400 pages for one of the meetings and that was a typical board meeting. That was just a standard.

The – I have every confidence that the board – and again, when we got down to the final numbers of the board, that even with those limited numbers, that the ability and the experience that we had insomuch as we possibly could, is that we pressed and pressed and pressed and pressed the management team to ensure that we were getting relevant and full and complete information. We continued to make appeals and pitches to government to make sure that we could get those outside, kind of, expertise in megaproject, in environmental and in legal contractual obligations. And we continued and we were very dogged and determined, as I think the record will show, from 2006 right up to 2015; we developed a risk register, we developed the implementation of a risk officer within the organization.

So do I feel that the board in – as it was constructed – did everything that they could have done to press management to ensure that they were getting complete information? Yes. Can I guarantee that the board got complete information? No, as we discussed this morning. But we certainly didn't shirk our responsibilities and we didn't – we weren't cozy with management to make sure that this thing was passing through as a rubber stamp. That's for sure.

**MR. BUDDEN:** You just used a qualifier: as the board as it was constructed. What do you mean?

**MR. K. MARSHALL:** I meant the fact that there was – we were down to four, kind of, independent members and, you know, it varied in sizes. But the board as it was constructed being that we didn't have that expert in megaproject; we didn't have that expert in environmental; we didn't have that expert in legal construction matters.

So insomuch as Tom Clift, for example, had kind of a very strong expertise in governance and marketing considerations, consumer sentiment. Leo Abbass had the consumer kind of pulse: the Labrador feeling, the public sector piece. I had a deep general business experience. Gerry Shortall – and to this day – is the best finance board member that I have ever seen on any organization that I ever worked with or for from a board perspective, and absolutely incisive. And if Deloitte Touche is ever called to testify I would suggest that you ask them that question. So the board was very competent in the areas that they had their expertise in but, you know, the board recognized that there was still areas that we would like to have fleshed out.

Do I view it as a – would I liked to have had an outside opinion reviewing, as has been suggested by Grant Thornton and by others, in hindsight? Yes. But did I feel at the time or did the board feel at the time that we should have that given all of the outside, independent, involved stakeholders – including federal, provincial government, TD Bank, Oversight Committee, et cetera – that it was necessary? No, we didn't feel it was necessary at that point in time.

**MR. BUDDEN:** You felt it would be good but not crucial.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Okay.

So we know that the predecessor board of Hydro have had people known to you: a Mr. Dobbin; Mr. MacDonald had resigned on a point of principle, I believe, in 2003; you, ultimately, did yourself.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** So, I take it, it never entered your mind – speaking for yourself – that these problems were so – so fundamentally limited the board's effectiveness that you needed to resign on a point of principle since you appeared to be unable to rectify the problem? That thought never crossed your mind?

**MR. K. MARSHALL:** I'm not sure I –

**MR. BUDDEN:** Okay. What me to (inaudible) –?

**MR. K. MARSHALL:** Yeah, no, I'm not – are you – I'm not sure if you're suggesting that because we didn't get that outside expertise or outside party we resigned. And we had actually retained outside counsel and expertise to advise us in that as the board members did back in 2003 from a governance perspective, as I recall.

**MR. BUDDEN:** But that was in April of 2016.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Yeah. Well, I guess my question is – and my preamble was: you would've known that previous members had resigned on a point of principle.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** You ultimately did so yourself. So you knew that was always an option.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** And my question is simply this: Did you ever contemplate resigning on a point of principle given that the sort of polite inquiries you were making, the demands you were making for the board to be made more robust were not being answered? Did you see that as a problem so fundamental that that would be an action you would contemplate?

**MR. K. MARSHALL:** I can only speak – as a board we didn't discuss that as a whole. But the – I can tell you that at every single meeting in camera it was an issue and board members were extremely frustrated. I can – I can't speak for any or all board members as to whether or not we considered – I know we did not consider en masse resignation because this wasn't getting dealt with. We were – we took our request to serve the board very seriously and our desire to serve the people of the province and to try make sure that this got done. And we all had this, I guess, continued belief that these issues would be addressed. And ultimately Premier Davis did, you know, indicate that, yes, we're going to do this in September 2015, albeit too late.

Did – you'd have to ask each board member individually as to whether they considered resigning. Did I? Many times through the whole piece I considered resigning because this board was taking a significant amount of time and effort and complication. And I actually did tender my resignation before I resigned on that matter of principle. More so from the basis of, you know, it's time – it's time that – you know, the administration has changed and I think – and I had a very cordial, frank and good conversation with the premier to that end.

**MR. BUDDEN:** Okay. I'll just ask one last question before moving on.

We know board members resigned; you thought doing this for yourself. One can see why, given the workload, lack of remuneration, people of other interests, other obligations – fair enough. To your knowledge, did any of the members who resigned during your time, 2004 to 2016, resign on a point of principle, I would say, in frustration at the lack of resources the board had? And by that I mean the specific lack of expertise –

**MR. K. MARSHALL:** Not to my knowledge, no.

**MR. BUDDEN:** Okay. Fair enough.

You're familiar, of course, with the I Believe in the Power of Newfoundland campaign from 2012?

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Did the Nalcor board – or to your knowledge, Nalcor at all, provide any financial resources to that campaign?

**MR. K. MARSHALL:** Not that I can recall, no. When I –

**MR. BUDDEN:** Okay. It's an important question –

**MR. K. MARSHALL:** Yeah, no, it was an important question. And I recall from phase one that I was actually concerned because I wanted to be sure that board members were not deemed to be biased towards that exercise. In that I was approached and I went to the CEO and said I have a concern here – and again, not being the chair – but I had a concern that board members should not be involved, because they should continue to be independent because we weren't sanctioned. We hadn't, you know, the horse hadn't left the barn, to use this mornings terminology.

But I – again, I don't know. Can I say that Nalcor provided any support? I don't – certainly not from me.

**MR. BUDDEN:** Okay. And to, your knowledge, did any other board members play a role in that campaign? (Inaudible.)

**MR. K. MARSHALL:** Not while they were board members.

**MR. BUDDEN:** Pardon?

**MR. K. MARSHALL:** Not while they were board members.

**MR. BUDDEN:** Not while they were board members.

**MR. K. MARSHALL:** No.

**MR. BUDDEN:** Fair enough.

Let's flash forward a bit to after the November 2015 election, and we will hear evidence, I gather, from Ms. Bennett that the – and other evidence as well, that the various options were considered going forward. And, I guess my question was: Did that new government consult with the board, on the advisability of a second – additional federal loan guarantee?

**MR. K. MARSHALL:** I can't recall if it came to our – if it came to – no, it did not, I don't think. It did not come until after the new CEO was in place which would have been after –

**MR. BUDDEN:** After you were gone.

**MR. K. MARSHALL:** – after we were gone, yes.

**MR. BUDDEN:** Okay. And similarly, was it ever suggested by the new government – or did the board, on its own initiative, consider suggesting the possibility of, perhaps, the federal government coming in as an equity partner to – as was contemplated by some earlier legislation, of course, from the '70s.

Was that ever mooted at any point post-sanction?

**MR. K. MARSHALL:** I don't – I think it was discussed but I'd have to say, in very general terms and not in specific terms.

**MR. BUDDEN:** Okay. So that wasn't something the board saw as a possible way of coping with these ballooning costs.

**MR. K. MARSHALL:** No.

**MR. BUDDEN:** Okay.

The – this is somewhat of a long-winded question, so follow me. But we're now talking the – again, a question around the escalation of cost. And from some of what we've heard, the project management team would often talk about, as bids were coming in higher than anticipated, they would talk about the – they would say, essentially, the impact on project costs was being minimized because of a mitigation or offset from other contracts or perhaps other aspects of the same broad contract.

Did the board ever challenge these assurances or perhaps attempt to look beyond them?

**MR. K. MARSHALL:** It's a very broad question. All I can say is that when they were presented, there was a very open, honest, frank, challenging, concerned discussion; posing of questions; posing of alternatives. And again, the minutes don't reflect the length or intensity of those board meetings. But they were never accepted at face value, they were challenged to the best of the board's ability to be able to do so.

**MR. BUDDEN:** The – because, of course, a – when the executive comes forward and says: Look, this – you know, this contract, we anticipated – we estimated this price and now the bid's coming in 25 per cent. That's pretty tangible.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Mitigation is significantly less tangible. And so, I guess my question is – again, and you've somewhat answered, perhaps very, very focused way – when these mitigation explanations were offered, to what degree were they looked at critically?

**MR. K. MARSHALL:** From the board's perspective?

**MR. BUDDEN:** Yes.

**MR. K. MARSHALL:** I think they were looked at very critically, whether or not we didn't necessarily retain outside parties to review them. But we pressed and, you know, each board member would use his own strengths, abilities and areas of expertise to be able to ask the questions that we felt were appropriate from a board level.

So it's a pretty broad question to try to answer, but I can tell you that, you know, the board questioned them quite aggressively, openly and with appropriate levels of concern and –

**MR. BUDDEN:** Okay. So you're satisfied, in retrospect –

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** – even.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Okay.

The – we've heard sort of continuously throughout the Inquiry as justification for Nalcor holding its numbers close to its chest, even from the oversight agencies, this talk of commercial sensitivity. And, as I understand it, the fear is that if the contractors know that Nalcor is anticipating these extra expenses, so they'll make it that much harder to deal with them. So that's an explanation that's been offered.

You've had considerable experience in the private sector. As I understand, in the private sector, if the costs on a project are growing as the cost of Muskrat Falls grew, there's an absolute positive obligation to disclose those cost increases, is there not?

**MR. K. MARSHALL:** The – I – again, there are two elements. Number one is what's been spent in the past – there's the absolute obligation. And what's going to be spent in the future, the estimates, it depends on how definitive and how solid that they are, depends on whether the organization is private or public, depends on how it's held. I think it's a subjective – there's no yes-or-no answer to that.

**MR. BUDDEN:** Okay. Well, let's get a little more specific.

**MR. K. MARSHALL:** Yeah.

**MR. BUDDEN:** Imagine – as an imaginative exercise, imagine that Nalcor wasn't a Crown corporation but was a publicly traded corporation, you sit on the board of it. Would you condone what you actually experienced in terms of these justifications, for not releasing information because of commercial sensitivity if this were a privately held corporation on which you sat – or publicly traded corporation on which board you sat?

**MR. K. MARSHALL:** So, from a board perspective, if there is a – if there is a kind of a guarantee that this is going to be the absolute price, it should be disclosed. And I'd also suggest that that's a question for the auditors and the audit committee, quite frankly, as opposed to me as one board member out of many, representing a number of boards.

**MR. BUDDEN:** Well, I think my question is pretty specific: Were you – would you as a board member, in that circumstance – the only difference is Nalcor's not a Crown corporation but a publicly traded one – would – some of the things that you accepted as being justified by commercial sensitivity if this were a publicly traded board, would you have accepted those justifications? You as a board member with the fiduciary duties and responsibilities of a board member?

**MR. K. MARSHALL:** If it related to past obligations, no, I wouldn't accept it. If it reflected the future, it's gonna depend on how firm and final those costs are and – what the auditor's opinion is. And I've dealt with this in my career within the Roger's world as well –

**MR. BUDDEN:** Which –

**MR. K. MARSHALL:** – which is a publicly traded –

**MR. BUDDEN:** – which is why I asked you.

**MR. K. MARSHALL:** – organization, yeah.

**MR. BUDDEN:** Yeah. So there's nothing here that you would've felt differently about?

**MR. K. MARSHALL:** I don't think so.

**MR. BUDDEN:** Not a thing?

**MR. K. MARSHALL:** I don't think so.

**MR. BUDDEN:** Okay.

**MR. K. MARSHALL:** No, we not – I mean, again, notwithstanding some of the issues that we discussed this morning with respect to, yes, we would've liked to have seen certain things. But again, the role of the board is to make sure that they're getting as definitive, as final, as specific, as tangible, as concrete information as is possibly available. Not best guess-estimates and possibilities and broad ranges. I mean, you can see the broad ranges, but from an approval perspective, you have to get to the specifics and the knowns.

**MR. BUDDEN:** Sure.

But in the private world, a similar weighing would be done. And I would suggest to you that in the private world, the point of which disclosure must be made is triggered significantly lower than absolute certainty.

**MR. K. MARSHALL:** Yes, but the private world would also not pick the high end of the range to disclose or know that they picked the low end of the range to disclose. So I don't know if we're able to compare the two because there's a difference between past expenditures and future expenditures.

**MR. BUDDEN:** I understand that, yes.

**MR. K. MARSHALL:** Okay.

**MR. BUDDEN:** Okay. All right. Well, you've given your answer.

The last couple of questions are around Mr. Martin and his resignation. And when he resigned in April 2016, we'll hear from him, but what he said, at the time, was – essentially, was a natural time to move on to the next stage of his life and – however, he – the board then, not too long after he said those words, awarded him a significant severance package of well upwards of $1 million.

I guess my question to you is: Why?

**MR. SMITH:** Commissioner? Commissioner, this whole area was canvassed by the AG, the Attorney – sorry, the Auditor General. And, it's our understanding that when this was raised earlier with the Commission, the Commission was not going to enter into an investigation of what's already been investigated and determined by an independent party.

So, I think this line of questioning is really treading into what was the Auditor General's terms of reference.

**MR. BUDDEN:** I'm aware of the Commission's position, and I'm not looking to redo the investigation, which, of course, is – was the Commissioner's concern, I believe, when this came up earlier. However, I think it's reasonable to ask under what basis what advice was relied on, if any advice, to make what, on its face, would appear to be an unusual decision, given Mr. Martin's remarks. It would seem to fall squarely within the authority of this Commission.

**MR. SMITH:** But, my position is that Mr. Budden has prefaced his comments that Mr. Martin resigned. It was the determination of the Auditor General that he had not resigned; he had been constructively dismissed.

**THE COMMISSIONER:** Right. So, I see a bit of a distinction here with regards to what I've ruled and what I'm going to be – how I'm handling this particular issue and what's happening right at the moment.

So, I think that this witness can be asked questions related to the reasoning for take – for the board's decision. We're not – I'm not going to explore whether or not there was a constructive dismissal or there wasn't –

**MR. SMITH:** Mmm.

**THE COMMISSIONER: –** constructive dismissal. I think this goes to a question more related to why the board decided to do what it did. And that, I think, is fairly within my realm, and I will listen to that.

**MR. SMITH:** Thank you.

**MR. BUDDEN:** Proceed, if you would, Mr. Marshall.

**MR. K. MARSHALL:** So, what did – the severance, what did you indicate that was?

**MR. BUDDEN:** My understanding was somewhat over $1 million – a 1.39 or something – but I'm – it's over $1 million. Let's leave it at that.

**MR. K. MARSHALL:** So, first of all, I was not in the room for the discussion between the Premier and Mr. Martin when the determination was made that his employment would not be continued. I – my understanding was that it was not a resignation per se. I was advised of that by Mr. Martin when he contacted me late one evening, following his meeting with the Premier.

We – prior to that, and I think it's evidence – I do believe it is evidence, and my counsel can confirm for me whether it's evidence, which were my emails to the Premier the night before our board meeting which was following the Premier's meeting with the CEO, with Mr. Martin.

The board had retained independent counsel, Mr. Ed Waitzer – I believe he was with Stikeman Elliott – to advise on this matter. And it wasn't this matter, at the time, that was the issue. The issue that we were discussing was the – was the kind of the short-term incentive program for all employees of the organization, which was the original basis for my conversation with the Premier and with the – for the board meeting on that Tuesday, as I recall.

So when I heard the information from Mr. Martin, on that Monday night, and then the next morning when he came to the board meeting to convey what his position – or what the essence of the conversation was, it was very clear that in his mind – his impression was that it was not a resignation but as was not – it was not untypical to convey, from a public perspective, that it was a resignation. That was not something that was condoned by me or by the board. He wrote his speech as he wrote his speech, and it was not run by the board before that speech was given. In terms of –

**MR. BUDDEN:** Who is he, in this case?

**MR. K. MARSHALL:** Mr. Martin.

**MR. BUDDEN:** Okay.

**MR. K. MARSHALL:** I had sent an email that morning before the meeting at 8 o'clock to advise the Premier of the – couple of elements. And I actually didn't review the document before – the last couple of weeks before here – but there was more about the – first, was the element of the short-term incentive program for all staff, because that was originally why we got outside counselling. We had –

**MR. BUDDEN:** If you can keep focused a little bit, please.

**MR. K. MARSHALL:** I'm very focused because this was about – this is about the essence of the communication between the Premier and I. And I was trying, as a board, trying to find out – there was a conversation between the Premier and the CEO, with respect to the cessation of his employment.

And from my perspective, my advice from outside counsel was I sent the Premier a note and said: here's our board meeting, here's our three things.

Number one was the short-term incentive program, which we had two outside counsels review and indicate that if we were to cancel that program after the year was completed, that we would be violating the construct and effectively – constructively dismissing every one of those individuals, and that the board should actually have some latitude and ability to do so and if they did not feel it was right, to give us an order-in-council or Cabinet – to not pay that program.

Second, was that we had to deal with the cessation, termination, resignation, whatever the word was, but – of the CEO and the resultant contractual obligations that they apparently had discussed, and I wasn't at that meeting.

And third, was to deal with the immanent board resignations and certainly, from my perspective. And my fellow board members indicated that they would be resigning because we did not, any longer, have the confidence of the government to run the organization and that the government had reached around to effectively terminate the CEO or end his employment.

As – Mr. Martin's counsel just indicated that the Auditor General had done a kind of lengthy investigation.

**MR. BUDDEN:** That's post factum?

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** So what happened was, at that meeting, we dealt with – Mr. Martin came in and advised us of the position. He then left the board, because the board was – the board was left to have to deliberate on the remaining items that we had. And Mr. Martin was not part of that discussion because he had advised us of that meeting.

I had still not gotten a reply from the Premier, with respect to my email, which, I am sure, can be found in evidence. And before we voted on any matter relating to that – and I trust, at some point, that this will be asked of Mr. Martin, will be asked of the Premier because they were the only two in the meeting. But I actually called a stop to the meeting to indicate – and the secretary of the board at the time, and Mr. Green, John Green, who, I believe, is still on the board, he was a party to this conversation as well – is before we voted on severance and – or the cessation of Mr. Martin's employment, is that we took a break in the meeting and I contacted the Premier by the phone.

And actually called his cell and his office number, and discussed with him the wording around – which Mr. Martin used, the fact that there were contractual obligations as per his discussion, as I understood. Because I had still not heard from the Premier regarding his conversation – I'd only heard from Mr. Martin – and I don't think it's fair to the board or to the public to be able to make a determination just based on me discussing with one side of the party who was in that conversation.

I indicated to the Premier what had been conveyed and that as a result of the contract, the way it stood, the agreement that they had reached with respect to this being the best time for him to leave the organization, that there were contractual obligations from a severance perspective.

And I did not record the conversation, I did not keep notes of the conversation. I actually left the board meeting, walked into the small meeting room next door, had my conversation with the Premier and came back into the board meeting.

When I conveyed the essence of the conversation, to the Premier, and he indicated that, yes, this is how Mr. Martin wanted to try and communicate this, he understood that they agreed that as a condition, would be his employment would no longer be with Nalcor. And I indicated that you are aware that this will require severance to be paid, because the board was put in a difficult position because this was a conversation held between these two individuals. And the board –

**MR. BUDDEN:** How many hours passed from you guys becoming aware that Mr. Martin was resigning or leaving the board or had been fired, until the severance package was agreed to?

**MR. K. MARSHALL:** Well, I found out 11 o'clock the night before. Our board meeting started at perhaps 9:30 and this was about 11 o'clock, I think. Having not gotten a response form the Premier, I called him and had a discussion with him. And when I conveyed this, he indicated: I understand. That was the essence of what he indicated was: I understand. Now, he has always said –

**MR. BUDDEN:** "He" meaning Premier Ball?

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Okay.

**MR. K. MARSHALL:** And he indicated that the administration of the contract rests with the board and – so then went back in and, in essence, I was actually still speaking with the Premier as I was walked back into the meeting room and – 'cause I wanted to satisfy to the board that, yes, I have had this conversation with the Premier.

I started the conversation in the side boardroom, finished it as I walked into the boardroom with the other members of the board and said: I just got off the phone with the Premier and this is – this is the understanding that that we have. So not withstanding – as you indicate, the comments that Mr. Martin made in his speech which, again, were not condoned, reviewed, approved by me or anyone else of the board, and I certainly wouldn't have advised him to use those words that – then satisfied me and the board and, again, outside council being John Green, who was on the phone at the time, that the Premier understood the implications for severance. And the board, the board took it as its fiduciary duty to respect and uphold the contract between the two parties.

Now, if I may –

**MR. BUDDEN:** Sir, I'll stop you there.

**MR. K. MARSHALL:** Yeah.

**MR. BUDDEN:** I've let you speak for a bit. So you found out that he was resigning just before midnight. By noon the next day, this was a done deal. So there's that reality, you're not disputing that.

**MR. K. MARSHALL:** Sorry, you said I found the night before, I found that he was –

**MR. BUDDEN:** You said you found out that he was resigning –

**MR. K. MARSHALL:** No. I didn't find out he was resigning. I did that – and you used that word.

**MR. BUDDEN:** You said that you spoke to him at – you found that was leaving, at 11:30 –

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** – the night before.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** By noon the next day, this was a resolved issue.

**MR. K. MARSHALL:** Yes.

**MR. BUDDEN:** Okay. And then you – the entire board essentially resigned, how much after that?

**MR. K. MARSHALL:** At that meeting, effective for the end of that week.

**MR. BUDDEN:** Did it not occur to you that it might have been prudent to leave it for the next board?

**MR. K. MARSHALL:** It – two things, I would – and – 'cause that was indicated –

**MR. BUDDEN:** Personally, yes or no, did that occur –

**MR. K. MARSHALL:** No.

**MR. BUDDEN:** – to you at the time?

**MR. K. MARSHALL:** No. And I –

**MR. BUDDEN:** And it was never mooted at, leaving it to the next board?

**MR. K. MARSHALL:** No, and I will advise why.

It was suggested in the Auditor General report that that is something that the board could have considered. That was not discussed with me, in my discovery, in my discussion with the Auditor General at all. I – when we met with John Green who was our outside counsel, at McInnes, for this matter, he did not indicate that that was something that the board should do. And he actually ended up on the subsequent board. When I met with Ed Waitzer of Stikeman Elliott, in terms of how this was to be handled, he did not indicate.

So we had – the board was of the view that we had the relationship – the board had the relationship with the CEO and some elements of this board – not necessarily everybody, but this board had been involved in the hiring, the administration, the ongoing management and review of the CEO throughout that period of employment. We had outside counsel in St. John's, we had outside counsel from Toronto, and we had a very experienced group of board members. I had the discussion with the Premier and I had the discussion with the CEO, in terms of the realities of why he was leaving.

So, the board –

**MR. BUDDEN:** So, I suggest to you –

**MR. K. MARSHALL:** Sorry, if I might finish.

The board felt it was its fiduciary duty in terms of its relationship with the CEO, to manage the contractual relationship with the CEO before the board left and as Mr. Martin was leaving. Because if we had left it to a board that was coming in after us and Mr. Martin would not be there, that they would have zero relationship, knowledge or indication as to what this contract entailed, what this – discussions that went on with respect to – so, as part of our management and upholding of our fiduciary duty, it was incumbent upon us to deal with that at that point in time, before we left.

**MR. BUDDEN:** To whom is your fiduciary duty owed?

**MR. K. MARSHALL:** To the people of the province.

**MR. BUDDEN:** And how, again, is it – following your fiduciary duty to the people of the province, to the purse of the province – to make this decision on the fly, as you did, and then resign?

**MR. K. MARSHALL:** It was not a decision made on the fly. The decision was also part of the decision with respect to the short-term incentive program for the hundred-odd people who were kind of recipients of – or were members of this program, that the administration requested us to bring it down to zero. And we had outside counsel indicating that – sorry, if –

**MR. BUDDEN:** Focus, please, on –

**MR. K. MARSHALL:** – you want me to finish, you continue to interrupt me.

**MR. BUDDEN:** No, no, please focus on, Mr. – I'm interrupting –

**MR. K. MARSHALL:** Yeah, no – but –

**MR. BUDDEN:** – you because you're wandering.

**MR. K. MARSHALL:** – it's part of –

**MR. BUDDEN:** The question is to do with Mr. Martin –

**MR. K. MARSHALL:** – it's part of the –

**MR. K. MARSHALL:** – the fiduciary duty –

**MR. BUDDEN:** – Mr. Marshall.

**MR. K. MARSHALL:** – it's part of the fiduciary duty because the short-term incentive program tallied about a million and a quarter for every individual who was part of that. The advice that we received was that if you do this, then you will be subject to a (inaudible) constructive dismissal effectively for 125 people. Whether or not all of them or some of them avail of it, there will be lawsuits flying, and it will be far costlier and messier to the organization as a whole.

So, this was a part of the administration of the contracts with the senior managers of the organization, the vice-presidents, as well as the cessation of employment of the CEO. They were all part and parcel of the same set of deliberations that the board had to engage in on that particular day at that particular time.

**MR. BUDDEN:** I'd suggest to you, Mr. Martin –

**MR. K. MARSHALL:** Marshall.

**MR. BUDDEN:** My apologies, Mr. Marshall, that to act as you did, knowing that you were director, that you suspected a shareholder had lost confidence in you as director – you testified to that effect – knowing that you had a personal relationship with Mr. Martin, that you guys had worked together for years, that it was, in fact, a breach of your fiduciary duty to make that decision on your way out the door, having already determined to resign.

**MR. K. MARSHALL:** I completely disagree. And I would challenge that personal relationship with Mr. Martin. We had a work relationship. I do not socialize with Mr. Martin; I do not vacation with Mr. Martin; I do not – that's – I think that's – you're putting words in your mouth and you're trying to change – you're trying to create revisionist history.

And I think that the board acted and was found to act, according to Auditor General, properly with respect to the administration of the contract, did question the issue whether we could have punted that to the next board. That was never asked of me in my discovery, never asked in my deliberation and never suggested as an alternative by experts in this field, from McInnes Cooper and from Stikeman Elliott –

**MR. BUDDEN:** Okay.

**MR. K. MARSHALL:** – in Toronto.

**MR. BUDDEN:** Well, I'm suggesting it –

**MR. K. MARSHALL:** So –

**MR. BUDDEN:** – now and the Commissioner (inaudible) determine –

**MR. K. MARSHALL:** – I really take offence to the fact that you indicate that I acted improperly. And I'm gonna have to ask my counsel to see if I'm off-line or not here.

**MR. BUDDEN:** We'll move on.

The – you expressed at that time of your evidence back in October, at the beginning of this Inquiry, that you admired Mr. Martin still. I believe that would be a fair description. You thought he had been a good CEO. A lot has happened since then; a lot of evidence has been led.

Has your opinion of Mr. Martin been altered at all by what you've heard?

**MR. K. MARSHALL:** I still feel he was a good CEO as I look at some of this. Would I have – everybody can have improvements with respect to how they convey. That would a question that you would have to ask Mr. Martin. Would he change things and submit more information to the board? I don't know if it was understandable, acceptable. It's difficult to take some of these items, which were internal management documents, and say they should have gone to the board. Hindsight is a perfect judge, and – have I changed my opinion? I think he was a very good CEO; I think he was a very competent CEO. Did I feel that – and in hindsight, looking at all of this, I still feel he was a very reputable, respectable and forthright CEO for the organization.

Do I – you know, I can't necessarily indicate whether or not I'd change my opinion, but it's – you know, this is – a lot of time has passed since this all went down.

**MR. BUDDEN:** (Inaudible).

**MR. K. MARSHALL:** And I have not seen him very much at all.

**MR. BUDDEN:** Okay.

One final question. I should have asked this earlier but I overlooked it. Our understanding – and there will be evidence led if it's considered relevant – that Mr. Martin and others, senior members of the project management team, on occasion at least, would have travelled by business class. The regulations, as I understand them, governing the executive of the province, even the premier, is that that is not something that is ordinarily permitted.

Do you recall whether Nalcor had adopted a specific policy to permit the senior executive to travel by business class if they felt it to be necessary?

**MR. K. MARSHALL:** No, I don't recall whether there was a specific policy, but I do recall raising this issue with Mr. Martin on a number of occasions, indicating that I was concerned because I'd be travelling somewhere on business and I'd see members of Nalcor in business class. Whether or not they were using their own upgrade points to get there, I don't know. But I was advised that they were adhering to the Nalcor and or government policies and, where appropriate, that they would use their own points to upgrade the travel, because it quite frankly irritated me.

**MR. BUDDEN:** Okay. So your understanding was that they were travelling business class on upgrades rather than Nalcor paying for business class tickets.

**MR. K. MARSHALL:** Where it didn't fit in the policy.

**MR. BUDDEN:** Okay. But you didn't understand specifically what the policy was?

**MR. K. MARSHALL:** No.

**MR. BUDDEN:** Okay. Thank you.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** Thank you.

Edmund Martin.

**MR. SMITH:** Mr. Marshall, Harold Smith for Edmund Martin.

**MR. K. MARSHALL:** Good day.

**MR. SMITH:** I only have a very few questions, just to clarify. In relation to your reference to ATIPP, Mr. Learmonth indicated that Mr. Martin had the final say on whether a document is released to ATIPP, okay? Or under ATIPP. Was that your understanding at the time?

**MR. K. MARSHALL:** I think it was a – there was such a deluge of ATIPP applications and requests that they became very difficult to manage, and as chair I didn't get involved in them, but this would be reported to me by the secretary of the board, primarily, and by the communications group. Whether or not we had a – there was always a desire by the CEO – and I use the AGM process as an example – is that Mr. Martin wanted to convey and always wanted to ensure that every question went answered and that – whether or not he had the ultimate decision with respect to releasing something from ATIPP – I can't say definitively throughout the whole period that that was the board's understanding.

**MR. SMITH:** Or your understanding.

**MR. K. MARSHALL:** Or my understanding.

**MR. SMITH:** Now, in the context of this project, what costs are transferred to the ratepayer?

**MR. K. MARSHALL:** That's a pretty broad question.

**MR. SMITH:** Well, is it only the capital cost? Is it the capital cost and the financing cost?

**MR. K. MARSHALL:** I don't know. It could – I mean, definitively, right now, I'm four years removed or three years removed and I think that that would be a question when the rates are set as to what is permitted to be going into the rates.

**MR. SMITH:** Yeah. No, I understand, though, that there are documents that indicate that the total costs of the project, including financing –

**MR. K. MARSHALL:** Right.

**MR. SMITH:** – are transferrable –

**MR. K. MARSHALL:** Yeah.

**MR. SMITH:** – effectively to the ratepayer –

**MR. K. MARSHALL:** Right.

**MR. SMITH:** – to be paid by the ratepayer over an extended period of time. Do you have a different –

**MR. K. MARSHALL:** No.

**MR. SMITH:** – understanding on that?

**MR. K. MARSHALL:** No.

**MR. SMITH:** So, if the costs are transferred to the ratepayer in the context of – let's talk about the $300-million up and the $300-million down – depending on –

**MR. K. MARSHALL:** There's no – there's a wash.

**MR. SMITH:** It's a wash as far as the ratepayer is concerned.

**MR. K. MARSHALL:** Yes. And it was a wash as far as the board was concerned in our deliberation at the time.

**MR. SMITH:** Now, I wanted to ask you to, if you could, to discuss with me the issue of the strategic risk that was suggested to you by Mr. Learmonth – $497 million or $500 million in round numbers –

**MR. K. MARSHALL:** That was in Phase 1?

**MR. SMITH:** Yeah, in – it was discussed in Phase 1, and –

**MR. K. MARSHALL:** But –

**MR. SMITH:** – it's come up here a couple of times –

**MR. K. MARSHALL:** Right.

**MR. SMITH:** – about the fact that the board wasn't made aware of the $497-million strategic risk, 'cause my understanding is that the board didn't get that.

**MR. K. MARSHALL:** Well, the board didn't get it as a line item because the board was – had discussed the view – as I indicated in testimony in Phase 1 – that there was two things. Number one was that it would be, you know, flashing a red light or a green light to the contractors to come and get us. And number two, that there was an understanding with respect to overruns which may have happened would've been settled as a result of some of those issues which we didn't put into the business case, like excess sales and Kyoto credits and other elements.

**MR. SMITH:** Madam Clerk, can we have 00130, page 287.

I know you haven't actually – or were not told – 497 strategic risk. That's (inaudible) your evidence this morning. But looking at the Westney view of strategic risk, it's obviously made up, in Westney's view, of four items.

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** Okay?

Did you have any discussions with respect to any of those four items at the board table?

**MR. K. MARSHALL:** I can't recall specifically, but the wage rates were always being challenged because it was a very hot and contentious labour market. The productivity issues were always an issue because the productivity assumptions that SNC had used and that Astaldi had used were found to be inaccurate.

So, from a risk perspective, we – when we got to some of the rationale and reasons for some of the changes, yeah, some of these were discussed. But, again, I'm not sure if you're giving me a timeline or a specific board meeting.

**MR. SMITH:** Okay. Well, maybe we can go to page 293.

Now, on page 293 the risks exposure are discussed in –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – a little more detail, okay? And it's said one of the risks was the payment of completion bonus. It is known that Western Canada projects are planning to pay a completion bonus of $10 per working hour. Assuming all – not all workers would achieve the required hours, $8 is used for impact calculation purposes.

This is one of the listed strategic risks, right?

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** Are you aware –

**MR. K. MARSHALL:** No.

**MR. SMITH:** – that there was no completion bonus paid on this site?

**MR. K. MARSHALL:** No.

**MR. SMITH:** You don't know that?

**MR. K. MARSHALL:** No.

**MR. SMITH:** The wage rate, they talk about the wage rate here and it says: "The Hebron wage rates used in the estimate are roughly $5 per hour to the person less than the Western Canada rates. The mining projects in the west of the province are currently paying Alberta rates." And then, in order to pay the Alberta rates, they had – they show about $150 million possible on the outside risk.

Do you know if the rates were –

**MR. K. MARSHALL:** No.

**MR. SMITH:** – compared with Alberta?

**MR. K. MARSHALL:** No.

**MR. SMITH:** So – okay.

And with respect to the productivity, they talk about: "The Long Harbour and western Province projects are experiencing poor productivity and some jurisdictional problems. The weather is problematic at this site, compounding the productivity issue." And they give that about $350 million in strategic risk.

**MR. K. MARSHALL:** It's not on the screen. Is that on the next page?

**MR. SMITH:** That's page 294, Madam Clerk. Sorry.

**MR. K. MARSHALL:** Thank you. Yeah.

**MR. SMITH:** Do you see that?

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** So I take it, like the others, there were discussions about productivity but not particularly of strategic risk?

**MR. K. MARSHALL:** No.

**MR. SMITH:** It was just a discussion –

**MR. K. MARSHALL:** No.

**MR. SMITH:** – about productivity and what they were doing –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – to improve the productivity?

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** Okay.

So if the other ones were not discussed – the other risks specifically – would that indicate to you that the project team believed that they were mitigated?

**MR. K. MARSHALL:** No.

**MR. SMITH:** No?

**MR. K. MARSHALL:** No.

**MR. SMITH:** Okay. So it's just nothing?

**MR. K. MARSHALL:** Well –

**MR. SMITH:** I'm trying to find out why you felt that the 497 should be brought to your attention if you really didn't know anything about it?

**MR. K. MARSHALL:** Well, it's difficult to say. I mean, it's – whether or not it should've been brought to our attention because these are the specifics that are cited as possibly contributing to that, and I mean, zero to $350 million, with respect to this last one, is a pretty broad range.

We always knew that there would be a range, but we also knew that there was a – that there were going to be challenges, that nothing was ever guaranteed and that we had – the provincial government had committed under this obligation to ensure that equity commitments would ensure that this would continue.

**MR. SMITH:** And I take it from that that Mr. Martin never guaranteed any AFE as final and absolute?

**MR. K. MARSHALL:** No, he did not.

**MR. SMITH:** No. He always indicated to you that – like many others – that the pressures existed –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – in both cost and schedule.

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** Now, one more – one final point I'll to draw your attention to. In your transcript of your February discussions, okay, you note at pages 31 and 32, particularly – I think it's more 32 than anything – excuse me, yeah it's 32.

Ms. Morry is interviewing you, okay, and I'll pick it up towards the middle of the page: You want more – you talked about the certainty – yeah – that you want in the AFE figures. In other words, you wanted certainty –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – in the AFE figures.

Yeah. Ms. Morry: Mm-hmm.

And management reserve – and management reserve so it's – again, we got back to the issue of reserves in Phase 1. That's your comment.

And Ms. Morry says: Mm-hmm.

And you continued – and this is the important aspect – Mr. Marshall says: And again, where we have contingencies just by coincidence, those two management reserves bring you back to 6.99 and the issue is how much do you flow contingencies – the red rag to the bull. I think you meant flag.

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** Red flag to the bull. Yes. And then you go on and say: To say come and get these figures because they're here approved waiting for you to make a claim against them.

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** Okay.

So in terms of the process that the board generally took with respect to management reserve –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – okay, was not to disclose that to the PMT –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – or to seek approval –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – from the PMT, right?

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** But there was funding available to deal with the management reserve –

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** – wasn't there?

**MR. K. MARSHALL:** Yes.

**MR. SMITH:** Okay.

And is that your understanding of what is necessary for management reserve? Did you have to have a bank account that says that? Or is it necessary that only – that the funding be available to cover it?

**MR. K. MARSHALL:** I think the funding be available to cover it.

**MR. SMITH:** Thank you.

That's all the questions I have.

**THE COMMISSIONER:** All right.

Thank you.

Kathy Dunderdale.

**MS. E. BEST:** Good afternoon, Mr. Marshall.

**MR. K. MARSHALL:** Good afternoon.

**MS. E. BEST:** I'm Erin Best; I'm counsel for Kathy Dunderdale.

You're a Newfoundlander, right?

**MR. K. MARSHALL:** Yes.

**MS. E. BEST:** And why did you serve on the Nalcor board? Why did you put in all the time and effort that you described?

**MR. K. MARSHALL:** That's a really good question.

Because of – first, I wouldn't have served if I did not think that I had something to offer. I was asked to serve, and when you're asked by the province to serve an organization like this – and it was certainly well in advance of when Muskrat Falls had had its initial, kind of, birth. I think I was the first board member that came on in terms of the new – after the election, the new administration.

But it was a commitment to the province, a commitment to the people, a commitment to doing the right thing; thinking – feeling strongly that there were people who felt that I had a certain degree of business knowledge, expertise and an ability to work through complex issues that would've been beneficial for this organization as it entered a tricky period.

**MS. E. BEST:** You think it's likely that a non-Newfoundlander would make the kind of sacrifice of time and effort that you made?

**MR. K. MARSHALL:** I – that's difficult. I mean, it's – the reality is that the commitment to this province was one that weighed heavily on my mind. And, you know, for example, Gerry Shortall, who hasn't lived here for probably 30 years, you'd have to ask him the same question, but he's a Newfoundlander but he hasn't lived here for 30 years. I think that it would be difficult for a non-Newfoundlander to see this same level of passion, commitment and desire to be able to do the right thing and to serve with this degree of passion, energy and vigour.

**MS. E. BEST:** Thank you.

Now, you said that you wanted to have someone with megaproject experience – or expertise –

**MR. K. MARSHALL:** Yes.

**MS. E. BEST:** – actually, I think you said – to sit on the board, but I gather what you mean is you wanted government to pay someone with megaproject expertise to sit on the board, right? Because it doesn't seem like someone who's – well, it doesn't seem like we had that expertise here, and it doesn't seem like someone who was, say, from another province or country would just fly to Newfoundland and Labrador to sit on our board and make the same type of sacrifice that –

**MR. K. MARSHALL:** That would've been difficult.

**MS. E. BEST:** – you made, without remuneration, right?

**MR. K. MARSHALL:** It would've been difficult, yes.

**MS. E. BEST:** Right. And your fellow board member, Mr. Clift, I believe he said back in – whenever it was – November, when he was sitting there at the table, that if another board member was going to be paid, he wanted to be paid too.

So my question to you is: Doesn't it make more economical sense for the board to retain expertise – so have experts come in and inform the board – as opposed to having that expertise sit on the board?

**MR. K. MARSHALL:** Possibly. And in some instances from – again, there was an individual on the board who had megaproject experience and that was Mr. Martin. The problem was he wasn't independent – he was also an officer of the corporation.

So, again, in hindsight –

**MS. E. BEST:** But I think what you wanted, wasn't it hydroelectric megaproject expertise –

**MR. K. MARSHALL:** Yeah.

**MS. E. BEST:** – specifically, right?

**MR. K. MARSHALL:** Yeah.

**MS. E. BEST:** Yeah.

**MR. K. MARSHALL:** But, yeah, in hindsight, you – we could've had our own consultant, but as I explained, we didn't necessarily – we always knew that we could hire, kind of, our own advisors and consultants, which we did, as I indicated when I contracted Mr. Waitzer from a governance perspective out of Toronto, and we contracted the Hay Group, and Mercers and Robertson Surrette numerous times from a human resources perspective.

But we felt that with the number of outside parties who were advising both the organization and the provincial government, and the number of affected stakeholders who were doing independent reviews of the analysis, that the board – and that's probably a – you know, something that if I was to go back, I would change. I would've had an independent advisor to the board with respect to some of these matters.

But, yeah, again, there was already Westney, there was Navigant, there was Manitoba Hydro, there was the project Oversight Committee, there was independent audit, there was Internal Audit, external audit. There was a lot – there was TD Bank, Government of Canada, Province of Newfoundland: there was a lot of outside groups that were evaluating and determining with a lot of expertise, and the board was relying on some of this information.

**MS. E. BEST:** Okay.

So just to summarize, you felt that the expertise that you had access to was adequate.

**MR. K. MARSHALL:** Yes.

**MS. E. BEST:** Thank you.

Those are my questions.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** Thank you.

Former Provincial Government Officials '03-'16 –'15 rather.

**MR. T. WILLIAMS:** Good afternoon, Mr. Marshall.

**MR. K. MARSHALL:** Good afternoon.

**MR. T. WILLIAMS:** Tom Williams, I represent a number of the elected government officials from 2003 to 2015. Just one follow-up question, I think it probably follows in line with some of the comments of Ms. Best.

You've identified some of the – and over the course of the Inquiry, some of the shortcomings which the board suffered from in terms of complement of full members, compensation issues, things of this nature. One of the mandates that the Commissioner has, and will be focusing a little more on in the next phase, is managing large-scale publicly funded projects.

**MR. K. MARSHALL:** Yeah.

**MR. T. WILLIAMS:** And that's something for the next scale – for the next phase of the project.

But you referenced in your comments in your testimony this morning the crossover that some board members have in terms of having to serve on other affiliated board companies. There's – we've had reference to a number of board committees, things of this nature.

My question is with respect to looking forward. You know, when I hear your evidence, both Phase 1, Phase 2, you know, between board committees, other board obligations, not – you know, complete complement, where do you see improvements being made for the province in terms of taking on these type projects, having served on the board like this for 12 years?

**MR. K. MARSHALL:** I think that there's – you know, number one is to review – when I – it's funny, when I look at the report from Dr. Holburn that was I asked to review for today, I can say, with all certainty, that 95 per cent of what he had in there, our board had – was active on, had brought in place, had brought in request for, had put in place risk registers and AGM process which hadn't been there before, developed the skills and competency matrix to assess what the competency was of the current board membership and what the skill requirement was of the board as a whole and where it was lacking.

I think that my recommendation would be to – again, we were pitching for that magic eight to 12 number of board members, recognizing that it's difficult to get there in a small province – as I was just asked: Would you get the same level of commitment and passion at the current level of compensation? And, for me, it wasn't about – it was never about the compensation; it was more about the greater good and the commitment to the province, the people, the project and the requirements to bring this forward.

I think that my advice would be to look at the work that was done by the Governance Committee and, I presume, continued to be so at the organization today to ensure that those qualified individuals are brought to the table in sufficient numbers, and that the management of information that goes to them is such that it's reasonable and commensurate with the compensation and the time requirement that's appropriate – that's required.

**MR. T. WILLIAMS:** Okay, two points coming out of that. How essential, do you think, is compensation packages to having qualified individuals serving on boards of the scale that we're talking in terms of Nalcor?

**MR. K. MARSHALL:** I think it's critical. I think that this is – and, again, going through a process like this, I don't think that anybody can understand unless they actually go through it. And, again, I'm three and a – over three years removed from this board. You know, being on the board was rewarding. It was stressful, it was strategic, it was challenging, it was difficult at times, but it certainly wasn't financially rewarding and – again, I am fortunate enough that that wasn't why I served.

Would you have been – would everybody be so inclined? No, I don't think so. You know, do I suggest – and much like the issue, we recognized entirely the realities of a Crown corporation – and, again, back to Mr. Holburn's testimony. But much like when we would get proposals and kind of petitions from management of Nalcor that we need a long-term incentive plan – and we would get an outside advisor like Hay or Robertson Surrette saying: Here, you need something to mirror a stock option program in the private sector. And I can tell you, I was very vocal and adamant that that can't happen, that this is a Crown corporation and we have to make sure that we're representing the people of the province and the taxpayers properly.

So, from a board perspective, you're never going to be able to get this to a private level of compensation, a public organization, a true, you know, exchange-traded publication for board members, nor are you going to get your management team to long-term incentive programs. There's got to be a level of – there got to be a happy medium, because right now I can tell you that it's at the low end of the scale.

And, particularly, in this case –

**MR. T. WILLIAMS:** You mean in terms of the senior management or –?

**MR. K. MARSHALL:** No, in terms of – and I think we brought the senior management piece along fairly well from the salary administration and from the short-term incentive program. And I use it as an example that, you know, we brought, you know, the CEO's 9 per cent bonus to a 25 per cent bonus. Well, that 25 per cent bonus in the private sector – and I can tell you from my experience within my organization and other organizations I know – that would be at minimum, at a CEO level, would be at 100 per cent and up to 200 to 300 per cent bonus level that would be available. At a senior vice-president organization it would be at least 50 per cent up to 60 per cent and it's down around 15 per cent in Nalcor.

So we brought that to semi-respectable levels that were appropriate for recognizing a Crown corporation. At the board level, you have to remember that there was only three boards out of the 15 that were compensatory. That was Hydro, CF(L)Co and I'm not sure if it was Bull Arm or oil and gas, but they were the only three that were compensatory. Nalcor itself, the Muskrat Falls Corporation, LIL, LTL: they were all volunteer.

So you had some individuals who were in there going from one meeting to another who are actually entirely voluntary. You had some individuals who were voluntary for some meetings and compensatory for others and the level of compensation was very low. Nalcor itself, the last two years going off, was entirely – as chair, I would be able to charge a hundred dollars an hour. That was only if I was working on Hydro material, not if I was working on Nalcor. Nalcor was non-compensatory.

**MR. T. WILLIAMS:** Okay.

You've referenced a number of different corporations and boards that individuals were required to serve on. How realistic is the workload that would be on the board of Nalcor on a go-forward basis? We referenced this morning that – or you referenced, I believe – I wasn't sure if it was in your direct examination or your cross, but at one point you spoke about some of the oil and gas projects, some of the other priority projects that were on the slate –

**MR. K. MARSHALL:** Yes.

**MR. T. WILLIAMS:** – other than Nalcor. I mean, was the workload – the size, the magnitude of some of these projects, is it unrealistic to think that you could have one board overseeing –

**MR. K. MARSHALL:** It is.

**MR. T. WILLIAMS:** – that vast an inventory of work?

**MR. K. MARSHALL:** It is.

**MR. T. WILLIAMS:** Okay.

And would you think that there would need to be individual boards?

**MR. K. MARSHALL:** Yeah, they can probably be somewhat combined or culled, but there'd also – there'd always be this parent company. The reality is, is that when we got to federal loan guarantee, there became this – and I won't say – I won't use the term, explosion – but there was an expansion in terms of the number of boards that were required from the point of view of maintaining tax-free status for the organization and for the project, maintaining fiduciary responsibilities, regulatory responsibilities, partnership obligations.

So there was a valid and deemed to be necessary from the point of view of the federal government and the TD Bank with respect to governance processes that were – that added to the number of boards that we had currently on the plate of the organization.

**MR. T. WILLIAMS:** Okay, that's all the questions I have.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** All right, Julia Mullaley, Charles Bown.

**MR. FITZGERALD:** Commissioner, I'm going to be a little bit longer than I normally am with this witness. And I know we started at quarter to 2, if now is a good time to break –

**THE COMMISSIONER:** Oh, okay.

**MR. FITZGERALD:** – and then we can just continue.

**THE COMMISSIONER:** Yeah, we can take our 10 minutes here then.

**MR. FITZGERALD:** Thank you.

**THE COMMISSIONER:** Thank you.

**CLERK:** All rise.

**Recess**

**CLERK:** All rise.

Please be seated.

**THE COMMISSIONER:** All right.

Mr. Fitzgerald.

**MR. FITZGERALD:** Thank you, Commissioner.

Mr. Marshall, my name is Andy Fitzgerald. I represent Mr. Bown – Charles Bown and Julia Mullaley.

**MR. K. MARSHALL:** Good day.

**MR. FITZGERALD:** Good day.

I'm coming at this from a bit of a different perspective in terms of governance and oversight, and you'll see what I mean once I get into this. Some of my questions, given your background, may seem rudimentary, but there is a reason.

**MR. K. MARSHALL:** I don't think there's such a thing.

**MR. FITZGERALD:** There is a reason for the question; I just want to give you a heads-up on that. In terms of – as I see it, you were on the board from 2004 to 2016.

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** Twelve years?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Was Mr. Martin there the entire time you were a board member?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** Okay. How long was he there in your tenure, roughly, of those 12 years?

**MR. K. MARSHALL:** He came on board, I believe, in 2006, maybe.

**MR. FITZGERALD:** So 2006 –

**MR. K. MARSHALL:** Bill Wells was actually the CEO when I started.

**MR. FITZGERALD:** Okay, so roughly from 2006 to 2016.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Okay.

Can you just raise your mic a little bit?

**MR. K. MARSHALL:** I'm sorry.

**MR. FITZGERALD:** I have difficulty hearing you.

**MR. K. MARSHALL:** Okay. Yes.

**MR. FITZGERALD:** That's great. Thank you.

And you've – if we could go to P-00431, please.

**THE COMMISSIONER:** That will be on your screen.

**MR. FITZGERALD:** Oh, sorry, yes. That'll be on your screen, Mr. Marshall.

**MR. K. MARSHALL:** On the screen? Okay.

**MR. FITZGERALD:** Yeah.

And if we can scroll down just a little bit? Continue to scroll down to section 4. Keep going down a little bit further. Thank you.

Section 4(1), Mr. Marshall, and this is the *Energy Corporation Act*. So this was the tool that the government set up in order to get Nalcor going and set up your board of directors and whatnot. And 4(1) of this act says: The *Corporations Act*, except those numerous sections that are listed there, does not apply to the corporation. So, all of those sections that are listed in there will apply to your board of directors.

And I want to draw particular attention to section 167 of the *Corporations Act*. Now, we don't have the *Corporations Act* in evidence but it is a matter of law. Given the way these two acts interact, Commissioner, I'm probably going to ask later that we enter the *Corporations Act*.

But the duty to manage is section 167 of the *Corporations Act*. And this states: "Subject to a unanimous shareholder agreement, the directors of a corporation shall … exercise the powers of the corporation directly or indirectly through the employees and agents of the corporation; and … direct the management" and "business and affairs of the corporation."

So that's one duty, the duty to manage, that was placed upon your board. Do you accept that?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Okay. Thank you.

And before I get into the next section I want to discuss, sometimes during your evidence this morning you've indicated, well, I wasn't the chair. But I would suggest to you that while a chair may be more involved with the day-to-day operations of the board, whether you're chair or not, you're all directors, aren't you?

**MR. K. MARSHALL:** Oh, I fully recognize that throughout. I think I drew the distinction because as chair, the amount of, kind of, planning you're doing for the meetings and the side conversations, it expands exponentially. You still got the all of the requirements to prepare for meetings, but you've got a whole bunch of other requirements.

**MR. FITZGERALD:** And that's how I took your answer.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** Not meaning that, well, because I'm not the chair –

**MR. K. MARSHALL:** There's not a lesser –

**MR. FITZGERALD:** – I'm not –

**MR. K. MARSHALL:** – responsibility.

**MR. FITZGERALD:** – subject to these director's duties.

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** Yes. Okay, thank you.

Another section that applies to your board as well is section 203. You'll see that there in the section 4(1) of the *Corporations Act*. And that sets out the duties of directors and officers. Now, I'm sure you may be familiar with this in any event, but I am gonna quote it: "A director and officer of the corporation in exercising his or her powers and discharging his or her duties shall … act honestly … in good faith with a view to the best interests of the corporation; and … exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

So I take it you would accept that those were your duties when you were a director of Nalcor?

**MR. K. MARSHALL:** Very much so.

**MR. FITZGERALD:** Yes.

Prior to your appointment at – on the board, was there any orientation provided to directors as to the legal duties that the board – that board members were subjected to. I know you have a lengthy history of being on boards, but everybody did not have your experience and your background, I would suggest, especially over time.

Was there any orientation session of how to be a director and what do to?

**MR. K. MARSHALL:** When I came on the board, no, there wasn't. There was a – I was provided an orientation, but basically, I was to review that myself. We – as I indicated in my testimony, as part of our governance activities, we established a Governance Committee. And part of that is we did establish an orientation manual, and every new board member that came on board would go through that orientation proceeding.

I guess I was grandfathered at that point in time, so I actually never did participate in the full session, so I can't tell you exactly what was there, but oversaw it – you'd have to ask Mr. Clift and others who are part of the governance. But we brought that in from an orientation perspective, as opposed to just reading a binder and taking it home and getting through the information.

**MR. FITZGERALD:** No, and the reason I ask is 'cause – and you're perfectly aware – your corporate background would be different than Mr. Styles' corporate –

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** – background, Mr. Shortall's corporate background.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** I was just wondering if there was any uniform orientation package that tells people how to do their job.

**MR. K. MARSHALL:** There is now.

**MR. FITZGERALD:** There is now?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Okay.

**MR. K. MARSHALL:** Well, I guess there was when I left.

**MR. FITZGERALD:** Roughly, when was that set up or established?

**MR. K. MARSHALL:** That would've been probably around 2009, '10. Yeah.

**MR. FITZGERALD:** And I guess that's a written policy, is it?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** I don't believe we've seen that, Commissioner. I stand to be corrected, but it may be useful if Mr. Simmons can see if he can provide that to us at some point (inaudible).

**THE COMMISSIONER:** I think I have seen it but –

**MR. FITZGERALD:** And if it's in, fair enough –

**THE COMMISSIONER:** – and maybe – we can check that.

**MR. FITZGERALD:** Yeah.

**THE COMMISSIONER:** Just –

**MR. FITZGERALD:** Just wanted to make the point.

**THE COMMISSIONER:** – yeah, we can check that.

**MR. FITZGERALD:** Now you indicated during your testimony this morning that you've read Dr. Holburn's report, in anticipation of your evidence?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** I'd like to take you to P-01770, please. That's Dr. Holburn's report. I don't know if it's in your binder, but it's –

**MR. K. MARSHALL:** It's not. It's in my briefcase, but I'm not allowed to pull that out, so it's – I'll wait for it on the screen.

**THE COMMISSIONER:** She's bringing it up on the screen.

**MR. FITZGERALD:** Page 13, please.

Actually, before we go there, this is *Best Practice Principles of Corporate Governance for Crown Corporations* – that's the title.

If we can go to page 13, the bottom of the page, please. Thank you. Board Relationship with Corporation's Executive.

And if we can go to page 14 and clause 3.5.2 – Mr. Marshall, I'd like you to read that into the record.

**MR. K. MARSHALL:** "Boards are expected to assume an active role in overseeing the CEO and holding management accountable for meeting performance expectations. The Board should develop clear CEO performance criteria and measurable metrics, and monitor performance and results achieved in implementing the organization's strategy. Monitoring the performance of the CEO is a significant responsibility of the Board, and the Board should ensure an appropriate evaluation of the CEO's performance is conducted regularly. It is typical for the Board to annually establish and review performance expectations for the CEO and assess performance against the position description and expectations."

**MR. FITZGERALD:** Thank you.

What steps, if any, did the board take to ensure that there was appropriate evaluation of Mr. Martin's performance?

**MR. K. MARSHALL:** They were pretty rigorous and –

**MR. FITZGERALD:** I didn't –

**MR. K. MARSHALL:** They very rigorous.

**MR. FITZGERALD:** Rarest –

**MR. K. MARSHALL:** (Inaudible.)

**MR. FITZGERALD:** – as in not frequent.

**MR. K. MARSHALL:** No, very rigorous. Rigorous as is in –

**MR. FITZGERALD:** Rigorous?

**MR. K. MARSHALL:** Yes, as this –

**MR. FITZGERALD:** Okay.

**MR. K. MARSHALL:** – I think, it's amazing when I read through Dr. Holburn's report, you know, there was a very clear tie to what we had established, but even – before we established, I came on board prior to Mr. Martin and when he became – 'cause when I was – when Mr. Wells was there, I was not a member of the Compensation Committee. Afterwards I was the chair of the Compensation Committee, and it became a very standard process. We had put in place this performance contract process, which was the short-term incentive program, and made some evaluation – kind of determination.

But every year, the CEO – and I was charged with it as chair of the Compensation Committee, starting in about 2006 with Mr. Martin in particular, that there was very clear performance criteria. They would be a buildup of all of the managers, directors, vice-presidents and executive of the organization – would all ladder up to what the CEO's performance criteria and metrics were. They were reviewed with respect to those metrics throughout the year, overall, because there was no – there was a ladder up and then there would be some unique – more umbrella.

For example, somebody with respect to Bull Arm would have metrics establishing only Bull Arm, but also would have corporate-wide metrics. The CEO would not have metrics for Bull Arm; he would more have the broad area of responsibility.

**MR. FITZGERALD:** Is there any written documentation that –

**MR. K. MARSHALL:** Oh, it's –

**MR. FITZGERALD:** – shows Mr. Martin's performance was reviewed annually by the board?

**MR. K. MARSHALL:** Absolutely. You can get that from, I would suggest, Mike Roberts at the – at Nalcor itself.

**MR. FITZGERALD:** Mr. Mike Roberts?

**MR. K. MARSHALL:** Mike Roberts, yeah.

**MR. FITZGERALD:** Okay. And you would've authored those documents?

**MR. K. MARSHALL:** I would've – so what happened, the process was, at the end of every year when they were submitting the – I would, as chair of the Compensation Committee having to report to the board, from the CEO's perspective, I would request, formally, the CEO to do a self-assessment. He would develop a long list of here's what my objectives were for the year.

The Compensation Committee would meet on those and evaluate whether or not that self-assessment was accurate and verify and validate, where necessary, to determine whether that was appropriate. Then the Compensation Committee would go to the board. And we would always leave the CEO's evaluation for last after the performance contracts were dealt with for directors, vice-presidents and the management team. And the CEO's was always the last to be done because anything that flowed up from them would've impacted on the CEO.

But it was a very formal detailed – and I can tell you it was a sheet of tangible objectives and then there was this five- and six-page self-assessment and Compensation Committee review of the performance of the individual himself.

**MR. FITZGERALD:** So there should be self-assessments of Mr. – that Mr. Martin authored that he provided to the board –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – during this process.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** And how many, roughly, are there?

**MR. K. MARSHALL:** There'd be 10. He was there for a decade.

**MR. FITZGERALD:** So it's every year?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Okay.

Once again, Commissioner, I don't believe I've seen any of that.

**THE COMMISSIONER:** Okay.

**MR. FITZGERALD:** I just want to point that out.

**THE COMMISSIONER:** Yeah.

**MR. FITZGERALD:** If we could go to –

**THE COMMISSIONER:** And that's something you can make a request for from –

**MR. FITZGERALD:** Oh yeah, I understand that, I just wanna –

**THE COMMISSIONER:** Yeah.

**MR. FITZGERALD:** – and if it's in evidence, fine, but I just don't recall seeing it.

**THE COMMISSIONER:** I don't believe it is.

**MR. FITZGERALD:** Yeah. Thank you.

P-00770, if we go to 3.5.4, it's on page 14: Board meeting agenda should regularly include time reserved – sorry, same Exhibit, P-01770. Sorry, I misspoke.

"Board meeting agendas should regularly include time reserved for an in camera session, in which the Board meets without the presence of the CEO or any management. In camera sessions allow Board members to explore freely and candidly any issues they wish to raise privately, such as performance of senior management and their impact on the corporation. After such meetings, the Board chair should give the CEO feedback on the contents and results of that discussion."

And I've gone through your minutes. I don't see a whole lot of in camera sessions and that's why I'm asking the question. Were in camera sessions of Mr. Martin's performance discussed by the board?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** How often?

**MR. K. MARSHALL:** Every meeting.

**MR. FITZGERALD:** Every meeting?

**MR. K. MARSHALL:** Every meeting.

Every meeting there was an in camera session, whether it was – at various points in time it was either Mr. Martin's performance or Mr. Martin's succession, succession for other individual candidates. There was discussions with respect to how things were progressing with respect to board composition, but in camera meetings – and, again, not necessarily just about CEO performance but CEO, senior management performance and some concerns that we may have had with other members of the management team. It happened every single meeting.

**MR. FITZGERALD:** Okay.

After such meetings did you take it upon yourself to discuss the feedback you had from the board with Mr. Martin?

**MR. K. MARSHALL:** While I was chair, yes. And previous chairs I can't speak for.

**MR. FITZGERALD:** No, no, I don't expect you to.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** Okay. Thank you.

Okay, so we've gone through the evaluations and the in camera sessions. Throughout your testimony this morning you've often referred to Dr. Holburn's statement you don't know what you don't know.

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** And I recall him saying that because he answered me during cross-examination. That's where it came from.

**MR. K. MARSHALL:** Right. It actually came from my preliminary interview back in February as I recall.

**MR. FITZGERALD:** Oh, fair enough.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** We're on the same page here.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** But, I mean, Mr. Learmonth took you through this this morning. I mean, Mr. Martin knew all the numbers. So this is not a situation where you don't know what you don't know, this is a situation where Mr. Martin could've fully informed the board of all AFEs and all the FFCs on a go-forward basis and a timely fashion. So I don't get how you don't know what you don't know applies in this context. Can you elaborate on that?

**MR. K. MARSHALL:** Again, I'm not sure. I think because Dr. Holburn also said that over provision of information to a board is as dangerous as under provision of information. So when we reviewed, for example, the November 30, 2014, board meeting this morning, you know, it was over 400 pages and that was very standard.

The role of the CEO and the management team is to make sure that the information – for example, when I looked at that Westney report just before break, you know, it was in the 400-page variety. Would I have expected that that 400-page report would go to the board in its entirety? I don't think so.

If it's – there may be elements of it, there may be excerpts, there may be some summations of it, but it often becomes a judgment call as to what is board relevant and what is not board relevant. And what is board pertinent, I guess –

**MR. FITZGERALD:** No, I –

**MR. K. MARSHALL:** – is a better term.

**MR. FITZGERALD:** And I appreciate that, but I would also say, you know, when you look at whether – the distinction between providing too much information to a board and not enough information, I guess it's subjective to a certain extent.

**MR. K. MARSHALL:** It is.

**MR. FITZGERALD:** However, you know, this is not a situation where Mr. Martin wasn't providing you with – well, we're going to raise the salary of someone in the clerk's office.

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** When you have a project and you're – it's the biggest project we've had, in the billions and billions of dollars –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – and the Commissioner has talked about this, this morning –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – and you have experience as a private sector CEO –

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** – wouldn't you expect your CEO to go to you and say: Mr. Marshall, here's where this is. I need to be frank with you. We may have an issue. I mean, isn't that just common sense in terms of how you would want your CEO to report to you?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Yes, it is, isn't it?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Because you, as the board chair, you also need to have that level of trust in the CEO.

**MR. K. MARSHALL:** Certainly.

**MR. FITZGERALD:** And you would much rather know, coming from your CEO, that we have a problem here with respect to a possible cost risk than someone else in the organization telling you. That would be a fair thing to say, wouldn't it?

**MR. K. MARSHALL:** So I think it would be a fair thing to say. And the previous testimony, the cross-examination by Mr. Smith, you know, Mr. Martin never did promise that this is absolutely guaranteed, here's the price; there's always these risks with respect to labour, with respect to productivity. So the board was always aware that there were certain risks.

As we got further into nailing down those contracts, as we got further into completion of certain elements, then that risk is intended and, hopefully, gets lesser and lesser and lesser. But, you know, I won't say that there was ever a guarantee that said – or there was ever a withholding to say, again, you don't know what you don't know, but –

**MR. FITZGERALD:** But he knew.

**MR. K. MARSHALL:** Well, he knew that there would've been risks and he conveyed to us that there may have been risks. And we looked at, you know, various probabilities and the board, as a whole, decided at the start to go with the P50 as was recommended by management.

**MR. FITZGERALD:** But, Mr. Marshall, you're a bright individual.

**MR. K. MARSHALL:** I would think – I would hope so.

**MR. FITZGERALD:** You're on a number of boards.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** If someone comes in and tells you: We have a risk here, it may be high, it may be low, I would suggest that what you would do is say: Give me the numbers.

**MR. K. MARSHALL:** Yes. Yeah.

**MR. FITZGERALD:** Isn't that how you would operate?

**MR. K. MARSHALL:** It would but they would always be in a range format.

**MR. FITZGERALD:** Okay.

**MR. K. MARSHALL:** And you've got to pin – you got to pick something to be able to go forward to be able to –

**MR. FITZGERALD:** But you'd want to know it.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Yeah.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Mr. Learmonth – I believe it's P-01931 – he questioned you on this, this morning. If we can have it up, please, Madam Clerk.

And if it's the wrong exhibit, it's because I can't read my writing and it's 01831.

**THE COMMISSIONER:** It could be 01831.

**MR. FITZGERALD:** Yeah, I think that might be 01831.

**THE COMMISSIONER:** Tab 16.

**MR. FITZGERALD:** Thank you.

Mr. Learmonth took you through this, this morning and he raised the issue of my client's testimony, Ms. Mullaley, and how she was angered by these numbers that were put forward –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – in terms of – you know, she felt she should've been aware.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** She's the current Auditor General and she's an auditor by trade, you know. But in terms of governance and oversight, how can civil servants and public servants and the government oversee a corporation when there's two sets of books being operated or being used at a corporate level, and your own board hasn't even been provided with all this information in a timely fashion?

**MR. K. MARSHALL:** I'm not sure what your question is.

**MR. FITZGERALD:** My question is – my point is: How can government officials be expected to oversee and conduct their oversight function when the very individuals in the upper echelons of Nalcor are not even sharing information with you?

**MR. K. MARSHALL:** Yeah, understood – difficult, yeah.

**MR. FITZGERALD:** Difficult, isn't it?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Because there's been a lot of criticism of oversight in some of my clients and I suspect that was some of Ms. Mullaley's frustration.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** Would you agree with me that she's entitled to be frustrated when there's two sets of books being used and the government, the shareholders, are left out of the loop?

**MR. K. MARSHALL:** I – again, I can appreciate. I've only met Ms. Mullaley once in a kind of a broad Treasury Board meeting, so I never actually had any interaction with her one-on-one. So I appreciate her frustration.

**MR. FITZGERALD:** Yeah. I mean you're clerk of the Executive Council.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** And the biggest project in the province's history is going forward and you find out, during an Inquiry –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – they were sitting on numbers.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** And I would suggest to you that sitting on numbers is withholding numbers.

**MR. K. MARSHALL:** So –

**MR. FITZGERALD:** Would you agree with me?

**MR. K. MARSHALL:** I agree to one extent. I agree to the – if these were determined to be the final numbers that they were sitting on. But if these were, again, management estimates that were still to be finalized and worked, that they were presented to the CEO and being – the management team was being challenged to make sure that they were as tightly defined as possible. Because one of the things in Dr. Holburn's testimony was also that management tend to be a little more conservative than shareholder and the senior executive.

And I can say that from my private existence that if I – you know, when I tell my CEO what the cost of something is going to be and he says it's unacceptable, he doesn't bring my cost to the board, he makes me sharpen my pencil and make sure that it's squeezed and tightened and nailed down before it goes to the board. So –

**MR. FITZGERALD:** Why can't, on the one hand, order your staff to sharpen their pencils and on the other hand, go to the board and say, they're sharpening their pencils but we might have a problem here?

**MR. K. MARSHALL:** Yeah, that's a fair comment. Yeah.

**MR. FITZGERALD:** Okay.

It would be good practice, wouldn't it, really?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** All right, can we just scroll down to page 12 of this document, please, and maybe 15. I may have the page wrong. Yes, I know it's difficult to see, Mr. Marshall. At least it is for me. I shouldn't speak for you.

This was a breakdown of the 7.501 number that we had here. And I guess your testimony just talked about how, well, if it's not a firm number, you know, maybe we don't have to bring it forward. But as I read this document, there was an awful lot of work done and basis for this 7.5 number at this point and time.

**MR. K. MARSHALL:** There was.

**MR. FITZGERALD:** Yeah, so this is not a situation where it's a crystal ball number or it may or may not land in a particular place, this is very detailed information that, I suggest to you, the board should've been brought – been made aware of and the shareholder at that time.

**MR. K. MARSHALL:** Again, I can't say definitively because the first time that I saw it was during this testimony.

**MR. FITZGERALD:** But it –

**MR. K. MARSHALL:** It is – I mean I –

**MR. FITZGERALD:** It's not a fluffy number, is it?

**MR. K. MARSHALL:** No, no, no, no, no, but this is –

**MR. FITZGERALD:** That –

**MR. K. MARSHALL:** This is a very – I mean all of the individuals that worked for Nalcor, at least in my tenure, were very professional and proud of their work. But, again it's still subject to – because of the reporting relationship it's still subject to the CEO and the vice-president for the project making sure they get challenged to make sure that, you know, that $3.6 million up there in subtotal of MF is indeed $3.6 million and that it shouldn't be $3.4 million or $3.2 million. So there's still work that's got to be done to make sure that that gets, you know –

**MR. FITZGERALD:** And I guess in fairness to you as a board member, you really lost your opportunity to challenge –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD: –** this number at an earlier point in time, didn't you?

**MR. K. MARSHALL:** Yes, yes.

**MR. FITZGERALD:** How does that make you feel?

**MR. K. MARSHALL:** Not happy.

**MR. FITZGERALD:** No, because your name –

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** – is on this, isn't it?

**MR. K. MARSHALL:** And – yeah, well, we – as I indicated that, you know, the board was very – always, whenever these came up, the board was concerned and animated. And I'm not sure what the date of this is. And when we talked about the two stage – I think we talked earlier this morning about the two stage, after going from the 6.99 to the 7.65, I believe it was. And there was discussion around: Do we go in this two phase? And the board said: How do you go in two phase?

**MR. FITZGERALD:** (Inaudible.)

**MR. K. MARSHALL:** If you think that it's going to go to that second number, then you get out and you get that number out there. So this two phase just didn't – it didn't fly from the board's perspective.

**MR. FITZGERALD:** Okay.

**MR. K. MARSHALL:** But it was also – I can say definitively from my perspective, that by the time we got to that 7.6 number, there was extreme – while I explained the kind of the 40-60 split between conscious engineering and camp-related investment I should say, and also then market productivity or labour or management issues, that by the time we got to here, the board was very frustrated with the fact that increases were coming back yet again. And there was a demand to say: When does this end and where does this end? And that's really where the Astaldi issue kind of went into overdrive with respect to the risk of – the true risk of them, you know, going by the wayside.

**MR. FITZGERALD:** When you were conducting the performance evaluations annually of Mr. Marshall –

**MR. K. MARSHALL:** Martin.

**MR. FITZGERALD:** – Martin – sorry, pardon me – did the issue ever arise with respect to we've had an increase from 6.2, 6.5, 7.65 – 6.9 is in the middle there –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – we want to know about this right away.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** We don't want to find this out at the last minute at a board meeting –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – we want to know when you know. Was that ever communicated to Mr. Martin?

**MR. K. MARSHALL:** Yes, it was. And, you know, again, there was fairly frequent board meetings that – and, again, as we indicated earlier with respect to the board minutes and some of the in camera sessions that were held, there was a very open wide-ranging discussion. And so I can't say definitively that some of these – I can definitely say that it wasn't presented in this fashion.

**MR. FITZGERALD:** Yes.

**MR. K. MARSHALL:** But there was a desire to be as open as possibly could. And in terms of getting kind of board awareness, certainly, prior to going to meet with representatives of the government that they wanted to ensure that the board was aware of what was going to be going to the risks that were going to government, or after a meeting with government as to what was said.

So – and those meetings were held with a lot of, kind of, extra time and extra pauses to say: Are there any more questions? Is there anything else that you'd like to see? So there was –

**MR. FITZGERALD:** So he had an opportunity to bring it forward to you.

**MR. K. MARSHALL:** Yes, yes.

**MR. FITZGERALD:** And he didn't avail of that?

**MR. K. MARSHALL:** Again, I can't say definitively as to what was and what wasn't because, you know, what I've seen in the minutes is not necessarily everything that would've been discussed with the board.

**MR. FITZGERALD:** But, now, looking at the documents now in retrospect, you know he was sitting on information he could've provided.

**MR. K. MARSHALL:** And some of that he may have provided in verbal form to the board with respect to a risk. But whether or not –

**MR. FITZGERALD:** Do you have any memory of that?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** Okay.

**MR. K. MARSHALL:** No, it was in general terms. And you could ask other board members from that perspective because –

**MR. FITZGERALD:** Mmm.

**MR. K. MARSHALL:** – or whether or not they'd have the same memory of me, but it was very – it was open. But, again, the recommendation that I would make, in reference to Mr. Williams's questions earlier, would be possibly to make sure that, you know, the minutes are a whole lot more reflective and complete in terms of what gets discussed at those board meetings.

**MR. FITZGERALD:** Yeah and I'm going to go into that in a second because I have some ATIPPA and confidential –

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** – information questions for you.

**MR. K. MARSHALL:** Okay.

**MR. FITZGERALD:** You know, when you look at the model that you have here and we look at Holburn's – Dr. Holburn's report, you have the senior executive and you have the board of directors. Ultimately, Nalcor was set up so the board of directors would've been the first level of oversight. Wouldn't it have been?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** And you would be responsible for the CEO?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** And the CEO would be responsible for the people underneath him. It's just – that's the way it was set up, wasn't it?

**MR. K. MARSHALL:** Correct. Yes.

**MR. FITZGERALD:** Yes.

**MR. K. MARSHALL:** The one area where we – where Nalcor differed from Dr. Holburn's testimony – and it's not that it was written down, but the CEO became the primary point of contact for the minister and for the premier. And that wasn't the role of chair as Dr. Holburn would've indicated should have been in best practice, but that was –

**MR. FITZGERALD:** How did that happen?

**MR. K. MARSHALL:** I think it was long before my tenure as a board member. I think it was – had been there for quite some period of time. It might've happened as a result of the fact that the CEO is – because the chair is a part-time position not involved in the details of the business on a day-to-day basis, that when you go to meet with the minister or the premier, is you want the individual that has the most in-depth and detailed knowledge of all of the issues on a continual basis, and that would be the CEO.

So that would happen – I would think it's still happening today. That happened during my tenure and it happened during a lot of my former chairs' tenures that the CEO became the primary means of communication. When I was chair, I did have some meetings with the minister and also with the deputy minister, which Dr. Holburn's report would say, no, you shouldn't be meeting with the deputy minister. I didn't meet with the deputy minister without the minister there.

So it was – it differs slightly and I think that's because of the part-time nature, the non-compensatory nature and the fact that you want the most knowledgeable individual in the room with the premier or the minister at the point in time of the information being discussed and conveyed.

Obviously, you know, when I did meet occasionally –

**MR. FITZGERALD:** Despite the compensatory point you just made – I'm sorry, did I interrupt?

**MR. K. MARSHALL:** No, go ahead.

**MR. FITZGERALD:** Yeah, the non-compensatory nature. I mean, I understand everybody wants to make money and get paid for their time. I mean, that's just the way the world works.

**MR. K. MARSHALL:** Yes, but they –

**MR. FITZGERALD:** But the non-compensatory nature didn't, in any way, reduce your obligation as a board member –

**MR. K. MARSHALL:** Oh, not at all.

**MR. FITZGERALD:** – and a director to do your job –

**MR. K. MARSHALL:** Not at all.

**MR. FITZGERALD:** – did it?

**MR. K. MARSHALL:** Not at all.

**MR. FITZGERALD:** No.

**MR. K. MARSHALL:** But –

**MR. FITZGERALD:** In terms of, I guess, on a go-forward basis, you can't – well, let me take it back a step. You can't recall how the reporting relationship evolved with respect to Mr. Martin going and directly to the premier's office and/or the minister's office. Is that your evidence?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** Okay.

Was any consideration given by the board during your time there that maybe this is not the best reporting mechanism we could be implementing here?

**MR. K. MARSHALL:** No, I think the – there was a recognition that because he was the senior official responsible for this, that he was the proper representative to speak with government officials, and he and, you know, Mr. Bennett or whomever would meet with those officials because they were full-time immersed and hired for the purpose of this project, as opposed to a – kind of, an appointed board member with that, kind of, part-time assumption implication. So it was always felt that that was proper.

Now, where the chair or a particular board member would meet – and I've met with Premier Davis, as an example – when it came down to explaining the compensation of the CEO and the annual review of the CEO, the CEO would not be present for that, and I would be the one to go and discuss, either as the chair of Comp Committee or as the chair of the board. So there were still some lines of communication in appropriate elements. And as an example, chairs before me, I know, indicated to us – I shouldn't say I know – but they indicated to us that they went to meet with the premier or the minister with respect to board composition and compensation.

**MR. FITZGERALD:** No, I understand that issue was out there and –

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** – but I did want to highlight the fact that, I mean, obviously no one forced you to be on this board.

**MR. K. MARSHALL:** No, no.

**MR. FITZGERALD:** No, you had the freedom to resign at any time.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** And if you felt like you couldn't do your duty or your obligation, you would've resigned?

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** Yeah, and you've – I know you did it to the best of your ability, but that does not change the fact that the buck stops with the board –

**MR. K. MARSHALL:** Totally.

**MR. FITZGERALD:** – in terms of managing this project and overseeing your CEO and –

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** – employees.

**MR. K. MARSHALL:** Yeah, but I can say that the board, with respect to that communication –

**MR. FITZGERALD:** Do you agree with me on that?

**MR. K. MARSHALL:** Yes, but the board did still feel that – I point out that it differs – I agree with, you know, 95 to 98 per cent of what Dr. Holburn had to say, but our reality at Nalcor – because he brought in this survey of Crown corporations globally, he didn't do an analysis of what's been done on Nalcor, what's being done at Nalcor. The one area that differs – and I think the board supported the role and the active nature of the CEO being that point of conduit and communication to the province.

**MR. FITZGERALD:** Do you believe your oversight duties were hampered by the failure to provide you with timely information?

**MR. K. MARSHALL:** At the time –

**MR. FITZGERALD:** Yes.

**MR. K. MARSHALL:** – no, I don't believe so. In hindsight, perhaps.

**MR. FITZGERALD:** Oh yeah, I'm talking about hindsight.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** What you know now.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** Yeah, fair play.

During your testimony this morning – I'm only going to touch on this briefly – the issue of the $6.5-billion figure came up with Mr. Learmonth and Mr. Ralph, and I believe you said that you discussed this with Mr. Gerry Shortall to try to obtain more information to refresh your memory.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** What did he say?

**MR. K. MARSHALL:** He said, you know, as I indicated earlier, no. Quite clearly, he said we were well aware of the $6.5 billion through that process, and it was two things. One is it was deemed to be because the $6.2 billion was the publicly released figure that was out there, it wasn't necessarily put in writing, but the board was aware of the 6.5. And also, because of the incremental interest benefit of the $300 million, it was deemed to be effectively a wash from an impact to the ultimate cost of the project – back to 6.2.

**MR. FITZGERALD:** Okay. Thank you.

And I may have misheard you, but did you indicate to me that during a board meeting – or indicate to the Commission – that this was provided to you in a – one sheet of paper and it was taken back?

**MR. K. MARSHALL:** No, no. No, I said that it wouldn't have been uncommon for us in some board meetings to have information provided to us and then taken back and that's – that – I can't say specifically with respect to the 6.5 or any of the specific documents –

**MR. FITZGERALD:** Okay.

**MR. K. MARSHALL:** – but I can say that it's not uncommon for it to have happened in some instances where information is commercially sensitive or yet to be determined. It's not uncommon when I go to meetings at Rogers with respect to information that is competitively sensitive, that that happens on a quite frequent basis.

**MR. FITZGERALD:** Okay. So you want to secure the information.

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** So when that information comes back to the secretary, I guess, at the meeting, or whoever's responsible for handing that out – this one page about a commercially sensitive information – it doesn't become part of the minutes, I guess, because –

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** – we have the minutes.

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** So where are all those pages at – where are those stored at Nalcor?

**MR. K. MARSHALL:** You'd have to ask the secretary of the board.

**MR. FITZGERALD:** Are you confident they exist?

**MR. K. MARSHALL:** That's a judgment question. Yeah.

**MR. FITZGERALD:** They did exist at one time.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** You're confident they existed at one time.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Yes, fair play.

And how often would that happen, every board meeting?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** Not often?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** In your time there, how many –

**MR. K. MARSHALL:** As I said, it was not uncommon. It wasn't a common occurrence. It was not uncommon.

**MR. FITZGERALD:** Not uncommon. So there would be a protocol in place where those documents would go back to the secretary or whatnot –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – and he or she would then, I guess –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – manage the information.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Okay. Thank you.

Now, there's been much discussion of commercially sensitive information and ATIPPA at this Inquiry and I – in my own opinion, there's a fundamental misunderstanding by an awful lot of people on how this legislation operates. That's just my opinion. And I want to ask you a few questions on that and try to assist the Commissioner and try to –

**MR. K. MARSHALL:** Right.

**MR. FITZGERALD:** – bring some of this out.

If we – when you joined the board, were you given any orientation on how the Access to Information Act would work?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** No.

If we could bring up Exhibit – what's the first exhibit – 00431, Commissioner, the *Energy Corporation Act*, please, Madam Clerk.

And if we can go up to section 2, please, the definition section. Okay. Just up a little bit further, or down a little bit further.

I'm interested in section (b.1), just down a little bit further – no, up, sorry. Keep going.

**MR. K. MARSHALL:** Right there.

**MR. FITZGERALD:** Thank you. Perfect.

Now, before I get into this, do you recognize, Mr. Marshall, that the Access to Information act does provide a right of access but, at the same time, it provides government and public bodies with the right to deny access to information, subject to certain exceptions?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** And if an exception applies, you don't get the information.

**MR. K. MARSHALL:** Correct.

**MR. FITZGERALD:** And I'm going to take you through this definition, some procedural mechanisms here because I think it's important we bring it out, because this is what the definition of commercially sensitive information that the government set up when creating Nalcor. And it's going to be my submission they set it up to allow you to do your job without worrying about commercially sensitive information being disclosed.

(b.1) here, commercially sensitive information – were you ever aware of this actual definition prior to today's testimony, the complete definition?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** Okay. Thank you.

And "'commercially sensitive information' means information relating to the business affairs or activities of the corporation or a subsidiary, or of a third party provided to the corporation or the subsidiary by the third party, and includes" – and I'm going to take you through this because I have a question for you – "(i) scientific or technical information, including trade secrets, industrial secrets, technological processes, technical solutions, manufacturing processes, operating processes and" logistical methods. So that's the first level.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** "(ii) strategic business planning information,

"(iii) financial or commercial information, including financial statements, details respecting revenues, costs and commercial agreements and arrangements respecting individual business activities, investments, operations or projects and from which such information may reasonably be derived,

"(iv) information respecting positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the corporation" – that's important in that style of context I would suggest – "a subsidiary or a third party, or considerations that relate to those negotiations, whether the negotiations are continuing or have been concluded or terminated …."

If we can just scroll up a little bit, please? "(v) financial, commercial, scientific or technical information of a third party provided to the corporation or a subsidiary in confidence,

"(vi) information respecting legal arrangements or agreements, including copies of the agreement or arrangements, which relate to the nature or structure of partnerships, joint ventures, or other joint business investments or activities,

"(vii) economic and financial models used for strategic decision making, including the information used as inputs into those models …."

And just in case, "commercial information of a kind similar to that referred to in subparagraphs (i) to (vii) …." Would you agree with that this is a fairly all-encompassing definition of commercially sensitive information?

**MR. K. MARSHALL:** Indeed.

**MR. FITZGERALD:** It is extensive, isn't it?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** And if you don't fit in columns one through seven or items one through seven, there's even a discretion there to say if it's similar –

**MR. K. MARSHALL:** That's right.

**MR. FITZGERALD:** – to any of that –

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** – you don't get it, it's commercially sensitive information.

So in terms of commercial sensitivity, I would suggest to you that the government provided Nalcor with a very liberal definition of commercial sensitivity so you as a board and Mr. Martin as the CEO wouldn't have to worry about people getting access to this information. Would you agree with me on that? It is pretty all encompassing, isn't it?

**MR. K. MARSHALL:** It is.

**MR. FITZGERALD:** Yes, thank you.

If we could scroll down a little bit further, and this is in relation to a question that Mr. Smith asked you. Next page please, page 4. If we could keep going down – that's actually 5.4 of the act is the section I'm looking for. Okay.

Notwithstanding section 7 of the ATIPPA, "in addition to the information that shall or may be refused under Part II, Division 2 of that Act" – so that act is useful to Nalcor as well; there is exceptions in that act that also would assist you separate and apart from commercial sensitivity – the CEO "of the corporation or a subsidiary, or the head of another public body, (a) may refuse to disclose to an applicant under the Act commercially sensitive information of the corporation … and (b) shall refuse" – no discretion there – "to disclose to an applicant under that Act commercially sensitive information of a third party …."

If we can scroll down a little bit further – thank you. And this is what Mr. Smith was referring to: "Where an applicant is denied access to information under subsection (1) and a request to review that decision is made to the commissioner under section 42 …" – and you did reference that this morning about a review of the commissioner – "the commissioner shall, where he or she determines that the information is commercially sensitive information" – and we've already heard your evidence that it's a liberal definition and a broad definition – on receipt of CEO's "officer's certification that he or she has refused to disclose the information for the reasons set out in subsection (1); and (b) confirmation of the" CEO's "decision by the board of directors" – which it would be a role that you would play – "of the corporation or subsidiary, uphold the decision of the chief executive officer or head of another public body not to disclose the information."

So would you agree with me that in this context, the board would play a role, and that if Mr. Martin, who you agree is the individual most familiar with the project, says it's commercially sensitive information, the board would, say, sign off on that and the Privacy Commissioner is stuck with that decision.

**MR. K. MARSHALL:** Yes, and I think that the board did have discussions with the secretary in a number of cases. And I think, you know, the board was broadly aware, and I can't recall the exact, you know, date or timing with respect to this, but the volume of requests was becoming absolutely enormous.

**MR. FITZGERALD:** Yes.

**MR. K. MARSHALL:** Some of them were felt to be frivolous and some of them were felt to be, you know, easily grantable and others were deemed to be – you know, like this would be deemed to be not presented. We were never – and actually –

**MR. FITZGERALD:** No, and I don't expect you to be in to day-to-day management of ATIPPA.

**MR. K. MARSHALL:** Yeah. No, no, but we had to be – with respect to – we had – I remember a discussion with this at one of the board meetings, but we were never – and I have to commend the process within Nalcor. I never, as chair or as a board member – never knew who made any ATIPP request which was part of the legislation.

**MR. FITZGERALD:** That's right. It still is.

**MR. K. MARSHALL:** Never ever once did I know yet individuals could make these continued requests. Now, we then couldn't stop it. If that individual was denied and denied and denied, then they'd run off to the media and say, I'm getting stonewalled and, you know, Nalcor – so, Nalcor still will face the negative implications of denying in some instances. If they refuse to provide, we could never know formally as to who was making –

**MR. FITZGERALD:** No.

**MR. K. MARSHALL:** – the request to see if they could be satisfied.

**MR. FITZGERALD:** But we do know that there is a place – and this Commission of Inquiry is –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – a good example of it – where there is some commercially sensitive information that shouldn't be disclosed.

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** The – it won't be disclosed, no matter who in the media –

**MR. K. MARSHALL:** Right.

**MR. FITZGERALD:** – is crying foul.

**MR. K. MARSHALL:** Right.

**MR. FITZGERALD:** You would agree with me?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** So what would happen would be an ATIPPA request would be made and the ATIPPA coordinator at Nalcor would make a decision –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – and it would be refused. If it's commercial sensitivity, there seemed to be an awful lot of flexibility in the act –

**MR. K. MARSHALL:** Yes. There should've been.

**MR. FITZGERALD:** – to allow Nalcor to deny.

**MR. K. MARSHALL:** Yes. Yeah.

**MR. FITZGERALD:** So you were doing nothing wrong, I would suggest.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** You know, I mean, the definition is quite broad.

**MR. K. MARSHALL:** Yeah. Yeah.

**MR. FITZGERALD:** Okay.

Now, are you aware that even in such circumstances, if an individual were go to Supreme Court if he or she were unhappy with the Privacy Commissioner at the time, then a justice, such as Commissioner LeBlanc, would be the individual to decide whether or not Nalcor was properly saying this information was commercially sensitive.

**MR. K. MARSHALL:** I can't say I'm aware to that degree. I don't know if –

**MR. FITZGERALD:** Okay.

**MR. K. MARSHALL:** – any case ever got to that degree.

**MR. FITZGERALD:** That was my next question.

**MR. K. MARSHALL:** Yeah.

**MR. FITZGERALD:** Are you aware of any case where a judge of the Supreme Court of Newfoundland and Labrador decided that the information request by Nalcor – or the position by Nalcor that the information is commercially sensitive information was wrong and an individual were to get that information?

**MR. K. MARSHALL:** No, not off the top of my head. No.

**MR. FITZGERALD:** No, I don't believe one exists.

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** Also in the ATIPPA, are you aware that there's provisions for Cabinet confidences –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – and for advice of recommendations to premiers, like Mr. Williams's clients and –

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** – Ms. Best's clients?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** So I guess what I'm getting at is I'm failing to understand the concern – the overriding concern of this commercial sensitivity piece when you have an act, the *Energy Corporation Act*, which expands upon the ATIPPA, also allows Nalcor to rely on the ATIPPA, and you have the government who has their confidences as well – why people weren't providing government with a full and open picture and providing your board with a full and open –

**MR. K. MARSHALL:** I don't know.

**MR. FITZGERALD:** – picture.

**MR. K. MARSHALL:** I don't know.

**MR. FITZGERALD:** Doesn't make sense, does it?

**MR. K. MARSHALL:** No.

**MR. FITZGERALD:** Yes. Would you agree with me, the model seems to make sense?

**MR. K. MARSHALL:** Yes.

**MR. FITZGERALD:** Those are my questions. Thank you, Mr. Marshall.

**MR. K. MARSHALL:** Thank you.

**MR. FITZGERALD:** Thank you, Commissioner.

**THE COMMISSIONER:** Okay, thank you.

Robert Thompson?

**MR. COFFEY:** Good afternoon, Mr. Marshall –

**MR. K. MARSHALL:** Good afternoon.

**MR. COFFEY:** – (inaudible) Bernard Coffey for Robert Thompson.

**THE COMMISSIONER:** Press your mic on, please.

**MR. COFFEY:** Oh, that helps, too.

Good afternoon, Mr. Marshall. Bernard Coffey for Robert Thompson.

I have some questions relating to your testimony, particularly this morning.

If we could bring up, please, Exhibit P-00664.

**THE COMMISSIONER:** That's at tab 1.

**MR. COFFEY:** Yes, thank you, Commissioner.

Now, Mr. Learmonth took you to this. It's the board minutes for August 23, 2012. And in particular, just right now, if we could go, please, to page 4.

Can you see that, Mr. Marshall? The second-full paragraph reads, "Mr. Bennett" – this would be Gilbert Bennett – "then reviewed the project definition for the Strait of Belle Isle crossing. He reviewed the estimating approach and the cost estimate components which included the base estimate, the estimate contingency and the escalation allowance."

Now I have looked through the rest of this document and there's no references that I can see to such a detailed approach to base estimate, estimate contingency and escalation allowance for anything other than the Strait of Belle Isle crossing in this particular meeting.

But – I'm just gonna ask you in relation to this, the idea that the capital cost estimate would include the base estimate, the estimate contingency and the escalation allowance – was that something that the board in 2011, 2012, '13, '14, '15 and '16 understood was the way that the capex was calculated?

**MR. K. MARSHALL:** I think these were early days –

**MR. COFFEY:** Oh yes.

**MR. K. MARSHALL:** – we were post-sanction, pre-financial close –

**MR. COFFEY:** Yeah.

**MR. K. MARSHALL:** – so we were doing kind of the – the process may have been a little more – less frenetic than it was as we got into construction and the issues that developed during construction. So I can't say if this was defined as being the requirement. I – again –

**MR. COFFEY:** Oh, I'm not suggesting this was the requirement. I'm just asking, you know, as a board member at that time – and this happened to be 2012, the middle of 2012 –

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** – the idea that the capex, capital cost estimate, would be comprised of the base estimate –

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** – an estimate contingency –

**MR. K. MARSHALL:** (Inaudible.)

**MR. COFFEY:** – and an escalation –

**MR. K. MARSHALL:** Escalation allowance.

**MR. COFFEY:** – allowance –

**MR. K. MARSHALL:** Again, I can't say if this was specific to the Island Link –

**MR. COFFEY:** Oh, no, no, I'm not suggesting it was.

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** It just happens – this happens to go further –

**MR. K. MARSHALL:** To be mentioned in that –

**MR. COFFEY:** – than SOBI here.

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** But I'm asking you about generally. Was that your understanding, generally, of each of the components of the project, that's the way they calculated the estimate?

**MR. K. MARSHALL:** I can't say –

**MR. COFFEY:** You can't.

**MR. K. MARSHALL:** – definitively, no. I really can't.

**MR. COFFEY:** Okay.

**MR. K. MARSHALL:** I wish I could.

**MR. COFFEY:** Now, in answering questions for Mr. Learmonth, I believe you said that in board deliberations we discussed what are the ranges and what are the worst-cost scenarios.

**MR. K. MARSHALL:** In many cases, yes.

**MR. COFFEY:** And could you give me – the Commission, please – a context in terms of the time at which that happened? Because it was not – at least I wasn't clear – at the time Mr. Learmonth had been asking about DG3 and then he had referred to – I can't – and the subject of the July 2013 FFC deck with its reference to $7 billion estimate was canvassed. And you made a comment then about getting a November 2013 – a board deck with 400 pages more or less.

And then you made this comment. You said: In board deliberations we discussed what are the ranges and what are the worst-case scenarios.

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** So could you explain to the Commissioner –

**MR. K. MARSHALL:** It was just, it was more –

**MR. COFFEY:** – like, how that came up and –

**MR. K. MARSHALL:** Yeah, it was more a general – I mean in particular, after we got in to the – you know, the 6.2 to – the 6.5 was discussed, but we were semi-satisfied. And then we got into the kind of the – kind of a frenetic period with respect to DarkNL and the resignation of Premier Dunderdale, and then the subsequent kind of delays with respect to bringing on new premiers and processes.

But as we got into the 6.99 and then the 7.6, the board became increasingly frustrated to say just where are we going here? Just how bad is this going to be? Now, there's not any evidence or recollection that I have specifically with respect to numbers that were positioned at the extreme high end but it was a free-flowing discussion and concern of the board to talk about some of the individual elements and, in particular as we were last and late in the project, from our perspective, was the issue around Astaldi in terms of what could happen there and there was one, you know, set of estimates with respect to trying to negotiate with Astaldi to get them to continue that, you know, trying to stave off bankruptcy – to keep them from that.

And then if you got rid of them and got another contractor, how much would that cost. So, we – it was more blue sky – not necessarily definitive ranges but they – those discussions did happen. I can't – I can't point to specific dates and I can't point to specific amounts other than the discussions really around the Astaldi piece last – in the later years.

**MR. COFFEY:** Okay. And that's – so, when you say discussions – discussions with whom?

**MR. K. MARSHALL:** Within the board. Within the board.

**MR. COFFEY:** With Mr. Martin?

**MR. K. MARSHALL:** Mr. Martin. Mr. Bennett. Yes.

**MR. COFFEY:** But they'd be there and –

**MR. K. MARSHALL:** Yes.

**MR. COFFEY:** – so there'd be – so, could you describe, like – how would a discussion like that work?

**MR. K. MARSHALL:** It would be based on questioning because, you know, the way that the board meetings work was that there would be a presentation and then there would be a – if something required a vote or didn't require a vote there would always be discussion period allowed after that presentation. That's when they would happen – was in that period of, kind of, review of the documentation that had been provided.

And there was always a desire – a strong desire – to make sure that any question that a board member may have had – either got addressed or was tabled to be followed up to bring back for communication – back to either that individual board member or the board as a whole.

**MR. COFFEY:** Now. And again, and – Commissioner, forgive me if this is a – if I'm going over ground that's been tried before but could you just give the Commissioner, please, a sense of, like, it's a board meeting – I'll just say the Nalcor board itself. The four board members – (inaudible) – five – depending on, you know – depending on four or five seats (inaudible) –

**MR. K. MARSHALL:** Well, at this one there was seven.

**MR. COFFEY:** Yes. Seven at various points.

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** My point being there'd be – Mr. Martin would be there –

**MR. K. MARSHALL:** Yes.

**MR. COFFEY:** The board members – the other board members would be there.

**MR. K. MARSHALL:** Yes.

**MR. COFFEY:** What would you bring to the meeting? What would – or what would be distributed at the meeting? You know, if you're talking about, like, 400 pages –

**MR. K. MARSHALL:** The – so – literally the – this binder here –

**MR. COFFEY:** Yes.

**MR. K. MARSHALL:** It would be bigger than that, typically, and double-sided and after a while, we – through conversations, there would be iPads, and so everything that we had would be electronically distributed, because it became problematic for board members such as Leo Abbass or Gerry Shortall who – Gerry would be flying in here from Toronto and if he couldn't get it couriered to him in Toronto, then it would arrive at his hotel the day before the board meeting.

So the iPad distribution became a pretty beneficial element to efficient distribution of material, and for review, and for environmental purposes – to not be, you know, destroying the trees of the province.

**MR. COFFEY:** Do you recall when the – such usage of iPads began?

**MR. K. MARSHALL**: No, I don't specifically.

**MR. COFFEY:** Okay.

In relation to the paper copies, when they were in usage, I take it that if there were notes made on the paper copies, would you be given the – like, the binder, leaving it behind after you left the room?

**MR. K. MARSHALL**: Not immediately. I mean, for a while – it's funny, I mean, I used to bring them back to my office – in my day job.

And then, you know, I needed another cabinet, and I said this is crazy because, you know, eight other people have this exact same set of binders. And so I contacted the secretary and said, can I return these? Because there is always the master set of documents if I have to. So I returned – never returned them directly afterwards, but returned them in weeks thereafter ’cause I kept them for a while, in case we had to follow up on certain things, and then would return them – and refer to the master document if I required to go back into – to look.

**MR. COFFEY:** Okay. So and – if, on your copy, when it was paper, if you made a note or notes or whatever, your notes ended up wherever –

**MR. K. MARSHALL**: Where – I have no idea.

**MR. COFFEY:** – those binders would go.

**MR. K. MARSHALL**: Yeah.

**MR. COFFEY:** Okay. And how about on the iPad?

**MR. K. MARSHALL**: Same and/or – you know, notes with – you know, with the digital pen –

**MR. COFFEY:** Yeah, that’s (inaudible).

**MR. K. MARSHALL**: – that would be there. They were more kind of reference to myself, to ask a certain question or come back to a certain issue or to flag a certain thing to ask about, but – and I would have no idea because when we left, we left our iPads there, and I presume they were wiped.

**MR. COFFEY:** Now you’ve indicated that, you know, as the – I take it that as the – after sanction, as time went on, at some point at board meetings – and you’ve described generally, I think, when this came about – the board began to ask questions about: well, what are the ranges, what are the worst-case scenarios – do you recall when that was? It – presumably, it wasn’t at 6.2.

**MR. K. MARSHALL**: No.

**MR. COFFEY:** In the context in which you’ve been speaking here–

**MR. K. MARSHALL**: No –

**MR. COFFEY:** – today.

**MR. K. MARSHALL**: – but even at 6.2, you know – and again, going back to Phase 1 testimony, it actually was at 6.2, because there was discussion, as we heard quite extensively, around, you know, P50, P75 –

**MR. COFFEY:** Yes.

**MR. K. MARSHALL:** – P25, P90. And all of those P-levels would indicate what the possible ranges were going to be. So there was discussion then, at that point in time, and it was also – had to be stacked up against the Isolated Island Option and what the differential was with respect to that and what were the, kind of, side – ancillary benefits associated with doing a project like Muskrat Falls.

There was never a desire while the differential was done – on the basis of spilling water, there was never a desire or an interest. It kind of – while it made sense financially, that was never our desired end-state. We wanted to make sure that whatever was being – capable of being produced was produced and able to be exported.

So I would say to you that those, you know, discussions and type of questions started – did start with the 6.2 –

**MR. COFFEY:** Okay.

**MR. K. MARSHALL:** – but they escalated as we got into some of the increase requests for the project.

**MR. COFFEY:** Now – so the questions – like – a question, what is the range or what are the ranges? What’s the worst-case scenario?

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** They would be questions the board would be asking and the answers would be coming from Mr. Martin, I’d take it?

**MR. K. MARSHALL:** Yes. Yes.

**MR. COFFEY:** And in terms of, you know, from time to time like, keeping track of what you were told six months ago –

**MR. K. MARSHALL:** Right.

**MR. COFFEY:** – as it were.

Was there any method used, like, in terms of like, Mr. Martin or Ed – six months ago you told us it was 7 (inaudible) –

**MR. K. MARSHALL:** Well –

**MR. COFFEY:** – and now it's 7.5.

**MR. K. MARSHALL:** – yeah, no, I guess we had the AFE's and we had that process as a historical. But I don't know if there was ever any, you know, quote register to say that here's where we were. But there was always recognized risk and there was, again, a kind of commentary that as we got further along with engineering that risk would – that risk lessened. And as we got further along with construction completion that risk became further nailed down and minimized.

**MR. COFFEY:** I believe this morning as well that – in response to a question Mr. Learmonth posed – was in the context of – I think he was asking you about the – one of the Grant Thornton – the Grant Thornton report, but you responded at one point saying: I can't say we didn't – in our board discussion – there could have been figures of eight, nine or 10 billion mentioned if things all went the wrong way.

**MR. K. MARSHALL:** No, I –

**MR. COFFEY:** I stand to be corrected, and that's why I –

**MR. K. MARSHALL:** Yeah, I never heard a $10 billion figure for sure. That's –

**MR. COFFEY:** – well if – okay, if you didn't hear 10, I'll use eight or nine.

**MR. K. MARSHALL:** Yeah.

**MR. COFFEY:** In what context did that occur?

**MR. K. MARSHALL:** Well –

**MR. COFFEY:** Like – and was it eight or nine?

**MR. K. MARSHALL:** – well –

**MR. COFFEY:** That's the figure that was used.

**MR. K. MARSHALL:** – yeah, no, when we –

**MR. COFFEY:** Was that the total figure, or?

**MR. K. MARSHALL:** – no, when we left, like for an example, in April of 2016, as I indicated, at Phase 1, the AFE and the FFC was sitting at 7.7. We understood quite clearly that there was going to be a figure between $300 and $500 million. And again, I was not in discussions with Astaldi. To this day I've never met anybody from Astaldi. So this was based on information that I was getting from Mr. Martin, Mr. Bennett and whoever else was in those discussions and negotiations with Astaldi.

So even at the top end of that range we were looking at 8.2, and that is if all went well from that point forward with Astaldi. Now, you know, could there be – was there still risks with respect to other elements? Well, we still weren't at completion – that was in 2016 – and we still had another year or two to go. So that's when the reference became, yeah, if things go poorly or things go wrong or things happen, then there was still some element of risk. But, again, we were getting closer and closer, we felt strongly we owned, up to the 8.2, because we knew that that was what we felt was going to be required –

**MR. COFFEY:** Okay.

**MR. K. MARSHALL:** – to get Astaldi settled and to finish the project.

**MR. COFFEY:** Oh, so this was in the – towards the latter part of your (inaudible).

**MR. K. MARSHALL:** Correct, yes.

**MR. COFFEY:** Okay, thank you.

Now, Mr. Fitzgerald asked you questions about, well, the *Energy Corporation Act*, and as well he referred to – you to several sections of the *Corporations Act*, which do apply to Nalcor, and there's a reference to – in section 167 of the *Corporations Act* – to a unanimous shareholder agreement, and there's in fact a definition in the *Corporations Act* of it.

And it's the – I believe – the definition, I believe, of unanimous shareholder's agreement is in 245, Commissioner, it may be 203 – my notes are not clear on this. My point being this, Mr. Marshall, at any point while you were a director were you aware of any unanimous shareholder agreement that applied to Nalcor? And I'm not suggesting there was, I'm just asking you if you were aware of anything you understood was a unanimous shareholder agreement?

**MR. K. MARSHALL:** I can't recall specifically, no.

**MR. COFFEY:** Okay.

You also, I believe, in answering questions from Mr. Fitzgerald, referred to – in passing, you said – well, I'd referred to at one point somebody – the board to suggest – if somebody suggested to the board that we use the 6.9 one – we're moving from $6.99 billion to $7.65 billion, that it be done in two phases.

**MR. K. MARSHALL:** Yes.

**MR. COFFEY:** And the board's response was no.

**MR. K. MARSHALL:** Yes.

**MR. COFFEY:** (Inaudible) the one. Who suggested the two-phased approach?

**MR. K. MARSHALL:** I can't recall.

**MR. COFFEY:** Would it be Mr. Martin?

**MR. K. MARSHALL:** It would've been a combination between Mr. Martin, Mr. Bennett, Mr. Sturge who would've been at all of those meetings presenting that Lower Churchill Project update.

**MR. COFFEY:** And why did the board reject, you know, the two-phased approach –

**MR. K. MARSHALL:** Well –

**MR. COFFEY:** – as suggested (inaudible).

**MR. K. MARSHALL:** – the principle was if it's known that we're gonna be at that higher amount, then get out and get it out there. And in fairness to, you know, recognizing the difficulty around that, this was a particularly sensitive time because it was an election year.

**MR. COFFEY:** Okay.

**MR. K. MARSHALL:** And in fairness to the premier at the time, he announced it in September just before an election, even though it was an unpopular – and there was great consternation with respect to that.

**MR. COFFEY:** What was the rationale offered for using a two-phased approach?

**MR. K. MARSHALL:** I can't recall.

**MR. COFFEY:** Thank you, Commissioner.

**THE COMMISSIONER:** Thank you.

(Inaudible) Consumer Advocate?

**MR. PEDDIGREW:** Good afternoon, Mr. Marshall.

**MR. K. MARSHALL:** Good day.

**MR. PEDDIGREW:** A number of questions I had for you have been asked, but I do still have a few questions for you. Just not to go over one issue that has been canvassed extensively already with some questioning, but the amount of information that you were getting from the CEO and the project management team about the various cost increases throughout 2014 and '15 especially – and Mr. Coffey just asked you about the worst-case scenario.

And I guess, just to be clear, so you're saying – asking for the worst-case scenario was something that you specifically requested of the board and the project management team.

**MR. K. MARSHALL:** It was a part of our board discussion and our, kind of, what happens if, I mean, as part of board due diligence. I think it's just a matter of – the board never sat there and said, oh, you're staying at 6.99? Okay, fine, let's approve that. It was, you know: What risks do we have in here, what else can go up, because we had been through – again, getting to the 7.6, we had been now through two increases, formally increased from AFEs.

So the board was making sure that the questions and that the risks were noted and that we had actually started just, you know, late in that period, in the 2015 range, we had developed that risk register, which would not necessarily quantify all of the elements, but would highlight what areas of risk and what the severity of those risks would be. But it didn't necessarily establish dollar figures to them, but it would ensure that the board was aware, through this risk register, as to what else was out there. And that became, you know, part of that discussion and – with respect to the cost increases.

**MR. PEDDIGREW:** Now, and what led to the board's decision to create a risk register?

**MR. K. MARSHALL:** Oh, it was our governance enhancements that we were trying to do and had started for the previous couple of years. We had put in place a Governance Committee; we had bolstered a number of those committees and added, kind of, environment into the health and safety group, added, in later years, communications into that group, added governance. And it was – we developed the whistle-blower legislation. So it was a part of trying to ensure – and earlier to that, we started the AGM process.

Nalcor – Hydro never had an AGM. Here it was a Crown corporation, you know, providing power to the people, generating the power, providing it to the people of the province, but never did actually have an annual meeting whereby people were invited. So, we had actually started the process back in 2006 or '07 to have a day whereby here's what we've done for the year, here's what the plans are for the year, here's the accomplishments, here's the spending and then it went on.

So it was a part of good governance and a part of being more open and transparent and communicating with the people of the province.

**MR. PEDDIGREW:** So the creation of the risk register seems to be that – what you're saying is it was part of, sort of, an overall enhancement of board –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – oversight as opposed to – it wasn't created in response to –

**MR. K. MARSHALL:** No.

**MR. PEDDIGREW:** – rising costs.

**MR. K. MARSHALL:** No.

**MR. PEDDIGREW:** Okay.

And just to go back to my first question about the worst-case scenario. So, from your point of view, the executive, the project management team would've been aware that the board wanted to know worst-case scenario?

**MR. K. MARSHALL:** Absolutely. The board – and there was always – it was never – you know, we – did we see the, you know, estimates like that – fixed engineering estimates from the FFC? No, but there was discussions around, you know, if this happens, if that happens, if, you know, there are risks associated with this contract or with that contract depending on labour issues and sourcing labour and productivity issues.

**MR. PEDDIGREW:** Right.

**MR. K. MARSHALL:** They were fairly wide-ranging and broad areas of conversation.

**MR. PEDDIGREW:** Didn't need all the detail; that could be too burdensome. But you did wanna know a break – or sort of a worst-case scenario?

**MR. K. MARSHALL:** Correct.

**MR. PEDDIGREW:** Okay.

One of the terms I think you used this morning was the funnelling process. So, the process, I guess, whereby project management and the executive would funnel information up to the board so that it wasn't overwhelming –

**MR. K. MARSHALL:** Right.

**MR. PEDDIGREW:** – in terms of how much information you received. So, I'm just wondering how did that – how was that funneling process carried out by the executive and project management team? Do you have any knowledge of that?

**MR. K. MARSHALL:** No, I mean that – it's always, it's always an imperfect science as to whether or not you're striking the right balance of providing the correct amount of information to the board, but that's – you know, I used the analogy in my preliminary interview – if you're advertising for a position and 100 people apply, then I, as the hiring manager or the CEO of the organization, I don't necessarily see all 100 resumes.

**MR. PEDDIGREW:** That makes sense.

**MR. K. MARSHALL:** Somebody from HR will dwindle it down to 20 and interview 10 and present you with what they deem to be the top five. Reality – you know, there might have been a golden nugget in one of the ones that didn't get to you.

So, it becomes a matter, from a judgment perspective, the professionalism, that we hire individuals, the CEO then hires individuals within the management team. There has to be a certain level of trust, responsibility that they're going to use good judgment and exercise proper treatment of information and make sure that the board gets what is required without under-providing or over-providing information to them.

**MR. PEDDIGREW:** And did you – as a board, did you ever set parameters, or here's a list of what we want to see at every meeting, here's what our expectations are? Or was it just a situation where you felt you were satisfied with what you were receiving so you didn't raise it?

**MR. K. MARSHALL:** No.

It was – you know, as an example, when we got to the 7.6, I think it was noted in the minutes. I think when we either got to the 6.99 or 7.6, it was something I know that I did as chair, is, I demanded to make sure that there would be more frequent – not necessarily meetings, formal meetings per se, but there'd be more kind of phone call updates as things progressed of interest, to not to necessarily be stuck with a quarterly update or meetings to be called as an emergency arose, that we could actually have – we were available for telephone call updates as – 'cause we were into the thick of things with Emera and with UARB approvals.

And, the board wanted to be involved and updated as we were heading towards financial close.

**MR. PEDDIGREW:** And updated by – sorry to cut you off – but updated by the CEO –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – or updated by the project management team as well?

**MR. K. MARSHALL:** By the CEO.

**MR. PEDDIGREW:** Okay.

**MR. K. MARSHALL:** But we never had, within the project management team, you know, whether be – Paul Harrington would be at some meetings to present but he wasn't a – you know, there was the secretary to the board, there was the CFO and a CEO who were at every board meeting. And then, others would be called in. For example, Mr. Bennett would be called in to present on Lower Churchill update, and others would be called in to present on Bull Arm, or oil and gas, or as their area of business was required to be discussed.

So, it was – the documents themselves took a bit of an evolutionary process in terms of what was to be required. And, quite frankly, there was – in frequent times, there was a lot of discussions. And I can recall the CEO and the CFO, you know, asking us in great detail and in great timing – to make sure that we got issues on the table – are we providing you with enough information? Are we providing you with too much information? Is there something different you'd like to see? Is there a different format you'd like to see it in?

So it was never a – it was never deemed to be here's the way we do it and here's the way we're always going to do it. It was an evolutionary process and making sure that it was fluid and meeting the needs of the board members.

**MR. PEDDIGREW:** Mr. Marshall, so I think your – or your evidence was that, you know, generally, it was Mr. Martin who did the reporting to the premier and to the ministers. And that's somewhat different than what Mr. Holburn identified in his report as sort of – as being, you know –

**MR. K. MARSHALL:** Best practice.

**MR. PEDDIGREW:** – in best practice.

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** But it was a practice you inherited when you came to the board –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – and when you became chair.

I guess, you know, looking at it now, do you see that that was a board responsibility, that you should have been the one communicating with the premier? Or are you –

**MR. K. MARSHALL:** No (inaudible).

**MR. PEDDIGREW:** – satisfied that given, you know, Mr. Martin was a full-time CEO, that that's the way it should have went?

**MR. K. MARSHALL:** I think so. I really do.

**MR. PEDDIGREW:** Okay.

**MR. K. MARSHALL:** Now, you know, in some instances I should have been there as well, for example, just to be – just to make sure that it's not a he-said-he-said type of discussion, but just to make sure – and we did. You know, the CEO and I actually – Premier Ball, I had – I probably had the most meetings with any premier was with Premier Ball as we were getting towards the issues around trying to deal with Astaldi, trying to – and I would go meet him directly to talk about board transition, to talk about compensation, the kind of – the bonus arrangements or the short-term incentive payments.

So I had more meetings with Premier Ball than I had with any other premier, quite frankly, as chair. And that was more to try to assist Premier Ball in getting up to speed as he was – again, every premier coming in drinks from the firehose, but when there's a changeover in administration, I'd suggest that it's even more so.

**MR. PEDDIGREW:** And were there any premiers that you did not meet with at all?

**MR. K. MARSHALL:** Well, I really only served, from a chair perspective, Premier Marshall, Premier Davis and Premier Ball.

**MR. PEDDIGREW:** Okay.

**MR. K. MARSHALL:** So they were the three and, yes, I had met with the three of them. But, you know, only for Premier Marshall was there for a brief period of time.

**MR. PEDDIGREW:** And just going back to – a moment to the fact that it was Mr. Martin who was reporting to the premiers and to the ministers. I guess, how did you assure yourself as a – whether it was as a chair or as just a director, that the information that should have been getting to government was getting to government by the CEO?

**MR. K. MARSHALL:** I guess there had to be a certain level of trust. And in every meeting the CEO would indicate, you know, I want to get the board together to make sure that here's the information that's going to Confederation Building or here's the information that came from my meeting.

**MR. PEDDIGREW:** Well, did that happen? Was there –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** Did Mr. Martin give you advance notice of what he was going –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – to talk about?

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** And did he do a debriefing after the fact?

**MR. K. MARSHALL:** Yes. Now, there was no way that he could brief us on every single phone call that he had with the Minister of the Crown, it was more the big-ticket items in terms of if there was a big level of presentation, yes, we were notified, advised and said either before and/or after and some cases both.

Now, we had to take him at his – you know, that this is what was conveyed –

**MR. PEDDIGREW:** Right.

**MR. K. MARSHALL:** – and communicated.

**MR. PEDDIGREW:** And you trusted –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** Okay.

There were some questions this morning about the, I guess, the wash of the plus-300, the minus-300 figure on the 6.2 and the 6.5, and then there was some discussion as well about the $100 million in excess sales. And when you found out those numbers, or when you learned of those numbers, did you have any basis of the understanding of what made up that $100 million in excess sales?

**MR. K. MARSHALL:** No.

As I recall – and, again, reviewing some notes from last night it was we had always had estimates with respect to what the excess energy sales would be, pending different market rates and different markets for that. But this was as a result of the final agreement with Emera and as a result of strengthening the line to be able to have – moving the line from 330 to 350 kilovolt. And I'm not an engineer and wouldn't pretend to be one but there was –

**MR. PEDDIGREW:** But as to how that hundred million was calculated –

**MR. K. MARSHALL:** Yeah, it was –

**MR. PEDDIGREW:** (Inaudible.)

**MR. K. MARSHALL:** There was discussion around, this is what's arise – has arisen as a result of our new agreement with Emera and our strengthening of the line, as over and above what we would otherwise have for excess water sales.

**MR. PEDDIGREW:** Do you have any idea what that translated to in terms of rates for ratepayers?

**MR. K. MARSHALL:** No.

For – and for ratepayers, because the implication was that that would then be eligible – and, again, that was not a decision of Nalcor or Hydro. That would be a decision of the administration of the day to be able to use that revenue to be able to offset rates for ratepayers.

So that hundred million was just a component of, you know, the – either the rate of return being reduced or the excess water sales being plowed in. There was, again, a range of possibilities and the government of the day – and we knew that we would be long gone, but we were hopefully leaving behind a revenue stream to be able to offset that for the benefit of the ratepayer.

**MR. PEDDIGREW:** And, Mr. Marshall, anything you've ever requested of Nalcor, did you say, you know, can you have your Investment Evaluation team provide us with, you know, what the impact of these costs are on ratepayers?

**MR. K. MARSHALL:** Was there anything that we requested?

**MR. PEDDIGREW:** As a board, did you –

**MR. K. MARSHALL:** I –

**MR. PEDDIGREW:** – request that information, a breakdown on what the cost per kilowatt hour would be for ratepayers?

**MR. K. MARSHALL:** Yes, that was – that should be in various degrees of board documents but, again, through –

**MR. PEDDIGREW:** Within various degrees of board documents, but is that something that you recall requesting from Nalcor's –?

**MR. K. MARSHALL:** It was – if it was requested or just provided, but it was – I remember – and, again, seeing Premier Davis's testimony, is that there was discussions around rate mitigation, but it was always – it was difficult for any current administration to decide what the rate mitigation strategy would be because those benefits would be coming somewhere down the road. And whether or not they were the administration at that point in time, you can't – they wouldn't be able to commit for future administrations.

So there was presentations; there was discussions. Whether they were requested by the board or provided to the board as a part of what can be provided to government, they should be in the files. I don't have a copy with me to review for this.

**MR. PEDDIGREW:** But you were aware that, you know, at a certain point rates were predicted to be about 22 cents per –?

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** Okay.

The strategy around not disclosing management reserve and so the $500 million, not to make it – put that number out there and, you know, contractors would know that – or I guess your thinking was that contractors would know that that number was available. And I guess that's a philosophy that Mr. Martin shared as well.

**MR. K. MARSHALL:** Yeah.

**MR. PEDDIGREW:** How did you come up with that philosophy, or where did that belief or understanding come from?

**MR. K. MARSHALL:** Well, it was a – it was from Mr. Martin's kind of previous experience doing Hibernia and other major contracts for Suncor. And it was also the chair of our Audit Committee, Gerry Shortall's belief, and he had served on the boards of other corporations and in the construction business. As well, he had done – he was the chief audit partner for Deloitte's nationally, and he – or Ernst & Young, sorry. And he said that was very much a principle which he supported and wanted to make sure it was to protect the interests of the organization and its ability to negotiate effectively.

**MR. PEDDIGREW:** So based on Mr. Marin's experience with – in the oil and gas industry –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – and Mr. Shortall's experience –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – working for Deloitte – and any idea what kind of projects Mr. Shortall –

**MR. K. MARSHALL:** EY.

**MR. PEDDIGREW:** – would have been –?

**MR. K. MARSHALL:** No.

**MR. PEDDIGREW:** Sorry, EY?

**MR. K. MARSHALL:** No, they would have been either projects he was working with or clients that he had from his audit practice in the construction industry.

**MR. PEDDIGREW:** Okay. Do you know if it was in relation to any Crown corporation project that we've talked about?

**MR. K. MARSHALL:** I do not know.

**MR. PEDDIGREW:** Don't know? Okay.

The questions you were asked earlier today about the request by the board for additional directors in some areas –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – of expertise that you did not have on the board, to whom at government were you making those requests?

**MR. K. MARSHALL:** They would go to the minister of Justice. They would go to the chief of staff –

**MR. PEDDIGREW:** And when you say minister of Justice, like, who are we talking? I mean the minister would change over time obviously –

**MR. K. MARSHALL:** Yeah so –

**MR. PEDDIGREW:** – but – so, yeah, if you can give me names.

**MR. K. MARSHALL:** – it would've been Minister Kennedy. It would've been minister – who else was in there, Minister – no, it's not Mr. Wiseman. He was Finance. It would go to the premier and we would have the chair. I mean I remember –

**MR. PEDDIGREW:** Which premier?

**MR. K. MARSHALL:** – the chairman, John Ottenheimer – it started with Premier Williams and the chair at the time was John Ottenheimer. He indicated that he went to Premier Williams. I went to Premier Davis on it and, ultimately, I had that – we had that event at Confederation Building with Premier Davis where he committed that this was going to happen and that he was going to expand the board. And we had developed, the previous year, that skills and competency matrix.

So there was a variety of individuals. I know Premier Dunderdale had met with Minister Bennett, not when she was minister but when she was chair of the board, with respect to this. So there was a variety of premiers and ministers who – there was letters gone, and I think that you would see in evidence letters from the chair of the Governance Committee. Tom Clift, at one point, had sat on a flight with Robert Thompson, and he had sent him a request which kind of flagged him to say, look, we still haven't gotten there and this is still an issue.

**MR. PEDDIGREW:** Okay.

**MR. K. MARSHALL:** But we started that process in 2006, 2007 and we were pretty dogged and determined and didn't let the dog rest, and right up to when we left in 2016.

**MR. PEDDIGREW:** Yeah. What was your understanding as to why it wasn't happening? It seems like a reasonable request –

**MR. K. MARSHALL:** Well –

**MR. PEDDIGREW:** – to me –

**MR. K. MARSHALL:** – it is.

**MR. PEDDIGREW:** – but it wasn't happening?

**MR. K. MARSHALL:** It is, but it's difficult. I mean, we understood that, you know, we were there – we had a number of people who were there to serve, you know, out of the sheer interest and desire to improve the province and to improve the governance of the organization, and also recognizing the realities of a Crown corporation and the complexities of, you know, changing the compensation structure.

But also, you know, as we expanded the board – you know, there used to be just Hydro and CF(L)Co and that was it. And then we expanded to be Hydro and Nalcor and CF(L)Co and Muskrat Falls and LIL and LTA and Oil and Gas. So it's not that the government was non-responsive to the request for boards, it's also that the needs of board members in the overall expanded kind of exponentially as well.

**MR. PEDDIGREW:** Well, the need of the organization, I would suggest, expanded to require these –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – areas of expertise. And I think with the expansion of Nalcor –

**MR. K. MARSHALL:** Yeah.

**MR. PEDDIGREW:** – and all the various companies you just mentioned, that would heighten the need for more expertise, would it not?

**MR. K. MARSHALL:** It did and we brought in some of those. I mean some of those people were brought in with respect to, you know, good, solid outside resource, but it was difficult to get, at the Nalcor level, the high-level expertise that we were seeking in environmental, in contractual status relationships, in contractual legal relationships, in megaproject experience as an independent – it was extremely difficult, particularly, as we indicated this morning, if the people weren't necessarily from the province and had that same passion and commitment that we had.

**MR. PEDDIGREW:** Are you – when you say difficult, do you mean requests were made and people turned it down or –?

**MR. K. MARSHALL:** No. No, no, just the – it was – it would've been – we would actually try to assist in terms of developing a list. And we got business people like John Steele on the Oil and Gas board; we had John Quaicoe from an engineering perspective on some of those boards. So we did get a number of people added to the boards, but still recognized the need to have very high-level skilled board members to be added to the complement that we had at the Nalcor level.

**MR. PEDDIGREW:** Mr. Marshall, I guess up to the time of your resignation from the board, what was your understanding of if the Labrador-Island Link ever went down and what the backup source of power would be? Would it remain to be Holyrood? Would it be something else? Would it be the bringing power in from Nova Scotia?

**MR. K. MARSHALL:** Well, it would be – well, there would be an ability to bring power in from Nova Scotia. There would be arrangements with Fortis and their power generation capabilities. There would be –

**MR. PEDDIGREW:** That last point you made –

**MR. K. MARSHALL:** – Holyrood – yeah?

**MR. PEDDIGREW:** – the Fortis and their power generation capabilities –

**MR. K. MARSHALL:** And Deer Lake – and Deer Lake Power. And –

**MR. PEDDIGREW:** Deer Lake.

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** So Deer Lake would be a backup?

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** Anywhere else with Fortis?

**MR. K. MARSHALL:** Whatever other generation capacity that they had, but there was discussions, I know, with them. There was – I know that there was going to be a – the combustion turbine had been brought in as a result of DarkNL, so that would be able to be continued. That had a life beyond just the next three or four years.

**MR. PEDDIGREW:** And where was that located?

**MR. K. MARSHALL:** In Holyrood.

**MR. PEDDIGREW:** In Holyrood, okay.

**MR. K. MARSHALL:** And there would be a continuation of Holyrood for a period of time just to be able to test and validate the reliability of the Labrador-Island Link. But, again, the importance of the Maritime Link was not to be underestimated with the ability – and has been tested and used to be able to bring power into the province for the first time in the province's history.

**MR. PEDDIGREW:** So your understanding is the Maritime Link would form as a – would be a form of backup –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – as would some other Fortis resources –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – and, to a certain extent, Holyrood?

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** Mr. Marshall, was the issue of – and this has come up throughout the Inquiry, was the – I guess, the lack of hydroelectricity experience on the project management team. And I understand from some of the evidence you've given, there was, you know, a lack of project management or megaproject experience on the board, except for Mr. Martin who did work on some oil and gas hydro projects.

But was that ever identified to the board as a specific reason to bring in an outside expert in megaprojects for some expertise, given the – I guess, the absence of that expertise on the project management team and –?

**MR. K. MARSHALL:** So you're referring to at the board level or as a hired contractor?

**MR. PEDDIGREW:** Well, given that it was absent at the project management level, was it ever identified as something even more important for the board to have hydroelectricity –

**MR. K. MARSHALL:** Yeah. I mean, we petitioned –

**MR. PEDDIGREW:** – experts?

**MR. K. MARSHALL:** We petitioned for that at the board level on quite a number of occasions. And as I was asked by Ms. Best earlier today, whether or not that comes in the form of a hired consultant to the board or a board member, our preference would always be that it be a board member.

**MR. PEDDIGREW:** Right.

**MR. K. MARSHALL:** A board member has – you know, a hired consultant has a mandate to deliver a report and walk out the door and gets to sleep at night when things go wrong. Board members don't have that luxury. You have to live it, you have to breathe it, you have that kind of ongoing responsibility to the corporation and to the people for which it serves.

So our preference would've been to have it at the board level and we were pretty adamant and directive in terms of making sure that that request was perpetually made. But that was part of our skills and competency matrix.

**MR. PEDDIGREW:** Right.

**MR. K. MARSHALL:** We would've assessed that –

**MR. PEDDIGREW:** Yeah.

**MR. K. MARSHALL:** – and indicated that that was a requirement –

**MR. PEDDIGREW:** Right.

**MR. K. MARSHALL:** – that we had.

**MR. PEDDIGREW:** Okay.

One of the questions you were asked about earlier this afternoon was about the – I guess, the bonuses.

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** And you indicated that as compared to private sector, Mr. Martin's bonus of 25 per cent was less than what he could expect if he was the CEO of a private company –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – I believe was your evidence. And so, just looking for some information about that bonus. Was that an automatic 25 per cent bonus?

**MR. K. MARSHALL:** Oh, no.

**MR. PEDDIGREW:** Was it –

**MR. K. MARSHALL:** No.

**MR. PEDDIGREW:** – subject to certain performance criteria?

**MR. K. MARSHALL:** Subject to the performance criteria that I was asked about – I'm not sure who asked me about the process that we engaged upon, but that was – that's well documented. And he had to indicate – and at no point did his, you know, completion factor ever exceed those of his top executives in terms of – and, again, there were also elements in there with respect to safety that if a certain level of safety and issues were not met, then bonuses could be severely curtailed and wiped out.

So there were amendments made to the short-term incentive program, over the years. There was also opportunity, if they over-exceeded, to over-exceed within a certain area but not to be able to over-exceed in the overall. It was capped at the 25 per cent.

**MR. PEDDIGREW:** It was capped at 25 per cent? Okay. And so was the amount – was it a range between zero and 25 –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – at the discretion of the board?

**MR. K. MARSHALL:** It was at the discretion of the board, but there was very precise criteria, tangible metrics associated with what had to be achieved from a financial, from a safety, from an environmental, from a productivity, from environment – like, there was a long list of things that I trust, as a result of today's conversation, will be provided in terms of how the CEO is compensated.

**MR. PEDDIGREW:** And do you know – did Mr. Martin achieve bonus in years 2014, '15, '16, while you were there?

**MR. K. MARSHALL:** A portion of the bonus, not all of the bonus. Yes.

**MR. PEDDIGREW:** Okay.

And I guess you can understand from a ratepayer, taxpayer perspective of the project that's so far behind schedule, so far over budget, that might –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – be something that doesn't go over well –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – in the public.

I'm just wondering what was the basis for the board awarding a bonus in the years 2014, 2015 when cost and schedule –

**MR. K. MARSHALL:** Because the performance contract took into account a whole series of items. And so, there was a lot of other good work that was done in the organization that had – that composed, comprised a portion of that bonus. That wouldn't necessarily bring it down to zero and that was part of the basis as to why we consulted with the outside parties to review this to get their determination.

And they said: Look, it's one element of your short-term incentive program; it's not everything of your short-term incentive program, and if you just unilaterally declare, after tracking this throughout the entire year, that you're not going to pay anything, then you're effectively, constructively dismissing everybody that's part of that performance contract.

**MR. PEDDIGREW:** When you say short-term incentive program, Mr. Martin was included as part of that program?

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** Okay.

Mr. Marshall, was there ever discussion between you and anybody in government as to what the outside limit of what the government was willing to spend on this project was?

**MR. K. MARSHALL:** No.

**MR. PEDDIGREW:** Did they ever say: Look –

**MR. K. MARSHALL:** No, but we –

**MR. PEDDIGREW:** – we need to make sure it doesn't go above X?

**MR. K. MARSHALL:** – discussion with who? With government?

**MR. PEDDIGREW:** Premier, any of the ministers –

**MR. K. MARSHALL:** No.

**MR. PEDDIGREW:** – with you as either a director or as board chair?

**MR. K. MARSHALL:** No, but I mean, as board members, you know, we felt the fiduciary obligation and, you know, we always – as I said earlier today, when that first estimate, or first DG3 estimate of 6.2 billion was presented, is that we wanted to stay as close to that as we possibly could. We knew that there was a $2.4-billion differential to the next lowest cost alternative, which was Isolated Island, but we never viewed that as being: Okay, we're good for the first 2.4 billion and then we're gonna get in trouble.

**MR. PEDDIGREW:** Yeah.

**MR. K. MARSHALL:** That was never –

**MR. PEDDIGREW:** I mean I don't –

**MR. K. MARSHALL:** – ever –

**MR. PEDDIGREW:** – I don't doubt that there was always an effort to keep costs down.

**MR. K. MARSHALL:** – yeah.

**MR. PEDDIGREW:** I guess what I'm wondering was there ever a discussion about: Look, this is as high as we can go as a government. That kind of conversation never took place?

**MR. K. MARSHALL:** Not with me, no.

**MR. PEDDIGREW:** Okay.

Then my last question – I skipped it over earlier – was just about the meeting minutes and the process. So I've been on boards before where, you know, typically before the next meeting, you review the minutes from the previous meeting –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – and approve them.

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** I'm just wondering what was the process for board –

**MR. K. MARSHALL:** Same.

**MR. PEDDIGREW:** Same thing.

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** So it – they would come as part of the board package?

**MR. K. MARSHALL:** At the start of every meeting, we would review the previous – if in fact, you know, during periods where we had rapid succession, for example, that November 2013 period, there was a lot of meetings that happened in rapid order, you wouldn't necessarily have the meeting minutes ready. But generally speaking, from a quarterly basis, you would be able to get your minutes from the previous meeting, from the last quarter.

So within – we then establish this – okay, these can't stack up so they got to be done within let's say the next meeting or 30 days, whichever is greater.

**MR. PEDDIGREW:** And they're always reviewed and approved –

**MR. K. MARSHALL:** Yes.

**MR. PEDDIGREW:** – by the board.

**MR. K. MARSHALL:** Our board.

**MR. PEDDIGREW:** Okay, thank you.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** Thank you.

Dwight Ball, Siobhan Coady?

**MR. O'FLAHERTY:** Thank you, Mr. Commissioner.

I'm gonna be a few minutes. I'm wondering if it might be better to start in the morning. I'd be more – I could be better organized. And secondly, I would like an opportunity, in light of the issue of the contract termination of Mr. Martin having been raised, to have the – I've been trying to reach my client to discuss that with him, because I was proceeding on the basis that my learned friend, Mr. Smith, was, that that was off-limits here at the Inquiry. And I would – I had been trying to reach Mr. Ball all day, because there's been a number of statements made about what he said to Mr. Marshall and what Mr. Marshall said to him which – I would, at least, like to give him the opportunity to give me some instructions on that.

But, now I'm not – I know you have a duty to keep the Commission moving. I'm just wondering if we could, maybe, start at 9 o'clock tomorrow or –

**THE COMMISSIONER:** No. We have to continue on this afternoon. Mr. Ball will be given an opportunity to testify when he's here.

We have a big problem as a result of today because we had two witnesses set and one of the witnesses that's coming up has counsel from Halifax, and I'm not sending him back and then bringing Ms. Bennett back. And we also have another witness who's testifying tomorrow whose counsel is from away, and I'm not sending him back either.

So, we're gonna finish with this witness. We're gonna talk about starting at 8 o'clock tomorrow morning, because we're gonna finish everybody –

**MR. O'FLAHERTY:** Okay. Thank you.

**THE COMMISSIONER:** – by tomorrow afternoon.

**MR. K. MARSHALL:** At what point may I be able to request a bathroom break?

**THE COMMISSIONER:** Oh, you can do that at any time.

**MR. K. MARSHALL:** Can I do that now?

**THE COMMISSIONER:** Yes. You go right ahead.

**MR. K. MARSHALL:** Okay.

**THE COMMISSIONER:** Five minutes.

**CLERK:** All rise.

**Recess**

**CLERK:** All rise.

Please be seated.

**THE COMMISSIONER:** When you're ready, Mr. O'Flaherty.

**MR. O'FLAHERTY:** Thank you.

Good afternoon, Mr. Marshall.

**MR. K. MARSHALL:** Good afternoon.

**MR. O'FLAHERTY:** My clients are Dwight Ball and Siobhan Coady.

The first topic I want to explore with you is the board's position with respect to the independent Oversight Committee appointed by the Government of Newfoundland and Labrador in 2014.

**MR. K. MARSHALL:** Okay.

**MR. O'FLAHERTY:** Okay?

Perhaps we could have Exhibit P-03452, Madam Clerk.

**THE COMMISSIONER:** That'll be on your screen.

**MR. O'FLAHERTY:** That should be on your screen.

**MR. K. MARSHALL**: Not yet. It's not there yet.

**MR. O'FLAHERTY:** So, Mr. Marshall**,** I don't know if you've had an opportunity to have a look at this. You probably saw this no doubt at the time.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay. If we can just scroll down and give you an opportunity just to look briefly at this.

**MR. K. MARSHALL:** As I recall though, the independent Oversight Committee would have come in place before this.

**MR. O'FLAHERTY:** Yes, but I'm going to ask you about the decision by my clients –

**MR. K. MARSHALL:** Okay.

**MR. O'FLAHERTY:** – as part of the government, of which they're Members, to –

**MR. K. MARSHALL:** Okay, Okay.

**MR. O'FLAHERTY: –** strengthen oversight on the Oversight Committee in mid-December 2015, okay?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So immediately after the government changed, the new government made that decision as the elected Government of Newfoundland and Labrador, which was and remains the sole shareholder of Nalcor Energy. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And it was the provider also of a full completion guarantee on the project. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

And I think you'll agree there was a very significant concern in the province at that time to understand what the actual state of the cost and schedule of the project was.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And that was because, Mr. Marshall, the discussions around the massive potential increases in electricity costs in the province. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And to give the people of the province the answers to these questions that they had about the cost and schedule, the government put in place a full independent review of the Muskrat Falls Project at that time. Correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So according to the bolded statement of Minister Coady – if we could just scroll down a little here – right here.

And this is the sentence I want to focus on, the last one: "We have advised Nalcor of the planned review, they have committed to full cooperation, and recognize the value of such a review." Do you see that?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** I take it then as the chair of the board you were notified of this decision of government?

**MR. K. MARSHALL:** Yes. Yes.

**MR. O'FLAHERTY:** Okay.

And how were you advised of the decision?

**MR. K. MARSHALL:** It would have been at a board meeting, I would have thought, as I recall.

**MR. O'FLAHERTY:** So you would have not been advised at that time?

**MR. K. MARSHALL:** Oh, absolutely. Yeah.

**MR. O'FLAHERTY:** Okay.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** And were you advised personally by somebody from government or was it by someone from Nalcor or do you recall?

**MR. K. MARSHALL:** I don't recall. I mean at that point in time I actually had had a couple of meetings with Minister Coady, I had a couple of meetings with Premier Ball. And it probably came from the CEO, from Mr. Martin, actually.

**MR. O'FLAHERTY:** Okay.

So these meetings that you've referred to that you're talking about that you had with Minister Coady and with Premier Ball, this was in the context of the transition of the government –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY: –** and after the swearing-in of the government**,** was it?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** Do you recall if it was before or after the swearing-in of the government?

**MR. K. MARSHALL:** The swearing-in would've been in January?

**MR. O'FLAHERTY:** No, it was on the 14th of December.

**MR. K. MARSHALL:** Yes, it would have been after that. Yeah.

**MR. O'FLAHERTY:** So it was after that. It wasn't before that.

**MR. K. MARSHALL:** And, actually, I can recall that I had a conversation with the Premier; in fact, on Christmas Eve we were talking on the phone. So it was – it happened both before and after. Yeah.

**MR. O'FLAHERTY:** Both before and after –

**MR. K. MARSHALL:** Yeah, in terms of conversations with the Premier.

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** But in terms of specific meetings, I can't recall the exact dates.

**MR. O'FLAHERTY:** Right. And that's what I'm gathering from your evidence to the Commissioner –

**MR. K. MARSHALL:** Right.

**MR. O'FLAHERTY:** – is you were saying that there were meetings and conversations with the Premier –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – around this time period –

**MR. K. MARSHALL:** Right.

**MR. O'FLAHERTY:** – but these seem to be more in the nature of briefings or discussions rather than something with an agenda.

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** I'm correct on that?

**MR. K. MARSHALL:** There was – the only time that there was agenda happened was when – I know there was a meeting in April to discuss – it was a couple of meetings in April to discuss the short-term incentive program and with – and then, separately, with Mr. Martin to discuss the process to discuss the Astaldi piece. Prior to that, I had a meeting with him in February to discuss my role as chair and continuing into the board.

So there was various, kind of, reasons for those meetings. Sometime – and sometimes, as I said on Christmas Eve –

**MR. O'FLAHERTY:** Yeah.

**MR. K. MARSHALL:** – it would've been just, you know, how are things going? Anything I can do to help with the transition?

**MR. O'FLAHERTY:** Correct.

And my understanding from my client is that the discussions between you and the Premier were always respectful and amicable –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – and you got a long quite well.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And they were professional discussions, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** So let's just deal briefly, because you've gone into it a couple of times about the short-term – this is the short-term incentive program that you're referring to, okay?

**MR. K. MARSHALL:** Right. –

**MR. O'FLAHERTY:** Just – because you've mentioned it a few times, I just want to clarify. You're talking about a contractual obligation from Nalcor Energy with respect to the employees on – in Nalcor Energy, correct?

**MR. K. MARSHALL:** Yes, certain members –

**MR. O'FLAHERTY:** Certain members.

**MR. K. MARSHALL:** – certain employees of Nalcor, yes.

**MR. O'FLAHERTY:** Okay. And those would have included the project management team, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

**MR. K. MARSHALL:** At a certain level – I think it was director and above –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – would have been, yeah.

**MR. O'FLAHERTY:** And why this discussion ensued in the time period of the first quarter of 2016, Mr. Marshall, was because the government, due to the financial situation –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – in the province was putting across-the-board restraint measures in place. Correct?

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Right. And they came to Nalcor as part of the budget process and said, look, one of the things we're trying to do is we're trying to put restraint in place. We'd like you to exercise that restraint with respect to a short-term incentive. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

And at that point in time you said to the Government of Newfoundland and Labrador that, in fact, the Nalcor board was the one that had the authority over the contracts with its employees. Correct?

**MR. K. MARSHALL:** Right.

**MR. O'FLAHERTY:** Right. And that would include the contract with Mr. Martin, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right. And that was a position that you expressed in, I believe an email, certainly to Siobhan Coady and you also expressed it in on – in telephone conversations as well. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

And as you've said you've got counsel to advise you on that and you had legal opinion saying that the board would have a contractual obligation to honour the short-term incentive program regardless of whatever restraint provisions were put in place across government. Correct?

**MR. K. MARSHALL:** And the organization – as I recall, the organization was also in a separate stream – going down a road of here are all of the restraint –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – mechanisms that we can put in place.

**MR. O'FLAHERTY:** Right.

So the message that you were sending back from the board to government at that time was – and you were doing it in a respectful way – was simply to say the administration of these contracts rests with the board. Correct?

**MR. K. MARSHALL:** There was two things. There was the administration of the contracts rests with the board and to negate those contracts from our outside legal opinion did two things; one is it put the organization at risk of further kind of damages, and also that we could bring it to zero, but we would require an order from Cabinet to be able to do that.

If we did it as a board, the organization would be sued, the board members would be sued and the owner –

**MR. O'FLAHERTY:** Sure.

**MR. K. MARSHALL:** – would be sued. So, it created all kinds of complications, so I tried to provide – here's what we can do as a board, this is the numbers and this the way that they've been tracked through the whole year. Here's – and the board actually reduced the bonuses considerably but also said if you wish us to go to zero then here's what I'd suggest that you do, is to give us an order-in-council to be able to do that.

**MR. O'FLAHERTY:** But the point though, Mr. Marshall – I think we're both agreeing upon this – is that the board was the one that made the decision to make whatever reductions –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – it was –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – on – in their own authority to do that. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

And, so my point is, is that during this time frame which, as you correctly pointed out, I think you said that new administrations are drinking from the firehose, is it?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** Which means, you know, it means to be overwhelmed by information–

**MR. K. MARSHALL:** Absolutely.

**MR. O'FLAHERTY:** – doesn't it?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So, you're saying they're managing all of the different things that they're learning about and they're hearing about for the first time.

**MR. K. MARSHALL:** Right.

**MR. O'FLAHERTY:** But I want to make the point in this context here, this was a particularly difficult transition, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Because of the financial situation –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – of the province, right?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** And also because it turned out that there were some issues that were – had been unresolved, if I could say that, before we move on to it – Nalcor with respect to the Astaldi issue. Correct?

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Right.

And they were about to find out about that as well. Correct?

**MR. K. MARSHALL:** As we were all finding out in real time, actually.

**MR. O'FLAHERTY:** In real time.

Right.

But the government – well, whoever found out about it and when they knew at Nalcor that would be for the Commissioner to decide –

**MR. K. MARSHALL:** Correct.

Yes.

**MR. O'FLAHERTY:** – but the point was that this new government certainly was finding out about it from and after December 2 –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – 2015, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Fair enough.

So, I'm sorry, we moved away but we're gonna transition now back to the issue of oversight, okay.

So, you were advised of this decision, as you say, of – that, you know, this measure had been put in place, this initiative. Now I take it you may be aware, and you may not, that there's been evidence provided to the Commissioner by the senior bureaucrats who both chaired the Oversight Committee and served on the Oversight Committee, and by the outside independent consultant who was retained by the Oversight Committee, that in the time period April 2014, right up until January, the end of January, 2016, that management at Nalcor had resisted or opposed the work of the Oversight Committee.

Now, were you aware of that evidence being given at the Commission?

**MR. K. MARSHALL:** I heard about it yesterday.

**MR. O'FLAHERTY:** Okay.

And there's also been evidence by at least one member of the project management team to the effect that he did participate and support the review which – and the Commissioner will have to assess that evidence and weigh it as part of this particular Inquiry.

But my question is this: You were the chair of the board during this – pretty much this entire time period from – you were certainly the chair from June of '14 right to the end of January '16.

**MR. K. MARSHALL:** I was acting chair as of March 2014.

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** So, yes, I was the chair.

**MR. O'FLAHERTY:** Yeah. But – and I listened to your evidence carefully this morning about the relationship between the shareholder and the board –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – and the board and management, and as a number of people have reflected upon, you are an experienced person with boardroom work –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – and you understand that milieu, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

You accept, do you not, that it was within the purview of the shareholder, in this case the elected government representing the sole shareholder, to take these steps to strengthen oversight.

**MR. K. MARSHALL:** Certainly.

**MR. O'FLAHERTY:** And it was also within the purview of the elected government representing the sole shareholder to order a full review of the Muskrat Falls Project by the outside independent consultant, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And they could've decided to, for example, put in another independent engineer if they wanted at that time.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And if they had decided to do any of those things, that would've then been the responsibility of Nalcor, both the board and management, I put to you, to co-operate fully with that decision. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

And to your knowledge was your view, as expressed here today before the Commission – was that ever questioned at the board level in any – at any time?

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** No.

So that was the view of the board?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So then – I want to turn then to a situation that came up in January of 2016. On January 29 of 2016, two members of Nalcor's senior management, Mr. Bennett and Mr. Harrington, had – they had raised questions with the clerk, Julia Mullaley, on the right of the independent consultant to have access to Nalcor board documents. Were you aware of that?

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** Okay. And – so it wasn't, then, on your authority that they approached Julia Mullaley?

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** So then, they are – they are line reports, right? Mr. Harrington reports to Mr. Bennett, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And Mr. Bennett reports to Mr. Martin, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So there – really, there are two possibilities for the Commissioner then, aren't there? Either they assumed that authority themselves, or Mr. Martin told them to do that. Correct?

**MR. K. MARSHALL:** One would think, yes.

**MR. O'FLAHERTY:** Right. Okay.

But you certainly, or the board certainly, didn't tell them that that was appropriate to do that.

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** No. And it doesn't seem to align with what you've just told us about your view of their responsibility, which is to co-operate, correct?

**MR. K. MARSHALL:** Correct. Yeah.

**MR. O'FLAHERTY:** Okay.

I wanted to bring that example to you because, of course, it is the board's information that –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – they were saying that the independent review person could not have. So do you know – and we've looked at these specific presentations, Mr. Marshall, and some of them are quite detailed and I would say contain, in fairness, richer detail than some of the public announcements as to what the cost and schedule outlook is for the project. Would you agree with that?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** So do you know of any basis upon which a government-ordered overview would not be entitled to see these specific –

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** – presentations to the board?

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** No. Okay thank you.

The second set of questions I want to ask you about is the board's knowledge of the likely cost impact on the project of the Astaldi schedule delays. So the context of this is going to be in the time frame from June the 24th of 2014 – I'm going to bring you to a board minute, the 77th meeting, okay. I believe you were the acting chair at that time, correct?

**MR. K. MARSHALL:** What was the date?

**MR. O'FLAHERTY:** June the – oh, sorry – June 26, 2014, I guess.

**MR. K. MARSHALL:** I would've been just appointed as chair then, yeah.

**MR. O'FLAHERTY:** Okay, thank you. Madam Clerk, could we have 00688, please? Page 6, please.

**THE COMMISSIONER:** (Inaudible) be on your screen.

**MR. O'FLAHERTY:** I'll just give you a chance to – if you could scroll down just a little bit, Madam Clerk. It may not be – yeah, here we go. So this is a report from Mr. Martin on the Lower Churchill Project, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And the paragraph I'm interested in is the one there beginning: "He advised." Okay, it says: "He advised that Astaldi, the contractor for the construction of the powerhouse, intake and spillway, had a slow start and there is a recovery plan in place and now seeing a positive change and productivity improvements." Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Let's go to the last page of the document, please, Madam Clerk. This is the in camera item 1007. Do you see that?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** So this confirms that having – the board having been informed by the CEO of a schedule issue with the Astaldi contract for the construction of the powerhouse, intake and spillway, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Then you went into an in camera session and it appears the schedule issue was enough of a concern that the minutes record a specific decision on that –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – don't they?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And they say – well, you read it for us, what does it say?

**MR. K. MARSHALL:** "The Chair stated that the Board would like to be briefed on any material Astaldi issues between meetings."

**MR. O'FLAHERTY:** Okay, thank you. And this decision was no doubt communicated to management, correct?

**MR. K. MARSHALL:** Yes. Well, I, you know, again, it made it to the minutes and that's –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – requirement to be communicated, yes.

**MR. O'FLAHERTY:** Obviously, and it does say that they're approved at a subsequent meeting in October, but in terms of the regular cadence of the board, perhaps you could just tell us: how quickly would the CEO or the senior management be made aware of this decision?

**MR. K. MARSHALL:** On June the 26th, 2014 they would've been made aware of that when they came back –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – into the room following the in camera session.

**MR. O'FLAHERTY:** Absolutely.

And then you referenced, subsequently – because I know the board meets on a fairly regular cadence and we looked at the different meetings, but you also referenced communication between the board and management and what you called a discussion format which, I take it, is simply you're referring to verbal communications between the board and senior management. Correct?

**MR. K. MARSHALL:** Within board meetings.

**MR. O'FLAHERTY:** Oh okay, within.

**MR. K. MARSHALL:** (Inaudible) yes.

**MR. O'FLAHERTY:** Okay.

**MR. K. MARSHALL:** None of us had an office in Nalcor. None of us were –

**MR. O'FLAHERTY:** Oh right.

**MR. K. MARSHALL: –** full-time stationed there.

**MR. O'FLAHERTY:** Okay.

But I also understand from your interview and your evidence here today that outside of the formal board meeting setting, these verbal communications would be conducted, typically, between the chair and between the president and CEO, Mr. Martin, on behalf of management.

**MR. K. MARSHALL:** Yes and also there would be – as a result of this there would have been occasional telephone calls that were scheduled with board members to update us on material issues, not just with Astaldi, with Emera, with others.

**MR. O'FLAHERTY:** Okay. So, in other words then, it went further than simply the – because when I looked at your interview about this, Mr. Marshall, it seemed to indicate that you were saying that as a member of the board you wouldn't really talk to the president and CEO as much as you did when you were the board chair.

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Because in the interim, when issues would come up, it was generally CEO over the board chair. Correct?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** Okay.

But you're saying under this particular minute or decision –

**MR. K. MARSHALL:** Okay.

**MR. O'FLAHERTY:** – there were actually briefings given directly to more than just you.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** It was the whole board.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay. Thank you.

**MR. K. MARSHALL:** Yes because I'd indicated the board would like to be briefed.

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** And our in camera session would have been – this would have been the consensus of all board members. And there's no point in just having the chair briefed, all board members were well versed and wanted to make sure –

**MR. O'FLAHERTY:** Yeah.

**MR. K. MARSHALL:** –that they were very involved.

**MR. O'FLAHERTY:** So it wasn't a situation of the board – sorry, the CEO reports to the board chair, the board chair reports to the board.

**MR. K. MARSHALL:** No. No.

**MR. O'FLAHERTY:** It's going to go right to all of you. Okay, that's very helpful. Thank you.

So this was a significant issue then, for the board –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – at that time. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay. Thank you.

So then you would've received verbal briefings and other briefings after June 26, 2014, on any, as it says here, material Astaldi issues between meetings. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** Okay.

And so then you testified this morning, I take it, that in the context of this particular issue, that by December 2014 you had become aware, from Mr. Martin – and perhaps you mean you and the board had become aware – that the Astaldi schedule had slipped by six months by that particular time frame.

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Perhaps we can go to Exhibit-02549, Madam Clerk? Now, this is the February 12, 2015, Cost and Schedule Update, Mr. Marshall, which I understand to be a presentation by the project management team to the CEO.

Can we look at page 11, please? The title – I'm sorry – the title of this – and this is what I think has been referred to as a slide deck.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Is that what you call it?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** Yeah.

So the title of this particular slide is: "Schedule Concerns." Correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** And it's broken down into the three actual projects which fall within the Muskrat Falls Project.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** The one I want to focus on is the Muskrat Falls generation one. You see that?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And that says that there's a schedule delay concern for the Muskrat Falls generation project identified by this date. Correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** And there are four factors identified, correct? A schedule slippage of six to nine months in 2014 on Astaldi performance, correct? The second one is the existence of difficult – I heard, you know, it was an incredibly poor winter –

**MR. K. MARSHALL:** It was a harsh winter.

**MR. O'FLAHERTY:** – in 2014, 2015. The winter conditions, correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** Astaldi reorganization was still evolving at that time. Correct?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** And, finally then, you were into uncertainty regarding ongoing performance post-reorganization, right?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So this six-to-nine-month delay would clearly be considered a material Astaldi issue within the meaning of the board resolution, wouldn't it?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And, in fact, you would have known, I take it, about this at this time, in real time –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – would you?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So this would have also – and I've read through your evidence on this and the linkage between how when a schedule slips that you're going to be looking at cost implications of that –

**MR. K. MARSHALL:** (Inaudible.)

**MR. O'FLAHERTY:** – okay?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So you're all alive to that concern as well. Correct?

**MR. K. MARSHALL:** Yes, yeah.

**MR. O'FLAHERTY:** Is that correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Thank you.

I know it's – you're tired, it's been a long day. I'll just try to move through it quickly –

**MR. K. MARSHALL:** No, no, take your time. Take here –

**MR. O'FLAHERTY:** Okay.

**MR. K. MARSHALL:** – as much time as you need.

**MR. O'FLAHERTY:** So this information about a schedule slippage of six to nine months on the Astaldi contract, that would have given rise to concerns about increased costs on the generation portion of the Muskrat Falls Project, wouldn't it?

**MR. K. MARSHALL:** It would have. And, again, I had not met with Astaldi myself. We had gone to the site, we had seen –

**MR. O'FLAHERTY:** Yeah.

**MR. K. MARSHALL:** – some of the issues. We had seen that, you know, the covering that was there that the board had actually questioned – had questions on back when it was first proposed.

**MR. O'FLAHERTY:** Mm-hmm.

**MR. K. MARSHALL:** You know, again, Astaldi was still indicating that they were working to make sure that this could be mitigated and brought back and amped out and, you know, we were trying to get their assurances and – but while we had improvements with respect to the transmission assets because, similarly, early in the game that they were having schedule concerns, but they got it back. And this was clearly a case of it was starting to become very real that this one was not going to make –

**MR. O'FLAHERTY:** Oh, no.

**MR. K. MARSHALL:** – its way back (inaudible).

**MR. O'FLAHERTY:** And I understand that, but we're now – I'm talking about in real time –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – not what the overall –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – the overview is here.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** This was the winter of 2014, '15.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** There was an unplanned shut down on site over that Christmas period. Correct?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** There was no Integrated Cover System.

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** That had failed.

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** There was no work going on under the cover. We know that.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So this was a real issue.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** This wasn't something that we were looking out in the future –

**MR. K. MARSHALL:** Sure.

**MR. O'FLAHERTY:** – and could become a risk, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

So I'm going to go back to my question now. So there were – there was a real concern on the board at that time for increased costs with respect to both the Astaldi contract and the knock-on costs for other contractors and for the owner's cost, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So – and you're telling us that that information was specifically communicated to the board by management in February 2015. Correct?

**MR. K. MARSHALL:** I'd have to see the schedule of the board minutes, but it – you know, when you say specifically, are you going to say can you recall the exact format, message, meeting? I don't have that diary, I don't have that. But, yes, we were well aware of the schedule delay of six to nine months in very much real time –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – because we had previously mandated that these more frequent updates occurred.

**MR. O'FLAHERTY:** So it's fair to say, Mr. Marshall, isn't it, by this point in time, based on these four factors – and you're tracking this issue now for, well, just about eight months now – seven or eight months – that there was going to be a number that was going to be required to either get – to both get a recovery plan in place, which is point one and, secondly, to deal with these cost impacts. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

And that was going to be a material number, wasn't it?

**MR. K. MARSHALL:** Well, that's when we started the process. You know, I think very shortly after this, the $7.6 million – $7.6-billion figure was becoming socialized and communicated.

**MR. O'FLAHERTY:** Right.

But my learned friend, Mr. Learmonth, has already brought you to the fact that the 7.653 number does not actually contain any number with respect to the impact of the costs.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** Right?

So whether or not you were moving towards 7.653 or not, what my point is is that you were telling the Commissioner you knew about this in February and then in September you did not have numbers in that forecast which reflected the cost impact. Correct?

**MR. K. MARSHALL:** That would seem to be the case, yes.

**MR. O'FLAHERTY:** That's the facts, right?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So – and in fact, you also knew at the board level that discussions were going to be held between Nalcor's very senior management and Astaldi's very senior management, commencing in the summer of 2015, I believe it's June –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – regarding the resolution of two issues: First of all, the recovery plan –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – and secondly, the commercial issues.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Correct?

And that's Exhibit 02412, please, Madam Clerk. And this I understand to be a summary prepared by Mr. James Meaney. If you go to the bottom of page – of the second page, please, thank you.

So if you see on the bottom of the second page, June 16, 2015: "Nalcor/Astaldi CEO meeting. Commercial discussions with Astaldi …" –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – "ongoing from June-December 2015 regarding Astaldi's recovery plan and the impact of their poor start in 2014 on the" – could you just scroll over to the next page, Madam Clerk – "on the overall cost/schedule under the CH-0007 contract." Correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** And then it makes this statement: "The need for greater clarity on this issue would have the most significant impact on any AFE/FFC revision." Correct?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** Right.

So now, you had earlier referenced in your evidence this morning, mission critical was in December. I'm going to suggest to you that – I don't know exactly what mission critical means, but this was a very critical issue –

**MR. K. MARSHALL:** Oh, very much so.

**MR. O'FLAHERTY:** – in June of –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – 2015. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And the board – you've confirmed today, and I said – there's no number put in the September update, right, even though it's being described as posing the greatest impact on any future revision. Correct?

**MR. K. MARSHALL:** Yeah, I don't know though and I certainly wasn't aware. And I know that through the discussions, it was more they were – what we were told was they were trying to come to an understanding of how big the issue is, not from a dollar perspective, but from a kind of an overall process timeline and other perspectives.

So I had not been advised in terms of a number for an AFE impact and I – again, you'd have to ask Mr. Martin whether he had been advised (inaudible) –

**MR. O'FLAHERTY:** No, no, I'm sure he will be asked about that.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** I'm really – what I'm really focused on is the board, okay –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – at this particular point in time?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** But my point is that whether or not – you weren't at the table with Astaldi.

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** No, so you don't know what they were discussing, but this document here says they were discussing both commercial discussions regarding the recovery plan and the impact from the –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – poor start.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Well, I put it to you that means money, doesn't it?

**MR. K. MARSHALL:** Absolutely.

**MR. O'FLAHERTY:** Right, so they're discussing money.

So as – and if I could refer you – maybe we don't need to go there, but in your interview, which – of February 3, 2019, you were asked about the overall AFE process, okay? And you flagged three AFEs. And I think there's going to be technically a point about the September one. It's not truth – it's not actually an AFE; it's more of a budget update, okay?

But, anyway, this is your evidence, and I think it's a fair point that you were making, that there were three AFEs: There was the first one for 6.2 –

**MR. K. MARSHALL:** Six point two.

**MR. O'FLAHERTY:** – the second for 6.99 and the third for 7.7, which you then referred to as the 7.653, correct?

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Okay.

And then on page 11 you said this – you said: And, again, we'll get to that. But at 7.7 we knew there was going – that there was going to be some money required to essentially try to save Astaldi from bankruptcy and get them over the finish line of the project.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** So the we refers to the board, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** It's not – yes, of course.

So, Mr. Marshall, then the board had tracked this issue right from June 26 of 2014 – if not before, right – and knew by the 7.7 point there was going to be a cheque written here. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So now, if the board knew before – at that time of the 7.7 or 7.653 that Nalcor would require a number from GNL to have the recovery plan and save Astaldi from bankruptcy. Let's talk about quantum. Now, you've said you weren't discussing any numbers – any particular numbers. Correct?

**MR. K. MARSHALL:** At the board level?

**MR. O'FLAHERTY:** Yeah.

**MR. K. MARSHALL:** No. And, again, what we had heard was that for the first number of meetings that they had and discussions, they weren't talking about numbers. I wasn't there. I can't validate that (inaudible) –

**MR. O'FLAHERTY:** Sure, so you're passing on anecdote, yeah.

**MR. K. MARSHALL:** But – and I can't remember the exact timeline, but when we did the September AFE, remember, that process had started back in March, I think, evidence shows –

**MR. O'FLAHERTY:** Yep.

**MR. K. MARSHALL:** – that we had started that process, and it took a while to get that. And it was, again, kind of a – it was an election year, so it was –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – a contentious period. But how soon after – the only time that I was aware of the $300- to $500-million range to resolve this, I do not now recall discussing that with the previous administration. I only recall becoming aware of that as a possible range of resolution with Premier Ball.

**MR. O'FLAHERTY:** Right.

And – but you did have discussions with the previous administration about the Astaldi issue, obviously, and there would be a cost impact.

**MR. K. MARSHALL:** Yes, but my discussion on that, I had never met with the premier on that. I had met with the minister, but there was never dollar figures associated that I can recall in my –

**MR. O'FLAHERTY:** Yeah, okay.

**MR. K. MARSHALL:** – discussions with him. It was more –

**MR. O'FLAHERTY:** So –

**MR. K. MARSHALL:** – this is going to be an issue that is going to have to get dealt with because it's become very real, and Mr. Martin would have led that discussion because he was in the negotiations and he was in –

**MR. O'FLAHERTY:** Yeah.

**MR. K. MARSHALL:** – the discussions and he was going to meet with the president.

**MR. O'FLAHERTY:** Correct.

And I think you said in your interview as well that generally the discussions between Nalcor, with respect to additional funds that would be required in that context, and the government were managed by Mr. Martin –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – with government, not by the board so much, okay.

**MR. K. MARSHALL:** Right.

**MR. O'FLAHERTY:** So but just – I wanna go back to the board now 'cause you're business people, you're there; you know the quantums that you're talking about with the size of these contracts. I am going to put it to you, Mr. Marshall, that you – the board well knew before September 2015 that the number that Nalcor was gonna require from government in order to save Astaldi from bankruptcy and get a recovery plan in place and keep them working on that job was not millions of dollars, it was hundreds of millions of dollars.

**MR. K. MARSHALL:** Again, it was not quantified for us, but we were well aware that it was going to be in the hundreds of millions of dollars.

**MR. O'FLAHERTY:** Correct.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** So we agree then that in the summer of 2015, there was an understanding at the board level that there had to be an additional uplift from government, the Government of Newfoundland and Labrador, who were standing good on the completion guarantee here.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** That – in the amount of hundreds of millions of dollars?

**MR. K. MARSHALL:** Well, there was, first of all, I think as – and, again, I don't know if I'm too far away from the mic or not, but there was a – there was – the first position was that Astaldi had its contract and it had its parental company guarantee and that we were trying to hold fast to say, you've got to complete, and that was your contract – that was your contract; you've got to complete for that.

At the outer end is you've got to try to – and we had, I can't remember the exact dates that we had engaged in. Not the board but the company as a whole had engaged an outside consultant to say: We're entering into uncharted territory here. What happens if a major contractor goes bankrupt and/or we want to voluntarily replace that contractor at this stage in time? And the recommendation that came back was, work with the contractor and get them to finish line, and that's your least cost alternative.

So, the first position was hold their feet to the fire, make sure that they can deliver and force them to deliver for the contract that they had signed. So, in the best case scenario, it wouldn't have cost us anything. We knew that that was an unlikely scenario, but it was still the negotiating position of the organization, and that's what the CEO had gone over with his opening salvo to indicate that Astaldi was still responsible for completion of the project.

**MR. O'FLAHERTY:** Well, it's a position, but I mean it doesn't take –

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** – months in –

**MR. K. MARSHALL:** But we didn't –

**MR. O'FLAHERTY:** – 6 months in negotiations –

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** – to tell somebody –

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** – they're responsible to perform work under a construction contract –

**MR. K. MARSHALL:** But –

**MR. O'FLAHERTY:** – correct?

**MR. K. MARSHALL:** – I did not have – the severity of the bankruptcy piece –

**MR. O'FLAHERTY:** Mm-hmm.

**MR. K. MARSHALL:** – coincided around the time of election and transition of government. I do not recall having any discussion with respect to dollar figure to mitigate this with the former administration.

**MR. O'FLAHERTY:** Yeah. Well, that's fine but I guess I was just reflecting on the point, as we've said – you know, 'cause we're going to look in a moment at the transition briefing –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – okay? There's a transition briefing provided by Nalcor, and the same breakdown – and perhaps you won't even need to do that, but the same breakdown is provided –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – the same $7.6 billion is provided.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** After – before the government is sworn in, on the transition period of time from the 2nd of December onwards –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – they do a presentation, and Mr. Martin provides it, in which the same $7.6 billion is there. But I would suggest to you, though, Mr. Marshall, that when we look at this, if we come up to 10,000 feet and we look down on it, the timing of when government is being given visibility on the fact that there are hundreds of millions of dollars that they have to come up with, that's immaterial.

The issue existed, was known and was understood to be a hundreds-of-millions-of-dollar –

**MR. K. MARSHALL:** Yeah. But –

**MR. O'FLAHERTY:** – issue. Just one – let me –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – finish my question.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** They understood that. The board understood it and management understood it in the summer of 2015. Correct?

**MR. K. MARSHALL:** That was – yeah, that it was a possibility –

**MR. O'FLAHERTY:** Yeah.

**MR. K. MARSHALL:** – but I don't know if it could've been quantified then, in fairness, but –

**MR. O'FLAHERTY:** Well, okay, that's fair enough, but you're acknowledging –

**MR. K. MARSHALL:** Yes

**MR. O'FLAHERTY:** – what the plain evidence –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – shows –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – on the page.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And it's essentially what EY concluded when they came in, because –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – they concluded that the September 2015 cost and schedule update was not reasonable in September of '15 when it was put together, correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** Right.

So then – and even this hundreds-of-millions-of-dollar issue that you're talking about, Mr. Marshall, did you understand that to be a final settlement figure, because we're going to get to another document where we're going to see that the estimated number in January is much higher than 300 to $500 million.

**MR. K. MARSHALL:** No. I mean I was of the opinion at that point in time that 300 to 500 was going to be a final figure, yes.

**MR. O'FLAHERTY:** You were. Okay, thank you very much.

P – sorry, 03874, Madam Clerk. So this is a letter from Julia Mullaley to the premier. She's the clerk of the – at that particular point in time on January 25. If you just look at the first paragraph – I don't know if you've had an opportunity to see this exhibit?

**MR. K. MARSHALL:** I did not.

**MR. O'FLAHERTY:** Okay, just read it to yourself on the first paragraph.

**MR. K. MARSHALL:** Okay.

**MR. O'FLAHERTY:** And I'll just have a couple of questions for you. Okay?

**MR. K. MARSHALL:** So the first paragraph. Yeah.

**MR. O'FLAHERTY:** Yeah.

So the context here is that Ms. Mullaley has testified that she received a telephone call from Mr. Martin in the – I believe she said she was in the parking lot of the Confederation Building. And he was asking her with – he was giving her information that there would be a requirement for some hundreds of millions of dollars to be paid when he was at the table with Astaldi, okay? And you'll see the context here, okay?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** So what happened at that particular point in time was the Government of Newfoundland and Labrador said you have to give us a briefing document which shows us a number of things. We want to know: What are the amounts that you're talking about paying? What is the amount of the potential exposure to GNL?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Give us a rationale for making any payment whatsoever, okay? And also the estimated delay, okay, that's going to result from this problem, all right? And then we can see, it appears – and there's another document – and we're late in the day so I don't want to flip around a bunch of more documents, but you can accept my –

**MR. K. MARSHALL:** Yes. Reasonable – they were reasonable requests.

**MR. O'FLAHERTY:** No –

**MR. K. MARSHALL:** They were –

**MR. O'FLAHERTY:** – it – well, I mean they're entitled to make the requests.

**MR. K. MARSHALL:** Exactly.

**MR. O'FLAHERTY:** But four days later they have the document, okay?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So here we have a hundreds-of-millions-of-dollars issue, okay, that I understand from the evidence that we've just reviewed has been under discussion and under negotiation since June to December of 2015, correct? That correct?

**MR. K. MARSHALL:** I wasn't at the negotiations, so –

**MR. O'FLAHERTY:** No, no.

**MR. K. MARSHALL:** – I can't say the extent of negotiations, yes.

**MR. O'FLAHERTY:** But we looked at a document that showed that, right, Mr. Marshall?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So – but you were aware of it, that it was a large issue?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** No documentation on it. We haven't seen – I've shown – I can show you –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – but we're late in the day. But in the transition briefing, there's no mention –

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** – of any of these issues, correct?

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Right.

So now we're in a situation where Mr. Martin – if the Commissioner accepts Ms. Mullaley's evidence, which I – you know, that'll be for the Commissioner – that he – she received a telephone call looking for hundreds of millions of dollars and said, no, we require documentation.

**MR. K. MARSHALL:** Correct. Yeah.

**MR. O'FLAHERTY:** Four days later, Mr. Marshall –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – documentation.

Now, I'm not going to bring you to it, but I can tell you the documentation shows it was a 600 to $800-million problem, okay, and a 12- to 18-month schedule delay, okay? Were you aware of that?

**MR. K. MARSHALL:** No.

**MR. O'FLAHERTY:** No.

So Nalcor could quantify the amount and the schedule risk within four days in January of 2016. Correct?

**MR. K. MARSHALL:** Yeah, presumably, yeah.

**MR. O'FLAHERTY:** Right.

So my question is: Why couldn't Nalcor quantify the amount and the schedule risk for the board in the summer of 2015 ahead of this September 2015 budget update?

**MR. K. MARSHALL:** I can't answer that.

**MR. O'FLAHERTY:** Okay.

**MR. K. MARSHALL:** I didn't have it and I presume that Mr. Martin will be asked those questions.

**MR. O'FLAHERTY:** Okay. Thank you. So we'll move on then.

But – so, in fact, this is the exact same time frame, Mr. Marshall, when the independent consultant was in place to report on whether this specific issue: Was the September 2015 cost and schedule forecast in fact reasonable, okay? That was the question that they were engaged. That's really the core of it, correct? Do you agree with that?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

And we know that by the end of February 2016 the consultant had reached the conclusion that the September 2015 cost and schedule forecast was not, in fact, reasonable at that time in September 2015 when it was done. Correct?

**MR. K. MARSHALL:** Right.

**MR. O'FLAHERTY:** Now, when you reflect back on what we've just discussed here, knowing, as you've told the Commissioner, that the board knew there was a hundreds-of-millions-of-dollars, you know, issue out there which hadn't been quantified, wouldn't you also be forced to confess that, well, yeah, it sounds like the September 2015 cost and schedule forecast was not reasonable.

**MR. K. MARSHALL:** The issue relates back to what I indicated earlier, and that is if we're going into negotiations with Astaldi, the CEO or whomever, it would be difficult, I think, to have that number out there publicly. It should've been conveyed, certainly, to the premier if it was known, but it would be done in an extremely sensitive, confidential manner and not in public documentation because it signals to the opposite party what your upper end of your negotiating limit is.

**MR. O'FLAHERTY:** Well, this is all –

**MR. K. MARSHALL:** So –

**MR. O'FLAHERTY:** – getting into this red meat issue –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – and all that, yeah, so …

**MR. K. MARSHALL:** Well, this is more than red meat, this is now late-stage negotiation to try to stave off a contractor who was – you know, who was looking at closing up shop and walking out the door. So I think it's a little bit more than a simple contingency. This is a critical negotiation element down to a single contractor.

So I just – I think that the board was – would've been aware that the 7.6 – and as, again, through my conversations, you know, we were of the opinion that it was a 300 to $500-million issue and that not the 600 to 800 but that's, again, for the Commissioner to determine.

**MR. O'FLAHERTY:** Yeah and do you know what, Mr. Marshall? At the end of the day it's hundreds of millions of dollars –

**MR. K. MARSHALL:** Absolutely.

**MR. O'FLAHERTY:** – of the province's money.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Of the people's money, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** So – and I guess I want to just go back on a couple of points there. You said that this was at a critical stage in the negotiation. I'm talking about the summer of 2015 and you told us just a moment ago that they were doing feeling out in the summer.

**MR. K. MARSHALL:** That's as I understood.

**MR. O'FLAHERTY:** As you –

**MR. K. MARSHALL:** I wasn't there.

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So it wasn't a critical phase in the summer, it was – you said they weren't even talking about money.

**MR. K. MARSHALL:** Well –

**MR. O'FLAHERTY:** That they – that was your understanding, correct?

**MR. K. MARSHALL:** That was my understanding, yes.

**MR. O'FLAHERTY:** Right.

And the second issue – and I don't want to dive too deep into the contracts, but the fact that Nalcor Energy had negotiated a contract with certain performance security in place that may not have been realizable, such as the parent guarantee –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – well, but that's simply part of the responsibility of the people who negotiated the contract. Correct?

**MR. K. MARSHALL:** It is.

**MR. O'FLAHERTY:** It is, right.

So I want to go forward now – and I know we're getting quite late – but it's 03361. So – and this is what I wanted to ask you about. If we can go to page 4 of 03361, I believe it's page 4.

So we looked at what had happened and we didn't look at the document itself, but we looked at what Ms. Mullaley had asked Mr. Marshall to be done – and I've told you what was done. And we know now that this is now the draft interim report of EY, okay? If you could just –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – scroll down a little bit.

Sorry, Madam Clerk, it must be a little bit below that. I apologize for that. Here we go – keep going down. Right here, yeah.

So if you look at page 4, there's a bullet there: "Page 4 Executive Summary point 1.3 – The statement that the September 2015 Forecast 'is not reasonable'" – those are quoted – "is not quite accurate. It was reasonable at the time it was prepared with the information available to Nalcor. Please consider the following.... 'The overall conclusion of the Review is that the September 2015 Forecast is no longer considered reasonable because of events that have occurred since that date.'"

You see that?

**MR. K. MARSHALL:** So is that management response?

**MR. O'FLAHERTY:** Well, before the management response – we're going to get to the management response. This is feedback from management –

**MR. K. MARSHALL:** Okay.

**MR. O'FLAHERTY:** – to EY –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – on changes that they're suggesting to the conclusions –

**MR. K. MARSHALL:** Okay.

**MR. O'FLAHERTY:** – okay?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** So what had happened in the email, and we'll – if we can go up – a little bit further up. And you'll see the emails. Madam Clerk, if – sorry about this, I don't mean to get you to move around – up the page, yeah, to the emails. So we can – probably page 2, I would say. We'll have a look at what the request was. And if we go down – keep going, right – sorry. Yeah, right here.

"Dear Paul" – this is from Tim Calver, one of the team from EY.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** "Please find attached a draft copy of the EY interim report. I can be at the Nalcor offices tomorrow, so I'm available to discuss this and receive your comments on any factual errors or misstatements."

Do you see that?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So they ask for feedback on factual errors and misstatements, but they get this position back saying that the September 2015 cost and schedule forecast was in fact reasonable in September of 2015 but was no longer reasonable due to things that happened afterwards. Do you follow what's happening?

**MR. K. MARSHALL:** Yes, yes.

**MR. O'FLAHERTY:** Okay.

Now was the board briefed – this is on February the 28th – was the board briefed that this was the position being taken by management?

**MR. K. MARSHALL:** I cannot recall.

**MR. O'FLAHERTY:** So might that be something that you would remember them asking you to do or –?

**MR. K. MARSHALL:** Well again, if this was done with Paul Harrington, we didn't interact with Paul Harrington on a regular basis. He was not necessarily on every call, so I can't say. I know I didn't have conversations with EY and I heard that EY said that they asked to have conversations with the board and were declined, but I don't know. I would've said: Give me a call. And I would've met with them, that was just how I operated.

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** So I don't know who would've had the authority to deny them access. To me, they were working for the province and the province would've picked up the phone, to me, and said –

**MR. O'FLAHERTY:** (Inaudible.)

**MR. K. MARSHALL:** – meet with EY and –

**MR. O'FLAHERTY:** But that's not –

**MR. K. MARSHALL:** – so –

**MR. O'FLAHERTY:** – but the question I'm asking you: Was the board briefed then and were they aware

**MR. K. MARSHALL:** So –

**MR. O'FLAHERTY:** – on February 28?

**MR. K. MARSHALL:** – yeah, you know, I think with respect to the – whether or not the board was briefed on February 28 or not is – I can't say definitively. I can say that the board would've probably been aware because, as I indicated earlier, that the ideal scenario during those summer discussions would've been that Astaldi had to complete its obligations under the contract and under its parental guarantee for no, kind of, obligation.

**MR. O'FLAHERTY:** Mm-hmm.

**MR. K. MARSHALL:** So that's where the board would've said: Yeah, we had an understanding that this could be as low as zero and it could've been possibly in the hundreds of millions of dollars. So whether that's a fair statement or not, that wouldn't – that's not a board-sanctioned statement that went back to EY.

**MR. O'FLAHERTY:** No, it's not. That's all I'm asking you –

**MR. K. MARSHALL:** Yeah, no, no.

**MR. O'FLAHERTY:** – Mr. Marshall. That's not a board-sanctioned statement, right. And, you know, we ask as lawyers, we're trained to ask, you know –

**MR. K. MARSHALL:** Yes, absolutely.

**MR. O'FLAHERTY:** – cui bono? To whom is it a benefit?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And it's a benefit to the people who could be the ones who put together the –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – cost schedule – cost and schedule forecasts. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

So let's move forward to MFI129. I believe it's MFI129? No, we don't have that. Okay.

There's another letter that's written on March 19 of – sorry, no, it's not March 19 – April 12, 2016. And that's written by Gilbert Bennett. So now we're – this is – Mr. Harrington told us that he spoke to Gilbert Bennett about it, he wasn't sure about Ed Martin, but on April 12, after the report came out – because EY didn't agree with that, EY said: No, that's not what happened. Information was there –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – in September. You could have put out a reasonable cost and schedule update but you didn't, okay?

On – after, Nalcor sent the letter saying a variation of the same thing, in response. Okay? At that stage, after the report came out, was the board briefed in to the idea that Nalcor would still take the position that the September 2015 cost and schedule update was reasonable at that time?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay. And the board knew about that?

**MR. K. MARSHALL:** Yeah, I mean – and, again, back to the point of not knowing specifically what the dollar costs were going to be with respect to resolving the Astaldi situation, that what we knew in September 2015 was the $7.7 –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – billion. Now, that had been – again, that had been developed going back as far as March, as I think the evidence –

**MR. O'FLAHERTY:** Okay.

**MR. K. MARSHALL:** – will show. So with respect to the – I mean the EY piece, again, we were not involved in the tos-and-fros of the management team. And I don't even know if Mr. Martin was in the province at that point in time because that's around the time when the board resigned. It was the following week, I think, that the –

**MR. O'FLAHERTY:** It was the 19th (inaudible) yeah.

**MR. K. MARSHALL:** I actually went to see the Premier on the – I think it was the 15th – the Friday, the 15th of –

**MR. O'FLAHERTY:** Yeah.

**MR. K. MARSHALL:** – April.

**MR. O'FLAHERTY:** Yeah. And I don't wanna interrupt you, Mr. Marshall, what I'm – my point, though, is you've confirmed that the board was aware and had endorsed the position that was taken in April 12, 2016, have you not? It was taken by –

**MR. K. MARSHALL:** No, I can't. No, I can't.

**MR. O'FLAHERTY:** You can't say that?

**MR. K. MARSHALL:** No, I can't say that.

**MR. O'FLAHERTY:** Oh, okay.

So this is the lead-up now –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – and we'll conclude then, I'm almost finished now. Then so – so then, we've talked about the short-term incentive program. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And you also talked about then learning about the issue of Mr. Martin and the decision which had been taken –

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** – with respect to Mr. Martin and the termination of his employment.

But let's just come back from that now, Mr. Marshall. It must have occurred to the board – I don't know about to you, but to the board at some point in time, in this context of what was happening here, that there may be some question about leadership changes.

**MR. K. MARSHALL:** I had had that conversation with Premier Ball going back as far –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – as December. That's –

**MR. O'FLAHERTY:** Right.

And I believe Premier Ball told me that he recalls a discussion with you in which you said: Look, Premier Ball, I understand that in the context of a transition of a government and in a difficult situation like this, sometimes change is made. Correct?

**MR. K. MARSHALL:** Yes, absolutely.

**MR. O'FLAHERTY:** Right.

And you had a discussion in which you put to him: I'd like to handle this in a respectful way in light of my long commitment to the board and my family and I'm well known – you know, I'm a man of St. John's –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – and a man of the province. Correct?

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** And you asked him could you be there at Muskrat Falls when they flip the switch and turned on the power. Correct?

**MR. K. MARSHALL:** No, I said I trust with all of this going on, this is difficult – I said, I trust I'll be invited. That was all.

**MR. O'FLAHERTY:** Yeah, I mean –

**MR. K. MARSHALL:** It was all –

**MR. O'FLAHERTY:** I didn't mean –

**MR. K. MARSHALL:** It was –

**MR. O'FLAHERTY:** – to say you were asking for a free –

**MR. K. MARSHALL:** It was –

**MR. O'FLAHERTY:** – trip, Mr. Marshall –

**MR. K. MARSHALL:** No, not at all.

**MR. O'FLAHERTY:** – nothing like that. I meant –

**MR. K. MARSHALL:** It was –

**MR. O'FLAHERTY: –** my point was you wanted to be there at the end.

**MR. K. MARSHALL:** It was – I had 12 years and –

**MR. O'FLAHERTY:** Right.

**MR. K. MARSHALL:** – an emotional and physical and complete investment in the development of this –

**MR. O'FLAHERTY:** Absolutely.

**MR. K. MARSHALL:** –project.

**MR. O'FLAHERTY:** And your family had given of your time –

**MR. K. MARSHALL:** Absolutely.

**MR. O'FLAHERTY:** – and you had missed time with your family –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – as a result of it. I understand those things. I'm in the same kind of a world –

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** – okay?

But my point is this: This was a topic of discussion, the issue of transition, change –

**MR. K. MARSHALL:** Yes, very much so.

**MR. O'FLAHERTY:** – was in the air.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** No question about it.

**MR. K. MARSHALL:** Yeah.

**MR. O'FLAHERTY:** And there was also a question in the air as to whether Mr. Martin would stay or go as well.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Correct?

**MR. K. MARSHALL:** Very much, yes.

**MR. O'FLAHERTY:** Right.

And Mr. Martin had a contract in place with the board. He didn't have a contract with Dwight Ball or the Government of –

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY: –** Newfoundland and Labrador, of course.

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Right?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And he had specific provision in there about loss of confidence as well.

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

And did you know that that contract was changed after the first – in 2009 to add in a provision about that?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right.

So then in 2009, after Mr. Williams had left government, there was a provision inserted that said Mr. Martin, in the event of government loss of confidence, he would be entitled to certain rights. Correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Okay.

So that's the context in which we were talking about when you get to the stage in April of 2016 and Mr. Martin tells you: I've had a call with Mr. Ball and, you know, I'm going to be resigning, but I think everything is gonna be worked out. Along the lines, he tells you on the telephone, right?

**MR. K. MARSHALL:** Correct.

**MR. O'FLAHERTY:** Right. And then as – and I don't fault you for this, Mr. Marshall, and that's not my point – because the Commissioner has already said he's not un-ringing that bell, okay? But it is a fair question to ask – if things were done quite quickly on the next day, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right. And you still have – this is the context of the premier drinking from the firehose as you've said – all hands to the pumps in Newfoundland and Labrador, correct? Right? Is that correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right. And you also have the context, at that particular point in time, where there's budget issues in Newfoundland and Labrador, correct?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** And there was a harsh budget, as it was described by people. Other people might have thought it was fair, but that was the context, wasn't it?

**MR. K. MARSHALL:** Yes.

**MR. O'FLAHERTY:** Right. So, it's in that particular context that you telephoned Mr. Ball that day to try to get him to deal with this issue, and he told you the administration of the contract –

**MR. K. MARSHALL:** Rests with the board.

**MR. O'FLAHERTY:** – is with the board.

**MR. K. MARSHALL:** Absolutely.

**MR. O'FLAHERTY:** Right. Mr. Marshall, a pleasure.

**MR. K. MARSHALL:** Thank you.

**MR. O'FLAHERTY:** Thank you for answering my questions.

**THE COMMISSIONER:** Right. Thank you. And Nalcor Energy.

Just before we start, I notice that the witness is there that was going to be called today. My apologies to you. I had no expectation that we were going to be this long with Mr. Marshall. I'm aware that your counsel is from away and that we have to get to you, and we're going to do that tomorrow. We're going to be starting tomorrow morning early, at 8 o'clock, with you, if that's okay. And we're going to finish you sometime in the morning. My instruction to Commission counsel is going to be hit the main points and then sit down. And then I'm going to – my instructions to the other counsel are going to be the same thing. And then sit down.

And then we're going to do Mr. MacIsaac, the other witness, tomorrow and we're going to finish him so that on Wednesday, when Mr. Martin is scheduled to testify, he will be starting on time. So, rather than you sit here for another half-hour or whatever, you might as well go and just return tomorrow at 8 o'clock, if you would. All right?

Good. Thank you very much.

All right. Go ahead.

**MR. SIMMONS:** Thank you, Commissioner. And in two minutes, I could say good evening. But I'll still say good afternoon. So, I'll try as best I can now just to hit a few high points.

The questions I have, largely, almost all come out of the questions you've been asked already and the evidence you've already given, Mr. Marshall.

First of all, concerning the interactions that you would have as either a board member or as chair of the board with the CEO of the corporation, which throughout most of your time was Mr. Martin, and I understand from your evidence that while you were a board member, it would have been the chair who would have had more outside board meeting interactions with Mr. Martin than you would have.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** But that likely changed when you became chair, and do I presume it also would've changed when you became – when you filled in as acting chair?

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Can you give me some idea of how much of a change it was, what the, kind of, ground rules were for what the interactions and communications would be for the chair and the CEO outside of the regular scheduled board meetings?

**MR. K. MARSHALL:** I don't know if there's anything necessarily in writing, but, you know, you still had the same level of preparation required for the board meetings and the pre-reading and the preparation with respect to analysis of the information.

But it was also, A, setting the agenda for those boards meetings because the chair would do that in consultation with the CEO, so you had to have that kind of pre-meeting and pre-establishment of requirements. You also had a number of times – because as luck would have it, when I became chair, there became that turnover with respect at the premier level and at the ministerial level, so it became a matter of getting various ministers up to speed. So it was – I would attend more meetings with the CEO, with Minister Dalley, with Minister Coady, with Premier Ball, as an example. So that – and that wouldn't have been required of any of the other board members.

So the amount of impromptu requirements and working on Nalcor business or Hydro business would've been now switched from kind of a weekly basis to more of a daily basis. Whether that be in telephone calls, or whether that be in meetings, or whether going – mean going to Nalcor to meet with Ed to go over certain elements of contention and/or preparation for a meeting with the minister the following day on certain issues, because Minister Dalley was, again, getting up to speed; Minister Coady was getting up to speed, and I had a number of meetings there as well.

So it was more a matter of setting the agendas for upcoming meetings and the individual meetings with ministers and occasionally with the Premier as required.

**MR. SIMMONS:** Okay.

And how much would Mr. Martin involve you in the business of the corporation, or would you insert yourself into the business of the corporation, aside from just those things that would be necessary to come to the board for meetings?

**MR. K. MARSHALL:** The business of the corporation was more – that was done at the board level, not the ongoing business. For example, you know, I've never met anybody from Astaldi. I had never – the only time we had met Emera was when we had a joint board meeting here to celebrate the – kind of, the partnership arrangement. So there was no direct involvement in the business on a day-to-day basis, other than the preparation for board meetings and for the preparation and minutes – or meetings with the political requirements of the day.

**MR. SIMMONS:** So, you would certainly have been in a position to insert yourself more into the business of the corporation had you wanted to, so I presume, then, that that relationship was one you regarded as being appropriate and satisfactory.

**MR. K. MARSHALL:** I think so.

**MR. SIMMONS:** Okay.

**MR. K. MARSHALL:** It was taking up an awful lot of time, and I –

**MR. SIMMONS:** Mm-hmm.

**MR. K. MARSHALL:** – couldn't necessarily see how I could justify or rationalize it taking up even more time.

**MR. SIMMONS:** Right. And are you in a position to comment at all on prior board chairs and whether they may have interacted with the CEO in the same or similar way to the way you did?

**MR. K. MARSHALL:** I think they did. The – you know, the issue was I happened to be there for the – the hottest time in the – of the life of my tenure in the 12 years happened to be the last year of my life as a board member. So, I can't really comment going back to – you know, in my 12 years, there was six chairs of the board. There was Paul Dicks; there was Dean MacDonald; there was Cathy Bennett; there was John Ottenheimer; there was Terry Styles, and there was myself. So, I can't comment on each of the six as to how much time they would have spent with the CEO and how much they would have spent going through.

I know that in my time as chair and immediately prior, the organization changed considerably with respect to the purview, the assets on our management, you know, the huge nature of this project and the implications therein. And the – you know, the establishment of the oil and gas business, the energy trading, you know, et cetera. There was other –

**MR. SIMMONS:** So, Mr. Martin or – in his CEO position, would have been your point of contact as chair of the board. And I think that would be normal for most corporate relationships between the board and the executive, that it would be the chair and the CEO would be the point of contact.

**MR. K. MARSHALL:** I would think so, yes.

**MR. SIMMONS:** Was there any practice or policy, or do you regard yourself as having ability to reach past the CEO and interact directly with the vice-presidents or other officers of the corporation, without involving the CEO?

**MR. K. MARSHALL:** That was, you know, suggested to us in terms of if you have – but typically, no. I would not pick up the phone and phone, unless in my role as chair of the Compensation Committee, I would work directly with the vice-president of human resources. But, by and large, we try to make sure that those contacts with management were done at board meetings and not necessarily directly to those individuals.

**MR. SIMMONS:** And as you say, there are committees of the board, and it would be appropriate for chairs of committees to interact with a counterpart officer such as the CFO.

**MR. K. MARSHALL:** For example, you know, Gerry Shortall, as chair of the Audit Committee interacted regularly with Derrick Sturge, the CFO, and not with the CEO involved.

**MR. SIMMONS:** Okay. You were brought to the *Energy Corporation Act*, which is Exhibit P-00431. Can we bring that up again, Madam Clerk, for a moment?

**MR. K. MARSHALL:** I wish I studied the *Energy Corporation Act* more before today.

**MR. SIMMONS:** Okay. I'm not going to look for a legal opinion on it.

You were brought to section 4; I'm going to bring you to section 7 and, unfortunately, I don't have the page number, so we'll have to probably page down until we hit section 7 of the act.

Continue down. Okay, slow down.

**MR. K. MARSHALL:** There you are.

**MR. SIMMONS:** There we are right there. There's a section headed: Chairperson and CEO.

7(1) and 7(2) deal with the chairperson and then 7(3) says: "There shall be a chief executive officer of the corporation, to be appointed by the Lieutenant-Governor in Council, who shall, subject to the terms of appointment that may be established by the Lieutenant-Governor … or in an agreement made under section 9, and, subject to directions of the board, be charged with the general direction, supervision and control of the business of the board and the corporation."

So the first observation is that the CEO of Nalcor is not appointed by the board, but is appointed by the Lieutenant-Governor in Council which is the province.

**MR. K. MARSHALL:** Yeah.

**MR. SIMMONS:** In your experience in private industry, is it not more normal to see the CEO being appointed and to hold office at the pleasure of the board?

**MR. K. MARSHALL:** It is. And if you look at the board of directors' mandate separately to this, there's a kind of a bit of a conflict in that we always recognized that the CEO is appointed by the Lieutenant-Governor in Council and that's typical for a Crown corporation.

**MR. SIMMONS:** Mm-hmm.

**MR. K. MARSHALL:** In the board of directors' mandate there is a requirement for the board of directors to do the recruitment, the search and the recommendation and conveyance of the board's position with respect to who should be appointed. So the board doesn't necessarily decide but the board – and that's very much how the hiring of Mr. Martin was done. It was done by the recruitment committee, the Compensation Committee and the board of directors and then passed to government to say here is who we recommend and then it was done through this process.

**MR. SIMMONS:** Right.

So – and I think from other questions you've answered already that it was well recognized by the board that the CEO had reporting responsibilities, not just to the board but also through to government.

**MR. K. MARSHALL:** Absolutely.

**MR. SIMMONS:** And that that was recognized as being through to the minister of Natural Resources and even to the premier's office.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** So, you, as chair and as board member for a – you had been aware that that had been a long-standing relationship.

**MR. K. MARSHALL:** Very much so. Yes.

**MR. SIMMONS:** Okay.

What was your conception of where the relative responsibilities lay as to what the CEO would report to the board versus government or – and in what circumstances he might take direction from the government as opposed to direction from the board?

**MR. K. MARSHALL:** Well, ultimately, government is the shareholder. And I mean from a – the Crown corporation, the principle is to try to establish some element of separation from – the policy comes from government, the strategic direction comes from the Crown, but hopefully you'd have some kind of alignment between the direction and the policy. But the purpose of the Crown corporation is to ensure that the organization acts somewhat independently from government –

**MR. SIMMONS:** Mm-hmm.

**MR. K. MARSHALL:** – but ultimately government is the shareholder and can effectively step in on, pretty well, any decision.

The CEO, typically, as I indicated earlier, if he was going to meet with the minister or the premier he would typically – if it happened to be around a board meeting – it would be: Okay, here's what I'm going in with, here's the position, I just want to make sure you're all aligned, aware as to what the issues are that I'm going to be discussing. And/or if he held a meeting with government, then when he came back it would say here's what – again, at the next opportunity for a meeting, to say: Here's what the discussion was with government.

So we were – to our knowledge, we were fully briefed prior to and/or after the meetings with government if there was any concerns.

**MR. SIMMONS:** Right.

Throughout your time as a board member and as chair, aside from this legislation, the *Energy Corporation Act*, were you aware of any type of documentation that would set out what government's expectations were of the CEO's responsibility to report and to take direction?

**MR. K. MARSHALL:** No. And we – from a communications perspective, I noticed that in Mr. Holburn's testimony that we did not have anything which clearly outlined, definitively, the communication expectations of the CEO to government. But it was a well-understood practice that the CEO became – as I indicated earlier, that he or she is the one who is hired full-time to be most immersed, most knowledgeable, most in-depth in terms of all of the issues and should be the one meeting with government; in some instances along with the chair and in some instances tout seul, so …

**MR. SIMMONS:** I'm going to ask you some questions now about AFEs.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And we use that acronym pretty freely around here, but it actually stands for authorization for expenditure.

**MR. K. MARSHALL:** Yes, yes.

**MR. SIMMONS:** So do you understand that to be – is that an internal Nalcor document or is that a public document or is that a document that has to go to government? What's your conception of the status of an AFE?

**MR. K. MARSHALL:** Well, my conception at the time was that it was a requirement of the lending – of the lenders and –

**MR. SIMMONS:** Right.

**MR. K. MARSHALL:** – and the federal government to make sure that these were established and not necessarily communicated publicly but they were there for proper governance and proper financial controls; before people could spend against them there had to be an AFE that was established indicating that this – what you're spending against is within the stated and approved AFE.

**MR. SIMMONS:** So you understood it, then, to be a spending control document.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And when you say spend against it, do you mean that when an AFE is put in place there is authority to only spend and commit to spending up to the amount that's authorized in the AFE?

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And if there were requirement to – in order to advance the project, to have to commit to spending more than is authorized in the AFE, then there has to be a request back to the board to approve a new AFE –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – for increased spending.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** So we've heard the AFE described as if it's a final forecast document, a predictive document –

**MR. K. MARSHALL:** Right.

**MR. SIMMONS:** – to predict how much the project will really cost –

**MR. K. MARSHALL:** Right.

**MR. SIMMONS:** – in the end. Was that your conception of it at the time when the project was at financial close, when the first AFEs were put in place?

**MR. K. MARSHALL:** No, and I would suggest that Gerry Shortall would probably be able to give a better answer than I would. But it was, again, the heading is authorization for expenditure –

**MR. SIMMONS:** Yes.

**MR. K. MARSHALL:** – I would like to think of it as what the project is ultimately going to cost us –

**MR. SIMMONS:** Yes.

**MR. K. MARSHALL:** – but understanding that even when we would issue one, the CEO would be very clear to say: We're still not free from risks here. And that became clear as we did two variations and iterations of an AFE. So –

**MR. SIMMONS:** Can we have Exhibit P-00675, please, which is, I think, the first board meeting in January.

**THE COMMISSIONER:** In tab 2.

**MR. SIMMONS:** And this is January 18, 2013. This is when the AFE was put in place following –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – no, maybe I've got the wrong one here.

**MR. K. MARSHALL:** Following financial close.

**MR. SIMMONS:** That may be 14th – can we go to page 9, please?

**MR. K. MARSHALL:** No, that would've been following sanction. That would've been –

**MR. SIMMONS:** Yes, right –

**MR. K. MARSHALL:** – the 6.2.

**MR. SIMMONS:** – following sanction. You are correct, right.

So this is following sanction and the AFE was put in place. And here in paragraph 786, it's saying here that: "Mr. Martin reviewed the Lower Churchill Project – Master Authorization for Expenditure (AFE) report …." And then at the latter part of that paragraph it says: "The Board is in effect approving the AFE budget for that time period whereby he, as President and CEO, would have authority to approve expenditures within the approved AFE budget."

So that's consistent with your understanding of it?

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And we scroll down, please, to the next – to the bottom of the page. You can stop there, just up a little bit. Up a little bit more. Okay, stop there.

The next paragraph is headed: Execution of LCP Contracts and Instruments. And there is a reference in the first paragraph, here it says: "Mr. Martin reviewed and referred to the Lower Churchill Project Approval Limits Matrix (Matrix) that was included in the Board papers circulated prior to the meeting and advised that Management is seeking approval of the Matrix to permit the delegation of President & CEO's approval and signing authority to the specified key Project personnel …."

So, my understanding of what the effect of these two steps is, that the AFE has approved an amount that the CEO now has authority to commit to spending –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – on the project –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – and that the approval limits matrix was also approved by the board, which gives the CEO the power to delegate his authority down through the organization –

**MR. K. MARSHALL:** Correct.

**MR. SIMMONS:** – so that different people have different approval limits –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – and that that was a – an approach that was adopted at sanction, shortly after sanction –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – and approved by the board. Okay.

Can we have the Grant Thornton report please, P-01677, the construction report, we're going to go to page 20.

You were asked some questions about this earlier this morning – page 19, please, you can stop there.

So, you were brought to this summary table, which was prepared by Grant Thornton, and it summarizes a number of information that had been – is described as having been presented to Nalcor executive leading up to the AFE that increased the spending approval to 6.99.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And did you hear the evidence from Tanya Power who – from project controls?

**MR. K. MARSHALL:** No, I saw –

**MR. SIMMONS:** Maybe not.

**MR. K. MARSHALL:** – one letter from her today.

**MR. SIMMONS:** Okay.

**MR. K. MARSHALL:** That was the first –

**MR. SIMMONS:** Okay –

**MR. K. MARSHALL:** – time I –

**MR. SIMMONS:** – and did you see Paul Harrington's evidence –

**MR. K. MARSHALL:** I did not.

**MR. SIMMONS:** – concerning management outlooks?

**MR. K. MARSHALL:** I did not.

**MR. SIMMONS:** Well, I'm just gonna give you a brief summary – I may get it right, I may not –

**MR. K. MARSHALL:** Okay.

**MR. SIMMONS:** – get it quite right, but you can make an assumption here that I'm gonna describe it correctly – that project controls on a regular basis – pretty well monthly – prepared the reports on spending –

**MR. K. MARSHALL:** Yeah.

**MR. SIMMONS:** – tracking spending on the project, tracking commitments on the project and trying to identify trends, and that there would be a monthly meeting where that information would be presented to senior project management team leadership, where they would make assessments of trends that they considered –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – spend – cost trends, and that the result of that would be presented in something they called the management outlook –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – that would be presented, then, to more senior –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – leadership, including Mr. Martin.

And on this first box for July 23, this material is extracted from what was described as one of those management outlooks, and Mr. Harrington's other evidence was that they were intended to present what he described as an indicative final forecast cost for the project.

Now, you've given evidence already about your expectations about how relatively firm costs would have to be before you'd expect them to be brought up to the –

**MR. K. MARSHALL:** Right.

**MR. SIMMONS:** – to the board, correct?

**MR. K. MARSHALL:** Correct.

**MR. SIMMONS:** So if we look at this table for July 2013 and go to the far right, you'll see that it quotes forecasting a final forecast cost to be about 7 billion, 6.3 if mitigated.

So let's go to the next box on –

**THE COMMISSIONER:** 6.8 –

**MR. SIMMONS:** – the top of –

**THE COMMISSIONER:** 6.8, I think.

**MR. SIMMONS:** 6.8, yes. Sorry.

Stop here.

So this is a month later in August 2013. Go to the far right. FFC is now predicted to be about 6.9 and exposure, if mitigated, it's still 6.8.

Scroll down to the next box, please. September of 2013. Far right, "'*forecasting the FFC to be in the range of ~$6.7B … to $6.95B*'" and exposure, if mitigated, would be 6.8.

So you can see there's a pattern here, where these numbers are fluctuating –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – on almost a monthly basis.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** So can you give me any comment on how much utility there would have been for the board through this period for information of this sort to be brought up?

**MR. K. MARSHALL:** There would be frustration as opposed to utility. And, again, from the board's perspective is, a board that's supposedly – you know, spends 8 to 15 hours per month in the best practice world according to Dr. Holburn – to get this kind of monthly variability would be more frustrating than it would be, you know, useful. That's why I indicated that we saw AFEs not on a monthly basis but more on a biannual basis to make sure that they were more firm, more complete and were concrete to approve.

**MR. SIMMONS:** So you've been asked questions about whether particular documents you thought should be brought to the board's attention –

**MR. K. MARSHALL:** Correct.

**MR. SIMMONS:** – or not. And I'm gonna ask you – was it more important for you to see documents – whether they're working documents or reports – or was it more important to get the information that the board needed?

**MR. K. MARSHALL:** The information the board needed, by far.

**MR. SIMMONS:** And in order to get that information you described that there had to be a funnel. There –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – had to be some sort of screening process in place.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Now you've given evidence that at financial close – and you've been fairly strong on this – that you and the board were aware – and you said before financial close that the cost of the project that was being estimated at that time was in the range of 6.5 billion instead of the 6.2 –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – that had been there at sanction. And you were asked a number of questions regarding a document that's at Exhibit P-02217. And I'm gonna try to avoid spending too much time on this but I want to go to it for a moment.

**THE COMMISSIONER:** Be on your screen.

**MR. SIMMONS:** It’s gonna come up on your screen.

So this starts with a message on the 19th of November ’13, and it’s sending two documents to be posted in the data room. This particular one was available to Canada and the independent engineer. If we go to page 2, please – okay, stop there. Okay, and this is – as you can see, this is a summary of where the – it’s actually 6.531 billion – came from.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And then if you go to the third page, this is – and we can shrink it down a little bit. This is the – it’s called a material contract summary. Mr. Ralph went through this with you. You’ve never seen this before?

**MR. K. MARSHALL:** No.

**MR. SIMMONS:** No, so it’s – you didn’t prepare it so I know you’re not in a position to interpret it. But it appears to be the calculation of where the 6.531 came from –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – based on looking at a number of contracts.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And you see that some of those contracts have been awarded and some have not been awarded.

**MR. K. MARSHALL:** Correct.

**MR. SIMMONS:** Right.

Bear with me for a moment. If we can scroll down please a little bit, to where we can see the bottom line, and just go over to the right a little. Okay, we can stop there.

Now, Mr. Ralph asked you a number of questions related to the contingency calculation and he put the proposition to you that perhaps what should have happened here was that the full contingency of $367 million should have been left in the forecast rather than reducing it to 182 million and that that would’ve resulted in a higher amount here than the 6.531. You recall that argument?

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Okay.

Now I don’t know how familiar you were with the use of the contingency and how it was set up, but if we go back to sanction, you were aware, I think, that at sanction the amount of contingency carried in the estimate was in round numbers, 368 million.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Rings a bell.

And at that time, there had been no contracts awarded.

**MR. K. MARSHALL:** Correct.

**MR. SIMMONS:** And were you aware, or not, as to whether any part of that contingency was intended to address the risk that the contract award amounts would be greater than the estimates?

**MR. K. MARSHALL:** I can’t say specifically.

**MR. SIMMONS:** Can’t say specifically.

So if I were to suggest that by this time, financial close, because some contracts have been awarded at higher than estimated, some of the contingent risk has been realized –

**MR. K. MARSHALL:** That’s what I indicated.

**MR. SIMMONS:** – and is appropriate to remove money from contingency.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Okay.

And the other point to be made here is that you had been brought to the Grant Thornton report, and a section of it, which said that everyone should've known that contingency was exhausted at financial close by the award of the Astaldi contract. Do you recall that?

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And would I be correct in saying that that assumes that the forecast cost of the project had not been increased to $6.5 billion.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And that the board knew that the forecast had been increased to $6.5 billion.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** So, consequently, there would be no reason to conclude at that time that there was no contingency left.

**MR. K. MARSHALL:** Right.

**MR. SIMMONS:** Okay.

I noted that your Commission interview was the first week in February?

**MR. K. MARSHALL:** Yes, it was.

**MR. SIMMONS:** And that was before the start of the Phase 2 hearings, I believe.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Yeah.

Before that interview, had you heard any testimony in Phase 1 or been aware of any discussion of the 6.5 as a potential number?

**MR. K. MARSHALL:** From …?

**MR. SIMMONS:** From the Commission testimony prior to that.

**MR. K. MARSHALL:** No, I was working in Toronto – working and living in Toronto from August on through. The only testimony that I saw was my own when I appeared here in October, November.

**MR. SIMMONS:** So when you went for your interview in early February then – and I believe reading the interview this – you spoke about this – knowing about the 6.5 number – that was coming from your recollection at that time.

**MR. K. MARSHALL:** As I indicated, actually, in fairness, you know, you occasionally catch a news clipping. I did see Premier Dunderdale's comment that she indicated that she had been aware of the 6.5. Again, it was just, you know, one story that I saw.

As I was preparing for my February session, as I indicated this morning, I recalled the 6.5 and I contacted Gerry Shortall in Toronto to indicate: am I wrong here because as I'm reviewing these documents, it goes from 6.2 to 6.99. But I recall there being an in-between process that we went through and confirmed that, kind of, recollection that I had.

**MR. SIMMONS:** Okay, a couple of questions about the December 18, 2013 board meeting. This was the one that followed financial close.

**MR. K. MARSHALL:** Okay.

**MR. SIMMONS:** And I'm going to bring you first to a page from the –

**MR. K. MARSHALL:** Sorry, what exhibit?

**MR. SIMMONS:** – board papers.

**MR. K. MARSHALL:** What's the exhibit number?

**MR. SIMMONS:** It's going to be P-04021 and I don't know what tab it's at.

**THE COMMISSIONER:** Tab 15.

**MR. SIMMONS:** But we're going to page 147 anyways – a page you were brought to before.

**MR. K. MARSHALL:** Okay.

**MR. SIMMONS:** So we've seen this page a lot here.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And this is a page from the presentation deck that was given to the board on that date. And it clearly discloses an increase in facilities capital cost of about $300 million.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Okay. So that information was presented to the board on that day.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** Now, if we go to the minutes at P-00684, please, page 17 …

**THE COMMISSIONER:** Tab 8.

**MR. SIMMONS:** Yeah, page 17. And you've been brought to this already, this is under other business. This is where it's reported that Mr. Bennett circulated the presentation –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – which compared the estimate to the current final forecast cost, and goes on to talk about some – in general terms – some information, and I notice there's no numbers here.

**MR. K. MARSHALL:** No.

**MR. SIMMONS:** The 300 million is not reported here.

**MR. K. MARSHALL:** No.

**MR. SIMMONS:** Is that typical of the board minutes, that there would be – when there would be more detailed information that might be considered for whatever reason sensitive, that it might be described in general terms in the minutes, but the number is not included?

**MR. K. MARSHALL:** I think, again, as I said, it would just be from the minutes perspective, you'd have to contact the secretary. I would've had to sign off on them – no, not at this point in time, I wouldn't, Terry Styles would've.

**MR. SIMMONS:** Mm-hmm.

**MR. K. MARSHALL:** But merely the fact that the 6.2 was the public number that was out there –

**MR. SIMMONS:** Mm-hmm.

**MR. K. MARSHALL:** – and the 6.5 we viewed as being effectively 6.2 because of the offset of the 300.

**MR. SIMMONS:** Well, we know from – if we were only reading these minutes we wouldn't know that the board had been given a specific number –

**MR. K. MARSHALL:** No.

**MR. SIMMONS:** – for cost increase. We have to go behind the minutes –

**MR. K. MARSHALL:** Correct.

**MR. SIMMONS:** – to the materials –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – in order to see that. And I think your evidence has been that, that sort of information could also come out through the discussion that takes place –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – in the board minutes –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – (inaudible) that's also not reflected in the minutes.

**MR. K. MARSHALL:** Yeah.

**MR. SIMMONS:** Okay.

So similarly, I just want to bring you quickly to the minutes for June 20, 2014, which is P-00687, please. And we're going to go to page 4. So this is now the – this is when the AFE was increased to 6.99. So we know that happened at this meeting here, and I won't go through the whole thing, but if we scroll down just a little bit we can look at this page. There's discussion here about the increase in capital costs. And go down closer to the bottom and stop there. "The Board hereby approves the cost amendment for the Muskrat Falls Project…" and et cetera. The number 6.99 is not mentioned –

**MR. K. MARSHALL:** Not there.

**MR. SIMMONS:** – in the minutes, is it?

**MR. K. MARSHALL:** No.

**MR. SIMMONS:** It's not there.

**MR. K. MARSHALL:** Again, sensitivity around making sure that it's aligned as to when it's going to go to the public.

**MR. SIMMONS:** Okay. Now, you'd been asked a number of questions about events in 2015 leading up to 2016, in particular concerning what was or should've been known to the board regarding the situation of the Astaldi contract.

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** And in relation to the increase in AFE to 7.65 billion –

**MR. K. MARSHALL:** Right.

**MR. SIMMONS:** – in September. So, first of all, can I bring you back, please, to Exhibit P-02549?

It's a small point. This was – this is from earlier in that. This is from February 2015. You were brought to page 11. Can we go there, please? And, on this page, you were asked about the information on this and asked to conclude that it should have been known at this time that there would be a cost as a result of the delay of six to nine months in the – in Astaldi's work.

And, I believe you answered something to the effect that, yes, there would be. So, I'm going to – maybe I got that wrong –

**MR. K. MARSHALL:** Well, I indicated that, presumably, there would've been, but we were still – again, Astaldi was still making its claims that they were going to get the schedule back on track –

**MR. SIMMONS:** Mmm.

**MR. K. MARSHALL:** – and that we were still of the view that they had a contract that they had to fulfill, but there was a likely cost implication that could have resulted.

**MR. SIMMONS:** And, if we bring you – and, if I bring you to the last bullet on this page, "We are eating into the built in schedule float, and that puts the December 2017 First Power Date under threat, but we are not projecting schedule delay at this time."

**MR. K. MARSHALL:** Right.

**MR. SIMMONS:** So, does that reflect that position?

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** In September of 2015, when the AFE was approved for 7.65 – unfortunately, I haven't been able to put my hands on the board minutes for that time. But –

**MR. K. MARSHALL:** For September which?

**MR. SIMMONS:** – within the last – no, within the last little bit. September of 2015.

**MR. K. MARSHALL:** Okay.

**MR. SIMMONS:** But were you on the Muskrat Falls Corporation board in addition to the Nalcor energy board?

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** You were. Okay. And they're not in evidence, I don't believe, but there are Muskrat Falls Corporation minutes that refer to putting in place the AFE for the Muskrat Falls portion of the plant –

**MR. K. MARSHALL:** Yes. There would've been three. There would've been MF, LTA and LIL AFEs that would have rolled up then to Nalcor. I wasn't on all of those boards –

**MR. SIMMONS:** Mm-hmm.

**MR. K. MARSHALL:** – but they would've been – the sub-components would've been delivered to each of those and approved by those boards.

**MR. SIMMONS:** Now, this may be a lot to ask, but do you have any recollection of, at that meeting, being explicitly told that the AFE for the Muskrat Falls plant did not include any costs that might result from Astaldi delay?

**MR. K. MARSHALL:** No.

**MR. SIMMONS:** Okay. If that were reported in the minutes, would you accept that as being something –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – that had been reported to the board? Now, around that time in September of 2015 compared to later – to December into January – how much was known in September about Astaldi's financial situation and whether it would have had an impact on the ability to hold their feet to the contract they had signed and rely on the parental guarantee? Do you recall?

**MR. K. MARSHALL:** Not specifically, because those months kind of blend into each other. All I can suggest is that there was no information that I had that would've conveyed the extent of the – basically, because we were still working towards holding their feet to the fire to deliver and/or the parental guarantee to deliver the contract.

**MR. SIMMONS:** Mm-hmm.

**MR. K. MARSHALL:** But I cannot recall in September 2015, when we approved the 7.653, that had been kind of being socialized as we saw AFEs take a while to get to approval. But I cannot recall there being any discussion that said, oh, by the way, there's going to be an extra – you know, as we heard – 600 to 800 that was in January. But there was nothing that I can't recall, again, being in any meeting of the board or any meeting as I was chair with the premier or minister, that discussed the dollar figure and the associated implications therein.

**MR. SIMMONS:** Yeah, okay.

And one last document I'll bring you to is something you haven't seen before, some of Mr. Sturge's notes we have in evidence. And that's going to be at P-02630, please, and it's going to go to page 22.

So we all struggle a little bit with reading these. And, unfortunately, we don't have Mr. Sturge here and I don't believe he was brought to these. But if you look on the upper left the heading appears to read: Meeting – Transition Team 12/04/15, which I'm going to assume is December 4, 2015.

**MR. K. MARSHALL:** Yeah.

**MR. SIMMONS:** You see that?

And if you go down to the bottom of that column on the left, there's the second paragraph from the bottom that appears to say: "Schedule – Ed said likely first power around end of 2018 (versus end of 2017)" –

**MR. K. MARSHALL:** Yes.

**MR. SIMMONS:** – which would be about 12 months late.

**MR. K. MARSHALL:** Right.

**MR. SIMMONS:** And then it says, cost – and it looks like 500 to 600M, could be – it's hard to make out, okay. But does this – do you have any recollection of those numbers being in play here in December of 2015 around the time of the government transition?

**MR. K. MARSHALL:** Yeah, I recall the bottom – the 300 to $400 million Astaldi side.

**MR. SIMMONS:** Yeah.

**MR. K. MARSHALL:** And I recall more the 300 to $500 million on the Astaldi side.

**MR. SIMMONS:** Okay, right.

Okay, good. Thank you very much.

I don't have any other questions for you, Mr. Marshall.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** Okay, thank you.

Counsel for Nalcor Board Members.

**MS. G. BEST:** Thank you very much.

It's been a long day and a lot of the questions that I was going to put to you have already been asked by other counsel.

**MR. K. MARSHALL:** Yeah.

**MS. G. BEST:** So I'm not going to repeat those.

**MR. K. MARSHALL:** Thank you.

**MS. G. BEST:** I do want to address with you, though, in summary format, the actions that the board had put in place to deal with the operation of the board. And I know we discussed – you discussed the CEO matrix and you discussed the risk register and the risk management register.

**MR. K. MARSHALL:** Yes.

**MS. G. BEST:** Can you advise the board of other actions that were undertaken or advise the Commission of other actions that were undertaken?

**MR. K. MARSHALL:** Well, they were numerous. I mean they started, really – we felt it was – and, again, we felt the importance and the paramount fiduciary duty over the project itself was huge. But over and above that, we looked at the governance – and this goes back early in our – in the tenure – bringing into account – bringing into play things like the AGM, things like going back to the shareholder at the time and trying to ensure that dividends were no longer paid out. That we had to strengthen the balance sheet of the organization in preparation for this project, because we had to attract outside lenders and get debt guarantees and if we were seen as spending – or returning more to the shareholder than we were actually earning in any given year. We had a horrific debt-to-equity ratio.

So there was – prior to the sanctioning of the project there was a lot of activity from a governance and trying to move the corporation to quarterly reporting and also to making sure that from the AGM, even as an example, not only do we put the AGM in place, but in a number of years later we move the date of the AGM because it used to be in June, five months after the end of a fiscal year which was certainly not acceptable from a public – private corporation, so we moved it back into March.

We established the Governance Committee. We established the board mandates, the committee mandates, refreshed them annually, made sure that they were communicated to board chairs and had to be signed off, and committee chairs had to be signed off that they were accepting this level of responsibility. And, really, that was done through the Governance Committee which we established, but also have to commend some of the individuals in the organization, namely from legal and from the CFO's office, that they became heavily invested in ensuring that we established more rigorous governance procedures in the organization. So we had to try to step back from the realities and the complications and the issues associated with the project, but also continue to drive the improved governance of the organization in the face of trying to expand the organization, grow the business, develop oil and gas and all the other ancillary businesses.

The other thing, as you noted, was, the risk register was developed. And that was a project that the CEO was actually adamant on, as was the board, so that the board would be recognizing the relative risks that were established or were present in various areas of financial or environmental or business or global, et cetera, and also hiring a chief risk officer.

The audit – the head of the Audit Committee took a great interest in strengthening the financial reporting, the notes that were in the documentation so that they more resembled a true public corporation that would be publicly traded, and really push the external auditors in that regard. And I would think that that could be easily validated through a conversation with the external auditors, that they were pressed to up the game and make sure that the audit timelines were back to a more appropriate public corporation in the, kind of, non-Crown corporation world.

And, as well, I would also say that Internal Audit was pressed considerably from when we were first there and the status that was there to ensure the appropriate internal controls were put in place. And I fully commend Gerry Shortall in that regard.

So every board member, again, as thin as we were from a numbers perspective, really had an obligation under – whether it be Comp Committee to make sure that those elements were brought up to speed to be able to attract individuals and to retain individuals, working with the human resource department – to governance, to audit – everybody was asked to really lean in over and above what was typically their responsibilities of reviewing, you know, the activities of the corporation and its ongoing activity.

**MS. G. BEST:** Okay.

Did you do anything with respect to the board, its matrix and its self-evaluation?

**MR. K. MARSHALL:** Yeah. So the board, as we indicated – I mean going back to 2006, those representations – I don't think the Commission needs to hear at 6:40 in the evening how many times that we petitioned the government to see if we could round out the board from a skills perspective. But also, as we got later in – it wasn't just a plea to say we need more bodies. As we got later into the process, we developed that skills and competency matrix.

So there was two things done. One was to assess the competency of the individuals on the board and what they contained and who would be eligible to go off and do additional training and additional requirements for more effective governance, and also the skills that we required that we did not have from those current board members, that was also kind of a formal process.

We also in 2014, 2015, started the – as is indicated in Dr. Holburn's report – a board self-evaluation process. It was socialized in 2014 and formalized with formal responses from each individual.

The other thing that we did in about 2009, 2010, would've been to put in a formal annual conflict of interest process to ensure that board members were documenting what other interests and holdings and potential conflicts, real or perceived, that they may have had in – so that they weren't held in conflict in their duties as a board member.

**MS. G. BEST:** Did you have any involvement at all with respect to the continuance of a government representative on the board?

**MR. K. MARSHALL:** That was somewhat – I can't recall exactly whether it was Chris Kieley's term, but again, back to Dr. Holburn's testimony to – the recommendation is to not have an elected or an – kind of a full-time government official on the board, and I was on the board when it was determined that as part of good governance. I was not the chair, and I can't recall exactly where the direction came from, but it was discussed at the board that it was better governance in that the deputy minister, who was an appointed member of the Nalcor board, should not be sitting on the Nalcor board because the question is: Does that individual represent the interests of the organization, or does that individual represent the interests of the shareholder?

So it was deemed to be not an independent member and was deemed to be certainly necessary to be involved. But that was done from the point of communication by the CEO or whoever would be discussing but not necessarily at a board level, because it was not deemed to be best practice.

**MS. G. BEST:** Okay. And in Phase 1, the panel mentioned the gaps that sometimes occurred with respect to appointment of board members. And what steps, if any, did the board undertake with regard to the timing or the extension of appointments –

**MR. K. MARSHALL:** So –

**MS. G. BEST:** – or the board members?

**MR. K. MARSHALL:** – it was one of those things where we would love to have seen that kind of the timely appointments and the expanded appointments. We then also would go back with more practical, immediately applicable – so in the case of Gerry Shortall, as an example, he was a number of months, and was coming to board meetings even though he wasn't formally a board member. Because his term had expired and we, you know, required his services and it was the full intent and expressed intent that he was going to be renewed.

But after that point, it – the wording and – and I don't know if it's legislation, but the wording for appointment was changed such that an individuals term is for a certain term but doesn't expire until he is replaced, and so he continues to be a board member.

**MS. G. BEST:** Okay. And you spoke about the board mandate, but did you also enact mandates for each of the committees?

**MR. K. MARSHALL:** For each committee, yes we did.

**MS. G. BEST:** And were those – how often were those reviewed?

**MR. K. MARSHALL:** Annually.

**MS. G. BEST:** Okay. And we know you mentioned the whistle-blower legislation?

**MR. K. MARSHALL:** Yeah. We were fairly early in that. We developed the whistle-blower legislation, had to get it ready to go. We were actually ahead of the provincial government and I was actually – I was involved in that because I had come from a public organisation which had just put in place whistle-blower legislation, along with its benefits and its pitfalls. But we tried to make sure that we developed that in proper format.

We were held off from implementation because our shareholder wanted to make sure that we were in lockstep with – or not in – out ahead of them with respect to implementing whistle-blower, but they felt it was important for them as well; they needed more time to be able to implement it.

**MS. G. BEST:** Yeah. And we've heard here today some of the various issues that were discussed by the board and seeing some of the board minutes. With respect to the strategic plan, how often, if at all, did the board review the strategic plan?

**MR. K. MARSHALL:** At least annually. And – you know, that – accomplishment of the long strategy would've been done at every board meeting, but the strategic plan would've been reviewed annually.

**MS. G. BEST:** Okay.

**MR. K. MARSHALL:** And it was kind of a rolling plan and we kicked it off with a – kind of an off-site session to make sure we develop this with an outside facilitator, and then it was amended and rolled annually.

**MS. G. BEST:** Okay. And you've referred several times to Dr. Holburn's report –

**MR. K. MARSHALL:** Yes.

**MS. G. BEST:** – to the Commission. I want to ask specifically, was there any mandate letter ever provided to you by any government, during the course of your 12 years as a board member?

**MR. K. MARSHALL:** Not that I can recall, I mean, we kind of did mandate letters and would provide them up. So we interpreted the *Energy Corporation Act* as a mandate letter, effectively. But in the ideal world, we would've been provided a mandate letter, and I can't recall one forthcoming.

**MS. G. BEST:** Okay. So if you interpreted the *Energy Corporation Act* as your mandate letter, how often did you report or write to the government, with respect to that mandate?

**MR. K. MARSHALL:** Well, we put in place this social responsibility report. That was annually. So it was – we didn't necessarily write to the government in as much as we put the social responsibility report – we broadened it from what it was to make sure it was more of a complete review of all of the activities of the organization in responding to all of the stakeholders for the province.

**MS. G. BEST:** Okay.

Now, Mr. Marshall, I have no further questions for you, but I just want to know whether or not there is anything particular that you feel the committee should be – the Commission should be aware of that hasn't been brought up by any counsel?

**MR. K. MARSHALL:** No, I just want to thank everybody for their – I know it's a long day so I don't want to be the one holding people up from getting a good dinner and watching the Raptors win tonight.

**MS. G. BEST:** Okay, well, you have some more questions –

**MR. K. MARSHALL:** I understand.

**MS. G. BEST:** – (inaudible).

**THE COMMISSIONER:** Redirect.

**MR. LEARMONTH:** Mr. Marshall, you talked about this $300-billion offset which was the savings for the federal loan guarantee?

**MR. K. MARSHALL:** Sorry, did you say billion or million?

**MR. LEARMONTH:** $300-million offset.

**MR. K. MARSHALL:** Million, okay. Yeah.

**MR. LEARMONTH:** Yeah.

So who – you – the board decided that that was an appropriate offset?

**MR. K. MARSHALL:** No. No, no, it just – again, it was never a formal AFE that was done, but it was presented that this would be – the capital costs were 6.5 and that it was – there was, as a result of this, $300-million incremental benefit of the –

**MR. LEARMONTH:** Mm-hmm.

**MR. K. MARSHALL:** – federal loan guarantee over and above what had previously been kind of recognized would be forthcoming, so it effectively was an offset. So I won't say that it was a – not a concern of the board, because every dollar was a concern of the board, but it was mitigated as a result of that.

So there was, I guess, a comfort in that from the board's perspective that it helped to offset that. But, again, that was prior to the financial close and it was discussed, the 6.2 had been out publicly and there was – while recognition of the 6.5 being the new number, there was also recognition of this new benefit that was coming along with it.

**MR. LEARMONTH:** Well, isn't it government's decision as to whether that's a legitimate offset? I mean, it doesn't have anything to do with the capital cost; it has to do with the financing charges.

**MR. K. MARSHALL:** If that's your assertion, I don't know. But I know it comforted the board to know that it was there as an offset, it would've been charged as an interest expense into the organization, to Nalcor, and it would've been to the benefit to the ratepayer ultimately as well, because interest costs would've been included in that, as we heard earlier.

So you're right, it may have been government's determination to do that. It just gave the board comfort that it was there, that it was something that was coming as a result of this that helped to mitigate the impact of that increase in cost.

**MR. LEARMONTH:** But you agree that the decision as to whether this is an offset or not is the government's decision, not the board of directors.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** I mean as we talked about. But from the board's perspective, the board has its fiduciary duty and in their analysis it was felt to be a favourable offset. Therefore, it didn't lessen the concern of the 6.5, but it helped to explain the net impact on the ratepayer ultimately down the road.

**MR. LEARMONTH:** Did you discuss this with government, whether it's an appropriate offset or not?

**MR. K. MARSHALL:** I did not.

**MR. LEARMONTH:** No, so the board just did this on its own.

**MR. K. MARSHALL:** I – again, I was a board member and you'd have to ask other board members and whether or not the chair had discussed that but, no, I did not.

**MR. LEARMONTH:** Okay.

Now, you said that the – Mr. Simmons referred you to three – the summaries on page 19, 20 – and 20 of the Grant Thornton report. That's Exhibit P-01677. And the July 2013 one was the one we talked about primarily this morning, about $7 billion and it could be 6.8 with mitigation, right?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And then the next one, August 2013, once again, exposure –

**MR. K. MARSHALL:** Sorry, if you could go a little slower, I'm just trying to catch up here. What –

**MR. LEARMONTH:** Page 20.

**THE COMMISSIONER:** Page 20.

**MR. LEARMONTH:** Page 20.

So this one is: "*We are forecasting the FFC to be ~$6.9B which is 10% beyond the DG3…*" –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – and the "*Exposure if mitigations are successful…FFC would be reduced to 6.8 B.*"

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And then the next one, September 2013: "*We are forecasting the FFC to be in the range of ~$6.7B to $6.95B (8 to 12% beyond … Exposure if mitigations are successful…FFC would be reduced to ~6.8B.*"

So, on all three of those, if there is mitigation it's $6.8 billion, right?

**MR. K. MARSHALL:** According to the FFC, yes.

**MR. LEARMONTH:** Yeah, and that's $600 million above the 6.2 at this time, correct?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And you're saying, if I heard you correctly, that the receipt of this information would be more frustrating than helpful – $600 million?

**MR. K. MARSHALL:** No.

No, that's not what I said. I said that the range above, they're forecasting FFC to be in the range. If it keeps on going up and down and sideways, I don't think that the board is set up such that they would be receiving this on a monthly basis. The board, as it is formally constituted, would be receiving this on a quarterly basis, and here it changed three times within that quarter with the range that was established.

I think that the – while I recognize the importance of the 6.8, I've never said that $600 million is insignificant or frustrating.

**MR. LEARMONTH:** So you do acknowledge –

**MR. K. MARSHALL:** I indicated –

**MR. LEARMONTH:** – that that's a significant –

**MR. K. MARSHALL:** Absolutely.

**MR. LEARMONTH:** – increase.

**MR. K. MARSHALL:** I –

**MR. LEARMONTH:** Yes.

**MR. K. MARSHALL:** – think I've been very co-operative in that regard.

**MR. LEARMONTH:** And you said earlier that the board should've received this information?

**MR. K. MARSHALL:** Yes. Yes.

**MR. LEARMONTH:** Yeah, okay.

But – okay, I just wanted to confirm that because I thought you were suggesting that.

**MR. K. MARSHALL:** No, no, my comment was with respect to the changing ranges and amounts above, not necessarily with respect to exposure if mitigations are successful comment.

**MR. LEARMONTH:** Yeah, but – okay, so – but you still –

**MR. K. MARSHALL:** It's more –

**MR. LEARMONTH:** – stand by what you said –

**MR. K. MARSHALL:** Yes, it's more –

**MR. LEARMONTH:** – this morning that they should've got –

**MR. K. MARSHALL:** Yes, but it's more –

**MR. LEARMONTH:** – recognized.

**MR. K. MARSHALL:** It's more to recognize the role of the FFC to be a daily management process –

**MR. LEARMONTH:** Yeah.

**MR. K. MARSHALL:** – to continue to evolve that document.

**MR. LEARMONTH:** Yeah, but I mean even for an AFE, one month after an AFE, the figures could change.

**MR. K. MARSHALL:** Absolutely.

**MR. LEARMONTH:** So it's always changing.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

So this $600 million – now as we talked about, you know, $600 million, I'm saying the difference between the mitigated amounts in all three of these reports, right, 6.8?

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** Okay.

So that seems to be a pretty consistent trend, doesn't it? I mean, the figures above that vary to a slight degree, but the 6.8 is solid. So it looks like there's a trend developing here, don't you think?

**MR. K. MARSHALL:** Well, yeah, it would seem so. But, again, it's the role of the CEO to continue to press the project management team to try to make sure whether or not, you know, 6.8 seems to be kind of a consistent theme that is coming back in those three months, yes.

**MR. LEARMONTH:** Yeah, but it's the role of the board –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – that it receive this –

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** – to deal with this.

**MR. K. MARSHALL:** Yes.

**MR. LEARMONTH:** And I remember Ms. Dunderdale, when she testified and when she was shown the first one, she said it was startling –

**MR. K. MARSHALL:** Yeah.

**MR. LEARMONTH:** – when she read it. All the other senior people in government said the same thing, Mr. Marshall. They were unanimous that this information should definitely have been provided.

**MR. K. MARSHALL:** I indicated that this morning. This should've come to the board, yes.

**MR. LEARMONTH:** Yeah, okay, okay.

So the frustration – your comment that it was frustrating more than helpful, I think you've explained what you meant by that.

**MR. K. MARSHALL:** Yes. Yes.

**MR. LEARMONTH:** Okay, very good.

Okay, those are all the questions I have.

**MR. K. MARSHALL:** Thank you.

**THE COMMISSIONER:** All right, thank you very much, Mr. Marshall. I appreciate your staying so long with us.

So we're going to come back in 13 hours, so 8 o'clock tomorrow morning we're going to get started. And we have a busy day tomorrow and I'm going to ask everybody to sharpen their pencils because I have full intention of finishing those two witnesses tomorrow.

All right, good.

**CLERK:** All rise.

This Commission of Inquiry is concluded for the day.