



COMMISSION OF INQUIRY  
RESPECTING THE MUSKRAT FALLS PROJECT

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Transcript | Phase 3

Volume 8

*Commissioner: Honourable Justice Richard LeBlanc*

Friday

26 July 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.

Ms. Nagarajah.

**MS. NAGARAJAH:** Good morning, Commissioner.

Today's witness is Mr. Mel Cappe. We are qualifying Mr. Cappe as an expert witness. So I'll start by entering his CV as an exhibit so that he can review his qualifications with us. Other counsel may have questions – an opportunity to pose questions to him.

So we're having – we're seeking to have him qualified as an expert in the area of governance and the role of the public service. Assuming his qualifications are accepted by you, I'll then go ahead and have the remaining exhibits entered into evidence.

**THE COMMISSIONER:** Thank you.

All right, so maybe I could just ask Mr. Cappe to stand, please, and I guess you'll be sworn, so go ahead.

**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. CAPPE:** I do.

**CLERK:** Please state your name.

**MR. CAPPE:** Melvin Samuel Cappe.

**CLERK:** Thank you.

**THE COMMISSIONER:** All right, go ahead.

**MS. NAGARAJAH:** The first exhibit I'm seeking to enter is P-04465, which is Mr. Cappe's CV.

**THE COMMISSIONER:** All right, that one will be entered as numbered.

**MS. NAGARAJAH:** Madam –

**THE COMMISSIONER:** And that's at tab 1, I believe, of the book.

**MS. NAGARAJAH:** Yes, that's tab 1 of the binder.

**THE COMMISSIONER:** Okay.

**MS. NAGARAJAH:** Madam Clerk, can you please bring up Exhibit 04465?

Mr. Cappe, can you please review for the Commissioner, highlighting your education experience that is – your qualifications for the Commissioner, highlighting your experience and education that's most relevant to the topics you'll be discussing today.

**MR. CAPPE:** Sure.

So if we just go – well, so my education, I did a bachelor's degree in economics at the University of Toronto; went to western Ontario for my master's degree; went back to Toronto, was Ph.D. (ABD) – that's all but dissertation; and then have a couple of honorary doctorates.

If you go down a bit further, you'll see that I had a number of positions in a number of different departments. The best title I ever had in the Government of Canada was that second one, the senior economist for the Department of Finance. It sounded like I was the senior economist in the Department of Finance. I was not; there were many, many senior economists. But I worked on a number of different issues in a number of different departments.

I – but as you can see, one of the relevant issues here is that the largest part of my career was spent both at the very beginning and towards the end in the Treasury Board Secretariat. And if qualified, I will speak a fair bit about Treasury Board policies.

I ended my career as a High Commissioner to the United Kingdom and, prior to that, I was secretary to Cabinet for 3½, clerk of the Privy Council and head of the public service. Those

titles are – well actually, clerk of the Privy Council and head of the public service is in the *Public Service Employment Act*, which is relevant to my testimony.

I then went on to head the Institute for Research on Public Policy where we did peer-reviewed research and had academics doing it and reviewed by our staff and then published, at which time I did some – managed some projects, research projects on public policy, but also on governance.

And for the last 10 years, I've been a professor in this School of Public Policy and Governance, prior to last year when it was merged into the Munk School of Global Affairs and Public Policy. So that gives you a sense of some of my background.

I should note that during that time at the University of Toronto, I also taught a course to the Ontario public service entitled risk analysis to public servants, and that's relevant in the context of dealing with risk analysis. And when I was High Commissioner I spent a fair bit of time with the United Kingdom government focusing on using my contacts, essentially, with the senior (inaudible) at – to deal with the UK and I – if I will speak to the issues, I will cite some UK examples as well.

And since then, while at the University of Toronto, I've done a number of studies on governance, both academic institutions and in government. And I have done some contract expert work for a couple of departments, including the Department of Public Safety.

**MS. NAGARAJAH:** And what courses do you teach currently at the Munk School?

**MR. CAPPE:** I teach two courses; one is called the role of government. I co-teach that, actually, with a former premier of Ontario, Bob Rae. And I co-teach – I coordinate both courses. I co-teach a course called the capstone course, which is intended to draw together everything that the two-year program in the Master of Public Policy provides. So both courses are Master's level courses.

**MS. NAGARAJAH:** Okay, thank you.

Commissioner, I'm satisfied to go forward with this witness and, again, it's in the area of governance and the role of the public service. Other counsel may have some questions.

**THE COMMISSIONER:** All right, any questions on Mr. Cappe's expertise? I'm not surprised.

In the circumstances, I'm quite satisfied that Mr. Cappe is well able to provide opinion evidence to this Commission related to governance and the role of the public civil service. So he will be permitted to give such evidence.

**MS. NAGARAJAH:** Thank you, Commissioner.

I'm going to go ahead and enter a number of exhibits. Some of these are exhibits from other – from the previous phase that are now being entered, so there's going to be a number of them.

**THE COMMISSIONER:** Okay.

**MS. NAGARAJAH:** So we've got P-01810, P-01814, P-01818 –

**THE COMMISSIONER:** Okay, just slow down a bit there.

**MS. NAGARAJAH:** Oh sorry.

**THE COMMISSIONER:** 01810, 01814...

**MS. NAGARAJAH:** 01818 –

**THE COMMISSIONER:** Mmm.

**MS. NAGARAJAH:** – 01820, 01844, 01845, 01862, 01871, 01882, 01883, 01906, 01924, 01934, 01935, 01954, 01963, 01970, 01978, 01979, 01980, 04465, 04466, 04481 to 85, 04529 to 04532, 04541 to 04542, 04522 to 04526, 04533, 04535 to 04540, 04543 to 04547 and, lastly, 04548.

**THE COMMISSIONER:** 04548?

**MS. NAGARAJAH:** Yes.

**THE COMMISSIONER:** All right. All of those exhibits will – as numbered, will be entered.

**MS. NAGARAJAH:** Okay.

So, before the witness begins, I just do want to note for counsel that Mr. Cappe is here to speak generally about the duties of the public service. So, he will not be commenting, specifically, on anything related to Muskrat Falls or specific issues dealing with the Newfoundland and Labrador Government.

So, Mr. Cappe, with that, please go ahead with your presentation.

**MR. CAPPE:** Thank you. And I'm happy to answer questions.

If we could have the slide show –

**THE COMMISSIONER:** So this will be P-04466.

**MS. NAGARAJAH:** Yes.

**THE COMMISSIONER:** And it's at tab 2.

**MR. CAPPE:** There.

So, if – for the Commissioner and counsel, I guess I should outline at the beginning what I am going to – there we go – what I'm going to talk about. And I just want to note that I will talk about the general role of the public service in a Westminster parliamentary democracy, but there were a few questions that were particularly raised by Commission staff that I will address as well; in particular, Crown corporations, the role of the public service in megaprojects, some of the risk analysis doctrine, if you will, or approaches that could be used by public servants and governments; and then talk, at some length, about accountability and the question of who's accountable to whom, and how accountability works and what are some of the mechanisms of accountability, whether public servants should be explaining of defending the government's agenda; and then, finally, a subject that is near and dear to my heart, the question of documentation of – by public servants and the question of secrecy, and I'll give a bit of a defence of secrecy.

Turning to the – page 3 of the slide deck using the red Commission numbering, the essential – let me start with the end. The essential summary

and conclusion that I want to leave the Commission with is that, first of all, governments have to be deliberate about how to manage risk. In my experience, and as outlined in the literature, governments have to be very deliberate because risk will otherwise come back to get them.

Governments create institutions to assist in this and establish policies and insist on certain practices to assess and manage risk. And risk – and this is a fairly technical way of thinking about these things because mathematicians, economists and others have developed a body of work – a body of knowledge on risk and what it means and how it should be assessed.

Noteworthy is that I never talk about eliminating risk. It isn't possible given that we don't know what's going to happen later today, let alone tomorrow, what risk is optimal – we are not aiming for zero risk. We're aiming to reduce risk and manage risk, but zero risk is not the desired outcome. Rather, it's – our objective is to come to a desired quantity of risk, how much risk is acceptable, how much risk do we want to undertake. And this, of course, depends on the consequences of the action.

If the action – if the question is on the safety of how a road is designed, then you get a different sense of risk because there's going to be life-and-death decisions. In other cases, if it's a policy of granting money to recipients, the life and death is less likely. And so, the nature of the optimal risk may be different in those circumstances. But, again, the optimal quantity of risk is not zero.

So the choice of that desired quantity or risk is, inherently, a political decision. Politics is a good thing. I know that often people will say oh, that decision, that was just political. I say thank God, because the alternative is what we see in Syria and other parts of the world where politics are replaced by conflict. So politics is a way of resolving some of these disputes and, of course, these political decisions should be made by ministers and not the public servants alone.

So the role of the public service – I'm turning about halfway down this page now. And so, the public service is responsible for using its expertise to analyze and dispassionately assess

the costs and benefits of a project. It is in a sense a great strength of the Westminster parliamentary democracy, and that's why I'm ending with this and I'm beginning with it that we have a professional non-partisan public service that can be analytic, that can dispassionately assess what the implications of certain decisions are.

This is holding the mirror up to the government. So regardless of the decision taken at the political level by government, this is a chance for government to recognize what they're doing, and the public service is thus the conscience of the government. So it is telling the government you can do this but if you do, here are the implications and these are the risks that you run. And often, in the literature, people refer to this as speaking truth to power and the power being ministers who were elected, who sit in the House of Assembly or the Parliament and are making decisions as government qua government, but are doing so on a risk-informed basis, an evidence-informed basis.

So the public service should advise the government based on the assessment of cost and benefits and their probabilities and risks and advise what risks to take. They shouldn't be deciding what risks to take, but they should be advising on that. And having recommendations is an important part of what the public service should be providing – not that the recommendations have to be followed but that the ministers benefit from having had those recommendations. And it should advise on what strategies and approaches it can take to manage the risks.

And finally, it is the responsibility of the public service to implement whatever decision the government finally takes. And this is what I will come back to as courageous advice and loyal implementation. Yesterday, I know the witness talked about fearless advice and loyal implementation. I have a friend who refers to being relentlessly honest, but that notion of courageous or fearless advice and honesty is an important part of the role of the public service. So just to repeat what counsel mentioned, this is what I am not going to talk about, I am – this is not a review of Muskrat Falls Project, I know only what I've read sporadically in the media on this.

I visited Muskrat Falls when I was in Labrador as a mentor for the Pierre Elliott Trudeau Foundation and I was with a group of people. And part of the purpose of being in Happy Valley-Goose Bay was to get over and physically see the site, which in itself is very impressive by some Tinkertoy standards of what a big project looks like.

I know a lot about the practices of the Government of Canada, but I do not know very much about the Government of Newfoundland and Labrador and so I will not be addressing those issues as such. So this is a presentation about governance issues from a more conceptual basis and, well, I'll deal with those issues that are on that slide.

I'm going to spend a few minutes on this slide because this is what I believe are the underlying principles of governance in a Westminster parliamentary democracy. And so, again, I'm going to sound fairly preachy and I apologize for lecturing and hectoring and I – this is the professor in me, but these are important principles. And what I hope the Commission appreciates is that these are, in a sense, universal principles in a Westminster parliamentary democracy that are manifest in different fashions.

So the UK Parliament, the mother of all Parliaments, actually has differences the way – with Canada. In a way, Canada is more Westminster-like than Westminster is. And it's reflected in Australia, New Zealand and in other Parliaments around the world to varying degrees. But it's my experience that while we all know these principles and they're easily forgotten, we pay a huge price for ignoring them, and so I will ask the indulgence of the Commission to just walk through them and spend a bit of time on them.

The other thing is our proximity to the Republican democracy south of the border gives us a different sense of what these principles are and we are very different than the US. So if it sounds obvious, I apologize but I will try to go quickly through them.

The fundamental principal underlying the Westminster parliamentary democracy – and I will come back to this often – is the supremacy

of Parliament. The representative democracy is based on whether the House of Assembly in the province or the Parliament of Canada, the supremacy of Parliament – and it's worth going through a bit of history here. I, again, apologize for going back to Elizabeth I, but in the 16th century, this was when Parliament started to really constrain the Crown.

And so the Crown had unfettered power prior to that and as we became more of a constitutional democracy, the Parliament became the constraint on the Crown. And over the centuries, Parliament has increasingly been validated as the supreme authority for decision-making. And so when we think about legislation giving powers to ministers, it is still residual in – from Parliament. It is transferred from Parliament.

So this means that government is subject to parliamentary authority and legislation allows government to act. So issues of risk management went down to Parliament or the Legislature to ensure that government has the adequate measures in place. And we shouldn't lose sight of, again, the role of Parliament in holding government to account for its actions.

The second principle is that government can only govern with the confidence of the House. When I was clerk to the Privy Council I was once asked whether, in a minority situation, a minority government, there was an appeal to the Governor General's decision of who should form the government. And I said, yes, there is an appeal from the Governor General's decision. It's an appeal to the House, because if Parliament doesn't vote confidence in the government, the government can't act. So that is a fundamental principle of accountability.

And then, third, is the question of in a Westminster parliamentary democracy, the public service is traditionally professional and non-partisan and serves the government of the day. Now, sometimes we've seen governments move away from this principle only to be drawn back because they get into trouble or problems occur.

I'm reminded of when Brian Mulroney, before he was prime minister, was campaigning for election he talked about giving out pink slips and running shoes to public servants. And then,

as he came into office, his chief of staff – he used a friend and – or later on in his tenure as prime minister, he turned to the public service and actually took a public servant to play a political role of chief of staff.

I could use other examples. I mentioned co-teaching with Bob Rae and – the former premier of Ontario. And when he became premier he appointed as clerk of the Executive Council his former chief of staff. And I'll come back to that. But at the end of the day, Premier Harris – when he came in to replace Premier Rae – ended up returning to a professional, non-partisan public servant as the head of the public service on Ontario.

So it – this happens more often in provincial governments than it does in the federal, but both have seen this happen. So there is, of course, a legitimate role for politics in governing and in administration, but it's an adjunct to the professional non-partisan advice to the public service.

I have in my office a photo of myself and the chief of staff to the prime minister sitting in front of Prime Minister Chrétien. And the three of us would meet every morning, four or five days a week, and deal with issues. And the chief of staff brought a political perspective, and I brought a policy perspective. Both were relevant. The prime minister would then adjudicate as a judge would do, but you would get perspectives that were different. And I didn't make my advice political. And the chief of staff didn't make his advice policy-oriented; it was very political. And the prime minister benefited from getting both of those. So the essence of what the public service does is give that courageous advice, but after decisions are taken, provide loyal implementation.

So when I say the public service – I should just clarify – I mean those public servants who are hired pursuant to an act of Parliament, or a legislature, as professional non-partisan officials. Legislation and process may vary by government, but essentially their employment is protected by statute and it's not subject to party partisanship.

There's also the broader public sector. And this would include, obviously, the officials in the

Government of Canada or the province, but it would also include the MUSH sector, so-called, the municipal, university, school and health sectors. And those – that public sector may be governed by legislation that creates these institutions or manages these institutions, but they aren't actually hiring individuals pursuant to statute. It may include Crown corporations and their employees – and I'll come back to dealing with Crowns.

And then there are partisan political officers serving ministers and in ministers' offices. And, indeed, I was involved in a Supreme Court of Canada case which determined that ministers' offices were not government institutions pursuant to the office of – or the *Access to Information Act*. And therefore documents in ministers' offices – because they're political – were not part of government institutions. But these political officers support ministers and they're important as well.

So, officials – and here I will sort of summarize a very important point – but officials are accountable to ministers, who are in turn accountable to Parliament, who are in turn accountable to the public, and that's what representative democracy means.

So, public servants are not accountable to the public. Public servants are accountable to ministers, who in turn are accountable to Parliament, who in turn are accountable to the public.

So, the point of the supremacy of Parliament is to hold the government to account. Let me just open a parenthesis here because some of the documents referred to anonymity and the anonymity of public servants. I used to tell people that I was proud to be a faceless bureaucrat. And that was part of the strength of the Canadian system – that we had bureaucrats who were not taking public stage because that was the role of ministers.

We were going through a bit of a change in that anonymity now as the current clerk of the Privy Council has a Twitter site and a Facebook site and the ministers are now – so, are we – observing the United States, policy by tweet. Certainly, in Canada there's a bit more of that, and we're adapting to these new mechanisms,

but at the end of the day, it's still Parliament that is to take a precedence. And, in Ontario there was an incident where the government tried to do a budget in a public place rather than in the legislature, and it was chastised and found to be unconstitutional, and it is intended for budgets to be done in the legislature.

There are many other institutions that we use to hold government to account. So, there's a tradition that the chair of the Public Accounts Committee in the legislature is a member of the Opposition that the – and, usually, the chair of a committee is a member of the government's side. But, in Public Accounts, we recognize that this is holding government to account.

Question Period is obviously an effective means for holding the government to account, but in the UK, PMQs are held once a week. Prime Minister's Questions actually only happen on Wednesday mornings. And in the – in Canada we, actually, have Prime Minister's Questions or Question Period every day. And that's a significant difference and that's why I say, in some respects, Canada is more Westminster-like than Westminster.

The other thing is – in the UK questions are often provided to ministers in advance, with the intention that ministers will be able to prepare and give better answers. Now, some would say they give worse answers with that preparation, but that's obviously a choice, and in Canada those – there is no advance warning. So each of these principles are maintained over time; they are durable, but they evolve to suit the government's requirements.

The other thing is that prime ministers are really just *primus inter pares*. They are the first among equals, perhaps the first beyond equals. But they have two powers, and these powers are essential and they may be all that they need. The prime minister has the power to appoint ministers and, secondly, the prime minister has the power to organize government. Once you establish the organization of government and you appoint ministers to those responsible positions, you've got all the authority you need to manage your party, to manage the government.

The prime minister or premier is also held to account by his or her Cabinet. Cabinet

discussions often consist of ministers passing messages to the prime minister or premier, or putting markers down about no-go zones or where they think that their prime minister or premier needs to stay away from.

Now, one of the problems – and Donald Savoie has – the scholar at University of Moncton – has written on this extensively, but there is too much deference to first ministers. And when there are these kinds of issues before government on dealing with policy and ministers defer to the prime minister, you get problems. Savoie calls Cabinet a focus group; I think he's exaggerated the point and I've told him so. This is where ministers say no, you know, don't do this, prime minister, or, prime minister, have you thought about the implications of that? And this is where ministers are sending, perhaps, subtle but nevertheless important signals that say don't do this or do that.

Caucus is another constraint on first-ministerial action. Weekly or periodic caucus meetings allow first ministers to keep their government together, but also allow a government of ministers and caucus members – MHA members and – MHAs and MPs to hold their first ministers to account. Parties play an important role in this as well, holding first ministers to account, and party conferences are often stage shows for the leadership corralling party members, but at the same time, they can be the party faithful constraining ministers and the first minister. And they're held to account by their party, their caucus, their Cabinet colleagues and the prime minister and, of course, every day in the House by the Opposition.

Let me turn to deputy ministers. This is the longest slide. I promise, Commissioner, I'll be faster on the others. Deputy ministers are the bridge between the professional, non-partisan public service and the political class. Yesterday, you heard testimony about serving at pleasure and whether that's a good thing or a bad thing, and I think it's important to recognize that that bridging role is important to the protected public servants, and serving at pleasure to the government of the day.

Gordon Osbaldeston and Gordon Robertson, both whom were – my predecessor, clerks to the Privy Council, have suggested that the key to

success for a deputy minister is to be politically sensitive and administratively and policy-wise competent, and the reverse for ministers. So ministers should be policy sensitive and politically competent. And that distinction is an important one that, in a Westminster parliamentary democracy, is why we often have someone who is not a doctor as the minister of health. And arguably that's a better assignment than appointing a doctor as the minister of health. Although I know the current Minister of Health here in Newfoundland is a doctor and a good one. So there are reasons why you don't want a fisherman as the minister of Fisheries. Because they're going to have to make tough decisions about the fisheries.

So deputy ministers are appointed by the PM, not the minister. They are accountable – and there's a book by Gordon Osbaldeston on deputy minister accountability; *Keeping deputy ministers accountable* is the title. And deputies are appointed by the prime minister, not the minister. Their accountability is to the prime minister.

I once had a minister tell me, I'm going to make an announcement in the responsible area of one of my colleagues; don't tell the Privy Council Office – when I was the deputy minister. The first thing I did, of course, was call the Privy Council Office because I knew my accountability was to the prime minister, not to the minister. In the UK, that's slightly different. The UK permanent secretaries are appointed by the prime minister or the governor in council. But in my time in the UK, ministers have far greater say on who they get as a permanent secretary than exists in Canada.

So for public servants, the accountability is clearly through the deputy minister, through the minister, to Parliament. The principles of accountability are fundamental to the success of Westminster parliamentary democracy. So efficiency, effectiveness, accountability, responsibility and openness are all relevant in trying to assess accountability. And these principles have remained relatively constant over time; however, how these principles are manifest and how they operate do evolve over time and are adapted.



So this Commission – if this Commission finds that these principles can be reinforced somehow, I think recommendations from the Commission can be very helpful. I mentioned the evolution of social media and I think that is changing the how, but not the what of these principles.

I'd offer a few selected histories – and I will be quick on this – they're merely intended to give you a sense of there is a long history to this Westminster parliamentary democracy set of principles. And the independence and professional non-partisan public service is – really goes back to 1854 and *The Northcote-Trevelyan Report*. Northcote was a Chancellor of the Exchequer and Trevelyan was his permanent secretary. And that created the first civil service commission in the United Kingdom and the notion of the independence of the public service.

The Glassco Commission in Canada created or reinforced the role of the Treasury Board and created a separate department from Finance, and the casualization of what its principle is, is let the managers manage, that was the idea. In Lambert, you had a long report and there's a part of it that's in your exhibits, but it dealt with financial and other management principles for the public sector, including questions about risk management. And then Public Service 2000 was an initiative in the Government of Canada which arguably could be summarized as make the managers manage.

And then the last reference I identify is the Walkerton Inquiry in Ontario, Justice Dennis O'Connor chaired it and reported in 2000 or 2001. And in the Walkerton Inquiry, there was a case of tainted water that led to the six deaths and several thousand people in hospital and the report is relevant because it's about risk management and what government can do with budgets to manage risk.

I'm trying to change the slide and it's not working. What am I doing wrong? There we go.

So one of the issues that the Commission staff asked me to deal with is whether Crown corporations are different, and I would say, yes, they're different but only to a degree. Paul Samuelson, who's a Nobel – was a Nobel economist, once said that the difference between

the difference in kind and a difference of degree is merely a difference of degree. So everything is a difference of degree. But I think Crown corporations – these principles still apply, but they do apply in a different way, a different fashion. So the fundamentals of parliamentary authority in creating these Crowns is important because they use legislation to establish the Crown and, therefore, ministers are responsible for Crown corporations and are held to account by the legislature.

However, Crowns have added complexity of accountability. They're at arm's length from government in order to avoid political decision-making. And I started off by telling you that politics was important. But for some decisions, you want pure administrative arrangements to guide, and you set up an independent Crown corporation, governed by a board of directors, using corporate governance principles, but that are appointed by the government. So the control government has in who – as in who sits on the board.

Sometimes, in fact most often, the CEO is also appointed separately by the government, which leads to further accountability complexity because you have a board appointed by the government and the CEO, normally accountable to the board, but actually appointed by the government, and that complexity can be very complicating and difficult.

The accountabilities include (inaudible) outlined in establishing legislation – so usually there's a purpose – and there is an accountability created in Canada in the *Financial Administration Act*, which sets out systems of accountability, financing arrangements, and then there's a whole range of other legislation they have to comply with, like human rights legislation, access, secrecy, et cetera. The *Financial Administration Act* identifies different classes of Crowns based on the schedule that they are in, and ones that are more commercially – commercial activity in a competitive environment have different standards again because they are competing with private sector companies.

So I recall, back in the bad old days, when Air Canada, CN and Petro-Canada were all parts of the government, in effect, because they were

created by government as Crown corporations. They were then, ultimately, competing in markets that were becoming more competitive and, therefore, the public purpose of these corporations was being challenged. And so they were privatized, but even as privatized, in some cases like Air Canada, there was a golden share retained and legislation still governed and regulations still governed how the corporation would perform.

The last point I would make for the Commission – and this is, I think, particularly relevant for this Inquiry – is the model of the Export Development corporation. And so the Export Development corporation has an independent board of directors, there's a minister responsible – the minister of International Trade – and there is a CEO appointed by the government through the statute. And so Parliament is holding the minister to account for what the Export Development corporation is doing. EDC is meant to be a financial institution that is self-sustaining. It charges its clients for the services it provides and doesn't come to government for appropriations, and so it's meant to be self-sustaining.

However, every now and then, there is an international contract where the corporation says: That's too risky, we will not undertake providing insurance to that contract. But at the same time, the government might say: But, you know, that's really valuable; we think there's a national interest in proceeding with this contract. And they need an instrument to deal with it and they have it in the corporation, but the corporation is saying: No, Parliament said we have to be held to account for being self-sustaining, and we're not prepared to take that risk.

So the government can create on government account in the corporation and the corporation maintains a separate account called Canada Account, where the government has said, we want you to proceed on this and we will carry the risk – we, the government, will carry the risk. So it's not for the financial managers of the corporation. They've rejected that risk.

Now, the reason I'm going into excruciating detail on this is that Section 23 gives the minister of International Trade and the minister

of Finance the ability to authorize that contract. The relevant point here is that it is not just the minister of International Trade who can incur the risk, it is the minister of Finance who's responsible for two things: the minister of Finance is responsible for the performance of the Canadian economy and for the accounts of Canada. The minister of Finance is responsible, ultimately, for the public accounts and the accounts of Canada.

So what happens is when a decision is made on Canada Account to proceed carrying this non-commercial risk, there's a middle-level official in the Department of Finance who says to the minister: Minister, if the government goes ahead with this unusual risk, we will have to provision that risk in the Accounts of Canada. We will have to say – and there are – there's a long list of public – and they have to gazette the decision, so it's public. And these are things like Bombardier that will have a contract with an airline that has a bad balance sheet.

And so this is not a commercial risk that the corporations will need to undertake because – but the government says: We want that contract because we think that the national interest requires Bombardier to be out there selling internationally these airplanes and we'll carry that risk on the Canada account. And this junior official says: Minister, we have to provide for that in the Accounts of Canada.

So that junior official then – is a middle-level official – makes a judgment that says there's about a 25 per cent chance of default on this loan guarantee. And when they make that loan guarantee and then they have to provide for it in the accounts, they will take 25 per cent, or they might negotiate and come to 20 per cent. But they will put, on the fiscal framework, a draw of that amount of money so that, going forward, ministers are held to account by the Department of Finance to actually provide for that risk.

Now, why would the minister listen to a middle-level official? It's because the Auditor General is going to audit the accounts, and the minister of Finance does not want a qualification on the Accounts of Canada that says you haven't provided for all the risks. So the Auditor General is going to assess the process that the Department of Finance uses in telling the

minister we have to provide for this. And so they might say: This particular risk is 10 per cent, maybe we can shave it to 8 per cent, but we're gonna have to book on the financial – the fiscal framework on the Accounts of Canada 8 per cent of that amount of money.

Now, I don't – I left government by the time the GM loan guarantee went into place, but my guess is there were fascinating conversations with the – this middle-level official in the Department of Finance and the minister of Finance saying: What's the right number to provide against that loan guarantee?

So I apologize for going into such detail, but it seems to me to be an interesting example of how governments carry the risk and provide for the risks in their accounts.

Megaprojects. In my time in Ottawa, we had something called the Major Crown Project Policy, which was meant to take account of megaprojects. And in this circumstance, the Crown refers to the government and not to Crown corporations. So this is a policy intended to manage particularly risky policies or initiatives or projects. It was replaced recently by the Major Projects Policy of the Treasury Board.

And remember Treasury Board – I said I spent the largest part of my career in Treasury Board. Treasury Board is the only statutory committee of Cabinet. So the prime minister can set up the Cabinet; however, he or she wants but they cannot get rid of the Treasury Board because Parliament had mandated that. In fact, I have in my office the order-in-council issued on July 2, 1867 creating a committee of Treasury. It was the first committee of Parliament – of Cabinet, sorry.

So this is a vehicle for recognizing that the major projects may occur at extraordinary risk, and that they require unique management practices, and that they require unique accountability so that ministers are going to be in control. I don't know the policy infrastructure of Newfoundland and Labrador, but I know that recent Speeches from the Throne have talked – in the province, have talked about the improvement of large capital project management.

So a brief word on the importance of the Treasury Board. I mentioned its origin, but it is the general manager of the government and it's responsible for managing risks to government and creating policies for how these are being managed. But the policy puts the responsibility and accountability squarely on the shoulders of project managers in departments.

One of the things I feel strongly about is that confused accountability results from too many people being accountable. So having a unique individual responsible – who wakes up in the morning and worries about this, has an important role to play. Then there's the role of the Department of Finance, and I touched on that earlier, and Finance is clearly responsible for the Accounts of Canada and, therefore, how the Auditor General has a role in accountability of the government.

Risk analysis and risk management. I'm gonna go quickly through this, but I want you to appreciate, Commissioner, that there is a body of knowledge along how risks can be analyzed and assessed. And I'll do this in three or four slides, but it's important to remember that there are sophisticated and highly mathematical and technical methodologies for doing risk analysis. You do Monte Carlo simulations, cost-benefit analysis, net benefits, econometric modelling, et cetera. You try to reduce risk, you try to mitigate risk and you try to manage risk. And ultimately, you wanna know which risks to take.

So this is from this course that I mentioned I teach on – to Ontario public servants, on risk analysis for public servants. Just a few highlights here. There – since 1921, Frank Knight, as an economist, the University of Chicago, made a distinction between risk and uncertainty. And a risk is where you have a probability distribution that you know what the outcome is going to be, there's stochastic likelihood of an outcome with a mean and a standard deviation. An uncertainty is where you don't have that, you don't know, there's no experience, we have no knowledge of how to deal with this. Donald Rumsfeld helped make this distinction when he talked about known unknowns. If you have known unknowns, you've got a probability distribution, you can anticipate it. If you have pure uncertainty, unknown unknowns, then you can't provide for

it and you don't have the probabilities of what's going to happen.

The other is that there are several different ways of dealing with risk. Risk can be pooled, which we do in the health system, for instance – I wanna lose my bet on paying my premiums on health insurance. But risk can be shared and so you have a deductible in how you manage risk, and that keeps some risk on the individual. So when I – in my auto insurance, I have – I bear some of the cost because we don't have no-fault auto insurance. I – and I have a – even if I do have no-fault, I –

**UNIDENTIFIED MALE SPEAKER:**  
(Inaudible.)

**MR. CAPPE:** – still have a deductible.

And finally, risk can be shifted. And the way you structure a contract can shift risk from the Crown to the contractor, and depending on how you structure it, you find a balance.

Finally, I'll mention black tail – black swan tail events, and this is when you do have a probability distribution but the events are low impact – sorry, low probability but high impact. So it's unlikely this is going to happen, but if it does, watch out. And the example I used earlier, of Walkerton, with the water killing people, was one of those – you know, it was a low probability event, we have a long history of clean water, but the high impact made it very important. The recession of 2008 was seen as a black swan, a low probability but high-impact event.

So those three are important to remember.

The optimal quantity of risk is not zero; I belaboured that but I'll – enough. And this formal risk analysis should include a cost-benefit analysis with simulation variations. So one of the challenges here is that you have measurable costs and often qualitative benefits and sometimes you have qualitative costs and measurable benefits.

So consider that you have to deal with both. Another problem or challenge in cost-benefit analysis is that you often have few people bearing the cost and many people benefiting. Or

vice versa: you sometimes have everybody bearing the cost and really only a very few people benefiting. And so the cost-benefit analysis has to worry about the distributional implications.

And then the last point I'll make is that the costs are usually in the present and the benefits may only accrue in the future. So one of the challenges here is how do you deal with the present cost and the future benefits, and that's what we have discount rates for – to measure – to equilibrate or equate a future benefit to a current cost. And, of course, we want evidence, this evidence, this analysis to inform decision-making.

Just a moment on these two types of errors. I've characterized them as type I and type II errors, but consider the two hurricanes that went through New Orleans. The first was Hurricane Katrina, where the government didn't take action and the consequences were devastating. And the second one was Hurricane Barry last month or this month, where they evacuated most of the city and it turned out to be a tropical storm.

Now, if you have to choose which problem you want, which mistake you want to make, I would argue the latter one is the far better one to live with than the former. But you need to judge the risks and you need to come to an understanding of this. The precautionary principle suggests that a type II error is important. I'll tell you that in Ontario, there are 238 statutes that actually use the precautionary principle where the legislature, the provincial legislature, has invoked it, and in the federal government, there are at least five. So you don't want to be in a position of saying I made the wrong mistake.

The other thing to keep in mind is that there's a difference between an ex ante decision on the basis of uncertainty or risk and an ex post assessment of that decision. Ex ante and ex post are very significant. You want to be able to recognize that a decision taken before the event may have been the right decision even though, ex post, it worked out to be bad. And the question is, what would you have done, ex ante, with the information you had available? And did you have enough information to make that

judgment and decision? And that comes back to the evidence informed.

I then talk about Walkerton in this course, and what was interesting that Justice O'Connor found in his inquiry was that neither Cabinet nor the public service had done an adequate risk assessment before changing the water – the budget out for water – that is, the amount of money that was going to go into water investigations and inspections – and the regulations. And given the consequences, at least ex post but probably ex ante, he would say, this was – this required and should have had an adequate risk assessment. The deputy minister of the time did not advise ministers – this is deputy minister of the Environment – did not advise ministers what the department found was a very significant risk.

And then finally, the government took on this risk with its – then political common-sense revolution, but there was this fascinating item in the third bullet on the slide, that Justice O'Connor found when he went in and got documents from government. There was an undated, unsigned memo from the deputy minister. And the deputy is – you know, was preparing to say: As dramatic as these constraints are and the constraints of the budget cuts, the ministry's capacity to fulfill statutory obligations and implement new priorities was maintained.

The deputy minister was presented with that, and did not sign it and did not send it to the minister. Officials in the department fought back, but the – the deputy minister said, I'm not telling the minister this. And it's worth keeping in mind that this document was found undated at the end of the – after – when the inquiry was going on.

I've got these 10 tips that I give public servants but – one is that there's a highly sophisticated and complex process for doing this. You have to translate the results for ministers. You plan because you know that you can't anticipate; therefore, if we knew what the future held, we wouldn't have to do contingency planning. There's diversity is a strength. Eight and nine gets at the optimality notion: you can be too cautious or not cautious enough.

And the last one is tell the truth. My favorite *New Yorker* cartoon shows a chap at the head of a table, in a meeting with a bunch of staff. And he says, okay, honesty is the best policy. That's option A. There is no option B, I'm afraid. And telling the truth is really important. So, I do remind public servants and my students of that.

On the question – and here I'm back to the questions that the Commission was posing – do public servants have a responsibility to the public? I've sort of answered this by saying contrary to public belief, there is no accountability of a public servant to the public. They're accountable to the minister and to – the minister to Parliament and Parliament to the public. And that's responsible government and that's crucial.

And in representative government we actually elect people to deal with complexity in the Legislature. So a referendum is actually anti-democratic because you deal with a complex issue – think of Brexit – in a simplistic fashion.

The one other thing I'll add about public servants' responsibility is you can ask yourself: Which is more problematic, the politicization of the public service or the marginalization of the public service?

As I set out at the outset, I said that a professional non-partisan public service was going to be important in a Westminster parliamentary democracy. And this we've seen over time where deputy ministers get appointed because of their political affiliation or turfed because they are thought to be political, and that politicization can be problematic because you end up diluting the policy advice and the evidence.

I think an even worse problem is the marginalization of the public service where the public service may still be professional and non-partisan and independent, but actually isn't listened to. And by listened to I don't mean that their advice is followed, but that their advice is heard. And the danger is when you have a marginalized public service.

So I mentioned earlier that Mike Harris – when he became premier of Ontario – replaced the political appointee of Bob Rae by – as clerk of

the Executive Council with a traditional professional public servant. In fact, she had been the – she was the spouse of the immediately previous professional clerk of the Executive Council. So there were lots of symbolism here. But then he proceeded to ignore her. And I think that becomes more of a problem than putting a political person in who will actually be listened to and marshal the evidence and bring it up to ministers.

On the question of the government's agenda, I was asked: Is the public service there to defend the government's agenda? No, it's there to explain the government's agenda. It is perfectly legitimate for the public service to hold the pen on writing the Speech from the Throne, which is an inherently political document but has a lot of substance in it, and then turn it over to the politicians to add political colour. But that the way the Speeches from the Throne in Canada have worked is that it is generally a public servant who begins the first draft of the Speech from the Throne and then it gets tarted up by the politicians.

It is not appropriate for the – for a public servant to defend the government agenda but rather to explain it as foreign. Now, this becomes more complicated, as I said earlier, with the arrival of social media and that now public servants are in the position of becoming less anonymous, having personality and therefore being in the position of potentially disintermediating MPs or MHAs.

So if you think about the person who should be in contact with the public, it should be the MHA or the MP. But as public servants are now on social media, they have a direct contact with the public and they have to manage that in a way that is not going to undermine that principle of accountability in a Westminster parliamentary democracy.

“A Defence of Secrecy.” This is, I said, my bugaboo. I think in order for – look, openness is desirable for accountability, but secrecy is desirable for candour and considering the options.

I think the Commissioner would appreciate that you don't – that while you want the court proceedings and the Inquiry proceedings to be in

public, you want the deliberations of the court to be held in private where they can argue the case among themselves. And if it's not in private, then it becomes staged and for a different audience. So there's a public interest in disclosure, and there's a public interest in secrecy, and you have to find that balance.

Who's standard? I would say you gotta go back to the objectives. The objectives are either the objectives of having a historical record, and historians value this and we all learn from history; is it the ministers' objectives or is it the minions' objectives and – or is it the parliamentarians' objectives? And there's a balance that has to be struck, then, and every opposition party thinks it's someday going to govern and therefore wants to preserve that principle of secrecy.

*Hansard* was the first attempt at open government. CPAC, the parliamentary channel, is the more modern version, and now Facebook, Twitter and Instagram are the more modern versions. But decision-making requires candour and thus requires secrecy.

I'll share with the Commission an anecdote. When I became clerk – I became clerk in '99 – in '93, the government of Kim Campbell decided to go with an Oath of Office for ministers that was plain language. And in the process, one idea was dropped, and that idea was that ministers had an obligation to speak their mind in Cabinet.

And in my term as clerk in 2000, we added that line back in. And we felt it was important enough that ministers understand that they swear to actually speak their mind in Cabinet, that they will defer to the prime minister, but be open with the prime minister. And this is an attempt to combat deference, and therefore, there is this balance between openness and secrecy.

And when the Commission talks – I'll come to the duty to document – the other anecdote I'll give you is that: I would say the prime minister I worked for, Jean Chrétien, as prime minister – I worked for seven prime ministers in the sense of my – over the 30 years of my career, but the one I was closest with was Chrétien. I ended with Stephen Harper – working for him.

But, with Chrétien, I would send him memoranda, and he would – there were three or four kinds of response, and probably disclosing Cabinet confidences here, but he would put JC to say that he had read it. He would put option A if I had given him a choice – or option B – or he would say, see me. But he would not do what Pierre Elliot Trudeau did, which was give extensive explanations in the margins of the memos.

And, I think that the openness of government has led to an oral – the development of oral exchange, which I think is problematic. And when you think about it, it's not that long ago when Prime Minister Chrétien's Cabinet confidences are now being released. Indeed, the ones when I was clerk are now being released, because I became clerk in '99. We're 2019.

I'll leave the Commissioner with a reference that I probably shouldn't use, but it's 'yes dash minister dot com'. And it's a searchable database, but the reference I want to make here is particularly relevant. It's the first episode of season 1 of *Yes Minister*, and there was some people who think *Yes Minister* is a documentary, but it's fictional. But the title of this episode is called "Open Government."

And during the course of the episode, the minister, Jim Hacker, turns to his permanent secretary, Sir Humphrey Appleby, and says, Sir Humphrey, we got elected on open government.

And Sir Humphrey says, well, minister, that's a contradiction in terms. You can have open or you can have government, but you can't have both.

Now, I don't believe that, but I do believe that there are limits, and the more openness you have, the less effectiveness in government you will have; and the more secrecy you have, the less accountability you will have; and both accountability and effectiveness are objectives you wanna meet.

I was – two weeks ago when Theresa May – is the last defender of secrecy, I saw, where Kim Darroch's private telegrams, reporting telex – telegrams back to London were released, and she said: "Good government depends on public

servants being able to give full and frank advice." And I think that's absolutely true.

On the duty to document – and I'm almost done, Commissioner – I think this is a good thing, but recognize that there are consequences. And again, come back to whose objectives you're – what objectives are you trying to meet: accountability objectives or openness objectives or historical objectives, which I think are important and effective.

One of the consequences of the duty to document that I would argue that the government and the Commissioner should take into account, is whether a duty to document will trigger the creation of too many documents. There is this principle of CYA, cover your arrière [sp. Fr., backwards – used by speaker to mean behind, rear in this context] where people now document in order to protect themselves. And you don't wanna provide an incentive for protection. That just creates massive amounts of documentation that are actually irrelevant.

When I was Cabinet secretary, I did a review of the degree of detail that we had in the note-taking we were doing in Cabinet, and I was on a – dissatisfied with it, because over the years we had become more a summary of what was said in Cabinet rather than details of what was said in Cabinet, and I thought for historical value we should have the records of Cabinet fairly complete. And what I did was, I tried to make a judgment in my own mind at that time of what was an historical discussion in Cabinet, of historical consequence, and for me there were three issues.

One was the bombing of Kosovo, the second was the development of the clarity act, which we tend to forget now, but – and then the third was the response to 9/11 and the creation of the *Anti-terrorism Act*. I thought that those were going to be of sufficient historical significance that we wanted to actually attribute what ministers were saying in Cabinet for the historical record, protect them as secrets but nevertheless understand what the – how the issues were playing out in Cabinet.

I think those were three important issues, but I did not have the benefit of history when I made that decision. And it may turn out that there was

some other very important issue that I'd neglected to take adequate notes on. And we should always keep in mind that there is – what was – what proves to be important at the end of the day, ex post, may not have been seen to be important at the time.

So, institutional evaluation – evolution, rather, and principal durability: I think the principals last but the institutions evolve. In a Westminster parliamentary democracy, I think that the feds are evolving but more slowly than the provinces. The provinces have evolved faster I would argue. There's more adaptation required, but you can do that without undermining the principles.

So, I'm back to my summary and conclusions. I won't belabour the point, but at the end of the day, I would argue that – well, I would apologize to the Commissioner for sounding preachy and hectoring a bit but it's worth saying even the obvious on these things – that the Inquiry has a chance to be helpful to governments, because other governments will be looking at this as well.

And how risk is managed is – you know, if this were simple, it would've been done. It is not simple. It's difficult and it's complicated. Is there an important role for the public service? I think the answer to that is, yes. It's a very important role. It needs to be – the public service needs to be the conscience of the government. They have to hold the mirror up to ministers, they have to respect ministers, they have to provide courageous advice, but at the end of the day once a political decision is taken, they have to provide loyal implementation.

That's my line and I'm sticking with it.

Thank you.

**THE COMMISSIONER:** Thank you very much.

Questions, Ms. Nagarajah.

**MS. NAGARAJAH:** Yes. All right. Okay.

So, the model that you've described here, Mr. Cappe, with the roles and responsibilities and duties that apply in the federal government, do they apply to all provinces in Canada, as well?

**MR. CAPPE:** I would say that the principles do. As I say, we've seen them honoured in the breach sometimes, but, no, I think the principle of parliamentary supremacy is there; the role of the public service, being a professional, non-partisan public service, is clearly there. As I say, we've had experience at that federal level where we've seen political appointments and at the provincial level. I think they're honoured in the breach more – they are disrespected more in some provinces but that they – provinces tend to go back to those principles.

**MS. NAGARAJAH:** So there wouldn't be any exceptions to the way these rules and responsibilities and duties are?

**MR. CAPPE:** I would not make exception.

**MS. NAGARAJAH:** Okay.

And so you've spoke a little bit about the anonymity of the public servant and how that's evolving. What impact does that have on the concept of ministerial responsibility?

**MR. CAPPE:** I think that's crucial, and I don't think we know yet. I think that it runs the risk of public servants being in the position of defending or going beyond explanation, as I suggested earlier. It also means that they can be held more directly to account for their decisions, whereas you want ministers to be responsible in Parliament for the actions of the department and putting in place policies that can manage those risks. And the more public servants take to the political stage or the public stage – I shouldn't say political – I mean, this was happening before social media. We have seen governments say, we want our public servants to consult more with stakeholders. And the more they consult with stakeholders the more they undermine that ministerial accountability and responsibility.

Having said that, this is an inevitable trajectory we're on, and it's going to happen, and we need to establish some principles, I would argue, by management of government – that is the Treasury Board or whomever or the Cabinet office – of how this will play out.

**MS. NAGARAJAH:** Okay.



And the idea that there's less permanence in employment of the public service, how might that be changing the role of providing advice?

**MR. CAPPE:** Yeah, I – both for good and ill. In the sense that where there – so in Savoie's book, *Breaking the Bargain*, he looks at this, and in some of the material before the Commission in – I can – tab 8, the document P-04529, the report – they point to this precarity of employment, but, you know, I think that it was always there. Public servants had an understanding, but it was the wrong one, that they were going to be able to hold their job regardless of what went on. I don't think that that was ever the case.

And, you know, when I became the deputy minister of the Environment, I had to cut my budget and cut – by 33 per cent. We cut our staff by 35 per cent, in program review in '94 or '95, '95 budget. So those public servants who thought we had tricked into thinking were – had job security, did not.

**MS. NAGARAJAH:** Okay.

Madam Clerk, can you please pull up Exhibit P-04481, please? That is at tab 3 of the binder, page 21.

**MR. CAPPE:** Yeah.

**MS. NAGARAJAH:** You can scroll down a little bit there, Madam Clerk. That's good, thank you.

So this is a quote from – in this paper, it's called – this paper is called, *A Strong Foundation: Report of the Task Force on Public Service Values and Ethics* by John Tait. So these are some concerns that this report lists as public servants having communicated.

It says: "These concerns take various forms: 'If I am encouraged to take creative risks and I fail, who will stand up for me?' 'Will I publicly be blamed by my superiors?' 'The advice we give to our ministers doesn't seem to matter.' 'I am not sure what I contribute to my department.' 'I'm held responsible for circumstances beyond my control.'"

So are these concerns that throughout your history of working with the government, you've heard before?

**MR. CAPPE:** Sure. When I was clerk, I used to give speeches to public servants and say, when was the last time your boss said, good try, too bad it didn't work? You need to have an optimal risk-taking by public servants. They need to go out and try new things. Now, you have to know what new things to try.

So, you know, I always remember one of my predecessors, Paul Tellier, telling assistant deputy ministers, I want you all to go out and take more risks. I was about to get on an airplane and hoped that the guy responsible for air safety waited a week. You know, take – know what risks to take. And try new things, but do them in a way that manages the risk.

But public servants are usually criticized for being too risk-averse, and part of that is that they aren't being given credit for and rewarded for taking those appropriate risks. And that – and it was ever thus. This isn't new, but John Tait's report points to those examples, and I just know that that is going to forever be true. And one of the problems – I've talked about the role of Treasury Board and coming up with policies to manage risk. One of the problems is every time somebody screws up or makes some bad decision, the Treasury Board tries to stamp it out forever by putting in place a new policy. Well, sometimes – I said there's an optimal quantity of risk – sometimes those mistakes were the right mistakes to make.

**MS. NAGARAJAH:** Mm-hmm.

So if we want to ensure that public servants are doing their duty and providing, you know, full and frank advice, how do we – what can governments do to combat these fears and concerns?

**MR. CAPPE:** I don't think this is something that the House of Assembly can solve or Parliament can solve. I don't think it's something that requires legislation in any way. Rather, I think, it's the kind of thing we do by example, and we set examples by – so in the federal government, the deputy ministers are – have their performance assessed by something

called the Committee of Senior Officials, COSO, chaired by the clerk.

And when you assess good behaviour, you want everyone to know that that person got rewarded for good behaviour. And so when someone manages a risk and gets rid of a problem, you want to make them – give them compensation for that. You want to recognize that publicly. I mean, they're not in it for the money necessarily, but they're – you want them to get recognized for having done the right thing.

So there's a leadership role here. It goes back to the first minister. If the premier or the prime minister says, nice try, it didn't work, that's a really valuable signal. If the clerk of the Executive Council or the clerk of the Privy Council says that, that sets a standard that's really valuable. Speeches – I mean, this is all soft power. Joe Nye, at Harvard, has this book on soft power, and it's these soft instruments of exhortation, of giving speeches, of talking about principle that I think convey those kinds of things.

**MS. NAGARAJAH:** And so the advice that civil servants are providing sort of flows up. When you were clerk of the Privy Council, you would have expected the same sort of full and frank advice to sort of flow up?

**MR. CAPPE:** Absolutely.

**MS. NAGARAJAH:** Yeah.

**MR. CAPPE:** In fact, when I became clerk, I noticed that my staff were providing too many briefing notes to the prime minister that said option A, option B, option C, but there was no recommendation. And I insisted that if I'm signing a memo to the prime minister, we collectively – the public service – had to have a view. It might be a weak view – W-E-A-K – or it might be a strong view, but it would be a view, and we would recommend something. And the way we would recommend it would give an indication of whether we felt strongly or not that it was – this was conclusively the better option or this was potentially the better option.

**MS. NAGARAJAH:** Okay.

So we've spoken about responsibility and accountability. Can you talk a little bit about the difference between, you know, blame, responsibility, accountability and answerability?

**MR. CAPPE:** Sure.

So, blame gets in the way. The more you want to assign blame, the more you're going to have people becoming too risk-averse. But what you have to look at is – and the Tait report, *A Strong Foundation*, makes this distinction between: answerability, so the minister is answerable in the House to questions about what is going on in his department; responsibility, that is the minister has to take responsibility for the actions in that department and make sure that there are policies to ensure that the right decisions will be made and the right actions will be taken; and then accountability is when the minister is to be held to account for the decisions that he or she makes.

And I think it – the report actually makes an important distinction between whether ministers should resign for a mistake in their department or resign for having inadequately managed that department. And I think the – it's the latter that is important for accountability purposes.

So the ministers shouldn't be accountable for everything that happens in their department, but they should certainly be accountable for anything which is within their realm of responsibility. And then they should be responsible to Parliament for everything within their department.

**MS. NAGARAJAH:** And so what are the consequences of taking responsibility or being held to account?

**MR. CAPPE:** Fixing the problem.

**MS. NAGARAJAH:** So you also spoke about loyally implementing decisions of the government. Is – can you say that – is loyalty, sort of, a two-way street?

**MR. CAPPE:** I don't like that notion, although I think may have been referenced in here, in the *A Strong Foundation* report. I think that government – that officials owe a loyalty to the government of the day. But loyalty doesn't mean

you're going to break the law. They owe a duty of respecting the law. So even if a minister tells me, you know, destroy this document. I'm going to say, no, there's a law that says I have to preserve this document. But, nevertheless, I owe that minister a loyalty that says, here's what I – here's how I will handle what you're intending and I'll do it within the law.

Does the government owe a loyalty to the public service? I think loyalty may be strong a word or the wrong word, but I think that the more the government supports public servants and public service and endorses the value of their actions and the value of their activity, the more public servants will serve them better. And so, you know, I used to have Prime Minister Chrétien come in and address the deputy ministers once a year, mostly to remind them of their accountability to the prime minister, as I outlined.

And – but he would always say, you know, I told my ministers in my first Cabinet meeting – and he did this, I was there or I was there after the election – he said to the ministers: If your deputy minister is successful, you'll be successful. And he then tells the deputy ministers: If you, deputy ministers, are successful, your minister will be successful. And you deputy ministers need to make your ministers successful just as the ministers need to ensure that you'll be successful.

So there's a sense – I don't know if that's loyalty, but it's an interdependence –

**MS. NAGARAJAH:** Right.

**MR. CAPPE:** – that I think is valuable.

**MS. NAGARAJAH:** Okay.

Is it ever appropriate for deputy ministers to sort of bypass their ministers and go to the – I guess in the provincial context we'll say the premier?

**MR. CAPPE:** So, I mean, I think the answer to that is yes. The accountability of a deputy minister is to the premier through the clerk of the Executive Council, when it is the clerk of the Executive Council – or it is the premier – or it is – the Lieutenant-Governor in Council who is appointing the deputy minister on the advice of

the premier, who is usually taking the advice or with the – with or without the advice, but nevertheless getting the advice of the clerk of the Executive Council. So I think it makes sense that the deputy understands that accountability to the premier.

Is it legitimate to snitch on your minister? I don't think that's a good practice because you'll be the former deputy minister pretty quickly. But there are many occasions – I had occasion where I had a minister come and see me and say, you know, I've talked to the prime minister about this, I'm not getting along with my deputy minister. My deputy minister's terrible. I need a new deputy minister – give him advice, get me a new deputy minister.

And I said, let me talk to the prime minister about it. And, of course, he had not talked to the – Jean Chrétien was deaf in his right ear, and we had this line that he must have whispered in his right ear. But the prime minister and I talked about it and said, we have a rogue minister and the deputy is trying to rein him in. And if we move the deputy, they're going to have – we're gonna have more problems with this minister.

And, at the end of the day, we kept the two of them together for a reason, that it was – so, now the minister is the one who raised it with me, not the deputy minister. Would it have been appropriate for the deputy minister to raise it with me? Absolutely.

**MS. NAGARAJAH:** Okay.

And you spoke about it not being appropriate for civil servants to defend decisions or public policy. Is it ever appropriate for them to publicly criticize?

**MR. CAPPE:** No. I – and, again, I think there are always ways of expressing that.

I had this horrible experience of a deputy minister of what was then HRDC – Human Resources Development – and I was in Bridgewater, Nova Scotia and this very dedicated young woman who was a very junior official who's on the line delivering employment insurance benefits, and she objected to what the government had done and Parliament had done in changing the employment insurance

legislation so that she, actually, had to disallow her neighbour from getting employment insurance benefits.

And she walked up one side of the deputy minister and down the other and I was humiliated and excoriated by this woman. But then I gave her the lecture on supremacy of Parliament and the accountabilities we had to do what Parliament had told us and that as much as she may have hated me or the minister or whomever, she could criticize us but she couldn't do it publicly.

**MS. NAGARAJAH:** Right.

**MR. CAPPE:** And there are – there's court cases in the Supreme Court of Canada on the extent to which public servants can voice their disagreement.

**MS. NAGARAJAH:** And when you speak about, you know, defending public policy, is that – would you say that's synonymous with supporting government policy in public?

**MR. CAPPE:** Again, I – there's a very fine line between explaining and defending. So, I want to be – I don't want to overplay it, but having said that, I think, in the minds of a public servant, they can make that distinction and they can stick to explaining without defending.

**MS. NAGARAJAH:** Okay.

**MR. CAPPE:** And sometimes public servants, especially with the more consultation that we engage in, public servants will be put in a position of having to explain over the line. And there are examples I won't quote in recent newspapers where I think a public servant went over the line.

**MS. NAGARAJAH:** Okay.

So, you've sort of explained here how civil servants, you know, they present all the risks to their ministers who then make a decisions and then the civil servants go on to implement those decisions. Would it be unusual for civil servants to be asked to justify a decision as opposed to being asked to analyze various options and present them to government?

**MR. CAPPE:** Sure. It may be that a public servant is put in the position of having to justify, but then what I have always done when I've been in those positions is cite the public statements of the minister or the government. So, I don't have to be the one defending, I can merely be explaining by citing what others do or others have said.

**MS. NAGARAJAH:** And you spoke about risk management, zero, you know – zero risk is not optimal risk. What should the public know and what should the public expect from their government in terms of risk management?

**MR. CAPPE:** So I think that the first is that there has been a risk analysis done that public servants are assessing objectively what those risks are. Secondly, that they are making recommendations in advice to government based on that analysis for how to proceed, what policy to pursue, and then providing risk mitigation proposals –

**MS. NAGARAJAH:** Mm-hmm.

**MR. CAPPE:** – for if you choose to do this, Minister, here's how we can do it in a way which minimizes the risk, and then managing that risk, in its implementation, by finding new implementation techniques that are going to reduce the impact on the public – the negative impacts.

**MS. NAGARAJAH:** And are there – or, you know, in an ideal world, would there be consequences to a public servant for their advice not being taken?

**MR. CAPPE:** No, there should be consequences to the public servant for the actions they take, but not for whether their advice is followed or not. You know, I – the very first memo to the minister that I ended up having any input into, I'd been in the job for – I'd been in the Government of Canada for two weeks. I apologize for all the anecdotes but it was a dissenting opinion – the memo was going up, advising the government, in the Pierre Elliott Trudeau government, to do with wage and price controls.

And I was this, you know, recent student who had the right answer, which was that was bad

thing. My immediate supervisor said I'll give you two sentences for a dissenting opinion. And it went into the memo and I was chuffed and that's what made me stay in government is I had a chance to whisper in the ear of the decision-maker. I advised against it and, then two weeks later, we had wage and price controls.

Had I been a success, was my question. And my answer was yes, because I had been heard. Not that I had been followed, not that my advice was followed but rather that my advice had been on the table.

**MS. NAGARAJAH:** Okay.

And are Crown corporation employees considered to be part of the civil service as well?

**MR. CAPPE:** Again, I was making a distinction between employees because they're hired in different circumstances –

**MS. NAGARAJAH:** Right.

**MR. CAPPE:** – typically. But I think that the duties and principles still apply. So they have to respect the law. I mean, that sort of should go without saying, but you got to say it. And then they may be in a position to provide advice to the minister for the exercise of the minister's authority with respect to the Crown.

And it's for that reason, I think, that you want a department to have someone who's looking at the Crown corporation, so that they can have some knowledge and expertise in order to make a judgment about what the Crown corporation is advising.

**MS. NAGARAJAH:** Okay.

Now, talking a little bit about ministers, how can ministers best utilize their deputy ministers?

**MR. CAPPE:** This is back to soft power; this is about establishing a relationship of trust. This is about understanding that the deputy's job is not to agree with you, it's to the present the other point of view.

When I was clerk, I had asked the chief of staff about two weeks – or two months after I had been in the job: How are things going? And the

chief of staff said: The prime minister's happy with what you're doing, but he thinks you argue with him too much. And I said: Well, that's my job. But I realize that he thought I was arguing because I believed in what I was saying. I was actually presenting the other side of everything that was being prejudged by the prime minister – don't rush to a judgment, think about these other things. I did change the way I presented it, but I didn't change whether I presented it.

I continued – and so there's a relationship of trust that I felt I could yell and scream if I had to, but that I could – that he knew that I would take his decision and implement it. I believe, at the end of the day, a minister wants to have an open relationship with the deputy and encourage the deputy to provide candor – candid advice, which the minister may choose to ignore, and ensure that the political staff to the minister respect the role of the public service. So, you know, the deputy is appointed pursuant to statute; the political staffers are not.

**MS. NAGARAJAH:** Right.

And on that note – on the role of the political staffer and, I guess, the deputy minister, you spoke a little bit about, sort of, the partisan role of the chief of staff and non-partisan role of a deputy minister. Is that evolving in any way?

**MR. CAPPE:** I hope not. I – so I've been out of government now for some time, I still have very close contacts in government, but my sense is that it's always under stress, okay? So that it ebbs and flows. And that's probably healthy, because it iterates towards some equilibrium that's desirable. I think the – if the principle can be respected, how you do it becomes less important.

So, the – pardon me, back to your previous question, access is really important. Will the deputy minister have access to the minister? Will the deputy minister be able to call the minister at night or in day and raise an issue or deal with a crisis or whatever? I think that's important. And so, the same with political staffers, you need to be able to have that open relationship and trust.

**MS. NAGARAJAH:** Thank you.

I'm going to move on to talk a little bit about transparency now. So you spoke about how, you know, more access to government might mean less documentation. Can you talk a little bit of how the access to information regimes have developed?

**MR. CAPPE:** Yeah, going back into the '80s there was always a demand for more openness. The governments used to be very secret. It used to be that all documents could not – you know, would not be made public. Now I think that we've been moving towards a regime where we identify – well, we move towards a regime where we identify classes of documents that would be protected, and we're moving towards a regime where it's the content of the documents that is going to be protected, and I think that's desirable.

As clerk I had authority, under section 39 of the *Canada Evidence Act*, to unilaterally declare a Cabinet confidence, that a document was a Cabinet confidence, it could not be disclosed to a court. I felt that that was – I felt a burden of that responsibility because if it was relevant to the consideration by the court, I felt that there should be a harm test used, and I was not in a position, under the Evidence Act, to use a harm test. I had to declare is this a Cabinet confidence or not, and I'm now convinced that that – at some – that has been sustained by the Supreme Court of Canada on several occasions now in 2003 and in 2011, and – but I feel, over time, it will evolve whereby a third party may make a judgment.

Now the clerk is seen as that third party, that he is not – he or she is not the instrument of the government in this; that it's a third party making a judgment about whether this is a Cabinet confidence or not, and if so it should not be released. You know, there was always this question – if the St. John's *Telegram* was on the – it was *The Telegram* was on the table in the Cabinet room, was it a Cabinet confidence? I mean, the answer, of course, is ridiculously no. But if a document prepared by the public service was advising ministers, was it a Cabinet confidence? Well, not really; the advice might be, but not the document itself. Whereas a record of Cabinet decision was a Cabinet confidence; and the exchange of letters between

ministers about a Cabinet issue was a Cabinet confidence.

**MS. NAGARAJAH:** Okay.

**MR. CAPPE:** So, we're moving from nothing to classes of documents to content. And I think it's the content that ultimately should drive this.

**MS. NAGARAJAH:** Okay.

And so what parts of Cabinet decision-making should be made public earlier, rather than 20 years down the road?

**MR. CAPPE:** So there are many proposals – there have been many proposals that the analytics that the public service goes through, the background documents – so in the federal system, there is a Cabinet document, it has two parts. One is the background/analytic portion and the other is the recommendation portion, and the background portion can be made public. The – so the analytics of the public service should be available.

Having said that, it becomes problematic if you put options in there because then ministers are gonna feel that, you know, you didn't recommend it, I followed your advice, but everybody out there thinks that option G was the right one.

And so you're starting to qualify the political judgment of ministers and you don't wanna do that. So if you can keep the analysis pure, then I have little trouble with that being made public. But that's gonna be used to hold the government to account and the government knows it.

**MS. NAGARAJAH:** So you think that releasing that part of the decision-making could undermine sort of the debate process of coming to a decision?

**MR. CAPPE:** It's going to change how public servants prepare those documents because they know they're going to be public.

So, you know, who's the audience? You want the audience to stay the minister and ministers. So you want public servants preparing documents that are gonna help ministers make decisions. If they start writing documents for the

public, that's not going to be as effective in helping ministers make decisions.

So the more – so that's why I say there is a tension between openness and candour in Cabinet, and openness and effectiveness of Cabinet. So it's a tension between accountability and effectiveness.

**MS. NAGARAJAH:** Okay.

And you spoke a little bit about the duty to document and sort of what perspectives that that can come from, the different objectives of the duty to document. One thing that we've talked a little bit about this week is legislating the duty to document. We understand that the only jurisdiction in Canada, at the moment, that has a legislated –

**MR. CAPPE:** BC.

**MS. NAGARAJAH** – duty to document is BC and that's not implemented fully or effectively, anyway.

So, is your understanding of the duty to document that it's there to combat this chilling effect?

**MR. CAPPE:** That's the idea. I'm not sure that that's as effective, though. Again, I say that you're going to see cover-your-behind kinds of documents created that are going to be unhelpful in the decision-making or in the historical record.

The other thing is that adequate documentation should be a culturally determined obligation of public servants. It isn't – you know, they should be doing it because it's the right thing to do, not because Parliament or the House of Assembly told them to do it.

Now, I recognize that it may be necessary to have a policy on this, and maybe you want to have the Treasury Board, as the general manager of government, or the Executive Council – the clerk of the Executive Council stating a new policy on this, but, again, it's not gonna be implemented – whether it's statutory, regulatory or exhortatory – unless the culture changes. And you need to have the culture there to say: We're doing this because it's the right thing to do.

And there're – again, I go back to why it's the right thing to do. The objective has to be clear. It's for preserving the historical record and improving the quality of decision-making.

**MS. NAGARAJAH:** Okay.

And how can we create this culture? Where does it come from? And how do you create consistency?

**MR. CAPPE:** So, I think it does come from the clerk of the Executive Council, it comes from the deputy ministers recognizing the importance of this. It comes from ministers and the premier or the prime minister saying: We need to do this because we need the historical record to be complete. And, again, I – you know, 20 years is a short time, it turns out – now that my beard is grey – that the 20-year rule on the divulgence of documents has proven that we have active politicians whose Cabinet secrets are being made public.

So, Joe Clarke was leader of the Opposition when his government's Cabinet's secrets were made – Cabinet confidences were made public. That's a curiosity. Now, there's two sides to this story. I think it's an offence, I think that's offensive to me, I would've made it longer than 20 years. The counter-argument is – and nothing happened, like, no problems arose when this was made public. So, what are talking about, Cappe? But I – there's obviously a balance in there.

And then there's the 30-year rule for sensitive things and a judgmental rule for national security. And I think that – again, if I believe in a harm test, I might use the judgment applied to the 20-year rule as well.

**MS. NAGARAJAH:** And the question that was asked earlier this week was although there's all this talk about legislating the duty to document, it hasn't really been done. Do you have any thoughts about why that might be?

**MR. CAPPE:** I don't.

**MS. NAGARAJAH:** Okay, fair enough.

So I guess my – the last question I'll leave you with is there seems to be a lot of, sort of, misconceptions about the role of the civil

service, deputy ministers, ministers. What can governments do to clarify those roles both for the public and for the public service?

**MR. CAPPE:** I was present for part of the testimony of the Memorial professor yesterday, and he emphasized training. I will emphasize training as well.

And I'll use – I apologize for all the anecdotes, but in 1993 when the Chrétien government came in, I was the senior official in the Treasury Board and I was asked to come to the orientation session that was being offered to senior political staffers and to ministers. To explain the role of the Treasury Board, I gave them the same lecture I've just given the Commissioner. But it basically was education for the purpose of the ministers and their staff so that they would understand why there are rules and why they shouldn't do things and then also tell them what they shouldn't do and what they should do.

So the distinction between a transient record and a government record is an important one and I suspect that most public servants don't know the difference. I do – when I was in government. But you need to train people to be aware and capable of doing that and I would say ministers need that, if they haven't been in government before. And sometimes their experience in government will be at the municipal level or the provincial level and there will be different rules and different practices at the federal level, or vice versa.

And, you know, when you have a federal minister who then becomes the premier of the province – which has happened only once, I think, and it was in this province – but then, you know, there may be practices in this province that are different than what the federal government did. Or if you were a municipal councillor, you may be used to something that requires a retraining, if you will, to learn the practices of this government. And what – and why, an explanation of why is sometimes very powerful.

**MS. NAGARAJAH:** Okay, thank you.

Those are my questions, Commissioner.

**THE COMMISSIONER:** All right.

Let's take our 10-minute break here now this morning and then we'll come back for cross-examination.

**CLERK:** All rise.

### Recess

**CLERK:** All rise.

Please be seated.

**THE COMMISSIONER:** All right. Cross-examination.

Province of Newfoundland and Labrador.

**MR. RALPH:** Good morning, Mr. Cappe. My name is Peter Ralph, and I represent the Province of Newfoundland and Labrador.

And my first question is a facetious one and not really meant to be taken seriously. But the question is, have you ever testified at an inquiry into why things are going okay in government?

**MR. CAPPE:** Well, let me give you a facetious answer, then, if the Commissioner will allow. I mean, the answer is no; however, I have often appeared before parliamentary committees or inquiries where they were looking for bad and found good. So –

**MR. RALPH:** Right.

**MR. CAPPE:** – but no, I – nobody every challenges the good.

**MR. RALPH:** Because I – on a daily basis, governments across this country, including our government, provide all kinds of services. And they're provided reliably day after day, month after month. And, of course, we take that for granted, but we look at states like Venezuela, and it's something we shouldn't take for granted. Is that fair enough?

**MR. CAPPE:** Very much so. I have a stock speech I used to give as clerk about, today, thousands of prisoners were kept in jail and airplanes took off and landed safely because of public servants, so ...



**MR. RALPH:** Right. So I guess an effective but imperfect civil service is still an accomplishment?

**MR. CAPPE:** Yeah, I agree.

**MR. RALPH:** Now, I guess you throw in peaceful transition of power every four years and the rule of law in where – that's a pretty good starting point.

**MR. CAPPE:** So, yes. The – when – again, I can just give anecdote after anecdote, but I – when I was High Commissioner in the UK – it was during the election when Stephen Harper beat Paul Martin – I was able to say that within two weeks, there will be a peaceful transition of power. And I had the great and the good of London in Canada House and I said, most of my ambassadorial colleagues could not say that.

**MR. RALPH:** Right.

Now, one of the essential roles, you've indicated, of the job of the civil servant – essential role of the civil servant is to provide risk analysis. Now, we've heard risk analysis in relation to the risks presented by the Muskrat Falls Project. So these would be risks that were, I guess, determined, ascertained and put on a distribution curve for the benefit of the CEO and other people within the company. So risks such as productivity and those types of things. So things that could affect the schedule and the cost of the project.

Now, when you talk about risks, are you talking about risks to the project, in terms of the civil servant's role, or risks to the government on a particular public policy? And do you understand the distinction?

**MR. CAPPE:** I'm not sure I do.

**MR. RALPH:** Okay.

**MR. CAPPE:** I would argue that those risks of the project – and I won't talk about Muskrat Falls, but I will abstract it – are the risks. And they may be risks to government, risks to the public, risks to the people working in construction on the project. I mean, there's a whole series of risks.

**MR. RALPH:** Yes. So I guess my point – if I'm doing risks, in terms of the risk to the project, then I need to be an engineer and I need forecasting – very complicated mathematics. You wouldn't necessarily expect the deputy minister of Natural Resources to be an engineer who can apply all these mathematical formulas and come up with these sort of – these numbers in terms of risk?

**MR. CAPPE:** No, I wouldn't, but I said you need to know what risks to take and you need to know what advice to take and where to get the evidence that you're going to base your decision on. So it might be contracting with a consultant – a consulting engineer to provide that, or it might be having an engineer on staff. I'd be surprised if there weren't engineers in the ministry of Natural Resources.

**MR. RALPH:** But you see my point. So, basically, it seems to me what the deputy minister of Natural Resources is doing in this circumstance would be trying to find out what risk exists within the project, and then he can advise the minister or Cabinet about what risks this, you know, will be to the government – say its financial forecast and so on and so forth.

**MR. CAPPE:** Sure. And there are environmental risks and risks to the relationship with local people and Indigenous people in all of that.

**MR. RALPH:** Yes.

Now, you've indicated one of the principles of the model, the Westminster model, is the civil service will be professional and non-partisan. And I guess the belief is that this arrangement will result in the best public policy outcomes. Is that right?

**MR. CAPPE:** Yes.

**MR. RALPH:** And so if courageous advice is given and implementation is provided, you will get better public policy outcomes than otherwise. Do you agree with that?

**MR. CAPPE:** I do, very much.

**MR. RALPH:** So this doesn't – it doesn't dictate the actual policy, but whichever policy is

adopted, we believe that it will be on sounder footing. Can you comment on that?

**MR. CAPPE:** Yeah, no, I – you’re on to something, Mr. Ralph. The point that I’m going to extrapolate from your question is that process matters, that coming up with a deliberate process – I said that governments have to be deliberate in assessing the risk – that the process used matters.

Now, when I used to say this to colleagues, they would say: Oh, yeah, you were clerk of the Privy Council; you were the head of process. And that’s true, and I make no apology for it. So when I said I was proud to be a faceless bureaucrat, I’m also proud to be responsible for process because the process you put in place is going to determine the quality of the outcome.

**MR. RALPH:** And so in your circumstance, when it’s the federal government, you would have Cabinet; you would have Cabinet committees, I guess, processes in terms of receiving memorandums and notes from departments. So one of the roles, would you agree, then, for a senior civil servant would be to protect those processes, and if it appears as though government wants to kind of circumvent those, it would be important for the civil service to say, hold on now, those are there for a reason.

**MR. CAPPE:** It would be important to say those are there for a reason. In terms of that process, you want to wait until an issue is ripe, that the analysis has been done, that all the varied judgments and assessments and the involvement of all the departments that are relevant have had a chance to play out.

**MR. RALPH:** Right. Fair enough.

And I guess once the government decides – Cabinet decides, well, we’re going to change how we do it, we’re going to change these Cabinet committees, then that’s fair enough, that’s up to them.

**MR. CAPPE:** It is.

**MR. RALPH:** Is that right?

**MR. CAPPE:** Yes, although the clerk of the Executive Council might have a view and advise

the Premier whether that’s a good thing or a bad thing.

**MR. RALPH:** Right.

**MR. CAPPE:** I mean, I – again, I don’t want to attribute anything to the Government of Newfoundland and Labrador, but when I was clerk, I would go to the prime minister – in fact, I did go to the prime minister and say that I thought we should have an international affairs committee of Cabinet, and he refused.

**MR. RALPH:** Right.

**MR. CAPPE:** Until 9/11, and then we had a security committee.

**MR. RALPH:** Right.

You talk about loyal implementation and, I guess, the question becomes: When does the sort of deputy minister or senior civil servant, you know, accept the decision of his minister or Cabinet and sort of move on? Or are there times when they should keep fighting? If they think that the minister or the Cabinet has done something particularly bad, particularly wrong – I won’t say legally wrong, let’s not go there –

**MR. CAPPE:** No.

**MR. RALPH:** – but just assume they’ve adopted public policy that’s bad. You know, once the decision is made, what do you do then? Do you say: Okay, that’s it, I accept that and now I implement it and I don’t make any other further comments about that?

**MR. CAPPE:** I think you make a judgment of how significant it is. You know, I usually – or I always attribute best intentions to ministers, so that they are actually interested in the public interest. And so is there a way – at what point do you say: This is so derogatory of the public interest, derogates so much from the public interest that I’m going to keep pushing back? And every deputy minister is making that judgment on a regular basis.

On an inconsequential decision, okay, you want that one, you got it. But on something of grand import you sort of say, let me get back – so, I mean, there are many ways of handling this. My

way was always: Prime minister, let me get back to you with an assessment of this; or, minister, let me give you a different view; or, minister, we need to do our homework on this. And you don't give up. If it's really consequential, you don't give up.

**MR. RALPH:** Right.

But you're in pretty dangerous territory. I mean, if you're digging in on a policy that's important to the government, then you are putting your job on the line.

**MR. CAPPE:** Well, so it depends on how it's important to the government.

If the government campaigned on this – and I have examples where I was sort of – you know, my arguments became pretty weak because the government had just won an election and campaigned on this and I thought it was a dumb idea, and I said so. Urging the minister to backtrack on a campaign promise, that's not one I thought I would be able to win. So I didn't push as vigorously as I might have, because he had democracy on his side.

**MR. RALPH:** Right. Which is fair enough. That's –

**MR. CAPPE:** Absolutely.

**MR. RALPH:** – the way it's supposed to work.

Now, when we talk about being non-partisan, I guess one aspect of that is tenure. And as you talked – you referred to earlier – I mean, the United States is very different. I understand when a new administration comes into power, layers of the civil service are removed and new officials replace those. And those are appointed by the new administration. Is that your understanding of how that works?

**MR. CAPPE:** From sort of director up, yes.

**MR. RALPH:** And –

**MR. CAPPE:** Although – sorry, just a qualification – there are many examples where a careerist has been advanced through –

**MR. RALPH:** Right.

**MR. CAPPE:** – the system. So the –

**MR. RALPH:** (Inaudible) from the Trump administration are –

**MR. CAPPE:** Exactly, I was just going to say.

**MR. RALPH:** Yes.

**MR. CAPPE:** The current secretary of Defense had been in various administrations.

**MR. RALPH:** Yes.

And intuitively, you think replacing that many officials and bringing in new ones who aren't familiar with the operation of government would be very disruptive, especially if you're doing it every four years. It's hard to imagine.

**MR. CAPPE:** Or less.

**MR. RALPH:** Or less. And I guess you would have spoken to American officials who were in that position, I presume.

**MR. CAPPE:** For sure.

**MR. RALPH:** And what's their experience of this, is it –?

**MR. CAPPE:** Well, so, in the US, you have a system whereby there is a shadow government outside of the government with think tanks and other non-governmental organizations, where people who are – were in government under one administration and they lose – go out to wait for the next opportunity, and you have this in and out. We don't have that tradition. We don't have that capacity. And sort of the best outsiders to go to the federal public service have been former provincial employees.

**MR. RALPH:** Right.

And so in this country, when a new government comes to power, the senior officials remain in place.

Now, so that American model, I suggest, looks pretty good to some politicians.

**MR. CAPPE:** It does.

**MR. RALPH:** And I guess –

**MR. CAPPE:** For the wrong reasons.

**MR. RALPH:** Yes.

But some politicians think that the civil service is going to frustrate their policy goals. Is that right?

**MR. CAPPE:** I've seen politicians with that presumption, and then they learn otherwise. I can – again, I apologize for –

**MR. RALPH:** That's fine, I'd like to hear it. Yes.

**MR. CAPPE:** – using too many examples. But in the case of the current clerk of the Privy Council, Ian Shugart, he had been in Jake Epp's office as minister of Health in the Mulrone government, Conservative government, and appointed as clerk of the Privy Council by Justin Trudeau, a Liberal government.

When I was clerk, there were six deputy ministers who had all served in Conservative governments, in minister offices as political staffers, who then entered the public service, worked their way up meritocratically and then got appointed as deputy ministers.

**MR. RALPH:** Right.

**MR. CAPPE:** So – by Liberal government.

**MR. RALPH:** Right.

**MR. CAPPE:** So, yeah, we have lots of (inaudible) –

**MR. RALPH:** But there's a concern, I guess, politically – I guess in academic circles as well – that the civil service can have sort of too much influence on public policy, and that the risk is that the civil service becomes an entrenched entity with its own interests that could possibly thwart the sort of – the democratically elected government's pursuit of policy.

**MR. CAPPE:** That is the allegation.

**MR. RALPH:** What do you make of that, that idea?

**MR. CAPPE:** I've not met – well I – so I've not met a public servant who doesn't have preferences and values, so sure. But I've not met a public servant who hasn't been able to suppress them in the interests of respecting the decisions of ministers.

**MR. RALPH:** Right.

Nonetheless, we still have politicians out there that have that perspective. Do you agree with that?

**MR. CAPPE:** Yes, that's – they're still alive. I've seen it in Ontario.

By the way, I should correct the record: I said that there was only one jurisdiction where I could think of a minister at the federal level going to become a premier in the province, and someone pointed out to me there were Lucien Bouchard and Jason Kenney, most recently. So I just correct the record.

**MR. RALPH:** Now, so we want civil service to provide, I guess, some courageous advice, and to do that they need to have some kind of sense of security. Is that fair to say? How does that happen?

**MR. CAPPE:** Some kind of sense of security –

**MR. RALPH:** Yeah, well –

**MR. CAPPE:** – I'll accept that.

**MR. RALPH:** Okay.

**MR. CAPPE:** But again, I don't think anybody should think that their security of employment is preserved to make bad decisions or give bad advice.

**MR. RALPH:** Right.

**MR. CAPPE:** They're being preserved for the purpose of giving good advice.

**MR. RALPH:** Now, I'm going to ask you some questions about the role of Crown corporations giving advice to government, and you referred to this earlier.

And I guess during your tenure there would've been – you've always mentioned these, there was – Petro-Canada was established, I'm not sure about the Atomic Energy of Canada. But you were an official in government when these organizations would be dealing with Cabinet and ministers. And these people, these organizations, you know, employ people with specialized knowledge: engineers, scientists, so on and so forth. And there's nothing wrong with a minister relying on advice from those people in making decisions. Is that correct?

**MR. CAPPE:** Relying on I might –

**MR. RALPH:** Is a strong word. Okay, that's fair enough.

**MR. CAPPE:** Yeah.

**MR. RALPH:** Getting – receiving –

**MR. CAPPE:** Receiving –

**MR. RALPH:** – advice –

**MR. CAPPE:** – absolutely, I agree.

**MR. RALPH:** And there's nothing wrong, of course, with government using a public corporation to achieve public policy goals, there's not – you –

**MR. CAPPE:** For sure.

**MR. RALPH:** – don't take an issue with that?

But I guess the question becomes, you know: What is the role of an official in a Crown corporation in advising the minister and Cabinet with regard to risks to the public, to public policy, to the – you know, the public purse and that type of thing? Do you understand the question I'm asking you?

**MR. CAPPE:** Not quite.

**MR. RALPH:** I mean so – you know if I'm – let's take the example of the Inquiry. So if, you know, it's a \$6.2-billion budget and, I guess, what you'd want to see is a deputy minister giving advice to the Finance Minister about the risks associated with this thing in terms of cost

increases and how that could affect the public purse. That's fair to say?

**MR. CAPPE:** Yeah, I think.

**MR. RALPH:** That should be the role of the deputy minister. That should not be the role of the person in the corporation.

**MR. CAPPE:** Let's be careful, I – first of all, I agree that it is the role of the deputy minister, but I wouldn't stop there because it – that – he or she would be coming to that judgment based on the analyses that they would receive, from the corporation, presumably.

**MR. RALPH:** Yes.

**MR. CAPPE:** And therefore, it is incumbent on the corporation to do good analysis and be honest and truthful, et cetera and report to government.

**MR. RALPH:** Right.

But ultimately it's – you know, the official is – has a role within the corporation. The deputy minister or senior civil servant has a role within government. And they're different.

**MR. CAPPE:** And they're different. I think that is – I subscribe to that, yes.

**MR. RALPH:** So whenever there's advice coming from a Crown corporation, it's important that that advice flow through the senior civil service to ministers in Cabinet.

**MR. CAPPE:** Very much so.

**MR. RALPH:** So this is a norm, that idea, I guess, would you agree with that? It's not – I mean obviously this is not – there isn't legislation or regulations that prescribe that this is the way you have to do it.

**MR. CAPPE:** Right.

**MR. RALPH:** And if a particular minister does not solicit advice from a senior civil servant, let's say a deputy minister regarding risks associated with certain activities, say, of a Crown corporation, I mean, that puts the civil servant in a tough spot.

**MR. CAPPE:** Yes and no. If there was to be a Cabinet decision, I'm thinking now of my time in the Canadian government. If there was to be a Cabinet decision on this, it would be incumbent on the Cabinet office, the Privy Council office, to ensure that all the right people had been involved and were aware and that the process in getting to Cabinet decision was going to be appropriate, and that therefore if the minister's department had not been involved, I can't see how you would get to Cabinet.

**MR. RALPH:** So in that instance where the minister – or the deputy minister feels that they're being ignored, it's their responsibility to go to the clerk, is that correct?

**MR. CAPPE:** I would (inaudible).

**MR. RALPH:** And say: Clerk, I think that this is not happening correctly.

**MR. CAPPE:** Right. And it's for the clerk to then decide whether it is appropriate that it happen or not.

**MR. RALPH:** So how do you, sort of, protect that role or enhance that role of the senior civil servant in terms of providing risk advice to ministers? Is there anything you can do – I'm not sure if you understand my question.

**MR. CAPPE:** Well, one of the things you can do is have an inquiry that's going to look at past decisions and then set new standards.

So, I'm sure that most public servants in Newfoundland and Labrador are looking at what's happening in this Inquiry. So, you set some standards by saying if you don't do it, here are the consequences. And I can use federal examples up the yin-yang of, you know, it would be remarkable if a federal official turned their eye on a rogue official within their department that was doing things that were exposed in the sponsorship scandal, for instance.

**MR. RALPH:** Right.

Now, if we could pull or put executive – or Exhibit, sorry, 04541 up. And this is – it's not in your book.

**MR. CAPPE:** Okay.

**MR. RALPH:** It's *Executive Council Act*, I don't know, I don't think there's a Privy Council act per se in Ottawa, is there?

**MR. CAPPE:** There is not, but this is in my book.

**MR. RALPH:** Okay – oh, is it? Okay.

And go to section 9 – oh, right here. So it's entitled: Departmental staff. And it says – oh, keep going (inaudible) – “The Lieutenant-Governor in Council on the advice of the Premier may appoint for each department, to hold office during pleasure, those deputy ministers and those assistant deputy ministers that the Lieutenant-Governor in Council considers necessary for the proper conduct of the business of the department.”

I'm not asking for your legal interpretation of this section, but, I mean, in your assessment, is that kind of similar to the situation you have in Ottawa with the federal government?

**MR. CAPPE:** No. It is insofar as the deputy minister is appointed, but not for assistant deputy ministers. Assistant deputy ministers are in their job pursuant to the *Public Service Employment Act*. So that – so they are in the traditional public service, the non-partisan, professional public service, but that the deputy minister is that bridge; very similar to what's in this legislation.

**MR. RALPH:** Right. So I don't know, I'm not –

**MR. CAPPE:** I should just mention that there isn't a central appointment responsibility for deputy ministers, each statute creating the department, creates the position of the deputy minister of that department and that's where – but it's essentially the similar appointment process.

**MR. RALPH:** Right. And I guess you haven't had a chance to think about this, but I mean do you – having sort of more layers appointed directly by the premier and the Lieutenant-Governor in Council, can you – any sense of how that would change how things operate within the model?

**MR. CAPPE:** Yes.

I said at the outset that accountability is facilitated by having one person on whose shoulders the burden is placed. In this circumstance, the deputy minister and those assistant deputy ministers are appointed by someone else. The assistant deputy ministers are not appointed by the deputy minister, which is the way the federal government works.

Now, I eluded on talking about Crown corporations that there was potential confusion when the Governor in Council appoints the board and then the Governor in Council appoints the CEO. Because arguably – and I’ve seen this – their objectives defer, their temperaments are not compatible and you end up with conflict.

This sounds to me to be where those assistant deputy ministers were appointed by someone else, not the deputy minister. You could have problems of dynamics within the team.

**MR. RALPH:** So, in this situation, not only does the deputy minister report to the premier, the assistant deputy minister does as well.

**MR. CAPPE:** Exactly. Around the deputy minister.

**MR. RALPH:** Yes.

So, I guess, that’s one issue with regard to tenure; it’s at pleasure. Are there any other kind of issues that you would address in terms of tenure and senior civil servants? Is there legislation? Is there, you know, organizational behaviour dynamics is there.

**MR. CAPPE:** I just come back to the notion of rules of the game, that there are – you have tenure, you have job security with purpose and under conditions. So, the – those public servants who were released under the – although they had tenure, as you put it, were – really didn’t have tenure. In the federal public service they were released because the budget had been cut.

**MR. RALPH:** Right.

My next series of questions are about secrecy and decision-making. I’m going to ask you questions that will refer to our access to

information legislation, but I’m not going to ask you for legal opinions about it. I’m going to ask you to basically accept my interpretations, and I’ll ask questions based on that. Is that fair enough?

**MR. CAPPE:** There’s a facetious answer I could make about legal opinion but I won’t.

**MR. RALPH:** Absolutely.

**MR. CAPPE:** Go ahead. I’m not a lawyer.

**MR. RALPH:** So, if we go to Exhibit 04519.

**THE COMMISSIONER:** That one won’t be in your book.

**MR. CAPPE:** No.

**MR. RALPH:** This is the Access to Information act.

**MR. CAPPE:** Mm-hmm.

**CLERK:** 04519?

**MR. RALPH:** Yes.

Well, I can read it, if that’s okay?

So, section 27sub (2).

**THE COMMISSIONER:** Just one second.

**MR. RALPH:** Okay.

**THE COMMISSIONER:** Let’s just go to that and then try to go back into it. You had it up before, so – in fairness to Mr. Cappe.

There we go.

**MR. RALPH:** Page 22, I believe. You can scroll down to subsection (2) so it’s – okay, right here. There we go. So, “The head of a public body shall refuse to disclose to an applicant (a) a cabinet record ....”

Obviously, this is different than in Ottawa. Basically, in the federal government, you prescribed – the Clerk prescribes what is or wasn’t a Cabinet record.

**MR. CAPPE:** Right.

**MR. RALPH:** And that's the end of the story.

If we can go back up to the beginning of this section. And then it describes what a record is.

So that seems to be protecting Cabinet confidences. Is that fair to say?

**MR. CAPPE:** I think so.

**MR. RALPH:** Now, if we go to section 29, I think that's on 23; page 23. There it is. So, it says: "The head of a public body may refuse to disclose to an applicant information that would reveal (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister ...."

And then if we can go to subsection (2), and it says: "The head of a public body shall not refuse to disclose under subsection (1) ...."

And then if we can go to subsection (k) down further here: "a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or" – I lost my place – "approved or rejected by the head of the public body."

**MR. CAPPE:** So is this an exclusion or an inclusion? I've sort of lost the plot.

**MR. RALPH:** So, basically, it's saying – so the head of a public body may refuse to disclose advice.

**MR. CAPPE:** Yes.

**MR. RALPH:** Unless that advice is included in a plan or a proposal to establish a new program or a change of program –

**MR. CAPPE:** I see.

**MR. RALPH:** – if the plan or proposal ....

And the next one, the "information that the head of the public body has cited publicly as the basis for making a decision or formulating policy ...."

So it appears to me that the act protects Cabinet confidences.

**MR. CAPPE:** Yes.

**MR. RALPH:** But if the minister has authority to make a decision, and ministers often have authority to make decisions, then the advice that he gets, perhaps – I'm going to ask you again, I'm going to ask you to accept this – the advice that he's getting may not be protected.

Now, in circumstances where the minister has to make a decision, granted authority under an act to make a decision, what's your sense of what should be a secret and what shouldn't be a secret on the advice he gets from a deputy minister?

**MR. CAPPE:** So I'm not the – (I) does not offend me; information that is cited publicly.

**MR. RALPH:** Yes, right.

**MR. CAPPE:** It's already in the public.

**MR. RALPH:** Yeah, fair enough.

**MR. CAPPE:** (k) does.

**MR. RALPH:** Yes.

**MR. CAPPE:** Or could.

**MR. RALPH:** Right. Assuming my interpretation is correct.

**MR. CAPPE:** Yeah, no, I mean, look, if this were a committee of the House of Assembly and I was asked: Should this legislation include (k)? I would probably say that it's problematic. I can see why the plan or proposal to establish a new program or to change a program, if it has been approved or rejected, could be made public, but I'd really want to not have an obligation to protect it or release it; that I want judgment to be brought that says does it make sense to do that? Is there a public interest in that?

**MR. RALPH:** Right.

**MR. CAPPE:** And I think there could be a public interest in protecting it and keeping it secret.

**MR. RALPH:** Right.



Now, I'm going to give an example, and it's simplistic and it's probably legally and factually wrong, but just to kind of make a point and I'm going to –

**MR. CAPPE:** Are you describing my answer or your –?

**MR. RALPH:** No, no, mine.

**MR. CAPPE:** Okay.

**MR. RALPH:** My example I'm going to give to you.

So, let's assume the government needs additional revenue, and the minister is considering, I guess, two options: either increase sales tax or increase income tax. And he – so he asked for a decision note from his deputy minister, and you would expect the minister – the deputy minister to advise him about the impacts of both options.

**MR. CAPPE:** Mm-hmm.

**MR. RALPH:** And the deputy minister could say: Well – in his note – Minister, if we raise additional revenues through an increase in sales tax, that hurts the poor more than it does anyone else. On the other hand, you know, the rich do better when it's a sale tax increase. When it's income tax increase that is used to increase revenue, the poor do better because many of them don't pay income tax, and the rich don't do as well.

Ultimately, let's assume now the Finance Minister adopts raising sales tax because it's good for growth and good for jobs. Now, that puts the deputy minister in a difficult spot, and the minister. If the minister gets a note and those kind of risks, and those consequences are spelled out, if I'm a minister, I'm not going to be very happy if this thing becomes public.

Is that fair to say?

**MR. CAPPE:** I suppose. I mean, you should be prepared to defend your decision, I say naïvely.

**MR. RALPH:** But you see the difficulty in the – you know, for a deputy minister –

**MR. CAPPE:** Sure.

I guess I come back to what are the incentives created? I have my own personal view, and I think what underlies the principles of the act are to promote candour and openness within government, as well as promoting openness with the public. And I see those in conflict often. And in this circumstance I could well imagine that the deputy minister would be writing that memorandum to the minister in a – with an eye on how it would be read in the public.

**MR. RALPH:** Right.

**MR. CAPPE:** Whereas, the candor to the minister as a decision-maker should be more candid indeed.

**MR. RALPH:** Right.

So if I'm the deputy minister and I go into your office and I say, you know, minister, there – I haven't got all the risks and all the consequences in this. I want to tell you some of it is, you know, some of the consequences I haven't put in there because they're politically sensitive. And so I advise you those risks, orally, but I don't put those in paper.

Does that result in less effective public policy making?

**MR. CAPPE:** Yes.

**MR. RALPH:** And why is that?

**MR. CAPPE:** For two reasons. The first is that, depending on – you want – I want to have the record complete. I want to be able to come back to the minister and say: Remember when I sent you this memorandum? And the second element of this is that the degree of completeness that goes into that argument should be documented and the analysis should be presented to the minister.

So if I'm shaving the edges, if I'm sanding the corners, then I'm – I should be held to account as the deputy minister. And the only way to hold me to account is to have a record.

**MR. RALPH:** So the deputy minister doesn't put that in his note, and if that's the case, is that

a situation where you have public policy not to protect that advice? And that decision to not protect that advice, in fact, may actually be bad for public policy making.

**MR. CAPPE:** It could be. But I would argue that is not the intent of this legislation. I mean, I do not know what was in the minds of the Members of the House of Assembly, but it would strike me that this – they’re leaning towards openness but that they have in fact – they may or may not have factored in the impact on candor.

**MR. RALPH:** So, I guess, there is a balance and perhaps there is a trade off here between, obviously, candor and transparency.

**MR. CAPPE:** I agree.

**MR. RALPH:** Now, at page 18 of your presentation, I don’t think we need to go to it, you said: “In ex post reviews like this Inquiry, the Commission should have access to the record. But there should be a record to have access to.”

Now, have you looked at this issue before?

**MR. CAPPE:** Only in my professional career when I was in the public service and concerned about what I was creating and what I was not creating.

**MR. RALPH:** Right.

**MR. CAPPE:** And what was available –

**MR. RALPH:** Yes.

**MR. CAPPE:** – looking at the historical records.

**MR. RALPH:** So as an academic, have you written articles or researched the duty to document?

**MR. CAPPE:** Not on that.

**MR. RALPH:** And so most recently, was this brought to your attention by the Commission?

**MR. CAPPE:** Yes.

**MR. RALPH:** And yet – because you were advised that there were issues with regard to the notebooks of civil servants. Is that right?

**MR. CAPPE:** I’m sorry?

**MR. RALPH:** There were issues with regard to the notebooks of civil servants. Were you advised of that issue?

**MR. CAPPE:** Yeah, and I’d seen that in the federal government as well.

**MR. RALPH:** Yeah, so, again, you can accept my interpretation, but I understand that notebooks are not exempt from access to information acts. So if they exist, they have to be produced.

**MR. CAPPE:** It’s a government record.

**MR. RALPH:** And senior civil servants, like the clerk or the deputy minister, often they’re taking notes during the course of discussions with ministers and the premier.

**MR. CAPPE:** Mm-hmm.

**MR. RALPH:** And I would suggest that, generally, they would be considered a Cabinet record and not –

**MR. CAPPE:** I’m not convinced that’s the case and I think it does depend. And, again, I don’t know the statute in Newfoundland and Labrador, but in the federal *Access to Information Act*, there is a recognition that you can have a transitory record that can be destroyed, that you don’t have to keep.

**MR. RALPH:** Right.

**MR. CAPPE:** And it’s usually a jotted note and that kind of thing. And it might be in a black book or not.

**MR. RALPH:** Right.

I guess the point – the government is not an archive.

**MR. CAPPE:** Oh, the government is an archive.

**MR. RALPH:** But not entirely. I mean, obviously, storage costs money, and we don't want to spend money storing stuff we don't need.

**MR. CAPPE:** That's true. In the federal government, we have a national archivist whose judgment is what determines whether something's a record or not.

**MR. RALPH:** Right.

Now – so the notes made by civil servants are not exempt from access. They are potentially transitory and can be destroyed, potentially.

**MR. CAPPE:** Yes.

**MR. RALPH:** And even though they are potentially transitory –

**THE COMMISSIONER:** Excuse me, Mister – yes, Mr. Fitzgerald.

**MR. FITZGERALD:** Yeah, sorry, Commissioner.

I just got a bit of concern about the hole we're going down in here with respect to the ATIPPA. This witness is not being called about the ATIPPA, particularly in Newfoundland, and some of the examples we're giving here. I know the ATIPPA is up for a full review, statutory review, next year. So I think we just need to bear in mind that when we're hearing the evidence from this witness who's not an expert on our ATIPPA and the way these questions are going of – you know, I was going to object earlier, but we still seem to be going down this road with our ATIPPA. I just – I have a concern.

**THE COMMISSIONER:** Response.

**MR. RALPH:** Commissioner, again, I'm not asking him for his interpretation about – of the act. I'm asking him to accept mine. If mine is wrong, then that can be cleared up later by others. I'm basically deriving sort of, you know, I guess, ideas and notions emanating from the act, from my interpretation of it, and asking them – asking him here his opinion about those things, those notions, not about the act itself or how to interpret the act.

**THE COMMISSIONER:** Okay.

Commission counsel have any comment to make on this?

**MS. NAGARAJAH:** The only thing that I will say is that if we're talking about general questions about access to information legislation, that does fall within his expertise in governance so – but not specifically with respect to the Newfoundland and Labrador ATIPPA.

**THE COMMISSIONER:** Okay, so I understand the experience of this particular witness, and in the circumstances, I think these questions of a general nature, as you say, they're your interpretations; they may not be the correct one. And so I'm fine with the questions.

**MR. RALPH:** So we have a transitory record that's a note from a civil servant which is destroyed, and subsequently we learn that that note could've been useful to a public inquiry.

I'm not asking that that's happened, but certainly you can foresee that being a situation.

**MR. CAPPE:** Well, again, I can only comment on the federal system and on my own experience, but I had to make a judgment about the compendium of transitory notes I had and whether they were government records or not and whether I should destroy them at the end of my tenure as clerk.

There were my black books – although I didn't have black books, but they were versions of that – I kept as government records, but I had lots of scraps of paper that were destroyed because I came to the judgment they were not government records.

**MR. RALPH:** Right.

**MR. CAPPE:** And I was obviously prepared to defend that if someone had challenged.

**MR. RALPH:** Right. But in that circumstance there could've been notes, for example, about the sponsorship program or whatever, maybe not, but there would've been –

**MR. CAPPE:** Wasn't, but –

**MR. RALPH:** Fair enough, but you understand my point. There could've been notes about subjects –

**MR. CAPPE:** Well, but I was making a judgment. I mean, I –

**MR. RALPH:** (Inaudible.)

**MR. CAPPE:** – said, was this important for the government record or not?

**MR. RALPH:** And that's the way information management works in government. I mean, it's up to every single employee to make that call.

**MR. CAPPE:** Which is why –

**MR. RALPH:** To whether it's transitory or not.

**MR. CAPPE:** – you want the principles to be clear.

**MR. RALPH:** Yes.

But you appreciate my point. So even the documents that you destroyed, an inquiry subsequently called (inaudible) – they might've been very helpful to us if we'd had those notes.

**MR. CAPPE:** For sure.

**MR. RALPH:** And I guess there are a number of reasons to keep transitory records, and you mentioned one of them, the sort of historical record. And I'm not sure what happens with the clerk of the Privy Council. Is it – are those – I guess not all of them, clearly, but most of your notes as clerk, written as clerk, would they be preserved for history?

**MR. CAPPE:** Absolutely, all my emails.

**MR. RALPH:** And is that by legislation or guideline or what?

**MR. CAPPE:** Yes. No, by legislation.

Now, again, there is a judgment made by the national archivist of whether to keep them or not, but –

**MR. RALPH:** Right.

**MR. CAPPE:** – I don't know how that – what has happened.

**MR. RALPH:** Because that's pretty good stuff, I suspect, for an historian who's looking at both public policy and perhaps just the way government works, historically –

**MR. CAPPE:** Yeah.

**MR. RALPH:** – that would be very useful stuff.

Now, is it fair to say that, generally speaking, civil servants don't rely on the notes of other civil servants?

**MR. CAPPE:** I don't know the answer to that.

**MR. RALPH:** That's fair enough. Perhaps I'll take a different take. So – I mean, if you take a note and it contains information, ideas, proposals that are useful to the government, I mean, once that information is somewhere else, for example, in a memorandum or a decision or even, perhaps, an email, then the value of the note no longer exists, perhaps, as a government record.

**MR. CAPPE:** Perhaps – I mean, I – the reason I felt my notes were transitory was that I had come back and debriefed my executive assistant or deputy secretary, and there was action that would follow from those.

**MR. RALPH:** Right. So it – you know, it doesn't matter where the information is, from a Cabinet perspective, as long as they got it to make decisions. I mean, that's perhaps too broad of a statement, but you understand my point.

**MR. CAPPE:** I do understand your point. But I should say that in my experience, when I was clerk, there were ATIPP requests for documents that were known to exist in the home of a retired public servant.

**MR. RALPH:** Yes.

**MR. CAPPE:** And the retired public servant had to produce his black books that were then released publicly.

**MR. RALPH:** Right.

Now, if we could go to Exhibit P-04489.

**THE COMMISSIONER:** And, again, this one will be on your screen.

**MR. RALPH:** Mm-hmm.

So this is the manual for information management for the government. I've not read it cover to cover. And I suspect the same thing, similar, would exist in the federal government. Is that right?

**MR. CAPPE:** I haven't seen the one in the federal government, but, yes, I'm sure there is. Sorry – it might be worth noting that in the way government departments are organized in this, there is an – a coordinator of access to information who would have read every page in that (inaudible).

**MR. RALPH:** Yes.

**MR. CAPPE:** Okay.

**MR. RALPH:** Now if we can go to, I think – basically scroll to the next page.

And here's where you've got a table of contents – keep going to number six.

Now this – just to be clear, this document has only been an exhibit for less than a week, so I'm sure the Commissioner and Commission counsel are not entirely familiar with the contents, but here under "Guidelines" it says, "Discovery and Legal Hold."

Now would you be familiar with that concept in the federal government?

**MR. CAPPE:** I'm sorry, the –

**MR. RALPH:** Legal – see it says, "Discovery and Legal Hold"?

**MR. CAPPE:** Are you – number 6?

**MR. RALPH:** Yes –

**MR. CAPPE:** Sorry, yes, okay.

**MR. RALPH:** I'm sorry. I'm not –

**MR. CAPPE:** Yeah, okay.

**MR. RALPH:** – being very clear.

**MR. CAPPE:** Yes, number 6.2. Okay.

**MR. RALPH:** And then perhaps we can go to page 229. And again, so this is the chapter on guidelines.

And then go to 252.

And so here's the particular guideline.

And then, finally, we can go to page 257.

And scroll down.

You spoke – right there. That's good. So 3.3 of this guideline says – and you can read it, but "**Legal Hold Process.** Organizations have a duty to preserve relevant information whenever litigation is reasonably anticipated, threatened or pending. This duty arises regardless of whether the organization is the initiator or the target of litigation."

So I guess the question is does this address our problem here?

**MR. CAPPE:** Well –

**MR. RALPH:** And I guess it depends on your definition of litigation, perhaps.

**MR. CAPPE:** But it says whether or – "regardless of whether the organization" is subject to litigation. So it doesn't —

**MR. RALPH:** That's right.

**MR. CAPPE:** – matter.

**MR. RALPH:** Well, no – the question is, though, if I'm a deputy minister of Natural Resources and there's something going on in Finance, I have to be cognizant of that. So it's not necessarily litigation against me, per se. As long as I'm cognizant of litigation within the government, then I have – I may have to, you know, I have a duty to preserve that.

**MR. CAPPE:** There's a case in Ontario that is instructive on this, and I don't know the law in

this but – or read the judgment, frankly – but David Livingston was the chief of staff to Dalton McGuinty as premier, three premiers ago.

And at the end – as McGuinty transferred power to – and authority to Kathleen Wynne, David Livingston, his chief of staff, hired someone who – and if I recall correctly, it was his brother-in-law who was an IT specialist – who came in and erased all the computers.

**MR. RALPH:** Right.

**MR. CAPPE:** David Livingston went to jail.

**MR. RALPH:** Right.

**MR. CAPPE:** So it might be worth looking at that judgment, because it was relevant to exactly this, where arguably they all had –

**MR. RALPH:** Right.

**MR. CAPPE:** – duty to hold – because they didn't know –

**MR. RALPH:** Correct.

**MR. CAPPE:** – whether those documents were going to be –

**MR. RALPH:** If I'm a civil servant and not a lawyer, I don't want to depend on my own interpretation of the –

**MR. CAPPE:** You got that right.

**MR. RALPH:** – word litigation.

**MR. CAPPE:** But I'm not sure why litigation matters because it says regardless.

**MR. RALPH:** Okay. Just look at – let's go to another exhibit, 04542.

**THE COMMISSIONER:** You have that one at tab 13.

**MR. CAPPE:** Yes.

**MR. RALPH:** So this is a definition of litigation and – so this is the UK definition. It

says, “The process of taking a case to a court of law so that judgment can be made.”

Can we scroll down a bit further?

There is the American, and it says, “The process of taking an argument between people or groups to a court of law.”

And arguably, this is not a court of law.

**MR. CAPPE:** Right.

**MR. RALPH:** So, the section that exists now in terms of legal hold – if we can go back to that, that's –

**MR. CAPPE:** 257.

**MR. RALPH:** 04489, page 257.

So the present time, my position – of course I might be wrong, the Commissioner could certainly take a different interpretation of it – this section does not envision that a civil servant should be anticipating a public inquiry. Now, that being said, that, you know – sort of, obligations and legal obligations are different things – but in this circumstance, it seems to me perhaps – and this is just a perhaps – that if we add the words litigation or public inquiry, then we may be able to solve the problem.

**MR. CAPPE:** You think that someone is going to anticipate that there will be a public inquiry?

**MR. RALPH:** Well, after someone has asked for it, or the government has committed to it – I mean, I think the government that's now currently in power, ran on this in the first time they were elected – that they ran on the platform that they would call a public inquiry with regard to Muskrat Falls. In that circumstance, I suspect, once they're elected, I think you're on notice.

**MR. CAPPE:** So, I – I'll – my impression of this – and it's impressionistic, therefore dangerous for me to carry on –

**MR. RALPH:** But you will.

**MR. CAPPE:** – but I will – the – that there probably was a duty to preserve, whether this was going to litigation or not.

**MR. RALPH:** Right.

**MR. CAPPE:** But, if there was litigation reasonably anticipated, threatened or pending, then there is a higher duty.

**MR. RALPH:** Right.

**MR. CAPPE:** If that's what you're driving at, then I would agree. And frankly, it's not obvious to me that if there is political controversy, as the Brit's would say, about a particular project, pick a project, that that political controversy could lead to reasonably anticipated litigation.

**MR. RALPH:** I'm sorry could you repeat that? I might (inaudible).

**MR. CAPPE:** That if – that –

**MR. RALPH:** So you're talking about the civil service?

**MR. CAPPE:** I'd say that if you think there's going to be political controversy around this –

**MR. RALPH:** Yes.

**MR. CAPPE:** – it would be very hard to say, and I don't anticipate litigation.

**MR. RALPH:** Right.

**MR. CAPPE:** I don't think you can do that. I – and I think it would be a bad judgment.

**MR. RALPH:** Right.

Thank you very much.

**MR. CAPPE:** Thank you.

**THE COMMISSIONER:** All right.

I just want to see where we are right at the moment, because it's about 12:30 and I don't want to do what we did yesterday. And I'm certainly not cutting back. I have some questions for this witness myself. So I'm just trying to figure out should we – where are we with regards to cross-examination?

Mr. Simmons, can you give me an idea as to how long, potentially, you might be?

**MR. SIMMONS:** Commissioner, Mr. Cappe's had very interesting and informative presentation, and we have no questions.

**THE COMMISSIONER:** Okay.

Mr. Budden?

**MR. BUDDEN:** I agree it was interesting and informative, but we do have questions –

**THE COMMISSIONER:** Okay.

**MR. BUDDEN:** (inaudible) about ten minutes, really at most.

**THE COMMISSIONER:** Okay.

Consumer Advocate?

**MR. HOGAN:** (Inaudible.)

**THE COMMISSIONER:** Okay.

Mr. Williams?

**MR. WILLIAMS:** No questions.

**THE COMMISSIONER:** Mr. Fitzgerald? Mr. Todd – Mr. Coffey?

**UNIDENTIFIED MALE SPEAKER:** Probably about 15 minutes.

**THE COMMISSIONER:** Okay.

I think, then, we'll come back this afternoon at 2 o'clock.

You're – you're not flying out this afternoon are you?

**MR. CAPPE:** No. Well, I am but late.

**THE COMMISSIONER:** Later? Okay. Good.

So we'll come back at 2 o'clock then.

**CLERK:** All rise.

Recess

**CLERK:** All rise.

This Commission of Inquiry is now in session.

Please be seated.

**THE COMMISSIONER:** All right.

Concerned Citizens Coalition?

**MR. BUDDEN:** Good day, Sir.

As you may recall from our brief conversation earlier, my name is Geoff Budden and I represent a group called the Concerned Citizens Coalition. And the Coalition consists of, largely, retired – former retired public servants who have, for a number of years, been observers and critics of the Muskrat Falls Project.

One of the officers of my group, actually, is a former clerk of the Executive Council in Newfoundland and so he certainly listened to what you had to say, with great interest.

I guess I am covering ground that other counsel have touched on, but I'm going perhaps in a slightly different direction. Both yourself and Professor Blidook used terms such as courageous in terms of the ideal civil servant speaking truth to power and so on.

And I guess my question is the combination of being courageous and serving at pleasure is obviously problematic in any situation but perhaps here in Newfoundland where we have perhaps more of a tradition of charismatic populist leaders of – less of a tradition perhaps of dissent than we perhaps should have. And fewer options.

So, while in Ottawa, one might go to work for the other branch of government or go to think tanks or so forth or academia, there are simply just fewer options in Newfoundland.

So, I'm just wondering that sort of tension between courage and personal security, how can that play out perhaps in place such as Newfoundland with fewer options than one might have for this public servant?

**MR. CAPPE:** It would be presumptuous of me to try to tell people in Newfoundland and Labrador how to deal with the tension. I acknowledge that it's there. I guess if you –

when you get the job – I would make a distinction between the employees hired with, you know, some security and those who serve at pleasure. So –

**MR. BUDDEN:** Yes.

**MR. CAPPE:** – talking about deputy ministers who serve at the pleasure. My – I had this advice very early on in my career and it was that you wake up in the morning with a job and you better be prepared to go to sleep at night without one.

**MR. BUDDEN:** Mm-hmm.

**MR. CAPPE:** That – those are the rules, those are the terms and conditions in which you are employed and it shouldn't affect the quality of the advice you provide. Now I'm not naive enough to think that it didn't have some effect in the back of my mind, but it – I think it is a problem, it's a problem everywhere. Pardon me. The – if you're thinking about what to do about it, I would say that –

**MR. BUDDEN:** That's part of where I'm going with it, but you go ahead

**MR. CAPPE:** – well, I was gonna say that one of the challenges is to look at how people have landed on their feet afterwards or not.

**MR. BUDDEN:** Mm-hmm.

**MR. CAPPE:** And so, I mean, let's – we can take the case that's right in the public where the clerk of the Privy Council twice removed, Janice Charette, handled the transition to the Trudeau government that took place in October of 2015 and by March of – or I think it was January or February of 2016, she was out of a job. And the prime minister had moved her out. He put her on the shelf and he gave her an option. And she ended up where I had been, in London as High Commissioner.

So while she lost her job and it was a bit of a kick in the slats for her, she was treated respectfully and found something else. So that in a sense – the way you treat people who you're going to move out is going to set a tone that – that's really important.



**MR. BUDDEN:** And that perhaps, I would suggest, may go to my point in that, like that's the softest of soft landings, I mean that's – while it may be a kick in the slats –

**MR. CAPPE:** You've got that – you've got that right, Sir. Yes.

**MR. BUDDEN:** Yes. But I'm thinking if you are a deputy minister – we've heard from any number of deputy ministers here, and I know we're not talking about Muskrat Falls, but, after all, that's why were here – we've heard from many of these individuals. And, you know, a level below the clerk where you're obviously at the pinnacle of the public service and anybody who gets to that point presumably has a variety of options. But the step below that, the deputy minister, you don't have tenure, you don't have security, but you are still expected to be fearless. And that's a problem, isn't it?

**MR. CAPPE:** Well, it's an issue. I'm not sure how big a problem it is. You shouldn't take the job if you're not prepared to be at risk. And I would say: If you're not prepared to do the job which includes being fearless, then you're in the wrong game. You're right that that was a very soft landing for Ms. Charette, but I can identify a large number of other people who were pushed out, if you will, and then – but were given a transition period, a way of, you know, four to six months to look for a job. They could've been expelled immediately and given nothing. But the way you treat those people, that gives some comfort to those people who are –

**MR. BUDDEN:** Sure.

**MR. CAPPE:** – in the job.

**MR. BUDDEN:** Because if you don't, then, obviously, a person will get to a certain level and be offered the DM position and it would be almost reckless in certain circumstances – if you have family obligations as most of us do –

**MR. CAPPE:** Sure.

**MR. BUDDEN:** – and you – you leave a tenured position to step into one where you're serving at pleasure.

**MR. CAPPE:** Well, you better do it with your eyes open because we have evidence that people don't last and that they get pushed out. I know of several people who have refused the proposed promotion to deputy minister partly for those reasons, partly because they didn't want the pressure. There's – you know, it's a complex decision, but nobody ever held it against them that they said no.

**MR. BUDDEN:** Okay.

'Cause I guess what – I guess, perhaps, I put this to you for – to hear what you have to say.

In the Westminster model that you've discussed, that we are – well, work within for – I would suggest for the public service who properly function within the Westminster model at function as intended, you really require a whole array of civic institutions and civic ways of behaving. You need an independent judiciary, obviously, but you would also, I would suggest, need a robust press. And, perhaps, even need procedures within government as to what is or is not acceptable behaviour within government and outside of government.

**MR. CAPPE:** Yes. I agree.

**MR. BUDDEN:** Sure.

**MR. CAPPE:** And that's why you have rules of engagement, as it were, that, say, the fine parameters within which public servants should behave. And so – but you – I just wanna emphasize the point you made. There are many different institutions that go into the support of democracy and Westminster parliamentary democracy and the judiciary – independent judiciary and robust press are two good examples.

**MR. BUDDEN:** And I would suggest it ultimately ends with, I guess, the political culture; that if you have a culture where it would be unacceptable to fire people at whim, to be punitive about it, then the Westminster model should work. If you have a culture where that's simply not present, then that really compromises the ability of the public service do job properly.

Would you agree with that?

**MR. CAPPE:** I think that's true to a point and I – so, I just put the caveat on what you've said, Mr. Budden.

The political culture does – is a determining factor in that, but for the successor premier to want to get the loyal implementation and loyalty of the public service, the way he treats those people is going to determine how the successor group is going to respond.

So, we have examples in Canada, and I won't use Newfoundland and Labrador, but in Saskatchewan, for instance, where there's a tradition of turfing deputy ministers – very distinguished and capable – and forcing them out the door when the government changes. Which has been a great boom to the federal government, I should tell you, because we hire them.

But the challenge is then: How is the next person gonna take the job, knowing that when there's an election and a change of government, they're gonna lose the job? So, you know, there's a cost to that. You're not going to attract the best people to be deputy ministers if they're going to be worried about whether they're gonna be treated fairly when the government changes.

**MR. BUDDEN:** And I would suggest even perhaps the way that the ministers, the government treat critics, how they engage in the public discourse can impact how that level of the public service views their – I guess the degree to which their fairness advice would be received.

**MR. CAPPE:** Sure. I think that's a fair statement and I think the – again, I think I would argue that ministers should want to incent that kind of behaviour of being respectful of the public service and being respectful of the relationship between the public service and the public at large.

**MR. BUDDEN:** Sure.

There was a discussion earlier with – in your examination with Mr. Ralph of the duty and also of your direct – the duty to document, freedom of information regime, generally. And it occurred to one of my clients that the duty to document decisions – which obviously reflects the advice and also the weight given to that

advice – can perhaps provide the level of protection to the public service at that highest level in the sense that if you are documenting for all time or at least for some reasonable period of time what your advice is, then perhaps that forces the executive to confront it on its own terms rather than reducing it to – or at least makes it more likely that it will be dealt with on its own terms rather than as a personal – you know, taking on the person personally.

**MR. CAPPE:** I suppose. There's no doubt in my mind that probably the – there would be, again, an incentive to keep a record and document it appropriately, and I would suspect that would – that's there, in any case, to some extent.

**MR. BUDDEN:** Do you – would you agree that that could perhaps provide some degree of protection to the public service, the duty to document and the fact that some of that information, at least at some point, will be publicly available?

**MR. CAPPE:** Sure, but I would argue they should do that anyway. I mean, I don't think – it's not clear to me that a rule or a statutory obligation is gonna change the incentive. If it helps, fine. I think that just as you identified political culture as important, bureaucratic culture is important as well. And if there's a tradition of documenting, then that's much more important than the obligation to document.

**MR. BUDDEN:** Sure. Thank you very much.

**MR. CAPPE:** Thank you.

**THE COMMISSIONER:** All right.

Robert Thompson? Oh, I'm sorry.

Former Provincial Government Officials?

**MR. T. WILLIAMS:** (Inaudible.)

**THE COMMISSIONER:** Okay, you're satisfied.

Robert Thompson?

**MR. COFFEY:** Your instinct was correct (inaudible).

Mr. Cappe, my name is Bernard Coffey.

I represent Robert Thompson who was a former clerk and a former deputy minister of Natural Resources, okay?

**THE COMMISSIONER:** Might be pointed out as well that Mr. Coffey is also a former –

**MR. COFFEY:** Oh –

**THE COMMISSIONER:** – clerk.

**MR. COFFEY:** – that’s another story. We’ll leave that.

The –

**MR. CAPPE:** What goes around comes around.

**MR. COFFEY:** Yeah, isn’t that the case.

Something, Mr. Cappe, because you have experience in Ottawa, why – and you spoke – you told the Commissioner this morning about certain subject matters, you know, at various points in your career, that you thought you should document, remember? You named them, the *Clarity Act*, I think, and there were two –

**MR. CAPPE:** Yeah.

**MR. COFFEY:** – others.

And were you speaking about that in terms of what went on in Cabinet itself?

**MR. CAPPE:** Yes.

**MR. COFFEY:** Okay.

Now –

**MR. CAPPE:** If I could just –

**MR. COFFEY:** Yeah.

**MR. CAPPE:** – be precise, if there were going to be note takers –

**MR. COFFEY:** Oh –

**MR. CAPPE:** – and –

**MR. COFFEY:** – yes.

**MR. CAPPE:** – notes taken, I wanted them to be more effusive and complete.

**MR. COFFEY:** Suggesting that in your experience, then, that they weren’t routinely as complete as you might –

**MR. CAPPE:** Yes.

**MR. COFFEY:** – want it for your purposes, for those three subject matters.

**MR. CAPPE:** That’s right.

**MR. COFFEY:** Okay.

Relating to that, that suggests to me that federal Cabinet meetings are not electronically recorded.

**MR. CAPPE:** They were not in my time, they are –

**MR. COFFEY:** And I’m not suggesting they are today even.

**MR. CAPPE:** Yeah.

**MR. COFFEY:** What I mean, they – in your time they were not.

**MR. CAPPE:** No.

**MR. COFFEY:** And I’m not suggesting they are today – I don’t know.

But, you served between ’99 and two thousand –

**MR. CAPPE:** I should be careful –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – here.

The – from 1979 forward, there was an electronic system put in to allow for simultaneous translation in the –

**MR. COFFEY:** Oh, yeah, but –

**MR. CAPPE:** – Cabinet room. And so I don’t know whether there was a recording of the –

**MR. COFFEY:** I – yeah, but –

**MR. CAPPE:** – translator or not.

**MR. COFFEY:** – but generally, what I’m getting at is, is it routinely this –

**MR. CAPPE:** No.

**MR. COFFEY:** – though? It wasn’t – based on your understanding, purposely put there to make a permanent record.

**MR. CAPPE:** Correct.

**MR. COFFEY:** Okay.

Now in relation to that, you know what, scribing, I’ll put it, like taking notes – which you describe yourself doing, in three instances – I’m gonna suggest to you dates back probably a thousand years or more. Okay, I’ve looked in the – and you can certainly find academic references to – this has gone on for a long time.

**MR. CAPPE:** Yeah.

**MR. COFFEY:** And, in your time anyway, even in the – you know, watching the federal Cabinet meetings, this was still the way it was done.

**MR. CAPPE:** Yes.

**MR. COFFEY:** Are you able to offer to the Commissioner any reason why, looking back on your own experience – or have you thought about it, why the meetings are not recorded?

**MR. CAPPE:** So, there – I can –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – and my experience has been that it is desirable in the interest of candour that you don’t record word for word. And I have made reference earlier to asking for attribution, which is typically not done in recording the minutes of Cabinet. The minutes would ordinarily say, a minister said or –

**MR. COFFEY:** Sure.

**MR. CAPPE:** – and it might in some circumstance say, the minister of Finance said, but unusually, whereas with a recording, you would have a verbatim transcript.

**MR. COFFEY:** (Inaudible.)

So it’s in the interest of candour then, that –

**MR. CAPPE:** I think that’s correct.

**MR. COFFEY:** – that’s your understanding. That was certainly your implicit understanding, anyway, that ...

**MR. CAPPE:** Very much so.

**MR. COFFEY:** And in your time, I’m going to – you know, you – I take it, then, that you never suggested that we should bring in recording equipment?

**MR. CAPPE:** No.

**MR. COFFEY:** I’m not suggesting you should’ve, but I’m just – it didn’t even occur to you to?

**MR. CAPPE:** Even more importantly –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – we did not allow cellphones in the Cabinet room.

**MR. COFFEY:** Yes.

Just – because you do – I take it from your comments this morning – and your presentation – that you do give – you know, teach a course or give seminars or conduct a seminar and discuss things like risk and the idea of risk versus uncertainty.

**MR. CAPPE:** Yes.

**MR. COFFEY:** Okay. And I understood, then, that – (inaudible) right – risk is something to which a probabilistic distribution can be assigned.

**MR. CAPPE:** Yes.

**MR. COFFEY:** And uncertainty is something that generally cannot be thought to be mathematically quantified.

**MR. CAPPE:** Yes.

**MR. COFFEY:** Okay.

But – then flowing from that, is it your experience that even when there is probabilistic distribution analysis and that at times – unfortunately, perhaps, in terms of the cost of things – that despite that, the cost is beyond the, kind of, 99.9999 percentile it comes in at, as it turns out, whatever the project is?

**MR. CAPPE:** Sure. I mean, what you're doing is coming up with a distribution; therefore, it is dispersed and –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – the outcome – anticipating the outcome in advance, it will not be what you anticipated. It will be – but it might be in the range.

**MR. COFFEY:** Yes. And – but at times it can be beyond what anybody even (inaudible)?

**MR. CAPPE:** At times, yes.

**MR. COFFEY:** Guessed.

**MR. CAPPE:** But again, the – so, you know, military procurement is an interesting –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – example –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – because we have experience of consistent cost overruns. Every now and then, something comes in on budget, but the question is how do you – what do you learn from that? And how do you adapt the process to take account of the fact that there's a consistent – modern behavioural economics now talks about some of the biases that are –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – built in. And so can you take account of optimism bias and build that into the distribution? And the answer is yes.

**MR. COFFEY:** And I'm going to suggest to you, though, even when at times that's done, it still costs more. And I'll just –

**MR. CAPPE:** You have evidence on your side, Mr. Coffey.

**MR. COFFEY:** And – yes exactly, here in this instance and – and a ready example, perhaps, in the federal sphere would be Phoenix, the payment system.

**MR. CAPPE:** Yeah, that was – I really don't want to go into that.

**MR. COFFEY:** Okay, and (inaudible) –

**MR. CAPPE:** I don't know enough, but arguably, there, the contract – it would be interesting to go in and see the contract and see how much of this was the risk should have been shared in the contract –

**MR. COFFEY:** Okay.

**MR. CAPPE:** – with the contractor, et cetera. I mean, it was a risk-free project for the contractor.

**MR. COFFEY:** Okay.

What is the difference between a public servant explaining a government policy versus defending a government policy?

**MR. CAPPE:** In explaining, you acknowledge the negative arguments and you do it in a neutral fashion. In defending, you ignore the negative aspects and become a proponent, glossing the justification.

**MR. COFFEY:** Okay. And I believe you indicated that you at times, though – when you were asked to expand upon this, you said at times you – like, in explaining government policy, you would recite, for example, what a minister had said about a policy.

**MR. CAPPE:** Yes.

**MR. COFFEY:** Now, if – I’m going to suggest to you that presumably – I shouldn’t say presumably – it wouldn’t be routine, I’m going to suggest to you, that a minister would acknowledge the negative.

**MR. CAPPE:** That’s a fair comment.

**MR. COFFEY:** Yes.

Therefore, in reciting the minister’s explanation, one – you, in doing so, would not be canvassing the negative.

**MR. CAPPE:** Yeah, fair enough.

**MR. COFFEY:** And I take it –

**MR. CAPPE:** Actually, I’m thinking of circumstances –

**MR. COFFEY:** Sure.

**MR. CAPPE:** – where I’ve been in that position –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – where I attribute the statement to the minister – the positive statement – and then say, however, and have provided the alternative. And I found myself in circumstance where I was explaining government policy with a member of another party. And I’m not a political actor and so I had to make sure that I was being – acknowledging that those –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – were legitimate arguments.

**MR. COFFEY:** And ...

Now, in relation to the duty to document – you’ve been asked about that this morning –

**MR. CAPPE:** Yeah.

**MR. COFFEY:** – you remember.

And we have had evidence – I’m not going to ask that the particular exhibit be brought up, but I believe everyone will recall, over the past week or so we’ve been referred to a UK parliamentary

report which – you know, it certainly addressed duty to document as one of its subject matters. And I think that dates back to 2000. And I understand from Mr. Ralph, who is counsel for the Government of Newfoundland and Labrador, that there’s another such report from 2012.

But why I raise it with you is this: Is there a federally legislated, for the federal government, duty to document that you’re aware of?

**MR. CAPPE:** Not that I’m aware of.

**MR. COFFEY:** (Inaudible.)

**MR. CAPPE:** Frankly, I wasn’t aware of the UK one until I read some of the material (inaudible) –

**MR. COFFEY:** Oh, yeah – I’m not suggesting even there is one in the UK. I don’t know. There’s one in –

**MR. CAPPE:** Okay.

**MR. COFFEY:** – BC, I know that.

**MR. CAPPE:** Yes, I’ve heard that.

**MR. COFFEY:** That’s – (inaudible) well, I know that there is legislation dealing with it in BC.

What I wanted to ask you – because you operated at the most senior level in Treasury Board in the late ’90s in Canada and then as clerk, you know, as the centuries changed. Did it – the civil service, to your knowledge – like, when you were at the top end of it, in the federal civil service – ever suggest to the government of the day implementing a duty to document?

**MR. CAPPE:** Not that I’m aware of.

**MR. COFFEY:** Do you recall it – again, bearing in mind whatever confidentiality concerns there might be – do you ever recall having a serious debate within the federal civil service about that issue or that idea?

**MR. CAPPE:** Not about the duty to document, but whether –

**MR. COFFEY:** (Inaudible.)

**MR. CAPPE:** – it was a desirable fact to do so, yes.

**MR. COFFEY:** Yeah.

**MR. CAPPE:** But not with respect to –

**MR. COFFEY:** Legislation.

**MR. CAPPE:** – an obligation.

**MR. COFFEY:** All right.

Now, you did refer, I believe, to loyal implementation of –

**MR. CAPPE:** Mm-hmm.

**MR. COFFEY:** – government policy, whatever –

**MR. CAPPE:** Indeed.

**MR. COFFEY:** – the government policy is.

And it was suggested to you, I think, by Mr. Ralph – he asked you about, well, if, as a civil servant, one, you know, has doubts about the wisdom of a policy, how far one might go. And in – I think he was trying to say, well, either you're not gonna resist it or to have it given a second look. I'm gonna suggest to you that if one is in a situation where you, as a civil servant, are asked to implement something that in good conscience you can't do, okay, and I appreciate there are differences, you know, sometimes can be life and death.

**MR. CAPPE:** My conscience and your conscience.

**MR. COFFEY:** But my point being this, if it's something one cannot do, then the choice one has really is to leave, that's –

**MR. CAPPE:** But that is the ultimate –

**MR. COFFEY:** Yeah.

**MR. CAPPE:** – choice, one can leave. I do – I keep coming back to this notion of making a judgment about whether the issue itself is severe enough or serious enough that warrants –

**MR. COFFEY:** Yes.

**MR. CAPPE:** – you going back to the minister or not.

**MR. COFFEY:** Yes.

**MR. CAPPE:** And, again, on conscience, I mean, I'm sad to say that I've been involved in implementing a lot of policy I think was bad, but not severe enough or not serious enough that I felt the need to leave.

**MR. COFFEY:** Yeah. And as you put it, the government of the day has democracy on side.

**MR. CAPPE:** Indeed.

**MR. COFFEY:** Yes.

Now, two final topics are – one is, you know, you've heard the phrase, like 'non-political', 'partisan', at times, and you have a lot of experience, academically and practically, in this – you know, in dealing with these ideas. What does 'partisan' mean in this context?

**MR. CAPPE:** To my mind, partisan means politically involved, party-political.

**MR. COFFEY:** Okay, yeah, actually being a member of a party.

**MR. CAPPE:** Or carrying out or engaged in party politics.

**MR. COFFEY:** And I raise it, you know, in – from the perspective of this, is that Acadians have a right to vote. Correct?

**MR. CAPPE:** That's a good thing.

**MR. COFFEY:** And in fact, I – if I – all Acadians can, including public servants –

**MR. CAPPE:** Yes.

**MR. COFFEY:** – and the judiciary.

**MR. CAPPE:** Yes.

**MR. COFFEY:** They can and do vote. At the moment, when anyone casts a ballot where

there's a party involved, they are making a choice between parties, aren't they?

**MR. CAPPE:** Very much so.

**MR. COFFEY:** So then, you know, that sort of thing, that's not partisan, in your world.

**MR. CAPPE:** I'm going to use your term, that's being done with them and their conscience –

**MR. COFFEY:** Right.

**MR. CAPPE:** – not engaged with others.

**MR. COFFEY:** Okay. And that's the distinction you would make?

**MR. CAPPE:** Absolutely.

**MR. COFFEY:** Okay.

**MR. CAPPE:** I mean I can tell that I've voted for three different parties over the course of my life and I, you know, defy anyone to tell me what party I sympathize with.

**MR. COFFEY:** Now, and I'm gonna suggest to you whether – based upon what I've heard from you is, is that it might depend upon the policy or the party of that particular day. It depends on –

**MR. CAPPE:** Sure.

**MR. COFFEY:** – on what their approach is.

So one final topic is this, is – you've been asked about security of tenure. And that sort of thing, in particular, is a – in the federal context, it would be at the deputy minister's level.

**MR. CAPPE:** Mm-hmm.

**MR. COFFEY:** And you've spoken that – I'm gonna suggest, fairly eloquently on it. But to put it in context here, I'm gonna suggest to you that in Canadian society the general legal rule is, is that no one is guaranteed a job –

**MR. CAPPE:** Agree.

**MR. COFFEY:** – a particular job. You're – generally, one – if one is employed, you are entitled to – in accordance with employment

laws, assuming there's nothing else is involved – reasonable notice or paid in lieu there of, and that's it.

**MR. CAPPE:** Mm-hmm.

**MR. COFFEY:** So as, for example, in deciding to take a deputy minister's job, that would be a consideration presumably?

**MR. CAPPE:** Presumably.

**MR. COFFEY:** That's right. Mmm.

**MR. CAPPE:** And all the accoutrements of compensation –

**MR. COFFEY:** Sure, yes.

**MR. CAPPE:** – and what notice one could expect –

**MR. COFFEY:** Yeah.

**MR. CAPPE:** – and what serving at pleasure means and what consequences come from being released.

**MR. COFFEY:** Yes. And, I'm not going to suggest I am being exhaustive, but in terms of security of tenure, such as there is, you know, generally, bargaining unit members, based upon seniority as a general rule, judges, perhaps to a certain – university tenure, to a certain extent –

**MR. CAPPE:** Which I don't have but –

**MR. COFFEY:** – yes.

**MR. CAPPE:** – but carry on.

**MR. COFFEY:** Yes. And a fixed term – fixed-term contracts.

**MR. CAPPE:** Sure.

**MR. COFFEY:** And –

**MR. CAPPE:** But just on the point–

**MR. COFFEY:** Sure.

**MR. CAPPE:** – of seniority, that really does depend on the contract –



**MR. COFFEY:** Yes, and –

**MR. CAPPE:** – provincially, okay.

**MR. COFFEY:** – and I acknowledge that and I'm – but I'm just, as a general (inaudible) –

**MR. CAPPE:** Fair enough, fair enough.

**MR. COFFEY:** – yeah. And even then, as you've pointed out, at one point you were a deputy minister and you had to implement – due to budget cuts, you had a lot of people let go.

**MR. CAPPE:** Mm-hmm.

**MR. COFFEY:** All right. Which – some of them bargaining-unit people.

**MR. CAPPE:** Very much so.

**MR. COFFEY:** Yes.

**MR. CAPPE:** Can I –

**MR. COFFEY:** Sure.

**MR. CAPPE:** – that's what I had in mind when I came back on the point of seniority because in that case, what we did was a ROM, a reverse order of merit. And so, what we did was take people engaged in similar work and decided which ones were the better ones and kept them; and which ones who were the least good – who left. Which created a whole series of other problems because the good people knew they'd find other jobs elsewhere and wanted the cash out; and the bad people got the cash out but weren't gonna get other jobs some place.

**MR. COFFEY:** And – thank you, Commissioner.

**MR. CAPPE:** Appreciate it.

**THE COMMISSIONER:** Thank you very much. All right. I notice –

**MR. COFFEY:** Thank you, Mr. Cappe.

**MR. CAPPE:** Thank you.

**THE COMMISSIONER:** – Edmund Martin's counsel's back. Any questions?

**MR. CONSTANTINE:** No. Thank you.

**THE COMMISSIONER:** Consumer Advocate?

**MR. PEDDIGREW:** Good afternoon, Mr. Cappe.

My name is Chris Peddigrew. I represent the Consumer Advocate and the ratepayers of the province.

I don't have a lot of questions for you today, a few areas I do want to cover, most of them in relation to things you've already discussed today, so just some follow-up.

When you mentioned – oh, sorry, before I get into some of that – the administrative record from one administration to another – how, in your experience, how is that preserved, so how is it passed on from one administration to another?

**MR. CAPPE:** It belongs to the prime minister of the day – sorry, it belongs to the prime minister who was prime minister at the time it was created. So, when access to information requests would come in for documents that were done in the Mulroney government years, when I was serving as clerk under Chretien, I would deal with Mr. Mulroney and ask him about – you know, here's what we can do with your documents and can we release them or not, and it was his call.

**MR. PEDDIGREW:** The – Prime Minister Mulroney's call as to whether they would be –

**MR. CAPPE:** The former Prime Minister Mulroney.

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** Yeah.

**MR. PEDDIGREW:** And so, how do you ensure that they're preserved or that they are –?

**MR. CAPPE:** Again, the national archivist would have preserved them.

**MR. PEDDIGREW:** Okay. And that was my, I guess, next line of questioning. So, the national

archivist, is that an office of people or is that one person?

**MR. CAPPE:** Yes.

**MR. PEDDIGREW:** Both?

**MR. CAPPE:** It – both, it's both.

**MR. PEDDIGREW:** Both of them.

**MR. CAPPE:** I mean there is an individual who's title is national archivist, it's created under the *National Archives Act*. And then he has several thousand people, is my guess, but I don't know, hundreds anyway, of librarians and documentarians and all kinds of professionals working there.

**MR. PEDDIGREW:** Okay. But one of the roles of the archivist, as far as you know, is to preserve records –

**MR. CAPPE:** Indeed.

**MR. PEDDIGREW:** – that go from one government to the next government.

**MR. CAPPE:** Indeed. Yes.

**MR. PEDDIGREW:** Okay. Do you know – provincially, do you know if that's a role that provinces would have?

**MR. CAPPE:** I don't. I know that in Ontario there's a comparable individual, but I don't know whether that's true in all the other provinces.

**MR. PEDDIGREW:** Okay.

And so – and this may relate to the first answer you gave, but – so then, the paper records that would go from a – or belong to a first minister – or that's a premier or prime minister, it's the activist role to – federally anyway – to ensure that they get maintained and they're dealt with appropriately and, I guess, passed on to the next administration, to the extent they're needed.

**MR. CAPPE:** No. Well, they're not passed on to the next administration, that's the point.

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** They are kept, insofar as they are the prime minister's documents –

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** – they're kept for the historical record and, really, only the prime minister or someone he identifies – or authorizes can have access to it.

**MR. PEDDIGREW:** So, if the prime minister says no, then the new prime minister can't see them.

**MR. CAPPE:** Right.

**MR. PEDDIGREW:** Unless they were subject to an ATIPP request or something.

**MR. CAPPE:** And that was a duty of the clerk to make sure that that didn't happen.

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** Right?

**MR. PEDDIGREW:** Okay.

Presentations to federal Cabinet, again, in your experience, is that something that – presentations, would they always be made by civil servants or would there be somebody, perhaps, from a Crown corporation that would be come in and give a Cabinet presentation, or would it be Crown corporation to civil servant, and then civil servant to Cabinet?

**MR. CAPPE:** I would say – I'm really trying to think – I can't recall a presentation that wasn't made by a deputy minister or a senior civil servant, but you do have to be careful of the boundaries here. So, we would have the chief of Defence staff or a senior military person, from time to time. You might have allowed a – someone from a Crown corporation to attend, but it would have been an official of a department, the relevant department that would've presented, I think.

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** That's my recollection.

**MR. PEDDIGREW:** And then, so somebody from outside Cabinet attending a Cabinet meeting, is that something that happened in your experience or was it (inaudible) people from staff or, I guess, anybody outside Cabinet – or in Cabinet meetings, in your experience, just Cabinet ministers?

**MR. CAPPE:** Just Cabinet ministers and there would be officials in attendance as appropriate. If the minister of Immigration was making a presentation, he might have one or two of his officials there.

**MR. PEDDIGREW:** Okay. But otherwise –

**MR. CAPPE:** (Inaudible.)

**MR. PEDDIGREW:** – it would just be a minister.

**MR. CAPPE:** It was just ministers.

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** And the seating arrangement is important. Only ministers sat at the table.

**MR. PEDDIGREW:** Right. Okay.

And so, I guess, unless somebody was needed for a particular reason for that meeting, they would –?

**MR. CAPPE:** And then they – that's right.

Now, committees would be done different, Cabinet committees, but full Cabinet – that's right.

**MR. PEDDIGREW:** All right.

I just wanna ask you a couple of questions now about – we had Stan Marshall here as a witness, CEO of Nalcor, presently. And Mr. Marshall was asked some questions about Crown corporations, and I just wanna read out a couple of his comments and get your thoughts on them.

So, and I do note, in your presentation, you – you know, you talked about Crown corporations and you said they're different but not very different, I think, was the –

**MR. CAPPE:** Yeah, to an extent, it was.

**MR. PEDDIGREW:** – to an extent, I think, was the language that you used, okay. I was trying to find it there but ...

So, Mr. Marshall had said – he said: I always sympathize with those who work for Crown corporations. And he was asked: How so? He said: Because they're torn between operating a business and trying to operate as a business and yet, being heavily influenced by government considerations.

And down a little bit further, he goes on to say: It's just where the political meets the business, and even if both parties are acting in the best interests of the province or the industry, it's just that they have different interests – genuine interests but different – so we can't fault either one of them but it's very – it's where the rubber meets the road, it's a very difficult situation to be in.

So I think what he was saying is Crown corporations have this, you know, dual role of, I guess, somewhat private in certain aspects but also public in certain aspects. And I guess Mr. Marshall indicated that it's a tough place to be.

I just wonder what your thoughts are on that.

**MR. CAPPE:** So, I think that's an overgeneralization although I share his sentiment, okay?

For some Crown corporations –

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** – I do sympathize, to use his term, because you're expecting them to operate in a commercially competitive fashion, and at the same time be sensitive to government objectives and the political requirements. But that doesn't apply to all Crown corporations.

**MR. PEDDIGREW:** Right, I guess I'd be thinking about more the first example you gave, so a Crown corporation that's operating in an area where it would be –

**MR. CAPPE:** Where there are computers?

**MR. PEDDIGREW:** – competing against private industry and carrying out projects that private industry might otherwise carry out.

**MR. CAPPE:** Then you have to ask, what are the purposes of the Crown corporation, why – what is the public interest in the Crown acting in this way, and why that corporate form is appropriate in terms of dealing with it? Is it something that could be done by a government department, for instance, or not? And there may be reasons why you want the corporate form because it's a more efficient vehicle for delivering some kinds of activities. Or, it may be inappropriate because it is inherently a governmental activity where you're asking them to do what is in the public interest and not commercially viable.

So, when I used the example of EDC before –

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** – I was making a very clear distinction between, here's what they do commercially and here's what they do for government. And there's a corporate account, where the Auditor General is their auditor and assesses that they've been making effective corporate decisions, and then there's Canada Account where they hold, on their books, liabilities that actually belong to the government, qua government.

**MR. PEDDIGREW:** Okay. I was gonna go there but before I do, I guess, just back to the – Mr. Marshall's comment. And I get he was making them in a general sense but, I guess in the sense of a Crown corporation like Nalcor – and I realize we're not getting into the details of the Muskrat Falls Project – but a Crown corporation like Nalcor who is carrying out a public – or, sorry – a project, but it has implications for the public. But it's also, you know – a lot of trappings of a private industry-type project. I guess I'm just interested in your thoughts on what – do you agree with Mr. Marshall that it would be a difficult place to be? Or sympathize with somebody who's trying to (inaudible)?

**MR. CAPPE:** Again, I think it can be a difficult place. I can sympathize with them. I don't ipso facto assume that I – that that is a difficult place.

I can't think of very many private projects that are of that nature.

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** I mean, there are but ...

**MR. PEDDIGREW:** Right, okay. And so, talking about the EDC example that you just brought up, I did have a question for you on that. So I believe your evidence was this morning – and I was trying to write down the notes, so I might not have gotten it exact, but I think you said that if – and correct me if I'm wrong here – but if EDC were to identify a risk that they were not willing to take on –

**MR. CAPPE:** Yes.

**MR. PEDDIGREW:** – but the government of the day felt that it was – look, this is a viable contract we want to enter into, or a viable project. We realize there's risk that EDC is not willing to take on, but we're willing to take that on, but I think the word you – or the words you used were that government would want 'to account' for the cost or – well, the cost and the risk, I guess.

**MR. CAPPE:** Yes.

**MR. PEDDIGREW:** And so, why – and when you say 'account', you mean put it on the books, identify a number of what you think this is going to cost?

**MR. CAPPE:** I mean exactly that.

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** Yes. That your balance sheet is gonna change as a result.

**MR. PEDDIGREW:** Okay. And what's the purpose, or what's the reason?

**MR. CAPPE:** As a constraint on gratuitous incurring of liability. You're incurring a liability on the part of the Crown, on behalf of the public, and you have to recognize that liability in the Accounts of Canada, in the case of EDC.

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** There are two directive powers I should've mentioned earlier. I believe it's section 23 of the Export Development Corporation, but I think there's also a section 49 – or I may have the numbers wrong – of the *Financial Administration Act*. So the *Financial Administration Act* gives the power of directive to the Governor in Council, on the recommendation of a minister and the minister of Finance. So the responsible minister for whatever the Crown –

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** – corporation is, and the minister of Finance 'cause he's responsible for accounting of the – for the liabilities. And then, you can get a directive in the case of the FAA, the *Financial Administration Act*, or an authorization under the Export Development Corporation Act [sp. *Export Development Act*]. And the accounting, just to come back to your point –

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** – the accounting is important, because the fiscal framework has to have meaning. The problem arises – and I was a junior official in the Department of Finance in the early '80s, and I remember when Standard & Poor came in and met with the deputy minister and went over the books and over the accounts and trying to assess what – how to rank Canada's debt and how – and what ranking they would give it. And the question came back for the deputy minister: you've got this thing called the Consolidated Revenue Fund; how do we know that it'll be there next week? And, it had existed since 1867 and so nobody really had a very good answer of, you know –

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** – but there's somebody checking on that, because they're gonna downgrade our bonds if we don't actually have a good answer to that.

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** So the deputy minister came up with a very good answer, of course. But the challenge is that those accounts, if the Auditor

General doesn't do his job, or her job, then you've got a problem of how the market is going to assess the quality of Canada or of provincial debt.

**MR. PEDDIGREW:** You need to know what your exposure is.

**MR. CAPPE:** Exactly. And you – as you incur contingent liabilities – when I – I joined the Department of Finance in 1982, after I'd spent time in Treasury Board, and the first project I worked on was contingent liabilities. It was a problem then; it's a problem now; it's not going away. But that – that was – and at a time when it was increasingly important for government to use these contingent liabilities as a vehicle of public policy, an instrument of public policy.

**MR. PEDDIGREW:** Okay. Thank you.

And I guess then the role of the Department of Finance is key in any sort of analysis.

**MR. CAPPE:** Very much so. I agree.

**MR. PEDDIGREW:** All right, the last area of questioning, I wanted to ask you about, Mr. Cappe, it's just – so we – I guess we've talked today about the role of the public service, the role of different responsibilities within the public service, how to get a full and frank discussion on issues in order to arrive at the best decision, but how to balance that with transparency and openness and make sure the public is informed and sometimes those two goals don't always measure up with each other, and they compete.

I guess I'm wondering, so the role of a regulator – so the Public Utilities Board in this case is the one I'm thinking of – how can a regulator factor into some of your presentation today and some of the points you're making in terms of informing government, helping government arrive at better decisions?

**MR. CAPPE:** I think of a regulator as an administrator of an existing policy. So it's, again, pursuant to legislation that's been passed by the Parliament or the Legislature. But they are implementing what the elected officials have directed in effect. And there are boundaries

within which they can make judgments and they have certain discretion.

But, they may or may not be at arm's length. I have been a regulator as a deputy minister. I, as deputy minister of Labour, was the administrator and enforcer of the *Canada Labour Code* as it applied to Crown corporations, banks, airlines, et cetera.

And so, I was inside government recommending policy on what labour standards should be but administering the existing standards –

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** – as well.

And the same thing with the *Environmental Protection Act* when I was deputy minister of the Environment. So there is both a policy and an administration role of government departments, and they are exercising those – that – not discretionary regulatory authority but enforcement action in that context.

**MR. PEDDIGREW:** Okay.

I guess – and when I think of the Public Utilities Board here in this province, it's, you know, a subject-matter expert on utilities –

**MR. CAPPE:** Yeah.

**MR. PEDDIGREW:** – electricity, providing electricity to the people of the province, the ratepayers –

**MR. CAPPE:** Yeah.

**MR. PEDDIGREW:** – at the lowest possible rate with reliable service. So I would suggest they are a subject-matter expert. And so when government is thinking of embarking on a project like Muskrat Falls, do you see the role of a subject-matter expert like the regulator helping inform the decision?

**MR. CAPPE:** I'm gonna give you an ambivalent answer –

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** – you're not gonna like.

The – but, Mr. Peddigrew, I think that you want to involve all the people who have subject-matter expertise that can contribute –

**MR. PEDDIGREW:** Okay.

**MR. CAPPE:** – to it. So in that sense, I'm sure I'm saying what you want.

However, I would say they should not be in charge of collating and integrating the kind of advice that goes to ministers, but they should be informing them. And we have lots of examples and someone earlier mentioned AECL. I mean, you know, should an independent Crown corporation involved in nuclear be involved in setting nuclear policy? They should be helping inform it, but they shouldn't be setting it.

**MR. PEDDIGREW:** Okay.

And when you say helping inform – government should look to them for –

**MR. CAPPE:** Expertise.

**MR. PEDDIGREW:** – ultimately it's government's decision, but their expertise is certainly something that's –

**MR. CAPPE:** That's right, but –

**MR. PEDDIGREW:** – helpful.

**MR. CAPPE:** – there should be a department – the model in this – and it's mentioned in *A Strong Foundation* document – is what was then called Solicitor General and now is the Public Safety Department, where there's a very small secretariat at the core of this large organization that advises the minister; it's a secretariat that advises. But around – it's a spoke and hub model and around the penumbra of this organization is the Correctional Service, the RCM Police, the Security Intelligence Service, et cetera. All of these agencies are independent agencies in a sense, but the way you would want to inform the minister is that the secretariat at the centre would be advising the minister but using the expertise in those agencies. But those agencies don't usually have policy capacity.

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** They have operational policy capacity, but they don't have grand-scheme policy capacity.

**MR. PEDDIGREW:** Right. Okay.

And I guess in this case, you know, the PUB has its role; government did go to the PUB to seek information, to seek a report for their views.

And I guess that's the basis of my question is, in that instance and where government seeks out the Public Utility Board's insight and input into a decision, I just wondered what your thoughts were on the importance of listening to them and hearing what they have to say.

**MR. CAPPE:** I use a different example of deciding on the total allowable catch, and I have in mind what happened to the cod in Newfoundland, actually, and I use this with my students. And there is a cod expert in the Department of Fisheries who thinks that you should have a very low total allowable catch, but as you go up the line in the Department of Fisheries, the groundfish director thinks differently and the fisheries director thinks – director general thinks differently, because they are considering cod versus other groundfish versus – and as it – and then there is somebody who worries about fishermen and fisherwomen, and fishers get a different – so that at the end of the day the minister is making a judgment with the input –

**MR. PEDDIGREW:** Right.

**MR. CAPPE:** – of that expert –

**MR. PEDDIGREW:** Yup.

**MR. CAPPE:** – but not as a determining factor.

**MR. PEDDIGREW:** Right, one factor in –

**MR. CAPPE:** Right.

**MR. PEDDIGREW:** Okay.

Okay. Those are all the questions I had. Thank you.

**MR. CAPPE:** Thank you.

**THE COMMISSIONER:** Thank you.

All right. Redirect.

**MS. NAGARAJAH:** No questions, Commissioner.

**THE COMMISSIONER:** Okay.

I just have a couple of questions if I can.

Let me pose to you a bit of a hypothetical: say if you were in a situation where the federal government had decided to proceed with a particular type of project and it did not have the expertise within government ranks itself to carryout the necessary risk analysis, et cetera. What normally would be expected with regards to how you would proceed? How would the public service need to respond to that?

**MR. CAPPE:** So, a couple of things, Commissioner. The first would be that there would be identified a lead department and a lead minister, and I think it's important that there be one of those, but that there be an obligation to involve others. When this report – a strong foundation was done in 1996, I chaired the deputy minister task force that was on working horizontally, not the prone position, but working collaboratively across departments. And that's a very important part to bring in the expertise that may exist in other departments – back to Mr. Peddigrew's point.

So, you would set it up with someone who's in the lead, someone who's – other people who are also involved. And then you would go out and hire the expertise required and, for instance, I've spoken with people who were involved with the GM bailout, for instance. Actually, I was involved with the Chrysler bailout in 1981 or so or '82 – no, '79. And you go out and you hire KPMG, Deloitte or whomever to give you financial advice because you don't necessarily have the same sophistication to go over the books of the – sorry – of the company. And they're going to put very capable people on it and you need your own capable people.

Now, you may have – I mean, you know, the Comptroller General of Canada has very competent accountants, but they haven't really got the same experience as some of those auditing corporations – auditing companies and

consulting firms. So you would go out and hire them.

And you would go to a bank who's making these kinds of judgments and get their advice as well. You would contract with them. One of the tactics that sometimes these companies use is to go up and give a \$5,000 retainer to everyone so that the government can't go – everyone's in a conflict position, that's not news, but you try to find somebody who's capable and can give you independent advice. And you put them in the room sometimes, I mean, you will trot them out to the negotiating table when it's helpful.

So you don't assume that the government, even in its ensemble of action, activities, would be – would have all the expertise it needs.

**THE COMMISSIONER:** Okay. So, is it my understanding, then, that it would be within the role of the public service to make those determinations as to whether we need to go outside to get that advice and whatever?

**MR. CAPPE:** In the federal government, that would be the public service decision.

**THE COMMISSIONER:** Okay. Is there any reason why that should be different in a provincial government?

**MR. CAPPE:** I can't see any. I should just add that sometimes there are large financial stakes at play and the money required for this might not be available in your budget and, therefore, you might have to go to Treasury Board or back to the centre to get somebody to allocate that kind of money, but I don't think it's different in the province than it is in the federal government.

**THE COMMISSIONER:** Okay.

I think I know the – how you're gonna answer this, but I need to ask the question anyway. So let's take this example a little bit further and let's say that the project that's chosen, the government, the federal government decides that they're gonna use of its Crown corporations to deliver the project.

Would there be any requirement then by government, public service or whatever, if you were being provided with issues, with numbers

related to risk and things of that nature, would there be any requirement to check or do some sort of review of what you're being given by your Crown corporation?

**MR. CAPPE:** I'm not sure. I think that, if I understand the question, you would have your officials in the department play a challenge role on the corporation.

You know, I spent some time talking about the role of Treasury Board and Finance, and it came back just again on Finance, but there's a role for those central agencies to play as a challenge function to the proponent department.

Now that becomes more complicated when the premier or the prime minister is the proponent, but – putting that aside for a moment – the role of the Finance Department in worrying about the contingent liabilities and the Treasury Board in terms of the management preoccupations, they are playing a role vis-à-vis, the Department of Natural Resources or the NRCan in the federal context, and they're pushing back and they're being demanding.

And one of the other things that would be done in the federal level is that there would be a task force set up if there were a number of departments involved. And so you might have, for instance, in something in that – that was simply an energy project, but if it had in – First Nations territory involved, you'd want somebody from that department and you might want the Agriculture Department involved. You can imagine you would set up a task force or a steering committee – there're various structures that would be created that would allow you to see the ensemble of the risk – and that committee then plays a role in preparing the documents that would go to Cabinet.

So one of the obligations, I think, of the Cabinet office has been that the Privy Council Office in Ottawa was to insist that that process – a process like that had been followed. If a department came with a document for Cabinet, and there had not been an interdepartmental committee prior, you would have insisted that that happen so that all of those issues would be on the table prior to it going to Cabinet.

**THE COMMISSIONER:** Okay.



All right, I wanted to ask you – you’ve referred – and you just – Mr. Peddigrew just referred to the issue of the involvement of the Department of Finance. So you – can you foresee any sort of a significant major project where the Department of Finance or Treasury Board would not actually be involved? Where there’s a large expenditure of money?

**MR. CAPPE:** No. Not if there’s a large expenditure of money and/or large other risks. Then – in the federal government – and that – I mentioned the – what was the Major Crown projects policy, when I was in government, now the major projects policy. And it would be that that would go to Treasury Board, and Treasury Board might say, eh, we don’t need to see this again. Or they might say, no, we’re triggering the policy, we want to see this every six months or we want to see it every two months, depending on the risks.

**THE COMMISSIONER:** Another little area of – that I wanted to ask you a question, like, you speak as if the public service is, you know, communicative with each other, department to department, everything works cozy and –

**MR. CAPPE:** Of course.

**THE COMMISSIONER:** – whatever I’m not – I think that’s – I’m being a little bit facetious here, but what do you say to this situation: What if you had a department who had an official in the department who is assigned a certain project that government was undertaking and they were given information, but because it was not within their scope of work, so to speak, they just say: Well, that’s not in business, and I’m not going to share this with another government department who probably should know about this.

How do you – have you ever run across that and how would you deal with that?

**MR. CAPPE:** Yeah, I mean, it happens all the time. So, you know, the organization of government by department is for the purpose of efficacy, of improving the effectiveness by which government delivers these things. I mentioned – it’s actually in this Strong Foundation document, there’s a reference to Managing Horizontal Policy Issues, which was the task force that I chaired. And we discovered

the blindingly obvious: That you have to give people responsibility but you have to give them direction; you have to align the objectives.

So, you know, when I was saying that you would have a department of – let’s say NRCan in Ottawa – that was working on a major energy project and they say: Oh, it’s only energy; it doesn’t have anything to do with Indigenous Services. And it’s the role of the central agency to say, no, no, no, there’s something here that requires more involvement of other departments. And it is then aligning those objectives and saying that the energy objectives are not inconsistent with the objectives of the department delivering Indigenous services.

Now, how do you bring those together is a bit of magic and a little bit of good public administration, but it would be an irresponsible deputy minister, I would argue, who thought that a major project didn’t have other departments’ interests involved. And, you know, something I tell my students is that I don’t think there is an issue of any import that the Government of Canada faces that doesn’t cut across departments and they all love to give me examples, all of which I can show them there is a multiple – multitude of departments that are involved.

Similarly, there are very few projects that have a – simply a federal involvement because they often touch provincial competence and jurisdiction. So, you know, again these are little games you can play, but at the end of the day, a responsible official will make sure that other departments are involved and other governments are involved and engaged to some degree.

**THE COMMISSIONER:** Okay.

Now I want to just shift gears a little bit to the issue of access to information legislation and whatever. And you spoke about – earlier about loyal implementation of government policy. I’m struggling here with what I’m seeing with regards to ATIPPA legislation.

So you have a province or a federal government that has, as its policy, accepted that there will be openness and transparency, there are rules to follow. And I would have thought that loyal implementation means you do everything you can as a public servant to make sure you comply

with the implementation of that legislation. Yet, for some reason, which I think is now becoming a bit more obvious to me, methods are oftentimes used to actually thwart the intention of the legislation. How do you fix that?

**MR. CAPPE:** I'm going to try to recast this, if I may, Commissioner. They –

**THE COMMISSIONER:** I like the way I cast it, but ...

**MR. CAPPE:** I – well, I just want to start off where you began. To do everything you can to comply is what you said you would've thought they would do. Sometimes they want to do the minimal amount required to comply, rather than everything you can. But they are at least trying to comply.

And I would say that often the intention – I'm a big fan of legislative intent being manifest in preambles in legislation. And I know a lot of lawyers hate that. But what it does is it helps an official understand what the intent is. And where you have legislation that trades off different objectives, it's better to have them articulated by Parliament than not or trying to infer what they might be.

So again, if there's a hierarchy of objectives, if the primary objective is disclosure, then you should do everything you can to comply, as you suggest. If there is an equilibration that you're looking for, then maybe you only want to do what's necessary to comply. And I think there's a legitimacy in both of those. I don't think it's ever legitimate to actually try to thwart the achievement of the objectives in the legislation.

And that – so that's why I'm saying that I think you can find the minimal requirements necessary to comply with the legislation.

**THE COMMISSIONER:** So what you're saying then is that whether they be a politician or a public servant, there should never be – it's not appropriate to act to thwart the legislation.

**MR. CAPPE:** I think that's correct. In fact, I'm very comfortable in – I would say, it is never legitimate to thwart the accomplishment of the objectives of that legislation. And I come back

to that opening principle I articulated of the supremacy of Parliament or the legislature.

Now, it is up to the legislature to be clear and to hold the government to account.

**THE COMMISSIONER:** Right.

Can you ever, in your experience, see a situation where, for instance, new government ministers coming into Cabinet would be told, the less you write, the better?

**MR. CAPPE:** Unfortunately, I can easily imagine that.

**THE COMMISSIONER:** Right.

And is that appropriate?

**MR. CAPPE:** No.

**THE COMMISSIONER:** Okay.

**MR. CAPPE:** But – if I may – I would want to have the purpose of the document, you know, the documentation, clear. Why do we document? We do it for a purpose, for a reason, and it's because we think history matters on public policy, and we think that accountability matters.

**THE COMMISSIONER:** So it's a question of how you educate people with regards to purpose.

**MR. CAPPE:** I like that, yes.

**THE COMMISSIONER:** Okay.

Okay, a couple more questions, if I can.

Mr. Ralph, this morning, referred to the difficulty, if I can put it that way, of governments if they had to continue to store records. It struck me when he – a couple of times he said that, and it struck me that, for the most part, the retention of records now is less by paper than it is by digital means.

**MR. CAPPE:** Absolutely.

**THE COMMISSIONER:** So what would be the issue of storage of records if you can store digitally? And I know there are limits, but the limits are pretty (inaudible).

**MR. CAPPE:** I think the challenge is digitization. You know, I move from Ottawa to Toronto and I – my doctor gave me my record on a USB key and when I got to Toronto, I gave it to my new doctor and he said: Would you mind printing it for me? And then six weeks later, the hospital where I was at had digitized my printed record. It was totally wasteful.

So how do you take the paper volume and digitize it? That's where the cost is. Once digitized, the marginal cost of an electron is pretty low.

**THE COMMISSIONER:** All right, okay.

**MR. CAPPE:** Excuse me, I would just add, Commission, that you've got to worry a little bit about what a transitory record is in digital form because the – you know, I might have been sitting here with my iPad open taking notes, and they – and I'm scribbling down on a paper here right now, but it might've been on my iPad and, of course, I hit delete far too easily on the iPad. I actually took the documents from this morning and ripped them up – the transitory records.

**THE COMMISSIONER:** Okay.

One final area that I'd like to ask you about, you spoke earlier about the minutes of Cabinet in the federal government and it struck me that you were referring to the fact that the notes would likely not refer to a particular minister asking a question or making a point or whatever it is, but would refer to it as the – a minister.

So can you tell me a little bit about the detail that would go into Cabinet minutes on the federal government level?

**MR. CAPPE:** So, there were a number of different documents that were being kept. The first was that there would be – there's a seat – so the Cabinet table is a long table; the prime minister always sat in the center, all prime ministers have, and over there, there would be a table behind the ministry – the minister is sitting at the table – of note-takers. The secretary to Cabinet actually sits in the corner. I can tell you anecdotes but I won't.

The note-taker is facing the prime minister for obvious reasons, but is literally taking notes.

Now, in my time, it may be digitized now, but in my time they were not typing, they were literally writing in a book and taking notes. They would then go back and write up a record, so they would write up their notes as the minutes of the Cabinet meeting. And they would be without attribution, typically. But they might have some ministers attributed, depending on how important the issue was.

They then would make a – if it was a Cabinet committee meeting it would be a CR, a committee record, and it would be a record of what was discussed and was decided by the committee, which then would go to Cabinet, to full Cabinet, and then there would be an RD, a Record of Decision made. And so there's this – and it would be printed on different coloured paper, and the colour was more – the fact that it was coloured was for – to remind people about secrecy and confidentiality, but the different colours were committee records were green and Records of Decision were blue, I think. But the point is that the notes that person took were transcribed or synthesized into the minute but then the Record of Decision was what was circulated.

So, all departments, and there would be literally hundreds of these printed, every department would get half a dozen of Records of Decision so that they could, in their department, stay abreast of what was happening. Now, some things were restricted because they were national security or personal and confidential and things like that, but by and large, they were widely distributed.

**THE COMMISSIONER:** So, I can – so my understanding is, then, only the record of the decision would be what would be circulated, ultimately, at the end of the day, but as backup to those, there would be a set of notes that would basically review what type of discussion – what was discussed and ultimately what the decision was.

**MR. CAPPE:** That's correct. And I would say that the important thing there is from time to time you needed to ask – I as deputy minister of an ancillary department – not the proposing department – needed to know whether a particular element of the issue came up and I would call the note taker from the Privy Council

Office and say: Did so-and-so say something, or did my minister intervene or did this happen or that happen?

And that was valuable because they had their notes. And they – in helping me, they would actually go back to their written notes, but they would at least have their synthetic notes, as well. And that was particularly important when there was an international leader to international leader discussion and you wanted to know what really happened, you'd speak to the note taker who was on the line.

**THE COMMISSIONER:** Right.

And would you ever see a situation where those notes would be considered transitory?

**MR. CAPPE:** No.

**THE COMMISSIONER:** Okay.

All right, I think that's it.

Thank you very much, Mr. Cappe. I really appreciate the fact that you've come here today and assisted us.

**MR. CAPPE:** Thank you. Good luck.

**THE COMMISSIONER:** So can I just make a couple of final comments, seeing this is the – you're the last witness of our –

**MR. CAPPE:** Mmm.

**THE COMMISSIONER:** – hearings, anyway.

So let me just say this: After, basically, 137 days of testimony in public and two days in camera, we've sat for 139 days during this Inquiry. We've heard from 129 witnesses in the public sessions and a total of five witnesses in the in camera sessions for a total of 134 witnesses. The Inquiry staff has received a total of 5,932,000 records to review, of which 4,548 are presently made exhibits – public exhibits – and 115 are made confidential exhibits.

The reason I say this is I know there has been a tally being kept by others and I just wanted to give the official tally for the record.

I want to say that getting to this point has been no – not an easy task and certainly a great deal of work done by a lot of people within the Commission, to whom I'm extremely grateful, but also to counsel for all of the parties who've been very co-operative with me and with the Commission staff. This could not have worked without everybody pulling on the oar at the same time.

I also want to indicate that as we look forward to public submissions, which will be taking place from the 12th to the 16th of August in Happy Valley-Goose Bay, I would like now – seeing our focus in Phase 3 is looking forward, I really see value in the fact that many of you are representing clients who have a great deal of experience and perspective that could be helpful to me in making recommendations out of this Inquiry. And I would really appreciate, in your oral and/or written submissions, that you don't leave that out. Don't leave out that experience. If there's a view with regards to some of the things that we could – that could be suggested as to what we could do better, I would certainly be very pleased to get that and it would be very helpful to me.

I just want to also just remind everyone of the public sessions that are presently in place. On Tuesday night, July 30, 2019, and Thursday, August 8, 2019, we have two public sessions opened up for members of the public – not for parties, not for witnesses to the Inquiry, but for others who have not participated – to have an opportunity to speak to what they've heard with regards to this Inquiry. And I'm certainly looking forward to hearing that.

The July 30 session at the Emera Innovation centre at Signal Hill from 7 to 9, I can say there's been a great deal of interest in that and there are already numerous individuals who will be speaking at that particular session.

For the session at Happy Valley-Goose Bay, right now the uptake has not been what I expected. There are only three individuals so far who have indicated a desire to participate. I am thinking that because there are various groups in Labrador, we may be getting more information with regards to who will be participating a little later and a little closer to the sessions.

But I certainly would suggest to the public that I welcome the participation of anyone who feels that they have views that could be assistive to me as the Commissioner of this Inquiry.

So thank you very much.

And we'll adjourn now until August 12 for the purposes of submissions.

**CLERK:** All rise.

This Commission of Inquiry is concluded for the day.