



COMMISSION OF INQUIRY
RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Summations

Volume 1

Commissioner: Honourable Justice Richard LeBlanc

Monday

12 August 2019

CLERK (Mulrooney): This Commission of Inquiry is now open.

The Honourable Justice Richard LeBlanc presiding as Commissioner.

Please be seated.

THE COMMISSIONER: All right. Good morning.

Welcome to Happy Valley-Goose Bay for the concluding week of the hearings in the Muskrat Falls Inquiry.

I understand from Commission counsel that some of you have expressed a bit of relief to be here this morning in this final week. It's been a tough go in the sense of getting a lot done in a short period of time.

Also, I understand from speaking to Commission counsel and some of you that the time that we have allotted for speaking for final submissions may not be as was initially indicated in the sense that you may be taking a little less time than what you had indicated. That's certainly fine with me. I've read most of the briefs.

My intention today is, depending on where this goes – initially my plan was hopefully get through the government and as well Nalcor. I think we're gonna do better than that based upon what I am told. So, likely, if possible, we will hopefully hear from the first four of the parties today. I plan – if we do do that and get that done that would be excellent.

So, if we finish Edmund Martin today, then we will start tomorrow with Kathy Dunderdale. And so, what I can say to counsel is that you should try to be ready when you're called upon. You may be called upon a little earlier than was initially indicated in the schedule, and I think Mr. Beresford has been, sort of, keeping everybody up to date with regards to what we've been hearing from counsel with regards to the amount of time that is needed.

So, having said that I'm going to start this morning by calling upon Ms. Muzychka, who has some final exhibits to have entered into the record for the purposes of the Inquiry.

MS. MUZYCHKA: Thank you, Commissioner.

We have Exhibit C-116, which is a Barnard-Pennecon confidential exhibit.

THE COMMISSIONER: Okay. I'm sorry. I'm having trouble hearing you. So – Okay?

MS. MUZYCHKA: Okay.

C-00116. And that's a Barnard-Pennecon confidential exhibit. Then we have C-00117, which is a Tim Harrington confidential exhibit. The next one is P-00006, which has been referenced but not entered. P-01816, and this is an agreement relating to Alstom – renewable supply and install agreement. And we have P-01858, which is also an agreement, number CD 0502-001, and that one is in relation to Alstom – engineer, procure and construct agreement.

We have P-01875, and that is a PUB order, number PU 14 (2004). We have P-01876, which is another PUB order, number PU 8 (2007). P-01953 – this is the environmental panel update on government response to *Lower Churchill River Hydroelectric Generation Project* – joint review panel report.

And the next remaining documents all relate to environmental panel. So, P-01957 is annex A to P-01953. The next document is P-01960 and that's environmental panel annex B to P-01953. The next document is P-01961, and that's also environmental panel annex C to P-01953.

Then we have P-01968, which is environmental panel annex D to P-01953; P-01969, which is environmental panel annex E to P-01953. Then we have P-01971, which is annex F to P-01953. And then P-01973, which is annex G to P-01953. And then lastly, we have P-04549 to P-04554. And that we be the conclusion of the new exhibits to be entered.

THE COMMISSIONER: Okay. Thank you.

MS. MUZYCHKA: Okay.

THE COMMISSIONER: All right. So, the first party this morning to begin summations is the Province of Newfoundland and Labrador.

MR. RALPH: Good morning, Commissioner.

For those who don't know, I represent Her Majesty in right of Newfoundland and Labrador and my name is Peter Ralph. The Crown has filed a written submission for your consideration, Commissioner, and I will read that submission almost verbatim. And I'm going to do that because the words in the brief have been chosen very carefully.

This submission has gone through many drafts. And although these submissions are not lengthy, the final form of the submission is a result of a great deal of thought and reflection.

"Commissions of inquiry are a method of investigation that" – branches – "that executive branches of government infrequently establish. Their purpose is usually to shed light on a matter of public importance that evokes passion in our communities materially greater than that generally associated with the day-to-day political issues.

The events that a commission of inquiry examines are usually ones that raise questions about the very legitimacy of the democratic institutions for which we rightfully take great pride and for which are the envy of the majority of the people in the world.

"The Muskrat Falls Project ... has prompted such reaction. Many believe that this Project represents an existential threat to the Province. That sentiment is sufficiently widespread to make clear that The Commission on Inquiry Respecting the Muskrat Falls Project ... is needed to explain the sequence of Project events that have created the challenges and sacrifices that are now confronting the people of the Province.

"This Inquiry is needed to satisfy the public interest necessity of providing answers to the many questions that the" Muskrat Falls Project "has raised.

"The Lieutenant-Governor in Council ... established this Inquiry on November 20, 2017, pursuant to" – an – "Order-in-council Section 3 of the *Public Inquiries Act 2006* grants" Lieutenant-Governor in Council "the power to establish a commission of inquiry.

"However, the power to create a commission of inquiry may also be a prerogative power of the Crown that would be exercised by the executive branch of government Legislation, such as the *Public Inquiries Act*, was" – likely – "enacted by legislatures to ensure that the power existed for '... commissioners to call and enforce the attendance of witnesses.' ... A commission of inquiry" – we suggest – "established pursuant to the prerogative power" – of the Crown – "did not possess the power of subpoena. A public inquiry act was necessary not to create the authority to establish a commission of inquiry but to create the authority necessary to subpoena witnesses.

"Therefore, it is likely that the original authority for the legal basis of a commission of inquiry was the authority of the Crown exercised as a prerogative power. Commissions of inquiry were originally not created by legislatures but by the Crown or monarch and, subsequently, by the executive branch of government exercising prerogative powers.

"Section 3 of the *Public Inquiries Act*, requires the" Lieutenant-Governor in Council "to designate a minister responsible for the inquiry, and Section 4 provides for the Commission to deliver its report to the responsible minister and for the minister to make that report public. The Order in Council, in this instance, directs the Commission to deliver the report to the Minister of Natural Resources. The House of Assembly could have specified that the report be delivered to the House itself when the *Public Inquiries Act* was enacted.

"However, the authority given to the Lieutenant-Governor in Council in section 4, supports the notion that the establishment of a commission of inquiry is the exercise of prerogative power and in the domain of the Executive Branch of government.

"One of the key characteristics of a commission of inquiry is its independence. Although established and funded by the executive branch of government, the commission of inquiry is entirely independent of executive influence from the executive branch. It does not exercise delegated authority. It is a government funded, independent investigator, with authority, resources and powers to obtain whatever

information that it determines is necessary to enable it to fulfill its investigative and reporting mandate. Another key characteristic” – of a commission of inquiry – “is the breadth of its investigative powers.

“The independent nature and breadth of the investigative powers of a commission of inquiry was considered in a ruling of the *Commission of Inquiry Concerning Certain Activities of the RCMP*, known as the ‘McDonald Inquiry’. The following excerpt from the ruling is lengthy, but it may be helpful to the Commission.”

And I quote at paragraph 12 of the decision:

“The Governor in Council, in creating such a Commission as this, asks this newly and specially created unit of the executive branch of government to examine some particular aspect of the government, (that is, the executive). The executive branch, through its chosen executive instrument, is examining itself. This must not be forgotten by those who expect the Commission to do as they wish and as it wishes (assuming they are one and the same). The Commission is created by executive (the Governor in Council) and its terms of reference can be altered – indeed its very existence can be abrogated – by another Order-in-Council at any time.

“On the other hand, a Commission of Inquiry is not a unit of the executive branch of government like other government departments and agencies. Short of direction by Order-in-Council, it cannot be directed by a Minister or even by Cabinet to interpret its terms of reference in a particular manner, or to follow this procedural course or that. It is for the Commissioners to interpret the instrument that gave birth to the Commission.

“Moreover, the Commissioners, unlike other arms of the executive branch, are by statute given powers which members of the executive branch” of government “– even ‘Royal Commissions’ appointed under the Great Seal but not pursuant to statute – do not enjoy: the power to summon witnesses, and to require them to give evidence on oath or affirmation, and to produce documents and things ... and ‘the same power to enforce the attendance of witnesses and compel them to give evidence as is vested in a court of record in civil cases’ These are extraordinary powers, ordinarily available

neither to the common citizen nor to members of the government services. These powers set commissions appointed pursuant to Part 1 of the Inquiries Act apart from the remainder of the executive.”

“The primary role of a commission of inquiry is essentially to report on the facts and provide recommendations on the basis of those facts to the decision-making entity that created the Inquiry.

“A commission of inquiry does not decide legal issues or matters. The Commission’s role is somewhat analogous to the role of an expert retained to investigate and advise on a particular matter and issue.”

The Lieutenant-Governor in Council established this investigation – this particular investigation as a commission of inquiry. It could have chosen a different method of investigating the circumstances of the Muskrat Falls Project.

Ed Ratushny in his text *The Conduct of Public Inquiries* identifies five other types of investigations that the Executive Branch could have created to investigate the project. But a commission of inquiry was chosen for a number of reasons. Two of the paramount ones were the independence of a commission and the transparency of its process.

Ed Ratushny’s text discusses the source of the – of a commission of inquiry’s independence and he states: “Once a commission of inquiry has been established, the interpretation of its terms of reference is the role of the Commissioner rather than the government. This is so even though the commission owes its entire existence and its mandate to the government”

The Crown’s interest in this Inquiry is that a final report is published, which the people of the province can accept as a thorough and carefully considered explanation of what happened with the Muskrat Falls Project. To that end, it is important that the findings and recommendations in the final report are independent and that they are perceived as independent and not subject to any political or commercial influence. The desired outcome is a report finding containing findings of fact and

recommendations in which the public can have confidence.

The role adopted by the Crown at the commencement of this Inquiry was a neutral one, out of deference to the Commission's independence. The purpose of examination of witnesses by counsel for the Crown was to elicit facts which the Crown believe may be relevant to the Terms of Reference. The purpose of examinations were not to suggest facts upon which the Crown would rely upon to advance a position on findings of fact or recommendations. Consistent with this report, the Crown in this submission will not be suggesting to the Commissioner that he make any particular findings or recommendations. The Crown's role continues to be to assist and not to advocate.

In its application for standing before the Commission, the province outlined its plan to participate in the hearing in this neutral manner as follows and I quote: "The Province's participation in the Inquiry would further the *conduct of the Inquiry*. ... The Province is furthering the work of the Inquiry by producing documents which are essential to the work of the Inquiry. The Province can also further the work ... in a manner unlike another party. The *Terms of Reference* focus on the operation of two related organizations: the Province and Nalcor. The Province is able to assist the Commission in understanding the operation of the province including the relationship between the Premier's Office, Cabinet Secretariat, Government Departments and Crown Corporations.

"The Province's participation would also contribute to openness and fairness in the Inquiry. The Province created this Inquiry and the *Terms of Reference*. The goal of the Inquiry is to grant the Commission the power and the authority to determine how and why the Muskrat ... Project was chosen to address the energy demands of Newfoundland and Labrador and also to determine why the Project's costs were higher than projected. The answers to these questions are important to the Province for many reasons, not the least of which is to address the Province's role in the creation and supply of electricity in particular and the Province's role in the economy in general."

In this application for standing, the province also stated the following: "The Province further advises the Commission that, at the present time, the Premier and Ministers of the Crown will not apply for standing separate from the standing that may be granted Her Majesty in Right of Newfoundland and Labrador. The Premier and Ministers of the Crown understand they are entitled to have counsel present while they are interviewed and during testimony before the Commission. Further, the Premier and the Ministers understand that counsel would also have standing before the Commission for the testimony of each of these individuals. Finally, the Premier and the Ministers wish to advise the Commission that they may subsequently apply for further standing if the need arises which need is not currently apparent. This standing would be further to the standing they are granted as witnesses before the Commission"

The Crown's position is that the application recognize that the Crown is a different entity than the executive branch of government. The usage of the word Crown "... dates from earlier times when all powers of government were vested in the monarch, and were exercised by delegation from the monarch." In his discussion on the usage of the word Crown, Hogg suggests that the word is often used to mean government. For example, reference is made to the Crown prosecuting a case, expropriating property or being sued for breach of contract. In the context of this Inquiry, the province is using the word Crown to mean Her Majesty in right of Newfoundland and Labrador.

In order to understand the meaning of the word Crown that is being applied in this submission, it is necessary to consider the power and authority that the Crown exercises in the political system of the Province of Newfoundland and Labrador.

The Crown, or Lieutenant-Governor, enjoys prerogative powers, and these are exercised based upon convention. Prerogative powers include the power of appointment of the premier, dismissal of the premier, dissolution of the House of Assembly and prorogation of the House. The Crown possesses other prerogative powers and the nature and extent of those powers are relevant considerations in both the operation of government and judicial review of government activity.

For example, in *Ross River Dena Council versus Canada*, the Supreme Court of Canada addressed whether the royal prerogative meant the Crown continued to possess the power to create reserves. The court found that the Crown still possessed the prerogative power to create reserves and stated at page – at paragraph 54 of the judgment: “The royal prerogative is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: ‘once a statute has occupied the ground formally occupied by the prerogative, the Crown [has to] comply with the terms of the statute’.”

The court also observed that the Crown, in a sense, assents to the diminution of its prerogative powers because the assent of the Crown is necessary to enact the very statutes that eliminate or circumscribe those powers.

Generally, the prerogative powers possessed by the Crown are exercised by the executive branch of government. For example, as suggested earlier, the original authority for the establishment of a commission of inquiry likely was, as with – was the case of reserves, the authority of the Crown exercised as a prerogative power.

Convention dictates that the Crown is unlikely to exercise the power to create a commission of inquiry, except when the executive branch of the government does so on the Crown’s behalf. Generally, the powers belonging to the Crown are exercised through an executive committee of ministers chosen and led by the premier and responsible to the House of Assembly for their policies and for the activities of government. Nonetheless, the existence of a prerogative power remains a consideration in the judicial review of executive action.

The province submits that the Crown’s approach to the exercise of its powers, prerogative and otherwise, is informed by the principles and conventions upon which our democracy is based; the Crown’s approach to this Inquiry is similarly informed. Newfoundland and Labrador is a parliamentary democracy in which the law is the supreme authority. Parliament in the province consists of two distinct elements: the Crown and the Legislature. Legislative power is vested in Parliament; to become law, legislation

must be assented to by each of Parliament’s constituent parts, the Crown and the Legislature.

Before a bill becomes law the Crown must assent to the bills that are passed by the Legislature. Before an order-in-council has the force of law the Crown must also assent to orders issued by the Executive Branch of government. The Crown is acting as Lieutenant-Governor in Council when it asserts – when it assents to orders issued by the Executive Council.

The Crown, by convention, assents to the legislation it is asked to consider, both statutes and regulations. However, convention also provides that the Crown only assents to legislation from the Legislature if a majority of the members of the House voted for passage of the bill. With respect to regulations issued by the Executive Branch of government, convention provides that the Crown assents to legislation issued by that branch of government only if the Executive Branch of government enjoys the confidence of the House or the Legislature.

The Crown remains an essential and important institution in the province’s political system. The system operates with little attention because generally the actors in our system of government understand and accept the conventions which underpin our particular type of democracy. The primary interest of the Crown is the preservation of our political institutions through which democracy is practiced.

The role adopted by the Crown at the commencement of this Inquiry was a neutral one out of deference to the Commission of Inquiry’s independence and the desired outcome of this Commission of Inquiry. A final report which is received by the citizens of the province as an independent and authoritative account of the project. Therefore, in the context of this Inquiry, it is in the interest of the Crown that the Commission writes and publishes a final report which the citizens of the province perceive to be independent and authoritative.

This approach at this Inquiry may be questioned from time to time by some, including by the Commission itself; however, the Crown must interpret its role in relation to this Inquiry. That role is not to shape or influence the findings of

the Commission; the role of the Crown in this Inquiry is to preserve the political institutions upon which our democracy is practised.

Before I finish, Commissioner, I would like to take just a few minutes on behalf of Her Majesty in right of Newfoundland and Labrador and the Government of Newfoundland and Labrador to acknowledge the tremendous amount of work that has gone into this Commission of Inquiry.

Firstly, it's important to thank all the witness who appeared before this Inquiry, both expert and non-expert alike. It was evident during their testimony that every witness attached great importance to the work of the Commission and also attached great importance to their own contribution to the Inquiry.

Secondly, it is necessary to recognize the contributions of the parties and counsel to the parties representing them. For many parties this Inquiry is not their job. Their work on the Inquiry demonstrated their passion for the province in general and for those who call it home – for Labrador, in particular. Also, many counsel representing parties at this Inquiry made professional and personal sacrifices to participate in the work of the Commission.

Personally, I want to acknowledge the work of the people that I work with on this Inquiry. We are a relatively small number of people and often the demands on us were very, very challenging. Much of what we did, did not endear us to anyone. However, the effort of the people in this office, I think, reflects their commitment to the province and the work of this Inquiry.

Her Majesty in right of Newfoundland and Labrador and the Government of Newfoundland and Labrador acknowledge the efforts of Nalcor officials and witnesses. Whatever your feelings or opinions may – you may have about the Muskrat Falls Project, it is still important to recognize that Nalcor has built the Muskrat Falls Project with someone looking over their shoulder. The demands of a megaproject are intense, and one can only imagine how difficult it has been to do that work while that work was being examined.

Similarly, government officials have spent hundreds of hours of time finding documents, reviewing documents, and collecting information. All this work was done by people who have important and demanding jobs, and sometimes the work being done for the Commission was being done by officials whose own work was being examined by the Commission.

An inquiry is not designed or intended to be an ordeal to be inflicted upon those whose conduct is being examined. The purpose is to find out what went wrong. However, this process is likely experienced by some as an ordeal. It is important to acknowledge the sacrifice these people have made, to acknowledge the contribution to the process of those whose conduct may be the subject of findings.

This is not a court of law in which guilt is established and punishment is meted out. This process is, in essence, an investigation that is carried out in public. No one likes to have their work reviewed, and that's especially true if that review takes place in public. These people have sacrificed a great deal in the service of this Commission, and some people will be dealing with the impact of this Inquiry on their lives long after the report is released.

Finally, Her Majesty in right of Newfoundland and Labrador acknowledges the tremendous efforts made by the staff and counsel for the Commission. Those of us who have been closer to the Inquiry appreciate that the people working on this Inquiry have worked many long days and most weekends since the Inquiry started.

When it started, many of us did not think that it would be possible to conclude this Inquiry as scheduled. The fact that it is on time is a testament to the commitment and passion that your staff has had for the Inquiry and also for your work as Commissioner.

Commissioner, yours is a particularly heavy burden. You've taken on a massive task when you accepted the role of Commissioner. You've made tremendous sacrifices to do this work, both personal and professional, and this sacrifice suggests/reflects a deep concern for the people of the province. This may be a watershed moment in the history of the province, and we

are very fortunate to have a person such as yourself, with your energy and determination, at the helm. On behalf of the Crown, the Government of Newfoundland and the people of Newfoundland, I thank you.

“In conclusion, the commission has heard a remarkable amount of information in a short period of time. It is now engaged in the daunting prospect of reporting on what happened with this Project and how its consequences might be managed The burden is a heavy one.” And “as the Commission begins the final stages of this process, the Crown asks the Commission to consider the following quote from the historian E. H. Carr in his book “What is History””

And I quote: “The facts of history are indeed facts about individuals, but not about actions of individuals performed in isolation, and not about the motives, real or imaginary, from which individuals suppose themselves to have acted. They are facts about the relations of individuals to one another in society and about the social forces which produce from the actions of the individuals results often at variance with, and sometimes opposite to, the results which they themselves intended.”

Thank you, Commissioner.

“The foregoing is respectfully submitted on behalf of Her Majesty in Right of Newfoundland and Labrador”

THE COMMISSIONER: Okay.

So, before you step down, I do have some questions for you, Mr. Ralph.

MR. RALPH: Yes.

THE COMMISSIONER: So, there is a fine distinction here to be made between the Crown and the Executive and Legislative branch of a government. I’m not certain that the intricacies of that distinction are fully understood, based upon the carefully worded brief that you’ve filed. So, I think there’s – I think I need to ask a few questions –

MR. RALPH: Sure.

THE COMMISSIONER: – to assist the public in understanding exactly what it is you’re saying, and then, also, I’m going to be putting some other things to you as well.

So, my understanding of what you’re saying is, is that: Notwithstanding that you are here on behalf of the Province of Newfoundland and Labrador, you’re not here on behalf of politicians, you’re not here on behalf of the public service, you’re not here on behalf of a Crown corporation. You’re here on the – really, on behalf of the monarch who is technically, in our democracy, the leader in the democracy. You’re here, basically, to protect the interests of the monarch, of the Crown.

MR. RALPH: That’s correct.

THE COMMISSIONER: Okay.

So, from that perspective, then, who is it that the Crown owes a duty to?

MR. RALPH: I’m not sure –

THE COMMISSIONER: So does the Crown owe a duty? Does she represent anyone? Is there anybody that she is interested in? Or anything she’s interested in?

MR. RALPH: Commissioner, I think you are appointed by the Executive branch of government.

THE COMMISSIONER: Correct.

MR. RALPH: I’m a different branch of government.

THE COMMISSIONER: Mm-hmm.

MR. RALPH: I represent the Crown.

THE COMMISSIONER: Right.

MR. RALPH: And, I mean, I think it’s up to us to define what interests we represent and they are different from the Executive branch.

You’re given a job by the Executive branch and though – that job is dictated by the Terms of Reference and I suggest it’s not your role to ask me what the job of the Crown is.

THE COMMISSIONER: Okay.

Well, let me remind you of paragraphs 9 and 10 of your standing application before the Commission of Inquiry and upon which I based my ruling to allow the Crown – or what I understood to be the Province of Newfoundland and Labrador – the right to have standing.

In paragraph 9 you stated – or I don't know if it was you who wrote this, but somebody stated: “The Province submits that after considering s. 5(2)(a)” – of – “the Commissioner should grant” – and this was of the Public Inquiries Act – “should grant the Province standing. The *Terms of Reference* clearly authorize the Commissioner to make findings which could adversely affect Nalcor (see s. 4 of the Terms” of reference. “This in turn could affect the interests of the Province as shareholder (Nalcor is a Crown Corporation wholly owned by the Province by virtue of s. 3(3) of the *Energy Corporation Act* ...). ... The findings against Nalcor would be in relation to the work that Nalcor has done on the Muskrat Falls Project including Nalcor's recommendation of the Muskrat Falls Project or Nalcor's management of the Project. Adverse findings against Nalcor could impact Nalcor's future operations in relation to the Muskrat Falls Project, other hydroelectricity activities, its oil and gas or fabrication activities. Any negative impact upon these activities” could “also have a negative impact upon the Province as the only shareholder of Nalcor.”

And I assume that when you were talking about the province, you were talking about the Crown.

Then in paragraph 10, you said: “The *Terms of Reference* also authorize the Commissioner to make findings which could adversely affect the interests of the Province more directly. The findings could be made in relation to the role of the Province in: i) the Sanction of the Muskrat Falls Project, ii) the exemption of the Muskrat Falls Project from oversight of the PUB, or iii) oversight of the Muskrat Falls Project. Any adverse finding could adversely impact the reputation of the Province and, thereby, impact future activities carried out by the Province including in relation to the Muskrat Falls Project or other projects. Further, adverse findings could have an impact upon the political and economic life of the Province.”

So, yes, I agree with your recitation of paragraphs 11 and 12, but 9 and 10 came before them. And my understanding, when I granted standing to the province, was that not only were you going to be assisting me as a representative of the province with regards to obtaining disclosure of documents, but also that you would be assisting me with making the findings that I would have to make. I can understand your position that you want to be neutral to some degree and I accept that. But I just remind you of paragraphs 9 and 10. And I think I do have the right to ask you questions based upon what you initially indicated in your application to the Commissioner as to what your interest was in the Inquiry.

MR. RALPH: Commissioner, everything that you've mentioned, the Crown has assented to. Whether it's the establishment of Nalcor, the passage of any legislation, the Crown has been involved in all of that.

THE COMMISSIONER: Correct.

MR. RALPH: We had to assent to that.

THE COMMISSIONER: Mm-hmm.

MR. RALPH: So we had a role to play. So, you know, we were – we asked to be a party, and as a result of that, we were required to do certain things. Certain things applied to us in terms of the legislation –

THE COMMISSIONER: Okay, so what –

MR. RALPH: – and getting documents, so ...

THE COMMISSIONER: Yes, it would've applied to you whether you were a party or not.

MR. RALPH: That's correct, exactly.

So, you know – and we didn't have to participate in this Inquiry; we could've stayed in the wings. And we thought that our participation, our presence during the Inquiry would be helpful and I think it has been helpful.

THE COMMISSIONER: All right, so –

MR. RALPH: But, you know, I don't think that it's – that those paragraphs are inconsistent. I mean, the Crown did play a role in this. It assented to all this legislation. And so, you know – but that being said, our interest is not in, you know, the outcomes or in policy. Our interest as Crown is to ensure that these institutions are operating properly.

THE COMMISSIONER: Okay.

So having said that, and looking to the future and looking to the future operation of the Crown and its various agencies, I have a few general questions that I – and I'll be very careful not to be specific with regards to facts of this case and Muskrat Falls.

So the first question that I have after I've read your brief is – and what I was left with – it was a question in my mind as to say could you assist me by telling me what role should the government have – should your government have in the oversight of the expenditure of public funds?

MR. RALPH: No, and that's not the role of the Crown.

THE COMMISSIONER: That's not the role of the Crown?

MR. RALPH: That's not the role of the Crown.

THE COMMISSIONER: So, you –

MR. RALPH: The role of the Crown – if the Legislature wishes to spend money or the Executive Branch of government wants to do something –

THE COMMISSIONER: Mm-hmm.

MR. RALPH: – it's our job to say, okay, is the authority to do that in law? Does that exist in law?

THE COMMISSIONER: So is there –

MR. RALPH: And if it does, then we assent to legislation or –

THE COMMISSIONER: So –

MR. RALPH: – we assent to ...

THE COMMISSIONER: So –

MR. RALPH: So that is not – our role is not to make policy.

THE COMMISSIONER: I think it will be –

MR. RALPH: And I know this –

THE COMMISSIONER: – I think it will be somewhat –

MR. RALPH: – worked out, Commissioner –

THE COMMISSIONER: – I think it'll be somewhat surprising to the public to hear that.

MR. RALPH: Well, Commissioner, I'd suggest it's a misunderstanding –

THE COMMISSIONER: But – excuse me if I can. So, again, my query is it's not in reference specifically to this project or anything else, but as part of the Crown. You know, what I'm trying to figure out is what can you offer to me to assist me in trying to determine what the role is of the Crown, of the government of the Crown with regards to the oversight of the expenditure of public money?

MR. RALPH: The question, to me, reveals a lack of understanding about our role, which, to me, we've had since the beginning. Now, if you thought that we had a different role, I apologize that you had that impression. But that was our position from the beginning.

THE COMMISSIONER: Well, I thought –

MR. RALPH: That we weren't representing executive council, that we weren't representing – in fact, it was clear during the practice of this Inquiry that every person who worked for the government who is a civil servant was entitled to have their own counsel –

THE COMMISSIONER: Correct.

MR. RALPH: – that the Premier and the Minister of Natural Resources had their own counsel, that all the prior ministers of Cabinet and premiers had their own counsel. So those interests were being looked after by others. And

that's how we designed this from the beginning. Because aside from the fact that that policy doesn't concern the Crown, it was also a very difficult situation, I'd suggest, that you had administrations and civil servants, civil and – senior and otherwise, over the course of many administrations.

And so this defined a place, a role that was helpful but didn't sort of pick sides. That's where we had to find ourselves, and I think that's what we did effectively. And I – you know, Commissioner, if you expected us to do more, I apologize. But I suggest that what we've done was the best thing that could've been done for this Inquiry.

THE COMMISSIONER: Right. I think that – you know, I'm not going to challenge you on that, but I have to say to you that some of your questions during the Inquiry went a lot farther than that. And that's the basis upon which I'm saying – I'm asking you these question.

And, as well, I think there is an interest in the Crown because you've told me there was one in the first place when you applied for standing, when you talked about any adverse finding that could adversely impact the reputation of the province was within the interest of the Crown, was within the interest of the province, and that's why you were applying for standing.

So I would've thought that as part of the Crown, you might have some sort of suggestion to me with regard to – as I said, from my first question is, you know, what can you assist me with, with regards to oversight of public expenditure and the Crown's – what's the Crown's view of that?

And you did ask questions during the Inquiry that certainly went to the issue of oversight and, for instance, information that went to the province's public servants, and yet at this stage, you're telling me that you want to – you don't want to answer a general question with regards to, has the Crown got an interest in the way that government expends money?

I'm having trouble reconciling that.

MR. RALPH: Well, that's fine, but I'd suggest it's because of your misunderstanding of the role of the Crown.

THE COMMISSIONER: Okay –

MR. RALPH: It's not because –

THE COMMISSIONER: I don't think I'm misunderstanding –

MR. RALPH: And not because –

THE COMMISSIONER: – the role of the Crown.

MR. RALPH: – it's not because of – I mean, we have had the same – well, no, we didn't get it perfect all the way through. I'd suggest that that's – there's times, perhaps, when, you know, we didn't get it perfectly right. But we have tried as Crown, as her Majesty, to contribute to this Inquiry in the best way that we knew how, and it was challenging given all the different interests involved here. And I'd suggest we've done a very good job of assisting this Inquiry without sort of, you know, having to defend certain administrations and attack other ones or defend certain –

THE COMMISSIONER: Okay, I'm not asking you to do that.

MR. RALPH: – civil servants and attack other ones. I think that we gave a lot of thought to how we'd approach this, and I think we had landed in a place that was most helpful, and I'd suggest that, you know, we didn't necessarily always get it right. You know, it's not – the government is not a monolith; it's a very – there's varying different actors that are – that have a role to play in government, so we didn't always get it right. But I think, at the end of the day, we had a vision of how we would participate in this and, for more or less, we lived up to it.

THE COMMISSIONER: Okay.

MR. RALPH: And I think our participation has been the best possible way that we could participate in this Inquiry.

THE COMMISSIONER: Yeah.

MR. RALPH: So –

THE COMMISSIONER: I'm not saying anything about your participation, so, again – and I do understand the role of the Crown, by the way.

So let me ask you a second question. The Crown's public service: Is there anything you can offer to me to talk about the role of – for me to consider with regards to the role of the Crown's public service in the oversight of government policy, the expenditure of funds, things of that nature?

MR. RALPH: Commissioner, I would've thought that if that – you wanted that question answered, you have the power and authority to go get someone to have that answered.

THE COMMISSIONER: I'm asking you.

MR. RALPH: I'm – I don't know. I'm –

THE COMMISSIONER: You're standing here –

MR. RALPH: – (inaudible) answer –

THE COMMISSIONER: – this morning –

MR. RALPH: – your question. Can I – can I –

THE COMMISSIONER: You're –

MR. RALPH: Can I answer –

THE COMMISSIONER: – you're standing here this morning, Mr. Ralph, telling me that you're here representing the Crown, that you want to assist me with regards to getting this right. And I'm asking you, as the Crown – and I understand the distinction between you as not a political being, not with the political parties, with the Legislature, even, to some degree, separation from the public service. I understand the role of the Crown.

I'm asking you, as the Crown, a representative of the Crown here, the legal representative of the Crown, questions that I think are within your ability to answer, but obviously you're not prepared to answer them.

MR. RALPH: Well, Commissioner, it seems absurd to me that you are appointed by

Executive Branch, which is different from me, and you as Executive Branch person, you're suggesting to me of what role I should play.

THE COMMISSIONER: Listen I'm –

MR. RALPH: And I –

THE COMMISSIONER: – I'm independent –

MR. RALPH: – to me –

THE COMMISSIONER: – you –

MR. RALPH: – I think that –

THE COMMISSIONER: – you indicated to me earlier, Mr. Ralph – this is a bit of a theoretical exercise we're going through here, but I think it's an important one. Because I think the public needs to understand what it is you're trying to say, and I'm not sure they're going to understand it. You know –

MR. RALPH: If I could finish –

THE COMMISSIONER: – the distinction –

MR. RALPH: – Commissioner –

THE COMMISSIONER: – the distinction here, I think, just if I can, because, you know, I think you're somehow – I'm not saying the Crown has not helped the Inquiry. I'm not saying you – in fact, I very much – and I've said it before and I'll say it again – I very much appreciated the efforts of those behind the scenes, in particular, who assisted us with disclosure. You know, I take no issue with any of that.

There has been a great deal of help from the government with regards to documentation and things that we've needed. We've made requests, we've gotten answers to them – very much appreciated. This is not an anti-Crown scenario.

I'm just looking for help, that's all, and I thought that you might be able to give it to me.

MR. RALPH: Right, no, fair enough.

And to me, you know, as we saw our role, was that we give you the mandate, and if you want to

get someone to assist you on that question, which (inaudible) about the civil service, I would've thought that perhaps you would've gotten Mel Cappe to do an – a thorough investigation of the workings of government and Executive Council, perhaps the House, and report it back to you. I wasn't anticipating that you were, you know – I would've thought that's the kind of thing you would've done if you want to answer those questions.

I don't think it's appropriate for the position I'm in to stand up and answer those questions.

THE COMMISSIONER: Okay.

Let me ask you this, what – whether – I have a couple more questions that I want to put to you; I think I know what the answers are going to be, but I'll put them to you anyway.

So what role does the Crown see that a Crown private – a Crown corporation, what is the duty – what can you assist me with, with regards to what the Crown would expect the duty of a Crown corporation and its executive officers is to the government and to the Crown?

MR. RALPH: Those are issues of policy that doesn't concern the Crown.

THE COMMISSIONER: Okay. All right.

I'll ask you the question, then, what about the policy of the Crown's with regard of the – I'm sorry – of the government – what's the Crown's position on the government policy and the government actions with regards to appointing representatives to Crown corporation boards, et cetera? Do you have any comment to make on that?

MR. RALPH: Commissioner, it – these are questions you could've asked during the Inquiry. I don't understand. If you wanted these questions answered, you could've called –

THE COMMISSIONER: I don't believe you were a witness –

MR. RALPH: – you could've called witnesses from Executive Council –

THE COMMISSIONER: Yeah, I don't believe you were –

MR. RALPH: – from the ministry. I mean, I don't think it's appropriate at this point –

THE COMMISSIONER: Okay.

MR. RALPH: – that I'm answering questions that you could've asked for the last 18 months, for example –

THE COMMISSIONER: Right. Well, I –

MR. RALPH: – it seemed to me – no, no. I think it's fair now, like, to give me a chance to speak.

THE COMMISSIONER: I think you're going beyond what –

MR. RALPH: (Inaudible.)

THE COMMISSIONER: – needs to go, Mr. Ralph.

I'll ask you one other question to make my point. What does the Crown view with – what's the Crown's view – because we've heard lots of evidence on this and I have had some evidence; you're not satisfied that I have enough. But what is your view – or what is the Crown's view with regards to the issue of the government's duty – or is there a duty – to not only observe the letter of the law with regards to statutes but also to actually fulfill the objective of statutes?

MR. RALPH: I'm sorry, so you're asking me – I mean, clearly, the Crown believes that the Legislature passes legislation and the Crown assents to it; the Executive Council issues orders as regulations and the Crown assents to it. The Crown only assents to it if it's done properly, and once that's done then the expectation is that the law will be abided by.

I don't know what else I can say about the question. I'm not sure. I don't know if I understand –

THE COMMISSIONER: Well, I'm assuming what you're saying because you said it in your brief. And this is the one point that I did take from your brief, is that once a statute is enacted,

the Crown is obligated to perform in accordance with the statute.

MR. RALPH: No question.

THE COMMISSIONER: All right.

So I guess that answers my question.

MR. RALPH: Yes.

THE COMMISSIONER: Okay.

I have some other questions, but I think I know where you're going. So I – but I appreciate it. No, I understand the distinction that you're making with the Crown and I appreciate that. I will say, once again, I do appreciate the efforts of the Crown here in assisting the Commission of Inquiry with regards to documentation and things of that nature.

I thought perhaps that the Crown, in its summations, might be able to assist me a little bit with regard to questions that I've asked. That's why I've asked them.

MR. RALPH: Yes, no fair enough.

And, Commissioner, I mean, we went through a very, sort of, lengthy process amongst many of us that are working on this and, you know, the submissions – we considered that. In fact, you know, we thought about very lengthy submissions and realized – and we just – we couldn't find that role that we thought we were playing in this. And the most profitable, the best thing we could do for this Inquiry was the one we've taken.

THE COMMISSIONER: Okay.

Thank you, Mr. Ralph.

All right, I'm wondering – it's quite warm in here this morning. I wonder, maybe, we'll take five minutes and then we'll start with Nalcor Energy next.

So we'll just adjourn for five minutes.

CLERK: All rise.

Recess

CLERK: All rise.

Please be seated.

MR. SIMMONS: Thank you, Commissioner. Dan Simmons for Nalcor Energy.

Commissioner, on Friday past we filed a written submission and in that submission we tried to be as comprehensive as we could, considering the time available and the amount of effort that's been put into getting to the conclusion of the evidence not long before that.

I'm not going to work through evidence. That's done in the written submission, to a large extent, although at the end I'm happy to consider any questions that you may have. And I've been struggling since Friday with what to say in the oral submission and what to supplement the written submission with.

So, I'm going to just offer some general comments about the process – about the Inquiry – about approaches to some issues and hit a couple of the broader issues that have been addressed in the – in submission. But I'm not intending to go into great detail on any of the evidence or the factual matters unless there's areas that you're particularly interested in.

And I don't have a – as well scripted a presentation as Mr. Ralph did, so I may be a little bit more random in addressing some of the issues that come up.

So the first point, Commissioner, is that this Inquiry, which has spanned some 140 or so days of hearings and the presentation of numerous documents, investigations by the Commission – a lot of work by everybody – it's been largely an inquiry into Nalcor. It's been focused on Nalcor as the subject of the Inquiry.

Some of the Terms of Reference do direct inquiry into actions of government concerning oversight, in particular, but when you read through the Terms of Reference, you can see that this is about Nalcor as an organization. And Nalcor, of course, is – it's a corporation. And corporations are sometimes difficult things to understand – they're abstract creations, they don't have a physical embodiment, they can only act through people.

And in this case, we have heard from many individual people who have been part of the Nalcor organization. They've had a great diversity of roles and responsibilities. They're – they form many small parts of the whole effort that's been required in order to get to the point of sanction and to bring the project near to the state of completion that it's approaching now.

So while the corporation has to act through individual people and individuals form part of the corporation, no single person is the whole company. We tend to talk and we've talked all the way through the Inquiry about Nalcor as if it was an embodied thing, with a viewpoint and a position and a set of knowledge. And sometimes we have to remember that it is just a compilation of individuals.

And it's only when you get to kind of the highest levels of the organization, do you begin to approach the point where the positions of individual people can start to be regarded as the positions of the corporation.

Below that, what you have are many people in many different positions who are contributing through the discharge of their own set of responsibilities and duties; and that's the extent to which we look to them if we're looking for people to be accountable for things. We look for them to be accountable for their own roles.

So the Terms of Reference don't charge the Commission with investigating individuals or investigating people. It's charged with investigating the role of Nalcor – and I'll come back to that a little bit more, later, and some comments about how the report may be approached – but I think that's an important first point to take out of it.

Related to that is considering the people we've heard from, who've been associated with Nalcor, who've appeared as witnesses – however you may assess the reasonableness of the decisions they've made, as individuals, or the advice they've given or the actions they've taken, my submission is that without exception, they've all – in doing their jobs in doing their work – they've been sincere in what they've done, they've been diligent, they've been professional. They've committed to the work and they've done their best for what they've

been called upon to do. And they've not acted in their own self-interests. They've acted in the interests of the larger organization.

So, as individuals, there's nothing more that we could ask for from them. And, related to that – the project, which spans back, really, to about 2003 – this iteration of it leading us up to where we are today – there's been an extensive effort at planning and at executing the project. Nothing in that time period has been done by the people involved without careful planning, diligent investigation in advance, and without structured processes to identify alternatives and options and to find the best ways forward.

As we heard the evidence throughout the course of the Inquiry, we hear bits and pieces. We hear small slices of events that have happened at any particular time. We form impressions when we hear it all together.

One thing that we tried to do in the written submission was to bring us back to the overall; structural organization that underlay all the work that went into the development of the material that – and the recommendations that led to sanction and the entire structure that lies behind how the execution of the project has been organized.

I'd submit that we may have underappreciated that on the way to the hearings. So, in the written submission we've tried to anchor our comments on the different Terms of Reference to that planning and organizational work that has underlain much of what's been done.

So, through this Inquiry process the project has now been the subject of a full investigative and forensic audit by Grant Thornton. There's been a – three – are the three separate audit processes engaged in – one looking at the sanction process; one looking at execution of the process – project; and the third looking at specific expenditure items.

The primary expertise of the auditors is on the forensics side, it's to find if there's been impropriety in the handling of money or on the financial side. And it's notable that, and should be noted, that nothing along the lines of any impropriety, financial or otherwise, was reported in the reports of the forensic auditors.

Mr. Ralph has already alluded to the participation in the Inquiry by government. Nalcor, of course, being the primary subject of the Inquiry, the custodian of the majority of the documents, has – since the Inquiry has been called, as the Commissioner is aware – worked as hard as we possibly could to ensure that the maximum degree of co-operation was provided to the Commission and that the work of the Commission was facilitated in anyway we could. We know that there's four or five million documents the Commission has collected, the majority of those have come from Nalcor.

There's been numerous interviews; there's been testimony of witnesses; there's been information requests that have come directly through Commission counsel, that have been responded to. As well, the investigative and forensic audit required as – ran as a parallel process that had its own interviews conducted of personnel associated with Nalcor, its' own document requests and its' own information requests that occurred. Throughout, Nalcor has done everything it can possibly do to have complied with all the requests and been of as much assistance as possible.

And it's been recognized, through the course of the hearing, that that has not been without impact on the execution of the project 'cause the Inquiry has been called in the midst of completing the work, not after the completion of the work. It's been impossible for that not to have some effect. Every effort's been taken to try to mitigate it – that as much as possible.

The Inquiry was called at a time following the events of 2016: with change of government; the problems with Astaldi; a lot of public criticism of the project at that time, including public criticism of the people involved in executing it. Morale is something that naturally would be expect to have been affected by that. The calling of the Inquiry added a significant layer of uncertainty over what was coming next and over how the Inquiry would progress.

It's understandable that that would contribute as well to the overall morale of the people involved in executing it, and then the – the process of responding, would have the certain degree of distraction from their other work. The Commission, through council and staff, I know,

has worked to accommodate that and recognize that all the way through, which – and we certainly appreciate the extent to which that was done.

So, as I've said in the written submission filed on Friday, we've attempted to be as thorough as possible in the time available. And the brief is structured to follow the Terms of Reference as much as possible. The evidence has covered a very wide range of material and topics, as it has had to, in order to ensure that, publicly, the matters have seen to be inquired into that needed to be inquired into.

But in the brief, we returned to the Terms of Reference and dealt with matters, issues that have been dealt with in the hearings, in the context of the Terms of Reference, and dealt with some of the evidence in the context of the Terms of Reference. And I'd submit that that is appropriate at this stage for, Commissioner, for you to do when you approach doing your report as well.

And as I've said, Nalcor has been the primary subject of the Inquiry. We have not, in our written brief, suggested recommendations to be made by the Commission. In large part because of that, because it is Nalcor that has been inquired – has been inquired into. It's not necessarily appropriate, in those circumstances, for Nalcor to be the one suggesting what recommendations should come out of this Inquiry and, hence, we haven't done so.

Commissioner, some observations on the Inquiry process itself, and these – I think we can come back to anchoring the approach that you will consider in presenting your report to the minister. First of all, it is an Inquiry, so it is an inquisitorial process – this is more lawyer stuff I'll get into here now. It's not an adversarial process like a trial would be.

So a Commissioner inquires, the Commissioner seizes the bit and makes the inquiries, determines the course that the Inquiry is going to take, the information that needs to be dealt with, and gathers it up, working through Commission counsel and staff.

A trial judge, on the other hand, is a neutral adjudicator. A trial judge sits back and lets the

parties bring the information forward. And the processes exist, in a trial, to ensure that all the parties have equal standing and equal footing and bear the responsibility of bringing the evidence. Here, the Commission, itself, takes the primary responsibility of collecting and presenting the evidence.

It's the Terms of Reference and the Commission's interpretation of those Terms of Reference that sets the agenda for the Inquiry; parties with standing don't. So there's nothing wrong with that. That's the way it should be, and it's organized that way for a purpose. The purpose of an inquiry is different than a trial in court. The purpose of an inquiry is to take broader views to explore a set of events and determine what has happened and to provide guidance and advice for the future.

The Inquiry, while it is partly backward looking because it must look back and determine what has happened, the real important part is the forward-looking part, which is learning from what has happened, making findings about what has happened and making recommendations arising out of that for the consideration of the minister to whom the report goes. In this case, that's the minister of Natural Resources.

So, consequently, the ordinary rules of court, that us lawyers are used to, don't apply in the same way. The rules of evidence don't apply. And that's, in part, recognized by Section 7 of the order setting up this Inquiry. It's the one that says that there will be no "conclusion or recommendation regarding the civil or criminal responsibility of any person or organization." And it's very clear that that's something that's prohibited.

But it suggests, also, that the focus on the Inquiry is not on fault-finding. This is where I come back, to some extent, to the idea that – we've heard from many individuals who've played their own individual roles. And while they are protected from expressed findings of civil or criminal responsibility, their roles are to be examined and will form part of the story – that I presume, Commissioner, you'll write – about what's happened with the Muskrat Falls Project and how it's developed and why we find ourselves where we are now today. But judging them is not what this process is about.

So the Inquiry is a public inquiry, and that's a very important part of the process, the public part. There are some limits, of course, and they've been recognized here: the legislation, the Public Inquiries Act, allows part of the proceedings to be conducted in camera, some of the information be kept in camera.

We've worked very hard to try to ensure that as few claims as possible for protection of information for commercial purposes were made, and I think that's been largely successful. Commission counsel and staff have been extremely cooperative in that regard.

So, it being done in public, the Inquiry by the Commission must – could be said to be – not only needs to be done, but it must be seen to be done. It must be seen to be done in order to satisfy that public interest goal. As Mr. Ralph has alluded to, we're here because there's been an interest which has been a public concern about the project. And the Inquiry, to the extent possible, needs to clear the air, ensure the public that all the important evidence has been brought forward, all the important matters have been considered.

So the result is that we've heard evidence in the public hearings that's been very broad. It's touched on many subjects. It's led us in many directions. The diversity, the depth and breath of the material that's been covered in the hearings has been very large. The hearings have had a feeling – because we've been marching towards this December 31 deadline that you have in order to file your report – we've had a sense of, what I've thought of as, unrelenting forward momentum. From the start we've been marching steadily forward, everyone's been working hard in order to get there.

The participation of many of the parties with standing has been important to discharge, in particular, the public objectives, the public airing of the issue objectives of the Inquiry. Parties with standing have been particularly useful on addressing matters such as Indigenous consultation, the safety of the North Spur and the methylmercury issue. It is ultimately for you, Commissioner, to determine where and how those matters fit into the Terms of Reference, as you've already interpreted them, and how they are to be addressed in the final report. But it's

been important that those issues be heard and that there had been a full opportunity to air them here.

So, Commissioner, concerning the report, which you will deliver to the minister and which the minister is mandated to release publicly after her receipt of it, as I've said it is – you are directed to make both findings and have the opportunity to make recommendations, and that the work of the Commission thus looks both backward and forward. And, as I've said, what the report must address is framed by the Terms of Reference that the Commission has been given. So two observations, only, regarding the preparation of the report – well, maybe three.

The first is that, as I've described it, one of the primary objectives of the Inquiry – aside from delivering the report itself – has been the public exploration of the evidence; that I've described as having been very broadly done. For the report, I would suggest that it is appropriate at that stage to return to the Terms of Reference, as they're interpreted, and to apply what may be a sharper focus now on those aspects of the evidence and those issues which are the ones that are mandated to be addressed in the Terms of Reference. Out of necessity, the Inquiry process had to be broader than that but it's now time to focus it back on those Terms of Reference.

The second point, and I've alluded to this already, is that the process of conducting the hearings, the testimony, it necessarily had to explore the roles of individual people. Commission counsel have done that in their examinations, other parties with standing have certainly done it as well.

But the Inquiry is not about the individual people, it's about the organizations, it's about Nalcor, it's about government – however we define it – it's about the roles of institutions, it's about how large decisions have been made and so on. So, in the report, I'd suggest it is appropriate to put the focus on that level.

Commissioner, about 10 years ago, I had the privilege of participating in Justice Cameron's Inquiry into the breast cancer hormone receptor testing. Mr. Coffey was there with me playing commission counsel role at that point, and you'll

be happy to know that reports don't sit on the shelves forever, because I pulled it off two nights ago and had a look.

And there were many parallels between the process in that Inquiry and the process in this Inquiry. There was a role for government; there was a role for a government agency. There was – there were issues which had heightened public awareness and public attention. There were technical issues, there were experts, there were many individuals who played individual roles whose experience in – through the Inquiry testimony was similar to the experience of many people here.

And it may be – if you haven't done so already – worthwhile to review Justice Cameron's decision. She dealt with the issues that were framed in the terms of inquiry – terms of reference. She dealt with the organizations. She told the story and the roles of the people involved without having to assess or judge their own particular discharge of their duties in a way that some might have expected would be done. And my submission is that it's appropriate to take the same approach here.

Commissioner, a comment on witness testimony. When we put a witness on the stand and us lawyers ask some questions, we ask some questions as if things happened yesterday, as if everybody's expected to remember everything. We keep asking questions until the witness can't answer anymore. And sometimes we forget that, here, the project was sanctioned in 2012. The process really began in – on the Nalcor side, it began inside Newfoundland and Labrador Hydro in 2005, and then Nalcor itself was only created when the Energy Plan was brought in in 2007.

So many of the events we have been inquiring into and asking witnesses about have happened between seven and 14 years ago, concerning the sanction phase. No one, whether they're a civil servant or an engineer or a construction manager back when they're doing their duties and their responsibilities, moving from one thing to the next, getting the job done and moving to the next job – very few of them would ever anticipate that in seven or 14 years' time they're going to be in a witness stand having to recall details and explain reasons for why things have been done.

So, consequently, a lot of what we've seen is people's recollections have had to be informed by the documentary records that have been available.

So, Commissioner, the Terms of Reference themselves, there are four primary ones and they can really be broken down in two ways – in the same way that the Commission has structured the Inquiry hearings. And I've been using the section numbers from the order: 4(a) was the consideration of options and recommendations to sanction the Muskrat Falls Project. And this was dealt with in Phase 1. We finished – that phase has been kind of regarded as having ended in December 2012 when the official sanction decision was then made, and perhaps that phase of process could be extended to financial close in November, December 2013 when the final commitments were made.

The second Term of Reference deals with why the project cost is more than estimated, and it has subsidiary, specific questions about the execution of the project that had been approved. So the second phase, then, really started at sanction and runs to the present.

Of the two other Terms of Reference, one is the exemption from PUB oversight and that kind of spans both phases in a way in that the decision to not have the PUB oversee the approval and execution of the project was made early in the project, but it also directs inquiry into the consequences of that which continues up – perhaps up to the present time.

And then the last Term of Reference, in 4(d), it really has two separate parts to it. The first is whether government was fully informed of risks before sanctioning the project, and that's clearly a Phase 1 issue. It's confined to examination of events leading up to sanction.

The second is the Term of Reference that's directed to government, and I won't say the Crown because it's – the word used in the Terms of Reference is government, and government is defined as the government of the province in the order. And it's whether government employed appropriate oversight. And that spans, I'd suggest, the whole project. That spans from the conception of it, even prior to the development of the Energy Plan – the process leading to the

Energy Plan – because the Energy Plan makes it one of the policy goals of the province to develop the project – and right up to today.

So I'm going to offer just a few observations and comments on some items raised in the Terms of Reference, leaving all the detail to the materials submitted in the written submission, which I understand is publicly available.

So first – regarding the first Term of Reference, which mandates, Commissioner, you to inquire into the consideration of options and recommendations and the recommendation made by Nalcor for sanction of the project. And it directs inquiry into the reasonableness of assumptions and forecasts on which that work was based.

And some of this may be obvious and we've heard this from witnesses during – all the way through, but if you're making an assumption, or you're making a forecast, in particular, you can only do that based on what's known at that point in time. And what happens afterwards is almost inevitably going to be different to one extent or another than what had been predicted.

So when the forecast is made, the future is completely uncertain. But from where we sit now, the vantage point we have today, there is certainty about the outcome. We know that. This is the hindsight question. So it requires a conscious effort – and it's hard to do – to constantly keep hindsight from creeping in when the task is to evaluate the reasonableness of assumptions and forecasts at the point in time at which they were made.

Examining the reasonableness of the choices made among options – among options for power supply between the Isolated Island Option, the Interconnected Island Option – raises similar considerations. So the natural inclination, when you're conducting a retrospective assessment of choices between competing options, is to kind of focus on the path that was taken.

So we spent an awful lot of time looking at what's happened because the Interconnected Island Option was chosen because we know what the outcome has been. We know what has happened and where we are today with that. So what would've happened if another option had

been chosen? Would it have worked out exactly as assessed back when the options were evaluated? Most likely not. How do we ever know today what the outcome of one of the options – other options would've been?

We've talked about optimism bias and how –

THE COMMISSIONER: All right –

MR. SIMMONS: – that can affect –

THE COMMISSIONER: – just if I can, just on that point because that's one of the struggles that I'm –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – having, is that if we were to have looked at one of the other options as opposed to Muskrat Falls, because of what we know today, it may well be that we could conclude – or some could conclude – that the wrong option was chosen.

But obviously I have to look at it from the aspect of what was known at the time or what was reasonably known at the time.

MR. SIMMONS: Yes.

THE COMMISSIONER: I assume that's the point you're making.

MR. SIMMONS: Yes, it is, because that language is in the first Term of Reference: "... reasonable with the knowledge available at that time," which is what you're charged in doing.

Now, on the question of whether, knowing what we know today, we think another option would've been better, it's a different question. It's a legitimate question and it's one that, in fact, may bear on the types of recommendations which you'd choose to consider. So it's not an irrelevant question to consider, but it's different and it has to be approached differently than the one that's framed in the Terms of Reference.

So, Commissioner, as I said when we've – we're talking about optimism bias, we've talked about that in the context of cost and schedule estimating, but when we look back at those options now, we need to take care to ensure that

the other options are not viewed too optimistically either.

And in the same vein, even if what we do is say, today, what do we think today, based on what we now know, would have been the better choice to make? Would it have been the Isolated Island Option? Would it have been the Interconnected Island Option? We can certainly make an evaluation of that and determine what would have been reasonable, knowing what we know today. But will that be the same in 10 years' time? Or 20 years' time?

Many things – many of the assumptions that were relied upon have changed since 2012: the price of oil, value of export markets, so on, cost of the project. So what's going to change in the next 10 years? Where will the price of oil be in 10 years? Where will the price of carbon be in 10 years? What will the value of export energy be in 10 years? It's very difficult to judge. All we can say is that time will tell, ultimately, whether the best choice was made or not.

So, Commissioner, the next point in relation to that first term of reference is that in examining Nalcor's role in the sanction decision, although the term of reference directs inquiry into Nalcor's recommendation and the assumptions and forecasts Nalcor used in making the recommendation, the context in which the recommendation was made can't be ignored; it can't be isolated out to merely the Nalcor role alone.

And we've included a section in the written brief dealing with the background leading up to the sanction decision. Government had to approve it. Premier Dunderdale testified that at the time the project was sanctioned, she regarded it as a public policy decision. So Nalcor's role was part of the bigger sanction decision that took other things into account.

So other elements of that public policy that were in play, largely arise out of the Energy Plan, which was a deliberately adopted plan for the future, for the province, setting out the direction that the government of the day intended to go in to develop the energy resources of the project. The Lower Churchill Project was a part of that plan. It was an economic and resource development part of that plan, but also a part of

the plan for supply of domestic power. In addition to the energy plan, we can look to materials that have been produced concerning Cabinet submissions and other government materials that help inform that.

So, while it is the task of the Commission to look into Nalcor's role, that can't be done in isolation without placing that role in the larger context of what the objectives were, that were established even before Nalcor as an energy corporation was established, and that have presumably informed the positions of government subsequently.

In 2011 and in 2012, the public communication of the decision to sanction the project was in large measure recast. It was – while the case was still made for the public policy attributes, economic development, excess power sales, positioning for the ultimate expiry of the Upper Churchill contract all those things, the approval process was kind of recast as a utility type decision, modeled on – invoking the utility concept of least-cost option.

That came with the referral by government to the PUB, and even though the Decision Gate 2 decision was – according to the decision gate model structure to have been the point at which a choice of option was made, it was still re-evaluated afresh at Decision Gate 3, as well, and in the context of the value as a utility question of the power to be supplied domestically to the province.

So in the written submission we've addressed the structured decision gate process. It was a deliberate – it was a carefully developed decision-making structure. The process is well documented. It was designed to bring rigour to the recommendation that ultimately would be made. Tests along the way.

And it was – by all accounts in the evidence, it was applied and it was used and it was followed by those within Nalcor's project management team and executive who are charged with conducting that work. The written brief discussed the excluded options, we described the Isolated and Interconnected Island options, speak to the forecasts and assumptions and how the modelling processes were used.

So that first Term of Reference does not ask the Commission to assess whether sanction of the project was right or wrong. It doesn't ask to assess whether sanction of the project was reasonable or unreasonable; it asks the Commission to examine and report on the reasonableness of the processes and the forecasts and the assumptions that led to the narrowing of the operations and the recommendation to sanction. And that's where Nalcor's role has been.

So, Commissioner, then the second major area of Inquiry was into the actual execution of the project following sanction – that's Term of Reference 4(b). And the questions there are, why is there a difference in cost between estimate and the actual construction cost and, as well, what is the cost to complete?

So, as for the process leading to sanction, the material in evidence demonstrates that there was a very well-planned, thoroughly documented project structure developed. The management of the construction – the management of all those aspects of the project were anticipated, there were processes put in place in order to carry that out as efficiently, as effectively as possible, and the evidence has been that it's been largely implemented as planned according to those processes.

In the written submission, we've described the process of development of the estimate, and the two major contributions to the estimate are the base estimate and the assessment or quantification of exposure to risk.

The base estimate was largely built by SNC-Lavalin – about 80 per cent of – the content of it was built up line by line. We know it was built by experienced people – people with hydroelectric experience – and they had references available to use to other hydroelectric projects in Quebec. There's not really been any question – serious question about the appropriateness of the processes used to develop the base estimate.

We've spent a long time looking at the quantification of risk and how that was managed. We do know that there was a very structured process adopted. We do know that it's about appropriate external consultants. Westney

were retained to bring expertise both in process and in completing the quantification of risk assessments.

But despite all that, we still hear from witnesses like Dr. Jergeas who, with all his study of these processes and projects, says, ultimately, it's a process of guessing. Now he may be going farther than many other people would say – he may be at one extreme – but that's essentially the way he described it. So, risk is the hardest part of the estimate to address.

The process adopted here was to divide risk into two buckets, as Dr. Jergeas would say. There was an estimate contingency for tactical risk, and it was explicitly included in the budget for the project. We heard a lot of evidence about the development of the contingency: the process, the choices made about the P-factors to be used – we've commented on this in the written submission. And one thing that we didn't hear in any of the evidence, I'd submit, is that we never heard anyone say that they were directed to change anything in the estimate to make it – the Interconnected Island Option more attractive.

The overall approach set at the top by the CEO, his approach to cost control, which he was entitled to do as the CEO of the company and which was a legitimate choice of range of options for executing a project like this, his overall approach may have influenced the way that people who prepared the risk analysis conducted their work.

But there's no evidence that anyone ever told anybody that they had to use a different number. The assessment of the strategic risk is similar in that there is no evidence that there was any influence, no fingers on the scale, when it came to the determination of that.

Now, we had a fair bit of expert evidence about how to approach management reserve for strategic risk, being those – the reserve for those things that occur outside of the control of the team that's executing the project. We heard that the reserve for those types of risk is often carried or managed outside of the project itself, to one extent or another. In private industry, it may be at the owner's level.

Dr. Klakegg from – gave us evidence on the Norwegian experience and certain other countries that have structured government models for how they execute large infrastructure projects – public projects. And one common feature of those seems to be that the – not only the holding of a management reserve type risk but even the assessment and quantification of it tends to take place at a level above or outside of the agency that's charged with executing the work.

In this case, for this project in this province, we did not, at the time that this project was sanctioned and when it was carried out, have an existing structure like that in place. Whether that's a good or bad idea, we don't offer any opinion on it. It's merely an observation that we heard evidence to talk about those structures and it's an observation that the same process wasn't here.

And we know from the evidence that for management reserves, specifically, that ultimately, the CEO of the corporation took the responsibility for how – what choices were made about whether to carry that in the public budget or not.

So, once you deal with the estimate – how the estimate was prepared and how risk was applied, how the budget was created, Commissioner, you're going to have to identify what the – why costs have changed. So, part of that process is identifying what the costs are that have changed.

Some of that information comes from the investigative and forensic audit. And at the Commission's request, Nalcor has also provided a breakdown, work package by work package, of changes from the Decision Gate 2 estimate through to the current estimated cost of completion of each project that at least allows some differentiation to see which are the work packages where growth and cost has occurred.

Regarding the reasons for increases in cost, that's a harder topic to deal with on a granular level. It's easier to deal with it on a higher level and we've addressed this to a limited extent in the written submission.

One of the areas where we know that there were increases in cost, over budget, were that contract

awards for work packages in many cases were higher than estimated; not all, there were quite a few that were lower, but there were also ones that were higher. And overall, the value of contract awards altogether was higher than the original estimate. That was something that wouldn't have been instantaneously observable because contract awards ran from bulk excavation before sanction through to the balance of plant contract that was only awarded in 2017.

The second and perhaps most unpredictable cause of cost increase has been the whole experience arising from Astaldi's performance of its work. And there's two factors to that, again, addressed in the brief. One was their early failure to manage their productivity on site which would not have been a financial cost to the project. It might have been a delay and consequent cost due to the delay, but it wouldn't have been a financial cost were it not have been for the second significant factor which was the insolvency of Astaldi's parent and the loss of the Astaldi's parent and the loss of the full ability to rely on the parental guarantee. So that is, as we've explored in the evidence, Astaldi essentially was going to run out of money. And there were other costs then that have been described as the knock-on effects from the Astaldi problem.

Aside from those two, cost increases can be attributed to a variety of different work packages, for a variety of different reasons. Some of them within the range of what might have been expected, others maybe not. So, Commissioner, you have the unenviable task of trying to explain why and where those cost increases occurred.

So under the second Term of Reference, there are also some specifics, some subparagraphs there that a direct inquiry into what, in the brief, have termed several project management issues. These were explored fairly extensively in the evidence. We've dealt with them in the brief and unless you have any questions, I'm not going to refer to them further now.

So, Commissioner, one topic related to this – probably both to the – both of those Terms of Reference, before sanction and during execution, that we've touched on in the written submission, but not as a direct separate topic, has been the

role of consultants and reviewers throughout the project.

So there's been outside consultants engaged by a number of parties at different times for a number of reasons. Westney was involved early on to provide its expertise for advice on risk. Prior to going through a decision gate, there were independent project review teams put together to assess the readiness to advance through the gate. Independent Project Analysis was hired for a similar reason. Navigant, an outside consultant, was retained to provide a type of cold eyes review of the option selection. Then the PUB engaged MHI, Manitoba Hydro International, and then the province engaged Manitoba Hydro International.

The province also engaged Ziff and Wood Mackenzie to look at assessment of natural gas options and prepare reports. Canada engaged its independent engineer to monitor and report on construction progress and that information became available to the province eventually. And finally, Ernst & Young was retained by the province on several retainers to conduct several different audit-type reviews for government in its exercising its oversight role. So these roles of these consultants and advisors, they ranged from kind of strictly providing services to something more akin to being auditors.

Now when we lawyers ask questions about this in the hearing, I think we often fall into the trap of thinking that if someone's called an independent consultant, they're like an expert witness who's coming to court. And it's the court's expert witnesses where the neutral arbiter, the judge, is looking for advice in an area outside the judge's expertise. And where that person should have the same or similar level of independence and – as the judge himself or herself has. Sometimes that's the way we think about these things; and hopefully we learn through the evidence in the Inquiry that that's not the right standard to be applying here when we evaluate and examine the roles of these consultants and reviewers.

In many cases, what's being sought is something like a cold eyes review; we know that in other instances these types of reviews are conducted by people within the same organization; it's like a second opinion. Sometimes they come from

outside the organization but it's not of great concern if those people have had some prior involvement or connection. They're still trusted to bring their own professionalism to bear on providing the advice that's being sought from them. That doesn't mean you can't rely on it, that doesn't mean that it's not valuable and important. Dialogue is part of the process between the consultants and the reviewers as well, and the – in this case it would be the people executing the project. And the review of draft reports is part of the process.

Now we know the primary purpose of that is to make sure that facts are correct and that, you know, that the consultant hasn't gone off in a direction that they shouldn't go in or that there's not other information they need to consider. But of all the parties we've heard from who've conducted these sorts of reviews who have actually provided testimony to the Commission, I don't think there's any who said that their views were influenced or changed because anyone at Nalcor or anywhere else asked them to, or applied any pressure on them to do it. They all maintained the continuity of their professional independence in carrying out their work.

So Commissioner, where we are today is that the project is nearing completion; first power is now scheduled for this fall. What the future may hold for the project we won't know. The plant itself is certainly good for a hundred years, so it's a valuable asset for long-term; it's for others to speak to the overall value of that. And as I've said, while it's very challenging at the moment to deal with the way the project has played out, its issues for the province – there's issues for the ratepayers, there's issues for the taxpayers. But, ultimately, time will tell whether the choices were correct.

So, Commissioner, that's all I was going to say, subject to any questions that you may have.

THE COMMISSIONER: Yes. I do have some questions about your brief and –

MR. SIMMONS: Okay.

THE COMMISSIONER: – I appreciate your review of those issues and – but I do have some

issues that I do want to raise with regards to some of the things that are in –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – your brief.

I do, also, want to acknowledge – as I did with the Province of Newfoundland and Labrador and as I've acknowledged before – but I just want to reiterate it is that: The Commission very much appreciates the co-operation we did receive from you, in particular; and as well, all those in Nalcor who we needed to get information from.

MR. SIMMONS: Mmm.

THE COMMISSIONER: We did not have difficulty getting that information for the most part. Sometimes we had a few discussions about it, but at the end of the day, I felt that we received what we needed to get and for that I'm grateful.

I want to go to – do you have your brief there –

MR. SIMMONS: I do, Commissioner.

THE COMMISSIONER: – with you?

MR. SIMMONS: I think I do.

THE COMMISSIONER: I'd like to go to your discussion about some of the excluded options.

MR. SIMMONS: Yes, Commissioner.

THE COMMISSIONER: And, particularly on page 29, related to natural gas and liquid natural gas.

I'm not certain that your review of the evidence captures everything, and I know that wasn't what was intended in the first place. So, I want to just review some of the evidence on this particular point, and you can correct me if I'm wrong, but my understanding is that: Nalcor had determined that natural gas and liquid natural gas were not viable options.

But subsequent to that, there was a request by the government, and I believe it was through Minister Kennedy at the time, to review the whole issue of natural gas and liquid natural gas,

I believe, as a result of Mr. Bruneau's interventions before the PUB – or I'm not even sure it was before the PUB – it could've been before that. And, ultimately, what transpired is there were two reports done – you mentioned them earlier – Ziff and the Wood Mackenzie report.

Now, my recollection of those two reports – and I have to confess, I did not go back and specifically look at the evidence –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – but I have been looking at it over time – was that the Ziff report pretty much was in agreement with what Nalcor had suggested as reasons why natural gas should be excluded. For Wood Mackenzie, I think that, again, they were very consistent with Nalcor's views. But they certainly appeared to be much more favourable with regards to the option related to liquefied natural gas than had Ziff been.

Am I hitting all points that you're aware of so far?

MR. SIMMONS: I think you are correct in that there was a – the Wood Mackenzie report had been done for government. And I believe there was a companion report – I haven't gone back and –

THE COMMISSIONER: Pan – there was

MR. SIMMONS: – actually read to piece it together but there might –

THE COMMISSIONER: Pan Pacific report –

MR. SIMMONS: – be a report for LNG –

THE COMMISSIONER: – early on. Correct.

MR. SIMMONS: – Yes.

THE COMMISSIONER: That was done quite early on in –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – in the process. I think it was back in the 2000s somewhere. That first report?

MR. SIMMONS: I'm not sure. I think the early one done was – the Pan Kenny Maritime [sp. Pan Maritime Kenney] report –

THE COMMISSIONER: Right.

MR. SIMMONS: – had been done early on and in – after the Navigant report had been prepared and provided to Nalcor, and I'm – I have to be careful not to stray into some things I've heard outside the hearing.

THE COMMISSIONER: Right. Okay.

MR. SIMMONS: I think this came out in the hearing. But it was once the Navigant report was there – and its discussion of natural gas, liquefied natural gas, was fairly thin – it didn't deal with it in great detail – that within Nalcor there was actually a report commissioned then from PIRA to look at –

THE COMMISSIONER: Right. That's correct.

MR. SIMMONS: – liquefied natural gas. That report was ultimately not released publicly because of proprietary right concerns that PIRA –

THE COMMISSIONER: Right.

MR. SIMMONS: – had. But that had been the Nalcor initiative.

And then afterwards – shortly after that when Minister Kennedy became involved, Ziff was retained, then Wood Mackenzie. And if I recall correctly, Wood Mackenzie did do some work on liquefied natural gas as well as piped natural gas from offshore.

THE COMMISSIONER: All right. Okay.

So in your brief, you talk about the fact what – how Nalcor explored the issue of natural gas and I – and you reference the fact that there was – that Mr. Keating, James Keating, basically had discussion with one of the operators, namely Husky, I think it was –

MR. SIMMONS: Yes.

THE COMMISSIONER: – at the time. And while he was careful about disclosing too much, and I didn't explore it too much because of some sensitivity there, there – to my recollection, there was no other effort made certainly by the government directly with any – I can't recall any evidence of any discussion between any government official, particularly elected government officials, and either Husky, Exxon, any of the offshore operators. Am I right on that?

MR. SIMMONS: I think you're right in that I don't recall any direct government involvement in those discussions either.

I mean, one point to keep in mind, Commissioner, in relation to the whole natural gas issue is that the – is that those people in Nalcor – Mr. Keating and others, of course – had been involved in the offshore oil and gas development industry for some time.

Mr. Keating in particular was familiar with the positions that the oil companies had been taking, the efforts they had made in order to try and investigate the commercial prospects of natural gas. So there was a known body of knowledge going into this even before the sanction decision was explored in – or the choice of options was explored in 2010, and so much of that information, though, was confidential and proprietary and didn't find its way initially into the public discussion.

And Mr. Keating did give some evidence about his sources of information and what was available for there to have been a reasonable conclusion reached that the possibility of exploiting natural gas through a pipeline bringing it on shore or through a liquefied natural gas option had been fully explored beforehand. And to the point where Nalcor had issued a kind of request for proposals sometime earlier – not on the Lower Churchill Project side, but on the offshore development side – to say, how can we do this? Can we use compressed natural gas? Can we use liquefied natural gas? Is a pipeline an option? And there had been a process over several years –

THE COMMISSIONER: Right –

MR. SIMMONS: – where that had been explored as well.

THE COMMISSIONER: – but that process – in fairness, that process, as I understood it, was a process involving a commercial activity that was far greater than the idea of providing electricity to domestic – for domestic use. This was to me, it was – as it was explained by Mr. Keating, it was more of a commercial activity with regards to sales of that natural gas on the export market basically to make it worthwhile –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – make it commercially viable to proceed.

MR. SIMMONS: One of the NRC reports, though – one of the NRC investigations – did look at use of natural gas for domestic consumption as part of kind of a portfolio of uses –

THE COMMISSIONER: Correct.

MR. SIMMONS: – to try and rise up to the level –

THE COMMISSIONER: Right.

MR. SIMMONS: – where it would become feasible for an oil company to agree to engage in a project.

THE COMMISSIONER: Right.

MR. SIMMONS: So in that sense, it was factored in –

THE COMMISSIONER: Right.

MR. SIMMONS: – and determined that even in combination with the other opportunities that were there, it didn't reach the –

THE COMMISSIONER: Right.

MR. SIMMONS: – ultimately the level where it would interest the oil companies in exploiting it.

THE COMMISSIONER: So I guess from my perspective, I think, one of the things, like –

well, you have have set out certain facts here. I think there are additional facts that –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – need to be considered, and one of the concerning things that I am looking at, to be quite frank, is – and I want you to comment on this if you wish to – is the issue of Mr. Keating’s communications between himself and Mr. Martin, specifically, you know, referring to issues of pile-driving the issue and whatever.

Now this – these are all semantics, and I recognize –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – that and, you know, we’re in the emotion of the day, and I’m sure it was frustrating for Nalcor at that time to be looking at a potential review of an option that they had basically excluded but, you know, that is there, and then when – and there is no – there doesn’t seem to be any high level attempt by, you know, anyone in the government basically to converse with people on the offshore.

I mean here we are, we – and the reason I’m putting this to you is because I’m thinking this way and I need you – I wanna hear your views on this – but here we are with gas out there that, as I understand it, oil companies are no longer able to flare it all off, so the result is that they use some of it to assist with their production and then the rest of it they end up having to pay to store it in wells, hopefully, for at some point in time, it’ll have some commercial value and when oil is said and done or, alternatively, something else arises beforehand.

We needed 30 years to get from sanction to Churchill Falls, the end of the contract. It just seems to me – and I just wonder, and some have suggested this in their briefs and whatever – it just seems to me that there is some reason just to think that the opportunity should’ve had far greater –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – review.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: And I’d just like to know what your comments are –

MR. SIMMONS: Sure.

THE COMMISSIONER: – on that.

MR. SIMMONS: Well, first of all, on the kind of colourful language which finds its way into some emails, Mr. Keating is an enthusiastic and sometimes effusive speaker, and people have different ways of expressing themselves, and I don’t think we should be reading anything, frankly, into that language. Mr. Keating would have been well-known to Mr. Martin, and anyone who was reading the emails would certainly read them in the context of the manner in which the author would normally express themselves, and really there’s nothing wrong with that.

Now on the question of the depth of exploration of this issue, of whether natural gas was an option that required further consideration, the – when this issue was brought to the fore by Dr. Bruneau, first in his submission to the PUB, which I think was probably in 2011, and then by his presentation at the Harris Centre in 2012.

The evidence is pretty clear that it was the Department of Natural Resources that took this issue on. And the work that was done within Nalcor was really supportive of the efforts that were undertaken in the Department of Natural Resources. They were the ones who retained Ziff; they were the ones who retained Wood Mackenzie; they were the ones, as well, who did the public communication on this issue as we neared closer to sanction. And I’m not looking to pass the buck on this, but that is – this is a reality at that stage, that the direction for that inquiry was set by what the minister was driving at, at that time.

Now regarding – you’ve made some comments regarding the uses that the oil companies make of gas offshore. It’s worth remembering, it varies between operators and fields, and the evidence that we’d heard was that all the operators would use it to power their platforms, of course. And it – that doesn’t mean that it’s gas that’s available for another purpose. If you

don't use it to power the platform, the power – platform's gotta be powered some way – other way.

The Hibernia Project in particular used its gas for exploiting more valuable oil extraction, by reinjecting it for the purpose of driving oil out of the reservoirs. It was only the White Rose field where there was some potential for there to be excess gas. The White Rose field has been one that's been – it's a complicated oil field. It's been going through a series of different expansions and uses – continues to do now. There's another platform being built for West White Rose at the moment.

And the – as I recall, Mr. Keating's explanation, the operators of that field had not been willing to give up the gas and preferred to store it in – either for future potential for commercial production for other uses or even potentially for use in oil extraction, if that worked out in the future. And the other piece of all that is that the structure of the development agreements that are in place for those offshore oil fields, gives the operators extensive rights.

And it's not simply a matter of government saying, you have to do something different. It would mean reopening or legislating or imposing changes on those significant agreements that were reached after long negotiations, and there was some evidence, as well, of the potential chill effect that could happen on the offshore oil industry, if those sorts of measures were taken.

So it was a complicated issue at the time. There would have been many hurdles that would have had to have been overcome, in order to create a viable prospect for development.

And I understand your question being about why weren't there more questions asked at the time. On the Nalcor side, I'd suggest that people knew what the situation was with the oil companies. On the government side, that would have to be a question for the minister and for government.

THE COMMISSIONER: Okay.

Go over to page 53 of your brief – 52 and 53. You're talking about conservation and demand management.

MR. SIMMONS: Yes.

THE COMMISSIONER: You make a statement at page 53 that the documents that you referred to “illustrate that setting CDM policy and implementing it involves the PUB, NLH and NP.”

I'm not sure that's exactly correct. You are familiar with the fact that in the Energy Plan, itself, the government directed that part of its policy was regarding conservation and demand management.

MR. SIMMONS: Yes.

THE COMMISSIONER: You know, Nalcor has certainly taken its mandate with regards to the development of the Lower Churchill seriously. Some might question whether or not Nalcor took it seriously – the policy directive of the government for the consideration of conservation and demand management, particularly when it was looking at the issue of what it saw was a crisis coming in the sense of a shortage. And Mr. Stratton left no doubt in anyone's mind when he testified about his view on CDM.

So is there anything you'd like to say in response to the fact that that is part of the Energy Plan?

MR. SIMMONS: Well, Commissioner, I guess the evidence is what it is on that, to a certain extent. That's part of the answer.

But it's not just Mr. Stratton's views that I think we need to take into account when we look at what the potential value of CDM – and I'm not arguing that it's not a good thing and that it doesn't work in places and under circumstances. But even Mr. Marshall – Stan Marshall – in his evidence had some doubts about the effectiveness of some of these measures, giving his example of the second fridge ends up being the beer fridge in the garage.

Now, that's – we can't make decisions on an anecdotal basis like that, I know. That's not the way –

THE COMMISSIONER: We also have evidence of –

MR. SIMMONS: – that these things can be done.

THE COMMISSIONER: Yeah, we also have evidence of the present president of Newfoundland Power, who basically indicated that in the last year 12,000 heat pumps were –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – installed, which was –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – which seemed to be – I was quite surprised when I heard that.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: And that certainly is a CDM measure. I mean, the fact is that, yes, there was some, you know – I’m not sure Mr. Marshall’s comments were agreed to by everyone because certainly there’s been a lot of progress in heat pumps and whatever –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – since and I didn’t get into it too much, but I got a little drift of it with some other witnesses afterwards. But, in any event, I’m not trying to put you on the spot on this but I’m just wondering why, you know –

MR. SIMMONS: It’s –

THE COMMISSIONER: – did you want to comment on why that policy of government in the Energy Plan was not followed?

MR. SIMMONS: It’s another example where we do need to take some care not to apply our knowledge of what has developed since then. The heat pump market is a great example. We now know the potential of heat pumps. We know the public’s interest in picking them up. To what extent that’s been driven by the fear of electricity cost increases as a result of the project, is a very good question and apart from that it’s hard to know what would have happened.

But we’ve got to put ourselves back in the 2010 time period, you know, when that particular consideration was being made and consider the reasonableness of the extent of emphasis that was or wasn’t placed on conservation demand management then.

Our point, in this portion here, is to say that it’s not – implementing it is not – was not strictly a Nalcor ability to do. The majority of the customers – the heat pump users – are Newfoundland Power customers, they’re not even customers of Newfoundland and Labrador Hydro or Nalcor.

CDM clearly falls within the jurisdiction of the Public Utilities Board, to make orders concerning and to investigate and to act on. And that’s the very sort of thing, I would think, the Public Utilities Board is there to do. So while we can say: Why didn’t Nalcor put a greater emphasis on this as a potential offset for new generation sources? We’ve got to look at that in the context of the time and in the context of the other participants in the utility regulation and delivery of power.

THE COMMISSIONER: All right.

Thank you.

Page 71 of your brief, you refer to – at the bottom of the page – the project management team providing a briefing to Mr. Martin – this would have been in May of 2014 – related to the addition of additional management reserve –

MR. SIMMONS: Yes.

THE COMMISSIONER: – and schedule reserve. And I think what you’re suggesting is that that, ultimately, was a decision that the CEO had to take.

MR. SIMMONS: Well, what we’re attempting to do is factually recount the things that happened –

THE COMMISSIONER: Right.

MR. SIMMONS: – without, necessarily, promoting conclusions of one sort or another. But I think it is a fair statement to say that, at that point, the presentation having been made to

Mr. Martin, and Mr. Martin having the authority to determine what the increase in the authorization for expenditure at that time would be, it would be his decision to determine how to address the recommendation for management reserve that was made in that presentation.

THE COMMISSIONER: Okay.

And I'd like to go to page 72, please?

MR. SIMMONS: Mm-hmm. Yes.

THE COMMISSIONER: And you're commenting on the issue of the discussion about the 7.5 number.

MR. SIMMONS: Yep.

THE COMMISSIONER: And you conclude and you say – at the middle of the page: It is reasonable to conclude that on March the 9th or 10th, 2015, senior government civil servants and politicians were informed of the potential increase in project costs of 7.5 billion.

You acknowledge, I assume, that Julia Mullaley has indicated that was not the case.

MR. SIMMONS: Yes.

It's – the evidence – there's evidence there that is capable of allowing the inference to be drawn that: Whether Ms. Mullaley was personally aware or understood that that was a topic of discussion explicitly at the meeting on the 9th, which was with senior public servants where Mr. Sturge noted the 7.5 in his notes. It's hard to imagine what else that could possibly relate to, given the other context of the notes and the information that was in it. And that for there to be a meeting the following day with the premier and for it not to have been a topic of discussion is a stretch.

So, this is a matter of – there would have to be an inference drawn from the evidence to conclude that and, Commissioner, you're rightly going to have to weigh and balance all the evidence available to make a determination on that.

THE COMMISSIONER: Okay. Thank you.

Okay.

I want to go to page 73 now –

MR. SIMMONS: Yes.

THE COMMISSIONER: – and your discussion about the construction reports and –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – you can tell me if I've got this right.

You're suggesting that the concern of the Government of Canada, at the time, had nothing to do with the construction reports. It had to do with being informed about the increasing in cost that it just didn't – as Mr. Argirov testified, it just didn't happen over night. It had to be coming, and the concern was that it wasn't provided.

MR. SIMMONS: Yes, Commissioner.

It was a concern about communication, but not –

THE COMMISSIONER: Right.

MR. SIMMONS: – specifically a concern about the form of the construction report.

THE COMMISSIONER: Right.

However, if you – I read over the – Ms. Manzer's letter, and it's pretty clear, in her letter, that she takes some real issues with the content of the construction reports in her letter. And I also reviewed Mr. Meany's testimony, and he didn't dispute, and nor did anyone else afterwards, any of the contents of her letter. There was no – Nalcor made no dispute about the factual content of her letter. Basically, the drive was to get Canada satisfied to make sure the money kept flowing –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – at the time.

I guess my – you know, I'm not certain that – and in the end, it was agreed that the construction report would – with – would still be

provided with the additional information related to the issue of the costs.

MR. SIMMONS: Yeah.

I guess –

THE COMMISSIONER: Correct?

MR. SIMMONS: – a couple points –

THE COMMISSIONER: Okay.

MR. SIMMONS: – out of that, Commissioner. I'd have to look at Ms. Manzer's letter again, because I don't have the content of it –

THE COMMISSIONER: Okay.

MR. SIMMONS: – fixed in my head. But I did look at it when we were drafting this portion of the report, and I did not, at that point, take it that there was explicit criticism of the content of the construction reports per se. And the issue, I think, was more around the communication of information as opposed to the required form of the – of that particular report.

And the problem was solved, not by changing anything in the construction report, it was solved by providing better supplemental information to the independent engineer that would give him a better heads up if there were things developing with the project that would ultimately cause the AFEs to have to be increased –

THE COMMISSIONER: All right.

MR. SIMMONS: – on a project. It's a bit of a fine point, and the reason we're making the fine point –

THE COMMISSIONER: Right, okay.

MR. SIMMONS: – is because the construction reports are signed off. They're signed off and certified and you have to look at them as they were understood by people who were signing them off and the people who were receiving them and, as well, to look at them in sequence. And when you look at them from one to the other, it is very clear from them that there are changes made at the time the AFEs are changed and that's explicitly referred to, as mentioned

here. And that was explored in the evidence of Mr. Bennett, as well.

THE COMMISSIONER: Yeah, I think the point in Ms. Manzer's letter was that Canada had expected that Nalcor would follow what was in the financing agreements.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: And in those financing agreements, the expectation of Canada was that in the construction reports, which were the only reports – the formal reports –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – that were actually going to Canada, as I understand it, there was to be information related to costs –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – cost increases, and it wasn't included.

MR. SIMMONS: Yeah.

THE COMMISSIONER: That's my reading of the Manzer letter, and I agree – I understand you haven't read it and I don't –

MR. SIMMONS: Well –

THE COMMISSIONER: – want to push you too much on this because of that.

MR. SIMMONS: – it's not just the construction report, because the independent engineer prepares its own report to Canada –

THE COMMISSIONER: Correct.

MR. SIMMONS: – at the same time. And the independent engineer has access to more information than what's in the construction report and has direct access into the project as well. The ability to question, follow up on things, and if I recall correctly, the monthly construction report, which is a multi-page report with a lot of information in it, was provided to the independent engineer. Although, we'd have to check that factually to make sure that that's correct.

So it's not necessarily that the – Canada only gets that construction report, they get the due diligence report from the independent engineer, who has more information available to him. And I think the way that the issue was solved was by giving the independent engineer more timely information so that he would be able to assess his view when he provided his report to Canada.

THE COMMISSIONER: Right.

I don't want to dwell on –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – this too much more, but I think that one of the – this is almost like one of the – one – sort of a sample or an example of the –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – issue of information flow from Nalcor –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – to others who –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – were supposedly having some form of oversight of the project.

MR. SIMMONS: Mmm.

THE COMMISSIONER: You know, I would've thought that if you were, you know, providing advice – I looked through the financing agreements to see what the obligations on Nalcor were, they were pretty extensive –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – and it seems that when Nalcor provided the information to Canada, things that they knew about, and certainly Mr. Meaney was – testified that this is the case –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – was – were not included.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: And so I think it – I guess it goes to the – Ms. Manzer's letter, and I think she was basically stating the same sort of principle with regard to the expectation on Nalcor with regards to provision of information.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: Anyway, I –

MR. SIMMONS: Yeah, and Commissioner there certainly was an acknowledgement on Nalcor's part, and we know there was a response to Ms. Manzer's letter and there was diligence efforts then to develop a protocol to ensure that, and the – all the evidence that's available is that there was no issues after that point –

THE COMMISSIONER: All right.

MR. SIMMONS: – at all.

THE COMMISSIONER: Okay, moving on to page 78, the issue of the Valard contract and the HVDC transmission line –

MR. SIMMONS: Yeah.

THE COMMISSIONER: – and the geotechnical information.

MR. SIMMONS: Right.

THE COMMISSIONER: So, what you're basically suggesting is that, you know, SNC estimators were involved, they –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – had –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – you know, they were running transmission lines all over Quebec and they would've had experience in the wilderness and all that sort of thing.

Can I just remind you of Jason Kean's testimony, where he testified that it was something to the effect that it would've been – it wasn't appropriate to do the geotechnical work

before because you really didn't know if you needed it. You would only do it when you actually do the work. And it struck me that when – that's not quote for quote, but I think –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – that's the gist of what he had to say, or part of what he had to say. It strikes me that that in itself is a recognition that, with regards to the estimate, there are risks that are associated with that estimate, and those risks need to be appropriately identified and quantified.

MR. SIMMONS: Mmm, so, we'd have to look – I'd have to look back at the exact testimony from Mr. Kean, but what I do recall from the – in general, about the testimony in relation to the geotechnical work is that the geotechnical work could be for a couple purposes. One could be for the purpose of making an overall assessment of the numbers of different types of foundations that would be required for towers and that would go to the estimate because you're figuring out how many expensive foundations, how many cheap foundations.

But totally apart from that, there has to be some sort of investigation of each site as the work progresses to decide is this one of the 40 where the most expensive foundations are going to go or is this one of the 2,003 where the least expensive foundations go.

So the type of geotechnical investigation that I know Mr. MacIsaac talked about when he talked about progressing the work – and may have been what Mr. Kean was talking about as well – is that once the contractor starts the work, you have to be doing some geotechnical investigation just ahead of the work, far enough ahead of the work, to keep the work progressing smoothly. That's not the same as the type –

THE COMMISSIONER: Correct.

MR. SIMMONS: – of geotechnical investigation –

THE COMMISSIONER: Correct.

MR. SIMMONS: – that would be used in order to generate the estimate. I think there's a distinction there.

THE COMMISSIONER: Mm-hmm.

MR. SIMMONS: And as for the reliance on the work that was done before the overall estimate was prepared, I think it was legitimate to put some reasonable reliance in the experience of the estimators, on that particular item. We do know that it – that turned out to be an area where there were more costs than had been anticipated. And if we look back now, we'd say: This is another one of those 'might have beens'. It's easier to say: Well, if you'd done more extensive geotechnical investigation, you know, you would've had a higher estimate, there also would have been a lot more cost incurred in order to do it. And some of the evidence, I think, was that there could be very substantial costs.

So this is one of those balancing things where the balancing things where the cost of taking the investigation further has to be weighed against the benefit and, as you point out, that then figures into the quantification of the risk.

THE COMMISSIONER: Okay.

I wanna go to page 89 where you discuss Mr. Lance Clarke's testimony on the issue of the Astaldi experience in the North.

MR. SIMMONS: Yes.

THE COMMISSIONER: So my understanding is, is that part of his reasoning was – is that: one, is that they did all kinds of work all over the world in various challenging conditions and whatever, and he made the comment that cold is not the only challenging condition. But then he understood that they would also have a Canadian construction contingent added to their project and – to assist with regards to cold water – cold-weather construction.

Now, some might say that, you know, we've heard the issue of Astaldi's issue – problems with getting people on the ground and the right people and things of that nature. And when I look at that and look at the importance of the issue of cold weather, and I think it was recognized by everyone this was an issue even at the time of construction be – compare that to

SNC. So SNC, when they had – notwithstanding, theirs was a different type of a contract, it was that EPCM contract.

When they were having problems getting people on the ground, they – Nalcor was basically jumping up and down and getting uptight about it – and rightly so – and were trying to force the issue and eventually moved the whole thing out to an integrated team not just because of the issue of personnel, but for other reasons as well.

What do you have to say about Nalcor's efforts to ensure that –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – appropriate cold-weather experience was added to this project?

MR. SIMMONS: Well, you're correct. There was a top management team put forward by Astaldi who, by their credentials, had appropriate experience. Mr. Chryssolor who was going to be their project manager, in particular, came with very good credentials – came to the site, started the job, but unfortunately had to leave. And then there was then a succession of short-term managers until they settled in for a time.

In one of the measures that was taken in order to try to ensure that Astaldi would live up to that obligation, was that there were liquidated damages in the contract for the failure to provide people. So there was an incentive built in to assure that Astaldi followed through. Now unfortunately, that didn't happen.

We know that Nalcor did intervene in a number of ways during the course of 2014, including in supplying some of the important supervisory personnel. I am not sure to what extent it would've been possible for Nalcor to impose a project manager, for a major contractor. I think they had the liquidated damages provision in there which recognized and sent the message that it was important that that expertise had to be provided and was being relied upon.

And when you look at it in the whole mix of the whole analysis and explanation that Mr. Clarke has given here, that's certainly one of the items that made it reasonable to conclude that Astaldi

came with the type of experience that should allow them to be relied upon to be able to execute this work appropriately. And unfortunately, that senior Canadian experienced management was not something that they ultimately brought to the site early in the job.

THE COMMISSIONER: Page 103.

MR. SIMMONS: Okay.

I can see now I've written too many pages.

THE COMMISSIONER: Pardon me?

MR. SIMMONS: I can see now I've written too many pages.

THE COMMISSIONER: No, no, it's very helpful.

I want to discuss a little bit about the Astaldi situation and the issue on schedule.

MR. SIMMONS: Yes.

THE COMMISSIONER: And again, the way some people may be thinking about this. So we have a situation that the contract was ultimately signed on November 29, the same time that financial close was in place. There's an indication that there was a very slow mobilization by Nalcor, even with regard to the Limited Notice to Proceed that had been –

MR. SIMMONS: (Inaudible.)

THE COMMISSIONER: – issued in September.

But when the contract was signed, one of the things that Nalcor wanted was basically a waiver from Astaldi with regards to the issue of schedule and the impact it might have with regards to future claims and things of that nature. And it ensured that Astaldi signed a waiver, indicating that they felt they could basically do it on the schedule that they had.

And I accept that they did that, notwithstanding the information that was provided by Mr. Chryssolor. But I just wonder – when you look at the information that the project management team had –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – we know, for instance, in the letter that Paul Harrington sent to Stan Marshall in 2016, he indicated at the time that the schedule was P5, P10, P20 – I forget the exact amount, but it was certainly a low-probability schedule at the time.

So this was known well before the contract was signed with – because he says he knew this at sanction. Nalcor would have known – I would think that the project management team members would have known, that the schedule was aggressive and that it was tight.

So here we are now, basically with Astaldi having done very little up to November, the winter setting in in Happy Valley-Goose Bay and certainly at the end of November – and was there any obligation on Nalcor, notwithstanding the waiver from Astaldi, to consider the fact that in the circumstances, the schedule was even more aggressive now, because of what was missed by Nalcor's late mobilization – or, I'm sorry, Astaldi's late mobilization.

MR. SIMMONS: Yep.

So I can't say, Commissioner, that it wasn't considered. I can't say that that wasn't something that was taken into account. I mean, the – Mr. Harrington's email by itself shows that senior people in the project management team were aware that there was some potential for there to be schedule impacts. So it was a live issue.

And as for exactly how it got worked out, we'd have to look to the – to precisely – to the testimony of the various witnesses. But the assurances coming from Astaldi had to be a piece of that. And it wasn't just the release that was signed. We know as well that the CEO of Astaldi gave the assurance that they could do the work in the time that was available.

The – it's not like nothing was done during the LNTP period. There was work done to prepare, but it wasn't to the full extent that the project management team people felt there was an opportunity to do, and they did properly flag that up. But at the same time, the suggestion was there that the reason for that might not have been

Astaldi's unpreparedness or inability to have done better, but might have been its unwillingness to proceed with it in light of the contract not having been in place and not having been signed.

So that's context. So there's a lot of context around it. So I don't think it'd be correct to say that the potential for impact on schedule wasn't recognized, but that in the evaluation of the team as it worked up through, that the conclusion appears to have been reached that it was, you know, appropriate to proceed as it was.

At the same time, too, we can remember that the team was regarding there as being some float in the schedule as well, because the formal schedule saw first power coming in July of 2017, although in reality first power wasn't needed until December, in order to offset supply from Holyrood, assuming that that would happen in 2017.

So there was a little bit of float, a little bit of leeway still built in to the schedule at that point that would probably have given some measure of reassurance at that stage also.

THE COMMISSIONER: I want to talk a little bit about SNC; this was referred to at page 119 onward on your brief and –

MR. SIMMONS: Yeah.

THE COMMISSIONER: – just another thing I want to put to you.

I've heard from most of the key members of the project management team. There is no doubt that they have, or many of them have, some significant experience in megaprojects and various roles in megaprojects, notwithstanding the fact they weren't hydroelectric projects, but they're certainly some high-level people.

I heard evidence as well from people like Pat Hussey who talked about his being hired in the 2000s and then working up to the time that SNC was involved, and the preparations that they had done – all the documentations, the procurement plan, things of that nature which ultimately were adopted.

And when I look at and consider what I would consider to be the – sort of the culture of that project management team, you know, they were not what I would consider to be followers, and I think they were well prepared to throw their weight around when they needed to do it. And I think that was exhibited well throughout some of the testimony and whatever with regards to the dealings with various parties.

And when I look at SNC being hired – so initially the idea was – is that there was not going to be an EPCM, that that didn't go over well in the market, so eventually there was an RFP for an EPCM. Some might suggest that SNC, notwithstanding there were some deficiencies, there was – and notwithstanding the significance of their need to be there for their – due to their hydro experience – that really what happened was – is that there was never a full intention on the part of Nalcor to have an EPCM contract, that it was going to – the project was going to be run by this project management team in effect.

Any comment you would like to make on that?

MR. SIMMONS: Yes, Commissioner.

Well, the first point, on the senior members of the project management team, if you look at their work experience and their histories and their résumés, their whole working careers have been working on teams and teams that have been composed in different ways, teams composed of various people in various different projects. Their work experience has been to move from one project to a next. They're not all done the same way. The teams don't function all in the same way. They've had to have experience of accommodating and coping.

And of course you want some strong personalities. They have important jobs to do. They have to work to tight schedules. They have a lot of responsibilities. It takes some Type-A personalities sometimes in order to make those sorts of things work. But I don't think, from the evidence as a whole and considering their backgrounds, it would be a conclusion that I would draw that they would be unprepared to work in some different (inaudible) – sort of team as part.

And remember, if you look at the EPCM structure, the project management team was still there and still intact. Their role was, essentially, overseeing what the EPCM contractor would do. It's – that's set out in the project documentation as the way it would work. So the team would have remained intact and would have had a fairly high degree of responsibility in that process.

When it became necessary to transition, the existing team had to change considerably itself as well. It had to bring in a lot of other people, bring them in from the outside. So it was a significant change even for the project management team itself in order to do that. And I don't think there can be any conclusion drawn from the evidence but that something had to be done.

And we know that parts of the EPCM work were working well. The design was going very well. Other parts weren't working so well. So if it was a problem of team culture or attitude or approach, surely that would've shown up throughout SNC's work and not been confined to the certain areas where there were identifiable deficiencies and problems.

THE COMMISSIONER: Okay.

Page a hundred and – oh, I'm sorry.

I'll refer you now to page 150 of your submission.

MR. SIMMONS: Yep.

Thank you, Commissioner.

THE COMMISSIONER: In the last paragraph, you indicate – what I understand you to be saying here is that – at least from your – Nalcor's review of the evidence: The use of a P50 to set contingency for what is known as tactical risk seems to accord with industry practice, and that if a reserve – if a management – I'm assuming this is a management reserve or a strategic risk reserve and –

MR. SIMMONS: That's correct.

THE COMMISSIONER: – that's why I just want to confirm – is established for risks outside

the project management team – project team’s ability to manage, then there seems to be consensus that P75 is within an appropriate range.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: So you’re – so you are talking there about strategic risk or –

MR. SIMMONS: Yes.

THE COMMISSIONER: – management –

MR. SIMMONS: Yes, Commissioner.

THE COMMISSIONER: – reserve or whatever? Okay.

MR. SIMMONS: That’s correct.

And whoever the holder is, whatever level it’s held, there seems to be a consensus that because of the nature of those risks, that there’s a higher P-factor to be applied to that one.

THE COMMISSIONER: All right. Okay.

MR. SIMMONS: And that’s more – what we’re doing here, this is more observation on the evidence that’s been presented as opposed to statement of a particular position.

THE COMMISSIONER: So I want to take you to page 159. I only have a couple more of these.

MR. SIMMONS: Oh, that’s no problem.

THE COMMISSIONER: One fifty-nine, which talks about the board, Nalcor –

MR. SIMMONS: Yes.

THE COMMISSIONER: – board.

MR. SIMMONS: Yes.

THE COMMISSIONER: So you acknowledge, at page 159, Ken Marshall’s evidence that “the amount of the contingency or the decision” not to “carry a reserve for strategic risk were not discussed” with “the Board.”

So you’re saying that notwithstanding the fact that Mr. Marshall testified that he would have at least talked to the board in general terms about the fact that there could be unknown costs that are – that could arise.

MR. SIMMONS: Yes, and we’re recounting the evidence there, Commissioner. We’ve stated –

THE COMMISSIONER: Okay.

MR. SIMMONS: – that that’s what Mr. Marshall testified – Ken Marshall testified and –

THE COMMISSIONER: Is there any evidence to the contrary that you can recall?

MR. SIMMONS: Other than the general evidence of – if there’s anything in the evidence of Mr. Martin. I’m not aware of any particular piece of evidence that would contradict what Mr. Marshall has said.

THE COMMISSIONER: Right. Okay.

MR. SIMMONS: And, again, I do have to qualify that, Commissioner, of course, on the basis that there’s been a lot of evidence since we started this in September, and if there’s something else in there I’m missing, I would apologize for that.

THE COMMISSIONER: All right. Okay.

And I just want to – one other at page 160 you refer to the quote of Mr. Martin’s testimony regarding the decision that the strategic risk or management reserve would not be included in the budget.

My recollection, as well, of his testimony was that he also indicated that, from his point of view, all of the strategic risks that were identified by Westney were mitigated and – so that there was no need for a strategic risk.

MR. SIMMONS: Yes, you may be right, Commissioner.

THE COMMISSIONER: Okay. And that it was zero.

But I also understand that from the evidence of Mr. Dodson and Mr. Westney, particularly Mr. Dodson, that there were 40 other – 45 other strategic risks that they did not review at the time, although they indicated that Nalcor were aware of them.

MR. SIMMONS: I think the process that was used, as I understand it, with Westney for quantifying the strategic risks that got quantified in the report of \$497 million, dealt with what were identified as the largest key risks.

THE COMMISSIONER: Key risks, yeah.

MR. SIMMONS: So they focused on the big ticket items, the ones that would have the biggest impact. The inference from that, I think, would be that although there were other risks identified that fell in the strategic category, they did not collectively identify those as being ones that merited the debt of evaluation necessary for quantifying the number.

THE COMMISSIONER: All right. Those are all my questions. Anything else you'd like to add, Mr. –?

MR. SIMMONS: Well, the only other thing I'd like to say, Commissioner, is to say thank you for the comments about the – Nalcor's co-operation. And I had neglected to say earlier, and I meant to, that it was only possible because of the immense help and co-operation from all the counsel staff, co-counsel, and everyone all the way through. We found everyone completely reasonable and good to deal with. And I think it's really expedited making it possible to be where we are now, doing our closing submissions on schedule, on time.

THE COMMISSIONER: Thank you very much.

All right, we'll adjourn now for lunch; come back at 2 o'clock. And next will be yourself, Mr. Budden, for the Concerned Citizens Coalition.

And Mr. Smith, I'm hoping that we're going to get to you this afternoon. It'll depend on how it goes, but we'll see.

MR. SMITH: I hope so too. I'll also have to check my reservations.

THE COMMISSIONER: Oh. I see. Well, we'll definitely get you in.

CLERK: All rise.

Recess

CLERK: All rise.

This Commission of Inquiry is now in session.

Please be seated.

MS. MUZYCHKA: Commissioner, I have one more exhibit we need to enter, please? And it is P-04555. And this would be the response to the A. J. Goulding report prepared by the Government of Newfoundland and Labrador.

THE COMMISSIONER: All right, thank you very much.

All right, Mr. Budden for the Concerned Citizens Coalition.

MR. BUDDEN: Good afternoon, Mr. Commissioner.

As you know, my name is Geoff Budden. I represent the Concerned Citizens Coalition, which, as you also know, is a group of individuals who have, for many years, been observers and ultimately critics of this project. The –

THE COMMISSIONER: Okay. Maybe in the back of the room – back – the technology people could up Mr. Budden's mic. We're having difficulty hearing him.

Just keep trying, then, Mr. Budden, and we'll try again.

MR. BUDDEN: Is this any better, Mr. Commissioner?

I did the – I turned it off and turned it back on again. That usually –

THE COMMISSIONER: Yeah.

MR. BUDDEN: That's the limit of my technical abilities –

THE COMMISSIONER: I think I heard somebody in the audience saying they can't hear. Nobody can hear back there?

Okay.

So we're having a bit of a technical problem. I'll just go back and speak to them. Just give me a minute and I'll just (inaudible).

Recess

CLERK: All rise.

Please be seated.

THE COMMISSIONER: All right. I think we have the problem solved, so go ahead, Mr. Budden.

MR. BUDDEN: Thank you.

My name is Geoff Budden. I represent the Concerned Citizen Coalition, which, as everybody here is aware, is a group of individuals who, for many years, have been critics of the Muskrat Falls Project. Firstly, we – on behalf of my client, I would like to thank the Commissioner for granting us standing, and we hope that we have made a useful contribution to the Inquiry.

My intention, now, is not to – given the time and given the – what I would regard as it being unnecessary to review our brief in detail. However, I do want to respond to the Terms of Reference, at least very briefly, and lay out the crux of our response to each in a sentence or two. So what I'll do, I'll just identify the Term of Reference and then briefly speak to it.

So, I'll start with reference 4(a)(i), and just to set it up: "The Terms of Reference for this Inquiry as they relate to the investigation to be conducted are primarily set out in section 4 of the Order in Council" – this is from your decision – "establishing the Inquiry. That section states that I must inquire into: (a) the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador's Island interconnected system customers that informed Nalcor's decision to recommend that the Government sanction the

Muskrat Falls Project, including whether; (i) the assumptions or forecast on which the analysis of options was based were reasonable"

And as is set in our brief at page 13 to 15, it is the submission of our – of my client that the assumptions or forecasts on which the analysis of options were based were not reasonable, particularly with respect to the load demand forecast, with respect to fuel costs and, to the extent that we are able to speak to it, with water management.

Question – sub number 2 of the Terms of Reference, 4(a)(ii), whether: "Nalcor considered and reasonably dismissed options other than the Muskrat Falls Project and the Isolated Island Option."

And our submission, which is set out at pages 16 to 20 of our brief, is that Nalcor did not consider and reasonably dismiss options other than the Muskrat Falls Project and the Isolated Island Option, and we note in particular what we believe were options that were not appropriately considered, but were dismissed, would be Dr. Bruneau's natural gas proposal, the deferred Churchill Falls, wait until 2041 option, as is variously referred to, and the purchase of power from Hydro-Québec. We believe that none of those options were appropriately considered.

Roman numeral three, the Inquiry is to inquire into whether: "Nalcor's determination that the Muskrat Falls Project was the least-cost option for the supply of power to Newfoundland and Labrador Island interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time."

And our submission is that that determination was not reasonable, even with the information available at that time as of 2012. And we set that out at length in our brief at pages 20-37. It's really the heart of our brief, and our submission is that the cost associated with the Isolated Island Option, we follow Grant Thornton in this regard, were overstated, particularly with respect to the calculation of fuel costs, while those associated with the Muskrat Falls option were, because of essentially refusal to – for many reasons but most egregiously, we would suggest, because of a refusal to properly account for risk, and the – and from ignoring the voices of

caution that even in 2011-2012 were certainly there to be heard – those were understated.

Moving on to the Term of Reference (b): “why there are significant differences between the estimated cost of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this inquiry together with reliable estimates of the costs to the conclusion of the project including whether

“(i) Nalcor’s conduct in retaining and subsequently dealing with contractors and suppliers of every kind was in accordance with best practice, and, if not, whether Nalcor’s supervisory oversight and conduct contributed to project cost increases and project delays.”

And we set that out, Mr. Justice, at page 38 to 44 of our brief. And our submission is that they – Nalcor’s conduct in retaining and subsequently dealing with the contractors and suppliers was not in accordance with best practice and that it therefore did contribute to project cost increases and project delays.

And we – just to pick the high points of our brief or the things that we consider the most relevant to this term. We would note the decision to award contract CH0007 to Astaldi, despite its lack of familiarity of the North and despite its bid being so low relative to those of more experienced contractors, and then to stay with Astaldi through all the events of 2014 and beyond; further, to commission the transmission line from Muskrat Falls to Soldiers Pond, notwithstanding the absence of adequate geotechnical data; and finally – and we believe this also to be relevant – the confrontational management style, I would characterize it, that is seen with various individual Nalcor project team members and generally, I would suggest, a culture of confrontation when dealing with other contractors, with ostensible partners, such as SNC-Lavalin and so forth.

The fifth term is were “any risks assessments, financial or otherwise, were conducted in respect of the Muskrat Falls Project, including any assessments prepared externally and whether” the assessments were conducted in accordance with best practice; Nalcor took possession of the reports, including the method by which it took possession; Nalcor took appropriate measures to

mitigate the risks identified; and Nalcor made the government aware of the reports and assessments.

And we basically – we take no issue – the Concerned Citizens Coalition takes no issue with how the risk assessments were done – by Westney in particular. It does, however, believe that Nalcor failed to heed the recommendations with respect to risk allocation, the explicit recommendations or even one – what one might reasonably infer from the recommendations and certainly failed to properly make the government aware of these risk reports and assessments. And this argument is set out in detail at pages 44 to 48 of our brief.

With regard to term 4(c), “whether the determination that the Muskrat Falls Project should be exempt from oversight by the Board of Commissioners of Public Utilities” – the PUB – “was justified and reasonable and what was the effect of this exemption, if any, on the” project “... costs and operation of the Muskrat Falls Project.”

And this, Mr. Justice, at page 49 to 53 of our brief, and our belief is that – our submission is that once Muskrat Falls pivoted from a project that was intended for export – the energy warehouse model, if you wish – to one that was intended to service the domestic market, at that point it should have been – the exemption should’ve been lifted and whatever legislative changes were necessary to effect that should’ve been carried through so that it would not have been exempt from the Public Utilities Board oversight and its regulatory authority.

This exemption was never really lifted. There was a reference question made, and it is the submission of the Concerned Citizens Coalition that that reference question was set up to fail in the sense that Nalcor did not co-operate, from the evidence of Maureen Greene and others, as it should’ve co-operated. When further time was requested, that time was not given, and in the result, the PUB, quite properly, could not answer the question.

So the effect of all of that was to remove an important oversight function, that of the PUB, which should’ve been in place for a project intended to address the needs of domestic

consumers, and in the absence of other effective oversight, as we discussed in our brief, that is a particular issue.

The – 4(d): “whether the government was fully informed and was made aware of any risks or problems anticipated with the Muskrat Falls Project, so that the government had sufficient and accurate information upon which to appropriately decide to sanction the project and whether the government employed appropriate measures to oversee the project particularly as it relates to the matters set out in paragraphs (a) to (c), focusing on governance arrangements and decision-making processes associated with the project.”

We deal with this fairly extensively at pages 53 to 61 of our brief, and our conclusion is that there was a failure on the part of Nalcor to properly inform the government but that, unfortunately, the failure was met by what we would characterize really as an indifference on the part of the government to be – to seek out answers, to ensure that it was properly informed.

And instead what we got – I would suggest on the part of the executive and also on the part of the senior civil service – was a fairly reflective deferring to Nalcor and a deferring to the decision to proceed with Muskrat Falls, and that that carried through, really, well past sanction, well into construction, well past the change of government in 2015 and that really, to the degree that effective oversight has ever been established, it perhaps was only established in 2017 or even later when the Oversight Committee was beefed up.

And finally, the last specific Term of Reference that we really speak to is paragraph 5(e), which is the one which speaks to this Commission is to inquire into: “the need to balance the interests of ratepayers and the interests of taxpayers in carrying out a large-scale publicly-funded project.” And this is addressed in our brief following page 61 – 61 to 68.

Our position there, I would summarize as follows: That, firstly, there has to be an understanding – a full appreciation of the real cost of this project, whether that be \$12.7 billion or a higher figure still once the financing is properly accounted for. As we submit, it really

hasn’t been in that \$12.7-billion figure. And, so firstly, there must be a reckoning in – I guess, the literal sense – a calculation of what the true cost is.

And then when a solution or at least a response is implemented that it cannot be to simply pass the problems onto future generations by deferring cost recovery in that fashion. It’s a problem that was created in our time and, as best as possible, it should be addressed forthwith – not down the road.

The – those are the specific responses, obviously, subject to such questions you may have to the Terms of Reference; however, there are a number of other observations that I do wish to make that’s still following in the Terms of Reference but in a more general sense. And really there are six points that I wish to make in that regard, Mr. Justice.

The first is that the Concerned Citizens Coalition still remains very concerned about the stability and safety of the North Spur and does not feel that this has been properly addressed by Nalcor, notwithstanding the peer review or by the Government of Newfoundland and Labrador.

We believe that the answer – and we believe that it is something that we think that this Commission can and, we respectfully submit, should recommend to government. It has no power to do more than that. But it recommend that a – independent of Nalcor – an independent board of geotechnical experts or otherwise qualified individuals be appointed to review the current evidence we have, particularly, the summer 2018 report of Drs. Bernander and Elfgrén, which is entered as an exhibit here.

The subsequent work of Mr. James Gordon, engineer, and that – even though impoundment is currently in progress – it is still a concern to the coalition. It is still a concern to the people of Labrador and that is one thing we would request of this Commission, that it do – it does recommend that such a further study take place.

The – our brief refers at several points, as I did a moment ago, to the – I guess, the whole question of hindsight. And we’re here now in 2019, where, I suppose, we know what the price of oil has been in these past years. We know what the

demand is and we know of many other things that were not known in 2011, 2012. However, there were voices of caution. There were people and institutions saying this is a reckless step or, at the very least, an ill thought-out step.

And my clients, as individuals, were among those people: Mr. Vardy and Mr. Penney, Mr. Sullivan. And following Exhibit 00329, which was their submission, there are a number of contemporaneous letters they wrote or other articles that were written for academic publications, talks that were given, interviews that were given with the press, submissions they made to government. It goes on at considerable length, the number of exhibits after 00329.

And, what I would suggest, your Honour, it's not that they're looking to be, I suppose, recognized or acknowledged. But just that, simply, a point of citizens – informed citizens, with no insight, or no particular knowledge of sensitive information were able to make such observations – then it cannot be said. And if you look at those – particularly, I'm thinking of Exhibit 00330 – some of them were quite prescient and could have been written last week – many of them.

But they weren't, they were written in 2011. And it wasn't just those individuals. There were others who commented in public, at the time. There were questions raised that are reflected in *Hansard* from the debate itself. So it cannot be said that there were – this was unknown or unknowable or cannot reasonably have been known. There were these voices of caution.

And beyond the individual voice of caution, we have the Joint Review Panel with its findings that recommended further studies be done before the commitment was made to the project. We have the PUB and its – I suppose, its refusal to make a recommendation because of a determination that it simply lacked the necessary information to make such a determination.

So – and I would suggest that we really have almost an absence of truly independent reports or institutions that were not coming to that conclusion. Those we have from MHI, in particular, where we now know we're proceeding on information that was, to one degree or another – or processes that, to one

degree or another, rendered them less than truly independent. And again, that is – we speak to that at greater length in our brief.

So the whole question of hindsight, we all agree it's unfair to say that Nalcor or the Government of Newfoundland should have been able to predict where fuel prices currently are. But that is not the point of this submission. The point is that there were always voices that said: Look, we don't have enough information, this is a very large project for a relatively small province, are there not more less risky assumptions, less risky ways of proceeding? Those voices were always there, it's just that they were ignored.

Which brings us to, really, our – where we see all this evidence coming together. And I would like to start by a reference to a specific exhibit, which I spent a fair bit of time – as did other counsel – putting to witnesses in the course of this Inquiry. And that is Exhibit P-00206, which was – as the Commissioner undoubtedly remembers – the Nalcor slide deck presented at an April 17, 2010, meeting at The Rooms here in St. John's. A meeting attended by Premier Williams; minister of Natural Resources, Dunderdale; the CEO of Nalcor, Mr. Ed Martin; Mr. Gilbert Bennett; and various other high-ranking officials of the Government of Newfoundland and Labrador and of Nalcor.

And we read great significance into not just that slide deck but perhaps even more importantly the handwritten notations which we take to be – and following the affidavit of Gary Norris, we believe it's fairly settled – were contemporaneous notes made arising out of the debate or discussion around that exhibit. That is our submission in any event.

THE COMMISSIONER: Maybe we'll just get that brought up here. Perhaps –

MR. BUDDEN: Pardon?

THE COMMISSIONER: We'll get that brought up then on the screen –

MR. BUDDEN: Sure, we can. It's page – that's it. And it's page 17 that perhaps we can go to. Though page 5 and various other pages have notations as well.

And I returned to this with witness after witness, and I'm thinking in particular of that top line under "General Assumptions for all cases," where it says, "P75 capital cost estimates." And then written in hand next to it: "more stress placed on the project cost – very conservative approach."

And we would submit, Mr. Justice, that this, really, is fairly strong circumstantial evidence, and the meaning of that evidence is, I would suggest, as follows – but first, I would have to acknowledge that of the many witnesses who were quizzed on this, very few, if any of them, seemed to have much recall of this – the meeting they recalled, but of the discussion around this particular exhibit, there appeared to be very little recollection.

And, for example, Mr. Gilbert Bennett – I think pages 52 to 54 of his evidence of November 18 – recalled a meeting, but he can't recall anything beyond what was written there, and that was, generally, the tenor of the witness that we heard from. But I would suggest, Your Honour, from what we do know, this is – the construction on this evidence, that I would suggest circumstantial but compelling. Nalcor went into this meeting with a P75 capital cost estimate as a general assumption for all cases.

From the discussion, it was determined, or at least observed, that such a capital cost estimate – such a P75 factor placed more stress on the project cost and it was a very conservative approach. And what would happen – but within a couple of months, certainly by that summer, Nalcor is now proceeding with a P50 factor for the project, and the differences we've heard between a P75 factor and a P50 factor, which is a reflection of the risk allocation built into a P75, is a difference of hundreds and hundreds of millions of dollars.

I would suggest that what emerged from this – and it is circumstantial evidence, but I would it is very powerful circumstantial evidence – is that: Nalcor came out of that meeting with either a direction or a consensus arrived at from it's – this high-level meeting of the Government of Newfoundland and Labrador and of the Nalcor executive with an instruction to reduce the project cost for Muskrat Falls to make it a cheaper project, as compared to all possible

alternatives, to make it an easier project to sell. That is where, I would suggest, the evidence leads, and that is where we ask this Commission to consider going with regard to its evidence.

The effect of it, of course – it carries on through – but if this is – if this construction of the evidence is accepted by the Commission, it would, I would suggest, explain quite a bit about how the – what unfolded from there because – and that flows into my next point –

THE COMMISSIONER: Well, just before you go to that, one other interpretation one might have of that is that whoever was doing the presentation was advising that they were using a P75 for their capital cost estimates, and that the note that was being taken is that they were being told, whoever was making the presentation, that this was putting more stress on the project costs and it was conservative approach, so therefore you should feel comfortable with the fact that we have whatever the number was at that particular point in time in that presentation. Maybe that's another way to view that particular slide.

MR. BUDDEN: Perhaps so, but I think it's – with respect, it's a less obvious interpretation. But even if that is the correct interpretation, I think it comes to the same place. Because a P50, as we all know by now, represents a much cheaper project. And if – DG3, if the sanction decision was truly a disinterested attempt to arrive at what is the cheapest way of delivering power, such as it was purportedly doing, then the difference between a P75 and a P50 is enormous, of enormous significance.

So I take your point, and it is ultimately unknowable, because we don't really have, unfortunately, for whatever reason, good viva voce evidence as to what happened. But we do have this, and something has to explain it.

And that flows into my final substantive point, which is that of political bias. And as was referenced in our brief, I would now direct the Commission to Dr. Flyvbjerg, his Exhibit at P-00004, at page 17 and I suppose it might make sense to call that up too, because I do intend to read a passage from it. So that'd be Exhibit P-00004, at page 17 carrying over into 18. And I

think this is useful, so I intend to read a short passage from it, if I may.

And it's under the heading Political bias: "Economists and political scientists tend to explain underreporting of budget and schedule risks in terms of strategic misrepresentation, or political bias." And there's a citation there.

"Here, when forecasting the outcomes of projects, forecasters and planners deliberately and strategically overestimate benefits and underestimate cost and schedule in order to increase the likelihood that it is their projects, and not the competition's, that gain approval and funding."

And it goes on in that vein and I won't read, other than the next paragraph which reads as follows: "According to this explanation, actors purposely spin scenarios of success and gloss over the potential for failure. This results in managers promoting ventures that are unlikely to come in on budget or on time, or to deliver the promised benefits." And, again, it goes on and some of the language is not entirely relevant to this exercise, but I think the gist of it, quite frankly, is.

So what we – our submission, our suggestion to this Inquiry is that what we have here is a case of strategic misrepresentation of political bias and that is, in that sense, what happened. That's how this project – this Muskrat Falls Project came to be sanctioned, not out of a disinterested weighing of options, a cold eyes weighing of options expression we've always heard, but with a deliberate thumb on the scale, so to speak, where one option was favoured and other options were not.

That is – I suggest, it's a circumstantial interpretation. There's no smoking gun, there's no witness who said you got us, that's what we did. There's none of that. There rarely is, really, in life I suppose. But it is an explanation that is consistent with the evidence we've heard over a hundred-and-something days of this Inquiry.

The alternative explanation, I would suggest, is perhaps even more incredible, that this intelligent – this group of individuals who are accomplished, intelligent, experienced in various fields – I'm talking about Nalcor, but also the

political and public service leadership of our province – somehow made this series of unforced errors.

Errors around forecasting, errors around bid calculation, errors around estimation, which – whomever calculated SNC or Nalcor, some combination thereof, which would be our submission, ultimately – even the original bid of Astaldi was underestimated by upwards of a quarter of a billion dollars, let alone where the numbers finally came in.

So there is an explanation here. I suppose it could be a blend of those things, but we believe that the explanation that resonates, that makes the most sense, is that a determination was made for reasons that we could speculate at or we could perhaps infer from the Energy Plan, from the evidence of Premier Williams and others, that it was a positive thing, it was a good thing to build a hydroelectric facility on the Lower Churchill.

That became the dream and it influenced everything that flowed from it, including the fair assessment of the options. So we do have, I would suggest, a clear case of political bias and as unpleasant as it is to contemplate, a scenario of strategic misrepresentation. It is consistent with the facts in a way that we would suggest that other explanations simply are not.

And when that decision emerges out of sanction, the consequence of that flow right through construction, as with Astaldi where there is, we suggest, a chasing of a sticker price to go with the lowest bid so as to maintain, as best one possibly can, the lowest possible project cost. But, of course, as we know, when you go for the cheapest thing, that's not always in the long run the most cost-effective thing.

The – we have ended our brief with a series of recommendations for the consideration of this Commission and they – some fall four-square within the Terms or Reference, some perhaps are sort of more on the edge of Terms of Reference, but we feel that they're all matters that we would respectfully submit for the consideration of you, Mr. Commissioner, as you write your final report.

It is also – while as we’ve established and as we all know for good reason it is not for this Commission to make determinations of civil liability or criminal, that would be unfair given how witnesses are compelled and so forth. Nevertheless, it is within the authority of this Commission to find that the conduct of certain individuals was improper, that in one form or another in their actions or inactions that they are guilty of a form of misconduct. We’ve made certain recommendations to that effect or certain comments in our brief and, beyond that, the two individuals who we reluctantly felt it necessarily to identify were Mr. Martin and Mr. Harrington. I’ll say nothing further, it’s in our brief.

The – while this is not intended to be rebuttal, there were a couple points set in our brief review of – four, actually, in our brief review of other briefs that I did want to comment on. And with Mr. Martin’s brief at paragraph 277, there is a suggestion that the higher the spending – if I understood it correctly, the higher the spending, the higher the province’s equity in the project and, therefore, the higher the dividend ultimately paid. The problems with that reasoning, we would suggest, are that it is the Newfoundland ratepayers who are paying the dividend. That is how the PPA is set up. That is a practical reality given the unfortunate circumstance of Muskrat Falls power being unmarketable non-domestically at anything approaching its true cost.

And that really is inadvertently that paragraph, I think, identifies the fundamental problem with this project. The more it – is spent, theoretically the dividends are higher, but since the dividends are coming out of the pockets of the ratepayers and, as we’ve heard, there’s a limit to what can be recovered there, which is why we spent some days talking about mitigation. That’s a fundamental problem that really suggests that the reasoning behind that paragraph is very problematic.

The – in the exchange between yourself and Mr. Ralph this morning with regard to the application of the government for standing here, we would note that paragraph 17 of the government’s – Government of Newfoundland and Labrador’s application for standing does seem to contemplate a different and larger role than it perhaps ultimately played, or at least that

it consistently played. So, I just feel that is worthy of some note.

The brief of Mr. Williams on behalf of the officials of the Government of Newfoundland and Labrador 2003-2015 references that paragraph 276 of that suggests that Mr. Vardy and Mr. Penny were part of a previous organization called 240 – 2041 Committee, or something to that effect. They wished to advise that they were not part of that group, the 2041 group. But the larger point – and it may be nitpicking, but it’s important to them – that it is suggested in that paragraph that they were asking for a reference question in the representation to Minister Skinner.

But as Exhibit 00330 makes clear – I think it’s 00330 – that it’s in with their letter to Mr. Skinner from 2011. It is not a reference question they’re seeking; they’re seeking to have the project – the exemption lifted and the project placed squarely under the authority of the Public Utilities Board. So, as a point of clarification, that’s one that we would wish to note.

So the – that really would be my substantive comments, subject, obviously, to any questions you might have. The – I would like to thank the Commission counsel who responded in a – with an unbelievable quickness to so many requests. Requests made at 7 o’clock were responded to by 7:15. That was a common occurrence. So we could not have – speaking for ourselves, but this is the general tenor of what I hear – we could not have had greater cooperation from the Commission counsel and from Commission staff than we’ve received for which we are – we, speaking on behalf of myself and my client – we’re very grateful.

Likewise for the Sherriff’s Officers and the other support staff and for yourself, Mr. Commissioner, for granting us standing and for allowing us to make representations and to – as you have. The – I’ll also speak on behalf of myself and – I’m speaking on behalf of myself and my co-counsel, Mr. Hiscock, in those comments. So that’s all I have to say, subject to such questions as you may have.

THE COMMISSIONER: I just have one area of questioning for you, Mr. Budden. In your brief, you talked about a concern that your

clients have relative to the responsibility – the ultimate responsibility of the province, if in fact the PPA fails to meet its objective, which is to basically collect the cost of the project back from the ratepayers.

MR. BUDDEN: Yes.

THE COMMISSIONER: Could you just go on to explain that a little bit more as to what the issue seems to be? Because it seems to me, ultimately, if Newfoundland Hydro is – doesn't receive, doesn't get enough money back to pay to Nalcor, or to pay for the project costs, that somebody has to step in at some point in time or something's gonna happen.

And so, I'm trying to figure out exactly what the point is here – is the suggestion that somehow we're all supposed to think that if the – if that PPA doesn't work out and they aren't able to collect the cost back that somehow Newfoundland Hydro assets are free and clear, they're not gonna be impacted, there's no recourse by the financiers or by Canada, is that ...?

MR. BUDDEN: It's a little more complex than that. The – I would characterize it as follows: the PPA, as we know, is between Newfoundland Hydro and Muskrat Falls Corporation. Under the terms of that – I don't have it at my fingertips, but I think this is the correct characterization – Newfoundland Hydro are supposed to – Newfoundland and Labrador Hydro are supposed to make periodic payments pursuant to the PPA.

There's also, essentially, a default provision that if those payments are missed, then Newfoundland and Labrador Hydro go into default, Muskrat Falls Corporation can call on Newfoundland and Labrador Hydro, which clearly puts the assets of Newfoundland and Labrador Hydro at risk. So the obligations flow from Muskrat Falls Corporation to the creditors. However, Muskrat Falls Corporation cannot make those payments if they themselves do not receive money pursuant to the PPA. I think that's patently obvious. Which begs the question, what if Newfoundland and Labrador Hydro is unable to make its payments?

Which is a scenario at the – within the contemplation, really, of what happens in a non-mitigation world. What happens if the government is unable or unwilling to directly mitigate, Newfoundland and Labrador Hydro can only – our submission is which we think was supported by evidence, particularly from Mr. Alteen and the expert whose name I cannot recall who sat to his left and some of the other witnesses at the financial impacts panel – but if we have a scenario where the Newfoundland and Labrador Hydro cannot make its payments because it's simply not bringing in adequate resources from the ratepayers, it cannot make its block payments to Muskrat Falls Corporation, do we then have a situation of default?

That's part of the problem, but what that would do, obviously would expose the assets of Newfoundland and Labrador Hydro which include Bay d'Espoir which with its ability to generate power very, very cheaply into the indefinite future, a very valuable asset.

So, the scenario is one where – and that's just one aspect of it, but that's one I can speak to right now – but what we have is a scenario where there is a contract in place. That contract contains provisions as all contracts do if the terms aren't met and essentially – one step removed perhaps – but it puts the very valuable assets of Newfoundland and Labrador Hydro ultimately in the hands of the creditors.

Does that answer your question?

THE COMMISSIONER: Yeah. I think I understood the argument now. You've confirmed what I understand, but, I mean you, to me, and – you know, I certainly I'm gonna have to give some thought to this because one of the things I have to look at is the issue of the project cost to conclusion of the project. I don't know if that means construction of the project or the payment of the project, but –

MR. BUDDEN: Yeah.

THE COMMISSIONER: – anyway, that's something I have to look at but –

MR. BUDDEN: We would urge an expansive – not to make more work for you but –

THE COMMISSIONER: Right.

MR. BUDDEN: – I mean, the project doesn't end when the switch is flicked at Soldiers Pond.

THE COMMISSIONER: Right.

I can only – the only thing I can say about this is, is that at this stage, without giving it any real deep thought, and I'm gonna have to certainly consider it is that – it seems to me that there can be a default and the question is, is: Who then is ultimately responsible should there be a default? And, you know, it may well be that it's – could be Newfoundland Hydro and that might then expose Newfoundland Hydro's assets. Or, alternatively, if government is trying to protect those assets, which I suspect it would try to do, then ultimately the government then has to step in and has to pay, so it's another form of mitigation.

MR. BUDDEN: It is, and it's set out more sophisticatedly than perhaps I just did on my feet just then in our brief, but it ultimately, perhaps, circles back to the same place. We all – those of us living here in Newfoundland with what we've built up, you know, in a public sense as citizens, as a government, all of that is exposed by this enormous obligation.

THE COMMISSIONER: Okay.

MR. BUDDEN: Yeah.

THE COMMISSIONER: All right. Thank you, Mr. Budden.

MR. BUDDEN: Thank you.

THE COMMISSIONER: Thank you.

All right, we'll take a break and then we'll start with Edmund Martin at that stage.

CLERK: All rise.

Recess

CLERK: Please be seated.

THE COMMISSIONER: Just to let people know, the reason I'm taking a little longer break today is – I don't know if you are feeling the same way – I – heat never bothers me. In fact,

the more the better. Today, I'm fighting off flies that are flying around here and, as well, this heat is enormous up here. So that's why I'm just – I took a bit longer, but we will be finishing with you today because I know you want to get out, Mr. Smith, so not a problem.

All right, so when you're ready.

MR. SMITH: Yes, good afternoon, Mr. Commissioner. Harold Smith for Edmund Martin.

THE COMMISSIONER: Okay, can you just move your mic over just a bit, so I can – thank you.

MR. SMITH: I'll try.

THE COMMISSIONER: Thank you.

MR. SMITH: Mr. Commissioner, I'm going to indicate to you that we have filed an extensive brief, and it's not our intent today to either summarize it or review it in any detail. Rather, the purpose of the oral submission today is to advise the Commissioner and the Commission, which I believe is of no surprise, that Mr. Martin fully supports the sanctioning and the progress of the Muskrat Falls Project, notwithstanding the unfortunate cost overruns.

He takes the view that if you look at what is before this Commission in terms of its findings and conclusions or recommendations, that ultimately the Muskrat Falls option was the only option from a perspective of what was known at the time.

Now, it is – it's undeniable that there was an element of public policy involved in the decision. That's evident in the 2007 Energy Plan and it's evident in some of the testimony that was provided to the Commission by some of the politicians. The difficult aspect for, I believe, the Commission in this matter is to marry that political public policy consideration with the requirements of the Electrical Power Control Act and its demand that the lowest cost option for ratepayers, that is reliable, be the choice.

In this context, one of the, perhaps, tougher jobs will be to determine what was the time frame that the Electrical Power Control Act references.

Some have suggested, you know, just the period necessary to create the required power source for that moment in time, and others have suggested you have to be prepared to look at a broader picture. Even the Terms of Reference says look at it in a context of 2011 to 2067, which is a 50-year context.

THE COMMISSIONER: Right. Let me just stop you on that one, because I notice this in your brief and I think it requires a bit of clarification.

So if I can go to the Terms of Reference and particularly 4(b). It – no, I’m sorry, 4(a) – it says – “The commission of inquiry shall inquire into ... the consideration by Nalcor of options to address the electricity needs of Newfoundland and Labrador’s Island interconnected system customers that informed Nalcor’s decision to recommend that the government sanction the Muskrat Falls Project, including whether,” and then, as item number (iii), “Nalcor’s determination that the Muskrat Falls Project was the least-cost option for the supply of power to Newfoundland and Labrador ... interconnected system over the period 2011-2067 was reasonable with the knowledge available at that time”

So there is – I agree with you in your brief that there is that reference, but I think this goes to your point that you’re making, too, now about the Electrical Power Control Act and the issue of least cost and what it means. I think that’s a separate issue that I’ve got to look at. But number two says that I also have to look at the – consider and reasonably dismiss options other than the Muskrat Falls Project and the Isolated Island Option. So there are obvious other ones that have a far long – a far less time frame than does the issue of the Muskrat Falls, the 50 years; 2041 is an obvious one.

So I don’t think it can be said that I have to look at this on the basis that I have to – it has to be the least cost for that 50 year or 56 year period from 2011 to 2067. Clearly, that’s not what was intended in the Terms of Reference. Otherwise, I wouldn’t be considering other options.

MR. SMITH: Yes. I understand that, Mr. Commissioner, but, realistically, if you’re – if one way of generating power is through a dam, a hydroelectric dam, the hydroelectric dam has a lifespan of a significant period of time, more than, for example, a CCT or any of these other – those options. With respect to the natural gas, I’m prepared to leave that to you. It was rejected on several fronts by several different experts as being not a viable option, and although it might get you to 2041, that assumes, of course, that you could come to an arrangement with the owners of the natural gas to bring it ashore.

As we heard during the course of the Commission, you know, some favoured natural gas, some favoured liquefied natural gas, some favoured a compressed natural gas. The issue from our perspective is that when you look at the Electrical Power Control Act, there’s no timeline or time reference, if you will, to what would be the least cost option. So if you have under consideration – and politically and public policy-wise, it was under consideration to have a hydroelectric dam as the option.

Well, that option would produce power for at least 50 years and probably 100. So in order to compare apples to apples or as best you can, you have to be able to look at what other options are comparable to that option and how do you go about drawing the conclusion. Because some would say – and it’s not too far-fetched to say, you know, hydroelectric project and any of the Isolated options other than hydroelectric projects are – is comparing two different types of systems.

THE COMMISSIONER: I agree with that, but I think –

MR. SMITH: Right?

THE COMMISSIONER: – the problem, though: It starts off with a premise, and maybe the premise is the Energy Plan that basically said it was government policy that they wanted to develop the Lower Churchill, and the premise was that we’re gonna do a 50-year project.

Now, if you’re looking –

MR. SMITH: But I don’t –

THE COMMISSIONER: Just a second now.

MR. SMITH: – I don't think they're going to do a 50-year project. I think they're gonna –

THE COMMISSIONER: Well, a project that was gonna go –

MR. SMITH: – last 50 –

THE COMMISSIONER: – 50 years.

MR. SMITH: – yeah.

THE COMMISSIONER: So, then, if you look at it – if you're looking at what is the least cost, which is what the *Electrical Power Control Act* talks about, why is it that it has to be a 50-year project? Why couldn't it be a 30-year project? Why couldn't it be 20 years? Why couldn't it be five years?

MR. SMITH: I agree 100 –

THE COMMISSIONER: And then –

MR. SMITH: – per cent –

THE COMMISSIONER: So –

MR. SMITH: – Mr. Commissioner.

THE COMMISSIONER: – so the only reason that we're comparing a 50-year lifetime project is because it was dictated, initially, to Nalcor that we wanna develop the Lower Churchill River and, therefore, we're gonna start off the premise that it's going to be a dam, and if it's a 50-year lifespan, then start with that and go from there.

Now, the problem with that is that – the question that it raises is whether or not they were actually proceeding to follow their own legislation, and that's a query that I'm gonna have to deal with.

MR. SMITH: As I was indicating, it talks about the lowest cost option with reliable power.

THE COMMISSIONER: Well, it talks – it doesn't even mention the word 'option'; it says the 'least cost' –

MR. SMITH: Least-cost power, agreed.

THE COMMISSIONER: The least cost to the ratepayer.

MR. SMITH: The difficulty is, is that the public policy – and I think you hit the nail on the head – the public policy was to develop the Lower Churchill. Well, if you look at the Lower Churchill, that sets the time frame upon which you judge the other option or options. And what they chose to do, rightly or wrong, they chose to look at the Isolated Island Option and they chose to look at that option in the context of apples to apples, trying to make it so that the Isolated Option was at least comparable to the 50-year power supply that would be produced by hydroelectric project.

So when you look at the legislation, it doesn't mention any. So, therefore, there are factors – I submit – factors which determine whether the least-cost option is either 20 years or 10 years or five, depending on what you're looking at. And the typical example would be whether you put in a CCCT or a CCT or multiple CCTs or you go and you expand one of the hydro facilities that already exist on the Island or build a new hydro facility on the Island. So you look at what would be the power generation from that facility and then compare the other options.

Now, this Commission has heard that what they did is they looked at all the various types of power generation other than – and including some hydroelectric power by adding additional turbines to Bay d'Espoir, et cetera. But, fundamentally, when they focused on the public policy issue of a hydroelectric dam that would have a lifespan of 50-plus years, they wanted to look at what would be the most reasonable Isolated Island type of approach.

And if you remember that there is an exhibit that shows that over a continual timeline, there would be so many hydropower improvements – hydro project improvements, CCTs, CCCTs, wind power, et cetera. All of those would be looked at.

They did eliminate, however, nuclear power because a statute says there shouldn't be nuclear power in the province. They eliminated some of the other – like natural gas. They eliminated other types of projects that could deliver electric power, but even the natural gas one would still

require the burning of fossil fuel – it may be natural gas, but it’s still a fossil fuel – and that had its own difficulties.

Plus, the fact is that the experts would say it wasn’t a viable option, even until 2041. It wasn’t a viable option because 2041 had a lot of uncertainty associated with it regarding whether or not Newfoundland would be able to get a lion’s share, if you will, or a good chunk of that power from 5,500-megawatt station.

THE COMMISSIONER: Which is another argument that I have a great deal of difficulty trying to figure out – how you could – you know, that’s one of the most surprising things I’ve heard in this hearing, is related to 2041. There’s no question there’s uncertainty about 2041, because we’re going to have to work some sort of a deal out at some stage of the game. But one thing is for sure: 2041, there’s no Churchill Falls contract with Hydro-Québec. They still are on the board –

MR. SMITH: They own –

THE COMMISSIONER: They’re still on the board –

MR. SMITH: Yeah. They still –

THE COMMISSIONER: – okay.

MR. SMITH: – own 30-odd per cent of it.

THE COMMISSIONER: They do, but they don’t have a controlling vote anymore, and we have 65 per cent or so of the voting shares. I think most companies would be looking at that as a pretty advantageous scenario to be entering into.

And even if we had to sell power at that stage of the game and power was expensive, and we had to sell it to ourselves at a high cost, guess what? Sixty-five per cent of that cost – I’m simplifying things a little bit – is coming back to us anyway, so we can do all kinds of things.

Like, it’s – this whole thing about the – about 2041 remains a mystery to me and that’s why, basically, I’m trying to focus now and asked the Premier and certainly asking the Premier and whatever, and I’ll be making a recommendation

(inaudible) with regard to getting cracking on getting a strategy for 2041.

But aside from that – and I don’t mean to divert you from your point because I know that’s not the point you were making – but, you know, I have to say, I’m – it continues to be a problem for me to think about.

MR. SMITH: Well, I would reference the fact that the Churchill Falls Corporation, I believe, is a federal corporation and –

THE COMMISSIONER: Mm-hmm.

MR. SMITH: – minority shareholder rights exist much greater than they would under our legislation. And, you know, although you have 65 per cent, you can’t oppressively apply those rights to the other company. In the absence of this project, that power would have to effectively stay in Churchill Falls because there’s no way – would have been no way to get it to the Island. There would have been, effectively, a situation where the power was landlocked and at the control of Quebec, because they will not allow power across their borders unless they purchase it.

So the purchasing power – I think several experts have also mentioned this – that the purchase of power is greatly enhanced and the value of it to Newfoundland is greatly enhanced by the connections that we now have between Labrador and Nova Scotia and Newfoundland.

THE COMMISSIONER: Right, we have one witness who said that, yeah.

MR. SMITH: Yeah. Well –

THE COMMISSIONER: One expert witness.

MR. SMITH: Well, it was one expert witness, and it was an issue that –

THE COMMISSIONER: And I’m not taking –

MR. SMITH: – no, but –

THE COMMISSIONER: – issue with it, either. I’m just saying we have one –

MR. SMITH: – yeah, but –

THE COMMISSIONER: – (inaudible).

MR. SMITH: Yeah, but it was an issue that troubled me originally: When we call experts to the stand and ask them to prepare a paper, et cetera, you know, challenging those experts without – quote, unquote – you know, clear and cogent evidence to suggest that they’re – what they’re saying is incorrect.

For example, Grant Thornton was an expert and qualified as an expert, but we, on several occasions, have challenged Grant Thornton’s conclusions, particularly in the area of the FFC AFEs, because they forgot – even though they knew about it – they forget about the fact that the cost of the project had gone up to 6.531 and they were using 6.2 as a reference number in that section of their page 12.

THE COMMISSIONER: Yeah, let me just say to you that I think you’re going to be hard-pressed, Mr. Smith, to convince me that the Grant Thornton report has been challenged in significant ways with regards to the actual outcome. I think, for the most part, much of what was in those Grant Thornton reports has come out in evidence from other witnesses.

The purpose of the Grant Thornton report – it’s like any other witness – I don’t accept it just because it’s the Commission’s expert. I look at the evidence that flows from it and I look at what other evidence that I’ve heard. And it’s got to – it’s on the basis of that. And I’m going to suggest to you that other evidence that came out spoke fairly significantly towards many of the conclusions that were reached by Grant Thornton.

They made some mistakes, to which they admitted, and those will be taken into account by myself. But there is a lot in the Grant Thornton report that is unrefuted by the evidence, I would suggest.

MR. SMITH: Okay. Can I return to ...?

THE COMMISSIONER: Sure.

MR. SMITH: Yeah.

What I indicated is that we have to determine from looking at the legislation what the time

frame is. And I think the time frame depends upon the projects that are under consideration, not a situation where you can grapeshot every project or any possibility during the course of the discussion as to whether – which is the least-cost option, but rather which project is here. And what was here – politically – was the Lower Churchill or Muskrat Falls Project. And that had a lifespan of 50 years.

So in order to look at that 50 years and that project, you had to look at what options might be available within the same time frame; otherwise, you’re comparing apples to oranges. And, more particularly, if you say it’s only the time frame necessary to get the necessary bump in power supply, either from a CCT or some other, you’d never consider a hydroelectric project of any kind because, of course, hydroelectric projects, you know, are long term and they produce power over an extended period of time.

So, as I said, I believe –

THE COMMISSIONER: Well, that’s presupposing that the only criteria for a hydroelectric project would be that it’s least cost. Because there are – there might be other reasons you’d build a hydroelectric project or other capital-intensive project.

MR. SMITH: Yeah, but then it’s purely a public policy question.

THE COMMISSIONER: Right.

The problem that exists here is that –

MR. SMITH: Okay.

THE COMMISSIONER: – this project was not sold, as Nalcor counsel referred to this morning, it was not sold to the public on the basis that it was these other benefits or whatever, to which you’ve referred to in your brief. It was sold on the basis that it was a – it was argued on the basis it was a utility-basis argument.

In other words, it was least –

MR. SMITH: I don’t recall that being in my brief.

THE COMMISSIONER: It was least-cost power.

No, no, I'm talking about Nalcor's counsel put it in the brief that – in their brief that the – there was shift to – when Muskrat Falls was going to be the project because it was shifting to the provision of power to domestic – domestically, and as a result the shift was to a utility basis-type argument.

So, then it means – then that brings in the least-cost issue, which you are – you've explained and which I indicate there might be policy reasons why you need to look at 50 years because that was the policy directive of government to look at the development of the Lower Churchill, if not to develop the Lower Churchill.

MR. SMITH: I'll leave Mr. –

THE COMMISSIONER: Okay.

MR. SMITH: – Simmons' argument –

THE COMMISSIONER: Sure.

MR. SMITH: – to –

THE COMMISSIONER: Sure.

MR. SMITH: – to himself.

I would indicate to you that the Isolated Option, as far as Mr. Martin is concerned – and I think some of the evidence very clearly supports this – is that the Muskrat Falls Project is nearly complete, and, therefore, we know what the cost will be and we know what the cost will be probably well into the future for 50 years or longer; 35 for certain because that's the amortization of the mortgage, if you will, or the financing.

But if you look at the Isolated situation, all that does, if you do it incrementally, which is what the Isolated was about over the 50-year period, you keep pushing the risk out into the future. You don't have certainty that you have with the Muskrat Falls Project.

The – I think it's been said in the testimony that it's like renting versus owning. An isolated option is effectively a renting situation because

so much of the cost is – of the power – is related to oil.

Now, we've heard some speakers today talk about the price of oil having fallen. Yes, but so did the exchange rate. The exchange rate is significantly different. You'll see the exhibit that was referred to by Mr. Budden, it showed that the exchange rate was 96 cents US – 96 cents Canadian rather for a US dollar. It's considerably lower than that today. I think it's around 65.

So, if you apply the exchange rate to the lower dollar value, of the US dollar value for oil, it's really not that difference – not that big a difference in cost for the oil that operates the oil-fired generation in Newfoundland, generally.

Comparatively, if you look at the Muskrat Falls Project, in 35 years that asset will be owned by Newfoundland and Labrador.

THE COMMISSIONER: You talking about the Maritime Link?

MR. SMITH: No. I'm talking about – Maritime Link is an extra bonus, but I'm talking about the actual Muskrat Falls generating station and dams will be owned after 35 years because the interest rate, as a result of the federal loan guarantee, is considerably less than the 8.5 rate of return – 8.5 per cent rate of return, so that we're able to service the debt that is created by having, if you will, a low interest rate – a much lower interest rate than you would be able to achieve in the Isolated process.

And, in addition to that low interest rate, the PPA that we talked about in, I think, your – you yourself, Mr. Commissioner, talked about it in one of the presentations about what happens if – excuse me – Hydro – okay, does not able to recover the full amount – the issue there is that likely that they're going to not recover the interest rate that is actually being charged versus the 8.5 per cent rate of return. So in order to talk about default by the creditors, you have to put that in a context of a different rate other than 8.5 per cent rate of return. I don't have it at my fingertips what that rate is, but it's relatively small compared to 8.5.

It's also true that, you know, many people are concerned about the debt created by funding Muskrat Falls, but you have to consider the debt not in the context of the Isolated, because in terms of operating the Isolated system the money is like money going on to a credit card, it's just gone, okay, whereas in the Muskrat Falls situation, you have a debt that is net debt. In other words, as you pay down, you get more and more equity until you actually own it outright. There's no possibility of owing the oil companies under the Isolated program.

My understanding is that there's about a \$6-billion benefit in borrowing with the federal loan guarantee versus borrowing normally by the province.

THE COMMISSIONER: Yeah, I saw that in your brief. I'm trying to find that in the evidence because I've seen evidence, or heard evidence from one of the politicians – I don't know, I think it was Ms. Dunderdale who talked about a \$1.1-billion difference and then (inaudible) –

MR. SMITH: That was the 300 –

THE COMMISSIONER: Then there would have been a \$300 million add-on because the rate was a little lower after financial close. I'm having a hard time –

MR. SMITH: No, the \$1.1 billion –

THE COMMISSIONER: Right.

MR. SMITH: – is present value whereas –

THE COMMISSIONER: Oh, I see.

MR. SMITH: – the \$6 billion is nominal value.

THE COMMISSIONER: Oh, nominal value, okay.

MR. SMITH: Okay?

THE COMMISSIONER: I'm not sure if we got the evidence of that but anyway –

MR. SMITH: Well, I think the – I think it's in Warren – Mr. Auburn Warren's graph, which sets out the benefits of the – the financial benefits of the Muskrat Falls Project over the

Isolated project. The Isolated does nothing really to help our greenhouse gas issue and carbon – costs of carbon. And even the replacement of Holyrood, Mr. Marshall described it as about a \$2-billion project, forgetting oil. The Isolated Option gives us nothing with respect to connection with the North American grid, which leaves us as one of the few jurisdictions in North America that is not connected to the grid, and the grid gives us the ability to bring power in, in emergency situations where something might fail.

THE COMMISSIONER: Couldn't we have done that with the LIL?

MR. SMITH: I believe there was some evidence on it in relation to the, if you will, the benefits that was suggested for the Muskrat Falls Project, that one of the benefits was connection to the grid. And I think Humphries might be the one you should look to because Mr. Humphries testified how fragile the Isolated Option really is, because you could have a failure of a component of the Isolated and you actually trip out the rest, so the Island goes black, or dark; hence, DarkNL.

The other interesting thing with the Isolated Option is that it provides no benefits to Labrador at all. One of the aspects of the Muskrat Falls Project is in conjunction with the recall power there would be sufficient power to actually develop mines in Labrador. Not many, but certainly some, which was also a part of the, quote, unquote, decision – you know, the political justification, if you will, for Muskrat Falls.

Mr. Martin would leave you with the view that he believes that over time, like the Sydney Opera House and other projects that were pointed to Mr. George Jergeas, that Muskrat Falls will result in not just some benefits, but significant benefits over and above the Isolated Island. One of the most crucial with right now is the fact that greenhouse gases will be severely reduced by the going on stream of Muskrat Falls.

So aside from any questions, those are my submissions.

THE COMMISSIONER: Yeah, I do have a few questions on your brief, if I could go to those, Mr. Smith.

I'd like to go to page 26 for a moment. Do you have your brief there?

MR. SMITH: I have it here. Yeah.

THE COMMISSIONER: Okay and your paragraph 81.

So in that paragraph you're indicating that, at least at DG2, that when the sensitivities were performed, only one of those comparative scenarios reflected that the cost of the Isolated Option would be equal. So –

MR. SMITH: Yeah, I think it's 50 per cent –

THE COMMISSIONER: So you would agree –

MR. SMITH: – increase in capital.

THE COMMISSIONER: You would agree with me, though, that that assumes a cost of \$5 billion or whatever it was the DG2 cost.

MR. SMITH: Agreed.

THE COMMISSIONER: Okay.

And, also, I noted that there were other – certainly more than one or two sensitivities that would have shown a difference of less than \$100 million; for instance, lower load and one other one that was \$27 million, I can't – oh, I know – and a 10 per cent increase in the cost.

MR. SMITH: Yeah, a capex increase of 10 per cent.

THE COMMISSIONER: Ten per cent would've been a \$27-million difference, so there were some that were close.

MR. SMITH: Some that were close.

THE COMMISSIONER: Right.

And at DG3 –

MR. SMITH: But, again, some which were close, based upon desktop study of what the Isolated Island was going to cost.

THE COMMISSIONER: Right. Okay.

And at DG3 many of those sensitivities were not run again.

MR. SMITH: Not run again?

THE COMMISSIONER: That's correct.

MR. SMITH: No. The only sensitivity that was run after DG3 is – my understanding is the Grant Thornton sensitivity chart which, I believe, is – I'll find it here for you, it's Grant Thornton 00015.

THE COMMISSIONER: Right. Okay.

All right, page 39.

MR. SMITH: Yes.

THE COMMISSIONER: Okay, you're talking here about the issue of the strain on Nalcor personnel with all of the reviews that were taking place and how resistance would – I think you're suggesting that resistance by Mr. Harrington would've been something that would be reasonable.

So I guess my query would be this, and I specifically refer to the government's request that MHI do the second review, and also government's request, through the Oversight Committee, basically to do reviews.

MR. SMITH: Unilaterally.

THE COMMISSIONER: So if you're working at Nalcor and your owner is the government, notwithstanding the fact there might be some strain, when your owner tells you you're going to do a review, I would expect that most people would reasonably think that I – okay, well, whether I like it or not, I'm going to have to do it.

If Mr. Harrington was in the oil business, it's – and I don't know if this is true or not but I'm just surmising – but if he was in the oil business doing an oil project and ExxonMobil told him

we're doing this review, I don't know whether or not it would be prudent for him, as an employee or even as a contractor, to resist – actively resist the performance of that review.

MR. SMITH: And in normal circumstances, I would agree. These were not normal circumstances.

THE COMMISSIONER: Okay.

MR. SMITH: This was a situation where Mr. Harrington, in leading the project management team, you now, was under, I guess, stress to perform, get the project done and done on time, and get all the moving parts running in favour of completion as close to on budget, on time as possible.

So, as a result, in each of the – whether it be MHI or whether it be EY or whether – whatever group were coming in, they were given, in Mr. Harrington's view, is my understanding – again, I don't represent Mr. Harrington, but it's my understanding and Mr. Harrington's view that they had been given a term of reference, a specific terms of reference. And I noted in several comments made during the course of the hearing, you know, the Commissioner was concerned about, well, you know, it's a review required by the owner, surely you should co-operate.

Well, the issue for Mr. Harrington was often whether or not the review being done was within the scope of the terms of reference for that review. And his resistance, if you care to look back over the evidence – his resistance was almost entirely related to his perception that the reviewers were going outside their terms of reference. And we can see that that was certainly an object of EY –

THE COMMISSIONER: Right.

MR. SMITH: – from the evidence we have.

THE COMMISSIONER: Right. But at the same time I think when EY was required to do the full review, certainly it was in their scope. I mean, again, you're getting paid by the owner and I – you know, it just strikes me that –

MR. SMITH: I think the Crown corporation –

THE COMMISSIONER: I understand the point you're making in the brief for that, you know, there was a lot of reviews and it was taking time of the staff and whatever and the PMT people, but, ultimately, at the end of the day, you're there to serve your owner. And when your owner makes a request you act on that request.

MR. SMITH: But, again, it looks like – if you take an ordinary corporation, the shareholders act through the board, okay? In this case, the shareholders were acting through the shareholders, not through the board and – so there was a level of interference that ordinarily you wouldn't see in a corporation, okay?

THE COMMISSIONER: Yeah, but I can't – I'm having a hard time contemplating that because if I was a politician who had made a decision that I wanted a job done through the corporation, and if I'm a member of the public, I'm assuming that I'm going to have the ability to ensure that it is done appropriately.

MR. SMITH: Yes.

THE COMMISSIONER: And, yes, there is this finery and through the board and all that, I understand all those legal intricacies. But, ultimately, at the end of the day, what the public thinks is that they're being protected by the government and the government thinks that they have control with regards to certain things.

In this particular case, this was as – I think one of the government people said, I think it was Robert Thompson – this was an integrated team sort of an approach, so it wasn't that it wasn't totally hands-off.

MR. SMITH: No, it wasn't hands-off, and I agree, generally, with the Commissioner that when the shareholder asks for something, you know, you have to be very, very sure of yourself not to proceed that way. I just don't think that the evidence is overwhelmingly contradictory to co-operation by Nalcor given the constraints it had.

THE COMMISSIONER: Okay.

I'm going to take you to page 41 and just going to go to the P1 to P3, and I know you – your – you've set out some other issues with regards to stress testing and P1, P3; none of which, by the way, either Mr. Westney or Mr. Dodson were cross-examined on, but I just want to ask you, notwithstanding the fact that Mr. Martin takes the view that this was not a P1 or P3, what – you don't say anything in your brief with regards to the determination, for instance, made by Mr. Kean when he went back to Westney after he got the report that it was P1 to – or that it was P1, that it was – that they were of the view that it was P20 to P30. Or you don't –

MR. SMITH: No, Westney didn't –

THE COMMISSIONER: You don't –

MR. SMITH: Westney came back with P3.

THE COMMISSIONER: Correct, but –

MR. SMITH: They didn't –

THE COMMISSIONER: – then Mr. Kean went back to Westney –

MR. SMITH: Yeah –

THE COMMISSIONER: – and said –

MR. SMITH: – he –

THE COMMISSIONER: – you know – after P1 –

MR. SMITH: Yes.

THE COMMISSIONER: – then Mr. Kean went back to Westney –

MR. SMITH: Yeah –

THE COMMISSIONER: – and said, no –

MR. SMITH: – he –

THE COMMISSIONER: – you know – after P1 –

MR. SMITH: Yes.

THE COMMISSIONER: – then Mr. Kean went back to Westney – this is my recollection – and he said, look, this can't be the case. He wrote a letter back saying – or an email, I forget what it was – saying, you know, this – we got – we think it's a P20 to a P30 schedule.

MR. SMITH: Correct.

THE COMMISSIONER: Then we have the evidence of the letter by Mr. Harrington to Stan Marshall in 2016, telling Mr. Marshall that, you know, they had made Mr. Martin aware that it was a very aggressive schedule and that it was, you know, at the best P – I think he said P10 to P20 at the time.

What does Mr. Martin say to that?

MR. SMITH: Mr. Martin says that you have to look at the whole discussion in the context of what was asked of Westney. It seemed that Westney had a little, shall we say, brain holiday when it came to what they were being asked. They were asked to test the schedule – 100 line items out of a 10,000 line-item schedule, they were asked to test the schedule for the purpose of identifying what risks would be catastrophic. And they said, here are the three or four risks.

I think some people say it's three, some people say it's four, depending on how you read the report, but that three or four risks that they identified would result in, if they occurred, a P1 schedule.

THE COMMISSIONER: Okay.

MR. SMITH: And when the P3 was proposed, you know, by Nalcor to Westney, they were again testing what the mitigations that Mr. – excuse me, I lost his name. The ...

THE COMMISSIONER: Mr. Kean?

MR. SMITH: Mr. Kean. He – they were testing those mitigations against the P1 schedule, i.e., would these – if these things happen, would – what would be the result on the schedule? And, you know, that is very clear in the documentation, if you review the documentation that they mention P1, P3 and the document that leads up to that, which was reviewed by myself in the evidence, okay, if you look at those, you'll

see that the whole purpose of that was a time-schedule test. It wasn't a – it didn't mean that the schedule itself would be running at a P1 or a P3, that the actual schedule is there. They had a great deal more confidence in it.

Realistically, what my – Mr. Martin would say that, realistically, it was probably a P20 to a P30.

THE COMMISSIONER: So he agrees with the project management team that it's around a P20 or a P30 schedule?

MR. SMITH: Yeah.

THE COMMISSIONER: So, does the Government of Newfoundland and – were the Government of Newfoundland and Labrador told that the probability of completing the project on time was going to be P20; 20 to 30 per cent?

MR. SMITH: No, Mr. Martin never used P-factors in discussions with government. He rather would say that the schedule is aggressive or very aggressive or he would say, you know, that the unknowns that are likely to be there, okay, that are not identified will have an impact on the schedule. Okay?

Now, that brings me, if you will, to something that was raised by you, Commissioner, earlier today, and Mr. Martin has asked me to clarify it for you, that the 497 identified – 497 strategic risks identified by Westney, Mr. Martin says that was the risks that were, if you will, mitigated away.

THE COMMISSIONER: That's why it was there.

MR. SMITH: Yeah. But he said it was mitigated away because they identified what was in that 497, okay? So once they become known and can – are capable of mitigation, they fall into tactical risks not strategic risks –

THE COMMISSIONER: Right.

MR. SMITH: – so therefore –

THE COMMISSIONER: So what about the political and social risks that were referred to in the other –

MR. SMITH: Yeah.

THE COMMISSIONER: – I made a mistake this morning, I referred to 45, I think I was 36 and there were four done, so 32 left.

MR. SMITH: Yeah.

THE COMMISSIONER: So of the 32 other strategic risks that were identified such as protests, other political risks et cetera, how were they mitigated?

MR. SMITH: Again, what I – what Mr. Martin would say to you is that they mitigated the 497 risks that were listed. The other risks in the – they believed they had mitigated them either by consultation with the Aboriginal peoples or taken other steps which would bring that issue lower. But once it's identified as a strategic risk and once it's mitigated or attempted to be mitigated, it falls into tactical by definition.

THE COMMISSIONER: Right.

MR. SMITH: Only –

THE COMMISSIONER: But how can you –

MR. SMITH: Only –

THE COMMISSIONER: – how can you – how can somebody take a strategic risk, assume it's going to be zero because they believe it's mitigated, how are they going to know it's mitigated until you actually proceed? It's an unknown unknown so it's not within the PMT's tactical risk.

MR. SMITH: No. But, again, like I said, some risks, once they are identified, generally fall into the tactical category not the strategic category. The strategic category are those which do not – for example, the – in the case of the Aboriginal peoples, it was believed that they had met the demands of the Aboriginal peoples and had negotiated a fair deal – the New Dawn and all these other arrangements – and it turned out that somebody, you know, picketed the site. That was unforeseen.

THE COMMISSIONER: Right, but isn't that what you have a strategic risk for? You have

your management reserve for the things that are not foreseen?

MR. SMITH: You have a management reserve for it.

THE COMMISSIONER: So how can you assess it as saying that we've mitigated everything so we're going to put a zero on it?

MR. SMITH: Yeah, no, we didn't – and that's what Mr. Martin would like me to reassure the Commissioner, is that the only things that they told or said were mitigated to be gone were those things listed at \$497 million. But what he did do and he did – and I think, Ken Marshall's testimony at the board level will demonstrate that Mr. Martin continuously pointed out to the board that these were not the only risks, these ones that were mitigated are not the only risks, that there may be other risks we don't know about that could drive the price up. And that was discussed with the board, according to, I think, Mr. Ken Marshall's testimony.

THE COMMISSIONER: Right, so that leads me to the next page, which is – I'm sorry, 43. So the long and the short of your argument is that in this particular case, the management reserve for those unknown unknowns, basically, was the completion guarantee that was signed by Ms. Dunderdale.

So did – I'm going to ask you, did Mr. Martin fully and appropriately explain, in your view – fully and appropriately explain – like, not in riddles. Like, did he fully and appropriately explain that we have a management reserve, we're going to not put it in the budget but we know we've got \$500 million because that's what he told Ms. Dunderdale, according to Ms. Dunderdale?

MR. SMITH: Yeah, no, he said it could go to \$500 million.

THE COMMISSIONER: To \$500 million, right.

MR. SMITH: It didn't say it would be \$500 million.

THE COMMISSIONER: I see.

MR. SMITH: At no time would Mr. Martin agree with you that he gave a definitive number.

THE COMMISSIONER: Right, it could go as high as \$500 million is what you said.

MR. SMITH: Yeah, he thought it could go as high as \$500 million.

THE COMMISSIONER: Right. Okay.

So your – in your view, he properly advised the government that this was a management reserve and that this is what he was using to cover the unknown unknowns.

MR. SMITH: Yeah. What he would say to the government would be that there are unknown costs associated with building a project of this type. And he told Ms. Dunderdale at a point in time that it could be as high as \$500 million in his mind.

In his testimony before the Commission, Mr. Martin said he had never in – never contemplated it being billions. He only contemplated it in the hundreds of millions. And in terms of management reserve, what Mr. Martin would tell you is that the management reserve needs to be funded, there must be available funds for the management reserve.

And he actually did that, he told government – whenever there was a need for more capital, he went to the government for approval of the – or board first and then the government for the AFE increase, okay, and told them in that there are some tactical risks, but that's not necessarily going to be the final number –

THE COMMISSIONER: Right.

MR. SMITH: – because –

THE COMMISSIONER: So how was the management reserve funded?

MR. SMITH: The management reserve was – as you indicated, was funded, from his perspective from not only the guarantee, the provincial guarantee signed by Ms. Dunderdale, but in his view that some of these other benefits of the project down the road would act to offset.

THE COMMISSIONER: Okay.

And your client takes the position that you don't include the management reserve in your budget. And you did refer to Professor Klakegg in Norway where they don't actually – and the government doesn't allocate – make a specific allocation. But isn't it true that it is in their budget and it is fully disclosed, they were fully transparent?

MR. SMITH: At the government level, perhaps, but not at the PMT level.

THE COMMISSIONER: Okay.

MR. SMITH: It's never given to the PMT.

THE COMMISSIONER: Okay.

MR. SMITH: None of the experts said that it would be given to the PMT.

THE COMMISSIONER: Okay.

MR. SMITH: Even Dr. Flyvbjerg.

THE COMMISSIONER: All right.

Seventy-four.

In paragraph 239 at page 74, you indicate that at the time of sanction –

MR. SMITH: Sorry, I'm trying to catch up to you.

THE COMMISSIONER: Oh, I'm sorry, page 74.

MR. SMITH: 239?

THE COMMISSIONER: Yes.

All right, at the time of financial close it says: "Other than evidence that ... estimates were lower than" the "bid amounts received prior to financial close, there is a paucity of evidence as to how or why the estimates were lower" But isn't it true that at financial close the bids were actually coming in higher; some of them?

MR. SMITH: Maybe it's a misstatement but that's what I was trying to convey.

THE COMMISSIONER: Okay, all right.

MR. SMITH: The estimates were lower than the bid amounts.

THE COMMISSIONER: Okay.

MR. SMITH: The estimates are lower than the bid amounts so the bid amounts are higher.

THE COMMISSIONER: Okay.

Now, just go back to the discussion about the issue of the \$500 million. You recall that there were other witnesses who testified – government witnesses who testified that they were never aware of the fact that there was the potential for \$500 million. There was Mr. Dalley; there were other politicians. And you're making a comment here at page 111 of your brief in paragraph 355 that "it would be difficult to conclude that the Minister of Natural Resources" and, as well, "other ministers in 2013 and 2014, were unaware of the cost increase"

MR. SMITH: That's the \$300 million that I'm referring –

THE COMMISSIONER: Right.

MR. SMITH: – to there.

THE COMMISSIONER: That's right. This is the \$300 million.

Where is the evidence that the – where is the evidence – aside from the fact that Ms. Dunderdale can't recall whether she did but she believed she would have told them, we have heard evidence from various ministers, none of whom basically recall the \$300-million increase.

MR. SMITH: I understand that to be the case –

THE COMMISSIONER: So you're asking me –

MR. SMITH: – Commissioner.

THE COMMISSIONER: – to make an inference that they knew?

MR. SMITH: Well, no, I'm asking you to look at, you know, the standard operating procedures within government. And that is that if a senior

civil servant of the Department of the – Finance is aware, and the evidence shows that they were aware, or the senior civil servant of the Department of Natural Resources was aware of the \$300-million increase, the procedures within government are that they would've told their minister. It's that the minister merely just didn't remember that they were told.

THE COMMISSIONER: Okay.

MR. SMITH: Because if you recall correctly, the ministers testified well in advance of the documentation supporting knowledge of the \$300-million increase at federal – at financial close.

THE COMMISSIONER: So how would Mr. Martin respond to the fact that many of the government ministers basically would've said, you know, every time that Mr. Martin spoke, he spoke with confidence, he had knowledge. He has experience. He spoke with confidence. Yes, he'd mentioned that there might be the possibility of some overruns, but he was confident in the numbers. He was confident.

MR. SMITH: He was at the time.

THE COMMISSIONER: And he was.

MR. SMITH: At the time.

THE COMMISSIONER: Yeah, okay.

MR. SMITH: He had no basis upon which not to be confident with the numbers.

THE COMMISSIONER: Notwithstanding, for instance, he might have had – or FFCs that were pointing to trends that were higher?

MR. SMITH: But the FFCs that were pointing to trends that were higher were untested. For example, FFC may have, as an integral aspect of the FFC bids being received. While the bids had not yet been vetted by the PMT – had not – negotiations had not been entered into with respect to the bids and whether or not you could move work around to get the bid lower. You know, these FFCs were –

THE COMMISSIONER: So, you –

MR. SMITH: – used as a management tool that –

THE COMMISSIONER: I understand that –

MR. SMITH: - were in excess of (inaudible).

THE COMMISSIONER: So – but – but why not say to the government, look, you know the – we're getting bids in and trends are getting higher instead of going back and saying, you know, we're confident in our numbers. Like, you were getting bids in there higher, but guess what? These are not tested, and we're going to do this, we're going to do that or whatever. I didn't hear any evidence that that's what he did.

MR. SMITH: My understanding is that he did do. He'd said – the FFCs were not, generally, referred up to government – only in one case and that's the \$300 million increase. That was an FFC. All other cases government received AFE information, not FFC information. FFC was used as a management tool within Nalcor.

THE COMMISSIONER: Right, so why not, at least, advise government – what is – is there a reason why you wouldn't advise your owner that this is happening?

MR. SMITH: Because he couldn't rely upon them. He wasn't in a position, and he made this crystal clear in his evidence that he was not in a position to say that these were actual numbers. And he did not want to, you know, have an actual number on March and a different actual number in April and a different actual number in May, which is what – if you look at the Grant Thornton report, it would have suggested if you used FFCs only, you would be up and down throughout a very short period of time.

And that would not, in Mr. Martin's view, instill confidence in the listener that he knew – or that Nalcor knew – what the actual costs were.

THE COMMISSIONER: See, one of the –

MR. SMITH: They didn't.

THE COMMISSIONER: One of the issues – one of the things I've been thinking about is that, you know, that could be understandable,

but there is another key pivot point here and that is the November financial close.

So, here it is – I think everybody would have understood this is it – once we get into this we're done. And notwithstanding for – from April on to November, he was getting information indicating that the bids were higher. Yes, they were FFCs that – he went with an FFC, ultimately, at the end of the day with a 6.531 anyway.

But, you know, at financial close, not to tell the owner that, you know, this is on the go and not – and, you know, at least explain it and say, look, there's no certainty with regard to this. We're doing this. We're doing that. To give the government an opportunity to have a, you know, just a sit back and sort of take another look at this and say, you know, okay, well, are we satisfied that this is fine? I mean, full disclosure seems to me to be something that was – was something that perhaps he should've provided to government.

MR. SMITH: You may be looking at it in hindsight, too.

THE COMMISSIONER: No, I'm not looking at it from hindsight.

MR. SMITH: No, but at the time, he was not confident with the FFC numbers beyond the 300 million that was put into the –

THE COMMISSIONER: Right.

MR. SMITH: – financial close documents.

THE COMMISSIONER: And then it's interesting, the 300 million is only added about maybe two weeks or so beforehand. It takes to the 20th or the 21st of November that we actually know it's imparted to the government people. Nine days before or eight days before financial close, the momentum is building; you're trying to get things done; the Astaldi contract's waiting to get signed. It just strikes me as to be a bit strange how that all transpired in such a short period of time.

MR. SMITH: Well, again, I think there is a fair bit of evidence that the financial team and the PMT and Mr. Martin were under tremendous

stress in terms of dealing with the issues arising from the federal loan guarantee and financial closing – closure. One of the most important things that I would direct your attention to, Mr. Commissioner, is that in that timeline or in that time frame, one of the issues was the COREA and what would happen to the provincial government treasury if the COREA had not been adjusted closer to what was expected to be the capital cost.

THE COMMISSIONER: Yeah, I understand – yeah.

Okay, just let me just see. I had – I think that's pretty much it but I just want to make sure I've covered off my queries.

No, I think that's fine, Mr. Smith. Thank you very much for your (inaudible).

MR. SMITH: Thank you, Mr. Commissioner.

THE COMMISSIONER: Thank you.

MR. SMITH: I appreciate your time.

THE COMMISSIONER: All right, I – it's 10 after 4, we'll break here now, and we'll start again tomorrow morning at 9:30. I'm not sure how far we'll get tomorrow morning, but we'll figure that out overnight and certainly advise everyone tomorrow.

All right. Thank you.

CLERK: All rise.

This Commission of Inquiry is now concluded for the day.