COMMISSION OF INQUIRY
RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Summations Volume 2

Commissioner: Honourable Justice Richard LeBlanc

Tuesday 13 August 2019

CLERK (Mulrooney): All rise.

This Commission of Inquiry is now open.

The Honourable Justice Richard LeBlanc presiding as Commissioner.

Please be seated.

THE COMMISSIONER: All right, good morning.

Just to give a bit of an update as to what this week's plan will be. So based upon the information that I now have related to the amount of time that each counsel is proposing to use, I think it's fair to say that we will be finishing on Thursday. So that will give the lawyers an opportunity to make arrangements with their flights and things of that nature. That's why I'm telling you this.

So my plan today is to get as far as finishing the Consumer Advocate and that should give us plenty of time to ensure that – based upon the indications to Mr. Beresford as to the amount of time each counsel would have, that will give us plenty of time to finish on Thursday.

So, having said that, Ms. Best for Kathy Dunderdale.

MS. E. BEST: Good morning, Commissioner.

As you know, I'm Erin Best and I represent Kathy Dunderdale.

So I've prepared some oral submissions for this morning that summarize and supplement my written submissions, but I am happy to take your questions at any time.

So I'm going to start with a brief timeline highlighting Premier Dunderdale's involvement in the Muskrat Falls Project and in government, and then I will speak to a few issues that have been central to this Inquiry.

Kathy Dunderdale was elected to the House of Assembly in 2003. She was appointed minister of Natural Resources in 2006, a position that she held until December 2010 when she became premier. In 2011, Premier Dunderdale was elected with a majority government. She resigned from the premiership in January of 2014.

As minister of Natural Resources, Ms. Dunderdale became acutely aware of a significant threat facing this province. The threat was the looming demand for power. Houses were getting bigger, more people were using electric heat and the old Holyrood infrastructure was doomed to fail. Without reliable, firm power, there would be no prosperity in Newfoundland and Labrador, no hope for a stable future. It sounds dramatic, I know, but that was the reality at the time. The threat was particularly intense on the Island portion of the province since it was truly an isolated system. The threat was imminent, but by 2006, when Ms. Dunderdale came on board at Natural Resources, government was already actively addressing the issue. It had already recognized the complexity involved.

In 2004, two years before Dunderdale became minister of Natural Resources, the Williams government, in consultation with industry experts, began restructuring Newfoundland and Labrador Hydro to create a new energy corporation. The purpose of this corporation was to amass and leverage expertise in the energy sector. In 2005, a year before Ms. Dunderdale started at Natural Resources Ed Martin was hired to lead the new energy corporation, now of course known as Nalcor. By the time Ms. Dunderdale was appointed minister of Natural Resources in July of 2006, Mr. Martin had been in his role for about a year and activities at Nalcor were advanced.

The creation of the Nalcor Crown corporation, as I said, was recommended by experts. This was because governments were, and still are, typically ill equipped to handle the complexities associated with the generation and distribution of energy. It's an area that requires significant expertise.

Like most politicians, prior to her appointment as minister of Natural Resources, Premier Dunderdale had minimal, if any, exposure to the energy or natural resources sectors. Before entering politics, Dunderdale had a career in social work and the community sector. Premier Dunderdale, like the premiers before her, was not an expert in energy or resource development.

She, like all other elected representatives, made decisions based on the best information supplied by the officials and experts who supported the office.

When a need for expertise is recognized, government's role is to allocate resources to amass and develop that expertise. This was the raison d'être of Nalcor and the reason why government was entitled to rely on Nalcor. In many ways, as we've heard, Nalcor was much like a core department of government. Premier Dunderdale was entitled to rely on the information that she received from Nalcor without the suspicion that she would have had for information she would have received from, say, a private, profit-driven company.

In his evidence before the Commission, Stan Marshall, the current CEO of Nalcor, stated as follows: "You know, you got to – when you go forward with these things, you got to have a team to do it. You know, the government should be entitled to rely on Nalcor. That's what special expertise would do. When Nalcor does it, it has a project team to do it.

"You can't be double- and triple-checking."

Throughout her terms in elected office, Premier Dunderdale frequently and consistently requested, challenged and relied on the information and advice of her officials and experts, especially the information and advice she received from Nalcor.

Importantly, though, fundamental decisions, including the decision to sanction the Muskrat Falls Project and proceed through financial close, were not made by Premier Dunderdale alone. Decisions of that magnitude are beyond the authority of any one individual, even the premier. As per the normal course, these decisions were made by the consensus of Cabinet based on the best information provided.

In 2007, when government released its energy policy, Nalcor and government were well aware of the looming power deficit that would face this province. But they were also aware of some incredible opportunities. Prime among them was, and still is, the potential for hydroelectricity from the Lower Churchill. In the 2007 election, the Progressive Conservative government was given a strong majority mandate to advance its energy policy, which included a promise to consider the development of the hydroelectric potential of the Churchill River.

Now, yesterday during submissions and questioning, there was some suggestion that the 2007 energy policy provided a directive to Nalcor to develop Muskrat Falls. So I'd like to look at that policy and, Madam Clerk, if you could please pull up P-00029, at page 40.

And firstly, as discussed, this document was prepared before Dunderdale's time. It took years to prepare and was released only months after she became minister of Natural Resources. And as we've all witnessed in our lives outside this Inquiry, with new leadership, naturally, comes new policies and new directives. So I'd like to read what this policy says at page 40.

"Together with our existing hydroelectric and some wind power, the Lower Churchill project will meet our long-term electricity needs." These "are, however, potential industrial developments both in Labrador and on the Island that could result in a sharp rise in – sorry – "There are, however, potential industrial developments both in Labrador and on the Island that could result in a sharp rise in demand before Lower Churchill is developed." Newfoundland and Labrador Hydro "is actively working with existing and potential new industrial customers to ensure their needs can be met.

"To ensure that we can meet our future electricity needs, we must also have an alternate plan in the event Lower Churchill does not proceed as planned. In this case, we will provide future electricity needs from the most economically and environmentally attractive combination of thermal, wind and smaller hydro developments. These sources could provide an additional 100-200 MW of power. The remainder would come from thermal generation." Newfoundland Hydro "is studying these sources in parallel with planning for the Lower Churchill to ensure the future energy supply for the province is secured." Newfoundland and Labrador Hydro "is also studying the potential for landing gas in the province from our offshore resources to fuel a thermal electricity generating plant."

If you could please scroll down – "In Labrador, in addition to available recall from the Upper Churchill, wind and other hydro developments are potential power supply options to be considered in the event that the Lower Churchill Project is not sanctioned."

So we can see here, first of all, that government is considering the possibility that the Lower Churchill Project would not be sanctioned, and that's explicit here in the policy. Actually, Madam Clerk, I am going to continue reading, and I apologize if it's tedious to read through it, but I'm just going to go through this section and then we can move away from this document.

Generating Electricity: Lower Churchill Project. "The Lower Churchill Hydroelectric Project is the most attractive undeveloped hydroelectric project in North America. Its two installations at Gull Island and Muskrat Falls will have a combined capacity of over 2,800 MW and can provide 16.7 Terawatt hours … of electricity per year – enough to power *1.5 million* homes without a requirement for significant reservoir flooding. The project will more than double the amount of renewable electricity available to the province and will dramatically increase the amount of power available for economic development in Labrador and on the Island."

And one thing that I mean to point out by reading through this, and you'll see more of it as I just complete this section, is that this policy clearly contemplates the development of Gull as well as Muskrat Falls. My point in going through this is to point out that clearly what is stated in this 2007 Energy Plan or policy changed as time progressed. And that clearly if this was any kind of directive or mandate for Nalcor, that that directive or mandate clearly changed as Premier Dunderdale came into government and became premier. Because quite obviously, if the mandate or directive was to get – to Nalcor was to develop Gull Island, then it completely failed at that mandate.

So I don't know if I need to read down more, but it does – I would like to read it because it does emphasize that point even further as I go down through. So "to ensure this project has every opportunity to move forward, the Provincial Government is leading its development through the Energy Corporation. The Energy Corporation has established a comprehensive and clearly-defined project execution plan and will continue to advance the project on multiple fronts, including engineering and the environmental assessment process, analysis of market access options and market destinations, and a financing strategy. The project is targeting sanction in 2009, with in-service of Gull Island in 2015."

So again, there, quite obviously, none of that happened. This mandate or directive that was given to Nalcor clearly underwent significant revisions in the years to come.

If we could please, Madam Clerk, just scroll up to the top of this page, I would like to read the section that's in green on the left – Policy Actions: Lower Churchill Project. And this is for – to emphasize the same point. "The Government of Newfoundland and Labrador will: Lead the development of the Lower Churchill Hydroelectric Project, through the Energy Corporation."

Bullet point two: "Ensure that first consideration for employment will be given to qualified personnel adjacent to the resource." And three: "Conduct a comprehensive study of all potential long-term" electric "supply options in the event that the Lower Churchill Project does not proceed."

So, as you can see here from bullet point three, it is quite clear that what this policy mandates – part of the mandate is to study all the potential long-term electricity supply options in the event that the Lower Churchill Project does not proceed. And I submit that the Lower Churchill Project, as contemplated on this page in this policy, did not proceed because, clearly, the target that was identified here was a development of Gull Island first with power in 2015.

So the truth is that the directive to Nalcor changed once Premier Dunderdale took power, and what it changed to – and you'll hear me say these phrases many times this morning – is, do we need the power, and is it the least-cost option? This was the driver throughout this entire process.

In the 2011 general election, the Progressive Conservative Party, led by Premier Dunderdale, campaigned under the slogan new energy and was re-elected with a large majority. Premier Dunderdale accepted the results of the election as an endorsement from the public to proceed with the investigation of the potential of the Churchill River, but only if it was confirmed that the project was the least-cost option to meet our power demands.

Premier Dunderdale, in her capacity as minister and as premier, always maintained the position that resource development could not occur at any cost. Any development had to be economical and in the best interest of the people of this province. This view of government was confirmed by Ed Martin during his testimony here at this Inquiry.

To pose a rhetorical question, if the Muskrat Falls Project was a directive as of 2007, or a fait accompli, then why all the study? Why compare the options? Why the CPW analysis? Why the independent experts? Why the reference question to the PUB?

Government was under no obligation to do any of that. All this analysis occurred because Premier Dunderdale's government decided that it would proceed with the option that was least cost. And this was an example of Premier Dunderdale and her government going well beyond its legal obligations in an effort to protect the ratepayers.

You see, in the year 2000, as you are aware – several years before Premier Dunderdale was elected – the Liberal government of the day not only exempted the Lower Churchill Project from review by the PUB; it also exempted it from the Electrical Power Control Act in its entirety. And we have that exemption order, Madam Clerk, at P-00023. I don't think we need to look at it, but it clearly states that the projects are exempt from the Electrical Power Control Act. So the obligation housed in that act to provide reliable power at the lowest possible cost did not apply to the Muskrat Falls Project or Gull.

And I would like to note that this is a revision to my written submissions, which I am happy to either revise or perhaps file as a reply.

Nevertheless, Premier Dunderdale's government took it upon themselves to promise to develop the Lower Churchill only if it was the least-cost option using the 50 years as the comparison term. And why 50 years? This was discussed yesterday. Well, 50 years, it's not the lifetime of the Muskrat Falls power plant because, as we've heard, that's more like a hundred years. According to Nalcor in it's submission to the PUB – and, Madam Clerk, this is at P-00077 at pages 43 and 29, but 43 is – clearly states there.

If you could please scroll down? Time Period of Study, that's it there.

According to Nalcor, 50 years is the life of the transmission lines – the LIL – which, I note, we would have required whether we proceeded with Muskrat Falls or whether we proceeded to obtain power from Quebec until 2041. So the 50-year comparison as a baseline made sense in regards to the multiple options of the Muskrat Falls Project or the idea of becoming interconnected to carry in power from Quebec or Churchill Falls.

In the same document, at pages 134 and 136, we see that Nalcor did in fact run the scenario where we burnt fuel in Holyrood until 2041 and then bought Churchill Falls power at market price. And we can see there, if you could scroll down, please, Madam Clerk? It's almost at the bottom.

Right there. You see, right – the third entry from the top: "Holyrood to 2041, then CF at market price." And you can see there that this analysis still favoured the Interconnected Option by $1.3 billion – well, $1.283 billion.

So this issue – this possibility was considered.

THE COMMISSIONER: So this sensitivity that was run – or this analysis that was run was based upon something – what was Holyrood at 2041? Was that the refurbishment of Holyrood to get it to 2041? Was it some other type of provision of generation sources aside from Holyrood? Was it using Holyrood to 2023 and then closing Holyrood and something else? Can you tell me what that actual sensitivity was?

MS. E. BEST: So I'm going to do my best to answer your question. Perhaps we can find the

answer at page 136 of the same document, where it describes this analysis in more detail.

Okay. So, I'll just read it out there, perhaps, or maybe we can take a moment to read it.

So it does say there, "… provision of $200 million in-service for each of the three thermal units was included in isolated costs."

THE COMMISSIONER: Sounds like refurbishment.

MS. E. BEST: Yes. And I don't think – beyond what this section of this submission to the PUB says, I don't think I have anything to add to that –

THE COMMISSIONER: That's fine.

MS. E. BEST: – sensitivity analysis at this time.

Okay. So back to my timeline.

In 2012, after thorough analysis and much debate, Premier Dunderdale and her Cabinet participated in good faith in the sanction of the Muskrat Falls Project based on the reasonable understanding, informed by independent experts and Nalcor, that Newfoundland and Labrador had an impending need for the power and that Muskrat Falls was the least-cost option for meeting that need.

At the time of sanction, Premier Dunderdale believed, reasonably and in good faith, that the best cost and schedule estimates for the Muskrat Falls Project had been prepared and made available to the public and that effective due diligence had been completed to protect the interests of the ratepayers and taxpayers in Newfoundland and Labrador.

In December of 2013, at the time of financial close and shortly thereafter, when she retired from public office, Premier Dunderdale believed the project to be stable and on track. It is her recollection that she and other senior officials knew, at or about the time of financial close, that the capital cost estimate for the Muskrat Falls Project had increased from $6.2 billion to $6.5 billion, but that there was a plan for this cost increase to be mitigated and that the increase was offset by additional financial savings – sorry – financing savings and benefits.

THE COMMISSIONER: So, you certainly indicate that early on in your brief. I think you explain that a little bit more at paragraph 95 – 93 of your – I think it's 93 – of your brief, where you talk about the fact that it is a recollection as opposed to – it's her recollection. She's not – she does not – I think what you're expressing to me in paragraph 93 is that there's no absolute certainty with regards to her knowledge of the extra $300 million.

MS. E. BEST: That is correct.

So, Ms. Dunderdale's approach to appearing before this Inquiry was to be absolutely truthful to the best of her ability.

When she was questioned on when she knew the 6.5 number, she simply had a strong belief that she knew, but that is as far as it goes. She couldn't get up and say before the Commission that she didn't know because she had a strong belief that she knew. But she had no documentary evidence to point to this fact and she was also sure – absolutely certain – that if she knew, others knew, her senior officials would have also known.

THE COMMISSIONER: Based upon the fact that she would never have met with Mr. Martin – except on one occasion – without senior officials being present.

MS. E. BEST: Precisely.

THE COMMISSIONER: So, let me – one thing that, in reviewing her testimony, that I did notice is the issue of timing, really, was not specifically put to her.

So, let me ask you this, was there any thought about the fact that it appears in a document later that went before the board that I've looked at, some time in early December, I think it was December 8 or 9, I can't recall exactly the date right now, that there was a mention of $300 million. Is it possible that perhaps she knew of the $300 million after financial close as opposed to before financial close?

Because I think her point was is that she was suggesting that she would have known before financial close, but based upon what you've just said and based upon my review of the evidence, I'm not sure whether there's that degree of certainty or knowledge that she would have had on her part at this time. She was trying to be honest, as you say.

MS. E. BEST: Yes.

Well, I think that this is something that would be better put to my client, but I will state – just reiterate my submissions that there is no certainty with respect to these dates and these timelines. What Premier Dunderdale attempted to do on the stand was provide evidence that was to the best of her recollection and belief and that was essentially all she could do. And I think that that was what she was expected to do.

THE COMMISSIONER: Right.

MS. E. BEST: So –

THE COMMISSIONER: So couple –

MS. E. BEST: So –

THE COMMISSIONER: – that with the fact that we have Cabinet Members who've testified that they were never told, and the premier indicated – or she indicated that if she were premier and she was told this, she would have taken it to her Cabinet, which didn't appear to happen because there is no – according to Julia Mullaley, there's no Cabinet record; she did a very extensive search. Couple that also with the fact that Julia Mullaley was there, Mr. Bown was there, and none of them can recall.

What do you think that should lead me to conclude?

MS. E. BEST: I do think that is for you to weigh and conclude. I don't have a position on that. All I can state is to reiterate again that my client gave her testimony to the best of her knowledge and belief. She was as truthful as she could possibly be and that's what led her to give the evidence that she gave.

THE COMMISSIONER: Okay.

MS. E. BEST: Thank you.

So before I elaborate on a few of the points I've already made, I'd like to briefly address the role of hindsight in this Inquiry. Of course, while we now have the benefit of hindsight in reviewing the decision to sanction the Muskrat Falls Project, it's necessary to recall the context in which the sanction decision was made.

So, firstly, the Muskrat Falls Project was sanctioned in an area – an era of high oil prices and robust industrial activity in the province.

"At the time of sanction in 2012, the price of Brent crude was over $100 per barrel. Future oil price projections prepared for government by" – experts – "PIRA Energy Group … predicted that oil prices would remain above $100 per barrel until at least 2025."

So, please remember that one of the biggest risks facing our province at that time was the volatility of oil prices. If we look at P-00015, Madam Clerk, which is the Grant Thornton report, the sensitivity analysis. If we could go to page 2, please, and I'm gonna refer to page 4 as well. That's fine right there.

So we see an example of hindsight bias even in the sensitivities run by Grant Thornton. So, notice that they run sensitivities – Madam Clerk, if you want to scroll up and down just so that the Commissioner can see the entirety of this page. They run sensitivities where the price of fuel – oil decreases by 10 per cent, 20 per cent, 30 per cent, 40 per cent, and I believe 50 per cent there at the bottom. But they only run sensitivities where the price of oil increases by a maximum of 20 per cent. They don't mirror those sensitivities truly to reflect what was a possibility at the time.

And even then – Madam Clerk, at the top there – okay, that's fine – at an increase of 20 per cent in the cost of fuel, the Isolated Option is, I believe, at over $15 billion the highest cost scenario considered.

At the time when Muskrat Falls was sanctioned, rising oil prices was one of the highest risks facing our generation of electricity, and that didn't even factor in carbon pricing which is on the horizon. If we had proceeded with the

Isolated Island Option and the price of oil had increased by 20 per cent or even 10 per cent, we would be here, I suppose or I suggest, in this same Inquiry wondering why we didn't develop Muskrat Falls instead of continuing to burn fuel for power. Further, with respect to the need for power, at the time of sanction the province was experiencing significant industrial activity with more prospective projects on the horizon in the mining and oil and gas sectors; projects that could never become a reality or even truly be considered without the promise of firm power.

Encouraging commercial and industrial activity was a central platform of Premier Dunderdale's government. Ensuring that the province had a reliable power supply at the least cost was vital to promoting economic development. Without this promise of firm power, there would be no ability to retain or attract industry to the province, which is a pretty bleak view of our future.

At the times of sanction and at financial close, the Dunderdale government did not have the benefit of hindsight that we have now. The Commission's expert, Mr. Colaiacovo – Colaiacovo, I think – described hindsight bias in his presentation to the Commission as follows: "**After 7 years of events it is impossible to *not* be biased**. Delays and cost overruns are a reality now, but only a possibility at the time." Low fuel prices, low export prices, these scenarios seem obvious, but that was not the case in 2012.

And, of course, the unfairness inherent in inappropriately relying on hindsight was recognized by you, Commissioner, in your interpretation of the Terms of Reference and I'll just read a very small portion: "In an investigative Inquiry, it is important to be reminded that implicit in being fair is the need to guard against inappropriate reliance on hindsight. Any evaluation of past conduct must be done in the context of the knowledge that was available at the time, not what we know today."

We do acknowledge and appreciate that this Commission is alive to the influence of hindsight bias, which has been prevalent throughout the Inquiry. And we ask that you continue to consider the impact of this bias as you assemble your report.

Moving on, according to her testimony before this Commission, Premier Dunderdale submits the following 10 points for your prime consideration, some of which I will discuss in more detail as I progress through my oral submission.

One: The creation of Nalcor and the Energy Plan were all well advanced by the time Dunderdale was appointed minister of Natural Resources in July of 2006. Premier Dunderdale advanced some of these policy objectives and revised others, but turned a critical eye to every aspect of each policy and its implementation, and encouraged her ministers to do the same. Specifically, Premier Dunderdale tasked Nalcor with finding out whether we needed the power, and if so, what was the least-cost option for providing it.

Number two: Nalcor was created specifically to do the work that government was ill equipped to do. Its purpose was to assemble the expertise required to study our power demands and supply options, and to advise government accordingly. Nalcor was built to be relied upon by government. Based on its work, the Muskrat Falls Project was recommended to Premier Dunderdale's government as the least-cost option to meet the province's power requirements.

Number three: While Premier Dunderdale relied on the expertise in Nalcor, she also supported and resourced her officials, and in particular, her minister of Natural Resources, Jerome Kennedy, to undertake a thorough, independent review of the Muskrat Falls Project in advance of sanction.

Number four: At the times of sanction and financial close, Premier Dunderdale and her Cabinet had a bona fide and reasonably held belief that Nalcor and the Muskrat Falls Project had been subject to detailed review and oversight by an abundance of independent experts and by core government departments.

Five: While the project cost estimates prepared by Nalcor and SNC-Lavalin were not ordered to be redone by government, government did undertake an independent review of the reasonableness of the cost estimates and the CPW analysis.

Number six: Premier Dunderdale's government consistently made timely public disclosures of the most current and accurate information with respect to the Muskrat Falls Project that was provided by Nalcor, except when government was advised by Nalcor that the information was commercially sensitive.

Seven: Premier Dunderdale trusted her senior advisors and the experts at Nalcor to advise government on risk. Specifically, Premier Dunderdale had no knowledge that strategic risk was removed from MHI's scope of work, or that it would have been reasonable to exclude or include it. In fact, Premier Dunderdale understood that risk was included in MHI's analysis, and anyone reading the report would note sections devoted to risk.

Eight. The Dunderdale Government had no obligation to task the PUB with an analysis of the Muskrat Falls Project; such projects were deemed exempt from PUB review by existing legislation. Despite this lack of obligation, Premier Dunderdale's government sent the PUB reference question to provide an additional layer of oversight. While the PUB abrogated its responsibility to answer that question, the independent expert retained by the PUB, MHI, did conclude that the Muskrat Falls Project was the least-cost option for meeting our energy needs.

Nine. Premier Dunderdale's government was responsible for negotiating and bringing home the federal loan guarantee, which has saved or will save ratepayers in the province over $1 billion in financing costs.

And lastly, at the time of financial close Premier Dunderdale reasonably believed that there had been significant, if not excessive, oversight of project work, including: the Decision Gate process employed by Nalcor; the Nalcor board of directors; the requirement of Nalcor to hold public AGMs and to report annually to the House of Assembly; the ability of the Auditor General to audit Nalcor at any time; the regular reporting by the CEO of Nalcor to Cabinet; the review completed by Navigant Consulting Inc.; the reference to the PUB and, perhaps more importantly, the independent review completed by MHI for the PUB; the review by the Consumer Advocate; the independent review at DG3 completed by MHI; the internal reviews of the cost estimates and CPW analysis by the Departments of Natural Resources and Finance; the reports prepared by Hatch Energy, Ziff Energy Group and Wood MacKenzie in respect of the alternate supply options; and the engagement of the independent engineer and the due diligence completed by the Federal Government in advance of the federal loan guarantee.

Premier Dunderdale had no reason to believe that the oversight of the Muskrat Falls Project was inadequate or that Nalcor's information and advice was not of the highest quality available in the circumstances.

A central theme of our submissions to this Inquiry, and the focus of Premier Dunderdale's approach from at least 2010 to 2013, revolved around two fundamental questions that I have already stated: did we need the power, and was it least-cost?

All the additional benefits of the project – the development of expertise in this province, the creation of jobs, the ability to generate and sell excess power, the environmental benefits, the return on equity – these were all supplemental considerations.

I'm going to address the two questions, but first I have a couple of points to make about them. These two questions, I mean do we need the power, and is it least-cost?

Firstly, as the Commission's expert, Mr. Colaiacovo, said: the fact that these were the two questions that were put to the PUB indicates that the decision to sanction the Muskrat Falls Project was in fact on the basis of these two questions. It was not a policy decision outside of those two questions, as has been suggested by other parties to this Inquiry.

Yes, there were those other issues at play – environmental, economic, political. And these things were considered by government, but the decision was not made on those bases. It was made on the basis of: did we need the power and was it least cost?

Did we need the power? A fundamental element of the mandate given to government – given by

government – excuse me – to Nalcor was to prepare electrical load forecasts for the province. Throughout Dunderdale's tenure as Minister Natural Resources and premier she was regularly advised by Nalcor as to the province's energy requirements.

Newfoundland and Labrador Hydro specifically advised government that based on its load-planning forecasts there would be a capacity deficit on the Island starting in 2015, and energy deficits occurring in 2019. This was confirmed by the PUB's independent expert, MHI. The evidence showed we needed the power.

Was it least-cost? The question for Dunderdale's government then became: what would be the least-cost option to meet the province's impending power needs? Based on the work completed by Nalcor, government advised that the two preferred options for meeting the province's power needs were Muskrat Falls and then the Isolated Island Option.

In determining which of these two options was the least-cost option, government relied on the CPW analysis completing by Nalcor – completed by Nalcor – which favoured the Muskrat Falls Project by $2.4 billion.

In his testimony before the Commission, Jerome Kennedy – then-Minister of Natural Resources – stated – sorry, Minister of Natural Resources at the time of sanction – stated: right from the beginning, Sir, early in this project there were two questions that I was asking myself – were: do we need the power; and, was it the least-cost alternative? Was it Muskrat Falls or was it the Isolated Island?

In her testimony before the Commission in December, Premier Dunderdale also stressed that the decision to move through Decision Gate 2 was premised on these two fundamental questions.

She stated: "And the big debate at this point in time in the development was whether or not which of the two projects – we were still going through CPW, and the big question was what was – which … was" the "least cost?" This "was one consideration … the second big consideration was did we need the power."

If the Muskrat Falls Project was not found to be the least-cost option, the Dunderdale government was prepared to walk away from the project, end of story. Whether the Muskrat Falls Project was the best option for the province overall, having regard to the additional economic and social benefits, was not relevant to the sanction decision. This was confirmed, as I stated, by the reference questions that was put to the PUB.

The Muskrat Falls Project was exempt from review by the PUB, pursuant to the *Labrador Hydro Project Exemption Order*, which was issued, as I stated, in 2000, long before Dunderdale's term in office. Given this legislative exemption, Dunderdale's government had no legal requirement to submit the Muskrat Falls Project to the PUB for review, or to submit the reference question with respect to least cost to the PUB for review.

However, some time between Decision Gates 2 and 3, there were requests from the public and ministers within Dunderdale's government to complete some form of independent review of the Muskrat Falls Project. In response to those requests, Dunderdale's government agreed – discussed and agreed, to submit a reference to the PUB, effectively asking the PUB to determine whether the province needed the power and, if so, what was the least-cost option?

The PUB report, which was delivered to government on March 30, 2012, concluded that it had insufficient information to determine whether Muskrat Falls represented the least-cost option for power supply.

This was in spite of the fact that the expert engaged by the PUB had completed an analysis and reached a conclusion that Muskrat Falls was the least-cost option.

THE COMMISSIONER: Was that an unqualified conclusion?

MS. E. BEST: Pardon me?

THE COMMISSIONER: Was that an unqualified conclusion? If you read the first six pages of that MHI report, it talks about the limitations of the report.

MS. E. BEST: Sure.

THE COMMISSIONER: Would you say that that was an unqualified opinion?

MS. E. BEST: I have never read an expert opinion that was unqualified –

THE COMMISSIONER: Right.

MS. E. BEST: – first of all. The opinions and expert reports commissioned by Commission counsel for this Inquiry were also qualified, so I would suggest that –

THE COMMISSIONER: Hmm.

MS. E. BEST: – that is the normal course for expert reports, but certainly I do agree that MFI's [sp. MHI's] report to the PUB was qualified.

THE COMMISSIONER: Right.

Just to go back to your point about the issue of the legal requirement, when the exemption order was put in place the – as I understand the evidence that I've heard and some of the arguments that I've heard from some of the counsel during the Inquiry or some of the comments – was that it was put in place because the project was, basically, going to be an export project in 2000 or even earlier. They were looking at exports.

So, my understanding is – and you've confirmed this – is that this was a utility-based decision to proceed with Muskrat Falls in the sense it was for domestic use and it was going to be the least-cost power. So, we've heard evidence, for instance, from A. J. Goulding who is – who I gave the status of being able to provide opinion evidence to me on this point and, I think, the suggestion is that if there is going to be a impact on the ratepayers of the province – even if it is an export – and if there was an impact on the ratepayer of the province, there should be review by some agency, whether it's the Public Utilities Board or some other independent agency, so as to protect the interests of the ratepayers.

In this particular case – because of the reference question – there was no independent review of the costs to – within view of the fact that we were protecting the interest of the ratepayers by a PUB or by another agency. There were other – there were many so-called independent studies, which I'll have to look at. The issue of independence has been raised with many of them.

I guess my query would be – notwithstanding the fact that the exemption order was in place – would it not have been reasonable for Ms. Dunderdale and her government to realize that now the project is shifting because it shifted in 2010 from Gull Island, which was mostly export-related, to a domestic provision of power project in Muskrat Falls?

MS. E. BEST: That was a long question.

THE COMMISSIONER: Yeah. I know.

MS. E. BEST: So –

THE COMMISSIONER: I tried to set it up.

MS. E. BEST: I'm going to try and answer the different parts of it. So, I think first of all what Mr. Goulding is suggesting – in order to reach his conclusion you would first need to also conclude that the exemptions order had no force in effect. I have trouble reaching that conclusion, as would many, I think.

So, I can't see how that order would not be in play to exclude the project from reference, but – sorry – review by the PUB. But I think your question is – aside from that – even though that exemption order was in place, I understand your question to be: Would it reasonable anyway to put the question to the PUB? And I – government clearly determined that it was not at the time, and I think that it had the ability to do so. And this was something that was discussed amongst government and debated.

The reference question that was put to the PUB went beyond what was required in the circumstances and did have an impact on Nalcor's work and slowed down their timeline, required them to allocate resources to answering that question. If there had been a full analysis, the project would have been hindered even more. I shouldn't say the project, the analysis that – and the work that Nalcor was doing would've been slowed down even further.

And government had already retained, with Nalcor, quite a lot of its own expertise with respect to the review of the other potential supply options that it considered to be sufficient in the circumstances. And I think that's where the question with respect to reasonability comes into play. I think government thought that the review that it had already completed with Nalcor and other experts had been reasonably completed and there – it would've been inefficient for the PUB to have redone that work.

Okay, so I'll just go back to where I was.

So the PUB report which was delivered to government on March 30, 2012, concluded that it had insufficient information to determine whether Muskrat Falls represented the least-cost option for power supply to Island customers. As I stated, this was in spite of the fact that the expert engaged by the PUB – MHI – had reached the conclusion as you stated – as we discussed.

The Commission's expert, Mr. Colaiacovo, in his presentation to the Commission, called this an abrogation of the PUB's responsibility to come to the conclusion. And just to give you the citation for that, that was in the transcript from July 18, page 50.

THE COMMISSIONER: Okay.

So can I refer you to a bit of another piece of transcript on this? And this is from Mr. Jergeas. And Mr. Jergeas was provided with a little bit more information than, I suggest, Mr. Colaiacovo had.

It was put to him, Mr. Jergeas, in his testimony on June 19, 2019, on page 66, he said something to the effect – I'm not going to read it verbatim, but Mr. Learmonth was asking him, he said: You know, the Public Utilities Board heard this application, the engineering that had been completed by Nalcor, at that time, was about 5 per cent, and they declined to express an opinion based upon the level of engineering. And Mr. Learmonth said, "Do you not agree that this was a reasonable decision?"

And Mr. Jergeas indicated, "Yes, I agree."

So we have two experts, and as I said earlier about even Grant Thornton, the fact that they're called by Commission counsel or that they're retained by the Commission, doesn't mean I accept or reject any of it. I'm going to look at it all and I'm going to decide what I'm going to accept and what I'm going to reject.

So while Mr. Colaiacovo has indicated that he felt it was as abrogation, which seems like a number of the parties have now picked up on, I think that there is other evidence to suggest, perhaps, it wasn't.

MS. E. BEST: Yeah.

Well, I'm glad to get into that issue because I'd like to speak about the timeline – and I am going off on a bit of a tangent here – but the timeline for the reference question and the fact of the reference question that was referred to the PUB.

So, as I've stated, government had no obligation to put anything to the PUB; however, it decided, in response to the public and internal request for review, to put a reference question to the PUB. Now, the government had the sole discretion to determine what that reference question was, and I don't think that's in dispute.

The reference question that the government posed was in the context of DG2 numbers. It was limited to DG2 numbers. The reasoning for it was that there was equal engineering done for both the Isolated and Interconnected Island Options, at that time; therefore, it was meant to be an apples-to-apples comparison, the PUB could consider which, between those two, was the least cost.

THE COMMISSIONER: Where in the reference question was there a reference to DG2 numbers?

MS. E. BEST: It does not speak specifically to DG2 numbers, but it's the timeline that speaks to the DG2 numbers. That was when the reference question was issued.

If the reference question had been answered in accordance with the first deadline, it would have certainly only been in reference to DG2 numbers. Then, once the timeline was extended – the first request for a timeline extension was

granted, some of the information that was received pointed to DG3 numbers. My understanding is that the PUB then wanted to extend the reference to include DG3 numbers which was not the reference question that was posed by government.

And I understand that this was part of the issue. It was essentially a misunderstanding of the context of the reference question being in reference to DG2 numbers as opposed to DG3 numbers.

THE COMMISSIONER: But wouldn't it have been reasonable in the circumstances if Nalcor had – assuming Nalcor was fully disclosing everything to government, government would have known at that time that the base estimate was done – a DG3 base estimate was done. The only real issue that was ongoing at the time for the most part, as I understand it, was the issue of the risk analysis.

So by – and that was done in the months of May and June, as I understand it, by Westney, so by the time that the report came in on May 30, shortly after that, the risk work was being done. Now the report didn't come in 'til October, but at least if MHI had been given the opportunity to look at strategic risk, they would have had that opportunity in assessing the DG3 numbers.

Like, and the big rush was, according to Mr. Bown and others, was that there was a – some sort of a debate that was going to take place in the spring in the House of Assembly which was eventually called off and it would – it didn't happen until the fall.

MS. E. BEST: I understand that that – those factors did play into the original timeline and the deadlines. But, what you just said with respect to the information – the risk analysis at the – closer to the DG3 as opposed to DG2. So first of all, I do not have that at my fingertips, but that is also not the – I don't want to give evidence in response to your questions and that's not something that –

THE COMMISSIONER: No, no, I'm not expecting you to, but I'm just saying if government was fully informed and knew the status of where things were with Nalcor, right, they would have known that this is where things were standing at the time. The base estimate was basically done, and the last thing to do was the risk analysis, which was basically compiled before the final estimate was determined.

MS. E. BEST: So in order to answer your question, I would also have to know if the risk analysis had been completed for the Isolated Island Option at the same time.

THE COMMISSIONER: Well, I don't think there was ever a risk analysis done for the Isolated Option.

MS. E. BEST: Well, then there would have been no opportunity for the PUB to do an apples-to-apples comparison, which was the reference question.

THE COMMISSIONER: Right, so what's the point of going to the Public Utilities Board and asking them to make a decision if they couldn't – if there was no issue of a risk analysis? Risk analysis, as we've found out, has a big role to play in the issue of the cost of a project and in the issue of determining a CPW analysis, capital cost goes into that CPW analysis – one of the major inputs. What's the point of going to anybody and asking them to do a review, if they're not doing a review based upon full information?

MS. E. BEST: Well, I'm not sure that the – again, the – all of the information with respect to risk that we now know in hindsight, was available to government at that time. But secondly, there certainly was still a point in putting the reference question as it was put to the PUB. And if the PUB had decided to issue a response which said that the Isolated Island Option was the least-cost option then government would have had to heed that response, it was – they were certainly prepared to receive either response from the PUB. And I think that is meaningful.

Okay, so the decision to sanction the Muskrat Falls Project was based entirely on the understanding that Muskrat Falls was the least-cost option for dealing with the province's impending energy deficit. The additional social and economic benefits were viewed as bonuses to a project that was, on its own, economically viable and necessary. Securing the federal loan

guarantee was another prerequisite for government's approval of the Muskrat Falls Project.

In Dunderdale's view, securing a loan guarantee from the federal government was vital to proceeding with the development of Muskrat Falls. While Premier Dunderdale was advised by Nalcor and others that the Muskrat Falls Project was financially sound on its own, securing the loan guarantee would result in over a billion dollars in interest savings, and it would confirm to Premier Dunderdale's government that the Government of Canada, based on its own independent due diligence was satisfied with the financial integrity of the Muskrat Falls Project.

Premier Dunderdale unequivocally stated before this Commission that, without the federal loan guarantee, she would not have supported proceeding with the development of the Muskrat Falls Project. Her minister of Natural Resources, Jerome Kennedy, knew that Premier Dunderdale was prepared to encourage her Cabinet to walk away from the development of Muskrat Falls if at any time issues with the integrity of the project were discovered or if the federal loan guarantee did not come through. Premier Dunderdale's successful negotiation of the federal loan guarantee in the midst of a contentious relationship with the Government of Canada further confirmed that the Muskrat Falls Project had merit.

The decision to sanction Muskrat Falls was informed by numerous studies of the potential supply options. As we have seen, part of Nalcor's mandate was to study the various power supply options for the province. In its submissions to the PUB in November of 2011, Nalcor outlined the process that it followed in fulfilling its mandate of studying power supply options for the province. In its study of power supply options, Nalcor employed a two-phase screening process.

Phase 1 considered security of supply and reliability, cost to ratepayers, environmental considerations, risk and uncertainty and financial viability of nonregulated elements. The power supply options that were not eliminated through this phase were grouped into two categories: Isolated Island and Interconnected Island.

Phase 2 involved a CPW analysis. The result of this screening process was that Nalcor recommended the Muskrat Falls Project as the least-cost alternative. Premier Dunderdale and her government were advised that Nalcor had exhaustively studied the numerous power generation alternatives and that the studies favoured the Muskrat Falls Project and the Isolated Island Option as the two least-cost reliable alternatives.

The power generation alternatives that were considered by Nalcor set out in their submission to the PUB but include nuclear, natural gas, liquefied natural gas, coal, continued oil-fired generation at the Holyrood plant, simple cycle combustion turbine power plants, combined cycle combustion turbine power plants, wind, biomass, solar, wave and tidal, island hydroelectric, deferred Churchill Falls until 2041, recall power from Churchill Falls, Gull Island, Muskrat Falls and electricity import.

In its forensic audit for this Inquiry, Grant Thornton reviewed Nalcor's assessment of power supply alternatives. The Grant Thornton report did not find that any of the alternative options were unreasonably excluded by Nalcor.

The Dunderdale government reasonably relied on the studies of power generation alternatives, which were understood to have been thoroughly completed by Nalcor. However, as an additional layer of oversight, and to ensure the veracity of Nalcor's work, Dunderdale's government commissioned, or supported Nalcor in commissioning, the following additional studies by independent experts in advance of sanction: report for wind integration study, prepared by Hatch for Nalcor; a review by MHI commissioned by government, which examined the wind studies for the Isolated Island, which were prepared for Nalcor; a study of the availability and feasibility of natural gas by Ziff.

And the following reports prepared internally by government: "Upper Churchill, Can We Wait Until 2041?"; "Gull Island, Why Not Develop Gull Island First?"; "Legal Options, Section 92 A, Good Faith and Regulatory Options in Quebec." Also, a review by Wood Mackenzie of the report on natural gas prepared by Ziff. Each of these reports agreed with Nalcor's exclusion of the respective power supply alternatives.

Premier Dunderdale and her government relied on the studies completed by Nalcor as supported by the studies of independent analysts and internal government departments in deciding to proceed towards sanction. Based on the extensive work completed by Nalcor and the independent experts hired by government, Premier Dunderdale had no reason to believe that Muskrat Falls was not the best option for meeting the province's power needs.

In particular, the option of buying power from Quebec until 2041 was considered and properly dismissed by government. Ed Martin testified that prior to sanction, Nalcor advised government that Nalcor had considered the option of purchasing power from Hydro-Québec but Hydro-Québec did not have the capacity to enter into a long-term supply contract for firm power.

It was the understanding of Premier Dunderdale's government that this option was properly excluded from further consideration, since Hydro-Québec could not guarantee security of supply. While security of supply was the primary basis upon which the Quebec purchase option was excluded, there were other factors at play which rendered the option of purchasing power from Quebec infeasible.

Number one, there was an understanding that purchasing firm power from Quebec would be expensive. Number two, there would be a negative effect on Nalcor's negotiating leverage in 2041. And number three, the historical relationship between Quebec and Newfoundland and Labrador with respect to the Churchill River would make for difficult commercial negotiations.

The Commission's expert, Mr. Colaiacovo, testified that the perception that a contract with Hydro-Québec would be expensive was not unreasonable. And I'll quote his testimony: "So, the perception in 2010 that a contract with Hydro-Québec would be expensive is actually not at all unreasonable. Another element to that is, that Hydro-Québec's – just to come back here to this side – Hydro-Quebec's realized prices are a combination of their firm power and surplus power sales.

You know, they sell firm power to certain customers at relatively high prices, and then they sell surplus power on the spot market at whatever price they can get. And so what you see here is simply an average of the realized price. So the firm price is going to be substantially higher than the average realized price and the spot price will be substantially lower. So looking back to that 2010 period and saying, well, what would be the firm price for power from Quebec for a 25-year contract, well, quite likely that would be quite high.

Based on the information provided by Nalcor, it was Dunderdale's understanding that even if Hydro-Québec could supply firm power under a long-term contract, the cost of such power would not be the least cost option.

THE COMMISSIONER: How was that determined?

MS. E. BEST: So, that is a question for Nalcor, I believe, as opposed to a question for –

THE COMMISSIONER: Okay, so –

MS. E. BEST: – Ms. Dunderdale.

THE COMMISSIONER: – okay, fine.

MS. E. BEST: But she was advised by Nalcor that it would not be the least cost option.

Further, it cannot be assumed that the expiry of the Upper Churchill power contract with Hydro-Québec in 2041 will result in a windfall of cheap power to Newfoundland and Labrador. CF(L)Co, which owns and operates the Upper Churchill hydroelectric facility, is, as you know, jointly owned by NL Hydro and Hydro-Québec.

In assessing the veracity of the 2041 option, it's necessary to consider the impact of Hydro-Québec's stake in CF(L)Co. Specifically, it's necessary to understand that Hydro-Québec has a profit motive, and that its interests are unlikely to align with those of Nalcor and the province. Without a viable alternative supply option, Nalcor would've been in a weak negotiating position with Hydro-Québec in 2041. This was confirmed, again, by Colaiacovo in his report to the Commission.

In his testimony before the Commission, Colaiacovo clearly opined that the development of the Muskrat Falls Project has drastically improved the province's negotiating position for 2041 because it has proven that there is an alternate route for getting power from the province to the North American grid. In his opinion, without the Muskrat Falls Project and the Maritime Link, negotiations with Quebec would've been like negotiating with a gun to your head, which would likely result in another bad deal for the Province of Newfoundland and Labrador.

A further ancillary factor rendering the Hydro-Québec purchase option unattractive was the historically troubled relationship between the province and Quebec stemming from the 1969 Upper Churchill contract. Given the notoriously inequitable Upper Churchill deal and Quebec's refusal to allow to route power through Quebec – to allow Newfoundland, sorry, to route power through Quebec, any further agreement between the province and Hydro-Québec would inevitably be publicly and politically unpalatable.

While Dunderdale, as she stated, had a generally positive relationship with the then Quebec premier Jean Charest, there was not a significant deal of trust in negotiating with Hydro-Québec given Hydro-Québec's interference with further developments by Newfoundland and Labrador, on the Churchill River.

Additionally, as a result of the many legal actions taken by Nalcor and the province in respect to the Upper Churchill contract, it was expected that the negotiations between Nalcor and Hydro-Québec would not be reasonable commercial negotiations.

Internal departments reviewed the Muskrat Falls Project in accordance with capability and capacity existing within government. It's not within the capacity or reasonable expectations for government to regenerate the cost estimates prepared by Nalcor. As the Commission has heard, significant and detailed engineering work goes into preparing a cost estimate for a megaproject. The capacity to do this work does not exist within core government departments. This is why government created Nalcor to do this work. Redoing the work of Nalcor within the core government departments would have amounted to the creation of a Nalcor 2 and an inappropriate duplication of effort and resources.

THE COMMISSIONER: So, does that really follow after what we've heard from others about what they're doing in other jurisdictions? For instance, it's interesting Norway – we have an Equinor which is the sort of model that Mr. Williams spoke about with regards to setting up of Nalcor. And yet, when they have a proponent – it could be a government proponent that is proposing a project or whatever – they felt there was a need notwithstanding the fact that they had an arm of themselves, basically, making a proposal – they felt there was a need for independent analysis based upon the fact that costs were so high and overruns and whatever.

In this particular case, is it reasonable to conclude that – because they were doing this in 2000 and other European countries were doing it well before 2012 – here we are in Newfoundland and Labrador taking on the largest project that we – you know, that we've ever handled, $6 billion potentially, and government never thought that it should have somebody else actually review the cost and schedule, some independent group that they gave a mandate to review the cost and schedule to protect the interest of the taxpayers and the ratepayers?

MS. E. BEST: So, I'm glad you raised that.

THE COMMISSIONER: Okay.

MS. E. BEST: And I'd like to point out a difference in the language there between 'redo' and 'review'. So what I stated was that it was not common practice or reasonable to redo the cost estimates. I do suggest that it is reasonable to review the cost estimates for reasonableness, which I submit was in fact done in this scenario. And I did not take, from that testimony in Phase 3, that those entities did, in fact, redo cost estimates. Again, I took from it that the standard practice is to review cost estimates for reasonableness. I did not hear that they were, in that context, being redone.

I also would just like to add – and I know you're acutely aware of this, but from the perspective of hindsight bias, while those countries may have been employing those strategies with respect to reviewing cost estimates at a date that was prior to Muskrat Falls sanction, I do not think that what they were doing was common or acceptably reasonable standard of practice at the time. It seems to me that what they were doing was fairly forward thinking and I'm not sure that we've had any evidence that those strategies have been employed across the board or accepted generally.

THE COMMISSIONER: So that excuses – potentially excuses us from not doing something that would be forward thinking, protective?

MS. E. BEST: Not at all. And I would suggest that that testimony and those ideas are very useful in the context of potentially developing Gull Island in the future, now that we are aware of them. But back when this project was being sanctioned, they were not on the table. To my knowledge, no such strategies were ever presented to government by any of their experts who were certainly qualified in their field.

And so I don't see how government at the time can be, in hindsight, required to have adhered to those types of strategies when they did not know of them and they were not commonly used –

THE COMMISSIONER: It wasn't too much later –

MS. E. BEST: – for these types of projects.

THE COMMISSIONER: It wasn't too much later in 2014 when government was being told that they should be doing it, by EY.

MS. E. BEST: That, again, may be the case but, again, would be in hindsight.

THE COMMISSIONER: Hindsight, okay.

MS. E. BEST: Well, I mean, again, to go back –

THE COMMISSIONER: You're – what you're saying is – to me, that it wasn't in sight or in mind at the time. And what I'm saying is that – and that it was reasonable that it wasn't. And I'm just – these are points that I'm just trying to raise because these are things I'm thinking about and I need to –

MS. E. BEST: Sure.

THE COMMISSIONER: – get the input of others.

MS. E. BEST: Sure.

THE COMMISSIONER: So don't misunderstand the purpose of my questions. I'm just trying to put out some things that I'm trying to get a feel for –

MS. E. BEST: Right.

THE COMMISSIONER: – as I go through, right?

MS. E. BEST: So I do think it's reasonable to evaluate all the ideas that come before you, or have your officials or experts evaluate them and present them to you. I do think that's reasonable. I don't think we've had any evidence during this Commission that those types of processes that you're suggesting were recommended to government prior to sanction or financial close.

THE COMMISSIONER: Okay.

MS. E. BEST: And as government – as I've stated in my submission but I would like to emphasize – government, essentially elected representatives, are laypeople who are informed by experts and their officials, and in this case, Nalcor. And they do have to rely on those experts in the field to present information, advice, recommendations and decisions are made on the basis of what is provided.

I think I'd like to add as well, that while I also found those submissions to the Commission in Phase 3 quite interesting, I don't believe there are any submissions with respect to the cost of those structures, or the timelines – the cost associated with the timelines and the delay, when those types of structures would have had to have been implemented in order to be effective with respect to Muskrat Falls and the costs associated with that. I think that that is crucial information that would also need to be known before we'd consider whether or not implementing such a strategy is reasonable.

So while the capacity did not exist in government to prepare a second full project estimate, the Departments of Natural Resources and Finance were intimately engaged in reviewing the work completed by Nalcor. Notably, the Department of Natural Resources thoroughly reviewed the CPW analysis prepared by Nalcor. Robert Thompson, the former clerk of the Executive Council, confirmed this in his testimony before this Commission.

"Additionally, the Departments of Finance and Natural Resources were engaged in reviewing" certain aspects of "the cost estimates prepared by Nalcor" and "it would be unreasonable and prohibitively costly for" Nalcor's "government departments to re-engineer the" Muskrat Falls Project "as an oversight mechanism, but they were engaged in reviewing Nalcor's work. It was" Premier "Dunderdale's understanding that the Departments of Finance and Natural Resources were engaged in reviewing the" Muskrat Falls Project "consistent with their expertise and capacity, and that this was prudent and reasonable practice."

"**Dunderdale's government appointed the best qualified persons to the Board of Directors of Nalcor that were available and willing to serve**" at the time.

"The Board of Directors of Nalcor, as with other Crown Corporations and government agencies in Newfoundland and Labrador, is uncompensated or compensated with nominal remuneration. This is a convention that pre-dates Dunderdale's time in office and which continues today" for good reason.

However, "finding qualified individuals with the necessary skill-sets who are willing to give their time for minimal remuneration is" in fact "a challenge …. At no time during her tenure" was Premier "Dunderdale presented with nominees credentialed in hydro-electric mega-project construction and willing to serve on the Board of Nalcor whom" she "failed to appoint."

While Dunderdale was made aware of vacancies on the board, she and her officials did take positive steps to fill those vacancies.

As we heard during this Inquiry, there was suggestion that the board lacked someone with hydroelectric megaproject expertise. However, as I explored during my cross-examination of Mr. Ed Martin, "for reasons of cost effectiveness, efficiency and to avoid conflicts of interest" and bias "the preferred approach is to hire specialized experts to advise a Board rather than to have such experts sit as" a member "of the Board."

"Nalcor and the Nalcor Board had the resources and the ability to consult with independent experts as required." This was preferable to having expertise on the board itself.

"**The Dunderdale government consistently provided timely public disclosure of cost estimates based on the information it understood to be current and accurate with the exception of what it was advised was commercially sensitive**.

"The Dunderdale government employed an open and transparent approach to the development" and sanction "of" Muskrat Falls. "When information regarding the" project "became available to government, public disclosure was promptly made of all such information with the exception of" what was "commercially sensitive.

"During the House of Assembly proceedings in March of 2012 …" Jerome Kennedy" then Minister of Natural Resources, tabled 8 boxes containing 152 documents relating to the" Muskrat Falls Project "in the House of Assembly. These documents" and others "were also supplied to the PUB as part of its review.

"Public disclosure of information regarding the" project "was also occurring regularly through Nalcor. In addition to the public" AGMs "Nalcor hosted numerous public information sessions between Decision Gates 2 and 3." Premier "Dunderdale had no reason to believe at that time that her government and the general public were not being provided current and accurate information with respect" to their work.

"When Dunderdale became aware of the Decision Gate 3 Cost Estimate of $6.2 Billion, she promptly communicated this to the public at a press conference held on October 30, 2012 …. This was the cost estimate that Dunderdale understood to be current and accurate at the time.

"Dunderdale was not aware of any increase to the Decision Gate 3 capital cost estimate until shortly before financial close. As she testified before the Commission, it is her recollection that she, along with other officials, were told at that time that the capital cost estimate had increased to $6.5 Billion, but that there was a plan to mitigate this increase and that decreases in financing costs and additional benefits offset the increase …."

"**Dunderdale was not involved in decisions regarding risk contingencies in cost and schedule estimates**."

"… while" Premier Dunderdale "was regularly informed as to the risks that could potentially impact the" Muskrat Falls Project "those who advised her did not speak in terms of 'strategic risk', 'tactical contingency' and 'management reserve'. While" Premier "Dunderdale was concerned with and informed regarding 'risks' generally, she was not involved in any decisions regarding the inclusion or exclusion of 'strategic risk'… or independent analyses of risks that could impact the" project. "These decisions were left to those with industry and subject area expertise."

Specifically, and importantly, Premier Dunderdale was not aware that Manitoba Hydro International did not include a strategic risk analysis review in its report on DG3. Premier "Dunderdale was not involved in the discussions with MHI regarding the" newly completed – sorry, "the review completed in advance of DG3. Specifically, she was not aware that a risk analysis had been removed from" the scope of work. She first learned of this during "evidence led before this Commission."

THE COMMISSIONER: So you – I'm not sure if you've read some of the other briefs, but a suggestion in one of them is that her chief of staff was at a meeting on April 6 when this was discussed. Mr. Kennedy would have been there as well. And Mr. Martin had indicated that there was an issue with regards to timing because of the risk analysis – the risk analysis hadn't been done. So would normally you expect your chief of staff to tell you that you were going to do something like this?

MS. E. BEST: So I have discussed this with my client and she confirmed that she was not informed of any removal of the strategic risk from the MHI report and, of course, I am giving evidence by – when I say that we wonder, if perhaps, that the exclusion of risk at that time, strategic risk from the report, was downplayed in significance and perhaps this is why it did not make it to Premier Dunderdale's ears. But, of course, we are speculating with respect to what happened in that meeting.

Okay.

Premier Dunderdale relied on her officials to ensure that best practices were followed and to advise her accordingly. The MHI report as I stated does contain a section entitled risk assessment, and to anyone reading that report it would appear that MHI did, in fact, consider risk in its review.

Similarly, Premier Dunderdale had no reason to believe that the P-factors utilized by Nalcor in preparing the project cost estimates were not in accordance with best industry practice. Industry standards for probability factors in engineering estimating is highly technical; as with all technical aspects of the Muskrat Falls Project, Premier Dunderdale relied on Nalcor to brief her on this subject and to provide their informed recommendation as to how to proceed. Dunderdale was advised by Nalcor that its estimates, including the use of a P-50 probability factor were in accordance with industry best practices. Dunderdale had no reason to doubt Nalcor's knowledge of the subject.

However, because Dunderdale's government did not have the specialized expertise to challenge Nalcor's knowledge of technical aspects of the Muskrat Falls Project, they engaged MHI and other independent experts to review Nalcor's work. In the report, prepared in advance of DG3, MHI found Nalcor's work to be, and I quote: skilled, "well-founded and … in accordance with industry practices …."

Premier Dunderdale was entitled to rely on this expertise, she had no reason to doubt it and anyone in her position would have reached the same conclusion.

Lastly, Premier Dunderdale was not aware of any concern with the project schedule. Of course, Premier Dunderdale was advised by Nalcor that there were some risks associated with the project schedule but she was regularly reassured that all risks were being mitigated. It was only through evidence led before this Commission that she learned that a P1 or P3 probability factor had been associated with the schedule estimates. If Dunderdale knew at the time of sanction that the project schedule had only a 1 to 3 per cent chance of being completed on time, she would not have participated in the sanction of the Muskrat Falls Project. Her evidence on this point has been simple and consistence.

THE COMMISSIONER: I wonder what she would have said if – as I learned yesterday, Mr. Martin believed, was a P20 to a P30?

MS. E. BEST: Pardon me?

THE COMMISSIONER: Anyway, I just – I'm just querying.

Yesterday I was told that Mr. Martin felt it was a P20 to a P30, so a 20 to 30 per cent chance that you might meet the schedule. And I wonder what her – of course, she wasn't asked this because it wasn't put to her at the time. I wonder what her position might have been.

But anyway, I don't expect you to answer that.

MS. E. BEST: Okay, thank you.

Yes, I didn't – I have not discussed that with her.

In conclusion, the evidence led before this Inquiry proves that Premier Dunderdale participated in the sanction and financial close of the Muskrat Falls Project in good faith. In doing so, she relied on the knowledge and advice she received from government officials, Nalcor and independent experts. She did so in accordance with the province's energy policy and with a view to securing short- and long-term financial and energy stability for the province and to encourage future economic growth.

Prior to her departure from government in early 2014, she understood that the Muskrat Falls Project was on track. She cannot be held responsible for significant increases in the cost of the project which have occurred since her retirement from public office. They would not have been foreseeable to anyone in her position.

Despite the significant cost overruns, the Muskrat Falls Project still stands to benefit the people of this province in the long term. Moreover, the project will ensure the province has a stable and consistent supply of renewable energy to promote future economic growth in the province. In an era where renewable energy sources are of growing importance, the Muskrat Falls Project stands as a tremendous asset that will benefit the people of the province for generations to come.

So any – subject to any further questions you might have, Commissioner, this concludes my submissions, all of which have been respectfully submitted.

THE COMMISSIONER: Okay.

No, I think I pretty much covered off the questions that I wanted to ask you about. So that's fine.

Thank you very much, Ms. Best.

MS. E. BEST: Thank you.

THE COMMISSIONER: All right.

We'll take a break here and next will be Former Provincial Government Officials.

CLERK: All rise.

Recess

CLERK: All rise.

Please be seated.

MR. T. WILLIAMS: Thank you, Mr. Commissioner.

Mr. Commissioner, I'd like to start off by thanking the Commission for the opportunity to speak to the evidence that has been presented over the last 140 days of hearings and provide my clients' views and perspective with respect

to some of the many issues that lie before you to consider and to make comment on.

Clearly, given the enormous amount of evidence and number of witnesses that have appeared before this Inquiry over the last 12 months, it's impossible to be able to summarize and make comment on all pertinent matters that have arisen. There has been much evidence adduced, and, as expected, aspects of the same have pertained to some of the parties more than others. So in the interest of time, I'll be reducing my remarks to those issues which are of primary consideration to my clients, but this is not to say, in any way, to ignore or undermine the importance of other matters for which we may not have time to comment on but have referenced in our written submission.

At the outset, I'd like to take a look at the big-picture view of where we are. Given the fact that all parties have been intrinsically involved in much minutiae surrounding the Muskrat Falls Project, we have a tendency to forget how it is that we came to be where we are today.

On November 20, 2017, the Government of Newfoundland and Labrador established a Commission of Inquiry with respect to the Muskrat Falls Project and outlined, at that time, Terms of Reference for which they requested you address by way of a public inquiry, and report back to them with your final report by December of 2019 – four short months away.

As has been noted before, the Commission has been consumed with reviewing nearly six million documents and hearing evidence from 135 witnesses over approximately 139 days of hearings. And, of interest, you're being asked to file the report with recommendations pertaining to a project that is not yet complete and for which full power is not anticipated until sometime in 2020.

I would suggest that at the time this Inquiry was called, there existed somewhat of a hysteria in the public domain, that as a result of what could be classified as unfounded rumours, innuendo and misstatements from many critics of the project, the residents of the province were led to believe that not only were their electrical rates going to double but the province was on the brink of insolvency. Such suggestions, I would suggest – respectfully submit, amount to nothing shy of fearmongering.

Over the course of the last 12 months of testimony, you, as a commissioner, have had the opportunity to hear much evidence pertaining to the issues of concern in relation to sanction and construction of the Muskrat Falls Project. But there has not been much made of the fact that at the completion of the project in 2020, the Province of Newfoundland and Labrador will be the owners of a world-class, technically advanced hydro generating facility and transmission system, that will rank among some of the best not only on the continent but, I would suggest, internationally.

This having been stated, that is not to deny that the project has been faced with challenges in relation to costing and scheduling issues for which we have heard from accepted experts, such as Dr. Bent Flyvbjerg, is given in similar megaprojects of hydroelectric natures other places on the continent.

One of the primary objectives of this Inquiry is to assist in identifying as to how and why such issues arose and to attempt to identify recommendations which may assist the province and its Crown corporations in undertakings of any future projects or similar developments.

The onerous burden for which you, as Commissioner, have been tasked with is to review and to draw conclusions on a $10 billion-plus project, at a snapshot in time, where there exists much negativity and skepticism as to what the future may hold for this long-term project.

While I appreciate that the Inquiry process is different than that of a civil procedure, where there's an equal opportunity for all parties to present their case and call evidence in support of the same, we do feel there's a need to speak to some of the responsibilities that fall on the shoulders of the Commissioner, in circumstances such as we find ourselves.

As has been noted by academics and authorities alike, the task of a commission of inquiry is larger in scope than simply answering the questions arising from the Terms of Reference, albeit these are your primary considerations. It is the respectful opinion of my clients that the

Commissioner, in rendering his reports, needs to be cognizant of maintaining some semblance of balance in order that the evidence can be reviewed in its proper context.

As you have already quite correctly outlined in your decision pertaining to the interpretation of the Terms of Reference, one of the fundamental principles that you highlighted was the issue of fairness. In your decision, you stated, and I quote: It is important to be reminded that the impact in being fair is – I'm sorry – is implicit in being fair is the need to guard against inappropriate reliance on hindsight, and evaluation of past conduct must be done in the context of the knowledge that was available at the time, not what we know today.

Mr. Commissioner, we cannot stress enough the importance of these comments given the fact that there was such an abundance of evidence that was provided by dozens of witnesses all whom had the benefit of hindsight in making some far-reaching comments. It is incumbent upon you, as Commissioner, in considering this evidence and drawing conclusions in relation to the same, that you remain mindful of dangers in which reliance on hindsight can have in passing judgment on the actions of individuals who are making decisions and carrying out their responsibilities at another point in time.

Furthermore, I would note the objectives to be achieved through any inquiry process expand beyond the mere answering of the terms of reference. As is noted by renowned author Ed Ratushny in his text *The Conduct of Public Inquiries*, he noted that the Law Reform Commission of Ontario identified six of the following principles as functions of commissions of inquiry: one, they are to enable to secure information as a basis for developing and implementing policy; two, they serve to educate the public or the legislative branch; three, they provide a means to sample public opinion; four, they can provide – they can be used to investigate the judicial or administrative branches, including the civil service and the Crown corporations; five, they permit the public voicing of grievances; and six, they enable final action to be postponed in circumstances where necessary.

My purpose for stating the same – in stating the same, I'm sorry – is to state that hindsight, as stated by Justice Peter Cory in relation to the Westray Mine Inquiry, also has a social function which commissions of inquiry serve in our democratic process. He stated: "… a commission … has certain things to say to government but it also has an effect on" the "perceptions, attitudes and behaviour.… There is much more than law and governmental action involved in social response to a problem" – end quote.

It is this social responsibility that I suggest need not be lost in drawing conclusions. While negativity has run abound over the last 12 months, I state on behalf of my clients that it's important that other perspectives not be lost. While such endeavours by myself may have been perceived at times to be political, I would respectfully submit: This was done so as to retain some sense of balance so such efforts could be made.

Accordingly, let me assure the Commission that my comments, both during the Inquiry itself and the submission process, were not steeped on a political agenda, but rather on my clients' sincere belief of both the short- and long-term benefits that the Muskrat Falls Project could bring to the people of the province. These objectives should not be lost in the process given the social responsibilities associated with an inquiry as a whole.

Given the enormous amount of time and money that has and will continue to be spent on this Commission of Inquiry, my clients, too, are hopeful that at the end of this process, that not only will you be able to identify some of the shortcomings that occurred during the project and recommend improvements for future endeavours but, as well, to allow the residents of the Province of Newfoundland and Labrador to be able to put the Muskrat Falls Project in its proper perspective. At the end of the day, it is the people's project.

Mr. Commissioner, I apologized at the outset if any of my remarks may be somewhat repetitive of what was outlined in my written brief or, in fact, perhaps, Ms. Best's comments, given that we are coming from similar backgrounds, but given the form of an oral argument, it's

important to address some of the issues which we feel are of importance.

It is the position of my clients that in order to consider many of the crucial factors that were taken into consideration when arriving at a decision to sanction this project, one need look at the background history in order to put it all in perspective. I would note that it would appear to be the Commission's – that – I'm sorry – I would note that it would appear that the Commission likewise saw the benefit of this perspective as the commissioned – as they commissioned a paper from Dr. Jason Churchill to address the early history of the Churchill River, and called him as one of your first witnesses in Labrador to give evidence as to set the stage and outline some of the crucial considerations that went into arriving, not only at moving forward with the project, but in the sanction of the same.

Perhaps one of the predominant misconceptions that surrounds the Muskrat Falls Project is the suggestion that it need not have proceeded given the alternative would be to import power from Quebec. While it's not necessary to review Dr. Churchill's paper in detail at this juncture, suffice it to say it should probably be mandatory reading for every Newfoundlander and Labradorian. Upon completion of reading Dr. Churchill's paper, you undoubtedly appreciate the challenges and insurmountable hurdles that have been raised by either the Province of Quebec or their energy corporation, Hydro-Québec, in facilitating Newfoundland and Labrador's efforts to have access for hydroelectric transmission through the Province of Quebec, or to mount obstacles to interfere with the province, our province, proceeding with developing its own hydroelectric resources.

Dr. Churchill took the time to outline in detail the issues which each consecutive premier since J. R. Smallwood, of both political stripes, have been met with in trying to proceed with alternative energy options for this province. While my clients may wish that they could take credit for coming up with the idea of the development of the Lower Churchill, history will show that this attractive hydroelectric generating resource has been a goal and objective for repeated provincial government administrations back as far as Confederation. It was, in fact, a sought-after goal dating back to the recommendation of Mr. Vic Young, chairman and CEO of the Newfoundland – chairman and CEO of Newfoundland Hydro, who has been referenced numerous times throughout the Inquiry, and this was back as far as 1980.

Let me say for the record, and it was borne out by the abundance of evidence before this Inquiry, that the decision to proceed with the Muskrat Falls Project was not some legacy piece for Premier Danny Williams or any subsequent PC administration, but that it was only arrived at following a culmination of years of detailed planning, review and due diligence that it was the right project at the right time.

This begs the question – how did we get to where we are now, with a 50-year history and a 100-year future related to the Muskrat Falls Project?

Having drawn upon the extensive expertise and experience of a group of senior government officials, Nalcor executives and community experts, in September 2007, the government released a comprehensive and carefully thought out policy document entitled *Focusing our Energy*.

In speaking to the achievement of this document, Commission witness Dr. Churchill stated in his evidence before the Commission, and I quote: "*Focusing Our Energy* provides evidence that the Williams' administration had studied all relevant issues associated with" the "previous attempts at development since the 1960's to develop the Lower Churchill River and incorporated lessons learned."

He went on to state: "While of utmost importance, as it had been in previous decades, developing the Lower Churchill was presented as an ultimate goal, but not one that would be achieved at any costs. The electricity chapter" of "*Focusing Our Energy* reflected caution towards future developments when it stated that if … the Lower Churchill did not proceed as planned … the province had a backup plan …."

And that the future posterity [sp. prosperity] "was to be anchored on natural resource development that included" – exporting [sp.

exploiting] – "a wide range of non-renewable and renewable energy sources including existing and new hydroelectric developments in Labrador. The key to achieving that prosperity was to have a flexible strategy with contingencies in place to mitigate, as far as possible, the vagaries of resource development, jurisdictional politics, and emerging opportunities resulting from global struggles to combat climate change.

"*Focusing our Energy* also illustrated the persistence of" – the – "key fact that had frustrated" – successful [sp. successive] – "provincial governments from the time of Confederation with Canada to Premier Williams. The vast hydroelectric resources in Labrador were isolated from the lucrative North American … markets" and the "basic fact was exacerbated by the additional fact that the province had perpetually struggled to overcome various obstacles – technical, economic and political – and had never been able to find a permanent solution to facilitate the full development of … hydroelectric resources … on the Churchill River." End of quote.

Mr. Commissioner, while government had every reason to be optimistic with proceeding with the project, such a decision was not arrived at haphazardly. As outlined by then-Premier Williams in his evidence, there were a number of essential preconditions that had to be achieved prior to the Muskrat Falls Project proceeding. Such elements included, but weren't limited to: (1) that there needed to be a need for additional energy; (2) that an acceptable lands claim agreement with Aboriginal peoples had to be achieved; (3) satisfactory environmental approval be obtained; (4) that the project was the least-cost option; (5) that the province could achieve a federal loan guarantee; and (6) that an acceptable agreement with Emera Energy of Nova Scotia for the establishment of a Maritime Link connecting the province with the Mainland.

Without conquering each of these preconditions, the Muskrat Falls Project would not have proceeded – contrary to the belief of some. Let me assure you, the Muskrat Falls Project was far from a runaway train, but, in fact, as supported by the evidence brought before this Inquiry, the final decision to sanction the Muskrat Falls Project was not arrived at until the days immediately preceding its approval in December of 2012.

At the time the decision to sanction was made, not only were interest rates at some of the lowest they'd been in recent times, the province was in the best financial position in its history, and that government had spent years assembling and preparing a comprehensive Energy Plan that would delineate a plan for energy resources of this province for decades to come. An essential element of this plan was the establishment of Nalcor; a Crown corporation that would serve to manage the province's energy warehouse for future energy developments.

I wish to state with confidence on behalf of my clients that at the time Nalcor was established, and up to current date, my clients believed in its strength, resources and expertise that was housed within this corporation, and that they were more than capable of undertaking a project of the scale of Muskrat Falls. This endorsement of Nalcor and the competency of its team was endorsed as well by current Nalcor CEO, Stan Marshall. When giving his evidence he stated he would involve the Nalcor team in any future projects he'd undertake.

It should also be noted that my clients expressed the same level of confidence in all members of the provincial civil service who were involved in the project during their tenure.

Mr. Commissioner, I stand before the Inquiry representing six former elected government officials who were members of the PC government between the years of 2003 and 2015. While their backgrounds and terms in office vary, they were all outlined in detail in our written brief.

These six individuals comprise three former premiers, being Danny Williams, Tom Marshall and Paul Davis; and four ministers of Natural Resources – Mr. Marshall having served a term as minister of Natural Resources as well together with Jerome Kennedy, Shawn Skinner and Derrick Dalley.

As you are no doubt aware, and which was readily acknowledged in the hearing granting standing, these six individuals made a conscious decision in the interests of time and money not

to seek individual standing before the Inquiry but combined as a group so as to result in a substantial savings for the Commissions during the course of this Inquiry.

It is not doubt a challenge to be able to represent six individuals with varying degrees of interest and involvement in the project, but I can state quite confidently that over the course of the Inquiry it became abundantly clear that these six individuals shared many similar and strong views in respect to the benefits of the Muskrat Falls Project and the long-term rewards that it would bring to Newfoundlanders and Labradorians for decades to come.

I would respectfully submit that the efforts, energy and personal commitments, which they each made during their tenure in office, is a true depiction of the due diligence that their administrations exercised along every step of the involvement with this project over their 12 years in government.

Mr. Commissioner, it's respectfully submit that the evidence that was provided by Danny Williams, Tom Marshall, Paul Davis, Jerome Kennedy, Shawn Skinner and Derrick Dalley has not only been consistent and reliable, but I would respectfully submit to you that it has been very credible, having been in large part independently validated by other unrelated parties having given evidence before this Inquiry.

While I would suggest that there may have been much public skepticism proceeding the Inquiry that there was some improper or wrong doing on the part of government, or that the Inquiry would reveal some sort of smoking gun, I feel quite confident in stating that no such evidence ever surfaced or was even suggested. While on occasions there may have been instances where Commission counsel, when examining these six individuals, may not have agreed with or endorsed their positions which they took on a particular position or issue, I think it's accurate to state that there were a few, if any occasions, where their factual evidence was challenged for inaccuracy or unreliability.

Mr. Commissioner, the thrust of our submissions, both written and oral, is not to convince you nor the public at large that all the various decisions of government made during the course of this project were necessarily always correct, now given the benefit of hindsight, but I can assure that at all material times my clients acted in an honest and responsible manner, having given due consideration to the relevant facts and the information that was available to them at the time and they reached decisions in a reasonable and prudent fashion in the best interest of the province as a whole, given both short-term and long-term consequences.

Mr. Commissioner, it is essential to remember in reviewing the decisions made by government, that our democratic process is structured such that it is the role of elected government officials to make policy decisions in respect to key areas of concern for the province. This is not only their democratic right, but it's their democratic duty, and one which I suggest is not an easy one.

The day-to-day operations of a government, regardless of political stripe, are to make those strong and necessary crucial policy decisions and determine appropriate financing for the same. Given limited resources, this frequently results in having to move funds from one area of the Treasury to another to accommodate the same. Such decisions are never easy, but are necessary to achieve the long-term goals and objectives for the betterment of the people of the province.

Mr. Commissioner, suffice it to say that prior to making the decision to sanction the Muskrat Falls Project in December 2012, government, as well as Newfoundland Hydro and subsequently Nalcor, had undertaken efforts to evaluate all alternative options for energy generation. While the Inquiry did not have the opportunity to delve in detail into all efforts that were made to this extent, the evidence contained in the forensic audit supplied by Grant Thornton – the Commission's own expert – confirmed the same, where in their Phase 1 report they confirmed that the following alternative power supply options were explored and appropriately dismissed. These have been outlined by Ms. Best and I do not – I need not repeat them again.

Grant Thornton stated that they found a vast majority of alternative power supply options were reasonably considered and eliminated. But

at the same time, they found that Nalcor prematurely eliminated options of importing power from Quebec or waiting until 2041. Both issues which we feel necessary to address.

Accordingly, while there have been many studies, reports and papers published by either Nalcor or government wherein they considered these various options, there was also the evidence provided by witnesses Williams and Kennedy in particular that spoke to the various efforts that were undertaken to ensure that all viable alternatives were taken into consideration.

Mr. Kennedy spoke emphatically about the efforts which he took as minister of Natural Resources, both prior to sanction and subsequent to the Williams term in office, to ensure that all other options had justifiably been considered and rightfully dismissed. In respect to the issue of the failure to import power from the Province of Quebec, the early history of the Churchill River as outlined by Jason Churchill clearly delineates the issues and concerns that served as a preamble to any viable discussions with the province.

As outlined by Mr. Williams in his testimony, there was an expression of interest circulated, and Hydro-Québec replied and responded to that. Their proposal was duly considered and dismissed having been fully and comprehensively evaluated.

Furthermore, witnesses Danny Williams, Kathy Dunderdale and Ed Martin all indicated that there were impartial and formal discussions with Quebec in which it was determined that Quebec did not have the capacity in which to meet the Island's requirements. Mr. Williams had even met with Premier Jean Charest while still in Opposition to investigate this issue.

The lack of capacity was independently verified, as noted in our written submission, when the Nova Scotia UARB reviewed the potential option of importing power from Quebec as an alternative to the Maritime Link. And it was noted by the NSP Maritime Link Inc. that there was no long-term, fixed energy policy – energy available from Hydro-Québec.

I quote from their proposal, quote: "We have been asked about discussions with Hydro Quebec and why we didn't go through a competitive bidding process and bring forward a long term competitive contract as an alternative to the Maritime Link.

"Emera and Nova Scotia Power have worked with Hydro Quebec for many decades. We met with them specifically to discuss and consider this alternative and simply put, there is no long-term, fixed price energy available from Hydro Quebec." End of quotation.

Accordingly, Mr. Commissioner –

THE COMMISSIONER: Excuse me, did the Government of Newfoundland and Labrador do the same?

MR. T. WILLIAMS: No, what I am saying that, yes, they did investigate and their indications were that there were not sufficient energy resources available for the province of (inaudible) –

THE COMMISSIONER: My understanding of the evidence before me is that there was some informal discussions with Quebec. I'm not certain as to whether or not there was any specific discussion about importing of electricity by Mr. Williams or by Ms. Dunderdale. There was evidence from Mr. Martin to indicate that it was his view, based upon his knowledge at the time, that there was no capacity in Quebec.

Now, there's been other evidence to suggest that that's not quite the case, but that if there was, that it would have been more expensive power. The other thing different from, of course, from Nova Scotia is that unlike Newfoundland and Labrador, we already have a relationship, whether we like it or not, with Hydro-Québec that is going into the future, and the opportunities that might have been presented are something that I would have thought might be of interest in determining whether or not to spend $6 or $7 billion on something else.

MR. T. WILLIAMS: I would suggest to you that if there was unofficial investigation of this issue by two premiers and the CEO of the provincial hydro company of Newfoundland, being Nalcor, and the same was being echoed through the province of Nova Scotia, that they

were satisfied given the fact that they had investigated this.

THE COMMISSIONER: All right.

But Nova Scotia – I don't want to argue with you on this – but Nova Scotia's position, I see, is totally different from the position of Newfoundland and Labrador, in view of our relationship with Hydro-Québec and their – the Churchill Falls scenario, whatever – there might've been an opportunity. I'm not saying there was, but I'm just saying I'm not certain that the evidence is as clear as you're suggesting in your brief that imports from Quebec were not possible.

And what is more concerning to me is – and what I will have to look at – is the level of effort that was undertaken to actually ensure that what the belief was, was true.

MR. T. WILLIAMS: Well, I think in response to that, that is why we've spent so much time on our written brief – and I've referenced it in in my oral comments – on the history of dealing with the Province of Quebec to –

THE COMMISSIONER: Right.

MR. T. WILLIAMS: – satisfy energy requirements. We have a 50-year history of running into nothing but obstacles –

THE COMMISSIONER: Right.

MR. T. WILLIAMS: – and bars in dealing with Quebec to satisfy energy needs and requirements. We've made inquiries –

THE COMMISSIONER: The problem (inaudible) –

MR. T. WILLIAMS: It speaks for itself. I guess you could argue it –

THE COMMISSIONER: – Mr. Williams –

MR. T. WILLIAMS: – back and forth, but –

THE COMMISSIONER: – the problem is, is that, whether we like it or not, geography puts us where we are. And infrastructure issues and whatever are obviously there. They're not controlled by the Province of Newfoundland and Labrador. As much as we might plead our sorrow at what's happened with Churchill Falls – and some might even argue that's hindsight in this day and age, you know, the fact is, is that, you know, we have to move on.

And the feeling that some might have as a result of hearing what I've heard is that, you know, Hydro-Québec, you know, damn them, we're going to do it ourselves, and – because we're not going to capitulate to them anymore. Certainly, in principle, nothing wrong with that attitude, but what I'm suggesting is that when – before you spend billions of dollars, you might want to actually have, at least, something more than an informal discussion about the availability of power, or alternatively, rely on your CEO who, basically, based on his knowledge, 'cause he didn't really have any consultation with anyone – there was no meeting such – at least Nova Scotia had a meeting, according to the UARB decision.

I didn't hear any evidence of that sort that would suggest that there was a real serious undertaking with regards to considering the imports from Quebec.

MR. T. WILLIAMS: And I hear you, but I take issue with your –

THE COMMISSIONER: Okay –

MR. T. WILLIAMS: – position on the –

THE COMMISSIONER: – fair enough.

MR. T. WILLIAMS: – given the fact that that's why I think the history is so important. You made note of the geographical boundary. Well, I think that's so important, because that's what the asset of Muskrat Falls gives us. It breaks down that. We now have another route in which we can move power and that (inaudible) take the price obstacles out of the way, that is what has freed us.

And what I think this Inquiry has done and something that I think is very important, from a historical perspective from current date back, because your sentiments are exactly what's been there in the public domain. We had at least two experts that have been called – independent

experts of the Commission, that have called – come in and have recognized the issues and have legitimized the concerns that have been expressed by not only my client's government but previous administrations that the history dealing with the Province of Quebec, we need not go down the path of all the various issues, has been insurmountable issues.

THE COMMISSIONER: Right.

MR. T. WILLIAMS: It was not ignored, not because of that was this ignored –

THE COMMISSIONER: Right.

MR. T. WILLIAMS: – it was looked at, it was investigated, they were invited to bid on the Muskrat Falls Project themselves –

THE COMMISSIONER: Right, we could –

MR. T. WILLIAMS: – and it didn't work out.

THE COMMISSIONER: We could discuss this for quite a while but –

MR. T. WILLIAMS: Yes.

THE COMMISSIONER: – but the scenario, you know, is that when you're – when ultimately this broke down – and I don't think this is recognized in your brief as much as it is by Ms. Best's brief or, alternatively, even the Nalcor brief, this was a utility-based decision. It was not about exporting power out of Newfoundland and Labrador; it was about providing power to the people of the province.

One of the side benefits, of course, is that we get the Maritime Link, which is very important. But the decision, according to Ms. Dunderdale, according to Nalcor, was primarily a utility-based decision. So while it's fine to talk about history and short-term, long-term benefits, all of those – no question, they're there or potentially there. You know, what this project was being sold on to the public at the time and perhaps not when your – when Premier Williams was there so much, because they were looking at Gull Island up to a few months before he departed, was to provide power to the people of the province. That we needed power and we had to provide it.

MR. T. WILLIAMS: Mr. Commissioner, to take your position to the extreme, given everything –

THE COMMISSIONER: Again, I'm not – don't understand this as my position –

MR. T. WILLIAMS: No, no, and I don't want to deal with the history but –

THE COMMISSIONER: – I'm throwing things out at you.

MR. T. WILLIAMS: – to take your position to the extreme, that would mean that we had a government over a 12-year period that intentionally denied the possibility of getting cheaper power through the Province of Quebec, and I don't think anybody is asserting that we would go into a $10-billion project simply to say because we don't want to deal with the Province of Quebec. Because when you break it down, that's what we're saying. And I don't think that is at all a reasonable position for anybody to take, given the efforts that have been put and when you put it in the context of history.

With respect to the issue of waiting to 2041, we're at a loss as to how it can be suggested that government did not consider this when they, in fact, published a paper in relation to the same. This notion was raised by Grant Thornton in a very cursory manner, we would suggest, as was confirmed by counsel for Nalcor, Mr. Simmons, in his cross-examine of Grant Thornton in Phase 1.

Upon questioning, they allowed that the only basis of the suggestion of such a theory was a superficial reference to the availability of power by the NSUARB in the Maritime Link decision. There was no additional evidence adduced with respect to support this suggestion and, to the contrary, there was substantial evidence stating that government was advised that there was an immediate need for power by the year 2020 and that some form of action needed to be taken.

As was stated repeatedly in the evidence, one of the primary factors to be considered in making a determination to proceed with the Muskrat Falls Project was whether or not the province needed the power and indicators were that it did.

Accordingly, we would strongly argue that all viable options were considered by government prior to proceeding with this project, and this is supported by the reviews and reports filed by Nalcor and government over the time period. The ultimate decision to proceed with the Interconnected Island Option was only arrived at following extensive review, and this was further supported by the report submitted by independent expert Manitoba Hydro who were retained on behalf of the Public Utilities Board to file a report pertaining to the lowest-cost option as between the Interconnected and the Isolated Island Options.

Another issue which arose and is specifically addressed by the Terms of Reference is in regard to whether or not Muskrat Falls Project should be exempt from oversight by the Public Utilities Board and if such decision was justified and reasonable.

Once again, I do not intend to belabour this point as our arguments are outlined in our detailed brief, but as referenced earlier, the decision to exempt this project from oversight was one made not by the PC administration, but by, in fact, a previous decision instituted under the former Liberal government under the Labrador project exemption order.

Mr. Commissioner, my purpose for stating the same is not to shirk responsibility for this to another government, but, in fact, to endorse my earlier comments with respect to the lawful and justified right of any government to make policy decisions in this regard.

As noted in our brief, not only does government have the legislative authority for the same, but, in fact, it's an entrenched constitutional right as outlined in the Constitution Act, which states that provinces and legislatures have the right to make laws in relation to electrical energy production therein.

When a government has a democratic, legislative and constitutional right to enact such provisions, then one is hard pressed to see how there could be any finding that this decision was not only justified, but reasonable. Even the projects – one of the projects biggest critics, Mr. Penney, had to allow in his cross-examination, and I state: when asked about government's inherent jurisdiction in this regard, he stated – quote, "And I should say I mean we recognize, because of our roles, that ultimately, yes, this is a public policy decision, no question about that. And government has the right to make that decision to either go ahead with this project or not."

Mr. Commissioner, as even the critics went on to allow that government is wholly within its authority in adhering to existing legislation to exempt this project from oversight.

THE COMMISSIONER: Right, it's not the – I don't think there's any issue with regards to the authority of government to make policy. The question is, is in this particular case, was it – as I sort of tried to ask Ms. Best this morning on behalf of Ms. Dunderdale, you know, where the project changed in scope – and I recognize again premiers changed by that time, or well around that time. You know, was there an obligation on the government to reconsider that exemption because we're going from a non – from an export project to basically a project that was going to be an infeed project to the domestic users?

MR. T. WILLIAMS: And I appreciate the comment, I know there is a distinction between the mandates – the possible mandates at the time, whether it be export or the Muskrat Falls Project. But I would suggest to you that it's a decision – it is a policy decision. While we all recognize that, this is – as you correctly stated – the biggest project in the province's history and if government feels it's within their authority to maintain control and oversight and not hand that off to a third party, then they're wholly within the right to do so. And it's because of the economic impact – not only benefits but cost – that they would have the policy right to make such a determination.

In respect to the issues pertaining to oversight, the Inquiry spent a considerable amount of time on analyzing and critiquing the same. While at the end of the day, there may remain a difference of opinion as to what constitutes sufficient oversight, my clients endorsed and acknowledged the comments of current CEO Stan Marshall, who stated that the Muskrat Falls Project was the most over-governed project in the history of the province.

Mr. Commissioner, there is an abundance of evidence in regards to the elements of oversight that were instituted for this project and they existed not only prior to sanctioning, but continued up until government left office in 2015. And there were continuous efforts of enhancement during all stages.

Once again, while trying to avoid duplication of argument, I simply wish to state for the record the various elements of oversight that existed in relation to this project. I think this is crucial, given our – my client's tenure in office during this period.

Minister of Energy and subsequently Premier Tom Marshall noted the following internal and external elements of oversight. One – or I won't do them numerically, I'll just list them. Officials of the Department of Finance, Natural Resources and Justice; Validation Estimating, who reviewed the base estimate; Westney Consultant, Nalcor's risk consultant; Manitoba Hydro International, who reviewed the DG3 numbers; numerous internal reports completed by government internally and published publicly, being the Labrador mining and power report; Gull Island report; "Upper Churchill: Can we wait until 2041?"; and the environmental benefits on closing the Holyrood Thermal Generating Station.

In addition, there was Nalcor's project team; Nalcor's executive team; Nalcor's board of directors; SNC-Lavalin, the base cost estimator and primary engineering firm; the federal government independent engineer; external lawyers; accountants and engineers; Nalcor's internal and external auditors; the Auditor General and, ultimately, the provincial government Oversight Committee.

Mr. Commissioner, this not only suggests that these are legitimate elements of oversight of this project, but this was endorsed and confirmed by the Commission's expert, Dr. Guy Holburn, who is a recognized expert in the field of governance of Crown corporations; who when questioned by myself, and provided with this list, confirmed that many elements, which I listed, constitute legitimate and recognized components of an oversight strategy.

Mr. Commissioner, with respect to the area of Indigenous consultation, while this matter was canvassed by – was canvassed with many of my clients, I would suggest to you that the more relevant issues of concern for the Indigenous groups surround the current administration as opposed to former government.

That being said, I would like to state that the evidence that was entered through witnesses Williams and Gover demonstrate that government took quite seriously the interests and concerns of various Indigenous groups. Mr. Williams spoke quite sincerely when he indicated that one of the highlights of his political career was when he was able to announce, in September of 2008, the signing of the milestone agreement, being the New Dawn Agreement, which resulted in a very co-operative and collegial relationship as between Indigenous peoples in Labrador and the government during their tenure.

One again, we'll leave the detail to other aspects to our written brief, and the issues pertaining to methylmercury are ongoing and we leave those to other parties to address.

Mr. Commissioner, through the course of this Inquiry, counsel have probed at length as to the information that was available by Nalcor, the timing in which it was known, and the disclosure of the same to the relevant parties, including government. My clients acknowledged that there were various pieces of information in relation to cost, schedule and risk, which were known to Nalcor but were not disclosed to government in a timely and prudent fashion. It was government's policy to try and remain as transparent as possible with the public on pertinent issues related to this project. And accordingly, the importance of such disclosure is central to their being able to maintain such transparency.

While the Commission has had the benefit of hearing the responses of the relevant Nalcor executives in respect to the rationale associated with their practices, we were once again critiquing these decisions with the benefit of hindsight. One has to stop and question as to what impact earlier disclosure would have had in terms of the decision making process and the

functions of government in relation to the project.

While my comments are in no way intended to undermine the impact of any increase in expenditures or delays, and government's right to be informed of the same, these issues need to be kept in the context of the project as a whole. By way of example, I would suggest that during Phase 2 of this Inquiry we spent an exhaustive amount of time on who and when various individuals were aware of the increase in the base-cost estimate from 6.2 to 6.5 billion.

At the end of the day, when one considers this in the context of a $10.6 billion project, one has to wonder what would be the ultimate consequential impact of the same. One thing is clear, and what – was that the clients of mine who were in office at the time were not aware of this increase until sometime in the mid-2013.

THE COMMISSIONER: Can I suggest to you that the sentence before that sort of just tweaked me.

MR. T. WILLIAMS: Can I finish this paragraph and I may –

THE COMMISSIONER: Just – let me just say this cause I don't wanna – just – just repeat the sentence before you – before that please? About the issue of whether it would've made any difference; can you just repeat the sentence that you read there?

MR. T. WILLIAMS: Yeah. I would suggest that during Phase 2 of the Inquiry we spent an exhaustive amount of time on who and when had – various individuals were aware of the increase of the base cost estimate from 6.2 to 6.5. At the end of the day, when one considers this in the context of a $10.6 billion project, one has to wonder what the consequential impact of the same.

Now if I could finish that next project 'cause I –

THE COMMISSIONER: All right. I'll let you go.

MR. T. WILLIAMS: – I know you're – I precipitate your comments –

THE COMMISSIONER: All right.

MR. T. WILLIAMS: – let me be clear: I'm in no way suggesting that the significant increase in the cost of $300 million is not important. But the preoccupation of this one issue, I would suggest, is diminished when one considers the – so many other pertinent issues that surround this project and that at the end of the day, it may represent 3 per cent of the total cost of the project.

THE COMMISSIONER: Some might say in response to that, that that was the last opportunity that the government had, basically, to reconsider its move. Because once the federal loan guarantee was signed as we've all heard, many people call that the point of no return. Three hundred million dollars is not a miniscule amount of money. I keep repeating that because we've been throwing billions around. But in Newfoundland and Labrador, that's a large –

MR. T. WILLIAMS: Whole lot of money.

THE COMMISSIONER: – amount of money. And I would suggest to you – and even some of your clients said this – that they would wanted – they would have wanted to know, certainly before financial close, even if it wasn't even financial close, they would want to know about a $300-million increase in the cost.

MR. T. WILLIAMS: And I'm not suggesting –

THE COMMISSIONER: So how – so I'm having trouble to reconcile that with what you're saying.

MR. T. WILLIAMS: And maybe I can expand upon it. Because I hear what you're saying, and I would agree – $300 million as a single number is huge. And we could build schools and we can build facilities and we can supplement social programs. It's a huge number. But at the end of the day – the issue of financial close, I think, is a separate issue. That was the point of no return, and I agree with you on that aspect.

But at the end of the day, would – and we can't answer this question. But at the end of the day, would a $300-million price increase, whether it had been at 6.2, 6.5, 6.8, wherever it may be, would that have halted the project?

I do not undermine the seriousness and the importance, but we were so focused on this one point – there are so many other large issues – and that's where I'm leading into: the other issue that we need to consider. I do not want it to be suggested that either myself nor my clients undermined the seriousness of a $300-million increase. That's not the point. The point is that in the totality of the project, that may not be the diminishing factor.

I think it was Mr. Learmonth who questioned Mr. Williams. And Mr. Williams had indicated – and I don't know if it was the 6.3 or five – you know, he believed in the project up to a numerical amount, and I think Mr. Learmonth said: What's the number? Where do we say too much is too much?

We can't answer that question because not only is it an analysis of the Muskrat Falls Project, it's an analysis of all the other options that you have to look at, and we – obviously we would be here for two more years if we were to do that.

THE COMMISSIONER: I must –

MR. T. WILLIAMS: So –

THE COMMISSIONER: – I must say –

MR. T. WILLIAMS: – I just want to put it in proper context – that comment.

THE COMMISSIONER: I must say, I'm having grave difficulty with the idea that it's only $300 million of a $10-billion project. And it may not have changed things, but here we were, November 29, November 30, 2013, basically dotting the i's and crossing the t's on the largest project that would have ever happened here and with significant impacts – both benefits and impacts, by the way. And, you know, not having that $300 million, not being advised of that, if they did not get advised of it, it just strikes me as passing strange –

MR. T. WILLIAMS: It's –

THE COMMISSIONER: – to hear you say that.

MR. T. WILLIAMS: I appreciate the concern and, like I said, I'll repeat my point – is not to lose the importance of the monetary amount.

THE COMMISSIONER: Yeah, it's not just –

MR. T. WILLIAMS: That's –

THE COMMISSIONER: – the monetary amount.

MR. T. WILLIAMS: – that's not where I'm coming from.–

THE COMMISSIONER: It's the – it is connected to the financial close.

MR. T. WILLIAMS: But at that point in time. It is a factor.

One of the other – you know, we have to look at the other related factors to that, is when was it known, was it communicated. There's a whole lot of other issues surrounding that.

THE COMMISSIONER: That's why –

MR. T. WILLIAMS: In hindsight, it's great for us to sit here today –

THE COMMISSIONER: Right. But that's why I take issue with the fact that we spent an inordinate amount of time, or whatever the wording you use, because I think that was a very crucial part of the evidence that I have to consider here with regards to what went on there. It may not be with regards to your clients; it may be with regards to other people who were involved.

So I –

MR. T. WILLIAMS: And I appreciate –

THE COMMISSIONER: Anyway, as I said, I don't want to –

MR. T. WILLIAMS: I'm not suggesting that it should not be a consideration. But when –

THE COMMISSIONER: Right, I don't want to dwell on it –

MR. T. WILLIAMS: – we look at so many of the other factors – and that's where I'm heading –

THE COMMISSIONER: Okay.

MR. T. WILLIAMS: – in terms of – Mr. Commissioner.

This leads into what I would suggest is the bigger picture arising from the Inquiry, that being what went wrong with the construction phase of the project, and why did we incur the cost overruns and delays that we did?

Finally, what impact will it have on ratepayers? It is clear that as a result of all the evidence heard during this Inquiry, that there was no one person, group or company that is responsible for the all – all the issues that have been of concern to the people of the province pertaining to the Muskrat Falls Project.

As has been evident throughout the Inquiry, this project was faced with challenges that were multi-faceted. While the primary focus of the evidence was on the actions and decisions made by Nalcor, I think it can't be lost that there were two other very significant players who share some responsibility in how matters unfolded.

First and foremost is the role of SNC-Lavalin, as they were the – originally hired as the EPCM contractor and charged with the duty and responsibility of formulating a substantial portion of the original base cost estimates, which they determined to be some $5-plus billion. While we need not get into detailed analysis of the same, clearly this estimate was not only grossly inaccurate, but in fact formed the foundation for which many other crucial decisions may have been made.

I don't think that we can lose sight of the significance of how such a substantial misquote played on the overall costing of the project. Cost overruns goes to the very core of the issues of this Inquiry. That, again, speaks to your issue of concern as to where determinations could be made with cost increases.

As was borne by the evidence of numerous Nalcor officials, not only were there issues with respect to the estimate of significant concern, but there was also the neglect and non-commitment of SNC-Lavalin senior staff and project managers which resulted in there having been significant changes in project construction planning. A substantial change clearly resulted in significant challenges that manifested into increase costs and possible delays of the development.

Furthermore, the performance and actions of primary contractor Astaldi Canada Inc. also contributed in a significant matter to the cost increases and delays pertaining to the project. While the decision of Nalcor to select Astaldi through the bidding process may not have been unreasonable based on the information available at the time, their ultimate performance and commitment had serious shortcomings. Not only were they slow to start construction of the project but their decisions such as the construction of the Integrated Cover system for the project and subsequent removal of the same was an indication of their lack of experience in Northern construction projects.

Furthermore, while the subsequent financial instability of Astaldi could not have been foreseen, this obviously preoccupied Nalcor for a significant period of time resulting in substantial cost overruns. This, in and of itself, has been stated as resulting in hundreds of millions of dollars, not including the delays and costs associated with having to have them replaced in order to have the project completed.

Accordingly, it's our respectful submission that both SNC-Lavin and Astaldi factors played a significant impact on the cost and schedule challenges encountered in the Muskrat Falls Project.

In concluding my remarks I can't help but return to where I started from, that being the responsibility that lies on all involved in this Inquiry process to ensure there has been a sense of balance and fairness taken into account when reaching such conclusions, as was indicated in the evidence of the Commission's expert, Dr. George Jergeas, who stated quite candidly that the success of this project will not be known for years or even decades to come.

While I suggest – what I suggest we do know from the evidence of Mr. Colaiacovo, another

expert who was called on behalf of the Commission, is that in approximately 20 years time as we approach 2041, the Province of Newfoundland and Labrador will have a financial windfall as a result of its hydroelectric assets and the revenue-generating capacity. In stating the same, we need to acknowledge the financial challenges that we are currently facing, but as suggested by prior administrations and as being adopted by the current administration, there are various rate mitigation measures that can be and should be taken so as to ease the burden on ratepayers going forward.

Let us not be mistaken, electrical rates in Newfoundland were going to go up regardless of the Muskrat Falls Project and furthermore let us not be mistaken that we did have a need for an additional electrical generation requirements that would've cost ratepayers when implemented. Accordingly, the upcoming increases in rates cannot be shouldered solely on the back of Muskrat Falls. While there are additional increases in rates that can be associated with this project, there are viable options to address the concerns of the ratepayers.

My message to the naysayers is stop trolling in negativity. The Muskrat Falls Project has produced, to date, in excess of 37-million hours of work for Newfoundland and Labrador residents alone, with employees having received in excess of $2 billion in wages. In addition, in excess of 1,100 of our own Indigenous people have found over 4,600,000 hours of work on this project, and that's as of April of 2019. The Lower Churchill Project's expenditures have invested some $3 billion into the province's economy across various industries. That's not to speak of what the future holds.

Mr. Commissioner, there's an old saying that may be applicable to reference here, and that is the reason why the windshield of a car is bigger than the rear-view mirror is because the road that lies ahead is bigger and longer than the road travelled over. And it's this perspective that I suggest we need to take.

To quote from current Nalcor board chair, Brendan Paddick: "Yes, there's all kinds of naysayers or people with opinions on whether it was a good deal or a bad deal and rewriting history as to how it came about, but hopefully the history on this one can be that we built an asset to be proud of, that made us self-sufficient for centuries to come, that positioned us to be in a position to export power, control our own destiny."

Mr. Commissioner, we need to be upfront and honest with the people of the province and state the basics as we know them to be true. One: The existing electrical rates of the province were going to go up, they were artificially low and not truly reflective of the cost of the system. They would go up. Two: That even to consider upgrading the existing Holyrood generation station – which would've been environmental suicide – with the cost of capital improvements and the unreliability of oil prices, would likely resulted in electrical rates going up. Three: The province had to undertake some form of expanded electrical generation project, no matter what it was, which would have resulted in additional capital costs, resulting in electrical rates going up.

The bottom line is that people don't want to see an increase to their rates, and understandably so. But the reality is that the times is that the rates were going up regardless. So let's not say that it was all Muskrat Falls, but the task at hand is managing that increase.

Undoubtedly, we can learn from the exercise that we've been through over the last 12 to 18 months. And from my clients' perspective, there could be improvements made in areas such as restructuring the lines of communication as between Nalcor, senior bureaucrats and officials within government, as well as reporting responsibilities to Nalcor's Board of Directors.

Enhancements and formalizing a more systematic approach of communications and reporting would result in increased governance and more clearly delineated lines of authority. Such a review would not only benefit Nalcor as a Crown corporation, but we would suggest that appropriate modelling could be adapted by other Crown corporations within the province.

Furthermore, there is needs for enhancement – for an enhanced commitment by government to ensure that the composition and compensation for boards of directors of key Crown corporations is adequately addressed. Clearly,

such boards carry an enormous amount of responsibility and work, and in order to attract and maintain qualified board membership, these requirements need to be addressed, irrespective of political consequence.

As regards to the duty of document – duty to document, we would state that no such formal requirement has been instituted within government – within the provincial government, so it's difficult to criticize past practice. While there is merit to conducting a review of the same, we would adopt the concerns as expressed by witness Mel Cappe, an expert called by the Commission, who outlined the benefits of the same but also expressed reservations as to the extent that such requirements are mandated.

Accordingly, any recommendations in this regard should be instituted only after a close and careful review with consideration of the implications of instituting such a program.

I would state in closing that my clients fully appreciate the very onerous task that you, as Commissioner, are faced with and having to assess and weigh the enormous volume of evidence that has been put before you. It is our hope that the evidence and perspective shared by my clients throughout this Inquiry has been of assistance to you in fulfilling your mandate.

As has been echoed quite consistently throughout my clients' evidence, that while they are – fully appreciate some of the challenges and shortcomings that have been identified during this valuable process, they do not want to lose sight of what lies ahead. It can be best – it can be perhaps best summarized in a quote from the late Winston Churchill, who is quoted as saying: A pessimist sees the difficulty of every opportunity and an optimist sees the opportunity in every difficulty.

Mr. Commissioner, given the limited time that the parties have to address all matters, I once again put forth all issues and arguments, as raised in our written brief, and state that we rely on the same. Finally, I would also like to take this opportunity to thank the Commission staff, including the Sheriff's officers, the webhost technicians, and all who've gone above and beyond the requirements to meet the demands of the various counsel at this Inquiry.

Given the vast volume of documentation that has been put forth, and the very obvious technical requirements of all the systems, they have worked above and beyond what could be asked. I'll certainly miss the late night and weekend emails from Diane, forwarding exhibits from witnesses, and I'm still amazed at the speed in which Marcella can pull up one of those thousands of exhibits in only seconds. It's been a long but enjoyable process, and I wish you the best in your deliberations.

THE COMMISSIONER: Okay. So you'll respond to some questions I assume?

MR. T. WILLIAMS: Sure.

THE COMMISSIONER: Can we look at page 97 of your brief please?

MR. T. WILLIAMS: Okay.

THE COMMISSIONER: You have it there?

MR. T. WILLIAMS: Yes, I do.

THE COMMISSIONER: In paragraph 118, you're indicating that Mr. Williams – Premier Williams had a strong belief that the province had the ability to complete the project on its own, and you cite a paragraph that – of his testimony, which some might think is not really an indication that we had the ability to do it, but rather that we should be the masters of our own destiny and – as the words are stated. Any comment you wanna make about that?

MR. T. WILLIAMS: Yeah. I think that comment – and I – you know, I don't wanna speak for Mr. Williams, obviously his words are his words and maybe he should be the one to speak to it, but my suggestion would be that you have to put this in the context in that when we say we're the masters of our own destiny, and we had the ability, is that we, you know, and without sounding historic, is that obviously we have a very strong history of the people and accomplishments in our province, but that there's been much thought gone in to this project. By not governments – but by governments, by experts within Nalcor, by community experts that had involvement in a plan, and that we're quite capable of achieving this. This is not to say that we can pour all the

concrete and we can put up all the dams and we can do everything on our own. But it's that we had the ability to do what we could do ourselves and attract the expertise that we would've needed. If that's – if I was to try to interpret those remarks, that's what I mean, is that we shouldn't be of the tone to think that we're not capable of taking on a project such as that.

THE COMMISSIONER: Okay.

I'll take you to page 139. This deals with the MHI exclusion – report number 2 and the exclusion of risk.

MR. T. WILLIAMS: What paragraph, if I –

THE COMMISSIONER: I'm sorry. We're at page 177 –

MR. T. WILLIAMS: Page – paragraph (inaudible) –?

THE COMMISSIONER: I'm sorry, page 139, paragraph –

MR. T. WILLIAMS: Right. Okay. Yes.

THE COMMISSIONER: – 177, sorry.

And, no doubt you've read the briefs of other parties with regards to this, particularly Charles Bown and Julia Mullaley. But particularly Charles Bown here, the indication of Mr. Bown is that Mr. Kennedy would have been well aware of the fact that there was going to be the removal of the strategic risk from the review done by – or the risk review done by MHI.

MR. T. WILLIAMS: And that was an issue that was raised during Mr. Bown's evidence, and I put it to him specifically as to whether or not he (inaudible). And his evidence is his evidence. I certainly – I can't speak to that. Only that, as you would find, over the course of the last 12 months, there's been a conflict in evidence in numerous witnesses. Mr. Kennedy stands by his remarks; Mr. Bown stands by his. I'll leave it to you in assessing everything to make credibility.

But I don't think it undermines the honesty and assessment of either one those two gentlemen, because I interpreted – I took them both as to be very honest and credible witnesses, not only in relation to this issue, but in relation to matters as a whole. And I don't think we could expect that every witness is going to have the same memory or recollection of every event.

THE COMMISSIONER: Right.

So Mr. Bown would say, you know, he wouldn't have the authority himself to remove that without getting direction from one of his political masters. And your response to that would be?

MR. T. WILLIAMS: I'm sorry, if I –

THE COMMISSIONER: I'm sorry. Mr. Bown would say or did say that he would not have done this – he wouldn't have the authority to do it on his own. He would have to get the approval to do this from his minister or from the premier. I know you're not representing the premier, so I'm not including her here. And I just wonder if you have any response to that?

MR. T. WILLIAMS: Well I – you know, I don't think there were so strict and rigid lines of authority as (inaudible) responsibilities, particularly when we look at this project as a whole. In that deputy minister's whether it be Mr. Bown or others, had a fair amount of authority. While he may not have perceived himself as having that ability, that's his evidence. Mr. Kennedy's evidence to that aspect was specifically that he has no recollection of ever doing it and he sees no reason why he would.

So I can't reconcile that the conflict between the evidence here, but again I'd just – I leave it to you that I don't think either gentleman were trying to be deceitful or untruthful in giving their evidence. They just had different recounts.

THE COMMISSIONER: Okay.

Paragraph 193 at page 152, this is in – a similar question to the last because this is the removal of the part of the Wood Mackenzie's report dealing with liquid natural gas, which obviously was a bit more positive news than perhaps other parts of the report. Again, a difference of view with regards to who authorized this, but Mr. Bown certainly indicates that it was – in fact, he actually indicates it was Mr. Kennedy.

MR. T. WILLIAMS: And, again, my comments remain the same. I would suggest to you while I – I'm not going to speak on behalf of Mr. Bown; I'm obviously not his counsel, but I will speak on behalf of Mr. Kennedy in stating that he gave two long days of testimony that was very credible. And I would suggest to you – and as I said this in my brief – is that when we talk about the duty to document, Jerome Kennedy probably was the best document-taker of any witness that appeared before this Commission of Inquiry, certainly in terms of the political or bureaucratic witnesses, I'll go that far. Maybe I shouldn't say on behalf of all.

And so he was very diligent in his note-taking, in his records, in his recollection. We have a difference of opinion and I'll leave it to the Commissioner. But I would certainly say that his credibility in terms of his evidence as a whole, was as good as anyone's.

THE COMMISSIONER: I'll take you to page 209. And this is – you're reciting in paragraph 290 various areas where your clients are saying they were not advised. So first of all, you're indicating that none of your clients were advised as to the manner in which strategic risk or management reserve structure was established and nor were you aware of the fact that it was removed from the capital cost estimate or that the – it was estimated at a P50 level. So that's one of the – you're indicating directly that Nalcor – that – I'm assuming you're suggesting that Nalcor should've advised your officials of that?

MR. T. WILLIAMS: Well, no, what I'm – and it's – you have to appreciate I'm in a bit of a difficult position because I have to classify my clients as we named the group, 2003 to 2015. There were various members there at various times. You know, Mr. Williams was there from 2003 to 2010

THE COMMISSIONER: Mm-hmm.

MR. T. WILLIAMS: Mr. Skinner was there for I think only a period of a year or so. You know, there's places throughout our brief we classified clients that were there at various times. So when I say group, I can't necessarily say all six individuals, but what I am saying is that there is evidence that was brought up by Commission counsel who put to various individual members of the group. And I'd have to go back through the transcripts to state which individual members were told what.

THE COMMISSIONER: Okay, I'm not so much concerned about that. I'm just trying to confirm that what you're saying is that is information that you feel –

MR. T. WILLIAMS: Yes.

THE COMMISSIONER: – should've been disclosed –

MR. T. WILLIAMS: As a – a general statement is that they're saying that they were not advised of the P50 risk assessment.

THE COMMISSIONER: Right.

So the – so that includes (b) and (c) talking about the first power date and the schedule issues –

MR. T. WILLIAMS: Correct.

THE COMMISSIONER: – the same thing and not being advised of – well, it's interesting, number (d) – "… was not advised that Nalcor had requested of MHI Consultants, who were retained on behalf of GNL to review DG3 numbers, to limit the scope of their review" to risk factors. So it's a little more than Nalcor. I would suggest to you it wasn't Nalcor who advised MHI that they weren't going to do it; it was somebody. And Mr. Bown admits it was him, but that it was with authority.

MR. T. WILLIAMS: Well –

THE COMMISSIONER: So it's not – you seem to be shifting the blame to Nalcor here where –

MR. T. WILLIAMS: And maybe that needs some clarification. And I accept your comments as stated. I guess what we're – the thrust of what we're trying to say there is as to who was aware. The group 2003 to 2015 weren't, and I'll make it – I'll leave it to the Commissioner's determination as to who else may have been aware. It certainly wasn't to set up any misconception there.

THE COMMISSIONER: Yeah.

MR. T. WILLIAMS: I appreciate the point that you're making, but I guess –

THE COMMISSIONER: Okay.

MR. T. WILLIAMS: – the one we're making is that my client, specifically, didn't know.

THE COMMISSIONER: And then you make the point that your client size were not informed, so I'm assuming your saying they should've been informed of the IPR review that was done that suggested that a management or schedule reserve be included in the budget.

MR. T. WILLIAMS: And that's the context of all of these issues that you've identified in this paragraph, Mr. Commissioner, and we readily acknowledge that these are all important aspects. As I alluded to in my oral presentation is that: If they are important aspects that could go to cost or schedule, then they should've been advised –

THE COMMISSIONER: Right.

MR. T. WILLIAMS: – of these issues.

THE COMMISSIONER: I guess when I read this, I – having reviewed the testimony of the witnesses that you are representing or the parties that you're representing, it's – I think there was a general tenor that – there was a feeling that no matter what the issue was, if it was germane to the issue of the cost or the schedule, they should've been told. So it's – it was much broader than just the six points that your –

MR. T. WILLIAMS: No, these are six specific – and I – and like I said, we had 140 days of testimony –

THE COMMISSIONER: Fine.

MR. T. WILLIAMS: – to get into an exhaustive list. And the other thing is that I think is very important for your clarification too – the reason why these were listed specifically is if you look at the Terms of Reference, it speaks to the information that government was aware of prior to sanction. So we could have, you know, a more extensive list, and that's probably what you're referring to, but the Terms of Reference specifically state 'to sanction'. So, while we – the objective to be achieved, in that paragraph, was to identify a number of issues that existed prior to sanction.

THE COMMISSIONER: So, you're not taking any issue with the other evidence of your clients, related to the – in general, the duty on – or their feeling that there was an obligation or a duty on Nalcor to keep them fully apprised?

UNIDENTIFIED MALE SPEAKER: Yes.

MR. T. WILLIAMS: No, no, that would be a statement that –

THE COMMISSIONER: Okay.

MR. T. WILLIAMS: – I would not object to.

THE COMMISSIONER: I spoke to Ms. Dunderdale's counsel with regard to the issue of oversight of the project and the approach taken by government with regards to oversight, and I'm looking at – particularly at paragraph 306 of your brief at page 223.

So, you're aware that other jurisdictions have recognized – and I think even in this province, some of your clients acknowledged that it was well-known that there – you know, they could expect – potentially, there could be a cost overruns or whatever. Not sure it was as well-known as – or at least as well-known by the individuals or expressed by them as what, perhaps, others might know. But other jurisdictions, before they actually implement projects, do have a formal type of approach for an independent review of cost, schedule, readiness for the project, things of that nature.

In this particular case, none of your clients appear to have given any thought to that.

MR. T. WILLIAMS: I can only give my –

THE COMMISSIONER: Right.

MR. T. WILLIAMS: – my perception. I – you know, this is not a question that was put to any of my clients, so I can't answer specifically on their behalf. But I could only suggest to the Commissioner that – you know, and my thoughts as having heard that question put to

Ms. Best this morning is that, you know, it comes to a point – and it was kind of brought out by Mr. Marshall, Stan Marshall, in his evidence, is that, you know: At what point is enough enough?

That's not to undermine the seriousness of this project, but if we took out a list – and I gave some thought to this while Ms. Best was responding – you know, if we took out a list of the multi-million-dollar projects that any one government does in a term of office, then, while I appreciate the magnitude of Muskrat Falls, can the same principle not apply? Then should government be double-checking, you know, the $500-million school or $2-billion, you know, facility that's gonna be put out on the West Coast?

You know, if you can't rely on the expertise of your own government departments, Crown corporations, then where do you stop? Where do you stop having to double-check? And so that – you know, I think where you defeat that argument is by having very strong recruitment qualification requirements, that you have strong lines of communication in between governments and departments and that you can strengthen. There's obviously room for improvement here. There's no way that somebody could stand up here and suggest that the system is perfect.

So there is room for improvement in this system, but whether or not you need to send it out to an independent third party, we'll say, when the department or Crown corporation which you're relying on has already retained expertise in those areas. Some of the issues that arose here – it's not that it wasn't being checked; it's, you know, was there full review being done? Should there have been more review? Were the experts that were retained limited in the scope of their reviews? They are some of the issues that have surfaced as a result of our Inquiry and having looked at that. So they are areas that we can improve on.

I don't know whether we need take it – and since Ms. Best alluded to, as well, you know, when you look at the cost consequence of trying to do that and what projects you – you know, you pinpoint. I mean, you can't have – when Eastern Health puts in an order for Band-Aids, you can't have the minister of Health out counting how many are left on the shelf before we order them.

THE COMMISSIONER: Mm-hmm.

MR. T. WILLIAMS: I mean, that's an extreme.

THE COMMISSIONER: And I –

MR. T. WILLIAMS: But, I mean, you got – you need to put it in some context –

THE COMMISSIONER: – I don't think anybody is –

MR. T. WILLIAMS: – that there has to be reliance on.

THE COMMISSIONER: – I don't think anybody is suggesting you do it for – you know, for supplies. What I'm suggesting is, is that if you have a major project, and in this particular case, it's $6 billion gone to $10 billion, that's a lot of money, again, in this province.

And the other thought that I had when I was just listening to you is, you know, I wonder how much money was spent on all of these reviews that were done and whether – if somebody at the beginning had
basically known that, you know, this is what other jurisdictions do, and you actually put it in the hands of one party or one group or one assessment agency to review it, they would have the whole picture for the first thing – because that's another thing, when you get individual experts, I suspect there's probably a bit of information that's lost in the shuffle.

MR. T. WILLIAMS: And I think –

THE COMMISSIONER: You know, I just think of these things as I go through this.

MR. T. WILLIAMS: Yeah, and I think, in a perfect world, that that's very nice –

THE COMMISSIONER: Okay.

MR. T. WILLIAMS: – but we don't live in a perfect world. Imagine the criticisms we would've come to if we hadn't done those (inaudible), I mean, there's been criticisms of having done those, saying they're not enough –

THE COMMISSIONER: Well, if you –

MR. T. WILLIAMS: – you should've done more, you should've gone further, you –

THE COMMISSIONER: I suspect the criticisms might have dissipated, to some degree, if there was a view that there actually was an independent assessment of the cost and schedule. And unfortunately, people are not convinced. And even based upon the evidence that they've heard in the Commission, now – and it's hindsight now, I know – but, you know, there might be reason to question just how independent – I think you've acknowledged that yourself in your earlier comments.

But anyway, I just raise with you, you know, the fact that, you know, there was – there were other mechanisms for oversight other than what was thought about. And whether or not it's – they should've been followed or whatever, is something that I will think about.

MR. T. WILLIAMS: But I think your comment is, you know, that's what we're doing. We're sitting here now on day 142 looking in hindsight of everything that has been done over the last –

THE COMMISSIONER: Right.

MR. T. WILLIAMS: – 12 to 15 years, saying what can we do to improve it. And I hate to throw the ball back in your court, but your recommendations will –

THE COMMISSIONER: Right.

MR. T. WILLIAMS: – help outline some of the things, and I think we can strengthen a lot of things that would help projects in the future.

THE COMMISSIONER: Right.

MR. T. WILLIAMS: As to having to go to that extent –

THE COMMISSIONER: I can't for a minute –

MR. T. WILLIAMS: – we might have to defer to your opinion on that.

THE COMMISSIONER: – think that some of the things that they're doing in Norway or Denmark or the Netherlands or Great Britain, some of the US states, in Quebec and things like that, aren't the result of some of the things that we heard about today, in the sense the same sort of things might have happened with their projects. I don't think this is just a nuance.

MR. T. WILLIAMS: But we're not the first. I mean, there's never been a –

THE COMMISSIONER: Hmm.

MR. T. WILLIAMS: – as – I think it was Mel Cappe who said that there's never been an inquiry called to tell a good story, yet.

THE COMMISSIONER: Right.

MR. T. WILLIAMS: So, you know, that's – we'll learn from the lessons, I trust, going forward.

THE COMMISSIONER: Okay.

Anyway, thank you very much, Mr. Williams.

MR. T. WILLIAMS: Thank you, Mr. Commissioner.

THE COMMISSIONER: Okay.

So I see it's 12:30, so we'll adjourn now until 2 o'clock and we'll come back.

And as I say, we're gonna get through the next three parties before we end the day.

All right.

CLERK: All rise.

Recess

CLERK: This Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: All right.

Mr. Fitzgerald, when you're ready.

MR. FITZGERALD: Thank you, Commissioner.

As you know, my name is Andy Fitzgerald. I represent Julia Mullaley and Charles Bown.

We have provided a written brief where we identified what we believe the issues of primary importance with respect to both my clients. Obviously, in a 140-day Inquiry there may or not have been issues that we addressed in there, but I'll certainly deal with those orally if you have any questions.

THE COMMISSIONER: Okay. I'm just going to ask the technical people in the back just to up your mic a little bit so that I can hear you. Okay.

MR. FITZGERALD: Not often I have that complaint. Thank you.

Can you – I'll just begin from the beginning.

THE COMMISSIONER: No, I –

MR. FITZGERALD: You heard?

THE COMMISSIONER: – yes, oh yeah.

MR. FITZGERALD: Okay. Thank you.

Initially, I had a set of submissions to make orally, and I still have those. And I'd ask for your patience, because after hearing your comments and questioning this morning with respect to some of the submissions that have been filed, it's not necessary for me to go through these in the same amount of detail, in particular with respect to some of the issues regarding the retention of MHI, the scope of work change and whatnot. I will highlight those, but it'll be more in the – I guess – in a reply sense, because I've already outlined it in my brief.

I guess, what I would like to start with – actually, sorry, Commissioner – before I go there – I've addressed the issue of the role and responsibilities of deputy ministers in my submission. And the guidance I used for that came from the Gomery report – Justice Gomery – and, interestingly, he quoted the 2003 handbook for the role of deputy ministers in Ottawa. I query whether Mr. Cappe probably wrote it or had some input into it, but in any event –

THE COMMISSIONER: He didn't write it, but he did have input.

MR. FITZGERALD: I thought he might've, yes.

THE COMMISSIONER: He's referred to in some of the footnotes in it –

MR. FITZGERALD: Yes.

THE COMMISSIONER: – so …

MR. FITZGERALD: And, I guess I say that at the outset because my clients and my brief, I deal – did not deal with systemic issues with respect to the Crown and government. I did not view that as my role, as I was representing two public servants who were operating within the system that was in place at the time. Rightly or wrongly, I felt that that was the role of the government, and – but what I have done is highlighted the role of the deputy ministers with respect to what's expected of them in carrying out their duties.

And I guess, most importantly, when you look at the role of a deputy minister, it's – and it's cited in my brief – it's effective department management, it's to provide sound policy advice and recommendations, fulfillment of authorities assigned and, most notably, the decisions that are made are not the decisions of deputy ministers, they are the decisions of the ministers or premiers, and that is the system which my clients operated in. And I think it – to be fair – and I'm not gonna quote back the fairness passage from your decision – we need to keep context in mind, the context in which my clients were operating in; at the same time we also need to keep in mind what their duties are in that context, or what they were, I should say.

Because I would submit, and I have in my brief, that the only way you can have a fair assessment of the conduct of my clients is if you take the guidance from Justice Gomery in mind, while at the same time taking context in mind. The context – by way of context, I have highlighted section 203 of the *Corporations Act*, which did place a duty of honesty and good faith on the

directors and officers of Nalcor Energy, as well as a duty to be diligent. I've also highlighted the fact that, according to Mr. Marshall: deputy ministers and ministers are not expected to be experts; Nalcor was the entity and is the entity that government has to be able to rely upon to oversee the project; and, ministers and deputy ministers should be able to expect to rely upon the information that is coming from Nalcor.

I put great emphasis on Mr. Marshall's comments because of all the witnesses that we heard at the Inquiry, he had more practical board governance experience, I would suggest, in running a utility, given his years at Fortis as well as now he's at Nalcor Energy. He certainly knows the industry well and has a lot of experience in how it should operate. However, any system is only as strong as the individuals who operate in it.

Before I get into some of the issues with respect to some of the specifics I've highlighted in my brief, I do want to begin with P-00807.

This is the Decision Note, Direction Note of May 11, 2011, that was prepared by Charles Bown and Terry Paddon, the deputy minister of Natural Resources and the deputy minister of Finance. And when you look at the passages from Gomery, it talks about being attuned to the objectives of policies and risks that might occur.

And this note, bullet number 2 on page 2 under Background and Current Status: "Project size and related financial requirements are significant relative to the capacity of the Province. Given the combined Nalcor and Provincial commitment of $4.4 billion, development of the MFP will add substantially to Provincial debt and could possibly impact future borrowing capacity for other" users. "For this reason alone" – and I highlight that – "it is prudent for the Province have a clear and independent review of project risks and their potential consequences."

Therefore, in May of 2011, the public service was recommending an Ernst & Young, Grant Thornton type of review, a very fulsome review of risks – and I've gone through these at length throughout the Inquiry. It was a very fulsome review and a fulsome recommendation. It was accepted by Minister Skinner and Minister Marshall, but it was ultimately not followed.

Mr. Budden, in his submission, highlighted the fact that there were voices of caution regarding the Muskrat Falls Project. And I agree with him – might be the first time in the Inquiry. However, my clients – Mr. Bown, in particular – and Mr. Paddon is here. I don't represent him, but he is a public servant – my clients were a voice of caution. They were providing policy advice and recommendations based on the information they had. They had a concern; they brought it forward to their minister, and it was up, then, to the government to decide to act on it or not.

And the decision was obviously to go to the PUB instead. Interestingly enough, I then highlighted in my brief, as well, that within two or three weeks, another note appeared with Mr. Bown involved, where he highlighted the pros and cons of going to the Public Utilities Board.

This process is the process of being a deputy minister and recommending advice on policy and recommendations to the government – and making recommendations to the government. This cannot be lost on this Commission.

There was a serious opportunity here, very early on in 2011, for a good look at this by someone like Ernst & Young or Grant Thornton. I know it went to the PUB and I don't mean – and I'm not disrespecting the PUB, but given what we know was found subsequently in the Grant Thornton report and the EY review, it's very interesting where we would be if this course of action was taken.

It seems to have also been a recommendation that was made at a time where the ball was rolling in the direction of Muskrat Falls. But despite this, I would suggest, this is evidence of a fearless recommendation that we think you need to take a look at this. And I think that is very important and I think it's absolutely a great example of a professional civil servant carrying out his or her role.

Premier Ball, when this was put to him – and it appears in my brief at page 12, and I'll just quote a portion of that: "But yet, we look at a Decision Note here, which I think (inaudible) vindication in any way, but, I mean, I think it reinforces that – the independency of what the

public service" was "doing." They "were there to actually provide advice.

"Whether a politician or decision makers actually take that advice, sometimes can be very frustrating. I think this here is an example of some of the signals that the public servants were sending to the" decision-makers "at the time."

The quote is interesting from a couple of perspectives as it does highlight the fact that this was an early indication of a concern by the public service, but it also highlights the fact that my clients are subject to political will and what the politicians of the day ultimately decide. You can only provide the advice and recommendations. Then, once the decision is made, you need to follow that. That's how our parliamentary democracy works.

Individually, both Mr. Bown and Ms. Mullaley are career public servants. They've served governments of different political stripes. They are non-political. They've acted with professionalism and integrity throughout their careers in government. The fact that've risen to the level – or rose to the level that they are today says something about their professionalism and the way they've conducted their selves throughout, I would suggest.

And when I was questioning witnesses, the various politicians, regarding the conduct of Mr. Bown and Ms. Mullaley, they were nothing but complimentary in how they conducted their duties. And that's clear throughout every witness that was asked a question about them.

A point that needs to be made – and it was made during Julia Mullaley's testimony; she made a lot of points actually – was that there is no commercial sensitivity between Nalcor and government. There was a lot of evidence in this Inquiry and a lot of witnesses referring to commercial sensitivity and ATIPPA for justification on some level of why information wasn't flowing. But between government and Nalcor, those are not issues; everything should've been flowing freely. When the information was known, it should be provided. Ms. Mullaley confirms that there was many meetings between Mr. Bennett and Mr. Harrington at the Oversight Committee, between Mr. Martin and Cabinet. There were plenty of opportunities for the information to be brought forward. And, in addition, her evidence also confirms that there was proactivity, the politicians were asking questions, the Oversight Committee was asking questions, government Members were asking questions. They were getting reassurances, but not specifics.

I would submit that given the context with which my clients were operating in, the legal duties under the *Corporations Act* with respect to the officers, in particular, of Nalcor Energy, as well as the professional duties that many people at Nalcor were subject to, just as we as lawyers are subject to our code of conduct and ethics, it was not unreasonable for the public service or government to expect full, frank, accurate and timely information.

And it's important – and Ms. Mullaley highlighted this as well – that without that information – and it was a real opportunity lost in July and August – sorry, July through August of 2013 when the FFC numbers were $6.8, $6.97 billion, for that to come back to government and you could have a real debate on policy issues: Where are we going to go, what are we going to do, what are our options? The failure for the information to be brought forward took away that opportunity and it was a missed opportunity.

With respect –

THE COMMISSIONER: The only thing is that if – you know, according to Mr. Martin and his counsel in argument, clearly they were given a mandate to proceed to follow through on the terms of the Energy Act. They were the ones that were hired, they were the experts that were hired to do it. And based upon, you know, what seems to be the argument of Mr. Martin it's that, you know, he was – he didn't need to provide that information. And he would only provide information if he thought it was necessary to provide it. I'm not quite quoting him, because –

MR. FITZGERALD: No, I –

THE COMMISSIONER: – part of the issue was is that he didn't think some of the information was accurate enough to provide to government.

MR. FITZGERALD: Well, I mean, obviously, that's Mr. Martin's evidence. I did question Mr. Martin about some of his conduct when he was under cross-examination and I asked him: Why didn't you bring this to the board? Why didn't you send an email? Why didn't you send email to government about these things, just for your own self-preservation, to cover yourself? I mean – you know, and I appreciate him saying, well, I don't need approval for everything, but on something as fundamental as a, you know, a major hundred-of-million-dollar increase in capital costs, it's not too much to ask that the CEO share this with the board and/or government officials.

Because ultimately he's there as a CEO, the board of directors manage and they have duties to the shareholder. And I would suggest to you, and particularly in the United States, there's an awful lot of law out there about the duties to disclose things to your shareholders with respect to potential risks and what's going on with companies. I know we're not in a private setting but those laws exist in Canada too, it just seems the penalties are more significant in the US.

With respect to Mr. Bown, there was an issue with respect to the retention of MHI that I've addressed in my brief. The evidence is clear that this was done at the direction of government. The minister was involved, Minister Kennedy, and MHI were retained. This was not a decision that Mr. Bown made in his own right. He followed the instructions he was given and that's his job.

THE COMMISSIONER: Right. One issue that has struck me about Mr. Bown's testimony was the fact that he indicated at one point – I'm not certain as to who he was answering this to – that he felt that it wasn't in his place to challenge government on this decision, to remove risk from – I'm sorry – you can't hear me?

MR. FITZGERALD: No, I can hear you, but I'm – I was going right there on the next issue –

THE COMMISSIONER: Okay.

MR. FITZGERALD: – on removing risk –

THE COMMISSIONER: Okay.

MR. FITZGERALD: – from the scope.

THE COMMISSIONER: Okay, go ahead but –

MR. FITZGERALD: And –

THE COMMISSIONER: But you might want – as you do it, one of the issues that I was – have been looking at is that fact that he felt he didn't have the ability to challenge that decision at the time. And having heard Mr. Cappe, having reviewed Justice Gomery's decision, looking at it with the role of a deputy minister, I would have thought that's exactly what he was supposed to do. He was to – it was – the whole idea is to challenge – I mean, it's done respectfully and it's done with an acknowledgement that it's ultimately up to the government but I was a little surprised by his comment in that regard.

MR. FITZGERALD: Well, I guess everyone operates differently depending on their nature. I do know that at the outset, and this is just contextual, he certainly did challenge government in May 2011 when he wrote the decision note saying you need to go outside and get an expert; that was a big challenge by him and Mr. Paddon.

With respect to the retention of MHI, that was a meeting that was held on, I believe, a Sunday morning in 2011; whether or not he actually challenged at that meeting, we'll never know. There obviously was a meeting between the premier – or, I don't know if – sorry, no, the premier might have been there in that one – I stand corrected –

THE COMMISSIONER: No, it was his –

MR. FITZGERALD: – chief of staff –

THE COMMISSIONER: – chief of staff.

MR. FITZGERALD: – Mr. Taylor. And obviously mister – actually we can –

THE COMMISSIONER: Mr. Martin.

MR. FITZGERALD: Mr. Martin was there and so was Mr. Kennedy.

THE COMMISSIONER: Mr. Thompson.

MR. FITZGERALD: And Mr. Thompson. So there was obviously a whole –

THE COMMISSIONER: Mr. Bown.

MR. FITZGERALD: Mr. Bown.

So what I would suggest to you, there was obviously a wholesome discussion about this at the time but, ultimately, the minister has to be – approve that. We're not going to – never – we'll never know what the debate was there but there's four or five senior officials in government; I don't think they just sat down in a room and said okay. I mean, obviously there was a discussion about it I would suggest and then the direction was followed.

THE COMMISSIONER: It's just that your clients' testimony – Mr. Bown's testimony was that he didn't feel he had the ability to challenge. Notwithstanding his knowledge of the – of, you know, the impact of –

MR. FITZGERALD: Yup.

THE COMMISSIONER: – removal of the risk.

MR. FITZGERALD: And the point I want to highlight – and this brings me to the second piece on scope and the removal of scope from strategic risk. I think there is a difficulty for public servants sometimes in balancing what is a political decision and what is a policy decision. And maybe – maybe at the time that that was trending towards politics – i.e., we need to get MHI in here right now, they're going to do it and who knows what that discussion as. The premier's chief of staff was there and Minister Kennedy was there.

There is a line that public servants cannot cross in terms of getting involved in politics and maybe – I'm just speculating, but maybe that may have played a role in that and I'll highlight that a little bit more when I talk about the removal of scope from – strategic risk, sorry, from MHI's scope of work. And it's probably a good place to go to that right now.

If we can bring up Exhibit P-01237, please; page 10, yes. Now, we discussed this this morning, Commissioner, when you were asking questions to I believe Mr. Williams and maybe Ms. Best. This is the April 6, 2012 meeting. Meeting of Ed Martin, Brian Taylor, Robert Thompson, Glenda Power, also the Premier's office, Mr. Thompson was the clerk and Mr. Bown.

That is who was at the meeting with respect to the decision of – the decision was made for scope to be removed from MHI's analysis. I think it's important to point out here – and I asked Minister Kennedy on cross-examination – if we can just scroll up a little bit here, thank you; scroll down a little bit, before you get to that.

There was two major issues going on at the time. There was the upcoming June debate in the House. We need to get this into the House by June, which I suggest to you is very much a political issue. The other issue that was going on was Nalcor's schedule being adversely impacted.

Two days prior to this meeting, Paul Harrington sent an email to the group at Nalcor referring to the fact they were being set up to fail. The risk can't be done. Subsequently during testimony here, Ed Martin, I would suggest, corroborated much of the information in this note, is that he went to the meeting and advised of the position of the project team and the decision was then decided to remove risk – the risk analysis from MHI's scope of work.

THE COMMISSIONER: It may not amount to much, but I think his testimony was that he initially couldn't recall it but he – but if, in fact, Paul Harrington had written the letter, then most likely he would go the meeting and he would espouse what Mr. Harrington had said.

MR. FITZGERALD: Yeah.

No, no I appreciate that; however, it does seem to fall in line with the other evidence in relation to that whole issue. And it was not just Brian Taylor who was at this meeting. I mean the clerk of the Executive Council was at this meeting –

that's Robert Thompson; that's the premier's deputy. I needed to make that point as well.

I know Ms. Best says well, the premier didn't know, the premier never had any knowledge of that but – and I believe Ms. Power was from the premier's communications team. I mean, there was an awful lot of people around here at this meeting that were very close to the premier but, ultimately, from my perspective and the perspective of my client, this was obviously the decision that was made and, subsequently, he followed his instructions. But there is a line here as well with respect to this decision because it does blur into the area of politics, because the June debate seemed to be something that was very concerning at the time.

And if we scroll down a little bit further, thank you.

And I asked Mr. Kennedy during my cross-examination if he puts stars next to things that are important. And he said yes, he does. And if we look down here: Premier – star – there has to be deadlines – star. There's a House debate coming up in June. This needed to be done. There was a political element to this.

The other issue that arose with Mr. Bown was the issue with respect to Wood Mackenzie and the removal of the liquefied natural gas from the analysis. His evidence was that he was instructed to do this. I cross-examined Mr. Kennedy at length on this issue. I also pointed out to Mr. Kennedy, given the way Mr. Kennedy operated and his personality, it would be my client's – how to put it – my client would follow those instructions, would make sure Mr. Kennedy was always fully informed, which he would always do with all his ministers.

There's also several emails around this time period where staff from the Premier's office are involved with respect to the liquefied natural gas issue as well. Premier Dunderdale was copied on some of those emails, so is mister – I believe Ed Williams was a political staffer. Ms. Lynn Hammond, I believe, was in the Premier's office doing communications.

In short, the Premier's office was very much engaged with respect to the Wood Mackenzie, Ziff issues. And I believe Mr. Kennedy even said – well, he didn't recall this specific issue, but he certainly – the tenor of evidence was that Mr. Bown wouldn't go do these things in his own right. The whole idea that a senior public servant would go and – oh, we're taking that out now, and I'll tell the premier and the minister and Natural Resources later. That's how you get fired. That's not how you keep your job. And you don't work for 31 years in the public service without keeping people fully informed. That's one of your duties.

Julia Mullaley gave evidence – I believe it was May 28 and 29. Her primary role, I guess, with respect to this Inquiry was as chair of the Oversight Committee. But it's interesting that her role with oversight actually started in – when she was deputy clerk '21, 2012 – sorry – 2011, 2012 when she actually had an MC authored suggesting that there had to be oversight protocols. Particularly given that the project was not going to be subject to PUB oversight. She then left Executive Council and came back in 2013. And when she came back she followed up on this issue and wanted to know what the status of it was, and tasked officials in Natural Resources and Finance and Justice to move the matter forward.

Subsequently – and I'm going to highlight Ms. Mullaley's conduct – when the Oversight Committee was established, herself and Mr. Bown was on that committee as well and played a big role on that committee – insisted that Ernst & Young be brought in and that they be provided with a budget because they did not have the expertise in-house.

Subsequently, we know despite differences of opinion with respect to Mr. Martin and the role EY should play, Ms. Mullaley stuck to her guns. There was a request that Nalcor's Internal Audit take the lead on a particular matter and Ms. Mullaley said no. She said I won't be the chair of this committee if that's the case and it was said to the premier's chief of staff at the time, Joseph Browne. And subsequently, Ms. Mullaley's views were accepted and Ernst & Young went and proceeded on to do the work.

The evidence also establishes that the Oversight Committee, the non-political civil servants did recommend the release of the report that came in from Ernst & Young prior to the election. And

the reason for it being divided into two reports and/or not released in its full entirety was a decision that was made on the advice of Mr. Martin with respect to commercial sensitivities.

I believe in – yesterday, you questioned Mr. Simmons regarding when the government became aware of the 7.65 number, and Mr. Simmons submission was: Well, there's a note from Derrick Sturge that references March 9 in 2015. Ms. Mullaley's memory of this is very good. She remembered it was on a holiday, June 22, 2015, at the Natural Resources Building in front of Ross Wiseman, who was minister of Finance at the time, and Minister Dalley. And Mr. Martin came in and said, we have a problem. They were advised, then, that the number could go as high as 7.65, but they needed to see how Astaldi was going to perform over the summer.

When Mr. Martin was cross-examined regarding this issue, Mr. Martin said that Ms. Mullaley's memory fits within the time period in the equation. And I think that's significant because what we know from this Inquiry is that Mr. Martin was the be-all and end-all when financial information would come to government.

So if Mr. Martin is saying that it's more likely than not it was June 2015, given that he was the one who would provide financial information, provide a new AFE to government, and given the fact that his memory is in line with Ms. Mullaley, I think mister – I don't put any credence in the chronology and the idea that that was March of 2015 when that was communicated. It's possible that Mr. Sturge wrote a note, but it doesn't mean it was communicated to anybody. I think it's more likely than not that that occurred in June.

Subsequently – actually, before I get into that, another major issue that has come up here – and it's probably the biggest one with respect to hindsight in terms of Ms. Mullaley and Mr. Bown. And it's easy for us now to come in and say, well, why didn't Ernst & Young do a complete, full review right away? That's the easiest thing for all of us to do. It's so easy to make that argument, you know, it's just – in many ways, to me, it's a little bit nonsensical. I mean, once the committee was established, they needed to understand whether the reports being generated by Nalcor Energy could be relied upon. So Nalcor Energy – sorry, Ernst & Young put procedures in place, reporting protocols, to determine what could be relied upon. That was the first step and it was a prudent step. These full-scale reviews – it may not seem like a lot of money, but 750 to 1.2 million is a significant amount of money.

And the public servants are also trustees of the public purse. In many ways, they play role in that. And I think it's prudent advice and a sound recommendation that at the time, the context that they were operating in – as Ms. Mullaley said, there was no stop-the-bus moment – that's her evidence – let's see what Ernst & Young tells us to do. What do we need to do to determine the reports that we're putting out to the public can be relied upon? I would suggest that that is exactly the process that should've been followed at the time.

And as I noted in my brief, when new information came out and the government changed, the current Liberal government, who had more information than Ms. Mullaley had at the beginning, then said – well, they sent Ernst & Young in at that point in time. But I think you need to keep context in mind when these decisions were being made. There was nothing unreasonable about the process that was engaged in at that point in time.

Another fine example, I would suggest, of Ms. Mullaley carrying out her duties effectively was her letter to Premier Ball in 2016 when she was leaving. She had very – she had significant concerns at the time with respect to the negotiating mandate, how they were going to handle Astaldi. And she want those documented.

And I've highlighted those at page 38 of my brief, is the recommendation:

"*Government consider immediately engaging the necessary expertise (to be identified) to complete an initial assessment of the issues including in particular, validating the urgency of the issue, the conclusion that there are concerns with the solvency of Astaldi and the related risks to the project. Further validation will also be required to assess the options and related legal*

and financial risks to provide a recommendation on how to move forward to manage the project and mitigate risk.

"*Further consideration be given to how this independent assessment would integrate with the current review being undertaken by EY on Project cost and schedule risks, of which Astaldi is included ….*"

And: "*Internal legal counsel in Justice and Public Safety familiar with the various contracts and terms of the Federal Loan Guarantee (and related agreements) be immediately engaged to assess any potential impact on the project be considered and deliberate thought be given to an interim replacement to be prepared to move quickly ….*"

It's kind of interesting, when you look at the recommendation that was made by Ms. Mullaley in 2016, it's kind of similar to the recommendation that the civil service made in 2011 before this all started: Let's bring somebody in here to do a full-scale review of this to see where we're to so we don't run into any trouble. There's no guarantee that any of this advice is going to be accepted, but you can only make the recommendation.

On the issue of documents, the evidence is clear that my clients handed their documents over, their black books. They're – they haven't been located. I would submit they were in the custody and control of government at one point in time. My clients did what was expected of them. You know, there's nothing else I can say on that. I think it's a shame that we don't have access to those. Those documents could've provided significant insights with respect to this matter.

I guess the last issue of any that I've dealt with in my brief is the $6.5-billion issue, which I think is very important. Three hundred million dollars is a lot of money. It's a significant amount of money.

Ms. Mullaley's evidence is that she never had any recollection of that and when this issue first arise; she went on an intensive search through Cabinet records, emails, notes. There was nothing to indicate she had any knowledge of that. Furthermore, if Ms. Mullaley had knowledge of that, she would have brought it forward to the premier.

With respect to Mr. Bown, his evidence is he has no recollection of that. Now I know the Consumer Advocate referenced in their brief that that's strange. Well, with respect, I think the whole issue of the $6.5-billion issue and how it played out is strange. It doesn't mean Mr. Bown knew about it. I think there is a systemic issue there. I believe I've highlighted it in my brief and I've used some of Ms. Mullaley's evidence in terms of that that should have come back to Cabinet.

When Nalcor was increasing the AFE, typically a presentation would be made to the board and a corresponding presentation would be made to government. That's what should have happened in this case, but it didn't happen. There's nothing in the Cabinet records to indicate that.

I would also point out that at the time, Mr. Bown – and his evidence is that Natural Resources took the lead – sorry, the Department of Finance took the lead on this issue. And I did ask Mr. Morris, who was in Natural Resources, if it's possible that that's why he doesn't recall telling Mr. Bown.

But, in any event, that's a systemic issue and I think – and I'm sure you're going to turn your mind to that in terms of what happened with that issue – 'cause it is important and it does bother both my clients.

The first time that Ms. Mullaley recalls that is during the budget process of 2014. And when she found out, she went to Cabinet and said this number needs to be released in the Oversight Committee report in July, and it was. But that's the evidence for my clients on those issues.

THE COMMISSIONER: Right.

So did you want to speak to the evidence of Paul Morris with regards to his knowledge and his indication to Mr. Bown?

MR. FITZGERALD: Well, Mr. Morris's evidence didn't hurt Mr. Bown. He doesn't recall telling Mr. Bown. There's no email from Mr. Morris going to Mr. Bown indicating that that would be the case, which I would suggest

that would probably be the normal course this day and age.

And also I questioned Mr. Morris in cross-examination on whether is it possible that you didn't tell Mr. Bown because Finance was taking the lead on this and he did indicate that that was possible.

But there is no documentation –

THE COMMISSIONER: As you said, it was a $300 million –

MR. FITZGERALD: It was.

THE COMMISSIONER: – increase, so it's –

MR. FITZGERALD: It should have come to Mr. Bown, it should have come to Cabinet and it also should have came to Ms. Mullaley and it should have came to all the ministers – Mr. Williams's clients. And it would have been another opportunity, to quote Ms. Mullaley, to have a debate on the issue, to have a sound debate on the policy objectives at the time. And because it didn't go to Cabinet, that opportunity for debate was lost. And that's a problem in terms of communication within government; I recognize that. But if senior officials knew, that should have went to Cabinet. The Cabinet is responsible for the decision.

And I would suggest, as well, that it's not enough that it just goes to the premier. The premier should – if the premier had knowledge, Cabinet should have been notified and there should be some communication somewhere of that, and we don't have it.

THE COMMISSIONER: This is one of the more confounding areas of the evidence for me –

MR. FITZGERALD: Yeah.

THE COMMISSIONER: – because in the normal course of events what I do know is that, first of all, if there was going to be an increase in the price, in the budget, you would have to go to Cabinet in order to get that approved. And that's what was done for other AFEs that were had.

In this particular case, in order for it to go to Cabinet, there has to be information that's provided to the government to make sure that it can go to Cabinet –

MR. FITZGERALD: Yeah.

THE COMMISSIONER: There has to be some sort of a presentation, some sort of requirement to produce documents. And then, on the opposite side of that, you have, you know, individuals like Paul Myrden, Donna Brewer, Mr. Morris all being made aware of the fact that there was $300 million.

Now, while they, I think, tend to deny the possibility that maybe they were thinking this was really not an increase and that this was for the purpose of the COREA or because the argument was – but I don't know when this was first raised, was that we're saving $200 million on financing and another $100 million on something, we're going to get some additional revenue from the excess sales or whatever it was, that it was a – basically meant that there would be no requirement for additional funds to be released.

I'm a little less certain about the second one because I don't think it really answers the issue of the need to increase the budget, but it just makes me wonder whether or not the significance of this $300 million, in the sense of what it meant to the budget, was understood by the public servants who were involved.

MR. FITZGERALD: Well, I can't – I don't represent Mr. Morris, Mr. Myrden –

THE COMMISSIONER: I understand that.

MR. FITZGERALD: – you know, or Mister – Morris, Myrden –

THE COMMISSIONER: Your clients don't – weren't even aware of the fact –

MR. FITZGERALD: No.

THE COMMISSIONER: – that there was an increase in the COREA amount.

MR. FITZGERALD: No. I mean, these are the – this was the team that was tasked to deal with

that issue and it never came forward to Cabinet. Those are my remarks on the substantive issues.

I would highlight that both of my clients operated in a structure that is a line-of-command structure, where you provide advice and recommendations. And then when the decision is made, you implement it, that's how it operates. The whole idea that a civil servant, now, would have to write a memo to file saying: I challenged my minister on every single decision, I think is a bit too much.

I think that job, in the practicality of operating in that environment, where there are political decisions versus policy decisions – it is a line that they have to deal with every day. And I think all public servants try to deal with that to the best of their ability, including Ms. Mullaley and Mr. Bown. They've been in the public service for a number of years, they are non-political who perform their role in a reasonable manner in the context in which they operated and they're still public servants that are representing the people of the province every day in the work they do to try and improve the lives of Newfoundlanders.

Unless you have any other questions for me, I mean I've dealt with the issues that I believe that were pertinent but, I guess, now's your chance.

THE COMMISSIONER: I have one other area I would like to canvass with you related to Mr. Bown in particular.

You indicated earlier that, as part of the duty of a public servant, a deputy minister, an ADM, I assume would be that they should be apolitical, and in this particular case, you indicated Mr. Bown had served many different –

MR. FITZGERALD: He did.

THE COMMISSIONER: – stripes of government.

There is – there are some documents that are before the Commission that Mr. Bown had a hand in –

MR. FITZGERALD: Yep.

THE COMMISSIONER: – that would – that I would consider to be – it would be hard for me to come to the conclusion that it was apolitical, an apolitical message, and some of them were put to your client at – by Commission counsel. You don't address that in this – in your brief.

MR. FITZGERALD: No.

THE COMMISSIONER: And I'm just wondering if you have any thoughts.

MR. FITZGERALD: I do.

No, well number one, I don't know the specific documents you're referring to. Number two, whether Mr. Bown was copied on a particular email that may have had a political tone, he couldn't help that.

THE COMMISSIONER: No, this was – there were –

MR. FITZGERALD: He never –

THE COMMISSIONER: – I'm thinking of one in particular where he actually was involved in the drafting of the document. But it's – I'm not overly concerned, I just wanted to make sure I give you an opportunity to speak to –

MR. FITZGERALD: Well, I would say, without seeing the actual document, I think we could probably engage in it if I had the document in front of me. But I would say, by and large, he's been there 31 years, he's served different stripes. If he was political, he more likely than not would not still be there. He does a good job; he does a great job as a deputy minister and a civil servant.

He's had the support of five or six or seven premiers. He's worked under numerous administrations and he's worked tirelessly on this project. He worked morning, noon and night in 2012 and 2013 for his employer, which was his job which he did dutifully and loyally. The government changed and he still serves the current government, a different political party.

I guess sometimes you're in the – I mean, there is a line. It is a grey area, as I said to you. I think every day when public servants go to work, they got to be careful to that line. I'm not saying Mr.

Bown is perfect; none of us are. But I believe overall when you look at his conduct throughout this Inquiry and the Muskrat Falls Project, his conduct was reasonable, under the circumstances, in the culture and context he was operating in at the time. And in assessing his conduct, with your principles of fairness, that's what we need to be keeping in mind.

THE COMMISSIONER: Okay.

And, finally, one other question that I did have was, as a senior public servant in Phase 3 and, particularly, the second week in Phase 3 where we're dealing with issues related to the public servants ability to speak truth to power, the duty to document, things of that nature. Is there anything that your client – clients wanted to add with regard to any of those issues?

MR. FITZGERALD: The only thing I will point out is that my clients did speak truth to power throughout.

THE COMMISSIONER: Didn't what?

MR. FITZGERALD: They did speak truth to power throughout.

THE COMMISSIONER: Oh, yes. Okay.

MR. FITZGERALD: In particular, in 2011, when they – Mr. Paddon and Mr. Bown had the fearless – fearlessness of putting forward a note, which I would suggest was going against the tide at the time, to bring in somebody else to take a look at this, in Ernst & Young or Grant Thornton. And Ms. Mullaley, any number of examples of her speaking truth to power in insisting that the – a budget be given for the Oversight Committee, in insisting that Ernst & Young be allowed to do it's work despite objections from Edmund Martin and providing advice to the premier on her way out as executive – clerk of the Executive Council with respect to the Astaldi negotiations.

These people speak truth to power. That's why they've risen in the public service and that's why they're still there today.

Those are my submissions.

Thank you.

THE COMMISSIONER: Okay.

MR. FITZGERALD: One point, Commissioner, I know everyone – I mean, I want to echo the words of everybody in thanking everybody in terms of this Inquiry and Commission counsel. I do note, no one has mentioned Justice O'Brien yet, but she did play a big role in this when it first started and I think a thank you should go out to her as well.

Thank you very much.

THE COMMISSIONER: All right, thank you very much.

All right, Robert Thompson.

MR. COFFEY: Good afternoon, Commissioner. Bernard Coffey, of course, I represent Robert Thompson, a former clerk and former deputy minister.

I should say at the outset, Commissioner, I want to correct a typo, and the responsibility for it, of course, is mine. Paragraph 106 on page 33 of Mr. Thompson's written submissions, there's a reference to July of 2012. That's that House of Assembly debate. It should've been June. And I don't think much turns on it in the context, but I did want to – right at the outset to, you know, make that correction.

THE COMMISSIONER: Thank you.

MR. COFFEY: Commissioner, I thought, you know, of different approaches I could take today. And one of them, of course, now, of course, is influenced by the way events have unfolded in the past day and a half, which is you have, as you've seen fit, posed questions based upon the written submissions.

Before, perhaps, I get into that – and there's one part of my written submission I am – or two part – two or three parts, really, I intend to refer to, but some things that are not covered in the written submission would be I would ask the Commissioner – you as Commissioner – to look back at the exhibits that have been filed in relation to what happened in the 1990s because – and in – through 2000 – because that, I'm going to suggest, Commissioner, may not fully explain, but certainly contributes to explaining

how events unfolded between 2003 and 2012, 2013.

You'll recall, Commissioner, that there are *Hansard* excerpts going all the way back to 1994, which is when then Premier Wells, Clyde Wells, brought forth, early that year, his initiative to privatize Newfoundland and Labrador Hydro. As part of that – it was two bills involved. The second bill was the enactment of what is now the EPCA 1994, which replaced the EPCA, which dated back, I believe, to the 1970s. And, of course, the privatization of Newfoundland and Labrador Hydro did not proceed at the time, but in June of 1994, the EPCA 1994 did pass and received Royal Assent, but it didn't come into force.

Commissioner, it is apparent – and when one looks at the excerpts from *Hansard* in 1999, in particular the comments of then-Minister Grimes – but even before I get to that – I'll leave that for a moment. I want to just revisit the 1994 amendment because not much attention has been paid here to the existence of section 5.1 of the EPCA, which was, in fact, when you look at it, was added in late 1995 and, in fact, gave Cabinet the ability to give a directive to the PUB in terms of the process to be used in determining rates.

And I raise that because the EPCA 1994 is a model. The idea was that beginning – whenever it came into force, the idea was that all major – the utility companies in the province, in particular Newfoundland Power and Newfoundland and Labrador Hydro, would be all privatized. The regime under which the PUB – the new regime they would operate would be one in which the PUB was only dealing with private organizations.

As you're only too well aware, Commissioner, the 1994 amendment only came into force January 1, 1996, but in December of '95 – and, again, there is an exhibit there dealing with it – there was an amendment passed, given Royal Assent in December of 1995, adding 5.1, which, when you think about it, meant that the government of the day – and that 5.1 amendment was made or put forward by Rex Gibbons. When you think about it, the government bringing into force this new regime – January 1, '96 – thought it necessary to install a new provision, 5.1, which gave reserve to Cabinet the ability to give direction to the PUB, which, of course, had not existed in the 1994 edition of the EPCA in 1994.

Commissioner, you've heard from Mr. Vardy. Mr. Vardy did explain that he was the chair of the PUB from 1995 through 2001 and he did acknowledge and say that, yes, the new act came into force January 1, '96. He acknowledged the existence of the, then, new section six, which gave the authority and responsibility to the PUB for ensuring the future needs for generation transmission and distribution were going to be met. He testified that that happened but nothing really changed at the PUB in terms of its approach.

We come then, finally, to 1999 in this regard where the, what is now, I believe, 5.2, the exemption provision, was enacted late that year. I commend to you a perusal of what the, then, minister of Natural Resources, Roger Grimes, said about the reason for it, and, in essence, I'm going to paraphrase and summarize.

He said that the government of which he was then part felt that they had heard kind of loudly and clearly what the public wanted, no privatization of Newfoundland and Labrador Hydro would occur, and what's more planning or the ability to control planning, or not so much planning as is consideration of what should be new sources of generation, would rest with Cabinet or at least Cabinet would have the ability to exempt it from the PUB.

We know that late in 2000, a year later, the first such exemptions occurred. The Labrador hydro projects was not the first one but they are there and you've been referred to them, I believe there's a summary or an exhibit which contains all of them, and they occurred in 2000, in 2002 and, I believe, 2004 – just a moment please, Commissioner.

Yes, the Newfoundland and Labrador Hydro-Corner Brook Pulp and Paper Exemption Order filed October 31, 2000; the *Granite Canal Hydroelectric Project Exemption Order* filed December 14, 2000; the *Labrador Hydro Project Exemption Order*, December 14, 2000; the Newfoundland and Labrador Hydro-Abitibi Consolidated Inc. Exemption Order, July 9, 2002; the – and, finally, the Newfoundland and

Labrador Hydro-Abitibi Consolidated Stephenville Operations Exemption Order, May 18, 2004.

Some of them, Exemption Orders, Commissioner, when you read them, deal with, like Granite Canal does, with an actual hydro project in the full, but others extended to the generation of power at an existing generation station above a certain amount. The point being that when you look at what was going on between 2000 and 2004, there was considerable involvement by the Cabinet of the day in exempting different projects from the PUB examination.

I've gone through that in my oral submissions now because there has been reference today, and if not yesterday, but certainly today, to, you know, the idea of, well, why, you know, the government of the day in 2010, 2011, could've, before it did, thought to refer the matter to the PUB, despite the existence of a 2000 Exemption Order, and I don't think anyone here has mentioned it, but – so far – but it is open to a Cabinet, Lieutenant-Governor in Council, to remove an Exemption Order, if they wanted to; just pass a regulation changing it.

However, that was not the mindset. The mindset was, in this province up until the beginning of 2011, the mindset – I think fairly put – was that decisions about major electrical generation projects in this province and even minor ones, when you look at what was exempted, under section 5.2, rested with Cabinet and its Crown agency Hydro, Newfoundland and Labrador Hydro.

I believe, Commissioner, since the hearings ended there have been Exhibits P-01875 and P-01876 I believe have been added. I was interested to see them. They're the – there's a PUB order in 2004 and a PUB order in 2007 arising out of Newfoundland and Labrador GRAs in 2003 and 2006. My point being this Commissioner, that when you look at those orders, in particular the portions of them where the PUB is dealing with its section six responsibilities, I'm going to suggest that there's no concrete illustration there of any actual activity in a substantive way to grapple with when you look at other documents was a perceived problem that was going to occur in terms of generation downhill within five to 10 to 15 years.

And in fact, when you look at the 2007 PUB order, you will find that they explicitly say, what we're going to do in relation to our section 6 responsibilities, well, we'll wait a little bit and see what the energy plan says. And again, that's – the material is there. I could take an hour – take a half an hour and take you through it, but it is there.

The point being that during the time frame between 1996 – and before 1996, but certainly from 1996 up through 2007, the idea – the process was that the PUB did not review this type of thing. And in fact, there is an email which Mr. Thompson wrote at one point – and it's referred to in my written submission – that explains and lists the number of projects in which – electrical projects, in which the PUB had not been involved, and the reasons are set out there therein, the reasons for them.

So, that's a long winded way of making a point, Commissioner, that it's hardly surprising that DG2 and the Emera agreement will come and pass before – or without an issue being raised about PUB involvement.

There's no evidence that I'm aware of – and, of course, I always stand to be corrected – but there's no evidence before this Inquiry that – prior to the beginning of 2011, that there was any suggestion that the – and any public complaint about the exemptions that had occurred over the years in relation to the PUB. There was no hue and cry publicly about that.

The approach was that the Crown agent that was involved in that field was Newfoundland and Labrador Hydro and they would take the lead. And the PUB – explicitly at times and other times implicitly – acknowledged it.

So …

I did want to address that, 'cause I think it's important. I'm going to submit not so much what I think matters, but I'm going to submit that it is important that the context – social context in which this project grew out of is kept in mind, particularly in relation to the comments of others about hindsight bias.

THE COMMISSIONER: So, one might be able to ask you, Mr. Coffey, in –

MR. COFFEY: Sure.

THE COMMISSIONER: – view of that, assuming your views on this are correct, were there – was there any distinction between those projects that were exempted and the Muskrat Falls Project? Because I think there are, particularly with regards to the manner in which it was going to be paid for, the onus on the ratepayer.

MR. COFFEY: The manner – well, I haven't researched how Granite Canal was gonna be paid for – presumably it was gonna be put in – the capital cost would be put in the rates.

THE COMMISSIONER: It was.

MR. COFFEY: To go back to the December 2000 Labrador hydro project exemption – which did include a line to the Island – you know, that became public at the time. There was no –

THE COMMISSIONER: Let's cut to the chase.

MR. COFFEY: Yes.

THE COMMISSIONER: So, was there a $6 billion project?

MR. COFFEY: No.

Well I – frankly, I don't know whether – what the cost would have been in 2000. I do know – if I remember correctly, somewhere there is a reference – and I believe back in the '80s or '90s – to a $2 billion line to the Island from Labrador.

THE COMMISSIONER: I don't think it ever cost that much.

MR. COFFEY: But I believe – if I remember correctly, that was the – it was kind of a ballpark figure put out. But the point being, Commissioner, that – you know, I see the point you are making which is the $6 billion, it's a lot of money. At the same time, Commissioner, there is, you know, a position to be put forward that because it is a lot of money, that ultimately it's a matter of public policy and it should rest with the government. It's the government's choice.

THE COMMISSIONER: Oh, I take no issue with that and I – it's not just so much the amount of money, it's how the project was gonna be paid for and the impact on the ratepayer. And you are here, you heard the – I'm –

MR. COFFEY: Yes.

THE COMMISSIONER: – correct me if I'm wrong, I'm sorry, I can't recall exactly, but you were – I believe you were there when you heard Mr. Goulding's testimony with regards to this. You've heard the evidence of Mr. Vardy on this – on the issue – on this issue as well as the evidence of others, including Mr. Raphals. It seems to me there's a distinction – all I was asking this morning –

MR. COFFEY: Sure.

THE COMMISSIONER: – is it just seems to me that, yes, there is an exemption order in place. Assuming for a moment that 5.2(3) of the Electrical Power Control Act doesn't – isn't given the breath that it might be, it just surprises me that, you know, no consideration would be given to – saying, okay, well, this is a different beast and as a result, we're gonna approach this differently.

MR. COFFEY: Well, as it turned – as it –

THE COMMISSIONER: And – and because your clients – because your client is in the public service –

MR. COFFEY: Yeah.

THE COMMISSIONER: – and a senior public servant at the time, he had a long history in government you know, maybe some people might expect he would do that sort – make that sort of recommendation.

MR. COFFEY: Well, Commissioner, you know, it's interesting the timing of this because, you know, up to DG2, there's no suggestion that occurred to anyone, anywhere. And most of us are somewhat – you know, our frames of

reference are formed by where we are and where our strength is. So –

THE COMMISSIONER: DG2 is not that important –

MR. COFFEY: Okay.

THE COMMISSIONER: – because it's not –

MR. COFFEY: Now –

THE COMMISSIONER: – it wasn't sanctioned. But –

MR. COFFEY: – now DG3 and this – DG2, and this is – I'm coming around the year then into –

THE COMMISSIONER: Okay.

MR. COFFEY: – 2011 and Mr. Vardy and others were advocating that the PUB be involved. Interestingly enough, the PUB, of course, did get involved. And before June – in fact, in May – the PUB was involved.

So, you know, despite the fact that the PUB had not – that I'm aware of, no kind of experience, you know, dealing with the idea of, you know, $6 billion, a project that, you know, might run $5 billion or $6 billion. They had no prior experience in that. Experience in tens or hundreds of millions maybe, certainly tens of millions, but not billions.

THE COMMISSIONER: But they had –

MR. COFFEY: And yet, it was put to them.

THE COMMISSIONER: – but they had experience in the utility business –

MR. COFFEY: Yes.

THE COMMISSIONER: – and best practices, things of that nature and, you know, and – just like – I forget who it was that we just talked about now about EY being hired by, you know, by someone just – you know, they hired MHI. I mean it's not about what they could do, because I think they could do anything they wanted to do assuming they were given the time and the resources to do it.

Again, I just go back to the question of different beast.

MR. COFFEY: And my answer is, is that the PUB did get involved.

THE COMMISSIONER: Hmm.

MR. COFFEY: That was the government-of-the-day's choice. They had, as Mr. Fitzgerald has just pointed out, has taken pains to point out, they had the deputy minister of Finance, the minister of Finance, the deputy minister of Natural Resources and the minister of Natural Resources saying: Let's go to the EY/KPMG/whomever of the world to do a review. I think if I'm categorizing the evidence correctly, Miss – premier – then Premier Dunderdale decided we're going to go with the PUB. It was her view and her government agreed and a PUB review did unfold.

So that's – that is what happened. The – so I did want to address that.

Commissioner, in relation to this April – or MHI's DG3 review and the issue of risk, now, Commissioner, I have filed a very detailed – I would characterize it as chronological summary with, you know, commentary running throughout, including rhetorical questions in appendix – I think it's Appendix "A".

THE COMMISSIONER: Yeah.

MR. COFFEY: It deals at considerable length with what the context in which MHI had operated before the government got involved with MHI and what happened. It is interesting, Commissioner, to me, just as an observer, that when you look at the scope of work/scope of services that MHI signed with the PUB, I stand – again, I stand to be corrected, but I believe if you do a word search, you will find the word 'risk' does not occur in it. Yet, at DG2, for the PUB, MHI did a considerable amount of review of risk and their findings, in fact, where the word risk occurs or contingency occurs and so on, are reproduced in my written submissions to emphasize the point that MHI didn't have to be told to do this. It was implicit on what they were being asked to do in their role, for the PUB, and –

THE COMMISSIONER: So I –

MR. COFFEY: – they did it.

THE COMMISSIONER: – I kind of took this from your brief and I took an opportunity –

MR. COFFEY: Yes.

THE COMMISSIONER: – to go back and look at your client's testimony 'cause I – something just didn't ring right with me.

MR. COFFEY: Sure.

THE COMMISSIONER: So, I think what I'm reading in Appendix "A" is that even if it was not included in the scope of work, it was implicit that MHI should go ahead and –

MR. COFFEY: No, no, no, no.

THE COMMISSIONER: – or it should be inferred, because I just wanna remind you –

MR. COFFEY: Oh –

THE COMMISSIONER: – of your own client's testimony –

MR. COFFEY: – oh, yeah, Commissioner, I – I was not inferring that, it's just – it –

THE COMMISSIONER: Okay.

MR. COFFEY: – was just – I'm just making the point that it is an interesting observation that they did all that work for the PUB, involving risk, without it being spelled out in particular in the scope of services that they had with the PUB.

Now, what is also interesting, a rejoinder to that, would be – well, when they were making their February 2012 proposal, or drafting it for Ms. Greene, they saw fit to actually spell it out, which is paragraph 2, X.(i), and they did and it is there. And what happened, Commissioner, and that's there, you can see these exchanges of emails, drafts of scopes of work/scope of service, things are in, things are out, things are – you know, X.(i) is there, X.(i) becomes X.; there's a meeting in St. John's, I believe, April 17 and 18 of 2012 with MHI, governmental people and Nalcor's people, different meetings.

You know, finally then, in revision 6, which we have – X./X.(i) is gone, but the word 'risk' is still there, and you can – I've spelled it out in excruciating detail. And it's not until April 30 when Mr. Bown sends NRs – and I was careful the way I phrased that; I phrase it as NR's draft of April 30, because I'm not – although Mr. Bown emailed it, I'm not so sure who actually drafted it, because he had officials, he said, helping him with this, including Mr. Parsons. But the email that sends the April 30 NR draft to Mr. Wilson, is a response email, a reply email to Mr. Wilson's April 19 email sending revision 6 to Mr. Bown.

The point being, I'm going to suggest, that on April 19 the word "risk" – or when Mr. Bown got revision 6 – the word "risk" was still in there; paragraph X slash XI was gone, but risk was still there. And some time between then and April 30, the word "risk" got eradicated.

Commissioner, Mr. Bown – and he testified, it's referred to in my written brief, his testimony – he acknowledged that he has no actual memory of the April 6 meeting, in the way of, you know, what was said, who said what. He was relying on the fairly terse, I would suggest, cryptic notes that Jerome Kennedy had made. In my written submissions I've suggested that, you know, if such a blanket decision was made as the risk is gone – risk is not going to be dealt with – that was the decision on April 6, it's not going to be dealt with by MHI – then it would be apparent to anyone who understood risk in – risk analysis in – from an expert's perspective, that, well the tactical risk is gone, to use Westney's characterization of – or distinction – tactical risk is gone, therefore the contingency is gone.

Therefore, in effect, the capital cost estimate is gone. In other words, what are you asking us to do? And that's not what happened here. And, in fact, Mr. Learmonth, when he was asking – put it to Mr. Bown I believe at one point, that well, if risk was gone, well – yet they went ahead and did contingency, didn't you find that odd when you got the report? And Mr. Bown had no explanation.

And I'm not suggesting there was anything nefarious, at all, here went on. The written submission – I pointed out – is my submission – that, really, what happened here was you had experts at MHI who understood the distinction between tactical and strategic risk. Understood, you know, what might or might not be included. How things – something might bleed from tactical to strategic, or in the other direction. How some owners might want to include strategic risk in a capital cost estimate; other's might not. And that's all spelled out in the evidence of MHI's – the people who testified.

The point being, you know, Commissioner, in this regard, that was on one side, and on the other side you had Mr. Bown, who was the one who dealt with MHI directly, and Mr. Bown testified that risk was generic, risk was risk. He never understood, until the Inquiry, that there was a distinction between different types of categories of strategic and tactical.

No one pressed Mr. Bown on this, but – although, as I said, Mr. Learmonth did raise it with him – well, if you didn't think there was any risk analysis going to be done, well, how are they even going to examine the estimate, the contingency part of it? And, you know, the implication being that Mr. Bown really didn't understand the implications of, you know, a blanket removal of risk.

And despite his blanket removal, Commissioner, from the April 30 draft of the scope of work, and despite the word "risk" not existing in the, you know, May 22 finalized scope of work for MHI's DG3 review, yet, MHI as they testified and as Mr. Learmonth acknowledged – in putting questions – it was apparent that they had – did do an analysis of tactical risk.

So you had a situation where MHI understood we're going to do tactical risk because, of course, that's implicit in looking at a cost estimate that involves contingency. We've got to look at that. Strategic risk they understood, somehow, and presumably not from Mr. Bown, explicitly, because Mr. Bown has testified he didn't understand strategic risk as a term. In order to tell somebody to remove it, you'd have to understand – I'd have to say to you: Commissioner, remove the strategic risk. And I'd have to have some idea of what it was I was saying to you or what it was I was telling you. And there's no – Mr. Bown testified he didn't know it, he didn't understand it, that term.

So – and to be – here – and this is in my written brief – here it's perhaps understandable that MHI kind of accepted that. When you bear in mind that they were fully conversant with what had happened at DG2. They understood that Westney, at DG2, had, you know, had a – I think it was a $300 to $600 million kind of range for strategic risk but I stand to be corrected on that, I think that's my memory of it. And it had been, in effect, valued at zero, ultimately, for the purposes of the capital cost estimate by Nalcor at DG2.

So when you – if you put yourself in MHI's shoes, working for the PUB, and the PUB also knew that that had happened, the PUB – well, MHI figures, well, we're now at DG3, it was accepted it was zero and very often people assume that others have the same degree of knowledge that they do because it's second nature to them and they think everyone else thinks the same way. And it's apparent here that – I'm gonna suggest to you based on all the evidence – MHI fully understood what strategic risk was, and yet you have on the other side here, Mr. Bown saying: First I heard of it was when this whole process started.

So, isn't – the submission I've made to you is it's entirely possible, and for the reasons – and I, unless you wish me to, I'm not going to go through them in detail, there are intricate, detailed reasons there. What happened here was that, yes, April 1, Mr. Bown was understood that he was to retain MHI and that's exactly what happened. It was announced the next day, publicly. April 6, he attended a meeting where the message was: Let's get this done. Do what's required to get it done.

And as April unfolded, without the intricacies of, you know, whether this risk would be looked at or that would be looked at or whatever, as April went on then these different drafts were exchanged and they arrived at a position where the word risk did not occur in the scope of work for MHI's DG3 review. Yet, they did finally – MHI did do that – a tactical risk review. They didn't do the strategic risk, but then Mr. Thompson didn't know about the idea of

strategic risk. He didn't know what that was, he testified. As he put it, he thought all risk was included in contingency; that contingency encompassed risk.

And that's not an unreasonable view for, you know, an educated person, a worldly person but someone who does not work in that world. All you need do is look at what Mr. Huskilson of Emera told Mr. Learmonth when he interviewed him. He explained that, we don't use that phrase, strategic risk; we, as in Emera, we never use it. And he explained in detail as to how they categorize things and my understanding is, is what, you know, might be termed as strategic risk by Westney would be accounted for within contingency by Emera. And, again, it's there. It's in Mr. Huskilson's interview and in the subsequent written response he gave to the Commission.

People assumed – people were not in the world of tactical, strategic risk. The people who were not in Mr. Kean's world or Mr. Bennett's world, Mr. Martin's world, they could quite reasonably assume that while contingency is covering risk, that's what it is, that what it's – it's an amount of money to –

THE COMMISSIONER: So assuming that is a correct –

MR. COFFEY: Yes.

THE COMMISSIONER: – statement, let me go back to what we talked about first. And that is the government actually having somebody that actually knew something about the project who could advise them or alternative at least conduct an assessment independent of what Nalcor was providing.

MR. COFFEY: And to quote Mr. Fitzgerald, that's what the deputy minister of Finance and the deputy minister of Natural Resources got their ministers to sign off on. And if you look at the evidence – and I can't off the top of my head remember exactly who said it but one of those two of them, if not both of them – Mr. Bown or Mr. Paddon said that they did not think that that sort of a Decision/Direction Note would end up at Cab Sec without the clerk, who at the time was Robert Thompson, having encouraged it to come in, to come up with it. So –

THE COMMISSONER: I trying to recall that –

MR. COFFEY: The civil service's perspective was, look, let's hire EY, KPMG, you know, whomever. Let's hire somebody to take a second look at this. As Terry Paddon pointed out, it would've taken at least a week to put together that Direction/Decision note, or it could be put together in a week, that May 2011 one. And it was put forth and the decision-maker at the time decided no, we're going to go with the PUB now and here we are.

So – now that's not to say that, in fact, arguably we could've ended up here anyway. Because – and I'll just point this out in passing, Commissioner, and I believe I did with one of the witnesses; I think I took Mr. Kean through it. When you look at Westney's risk estimates, the only way to arrive at $10.2 billion is to look at all of the – all the graphs for each of the three components of the project separately for tactical risk, the extreme P98, P99 values on the right-hand side.

THE COMMISSONER: Or you adjust your base estimate.

MR. COFFEY: Well, that's a possibility too. But in terms of that, that is one – you know, the – based upon the base estimate that existed, that's the only way one ends up at $10.2 billion – or that's a way. And that involves an approach that Westney would not encourage, which is to look at them separately. In effect, whatever could go wrong did go wrong, in terms of – you know, as things unfolded, as the project got constructed, apparently.

So, Commissioner, one final point I want to address, because you have raised it, I believe, with Mr. Fitzgerald. You know, the idea of political, apolitical. Political, apolitical, at one point I asked somebody: What does the word partisan mean? And I got a response but, the point being, Commissioner, here this, that particularly senior civil servants, when you think about it, well they are the deputy minister to the minister. And they are tasked with carrying out the policy directives – policy decisions and – directives and decisions of their minister, and the government of which their minister is a part. Sometimes that involves public persuasion,

when you think about it. And in crafting a message for the public, one presumably is doing so on the basis of selling the policy objectives or, you know, policy choices positive features.

So that is, you know, that is the place in which DMs in particular – you know, and perhaps ADMs, but certainly DMs find themselves. It might be, as Mr. Fitzgerald pointed out to you, that a week or two later, you have a minister of a different political party. You're still the deputy minister; the policy direction might be the same or it might change. If it changes, well then it changes. And your job is to support that.

And a number of civil servants have come through here – public servants have come through here, and have told you that. And that it their role. It is as well to point out the potential pitfalls or weaknesses of a particular – you know, of an approach that, you know, that a government might want to take, but it's the pros and cons, and a decision is made. And then your job is to support their decision.

Now, Commissioner, Mr. Thompson did take you up on your invitation. Part – appendix C, I believe, talks about – or addresses the matter of duty to document. I'm going to just – in relation to that, give an example. You know, if there was a duty to document, depending on what – you know, how it's framed and how extensive it is – today many meetings involve, as many of these briefings did, involve slide decks.

You have a – well, just pick a deck. The Nalcor deck presented to Ms. Skinner in June of 2013, was I believe 80-odd – it's 80-odd slides – 82, 86 slides. If instead of just two civil servants there had been 10 there, everyone gets what I hand out. You have 12 people, not including anybody from Nalcor, looking at 80-odd pages. Some people are note takers; some are not.

If we want to know what everyone thought, one would have to collect them all afterward as well as have somebody in the room scribe what was being said. That would all somehow or another have to be – to have a true account of what happened or what was thought – would have to have copies of all that made and stored.

THE COMMISSIONER: Physical?

MR. COFFEY: Well, in today, it could be electronic, but it still has to be scanned and someone has to be responsible for the scribing and how accurate the scribing is, is another whole story in terms of, you know, that. You're gonna circulate the minutes and all that. And in these meetings I'm thinking about, it's just the logistics of it.

THE COMMISSIONER: All right.

Federal Cabinet though, according to Mr. Cappe –

MR. COFFEY: Yeah.

THE COMMISSIONER: – with regards to minutes of Cabinet meetings, whatever, for a couple reasons: one for the purposes of accountability but also for the purpose of historical value. You know, he instituted – as he testified, he instituted, you know, a better system of recording of minutes or recording of conversations of Cabinet meetings.

MR. COFFEY: I stand to be corrected, Commissioner, but I think he did it. He said in two or three instances, he made sure he did his own because he wanted a more thorough one, a more thorough record –

THE COMMISSIONER: Right.

MR. COFFEY: – for his own purposes. That was it.

THE COMMISSIONER: (Inaudible.)

MR. COFFEY: He did testify. In fact, I asked him specifically about it, and he said, well, I don't know if the meeting is recorded. Because he says there's some kind of simultaneous translation going on, so that may or may not be recording. But he said – but generally for the purposes of recording, like recordings as in to play back, no. He said that – they're not done for that purpose.

THE COMMISSIONER: No, this was in response to my questions to him at the end. But anyway, I'll review that.

MR. COFFEY: So, I mean, that's not to say, Commissioner, that the idea of looking at this,

and you suggesting that it be looked at, is – obviously in British Columbia it's thought to – it's reached the stage of at least some kind of a legislative form. But the idea of someone looking at this in a serious way, and perhaps determining such a thing as, well, duty to document certain types of things, certain types of decisions.

That might very well be useful from a public interest perspective here because, you know, one would know that at – or at least there would be some guidance. Because, as it is now, there are some things, yes, it's apparent you have to record them, but a lot of the rest of it is left to the proclivity or the habits of the individual. And that works fine as long as you're not called upon years later to account for something in terms of what you did or didn't do.

Mr. FitzGerald, Commissioner, did refer to black books; it hasn't played as large a role in this, but I believe that of course some excerpts from Mr. Thompson's black books are exhibited, some of the ones relating to this project, and Mr. Learmonth is aware of this. I believe it may have come out during Mr. Thompson's evidence, but if it didn't in any case it is known to Commission counsel that those black books were ones which when Mr. Thompson was given standing, of course, he produced them, 'cause he actually had them in his possession.

There were some black books, though, that from a certain point in time – they only went up to a certain point in time – and from that point to the time he retired – he did not have the black books in-between – and he had left those at the Confederation Building, and presumably they went wherever Ms. Mullaley's and Mr. Bown's went, or somewhere like that.

But I thought in the interest of, kind of, completeness here, I would raise that; I wasn't certain whether or not you as Commissioner were aware of it, and I couldn't recall off the top of my head if it came up during Mr. Learmonth's examination.

So, Commissioner, unless you have some other questions, I'm done.

Thank you.

THE COMMISSIONER: Thank you very much.

We'll take our break here now, and then we'll come back for the Consumer Advocate.

CLERK: All rise.

Recess

CLERK: All rise.

Please be seated.

THE COMMISSIONER: All right.

The Consumer Advocate, Mr. Hogan.

MR. HOGAN: Thank you, Commissioner.

John Hogan for the Consumer Advocate.

Mr. Commissioner, you've obviously seen our written submissions and you probably noted – despite your request – there was no recommendations in our written submissions, but we did take the time to prepare them over the last few days, and we'd like to make some recommendations now, before we get into – before I get into – a review of the written submissions.

First of all – number 1 – we note there was never a fulsome and thorough independent analysis of the Muskrat Falls Project costs, or to what extent the province could afford any overruns and, if so, how much those overruns could be afforded.

The Consumer Advocate recommends the Government of Newfoundland and Labrador consider creating a legislative budget office that monitors and reviews spending. This would be similar to the Parliamentary Budget Officer at the federal government level, whose mandate is to provide independent analysis on the state of the nation's finances, the government's estimates and trends in the Canadian economy and, upon request, estimates the costs of any proposal under Parliament's jurisdiction.

We note that this would be an additional layer of scrutiny for any utility projects and capital cost reviews that would be undertaken by the Public Utilities Board.

Second, the Muskrat Falls Project was sanctioned following a private Member's motion in the House of Assembly, thereby limiting open and public debate on the issue. The Consumer Advocate recommends that Crown corporations appear before the legislature to answer any questions prior to approval of large expenditures up to a certain threshold, and that all approvals, estimates, issues surrounding water resources, Indigenous concerns and any outstanding preconditions be obtained prior to the legislature considering any such expenditure.

Number three: Ole Jonny Klakegg provided the Commission with evidence that for the purpose of external quality assurances, models exist throughout the world, such as a team of two to three project experts who are independent from the project are used to review a project prior to sanction. The Consumer Advocate recommends that this practice should be adopted in this province, with specific reference to, when there is a proposed utility project, the independent reviewer should have no affiliation with other utilities who are engaged in similar projects elsewhere.

Number four: During the public debate at sanction, Nalcor was actively engaging in debate to support and justify the Muskrat Falls Project. The Consumer Advocate recommends that Crown corporations be prohibited from engaging in public debate or advocating for approval of their project. Members of a Crown corporation should be permitted to explain and answer questions related to a project, but there is no need for promotion by a Crown corporation to sway public opinion.

Number five: As noted by the Commissioner on Monday, 2041 is approaching, and there is concern regarding next steps in this process. Therefore, a plan needs to be developed now regarding 2041 negotiations with Hydro-Québec. The Consumer Advocate recommends that a panel, chosen by the Independent Appointments Commission, be established consisting of the necessary expertise from areas such as engineering, finance and the law to prepare for 2041 and to make recommendations to the government as to how to go forward, which may include the panel having discussions directly with Hydro-Québec.

Number six: The Consumer Advocate recommends that consumer representation be on the board of both Nalcor and Hydro, whose representation should be chosen through the Independent Appointments Commission.

And number six: The Consumer Advocate recommends the implementation of integrated resource planning coordinated through the PUB in the event this still may be useful in the future.

Commissioner, I'll now turn to a summary of our written –

THE COMMISSIONER: So, if you – can I –

MR. HOGAN: Yes.

THE COMMISSIONER: Could I ask you to, seeing that this is coming late, could I – this is one thing that I would like to get in writing from you. So it doesn't have to be anything more than what you just said to me, but I would like those presented so that I fully understand exactly what it is you're recommending.

MR. HOGAN: So I can provide those in written form?

THE COMMISSIONER: Yeah.

MR. HOGAN: That's – yes, no problem, Commissioner.

So I'll now turn to the Consumer Advocate's written submissions.

Mr. Commissioner, I noted, just before I start, my co-counsel, Chris Peddigrew, will be covering approximately half of the written submissions. So I'll be covering pages 1 to, approximately, 60. So when I'm done, if you have any questions on those pages, perhaps, before I sit down, you can ask me, and then Mr. Peddigrew can come up to finish the presentation.

Mr. Commissioner, the evidence put forward at the Inquiry demonstrates that decisions regarding the assumptions and forecasts were skewed to benefit Nalcor's choice to proceed with the Interconnected Option. Nalcor unnecessarily and unreasonably framed the decision as an either/or choice between two

specific predetermined options, and the use of the period 2011 to 2067 to determine the cost of power was inappropriate.

Taking the evidence in totality demonstrates a concerted effort to favour the Interconnected Option over all other options, including specifically the Isolated Island Option. We had set out a number of examples in the written submissions, but I want to comment on a few of the following here today.

Load forecasting was left to one person and was done over a period of 56 years, which was described by many witnesses as useless and inappropriate. These witnesses include Peter Alteen, Maureen Greene, Stan Marshall and Philip Raphals. There was a failure on the part of Nalcor to conduct load sensitivities at DG3. The MHI report at DG2 states that best utility practices for load forecasting was not followed.

As noted by Ms. Best earlier today, there were two questions asked in relation to the Muskrat Falls Project, one being, do we need the power? One would have thought a more robust analysis on load forecasting would have been conducted given that one of the questions was do we need the power.

We'll make a quick reference to why proper forecasting is necessary. There's a Natural Resources Canada report that has been filed that shows, even with one change – that being demand growth remaining flat – the CPW of the Isolated Option becomes $800 million less than the Interconnected Island alternative.

We note there was a failure on the part of Nalcor in not obtaining independent experts to conduct elasticity studies to determine the effect price increases would have on demand. Nalcor was overly optimistic and failed to consider what would happen if its internal assumptions did not hold true. Given that the ratepayer was paying for the entire cost of the project regardless of the size of any cost overruns, there should have been an analysis conducted to determine the effect cost overruns would have on the system.

The evidence is that when the cost becomes too much, people find alternatives, thereby making it more expensive for the remaining customers who do not abandon the electric heat system. These remaining customers may then also leave the system because of continuing increases, creating what we've heard is called a death spiral.

An input in forecast which Nalcor failed to consider was conservation and demand management. It has been referred to at this Inquiry as a much more cost-effective resource than any source of generation. But we heard evidence that Newfoundland and Labrador Hydro has chosen to exclude consideration of CDM savings as a resource in its 50-year power plan and that no other utility in North America has so blatantly disregarded CDM as a resource.

The evidence is that using an appropriate level of CDM would've resulted in the load forecast causing a reduction in the CPW value for the Isolated Island Option. Even a moderate CDM program would've changed the CPW by $447 million; an aggressive program would've had an $875-million effect.

We've heard evidence that quite simply showed megaprojects do not stay on budget and can, in fact, double. This was never communicated to the public and never built in to the CPW analysis. This failure alone shows that the Isolated Option was preferable.

Normand Béchard, George Jergeas and Bent Flyvbjerg all testified to this fact. In fact, George Jergeas testified he would've announced the cost publicly of the Muskrat Falls Project as between $9.3 and $12.4 billion. Simply put, Nalcor and the government failed to conduct any basic research into megaproject cost overruns.

We've also heard evidence about P-factors, and there were recommendations that a P-factor other than P50 be used. This was discussed yesterday. And the difference between a P50 and a P75 is $900 million. We heard that Westney suggested a P75; Mr. Mallam suggested a P90, and we know that Normand Béchard of SNC, who managed the Eastmain project, which came in on schedule and under budget, used a P85.

We also note that Pelino Colaiacovo testified that P-factors generally only apply to megaprojects and, therefore, would not be applied to the Isolated Island Option. As a result, the use of a higher P-factor, such as P75, would

have significantly altered the gap between the two options.

For the Isolated Island Option, fuel costs, as we know, represented a significant portion of the total cost: $6.7 billion of the $10.7-billion total was allocated for fuel. It was not reasonable or objective to use a long-term forecast, which was unique to Nalcor and the Muskrat Falls Project.

PIRA did not actually provide a forecast for the price of oil beyond the 20-year period. In fact, MHI stated at the Commission that no one would do this. What was done was, for subsequent years beyond 20 per cent, was an escalation by 2 per cent for each year.

Sensitivity of this can be demonstrated as follows: In the event there's no increase in the price of oil after 2030, it's an $857-million effect in the CPW analysis in favour of the Isolated Island Option. Even with just a low price of oil forecast the gap in the CPW closes by almost $600 million.

This is also a good time to note that there was not enough sensitivity analysis done. Mr. Colaiacovo testified that when he reviewed the information he found that 12 sensitivity analysis were conducted, where in his opinion there should have been 281. This is just 4 per cent of what Mr. Colaiacovo believed was appropriate and which is why he said the dataset was grossly incomplete.

We also like to refer to the fact that there were discussions and promises on the closure of Holyrood. The public was told once the Interconnected Option was constructed and operating, Holyrood would be decommissioned; however, the Commission heard evidence that the plan was in fact to keep it warm and that maybe it would close in 2020. It is now 2019 and Holyrood has not been retired and there is no active plan put into evidence to show there is a plan to retire it. And, as we know, PUB authorization is required to retire Holyrood and Nalcor never had and does not have any jurisdiction over any decision regarding the closure of Holyrood.

Nalcor knew with certainty that Muskrat Falls would not be operational in the time frame communicated to the public and therefore the cost of continuing to operate Holyrood beyond the target dates of first power should have been included in the Interconnected Option CPW.

Mr. Commissioner, these are just some quick comments which are outlined in further detail in a written submission. Given all the questions raised when looking at these forecasts there is reason to doubt the accuracy of the CPW for the Interconnected Option at the time of sanction. This is not hindsight.

In terms of favouring the Interconnected Option, several quick adjustments can close the gap fairly quickly, as I've outlined already here today. This doesn't take into account the failure to include a number for management reserve, the fact aggressive tactical risk was used and the fact that there was a $300-million capital cost increase at financial close. Any number of combinations of these adjustments could have resulted in the Isolated Option CPW being the preferable of the two. It's math that could have been done in 2012. It is not hindsight.

We also outlined in our written submissions that certain options were not reasonably explored, most notably natural gas and the deferred 2041 option. Other than the failure to fully analyze natural gas, the most troubling part is that a section of the Wood Mackenzie report was removed, which stated: "Wood Mackenzie believes that a gas-to-oil price arrangement in the range of 70% would be more reflective of these evolving market conditions." Whereas Ziff used 80 per cent; using 70 per cent would have resulted in a CPW value that was lower than the Isolated Island Option, thereby creating a whole new analysis for the least-cost option.

Commissioner, I agree with your statement yesterday regarding the Terms of Reference and whether the determination of the time period, 2011 to 2067, was reasonable and not whether just the analysis should be done within that time period. Mr. Alteen noted "those aren't the only two options that exist in the planning world that might be the lowest cost consistent with reliable service." The use of this period to determine least cost or lowest possible cost was subjective and random, except that it was tied to the purported life of a hydroelectric dam.

We submit what happened was the Energy Plan outlined a plan to develop the Lower Churchill. When Gull Island was not feasible, the plan and goal to do a project on the Lower Churchill remained, but the plan quickly turned to a domestic project. This was the only option. It was project first; justification second.

We've heard that people need to compare apples to apples, but nowhere is there a mandate that one of the apples has to be Muskrat Falls, and that is the flaw. The apple could have been a 10-year project or a 20-year project, et cetera, et cetera. The false choice was created with the least-cost option and not the lowest possible cost.

This also goes to the issue of hindsight. It was raised that we cannot look at decisions now because we know certain things have transpired. But we did know, and it was acknowledged by counsel yesterday, that if there are projections, they are invariably going to change. And that is why utilities are built to need in a shorter term so there is no overbuilding. So even without hindsight, the error was the long-term choice.

Ratepayers are now forced to pay for the cost of constructing a hydroelectric dam that will provide 824 megawatts of power; however, ratepayers only needed perhaps 40 per cent – if that. As a result, the ratepayer is paying for a significant block of power that the ratepayer does not need. This is not how utilities are supposed to work. Furthermore, the EPCA has been conflated with other government policies, but there is only one legislative mandated policy – that is the EPCA, which would trump the Energy Plan and the goal of an energy warehouse.

Mr. Commissioner, I'd also like to speak briefly about Astaldi, which was the largest overrun.

There were issues with the Astaldi bid from the start. It was $250 million above the estimates and was significantly lower than two other bids. The disparity among their bidders was described as a red flag and an outlier, yet it was missed or ignored by Nalcor. It should have been obvious from a cursory review of the Astaldi bid that it was not achievable due to the variances with the other bids and the DG3 estimates.

The Integrated Cover system, which was a large part of the reason for the overruns, was never thoroughly planned or studied, and led to massive schedule delays and cost overruns. It may have been an innovative idea, but it was risky, especially given its size. Numerous witnesses testified it was a bad idea. The ICS failed.

Astaldi came to the site on a Limited Notice to Proceed, but according to – or sorry, according to Nalcor project management team witnesses, they accomplished nothing during this period. They did not accomplish the LNTP deliverables, including the design of the ICS, yet Nalcor proceeded to enter into a contract with Astaldi anyways.

Mr. Harrington's evidence was he did not want to give up on an entity like Astaldi too soon. However, we note, this is in stark contrast to the way Nalcor treated SNC, which they were quite ready to give up on. This is because Nalcor wanted an integrated team from the start, and Nalcor eventually got its way.

Nalcor did not have the hydro experience to do this project, and it is baffling why they pushed so hard for the go-it-alone approach, and why they did so without the necessary hydroelectric experience. The team assembled to undertake the Muskrat Falls Project were from the oil and gas sector. This was not where the recruiting should've taken place. SNC had a proven track record of constructing hydroelectric dams, including ones very similar to Muskrat Falls.

It was a fatal error to remove SNC as the EPCM contractor. The experience of the Nalcor project management team paled in comparison to what SNC, as the EPCM contractor, had to offer.

Mr. Commissioner, those are the submissions on the first half of our report.

THE COMMISSIONER: Okay.

All right, Mr. Peddigrew.

MR. PEDDIGREW: Thank you, Commissioner.

Commissioner, I'm gonna speak first to – and just briefly, about the risk assessment and

communication of risk at Decision Gate 2 and then move on to the same topic for Decision Gate 3, sanction, also the same issues leading up to financial close and then with some concluding remarks.

So, in respect of Decision Gate 2, and all this is outlined in more detail in our written submission, but during the negotiations that led to the term sheet with Emera, Nalcor executive – and this is – this came from the project management team in terms of exhibits that came through the Inquiry, but Nalcor executive made a decision to – conscious decision to drop strategic risk allowance that was recommended in the DG2 QRA, stating it was required to respond to Emera's concern regarding its ability to sell the strategic risk concept to the UARB in Nova Scotia.

The evidence is that Nalcor was motivated to lower the cost of power for the Nova Scotia Block A in order to get the Maritime Link approved by the UARB, and did this by lowering the cost by removing 6 per cent strategic risk altogether and by selecting a P50 instead of a P75 for the purposes of cost estimates.

As part of its submission to the PUB for the reference question – and I'm going to address the PUB process as well – Nalcor communicated to the PUB, for various reasons, that it was not appropriate to create a positive or negative risk reserve at DG2, despite evidence that strategic risks still did exist.

The PMT's evidence was that this step signified a significant shift in risk appetite, and from this point forward allowance for strategic risk was not carried in capital cost inputs. Nalcor proceeded, from what we've heard, on the basis that any strategic risks, should they arise, would be paid for by contingent equity from the province.

Commissioner, moving on to some of the issues with risk assessment and communication of that at DG3. By DG3, based, again, on a P50 valuation, approximately $500 million in strategic risk still existed, but it was not included in the DG3 cost estimate, nor was it included in the CPW calculation.

The Independent Project Review team had recommended that a management reserve and a schedule reserve be included in the sanction costs and schedule, but neither the board nor government was told about this. So, the advice from IPR, in this respect, was not followed.

Also, for DG3, $6.2 billion became the cost estimate, but the estimate did not include, as we said, any amount for strategic risk. It was aggressive insofar as there was no amount for strategic risk included, even though there were still three big risks at the time; those being time risk, performance risk and labour risk, and labour risk has been further broken down into productivity and availability of labour, as well as, you know, there were – we've heard references to 30-odd, 40-odd, other strategic risks that still existed at the time of DG3.

Communicating its cost estimate, Nalcor referred frequently – and this is outlined in more detail in our submission –but to a report from John Hollmann of Validation Estimating to bolster the strength of the $6.2 billion estimate, but Nalcor failed to point out the limitations of that review, I guess, firstly, in that it was not quantitative. It was a qualitative review. It was a draft review, and especially in relation to risk where Mr. Hollmann commented that there were weaknesses in relation to the risk analysis.

These limitations and weaknesses that were identified by Mr. Hollmann were not pointed out to government, to the board, to the federal government, and so to the extent that Mr. Hollmann's statements were portrayed as a full endorsement of Nalcor's $6.2 billion estimate, the Consumer Advocate submits that it was misleading.

So not only, Commissioner, did Nalcor not include any amount for strategic risk at DG3, it proceeded to use tactical risk of 300 – or proceeded with a tactical risk estimate of $368 million, which is about 7 per cent of the 6.2 billion estimate. Several experts and several individuals who gave evidence throughout the Inquiry testified that this was much too low.

We've heard evidence – or submissions today from a number of the parties about the 500 million strategic risk and whether it was reviewed by MHI. We know that it was not

reviewed. Again, that's the way MHI's report was portrayed. Certainly, the absence of a review of that amount of money is material. So politicians, civil servants testified to being unaware of that removal, and that would include Robert Thompson, Tom Marshall and Jerome Kennedy.

We did hear, as well, the argument – the red-meat argument, so the reason that the 500 million may not be identified and put out there is that it would be attractive to contractors and may try to drive up the price. That argument, the Consumer Advocate would submit, is irrational insofar as – the red meat, in this case, would be the fact that no matter what the cost, the ratepayers had to pay for it, and government had signed a completion guarantee and was required to put in contingent equity. So there was no, sort of, limit placed on this that contractors would be aware of.

So Nalcor proceeded through DG3 with the $6.2 billion cost, also knowing that there was a very low probability, almost zero, that they would achieve schedule. Again, this was not communicated to the board, to government or to the public.

Cumulatively, Commissioner, this shows that Nalcor took an aggressive approach to cost and schedule risk both in terms of what risks were included and also in terms of quantifying those risks. Nalcor failed to set aside sufficient contingency to fund these risks that were bound to occur and failed to fully inform government, the board and even its own advisors as well as government advisors and, ultimately again, the public.

The public, who would've thought the 6.2 was a realistic estimate, when, based on what I've spoken about for the last few moments, it was not. Nalcor's approach in this regard was at best evidence of optimism bias. That, Mr. Flyvbjerg – or Professor Flyvbjerg spoke to in evidence in this Inquiry. But, similar to what was put forward by Mr. Budden on behalf of the Concerned Citizens, it's also plausible, based on the totality of the evidence, that it wasn't just optimism bias, but it was a motivated attempt to keep the costs of Muskrat Falls low to ensure it was the approved project.

Moving on, Commissioner, to some comments about the federal loan guarantee, the various project agreements between Nalcor and Emera and the impacts of those agreements on ratepayers. And we would direct your attention, obviously, to the Tom Brockway papers, which go into great detail about those agreements and provide a lot of commentary on the impacts on ratepayers.

So, as we know, there was legislation passed, of course, making ratepayers responsible for the full cost and that was required in order to get the federal loan guarantee. And the Consumer Advocate submits, Commissioner, it was completely irresponsible of government to pass such legislation when there was: no limit placed on the cost of the project; no quantification of a worst case scenario by government; and, thus, no limit or quantification of the amount of exposure for ratepayers; and, making ratepayers responsible by legislation in order to pursue a project that was not necessary to meet the power needs of those ratepayers, which is unacceptable and unfair.

Mr. Martin said in evidence, back in December, in response to questioning about a budget, he said, when you say budget to me, I hear fund – the ability to fund. And he says – in Nalcor's case, we had to look at that in conjunction with the government, because they were the ones who would be providing contingent equity, and so from that perspective, yes, we did budget for it by establishing an agreement with government that they would fund additional equity to cover things that were unforeseen.

And so, again, Commissioner, this is evidence that Nalcor processed from a point of view that government would provide the contingent equity, if necessary. But, again, it was not quantified. And going back to the evidence of Mel Cappe, who testified in Phase 3 – Mel Cappe stressed the importance of quantifying these risks when government steps in and assumes risk that a Crown corporation either may not be willing to take on or is not taking on.

Some discussion or some comments on the involvement of the PUB and PUB oversight: and so, again, the Consumer Advocate submits that the PUB would certainly be a subject-matter

expert that would have brought independent oversight to this process.

The reference question that was put to the PUB was an either-or question. The PUB wasn't given a broad mandate to consider all possible options. And even with respect to that either-or option that was put to the PUB, the six month time frame given to the PUB was unrealistic and the PUB's ability to answer that question was further hindered by both government and Nalcor. In terms of Nalcor, it was slow providing documentation. We've heard evidence of that. And with respect to government extensions, reasonable extensions by the PUB were refused.

Had government granted – and I go back to some of the comments about hindsight and, you know, it's – we can't look at this with hindsight. But if we had the ability to go back in time and let the PUB do a more fulsome review, it's very likely that some of the information that's come out about this at this Inquiry about risk – some explanation about strategic risk, tactical risk, what might have been removed – all these types of things may have come out had the Consumer Advocate, Newfoundland Power intervenors been given a full opportunity to contribute at a PUB hearing. A technical conference did not happen. So some of these things that have come out in the Inquiry may have come out had the PUB been given an opportunity to do a full review.

And Commissioner, just a comment about – the PUB is a quasi-judicial regulatory body with subject-matter expertise. And once it determined that it did not have enough information to answer the reference question, it was heavily criticized by government and Nalcor, which the Consumer Advocate submits is entirely unacceptable.

We draw your attention, Commissioner, to the evidence of Guy Holburn and A. J. Goulding as well, but especially Mr. Holburn, who goes into detail in his paper about the value that a more fulsome PUB process could have brought to the process back in 2011, 2012.

THE COMMISSIONER: Can I just stop you there. It hasn't been raised as yet by any of the parties, but there is evidence that after the PUB made its decision, there was some concern, as a result of some activity by the chairperson of the board, with regard to, perhaps, a bias or a perception of bias on his part.

Is that – would that be an appropriate basis, at least, to – may not as – maybe not as strongly as government did, but also to question the decision of the board?

MR. PEDDIGREW: Right.

As well – I guess you're talking about the comments of Mr. Wells, who, it has been suggested, was a – maybe already had his mind made up about the Muskrat Falls Project. I would like to think that, you know, despite his, you know, personal views on that, that he would have been able to approach it from an objective standpoint. I mean, he's mandated to fulfill that role as chair of the PUB and the process – a full PUB process would bring in experts who would talk extensively about evidence, technical components, risk. So things – I don't think it would have been decided yes or no just based on what may or may not have been Mr. Wells's preconceived notions about the project.

THE COMMISSIONER: Okay.

MR. PEDDIGREW: There has been a lot of discussion – and what I've said already does touch on the issue of government oversight, Commissioner – but some things I'd like to point out that I haven't addressed already.

There has been evidence about how the need for oversight was identified back as far as 2012, perhaps before, but no oversight committee was established until 2014. And even then, it lacked the independence and the required expertise and it also encountered difficulty getting co-operation from Nalcor.

What we've seen, as well, is an absence of formal reporting requirements as between Nalcor and government. Updates from Mr. Martin were generally given informally, often verbally, in person using PowerPoint presentations, as opposed to formal mechanisms in place in order to ensure government was provided with accurate and up-to-date cost and schedule information.

The Consumer Advocate submits that not only was Nalcor less than forthright in terms of what it shared with government, but government failed to put appropriate oversight in place and failed to put mechanisms in place to ensure that it was fully informed.

And so I think the evidence – the confusion surrounding this $300 million at financial close is evidence of – or an example of – how formal reporting mechanisms would have avoided the type of confusion we're dealing with today about who knew what and when about the $300 million at financial close.

In the lead up to financial close, we know that there were FFCs, final forecast costs, from the project management team going back as far as mid-2013 that were referring to a $7 billion cost estimate and that following financial close – financial close would go down to 6.5 – and then following financial close, the cost estimates fairly quickly go back up to the $7 billion range.

We're also aware that Nalcor was aware as early as April 2013 that bids had come in $600 million above cost estimates and that the $368 million in tactical contingency was essentially exhausted. Again, this was never communicated by Nalcor.

And just going back to the issue of financial close – and, Commissioner, you've raised it, and I would like to just bring attention to it again. With so much riding on the decision that was made at financial close, the lack of information or the information that was held back by Nalcor at that time is simply not acceptable, nor is the absence of a formal reporting mechanism by government at that time to ensure that before it went ahead and passed through financial close, that it had absolutely every piece of information it needed to make a decision.

Throughout 2014 and 2015, again, we see trending increasing costs and, I guess, continued holding back or slowness in terms of reporting those cost increases. Things did improve in 2016 with the implementation of stronger oversight, the retention of Ernst & Young.

So, Commissioner, those are the main submissions, but briefly, just in conclusion, the decision to sanction and ultimately proceed with Muskrat Falls Project should not have occurred from the Consumer Advocate's standpoint. Risk was not properly identified or quantified, nor was the schedule ever truly achievable. In terms of information-sharing, Nalcor held back, and government was not sufficiently proactive.

"… while the 2007 Energy Plan discussed developing the Lower Churchill, it did so on the basis that it would be part of an 'energy warehouse.'" And the idea was the power would be exported. "However, Muskrat Falls was sold to the public as a domestic-needs project." And "These two things are not the same. Development of natural resources for economic reasons," such as creating jobs or driving the economy, "while valid objectives," they "are policy decisions that should be analyzed separately from the type of analysis required to determine if the development of a natural resource is necessary to meet the requirement to provide power to the ratepayers at the lowest possible cost consistent with reliable service." And government conflated these two issues.

Finally, Commissioner, we heard some discussion in the evidence and this morning about becoming masters of our own domain by developing the Lower Churchill and not having – being beholden to the Province of Quebec. Unfortunately, now, as a consequence of the go-it-alone approach for the Muskrat Falls Project, we seem to be beholden to the banks, the financial institutions and the rating agencies. And the Consumer Advocate is not happy to make this submission, but essentially this is why this Commission of Inquiry was necessary.

And those are the end of our submissions unless the Commissioner has any questions.

THE COMMISSIONER: I just have one.

I was – one of the briefs this morning – it was either Ms. Best's or Mr. Williams's, and, Mr. Williams, you might be able to help me with this. It may not be yours; I think it's Ms. Best's – made a reference to the fact that the Consumer Advocate's arguments in this particular case and many of its questions at the hearings were hindsight based because the Consumer Advocate in place at the time that the project was sanctioned actually expressed support for the sanction.

I don't think that's – is that in Ms. Best's or is that yours, Mr. Williams?

MR. T. WILLIAMS: (Inaudible) trouble hearing you, Commissioner.

THE COMMISSIONER: Oh, I'm sorry, there's – in – I'm pretty sure it's Ms. Best and it's not yours, but I just want to confirm it.

There was a reference to the fact that at this point in time, the consumer – the present Consumer Advocate is hindsight biased in the sense that the previous Consumer Advocate had supported the Muskrat Falls Project. I don't think that's in your brief; I believe it's in –

MR. T. WILLIAMS: (Inaudible.)

THE COMMISSIONER: Okay, so it's in Ms. Best's brief.

MR. PEDDIGREW: Okay.

THE COMMISSIONER: I'm not sure if you saw that or not.

MR. PEDDIGREW: I was aware of it, yes.

THE COMMISSIONER: Okay.

MR. PEDDIGREW: So, Commissioner –

THE COMMISSIONER: Did you want to respond to that?

MR. PEDDIGREW: Yes, sure.

In response to that, I mean, I don't believe it's hindsight bias. I think the position of the Consumer Advocate is, had we done types of things that were being called for back in the pre-sanction, pre-financial close, even back as far as Decision Gate 2, perhaps earlier, had we taken some of the steps that were out there, that people were advocating for in terms of full PUB review, that we would not be here today. I don't think that's hindsight. We're saying that's – it was foresight back then for these people to see that this type of process was necessary.

I also point out that Mr. Johnson, who was the Consumer Advocate at the time, did request additional time or did indicate to Minister Kennedy that he agreed with the necessity for an extension that the PUB had requested. And so despite the Consumer Advocate's support for that request by the PUB, it was still not granted by the minister.

THE COMMISSIONER: Okay.

All right, thank you very much.

MR. PEDDIGREW: Okay, thank you. Just a last comment, Commissioner, before we go (inaudible). Again, as everyone else has done, thank you to the Commission; yourself, Commissioner; the Commission staff; sheriff's officers; and certainly the technical people.

So it was a lot of information and – but we had really good access, and any time we had a question, it was responded to very quickly. And it was a tough haul, but I think it was made a lot easier by the Commission staff, so thank you.

THE COMMISSIONER: Thank you.

All right, so that ends today's proceedings, right on time.

Tomorrow, my plan is to proceed with the Innu Nation, NunatuKavut, le Conseil des Innus d'Ekuanitshit and the Grand Riverkeeper and Astaldi, if we get to Astaldi. So those that are here know that, and you can prepare. And then Thursday morning, I suspect we'll deal with the remaining people at that stage.

So, with that, we'll conclude and we'll start again tomorrow morning at 9:30.

CLERK: All rise.

This Commission of Inquiry is now concluded for the day.