COMMISSION OF INQUIRY
RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Summations Volume 3

Commissioner: Honourable Justice Richard LeBlanc

Wednesday 14 August 2019

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

The Honourable Justice Richard LeBlanc presiding as Commissioner.

Please be seated.

THE COMMISSIONER: All right, good morning.

So today we're going to proceed with the Innu Nation, NunatuKavut Community Council, the Conseil des Innus d'Ekuanitshit and the Grand Riverkeeper.

I'm also – I'm not sure if Mr. Burgess is here – so you are. So we may well get to you today as well.

All right. So we'll call upon the Innu Nation.

MS. BROWN: Good morning, Commissioner.

THE COMMISSIONER: Good morning.

MS. BROWN: My submissions today on behalf of Innu Nation will focus on three topics: consultation with Indigenous groups, Labrador Innu participation in the project pursuant to Innu Nation's IBA with Nalcor –

THE COMMISSIONER: Okay, can I just stop you there just for a second. I'm having difficulty hearing you. I think we're going to need to up the volume somewhere, so if the –

MS. BROWN: I can also –

THE COMMISSIONER: I'm not sure if it has –

MS. BROWN: I'll speak louder.

THE COMMISSIONER: I'm not sure if it has to be done up there or down here. Down – back here?

Okay, so if the people in the back of me can just up the volume a bit, it would – I'd appreciate it. Thank you.

Go ahead, then, Ms. Brown –

MS. BROWN: Thank you, Commissioner.

THE COMMISSIONER: – sorry.

MS. BROWN: Thank you.

Our third topic will be the environmental assessment work done respecting to the project.

My submissions today will build on our written submissions and will also make reply to the submissions of some of the other parties.

Before addressing those three issues, and by way of overview, I'll speak to Innu Nation's involvement with the Muskrat Falls Project to date. Innu Nation represents the Innu of Labrador who belong to two separate communities: the Mushuau Innu First Nation, who now live primarily in Natuashish; and the Sheshatshiu Innu First Nation, who now live primarily in Sheshatshiu.

The Commission has heard evidence of the Labrador Innu's long-standing occupation and use of the lands where the project has been constructed from time out of mind. Innu Nation is in the process of negotiating a comprehensive land claims agreement with the Crown, and both the federal and provincial governments have recognized the Innu Nation's land claim, which includes the project area.

The last hydroelectric project development to take place on Innu land did not recognize the Innu's claim to the land. As the Commission has heard, the Churchill Falls Project was developed without consultation with or the consent of the Innu of Labrador. This lack of consultation had devastating consequences for Innu whose lives were intertwined with Churchill Falls and what's become the Smallwood Reservoir.

Because of this history and because of the impacts that Muskrat Falls, this new hydroelectric project, has had and will continue to have on Innu land, Innu Nation has ensured that it is at the table and has a voice in the development of the Muskrat Falls Project.

This has involved actively participating in the project's environmental assessment process as well as negotiating an Impacts and Benefits Agreement with Nalcor, and a redacted version

of the IBA is in evidence. The agreement covers many areas impacted by the project's development and outlines commitments and accommodation measures to avoid, mitigate or compensate for those impacts. As you have heard, Commissioner, the implementation of the IBA hasn't been perfect, but Innu Nation continues to work with Nalcor and the province to address the project's impacts on Innu land.

Turning now to the first issue my submissions will deal with, consultation with Indigenous groups, Commissioner, you have interpreted the Terms of Reference for this Inquiry as including a mandate to consider the consultation that has taken place between Indigenous people and Nalcor as well as the Government of Newfoundland and Labrador and how concerns raised in the course of consultation have been addressed. You have also interpreted this Inquiry's mandate as excluding any determinations of asserted Aboriginal or treaty rights or title claims.

In our submission, this interpretation of the Terms of Reference rightly limits the Commission's Inquiry into consultation with Indigenous groups to reviewing and recounting how Indigenous groups have experienced consultation and how Indigenous groups felt the concerns raised by them were dealt with.

This Commission has stated many times that this is not the appropriate forum in which to make determinations
as to asserted Aboriginal title and rights claims, or determinations as to constitutionally required consultation and accommodation and whether that has taken place. We agree.

It is Innu Nation's view that venturing beyond what I've outlined – so beyond an examination of how Indigenous groups have experienced consultation, and this is something that the Commission has been invited to do by other parties to this Commission – will necessarily take the Commission into areas where determinations can't be made unless a rights assessment is undertaken.

THE COMMISSIONER: Well, it depends – I think I need to straighten this out this morning right off the bat, because I've certainly seen your brief and I've seen the briefs of others, and there are limitations that I think everybody is aware of because I set them out in the Interpretation decision that I made back in March.

So just to be clear on this, obviously, what I indicated at the time was that I would be considering "what consultation occurred between the established leadership of Indigenous people and Nalcor as well as the Government prior to sanction" and the risk assessments, et cetera.

So in considering that, obviously there was certain consultation that was offered to each of the Indigenous groups, and the recognized Indigenous groups – or some of – most of them are here. Certainly the ones in Labrador all are here. And there's one from Quebec.

So, you know, my way of thinking is that what I will be doing here, is looking at what the consultation was and certainly considering, you know, setting that out, but I think where you and I are going to differ is with regard to whether I can comment on the value of that consultation or, alternatively, the responsibilities of the parties to that consultation. And I have no intention of looking at the constitutional issues with regards to the duty to consult or anything like that.

What I will be commenting on, and what I likely will be commenting on, will be what I see as what transpired with regards to consultation. If there are shortcomings with regards to it, I will certainly identify that, not in a constitutional sense, but in the sense that it was recognized by the province and by Nalcor that there were certain groups that they wished to consult with.

And as a result of that, I'm going to basically recognize that and I will be making comments on – or likely will be making comments on the value of that consultation, whether or not the obligations of both the parties were met with regard to that consultation. I think I will be going farther, in other words, than what you're suggesting I can go, but it will not be to the point of comparing it to the legal authority with regards to what that duty to consult is or whatever.

I notice the NCC have sort of suggested to me recommendations that, you know, I'm going to

somehow recognize now that they have this long-standing right or whatever. I'm not getting into that. What I'm getting into is it was recognized by the province and by Nalcor that consultation was going to be offered, that certain things were going to take place – commitments were made, discussions occurred. I'm going to assess those and see if the parties met their obligations or responsibilities based upon what they undertook to do. But it will not be in the constitutional sense.

MS. BROWN: And so, Commissioner, if I understand correctly, what you're suggesting is that the Commission will look at commitments that were made by the province and Nalcor, and won't be assessing whether those commitments were appropriate or adequate, but will be looking to see whether parties lived up to the commitments that were made. Is that right?

THE COMMISSIONER: No, I might be assessing whether they were appropriate or adequate in the context of what was accepted at the time as appropriate consultation.

I'm – you know, I'm dancing on a bit of a pin – the – you know, the top of the pin, of a needle. But I'm going to be very careful and I'm not assessing anybody's rights or claims. There may well be many more groups who have constitutional rights to this particular property, to this land or whatever or may not be. That's not for me to decide. I don't have time to decide it, nor do I have the evidence upon which to base any constitutional rights. So I'm going to be very careful in that regard. But I am going to go farther than what you've suggested in your brief.

MS. BROWN: Well, Commissioner, so I appreciate the clarification, and would say that it is certainly our view that that really is dancing on the top of a pin.

It's difficult to make an assessment about whether the commitments that were made with respect to consultation were adequate and appropriate, without making an assessment of the rights underlying the rationale for why certain parties were going to receive certain types of consultation and accommodation, and why were other parties were not going to receive that same level of consultation necessarily.

THE COMMISSIONER: Well, the same thing could be said back in 2009, 2008, whenever it was when the environmental piece started or when consultations started.

I mean, it's obvious at this point in time that the provincial government – or at that point in time, rather – that the provincial government didn't accept certain – didn't accept the significance of certain claims, but they still offered consultation. Just because they offered consultation doesn't mean that they – that it implied recognition of any constitutional right. It's just that they provided consultation. So I'm going to do the same thing.

MS. BROWN: Well, the scope of consultation varies according to the right, as we've laid out in our submissions. And so looking at whether the steps that were taken in terms of consultation were appropriate or adequate, we say, really can't be divorced from looking at the scope of the right in issue; because what constitutes appropriate and adequate consultation relates directly to the strength of the right asserted.

And the province is one of the – you know, the Crown is the decision-maker, and the courts, of course, have the ability to review these determinations about scope of right. But in our view, it's really – it's impossible to divorce these two concepts: adequacy and appropriateness of consultation and the underlying rights claim. They simply – they go hand in hand and really can't be disengaged from one another.

So I appreciate, Commissioner, that you've indicated you're going to be very careful in navigating this water, and we would say it is treacherous water. There are many potential pitfalls.

THE COMMISSIONER: Well, I don't even find it treacherous water. I'm just going to say right at the beginning, as I'm saying now, I'm not here deciding any constitutional rights. What I'm doing is I'm taking it as a given that the province and Nalcor acknowledged they had certain obligations with regards to consultation. I'm going to see whether or not they met their obligation. That's it.

MS. BROWN: And those obligations as laid out and recognized by the parties themselves, by –

THE COMMISSIONER: Well, by –

MS. BROWN: – the government and Nalcor?

THE COMMISSIONER: By what – you know, I'm going to look at what – like, I'm not going to decide whether or not – for instance, I think your concern – your client's concern, I think, is primarily with regards to NunatuKavut, by the sounds of it, and I'm not going to get into that political battle between the two of you guys. That's – you guys will deal with that in time. But what I'm going to do is I'm going to accept that there was an obligation because the province and Nalcor accepted there was an obligation. And I'm just going to go from there to see whether or not they – whether what happened was appropriate in the circumstances based upon that.

But I'm going to be very clear that anything I do has nothing to do with any recognition or non-recognition of a constitutional right or a land claim or anything of that nature. I'm going to do what the province did initially, and that is recognize that there's an obligation and then assess what – whether or not they met their criteria when they applied it.

MS. BROWN: Well, Commissioner, maybe it would be helpful for me to – I have a couple of examples that illustrate where we see some of the dangers in looking at these issues. And so maybe that would be a helpful way for us to explore this issue so that you can understand our concerns around it.

THE COMMISSIONER: Mm-hmm.

MS. BROWN: Of course, I understand what you've said about the – your approach in looking at these issues as well, Commissioner.

So a first example of where we see some real danger in terms of recommendations that are being suggested to this Commission, NCC has suggested that this Commission should recommend a policy – and I believe, Commissioner, this is something you may have had in mind as you outlined where this Commission is going. But they've recommended a policy to develop – be developed to govern the relationship between project proponents, the province and NCC when a project is proposed to be developed within NCC land claim area, and have also suggested that this – that NCC should ought to have adequate resources to meaningfully participate in the policy-making process.

Now, in our view, this suggested recommendation is problematic because its premise assumes that NCC is entitled to consultation. And that question: Whether or not NCC is entitled to be consulted and, if so, to what degree? Is not settled, and is not something that this Commission, I think, is interested in settling or ought to settle.

And what they're describing is what's commonly described as a consultation and accommodation protocol. Whether or not that type of policy or protocol is appropriate is necessarily linked with an assessment by the Crown of the strength of NCC's asserted rights and title claims. And so, by way of example, if the Crown determined that NCC's claims are weak, there would likely not be a need for that kind of policy to be in place because NCC may not be entitled to consultation.

So with that recommendation, specifically, weighing in on whether – asking the Commission to weigh in on whether the provincial government ought to have a consultation protocol or policy with NCC, would essentially require you, Commissioner, to bypass the province's assessment of this issue and to insert the Commission's view on whether the duty to consult and accommodate has been engaged and how the government should discharge that duty.

So that's one example of some of the pitfalls we see in this area and the dangers that we see. As I say, in our view, those two concepts, the duty to consult and accommodate, and consultation is part of that, and a rights assessment are really inextricably linked. And you can't divorce one from the other.

THE COMMISSIONER: So let me ask you this – and I do certainly want to be very careful how I phrase this because I'm not – it's not

intended to be offensive to anybody and I'm trying to be very sensitive here.

But one could look at your organization, one could look at the NunatuKavut Community Council, for instance, as being an organization and not specifically being an Indigenous organization. So would there be anything wrong with me looking at it on the basis that this is an organization that represents a group of people that are Labradorians, because it's not just Indigenous groups that are impacted by hydroelectric development or whatever, there are – you know, I've heard last week in a community consultation here, that a number of groups were impacted – or indicated they were impacted by Muskrat Falls and the issue of their use of the land themselves and whatever.

So, what – if it's – if I'm deciding this outside of the context of any constitutional right under section 35 of the Constitution – what is the problem with my discussing that type of consultation?

MS. BROWN: Well, Commissioner, in our view, the organizations really are not similar and are not comparable.

Innu Nation represents First Nation rights-holders in this province who have constitutionally protected rights, and those are the Innu of Mushuau and of Sheshatshiu. So, Innu Nation itself is an organization that is empowered to represent the interests of those two First Nations, but the First Nations themselves are constitutionally recognized, they have rights that are protected and must be recognized by this province. They have a land claim that has been recognized by the province and by the federal government, and are in the course of negotiating a land claims agreement.

So, Innu Nation is not simply an organization like, for instance, the Grand River waterkeepers, they're not –

THE COMMISSIONER: Oh, I understand all that and that's why – what I was trying to just portray to you is that, if I take it outside of the Indigenous context and apply it as an organization that is representing people who live nearby and are impacted by hydroelectric development, what is the problem with my making comment with regard to the level of consultation, the obligation to consult or whatever, from a – not from a legal point of view but from a point of view as a Commissioner investigating the Muskrat Falls Project?

MS. BROWN: Well, Commissioner, I suppose our view would be that it's difficult to take this question outside the context of what is owed to Indigenous people under the duty to consult and accommodate.

THE COMMISSIONER: Yeah, but I'm not deciding what's owed to First Nations people. You've told –

MS. BROWN: I –

THE COMMISSIONER: – me you don't want me getting into that –

MS. BROWN: No I –

THE COMMISSIONER: – and I'm not –

MS. BROWN: – I certainly –

THE COMMISSIONER: – and I'm gonna –

MS. BROWN: – don't.

THE COMMISSIONER: – assure you I'm not gonna get into that.

MS. BROWN: Well –

THE COMMISSIONER: Have no fear about that, I'm not going there. But I am going to look at consultation.

The province, in this particular case, decided they were going to have consultation with various groups, or indicated they were gonna have consultation. I'm gonna see if they did it – what they said they were gonna do – and I'm gonna comment on that, if I feel it's appropriate to do so.

MS. BROWN: So, I would say from our view, it is difficult to assess what would be appropriate consultation without looking at the obligations that are owed pursuant to the duty to consult and accommodate. And I would also say that

consultation comes up in your interpretation in the section dealing with Indigenous people. So it was certainly our understanding that that question was going to be looked at through that lens.

If the Commission is going to try to look at that – look at consultation outside of this context – well it – as I say – I think it will be very difficult to do, because what is considered to be adequate and appropriate really does hang on what is owed to groups. And that is determined based on Haida Nation and the Supreme Court's jurisprudence on this issue.

THE COMMISSIONER: Well, I'm not so sure that – for instance, if I took some of the people who were here – and I'm not sure if any of them were members of any of the Indigenous organizations – but – you know – if I took your comment, then it was meaningless for me to sit here last Thursday evening and listen to nine people who stood up – some of whom did self-identify, by the way, as Indigenous – as members of Indigenous groups. But those who didn't, there was no import for me to sit here and listen to what they had to say about their views on the impacts of Muskrat Falls?

MS. BROWN: Well, Commissioner, the importance of those views – as I say, in our view – is simply different in kind. We're not saying that it's not important. The experience of Labradorians in dealing with this project and the environmental assessment issues that have gone along with it are important; of course they are.

However, I would say that the consultation owed to Indigenous groups is very different in kind because it has this constitutional component. It is required under the Constitution; the honour of the Crown requires it. So it simply isn't the same concept. The word is the same, but the content is different.

THE COMMISSIONER: I don't take any issue with that.

MS. BROWN: Okay.

THE COMMISSIONER: I'm not sure if I'm miscommunicating with you or whatever, but – again – I'm not going to be commenting on what level of consultation should take place based upon any constitutional right or anything of that nature. I'm not doing that.

MS. BROWN: Well – for example – questions of funding. This is something that's been raised by other parties to this Commission. Whether or not a party is entitled to funding – an Indigenous-identifying party is entitled to funding – that is something that is bound up with the duty to consult and accommodate, and a rights assessment.

So there are many aspects of the duty to consult and accommodate that are very much at play in the evidence that this Commission has heard. And while it might seem like an issue that doesn't necessarily go to this constitutional duty – something like funding – it, in fact, is very much tied up with that question in the case law on this issue.

So, as I say, from our perspective, it's – it will be very difficult to look at consultation of Indigenous groups without considering what was owed and the scope of what was owed and –

THE COMMISSIONER: (Inaudible.)

MS. BROWN: – that involves a rights assessment.

THE COMMISSIONER: So just on the issue of funding. So, again, I think that funding is not just applicable to Indigenous groups. For instance, in the environmental assessment process, funding was provided to non-Indigenous organizations. And, in fact, I've – I'm gonna hear from two of them today who are speaking about their level of funding that they received.

I mean, there's no – I don't think there's any limitation on my ability to assess whether or not, in the circumstances, appropriate funding was provided to them so that they could do meaningful – have a meaningful input into the environmental process. That's not to say I'm gonna find that, but I'm just trying to respond in the sense of saying to you I think the issues that you're talking about, carefully, can be distinguished from the applicability of any constitutional right under section 35.

And I'm saying it here and I will say it in my report, that I am making no – I am not considering legal obligations, constitutional obligations or anything of that nature. I'm looking at it purely from the perspective of the fact that certain parties undertook certain things, did they do it, and make comments with regards to whether they or they didn't and what they should have done and what they shouldn't have done. And that's what I'm gonna do, that's my plan.

And as I said, I'm very aware of the need to ensure that I don't stray into that other area and I'll be very frank with you – and I mentioned it earlier – just as I'm speaking to you, I'm hoping that those who are representing the NunatuKavut Community Council or any other group that might think otherwise, they understand where I'm going with this. Because there are things they're asking for that I can't do within the confines of this Inquiry.

But it doesn't mean I'm not going to look at certain things, and that's why I wanna point it out to you because I can see – as soon as I read your brief and read theirs, I knew what was going on. And I said, okay, I gotta straighten this out. Okay?

MS. BROWN: Thank you, Commissioner.

As I say, we appreciate that clarification and you have our concerns. You know what it is that troubles us and where we see the potential dangers in looking at these issues. And I know that you will be alive to those in putting together your report.

In light of that discussion, I will – I had another example, but I think it would be more helpful to move on to another –

THE COMMISSIONER: Well, it might be helpful for me to know what other area you think might be sensitive so that I can be aware of it.

MS. BROWN: Well, it is related.

So the second example of the difficulties that we see arising with looking beyond how consultation was experienced and how parties have perceived that – another example would be NCC's second recommendation, which is that they would recommend that – or they have asked the Commission, rather, to recommend that when a project is proposed within its land claim area, the province and Nalcor be required to mitigate all concerns that NCC raises.

And so from our perspective, phrased or framed another way, NCC is requesting that the Commission require the province to assess the level of consultation and accommodation to which it's entitled as very high, such that all of its concerns must not only be explored through consultation but must be accommodated by mitigation or other means. And so, again, this recommendation is very much linked to a determination that the Crown must make and that the courts may review as to NCC's asserted title and rights claims.

Canadian case law right now would only require the level of consultation and accommodation that NCC is requesting in a situation where the Indigenous group has very strong prima facie claim. And NCC is asking this Commission to recommend a policy be adopted by the province that assumes NCC is at the highest end of the spectrum in the strength of claim analysis that the Crown would ordinarily undertake, and directly award it the highest level of consultation.

And so, in asking the Commission to make this recommendation, NCC is asking the Commissioner, you, to bake in a requirement that NCC always benefit from the highest level of accommodation and consultation. And from our perspective, that's clearly beyond the scope of what, Commissioner, you have interpreted your mandate to be and what's outlined in the Terms of Reference.

And NCC frames its suggested recommendation – these two recommendations that I've just discussed – as means by which development-related protests and the costs associated with them can be avoided going forward. They cite Professor Flyvbjerg who testified that early engagement with stakeholders can act as a cost-saving measure. We suggest that the Commission should be wary of the invitation to consider the issues in this way.

Accommodation measures like consultation and accommodation protocols and IBAs are linked directly to constitutionally-protected Aboriginal rights. Whether these types of accommodations are appropriate depends on the strength and the scope of the right at issue. There are strong public policy reasons for which it would be problematic to enter into these types of agreements for the purposes of avoiding potential protests associated with a project.

Counsel to Innu Nation did try to elicit testimony from Aubrey Gover from the government, about the government's view on this question, but, Commissioner, you indicated that this question, of whether IBAs or similar types of agreements should be used to lessen stakeholder opposition to a project, is not a question that the Commission will be deciding on, and we agree with that decision. And as such, this question is outside the Inquiry's scope since there really is no way to carve it out from a rights assessment.

To look at this from another angle, it also bears mentioning that while NCC states that protest causing delay and an increase to the project's cost could have been avoided had its concerns been addressed earlier, the Commission has no real evidence before it as to the costs attributable to these projects.

We can assume that there were costs – that's a common sense proposition and conclusion – but since they haven't been quantified, the Commission can't compare the costs caused by the protests with the costs associated with the Community Benefit Agreement that NCC holds out as an example of how it could've been engaged with earlier on. So we can't know whether the CBA was more expensive or the protests were more expensive.

Now, Commissioner, we've gone over this ground, but it would be our submission that these examples illustrate the extent to which rights assessments are bound up with questions of consultation and accommodation. By contrast, examining and making findings on how different Indigenous groups have experienced consultation and accommodation would fulfill the order-in-council's requirement that the Commission consider participation in the Inquiry of established leadership, without straying into rights determination questions.

So I'm going to move on to my second session – or section rather. Unless you have further questions or comments on that, Commissioner?

THE COMMISSIONER: No. That's fine. Thank you.

MS. BROWN: Okay. Thank you.

So our second topic is Innu participation in the project. This Commission's central purpose is to inquire into financial and scheduling matters relating to the project, including cost overruns. Labrador Innu businesses and workers have been participating in the project's construction, pursuant to Innu Nation's IBA with Nalcor. The Commission has heard from certain witnesses that there was an impression that Innu contractors had a premium associated with their bids in the range of 2 to 5 per cent. This is, of course, relevant to the Commission's determination on cost overruns.

The Commission has also heard evidence that this impression about the 2 to 5 per cent premium was developed based on information from one non-Innu contractor in the course of negotiation for one contract with Nalcor. Based on the testimony this Commission has heard, it appears that no work was done by Nalcor to verify whether or not what this one contractor stated about an Innu premium was true.

This Commission is left with only this one specific instance of a possible premium associated with having an Innu contractor bidding on a project and it was relayed to the Commission third-hand from a non-Innu contractor. In our submission, this does not amount to reliable evidence before the Commission on which to find that there is any type of premium associated with Innu contractors.

As to employment, the Commission has heard evidence that the employment and training provisions of the IBA were not implemented without difficulty. Innu Nation tried to ensure that the IBA was implemented as it had been anticipated and not in half measures. And, this is

ongoing work. Innu Nation remains engaged with Nalcor to ensure that this happens.

Finally, moving on to our third topic, this Commission is being urged by other parties to make findings on environmental issues that have already been addressed through the extensive environmental assessment process undertaken by the Joint Review Panel and the later environmental work undertaken by the IEAC. As with questions of consultation, it is Innu Nation's view that the Commission's mandate on these issues is to review and recount how Indigenous and other groups have experienced their participation in these environmental processes.

Going beyond such an examination would require the Commission to revisit and reconsider the work done by the JRP and the IEAC, work that, in the JRP's case, has already been revisited and reconsidered by the courts on several occasions and which you've stated, in your Interpretation, that you don't intend to revisit. Commissioner, you made it clear in your Interpretation that you will not be assessing the correctness of the positions taken by Nalcor or the Government of Newfoundland and Labrador with respect to environmental matters. And you've also stated that you will not be considering Nalcor's adherence to environmental permits, and we fully agree with that approach.

There are at least three reasons that the Commission should decline to go beyond what we've outlined, and these are – or, pardon me – should decline to engage in a reassessment of the JRP and IEAC's work, engage in a reassessment of the project's release from environmental assessment, or make findings about the adequacy or reasonableness of the JRP or IEAC's work.

First, the issues dealt with by these bodies are complex and multi-faceted and largely unrelated to issues of cost overruns for the project, which are, of course, the core of the Commission's mandate – and scheduling overruns.

Second, on a practical basis, it simply isn't realistic for this Commission to try to redo environmental work that was already done, even if the Commission wished to do so, which, Commissioner, you've said you do not. It's simply too extensive and it's too complex. The environmental assessment process took over two years, and the report issued by the panel is extensive. The IEAC had six scientists and three Indigenous-knowledge experts advising it. This Commission does not have the benefit of the time or the evidence before it to re-evaluate these bodies' findings.

Third, there have been several unsuccessful court challenges to the JRP's Report and the environmental – pardon me – the environmental assessment process's release, including challenges relating directly to methylmercury and its mitigation. On the methylmercury issue, it bears pointing out that the JRP made findings on methylmercury in 2011, based on the record that was before it at that time. The project was released in 2012, also based on the information that was available at that time.

In 2015, a new report was released with modelling that suggested methylmercury levels would be higher than had been anticipated and the effects would extend farther than had been anticipated. That was new information, and it was considered by the IEAC with the benefit of scientific and Indigenous-knowledge holders' expertise.

An example of the difficulties associated with going beyond reviewing and recounting how people experienced the environmental processes is Grand Riverkeepers' suggested recommendation concerning environmental assessments. Grand Riverkeepers have suggested that this Commission should make recommendations for a stronger environmental assessment process and suggests that one way to accomplish this would be for joint review panels to be granted authority to make binding determinations. This recommendation would involve both federal and provincial legislative changes and, in our view, is outside the scope of this Inquiry.

Given these issues and the reasons outlined in our written submissions, it is our view that the Commission should decline to make findings reassessing the environmental work done with respect to the project, as it is being urged to do.

THE COMMISSIONER: I'm not sure that they're asking me to reassess the work that was done by the groups. I think what they're asking me to do is investigate, after that work was done and commitments were made or not made, whether or not certain things happened. And I think that's certainly within my bailiwick as you're – you're absolutely correct. I'm not conducting another environmental assessment. I don't have the time and I don't have the expertise and I don't have the money.

So the thing is that what I am going to do is, you know, proceed on the basis of what did transpire and then determine whether or not, as a result of what transpired, what the various obligations, responsibilities, commitments – whatever it is – were followed. That's my plan.

MS. BROWN: Well, Commissioner, I – our concern would only lie insofar as those types of considerations might get back into an assessment of whether the environmental assessment process should have been released. So to the extent that that doesn't happen, we wouldn't have concerns with the Commission going back over and seeing whether the recommendations have been followed.

THE COMMISSIONER: I'm not in a position, I can tell you now, to assess whether it should have been released or it should not have been released. I'm going on the basis that it was released and then what transpired after.

MS. BROWN: Very good.

So, Commissioner, unless you have further questions, I'll conclude my remarks by saying, as other parties have said, Commissioner, that you have been tasked with a difficult undertaking: inquiring into the reasons that the Muskrat Falls Project is more expensive than anticipated and why its schedule has been delayed. Given the project's long history and the many parties involved in the project's development and construction, this Commission's task in reviewing the evidence presented to it and making determinations on these questions is a daunting undertaking.

Innu Nation agrees with the Commission that its mandate does not include making determinations related to asserted Aboriginal or treaty rights or claims or the duty to consult and accommodate linked to such rights claims. While the Commission has heard evidence on these issues and on environmental assessments, we do urge the Commission to review and document the experiences of various parties in dealing with these issues without venturing into areas that are going to link to rights, determinations or reassessment of work that has been done.

In our view, this approach aligns with the Terms of Reference and your Interpretation of those terms. Separately, on the question of Innu participation in the project pursuant to the IBA, Innu Nations submits that there is no reliable evidence before this Commission to suggest that Innu participation led to cost overruns or schedule delays.

Those are my questions, and I'll simply say thank you now. Thank you, Commissioner. Thank you to Commission counsel, Commission staff, the witnesses who have participated, my colleagues representing other parties and the security officers and technical support. We appreciate all of your work.

THE COMMISSIONER: All right. Thank you, Ms. Brown.

MS. BROWN: Thank you.

THE COMMISSIONER: All right. Thank you.

All right, the NunatuKavut Community Council.

MR. COOKE: Good morning, Commissioner.

THE COMMISSIONER: Good morning, Sir.

MR. COOKE: Jason Cooke here for NunatuKavut Community Council.

NunatuKavut Community Council has over 6,000 members, of which – the vast majority of which reside in Labrador.

I intend to keep our submissions brief. Commissioner, you have our written submissions, but I did want to highlight a few issues for you.

The first is that, obviously, you're guided by the Terms of Reference and, particularly for the

Indigenous parties, your Interpretation decision of March 18, 2018, that provided – really broke it down into four areas.

First is what consultations occurred between the established leadership of Indigenous peoples and the province and Nalcor prior to sanction. And I'll just stop there because I think you've been clear, Commissioner, when we say consultation there, it is a small-c consultation; it is not constitutional consultation.

B, what risk assessments and reports were done as regards to the concerns of Indigenous people. C, whether these assessments were appropriately and reasonably considered by the province and Nalcor. And, D, whether appropriate measures were taken to mitigate against reasonably potential adverse effects to the settled or asserted rights of Indigenous peoples, both at the time of and post-sanction.

So, clearly, we're not here – you're not here to determine treaty rights, consultation rights, land claim rights.

Commissioner, I'd like to start with two quotes from the hearing transcript, because I think, in tandem, they set out NunatuKavut's position much clearer than I can.

And so, the first one I will read to you – and this is the beginning of the quote: "*... a company like Nalcor or anybody in the utility business it's very long-term assets.*" Nalcor is "*going to be around for a long period of time and, clearly, the Aboriginal community, they're going to be around for a long period of time*.

"*So, at some point*," you've "*got to sit down and say: Okay, we need to have a good and healthy relationship .... It's going to benefit us both*."

THE COMMISSIONER: So that was Stan Marshall's testimony?

MR. COOKE: That was Stan Marshall, CEO of Nalcor.

The second quote I'd like to read to you, Commissioner, is from Dr. Flyvbjerg, and this was in a response of a question from, I believe, you, Commissioner, regarding the benefit of early stakeholder engagement:

"*So we've generally found that it does make sense to involve all stakeholders as early as possible. And that's actually what we see; that is what good project organizations are doing. Because it's like with the biases: if you don't do it, it's going to come back to haunt you. It's not like these stakeholders will go away peacefully and say: Okay, we weren't taken into account, we accept that and ... we'll go home and do something else. That's not what happens. And it's much more expensive to take these things into account if you have to do it later on in the process. So that's the rationale for doing it earlier*."

So …

Commissioner, I don't think there can really be any debate that NunatuKavut is a stakeholder, and a key stakeholder. I think that's been recognized by both the province and Nalcor, although at a late juncture in relation to that – this project, and I say that in terms of the examples I would give from the province. The clearest one is the IEAC, where there were four constituent groups: the three Indigenous groups in Labrador – Innu Nation, Nunatsiavut Government and NunatuKavut Community Council – as well as a representative for the municipalities.

So, I think it's clear that the province, in terms of the issues for the IEAC, identified who the key stakeholders were and gave them positions accordingly. I think for Nalcor, we've seen certainly a recognition of NCC being a stakeholder, both in the Community Development Agreement, which was an exhibit before this hearing, and also in terms of recent developments in terms of funding for health and social programs.

I think if you distill what Mr. Marshall said and Dr. Flyvbjerg said, I think they're really sending some consistent messages that I think are relevant for you and the Commission in your deliberations. One is that early engagement with stakeholders is important. The second is that the failure to do early engagement has a real impact and cost on a project. And I think the third point, which is really Mr. Marshall's point, is simply that a healthy relationship with key stakeholders is simply good business.

When we talk about cost, I think it's important from our perspective to note that – and I know we – you know, your mandate is talking about, really, financial cost as a result of this project, but there's a bigger cost, NunatuKavut would suggest, for failure to engage early and meaningfully with stakeholders. And that's a cost of what I will call trust capital.

And, I think, frankly, we are seeing that again and again when the trust capital is exhausted, even when proponents and government take actions it's often met with suspicion or disbelief; once lost, it's difficult to recover. I think on the methylmercury issue that's really the clearest example that's been in evidence before you, Commissioner.

So coming back to those principles articulated by the two quotes: Did early engagement occur? From our perspective, the engagement that did occur was certainly not at an adequate level. The province essentially would not engage with NunatuKavut and we say that their basis, at least according to former Premier Williams and Aubrey Gover, was on a legal belief that groups cannot be engaged in until land claim is accepted. And while we're not going into issues of constitutional consultation, post-2004 and the Haida Nation decision of the Supreme Court of Canada, that is simply wrong in law and I believe the evidence shows that the government took that approach beyond Haida Nation coming into effect.

So what were the costs out of a failure to engage? Clearly protests are the most visible. Environmental issues remained and remain outstanding. Issues regarding methylmercury, which have been addressed, in part by the work of the IEAC, also concern ongoing concerns with the North Spur and, of course, ultimately the cost of the necessity to have this Inquiry.

So, Commissioner, I'd like to talk about engagement in the phase one period, so up to sanction. And I think it's important to note that NunatuKavut has sought meaningful engagement regarding any projects or possible projects on the Lower Churchill for a long period of time. And I think the evidence shows, before the Inquiry, that it was as early as 2005 when NunatuKavut reached out to the province to try to come up with a process moving forward to deal with concerns relating to possible projects on the Lower Churchill.

And NunatuKavut has been consistent in asserting the need for meaningful engagement throughout. Unfortunately, for a great period of time, the position of the province was also consistent. They would not engage NunatuKavut without an accepted land claim. And, as I said, that position, if grounded in law, was wrong as of 2004 and the Haida Nation decision.

In terms of the Joint Review Panel process, I think it's important to highlight the resources provided to NunatuKavut, which were under $200,000. And again, you don't have to decide on whether that was constitutionally based or otherwise, Commissioner, but it is completely within your mandate to consider whether $200,000 was adequate given the issues at play and the scale of the project. From NunatuKavut's perspective, the resources provided were grossly inadequate and created enormous difficulties to meaningfully participate in a Joint Review Panel process.

And when you're looking at the JRP report, I don't think anyone is asking you, Commissioner, to go back and redo that process. But you certainly can look at what did the Joint Review Panel say, what did they recommend and what did the province and Nalcor do or not do following that.

So I wanted to highlight two areas that the JRP commented on. One referred to NunatuKavut and in the report it stated – and I'm quoting – "Based on the information on current land and resource use … there are uncertainties regarding the extent and locations of current land and resource use by the Inuit-Metis in the Project area."

Also in the report, the panel expresses a – an expectation that there would be some kind of further consultative process following the issuance of the report. The second comment of the panel has to do with methylmercury, where the panel stated the following: "… it was still uncertain whether methylmercury would bioaccumulate in fish and seal to levels" which "would require consumption advisories, especially considering the lack of baseline information."

For the methylmercury issue, in NunatuKavut's view, it only started to be meaningfully addressed by the formation of the IEAC –a very late juncture in the project lifespan. And I'll come back to the IEAC, Commissioner. But in NunatuKavut's view, IEAC has done very good work and created a body of knowledge that I think is helpful to all parties, frankly, but is limited necessarily by the timing, that it's coming so late in the project construction lifespan.

Really, from NunatuKavut's perspective, we can see no good reason why the work of the IEAC could not have been done prior even to the Joint Review Panel process but certainly before sanction. In terms of the uncertainties that they identified regarding NunatuKavut, simply there's no evidence that any follow-up occurred.

So, Commissioner, going back to Dr. Flyvbjerg's comments on early engagement and the consequences of failure to do so, we've seen it in regards to the Muskrat Falls Project again and again. The first example I'll give is in 2012. In 2012, a number of NunatuKavut members engaged in a information picket at the gates to the Muskrat Falls site.

I think it's important to look through the lens of the need for meaningful engagement when you look at Nalcor's response. Was Nalcor's response to sit down, set up a table, have a conversation? Quite the opposite. The next day, Nalcor goes and gets an ex parte injunction, sweeping in scope, both of geography and a conduct enjoined.

Nalcor then goes further. In November 2012, the injunction becomes a permanent injunction, which meant, had NunatuKavut not successfully challenged it in the Newfoundland and Labrador Court of Appeal, their rights to protest or even access lands near the project would have been extinguished. That can hardly be called engagement.

Then, of course, we had significant evidence, Commissioner, on the protest arising in 2016, which involved many people from all three Indigenous groups and beyond. And I think we're primarily motivated by the concerns around methylmercury, particularly arising out of Nunatsiavut Government's work with researchers, which is often called the Harvard report or the Calder report.
Following the protests in 2016, some engagement did occur in the form of the IEAC. Again, the work of the IEAC, in NunatuKavut's view, is exemplary. It has vastly increased our body of knowledge around these issues, but, again, it should've been done much, much earlier and certainly before sanction.

But while the work of the IEAC is laudable, the response by the Government of Newfoundland and Labrador is the opposite.

Commissioner, despite the public attention on methylmercury concerns, despite the IEAC recommendations coming out in April 2018, and despite the intense attention on this project – most notably the fact that it was smack dab in the middle of this Inquiry – the delay of the province in responding meant a key recommendation could not occur.

In NunatuKavut's view, it simply defies logic. Moreover, neither Premier Ball, Minister Coady or the Municipal Affairs and Environment officials, in evidence, could really provide any kind of satisfactory or any real explanation at all how it happened.

Premier Ball points to new data suggesting that methylmercury levels may be lower than expected, and lower than in the Calder-Harvard model. If that's the case, that's good news for all of us. But, respectfully, Commissioner, it misses the point.

Clearly, there was some kind of process failure. And it's particularly unfortunate where, for many NunatuKavut members and many Labradorians generally, there is this lack of trust that we say is a result of the lack of early engagement with key stakeholders. It was completely avoidable, in our view. And it would have been avoidable by simply doing a formal, public and timely response to the IEAC recommendations. It's concerning to NunatuKavut, Commissioner, that the province does not seem to be learning the lessons coming out of this Inquiry.

I think, from NunatuKavut's point of view, the most important finding you can make, Commissioner, both in terms of what happened

and going forward, is that the province and proponents must meaningfully engage with key stakeholders at the earliest opportunity. And in our view, that's a key reason why were all here today at this Inquiry.

So, Commissioner, I'm happy to address any questions you may have.

THE COMMISSIONER: Yeah, I'd like you to respond in some sense to some of your suggestions with regards to recommendations that I might make because as you just heard with my discussion with Ms. Brown, there may well be some merit with regards to how this would fit within these Terms of Reference.

MR. COOKE: Look, Commissioner, if you feel that's straying into constitutional territory, that's – you know, you have the – obviously the right to do that. I think the key – and I'm coming back to this – is less, you know, specific, prescriptive recommendations, and more focusing, again, on the critical importance of early engagement with key stakeholders. And that's, obviously, including Indigenous groups, particularly in Labrador. But it really, I think, is broader than that.

Obviously, we think we're – have constitutional rights, and certain responsibility of the Crown now flow for that; that's outside of your mandate. But what's well within your mandate is to say: Look, there is stakeholders here; there's groups including NunatuKavut with thousands of members. You cannot put them on the sidelines and expect a project like this to succeed.

THE COMMISSIONER: Okay, I just want to just check. I did have a couple of questions for you and I just want to see if …

Oh yeah. I'm assuming that notwithstanding then – and this is not evidence before the Commission, but I think I'd be foolish to suggest that I don't know about it. And that is with regards to the agreement with Nalcor now, and you've alluded to it earlier –

MR. COOKE: Yeah.

THE COMMISSIONER: – with regards to the $10 million –

MR. COOKE: Yeah.

THE COMMISSIONER: – which was set aside for wetland capping, or a portion of which was set aside, or all of which was set aside along with other monies. So NCC's acceptance of those funds does not mean it – you seem to be still indicating that the methylmercury issue is not resolved from your point – your client's point of view.

MR. COOKE: Absolutely.

And you can look at the agreement, Commissioner. It's on the public record. It is connected only to being provided to health and social programs. There is no exchange; there is no quid pro quo. We maintain our positions. We've made that clear; President Todd Russell has made that clear to CEO Stan Marshall. Everyone understands that and any suggestion otherwise is simply wrong.

THE COMMISSIONER: All right, good.

Thank you very much, Mr. Cooke.

MR. COOKE: Thank you.

And thank you to Commission counsel and Commission staff and you, Commissioner.

THE COMMISSIONER: Okay.

All right, we'll take a break and then we'll come back with d'Ekuanitshit next. Ten minutes.

CLERK: All rise.

Recess

CLERK: Please be seated.

MR. JANZEN: Thanks, Commissioner.

My name is David Janzen and I'm here on behalf of the Conseil des Innus d'Ekuanitshit, which is a First Nation whose reserve is in Quebec and whose land claim overlaps with the project area. The first language of the people in Ekuanitshit is Innu, the second language is French and very few people in the community speak English.

And the main thrust of my submissions this morning will be that while Ekuanitshit suffers the adverse effects of the project, it has derived no benefit from the project and its concerns were never seriously considered by government or Nalcor.

And the way that I would intend to proceed to illustrate this thrust of our submission is I would like to look at what the Joint Review Panel said about some of Ekuanitshit's main concerns, see what was done about them. And, secondly, to address post-authorization consultation and, in particular, the permitting process. And then, finally, make a couple points about things raised by other parties.

THE COMMISSIONER: Sorry, the last point was…?

MR. JANZEN: To – the third point would be just to address some points raised by other parties.

THE COMMISSIONER: Right, okay.

MR. JANZEN: So the first issue that I would like to address is caribou and, in particular, the woodland caribou, which are threatened under the federal and provincial endangered species legislation and are known to inhabit the project area. And under the legislation, the critical habitat of the species is defined as the habitat critical to survival of the species.

And I would just like to jump, if we could, Madam Clerk, please, to P-00041, the Joint Review Panel's report, at the bottom of page 142, to see what the Joint Review Panel had to say on this subject with respect to caribou, at the bottom of the page and then at the top of page 143.

So, at the bottom of the page, just the last sentence, it says: "For listed species, access to recovery strategies that include the identification of critical habitat will be critical for government decision makers to be in a position to properly evaluate the potential risk the Project poses to the recovery of listed species. Without the recovery strategies and critical habitat, decision makers will not be in a position to fully appreciate the Project's impact on the most vulnerable species."

And then if we could scroll down, please, in the second paragraph in the middle: "The Panel was provided with a recovery strategy for the Red Wine Mountain caribou herd; however, the strategy fails to identify critical habitat for its recovery. Without knowing whether the primary habitat to be flooded is critical habitat for the recovery of the Red Wine Mountain" caribou "herd, it is more difficult for the Panel to assess the impact of the Project on the prospect for recovery of the herd."

And then if we could just scroll down to the recommendation itself, 7.3: "The Panel recommends that, if the Project is approved, federal and provincial governments make all reasonable efforts to ensure that recovery strategies are in place and critical habitat is identified for each listed species found in the assessment area before a final decision is made about the effects of the Project."

And I'm not sure if I – just above, I'm not sure if I had mentioned this, but the panel said that it: "It clearly would have been desirable for all recovery strategies and critical habitat identification to have been completed before the start of the" Joint Review Panel hearings.

So, it clearly would have been desirable for it to have been done before the Joint Review Panel's hearings. In any event, all efforts should be made to make sure that the identification is completed before a final decision is made about the effects of the projects on those species. And to date, in – now in 2019, the critical habitat for the woodland caribou and the Red Wine Mountains herd, in particular, still has not been identified. And that's at P-04229. But also in our examination during the environment panel from Dr. Susan Squires.

And so, in other words, the entire project was conceived and carried out without knowing whether the habitat being flooded was habitat critical to the survival of these caribou herds or whether the transmission lines were being built through habitat critical to the survival of these herds.

And to paraphrase the Joint Review Panel, this all means that government decision-makers just could not be in a position to properly evaluate the potential risk posed by the project to the

threatened caribou herds. And I would just make – like to note three things about this, just to take it a step back in terms of context. Which is that the recovery strategy for the Woodland caribou published in 2004 by the Department of Environment said that the capacity for all three herds to recover was excellent if challenges related to resource development, opening up of the territory, illegal hunting could be overcome.

And that the project has also been in the works since at least 2003, I believe, was what counsel for Nalcor said on Monday, if not earlier. So that all of this has been – all of this has occurred over a time frame when the project was in the works for a long time and everybody knew that the situation of the caribou herds was critical. And furthermore, that the caribou are of sacred importance to the Innu of Ekuanitshit.

And it's hard for me to put that into words, but I know that chief of the community of Ekuanitshit has said that the Innu and the caribou are one. So that when we're talking about these endangered species and their survival, we're not just talking about endangered species but we're also talking about the identity of a people.

THE COMMISSIONER: Can you remind me what the government's response was to recommendation 7.3?

MR. JANZEN: I believe that the government's response was to accept – it accepted the intent of the recommendation and, if I recall correctly, it expressed some reservations about the time frame for implementing the recommendation. But that – to be corrected, but that's my – that's what I recall.

THE COMMISSIONER: Okay.

MR. JANZEN: So, moving on, the second issue related to land use is that the entire project was carried out without a single study involving Ekuanitshit on the communities land use or its traditional knowledge. And the Joint Review Panel said that there are uncertainties regarding the extent and locations of current land use (inaudible) and resource use by Quebec Aboriginal groups in the project area. And implied that further consultations might address those uncertainties. However, neither government, nor Nalcor took any steps to address those uncertainties.

Recommendation 9.3 of the Joint Review Panel was that the panel recommends that if the project is approved, Nalcor involve all Aboriginal groups in the design and implementation of its proposed community land and resource use monitoring program for the duration of the construction period to ensure that parameters of importance to those groups and traditional knowledge are included.

And again – sorry, if you're scrolling through, Madam Clerk, I believe that's at page 203 at the bottom. There we go. And I believe, again, that the government response was to accept the intent of the recommendation but Ekuanitshit was never involved or invited to participate in the design or implementation of such a program.

Third issue relating to the cultural heritage of the community of Ekuanitshit – and if you want to go to page 220, Madam Clerk, but I'll just paraphrase. This is after the Joint Review Panel had noted that Quebec and Labrador groups had noted existence of burial sites in the project area.

The Joint Review Panel said that Nalcor should involve all affected groups in searching for, documenting and commemorating historic and archaeological resources; engage aboriginal communities in commemoration initiatives; and consider inviting Quebec Innu to participate in programs to document and interpret archaeological sites and artifacts.

And, again, none of these commitments or recommendations were implemented with respect to Ekuanitshit.

THE COMMISSIONER: What was the government's response, do you recall?

MR. JANZEN: Again, it was to accept the intent of the recommendation.

With respect to employment opportunities, page 244, Recommendation 12.7. "The Panel recommends that, if the" program "is approved, Nalcor initiate an employment outreach program for interested Aboriginal groups in Quebec …." And no such program was ever initiated.

THE COMMISSIONER: Government's response was?

MR. JANZEN: I believe that the government's response was to sort of skirt that recommendation. It didn't accept the recommendation or the intent of the recommendation.

And, finally, Recommendation 15.5 at page 293. This is the recommendation to establish a Community Liaison Committee with representation from Aboriginal organizations, and it would advise Nalcor and Department of Environment regarding specific mitigation and monitoring measures. And this was something that I – that we had asked Mr. Gilbert Bennett some questions about.

But, essentially, what transpired was that after the project was released from the environmental assessment, Ekuanitshit wrote to request more information about the committee, and the response was to send a copy – to send to Ekuanitshit a copy of the Terms of Reference for the Community Liaison Committee in English only with three spots on the committee for Aboriginal communities, excluding any representation for the Quebec Innu communities and saying that Ekuanitshit was welcome to attend the meetings of the Community Liaison Committee but everything would be done in English and that they would pay their own way.

THE COMMISSIONER: And government's response to that recommendation?

MR. JANZEN: Again, what I believe was to accept the intent of the recommendation.

So, now I would just like to say a few words about the permitting process because this was the primary vehicle by which the supposed consultation of the people of Ekuanitshit was supposed to occur after the project's release from the environmental assessment. And the purpose of the supposed consultation through the permitting process, as communicated to Ekuanitshit by government officials and Mr. Gover, in particular, was that the purpose of the process was to identify specific impacts and specific mitigation measures to attach as terms and conditions of the regulatory approvals.

So, that's at P-01721 – the letter from Mr. Gover to counsel for Ekuanitshit.

And so after the release from the environmental assessment process, when the permitting process began, Ekuanitshit began to receive dozens, then hundreds and eventually, perhaps, thousands of permit referrals and planning documents in English and virtually all with a 30-day period for comment.

And so, Ekuanitshit's response was to write to government and ask: when you are sending us these permit referrals, is it possible to tell us what impacts you foresee on our interests and what mitigation you propose? And, can you provide us with any capacity so that we could review these permit referrals and do that work ourselves?

And the answer to those questions was no to both. No capacity for you to review these referrals – no funding, no capacity for you to review these referrals. And, we're not going to provide you with information with what we see as the impacts on your interests, or what mitigation we propose when sending you those referrals.

And the same – while this was sort of how permitting proceeded in general – the same was true with respect to issues of particular importance to the people of Ekuanitshit, such as the – for example, the archaeological permit and Nalcor's proposed – pardon me – Historic Resources Assessment and Recovery Program, as well as the Endangered Species Permit and Nalcor's Species at Risk Plan.

So, if we could maybe just, please, Madam Clerk, pull up P-01750? And if you could scroll down, and then to the second page? In the paragraph beginning: "In your letter."

So just by way of context, there's – earlier in the exchange between government and representatives from Ekuanitshit – Ekuanitshit's counsel had asked whether they could receive funding in order to have the Historic Resources Assessment and Recovery Program reviewed by an archaeologist to be hired by the community. And that request was rejected. And so then, Ekuanitshit said, well, can we speak to your

archaeologists? And in the meantime, can you defer issuing the permit?

And the response from government is here in – at Exhibit P-01750. And in the paragraph beginning, "In your letter." And the response is that: "In your letter you have requested that a conference call be held between the" province's Archaeology Office, "the Proponent and … contact persons to be identified by the Innu Council of Ekuanitshit, along with the necessary interpretation services. The Province is willing to consider covering half of the cost of any required interpretation services. Please provide an estimate of these costs as soon as possible …." And, "contact me within … 10 days … to set a mutually agreeable time …."

And then the next paragraph: That "being said, we see no further reason to delay the issuance of the permit."

So in other words, we're not going to provide any capacity for you to have – to hire your own archaeologists to provide input. If you would like to speak to our archaeologists, then you can organize all of the interpretation services, let us know how much it will cost, and we will consider footing half the bill, and in the meantime we are issuing the permit before we talk to you.

So in a – pardon me – I would just mention that the experience with respect to the Species at Risk Monitoring Plan was similar in that Ekuanitshit, again, said: this is an issue of real importance to us; we would like to hire our own biologist to review the plan; would that be possible? The answer was no, and then when Ekuanitshit requested to speak to the province's biologist, again the answer was yes and we will consider paying half of the cost of the interpretation services.

So, in this context, it's Ekuanitshit's submission that the permitting process as carried out by government and Nalcor did not provide a – was not serious consultation and Ekuanitshit's concerns were never seriously addressed.

So I'll just say in a few final words in response to submissions by other parties, and, I mean, I suppose that Mr. Williams's suggestion yesterday that – or submission that the concerns of Indigenous peoples were taken seriously, we would submit that in Ekuanitshit's case there is no evidence of that.

And with respect to Innu Nation's submission regarding the jurisdiction of this Commission to deal with issues related to Indigenous consultation, I would – we would just highlight that we are not asking the Commission to redo the environmental assessment or to make any determinations about Ekuanitshit's constitutional rights, or to stray from the interpretation of the Terms of Reference that was released in March of 2018.

I think those kinds of issues came up early on and it's been clear all along that the questions related to strength of claim and determination of constitutional rights were outside of the scope of the Commission's mandate, but that it was nevertheless legitimate to ask what concerns were raised by Indigenous peoples, how were they addressed, and was this all done in a way that was likely to result in a good project and a project that minimized risks, recognizing that if the concerns of Indigenous peoples are not addressed, then it results in higher costs and higher risks – risks that could be avoided, for example, to endangered species, to the environment, to people's cultural heritage, not to mention the risk of costs associated with litigation and project delays and relationships that need to be rebuilt.

That's – that would close my submissions, Commissioner, unless you have any questions.

THE COMMISSIONER: No, thank you very much. I appreciate it.

Thank you.

MR. JANZEN: Thank you. And I'll just add my voice to the chorus of those thanking everyone who has been involved, Commission staff and so on.

Thank you.

THE COMMISSIONER: Okay.

All right, Grand Riverkeeper/Labrador Land Protectors.

I guess, first of all, congratulations are in order.

MS. URQUHART: Thank you.

So good morning, Commissioner. As you're aware, I'm Caitlin Urquhart representing Grand Riverkeeper and Labrador Land Protectors who are two citizens' organizations here in Labrador who are dedicated to the protection of the ecological integrity of the Grand River, also known as the Churchill River.

And I just want to start sort of – I'll just introduce my remarks and then go through some sort of brief overview of our submissions for the benefit of the public as well as –

THE COMMISSIONER: Okay. I'm just going to ask that the technical people up your volume just a bit –

MS. URQUHART: Okay.

THE COMMISSIONER: – so I can hear you just a bit more clearly.

MS. URQUHART: I can probably get a little closer also.

THE COMMISSIONER: No problem.

MS. URQUHART: Okay.

All right, so throughout the colonial history of Labrador, successive governments have exploited the bounty of Labrador, taking the spoils and leaving Labradorians to bear the consequences. In this case, despite the semblance of consultation and environmental sustainability, Grand Riverkeeper Labrador and Labrador Land Protectors submit that in developing the Muskrat Falls Project the provincial and federal governments have replicated these systems of oppression and have sacrificed the sustainability and ecology of Labrador in exchange for short-term political gains and economic gains that may never be realized.

When the project is completed, the waters of the Grand River will be contaminated with methylmercury. Traditional trapping and portage routes will be submerged. Winter travel will be more perilous. The people downstream will live in fear of the failure of the North Spur. And the fish, water fowl, mammals and flora that relied on the Grand River will displaced, depleted or extinct.

The benefits to Labrador that were promised relied heavily upon the reinvestment of revenues from the project into Labrador. Which, given the ballooning cost of the project, seem now wholly unlikely to ever materialize. However, the impacts will be felt by all Labradorians.

As I noted, I intend to provide a brief overview of the written submissions we provided and then move into some of the recommendations, as well as some issues that have arisen from previous submissions of other parties.

I just wanted to start actually with the interpretation of the Terms of Reference and note that the principles for this Inquiry were those of independence, co-operation, thoroughness, expeditiousness, openness to the public and fairness. And at paragraph 54, Commissioner, you noted that you will investigate what analyses, risk assessment, et cetera, were done as regards environmental concerns and whether these were appropriate and reasonable in the circumstances based upon accepted industry standards and knowledge that parties had at the various times when the analyses or risk assessments were completed.

And you also noted that you would be considering measures taken to address any legitimate concerns.

Following that, Grand Riverkeeper Labrador and Labrador Land Protectors were granted limited standing to address these issues. And by way of background, specifically, Grand Riverkeeper Labrador has been actively involved in protecting the ecological integrity of the Grand River since the 1990s. They've fully and actively participated in good faith in all aspects of this project including, of course, the Joint Review Panel environmental assessment.

And in that – in the course of that portion of the project, they retained experts; they went out and collected concerns and comments from members of the community. And the vast majority of the work that was done was on the shoulders of volunteers – so people from this community who

were so passionate and dedicated to this river and the ecology of this area that they donated generously of their time. They attended every day of hearings and provided significant submissions to that body.

And I will note that, of course, I'll echo the comments of my friends that we are not looking for this Commission to reopen the JRP or any of the court decisions thereafter; however, we do feel that the determinations that that body made – the findings and recommendations – certainly form the foundation and part of the body of knowledge that was available to decision-makers at the time. And we'll get into that a little bit more as we go ahead.

In our written submissions, we've covered a number of issues, and I'm just going to, at a very high level, touch on those, mostly for the benefit of the public and for the members who are here, who may not have had an opportunity, as there have been many written submissions, to review all of them.

So, firstly, we discussed the fact that the sort of appearance of consultation and the – ultimately, the lack of meaningful accommodation meant that many – locally, many Labradorians viewed that as really a tool to distract and pacify the people of Labrador until such a time as it was too late for the project to be stopped.

And we see some sort of validation of this in the fact that some of the key findings and recommendations of the Joint Review Panel, such as the lack of justification of proper cost-benefit analysis being performed by Nalcor or being provided by Nalcor – one of the first recommendations from the panel, which was summarily rejected by the province.

As well, we note that the panel did indicate that there – the benefits to Labrador were uncertain.

Throughout the hearings of this Inquiry, we've seen that the decision to build the Muskrat Falls Project was a political decision. It was one based on an energy policy that empowered a Crown agency to go forth and build this project, and at various decision points where evidence was available – including, for example, the Joint Review Panel, which questioned the need for the project and the cost and revenue streams that were being projected for the project – these evidence – these points or these opportunities for evidence based decision-making were rejected.

As I've indicated, the lack of, sort of, meaningful consultation and accommodation resulted in broken trust, and my friend Mr. Cooke discussed the sort of – I think he referred to it as trust capital, and an important part of a project which – in a location such as this, and that led to civil unrest, as we've seen, obviously.

And for Grand Riverkeeper and Labrador Land Protectors, one of the essential parts of that lack of trust has been a lack of transparency, the unilateral ability on Nalcor's part to determine something to be commercially sensitive, as well as the fact, for example as is noted, that – in the federal court decision on the Joint Review Panel – that was the case involving my clients, Grand Riverkeeper Labrador – indicated that, of course, the Joint Review Panel was unable to subpoena records that didn't exist. And so by virtue of the fact that certain types of cost estimates or needs assessments hadn't been performed, Nalcor was not required to provide those or produce those.

We also note in our submissions, the lack of capacity within the bureaucracy. So beyond, sort of, not the political level, but of course the level of the public service, there was a lack of truly independent oversight. And one example, of course, is when – whether items are determined to be commercially sensitive. And, additionally, truly independent bodies, expert bodies, such as the Joint Review Panel, and the environment – the Independent Expert Advisory Committee were not being, sort of, given adequate weight. And since the government is not bound by those decisions, those independent bodies can be sort of summarily dismissed.

We also note, importantly for the present day, that monitoring and enforcement is lacking. In respect of caribou, we know that the Woodland Caribou Recovery Team hasn't met since 2011. There – we've gone over this multiple times throughout the hearings, but there was no list or chart or tracking within the Government of Newfoundland and Labrador of all of those commitments and conditions of the release from environmental assessment, which Nalcor would be required to comply with.

In terms of recommendations, we started with one of the most important topics, which is transparency. And, essentially, without transparency, without access to the information – and one example would be a list of the commitments that have been made by Nalcor, which are required conditions for the release from environmental assessment – groups such as Grand Riverkeeper and Labrador Land Protectors are unable to participate in the function that is to hold these parties to account, these bodies to account.

They are unable to ensure that compliance is happening from an external perspective. They don't have access to that information, and therefore they can't follow along. And again, this is a place where we lack – we end up without having trust.

So one of the issues, as well, with – particularly with a technical project, such as this one is, there's often a significant amount of scientific information or long, lengthy reports that are not accessible for many people. So ensuring that there are external independent bodies – and we've highlighted the media or universities as some bodies that can serve in this function – to translate that science information into information that is accessible and culturally appropriate for the community for which it's intended.

We recommended considering a more collaborative approach. Unfortunately, we've seen throughout many years of the consultation processes – not only here with this project, but many projects across the country – that consultation can often be token or note taking, or one-way information out type of processes.

So we're hoping that in the future, a more collaborative approach – both with Indigenous groups and governments, but also with environmental groups and local residents – to ensure that there is a sense of buy-in within the community and to build trust, respect and support between proponents and community.

As my friend, Ms. Brown, alluded to, we have recommended that environmental assessment – the environmental assessment process be more robust. And one way to do that might be to provide those panels with more authority, much more like an administrative decision-maker. They do have a lot of quasi-judicial functions already, and allowing them to have some ability to make decisions and orders would ensure that that independent expert body would be able to actually be meaningful. As we've indicated in this case, our – my clients don't feel that their – that the recommendations were listened to and therefore we've sort of wound up in this situation.

THE COMMISSIONER: So just on the point made by Ms. Brown, which I think is a correct one, is that my authority is also limited. So you've asked, as one of your recommendations, that I consider making it binding that there would be – whatever the environmental assessment panel decided would be binding.

That's asking an awful lot of a provincial Inquiry into the Muskrat Falls Project because this goes to the heart of environmental assessment all over the country. The – both governments, and these are elected institutions, basically have established procedures that suggest that there will be assessments but they're not binding assessments.

Most recently, the Government of Canada has changed the environmental assessment process to add a little bit more, I think, robustness – to utilize your term. But the ability of myself, even if I had the knowledge or the expertise to do that is – I think, you would have to admit – is fairly limited because there's a lot more at play with regards to that process than just the Muskrat Falls Project. I would need to hear from, you know – anybody who is going to make a decision on this would need to hear from, you know, governments, proponents, members of the public.

You know, I think it's important to understand here that, as I do, that environmental issues are very important. Sometimes they're more important to some people than they are to others and there is a balancing that our elected governments have to take in that regard.

So, some of what you're asking me to look at here I think is a little bit beyond what I think would be fair, for me, to even consider trying to do. There are other things that I – you know, I

certainly see possibilities, but I think I need to be honest with you with regard to that.

MS. URQUHART: And, again, I think that that's within – you know, you make the ultimate decision of what – which items you wish to – you know, you'll consider all of them and then make decisions on what you'll bring forward into your report. And from our perspective, we wanted to ensure that the full suite of, sort of, options or ideas of how those recommendations could potentially look were provided and just to, sort of, give you an opportunity to turn your mind to it, not – understanding, of course, that there are limitations to what you may want to recommend. I – you know, there are, obviously, other pieces that you may recommend that would result in legislative changes. So, this wouldn't be, sort of, unique in that way.

However, understanding that you're looking specifically at this project but also for looking – there are other ways, as we've indicated, for example, requiring governments to respond in ways that are more sort of robust or ensuring that – for example, one of the recommendations of the Joint Review Panel was that the – all of the commitments that were made throughout the process would be included in the environmental release regulations. And that was not done and as a result, we've viewed or we've heard throughout these hearings, that there wasn't any monitoring being done on the commitments outside of those which were expressly laid out in those regulations.

So, in our view, it's important to consider the ways in which that sort of – that also plays into and folds into the, you know, the civil unrest, the lack of trust, but also the project costs, the type of oversight that was and wasn't being performed. And I guess that sort of brings me to – if there's –

THE COMMISSIONER: I just have another question, so just on the last point. So with regards to the issue of the monitoring of commitments, so there are two sets of commitments here. One set of commitments would've been the commitments that arose out of the release of the environmental assessment. And my understanding is the Department of Environment did have some sort of a tracking mechanism in place – it wasn't in Environment, it was with – I think it's called Aboriginal Affairs, I'm sure everybody'll know what I'm talking about – which was only periodically updated, and I understand that evidence.

But there were another set of commitments that Nalcor had made during the environmental process itself. And you had a concern, I think you asked questions about this during the Inquiry. And Nalcor had, internally, some form of a tracking system for that.

So what are you – are you suggesting deficiencies there, what are you actually asking me to consider doing with regards to that monitoring?

MS. URQUHART: So the deficiency there is in the – so the recommendation from the Joint Review Panel was that all of the commitments that Nalcor had made throughout the EIS process, the information requests, throughout the JRP, would all be listed and included in the environmental assessment release regulations. What the actual regulations state is the first condition of release is a general clause that says: Nalcor must abide by all commitments made throughout – and it lists those things – the Environmental Impact Statement, the IRs, et cetera. And –

THE COMMISSIONER: So, but not – I recognize that, so it didn't include a detailed list of those – what those commitments were?

MS. URQUHART: Correct. And then, so government had the document that the Commission requested to be updated, which was the 83 recommendations from the Joint Review Panel and how those were being addressed. They had a table or chart that summarized what was being done to address each of those 83. And then they also had the document that I think you're referring to within Aboriginal Affairs – I'm trying – Labrador and Aboriginal Affairs, was based on the permits that were required, so it was a tracking of the permits that were being issued together with the conditions or requirements pursuant to those permits.

But there is also – we have evidence from – that Nalcor had a list of its commitments and there were, I believe, over 450 commitments that were made pursuant to sort of that first blanket clause,

I'll call it, that they had the commitments pursuant to the EIS, IRs and statements made during the JRP. So there were an additional 450 commitments that Nalcor had made that they were tracking, but the government had no – you know, none of their disclosure, had any – had these – this list or was – showed any evidence they were tracking that in any way. And all of the folks who I asked about that had no information that that was being tracked or monitored in any way.

So, in our view, 450 commitments is not insignificant and the fact that those are, by virtue of that first term of the condition of release, required for the compliance of this project to its conditions of release. The fact that they weren't being tracked is certainly concerning.

THE COMMISSIONER: So your clients are satisfied with the tracking that was being done in the Department of Environment or through Labrador and Aboriginal Affairs, at least with regards to the 83?

MS. URQUHART: Well, the – I mean, they're a bit – as you've noted, they were only updated in 2012, I believe, and 2014, and then again for this Commission. So they clearly weren't being tracked in any meaningful way. Obviously, at two points in time they were updated and as – Commissioner, as you noted, the information in them is quite summary. It's not particularly detailed.

So whether or not that's sufficient – and, additionally, if it's not updated, then even with an ATIPP request, we wouldn't be able to obtain any further – my clients wouldn't be able to obtain any further information as to the updated status of those actions.

THE COMMISSIONER: Okay. Thank you.

MS. URQUHART: And so, further to that I suppose, we've indicated we believe that monitoring should be done publicly, that these things ought to be publicly available and, as I've noted, that they should be provided in a way that is accessible and culturally appropriate.

And we've also recommended that projects such as this and projects going forward focus on the people and on the ecology because the folks who live in the area are the ones who ultimately have to live with the consequences of the project.

THE COMMISSIONER: Okay.

So when you say, in a way that is accessible – so you refer in your brief that it shouldn't be on – just on a website. You've actually suggested Facebook. So I'm assuming you believe that the vast majority of the people in – would have access to Facebook.

MS. URQUHART: So I think if – particularly in Labrador, Facebook, radio, bulletin boards are all important means of access to information. They are highly utilized. And whether or not somebody is going to think: Oh, it's Tuesday, I should check the Nalcor website to see what the most recent updated report is. I mean, I think that that's unlikely.

And, unfortunately, if the information is not sort of coming up in a way that cues people to review it, people won't review it. Or I've had myriads of questions of people asking, you know: Where was that document, I've not seen it before. And we found it on the Nalcor website, but you need to know that it's there and that it exists.

So even ways of advising people, the monthly report for caribou has now been posted, or whatever the case may be, to ensure that people know when the information is available and what information is available. As I say, in a way that is mindful of the fact that not everybody has Internet, not everybody is going to check a website, and that if it's sort of out of sight, out of mind, then they may not be checking it on a regular basis.

THE COMMISSIONER: All right.

See, there are practical implications here, because, you know, newspapers, radio stations, media don't tend to accept this for free, and unless it's a big news item it's not going to be something they include. So, otherwise, then you would have to pay to have it included.

So might not a better idea be – and it seems to me because of the myriad of websites or whatever, like, if there was a situation like this particular project, like, if there was one site that

was kept by government that was both joint Nalcor and the Government of Newfoundland and Labrador and Government of Canada where environmental information would be, maybe, one of the topics there and broken out. Might that be more appropriate than depending on the whims of the media or, alternatively, the people who have Facebook?

I agree with you that not everybody has Internet service, and I suspect in Labrador, I recognize in more rural areas it's even more difficult. Although there are steps being taken, as I understand it, but I think it's becoming the way of life, and so I'm thinking that might be, practically, the better – the best way to approach this. But I'd certainly be open to any suggestions you'd have.

MS. URQUHART: Well, I think, absolutely, that having one sort of repository of information that is easy to navigate, that the information is clear, that there is plain language versions, that there are versions in different languages. Obviously, we have a number of different dialects here in Labrador – languages and dialects.

And also I think that utilizing and making good use of things like a community liaison committee. Having one that is robust, that is active, that has capacity and that goes and engages, for example, in public sessions to ensure that people are aware that the information is available, what information is available and where they can access it may also be a part of that, sort of, accessible and culturally appropriate (inaudible) –

THE COMMISSIONER: Okay.

What type of information, now, are we talking about? Because before we were talking about the monitoring –

MS. URQUHART: Mm-hmm.

THE COMMISSIONER: – the public's ability to monitor –

MS. URQUHART: Mm-hmm.

THE COMMISSIONER: – the commitments. What are you speaking about here with regards to community liaison?

MS. URQUHART: Well, I mean, part of the point of the community liaison is to ensure that information is passing from Nalcor to community and from community to Nalcor. And that they're supposed – I think the intention or part of the intention of that Committee is that they're a liaison, right? They're the – a place of interface.

And while they're both representative, I would hope that they also have a bit of an obligation to, as you say, ensure that information is going both ways, that it's both – information from the community is going through the representatives to Nalcor but also that the information which Nalcor holds – which would include, for example, those 450 commitments which Nalcor has been monitoring but the government wasn't – that monitoring information.

And additionally, I mean, if you look at the Nalcor website, there is – there are reports, regular reports, on the status of wildlife, all sorts of different issues. The fact that those are available, we would hope that a liaison committee that was actively engaged would be able to channel some of that information back to the community and would be more aware of some of these things about cultural – you know, about the fact that not everybody is going to have Internet, not everybody is going to be able to access the information in the same way. So perhaps provide some navigation around that.

THE COMMISSIONER: So what – like, again, I want to try to make sure I know exactly what you're asking.

So if we're still talking about the issue of the monitoring of the commitments, might another way to do that be, maybe, you know, having a twice-yearly public meeting where somebody basically reports on it and questions can be asked? It's – because the other thing that I do think that I've heard of in this particular case is that one thing that Nalcor did do is it did have meetings in communities and whatever – and I've heard about those – which I think is something that is helpful to the communication process.

Now, some people say it was too much one way or whatever, but at least there were community meetings as I understand it – or sessions. Nalcor, for instance, has its annual meetings in public. They're advertised and I think there are even updates, now, with regards to cost and schedule; I'm not sure if there are meetings for that or not.

But – so I'm just wondering, like, with regards to the issue of potentially some sort of ability on the part of the public to understand the monitoring that's being done and what's being done with the commitments, the idea of maybe a, you know, central website with, you know, a meeting held every six months or once a year. What's your thought on that?

MS. URQUHART: I think that would – certainly if it was in community and if it was at least held in Goose Bay, but also, as I'm sure you've heard, there were concerns from members – or from residents of Rigolet and Mud Lake, for example, that they would have difficulty in coming to attend here either for the summations, but also for the public session.

And so, similarly, when there are issues that are going to impact other communities' travel to and from ensuring, you know, in the event that – you know, certainly there's technology; there is potentially an ability to have a sort of video, I don't know, conference, but generally, preferably, you're going to get the most attendance, the best, sort of, participation if you're attending in person, in community. So I think that that certainly would be a great improvement if that was available.

THE COMMISSIONER: Thank you. All right, thank you.

MS. URQUHART: Thank you.

The final submission – or, sorry, the final recommendation that was made in the written submissions turned to the issue of the North Spur and just that we hope that there may be a recommendation around performing some testing or looking into some further testing of the North Spur as the residents downstream remain very concerned about this issue.

I'll move now into the comments and recommendations arising from the submissions of other parties. And, firstly, wish to reiterate that we're not seeking to revisit the Joint Review Panel or the IEAC reports; however, as we've indicated, the information are – contained therein is important as it forms the foundation of the information available to decision-makers at the time.

And in particular, on page 9 of our submission, we have – I have just a quote and – actually, Madam Clerk, if you'll pull up P-00041, please? At page 13; and just scroll down, please.

So "the Panel concluded that Nalcor's analysis, showing Muskrat Falls to be the best and least-cost way to meet domestic demand requirements, was inadequate and recommended a new, independent analysis based on economic, energy and environmental considerations. The analysis would address domestic demand projections, conservation and demand management, alternate on-Island energy sources, the role of power from Churchill Falls, Nalcor's cost estimates and assumptions with respect to its no-Project thermal option, the" best "use of offshore gas as a fuel for the Holyrood thermal" generation "facility, cash flow projections for Muskrat Falls, and the implications for the province's ratepayers and regulatory systems."

We also – just a note in respect of this – it was – came to the attention of the Commission, I believe during the hearings, that conservation and demand management, certainly, was not considered in the forecast, the energy load forecast, and further that the efforts around conservation and demand management were under-funded compared to what was recommended by, I believe – I'm forgetting –

THE COMMISSIONER: Marbek.

MS. URQUHART: Thank you. Marbek.

Madam Clerk, if you could please go to 275? Just – I've abridged this slightly, but if you'll scroll down, please, Madam Clerk. I may have used the number at the bottom of the page. Well, I have it here. So, I will read it. I apologize –

THE COMMISSIONER: Try – can we go about 30 pages beyond this and just scroll down 'til we get to page –

MS. URQUHART: So, actually, if you'll – yeah – sorry.

THE COMMISSIONER: Are we in the right place? So, around –

MS. URQUHART: No, I think – so it's the impacts on benefits and impacts of the project; biophysical, net benefits, there we go.

So, here it says: "Net benefits to Labrador are even more dependent on a large-scale mitigation and adaptive management effort with respect to adverse social and biophysical effects expected for a long time to come. … the residual environmental effect … would still be negative for Labrador."

The full project, i.e. – and I think we may have to scroll down a little bit to get to this part. "The full project," i.e. both Muskrat Falls and Gull Island, "would likely deliver net benefits to the Province. Whether it would also deliver net benefits to Labrador depends on whether enough of the revenues generated from the Project are re-invested in Labrador to ensure a net benefit.

"If Muskrat Falls only proceeds on the basis that it would be needed to meet Island energy needs, then it is much less clear that the Project will result in net benefits to the Province as a whole or to Labrador."

And given that the recommendations around the adequacy or inadequacy of the assessments done by Nalcor, and the fact that those were rejected by the province, Grand Riverkeeper submits that such an independent expert body ought to have greater authority to create real and meaningful opportunities for the public to engage, even after the release from environmental assessment, which is, as we've discussed earlier, potentially something more proscriptive regulation that clearly lays out commitments and conditions of release, as well as the ability to track those commitments and permits for compliance by the public.

Flowing from that, we also note that while the Crown – and this also comes from my friend Mr. Ralph's submissions earlier, that while the Crown has an obligation to perform in accordance with statutes, in carrying out this obligation, it requires resources and capacity within the public service. So, if public service lacks capacity, its ability to perform that duty is diminished, and in some cases rendered meaningless, which is, we would put to you that that would – that the – or we would suggest that the monitoring of those 450 commitments, essentially, was non-existent, because there was a lack of capacity to do so.

Another example of this would be the issue of poaching. We note that in Labrador, in Central, there are now only two wildlife officers, which, in our view, is wholly insufficient to properly monitor and protect the wildlife in this area, in this vast area.

Further, the public service must have access to independent experts and external resource and expertise as necessary. One example might be the salmon studies that clearly conflicted with local knowledge of the pathways of salmon, that that could've been an opportunity for an external resource to be leveraged to confirm or reject findings.

In addition, unfortunately, I feel we have to note that there must be an authority within the public service to demand compliance and ensure that there are repercussions for failure to comply. One example that sticks out for us is the fact that the independent engineer continually raised the issue with regards to the North Spur geotechnical mapping and Nalcor's failure to comply with industry standards.

However, we heard from those responsible and the Oversight Committee as well as the environmental panel that they did not have the authority – or they didn't believe they had the authority to demand that to be done by Nalcor. And again, having this done and having this geotechnical mapping made public could have potentially improved public trust in the project and in the North Spur.

Further, the issue of integrated resource planning is one that came out, and it's important in our view that resource planning in the future be done

in a way that is integrated, in a way that considers all regional players and in a way that has proper and independent oversight, for example, by the PUB.

As we've noted, there's evidence that in this case, conservation and demand management was not only not considered, it was also under funded. Again, arising out of comments of other counsel, we simply want to note that in respect of wheeling through Quebec, that –

THE COMMISSIONER: Okay. Just – if I could go back to integrated management.

MS. URQUHART: Mm-hmm.

THE COMMISSIONER: Resource – planning, rather. So my understanding is that the JRP recommended that this be undertaken.

MS. URQUHART: Yeah.

THE COMMISSIONER: And that the Government of Newfoundland and Labrador accepted the intent of that recommendation. It was an issue about timing, and I think that was referred to. So, what you're asking is that now be followed through on?

MS. URQUHART: Correct.

THE COMMISSIONER: Okay.

Okay. Sorry.

MS. URQUHART: No, thank you.

So, in respect of wheeling power through Quebec – which was noted a number of times, I believe, yesterday – we simply wanted to flag – and I don't have the depth of knowledge on this, but the Quebec – as an entity that sells power into the US would be subject to the US Federal Energy Regulatory Commission, which has some fair trade requirements – or, sorry, free trade requirements. So, I'm not sure to what extent that creates leverage for Newfoundland and Labrador, but that's something that was flagged.

And, finally and importantly, bearing in mind that – as was indicated by the Joint Review Panel – that revenues were to be reinvested in Labrador in order to ensure benefit to Labrador. It's important to note that many US states are now not willing to purchase power from megaprojects, such as Muskrat Falls, because this power is not green, clean or sustainable.

So, Commissioner, unless you have any further questions, those are my submissions.

THE COMMISSIONER: No, that's fine.

Thank you very much.

MS. URQUHART: Thank you.

THE COMMISSIONER: Okay.

I'm just looking at the schedule here now. This is going a little quicker than I expected, and my problem is that I've been trying – these briefs all came in on Friday, so I've been trying to catch up to everybody, and I'm only up as far as Mr. Burgess' brief. So, I don't have any of the others read, to be quite honest with you, which presents a problems because I would like to review them before I hear from counsel – for obvious reasons.

So, what I think I'm going to do is: we'll proceed with Mr. Burgess this afternoon. I'm going to try to have a look, Ms. Best, at your brief over the lunch period. If I can't do justice to it, I'm not going to do it. I'm going to spend the evening to have a look at it. And we'll decide if you're going to go this afternoon, or not, a little later.

Is that – does that present any problem to you?

MS. G. BEST: No, it doesn't, Commissioner.

THE COMMISSIONER: Okay.

All right.

So, let's adjourn now, and we'll come back at 2 o'clock.

CLERK: All rise.

Recess

CLERK: This Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: All right, Mr. Burgess for Astaldi.

MR. BURGESS: Thank you, Commissioner. My name is Paul Burgess. I represent Astaldi Canada Inc. Good afternoon.

Commissioner, for purposes of the oral submission, I propose to summarize the issues that were raised in the written submission filed on behalf of Astaldi. I will then offer some comments on suggested approaches to some of the analysis and issues and respond to some of the submissions that were made by other parties and then, certainly, take any questions that you may have at the end or certainly, obviously, during the presentation or the submission.

The oral submission will be fairly brief, and we rely on the written submissions as presented.

In the written submissions that have been presented to the Commission and the Commissioner, I've attempted to put forward information related to Astaldi's experience with the Muskrat Falls Project and Nalcor and the Muskrat Falls Corporation. I have attempted, hopefully successfully, to avoid the natural tendency we have as lawyers to litigate the issues. You've made it quite clear throughout the Inquiry that this was not a place for the parties to litigate matters that are ongoing. And I recognized, and do recognize, that this is an inquisitorial process rather than an adversarial one.

So what we did in the written submission, presented by Astaldi, is break down the issues to correspond with the relevant sections of the Terms of Reference as they apply to Astaldi. And while we recognize there may be an overlap of some of these issues, we've tried to put them in three categories.

The first category is in relation to clause 4b(i) of the Terms of Reference, which lays out any delays and cost overruns caused by Nalcor's supervisory oversight and conduct of the contract between Astaldi and Nalcor. And I will – interchangeably, I may refer to that contract as CH triple-zero-seven or CH0007 or the contract for purposes of this submission.

And in this submission we have outlined under five separate issues. The first being the lateness in the date of the actual award of the contract by Nalcor to Astaldi. The second being the insufficient on-site authority by Nalcor. Three, the unprofessional conduct by certain of Nalcor employees. Four, the impact of Nalcor assuming the role of engineer/payment certifier. And fifth under that category, the termination of Astaldi, which Astaldi claims was a wrongful termination.

Under the second category, which is – in the written submissions is IV, it deals with clause 4b(ii) of the Terms of Reference, and that deals with the delays and costs overruns as a result of the terms of the contractual arrangements between Nalcor and Astaldi related to CH0007.

And for that, we have categorized those under two issues: one, the labour productivity assumptions and related issues; two, the Limited Notice to Proceed and as amended; and the restrictions and limitations that are placed on someone operating under a Limited Notice to Proceed.

Finally, the third category under V in the written submissions relates to the Terms of Reference, clause 4(b)(3), which is delays and cost overruns related to Nalcor's project management structure. And in that category, we have framed it and phrased it as Nalcor's multiple prime contracting model.

Now, the issues that arose and the evidence that was heard, Astaldi acknowledges that the contract CH0007 got off to a slow and unsteady start in 2014. Some of the reasons for this, Astaldi respectfully submits, were the late award of the contract; the time of year that the contract was awarded, being in November versus June of the year and the implications of the harsh weather conditions experienced in Labrador; and the limitations and restrictions applicable to LNTPs – or Limited Notices to Proceed.

We heard much evidence during the Inquiry that the start-up of megaprojects is difficult and often slow. That, we heard, is not unusual. We also heard from numerous witnesses that Astaldi turned it around in 2015 and they were performing as good as or better than could be expected.

This Inquiry also heard that while the benefits of the Integrated Cover system, commonly referred to as the ICS or the dome, were never fully realized, conceptually, it was a good idea and there were some benefits to the ICS as constructed. Specifically, I refer the Commissioner to the evidence of Georges Bader in that regard. All of this led to Astaldi and Nalcor negotiating additional compensation, and in December of 2016, they signed the completion contract.

From that contract, and as part of the terms, there was an additional approximately $800 million that Nalcor agreed to pay to Astaldi. The basis for that payment, Astaldi asserted that there were extra costs that were justified as a result of Nalcor's actions and decisions, which caused delays and cost overruns, as well as such things as the costs associated with protests.

We heard the evidence of Nalcor that they claim that payment was the most efficient way to deal with the issues facing Astaldi, rather than terminating Astaldi at that time. Regardless, whatever the issues might have existed between Astaldi and Nalcor prior to December 2016, any such issues, we respectfully submit, were rendered moot by virtue of the terms of the completion contract.

We recognize, as has the Commissioner and the Commission, that there are ongoing –

THE COMMISSIONER: Rendered moot in the sense of legal recourse by either party?

MR. BURGESS: I'm sorry?

THE COMMISSIONER: I say rendered moot in the sense of legal recourse by either Astaldi or Nalcor.

MR. BURGESS: Correct.

THE COMMISSIONER: That's what you mean?

MR. BURGESS: Not – certainly. From a legal sense rendered moot at that –

THE COMMISSIONER: Okay, some people might think it's something different.

MR. BURGESS: No, that's clearly – it's a significant amount of money, but at that point in time the completion contract contained terms which said that on a go-forward basis here would be the arrangement. And looking backward, any claim for damages that were in the original contract were thereby waived. So it's the legal basis of moot. And, again, I don't undermine the significance of that payment.

As I said at the outset, Commissioner, we recognize, as has the Commission, that there are arbitration proceedings between Astaldi and Nalcor in which Astaldi is claiming damages of hundreds of millions of dollars, and there are other third-party claims which impact this Inquiry. It's for that reason that we have made limited submissions, because I think the evidence is clear and it's for the Commissioner to decide what is relevant for purposes of rendering your recommendations.

THE COMMISSIONER: So, where is that, just for interest sake, because one of the things, obviously, I have to think about is how I'm going to word this, 'cause I don't want to impact the arbitration. So, where is the arbitration process right now, as an aside?

MR. BURGESS: My understanding of the arbitration process – again, keep in mind there's other litigation, for example, with respect to the ICS, but in particular, the arbitration process, as I understand it, the statement of claim has been issued by Astaldi. My understanding is in, I believe it's the end of August, that there will be a response which could take the form of a claim back – a counterclaim back. But the response of Nalcor, I understand, is to be by the end of August, I think. The hearings, I understand, are in the fall of 2020 is my understanding.

THE COMMISSIONER: Okay. So we're over a year away from any sort of decision on the arbitration?

MR. BURGESS: We're not on the doorstep.

THE COMMISSIONER: All right. Okay.

MR. BURGESS: Commissioner, there's a couple comments I would like to put forward regarding the approach to the analysis and a response to the submissions of the – some other

parties have made, and I make these respectfully.

First, Nalcor suggests in its submissions that the Commission should look at Nalcor as a corporation, and not as the individuals and their actions. Astaldi respectfully submits that when we're dealing with senior management by Nalcor or Muskrat Falls Corporation, they speak for and represent Nalcor.

Nalcor has suggested that, amongst other things, the Nalcor employees were sincere, hard-working, professional. Astaldi's evidence alleges instances of unprofessional actions by certain employees of Nalcor, not certainly all employees of Nalcor. As Don Delarosbil clarified in his evidence, the majority of Nalcor employees were, in fact, hard-working, and he found the experience to be very professional. And I think one must keep in mind, when weighing the allegations put forward by Astaldi, that evidence and instances of allegations of unprofessional actions by certain Nalcor employees were given by other unrelated Astaldi witnesses who gave similar evidence.

Finally, I respectfully submit that if the evidence and claims of Astaldi were uncorroborated and isolated, then you could argue it's simply evidence influenced by ongoing commercial disputes, as we heard in response from many of Nalcor's senior employees. In this case, the experiences of Astaldi were echoed by not only other contractors, but also former Nalcor employees, which we respectfully submit, corroborates Astaldi's allegations.

Commissioner, those are the oral submissions on behalf of Astaldi, and in this case it's in recognition that – perhaps the most valuable if you had any questions – may be more valuable in oral submissions, again, because of the sensitivity of litigation matters, and that was why the written submissions were worded – I hope at least, my attempt was, to word them carefully and not try to get into the middle of the litigation before you.

But before we get to that, I do want to take the opportunity on behalf of Astaldi to first thank the Commission for granting standing to Astaldi and the right to be heard on these very important issues. And also, while many if not all of those who proceeded me in delivering their submissions have thanked the Commissioner, Commission counsel and Commission staff, the Sherriff's Office, I suggest to you it's only those of us who had the privilege to directly participate in this Inquiry can we fully understand the level of commitment, the professionalism, as well as the personal sacrifices that each of you have made to get this job done.

This Inquiry is extremely important. Astaldi recognized that and requested, therefore, standing and was granted standing before this Commission. Whether we like it or not, whether we as Newfoundlanders and Labradorians supported the project or not, at any time, whether you were opposed to it or in favour of it, the fact is we, the people of Newfoundland and Labrador, we have it and we own it.

So on behalf of my client and myself personally, Commissioner, I want to offer my thanks to you and the Commission staff. Good luck in your deliberations and if you have any questions I'm more than happy to try to answer them.

THE COMMISSIONER: Yes, I just have a couple of questions, Mr. Bursey – or Mr. Burgess, rather.

Paragraph 37, this is the part of your brief that deals with the issue of the engineer, payment certifier. And the first time I ever – that I can recall during the Inquiry hearing about this particular position – engineer, payment certifier – was actually when I was reading your brief.

And, you know, I certainly know how it worked because it was explained by various witnesses how, you know, invoices were made and whatever. But there is one, you know, I query whether I have information that suggests – your last sentence in that paragraph states that "Contrary to best practices, Nalcor undertook this role with predictably disappointing results."

And from my knowledge, I don't believe that I have any evidence before me as to what the practices are, or the best practices are, with regards to that issue. Now, you have referred to some of the exhibits which describe that position and whatever, but whether or not I have

anything or have enough that talks about what the best practice is, is something that I question.

Your comments?

MR. BURGESS: My comments would be as follows, Commissioner: First of all, you're absolutely correct. There wasn't much evidence given before the Inquiry with respect to this issue. Although, this issue, I suggest to you, is one of which is contract based, and that's why we attached the case law.

One of the things we would suggest is that the fact that Nalcor assumed the role of both engineer – not engineer of record – but engineer and payment certifier then created a situation where you had clearly an interested party who was dealing with issues of which it had a direct interest. So, for example, if there was an engineer and a payment certifier in relation to the crane rail incident, that is a case where it could be argued – or I would argue and respectfully submit – that an independent engineer or payment certifier could be involved to make decisions.

What Nalcor has done for instances when there is any dispute or issue in relation to payment, and whether it was a design issue or whether it was a contractual issue under CH0007, they didn't have the reliance upon an independent person or company to take that role.

I will point out to the Commissioner – I'm glad you raised it – this is an issue that is being presented before the arbitration. So my comment that I meant to make in my submissions was I've included it. I want you to be aware it is part of the arbitration argument, and then you can deal with it and use it as you see fit, given those circumstances.

THE COMMISSIONER: So just to go back to my query about best practices. What evidence do I have, if any, related to what the best practice is in this area?

MR. BURGESS: Well, you might not have anything with respect – it may be a stretch, but the crane rail incident, for example, is one I use.

If you recall that issue, Commissioner, there was an issue with –

THE COMMISSIONER: Oh yes, I recall what it is.

MR. BURGESS: Right.

THE COMMISSIONER: So – but I – but again, I'm – you're indicating, "Contrary to best practices, Nalcor undertook this role with predictably disappointing results."

And I'm – I don't – you know, again, I'm sitting here, like most people are, not involved in the construction industry. I think I've learned a fair bit during this Inquiry, but I have no idea – and nor do I have any evidence – about what is the best practice with regards to getting an objective – I know that's what is referred to in the contract, but I don't know what the practice is with regards to other megaprojects or other construction projects with regards to this particular individual.

Now, you have cited some case law as well.

MR. BURGESS: Well, that's what I was going to indicate to the Commissioner. There was no expert evidence that was led on this particular point, and Astaldi's witnesses did not deal with this issue directly as well. But you do have case law and authority that cites the principle that the engineer payment certifier deals – a lot of the case law, in fact, deals with the independence of the payment certifier. But there is case law that says you shouldn't be – the payment certifier should be independent.

So I think you can take, from the case law and the authorities we've cited, that an owner in a case such as this ought not to get involved and take over the role as architect – rather, as engineer and/or payment certifier. And as in one of the cases stated, it was a fool who took over that position in one of the cases. And I think I've cited it, but I don't recall which particular case that came from.

THE COMMISSIONER: So similarly, I guess the reference on page 42 – or paragraph 42, page 16 of your brief, you were talking about: "The role of 'Engineer' involves considerable exercise of expert discretion, which in turn shapes the success of a project. This is well-understood in the industry and at law to be a quasi-judicial role. Nalcor reserved that role to itself. This is

highly unusual, unprecedented perhaps in any project of this size and importance."

And again, it's one thing to say it; it's another thing to have evidence that establishes it. You're making submissions; you can't provide evidence. And I'm wondering where is the evidence to establish that?

MR. BURGESS: Well, that would be specifically contained at tab 1, the excerpt from the *Canadian Law of Architecture and Engineering*.

THE COMMISSIONER: So how do I know that that is the bible, so to speak? Like again, you know – like, you're referring this – anybody can give me – on summation – can give me a document that says something. Unless – I can only act on evidence that is provided during the Inquiry. I don't think even a submission of a document that's not been referred to in evidence is something that, in usual course, that I could treat as evidence. So this – it just concerns me this whole area is an area that was not tested during the hearing, and yet you're raising it in your submission for me to consider. And I query whether I can.

MR. BURGESS: Well –

THE COMMISSIONER: And now even more so because it is part of the arbitration which – but, again, I'm going to – you know, there is going to be a bit of overlap here because there are going to be things that I need to deal with that could well before the – be before the arbitration. But there are things that are public now anyway. So it's – but –

MR. BURGESS: Well –

THE COMMISSIONER: – anyway, I just wanted to raise this, give you an opportunity to speak to it.

MR. BURGESS: And I appreciate that, Commissioner. And that – again, it was – what I indicated at the outset – I felt that the value – in relation to Astaldi, at least – the value of the oral submissions. I'd say two things with respect to your – or three things.

Absolutely, you will have to weigh what weight, if any, you give to these arguments and the authorities that are attached.

Second, I would submit you do have an excerpt from a text, one of the authors of whom is former chief justice of our Supreme Court of Canada, Justice Beverley McLachlin.

Third, you may file it in the same file to, whichever weight you do, when we had the expert witnesses from Grant Thornton and in the report providing quotes from text.

So the weight that you give it, I felt that it was incumbent upon me to include it, to indicate to you the limitations you may want to have with respect –

THE COMMISSIONER: Right.

MR. BURGESS: – to it.

THE COMMISSIONER: So just to get back to the GT report. Of course, they were witnesses who testified, and opportunity was given for all parties to speak to some of those quotes – actually, there were some questions that were asked with regards to quotes from Edward Merrow and others, my recollection is. So – but it's a little different when you present me with a document that has not been given to anybody else during the evidence, and I'm some – the implication being that I'm supposed to give some sort of evidentiary value to it, i.e., that it is – it expounds the best practice. I don't think I can take judicial notice that far.

MR. BURGESS: That's a fair enough comment. I don't take any issue with that.

THE COMMISSIONER: Okay.

All right. Good.

Thank you, Mr. Burgess.

MR. BURGESS: Thank you, Commissioner.

THE COMMISSIONER: Thank you.

All right. Nalcor Board Members.

MS. G. BEST: Thank you.

First of all, I'd like to take – to thank the Commissioner and Commission counsel for accommodating me this afternoon. I wish to reiterate as well Mr. Burgess' comments with respect to the dedication that you and your staff have shown during the Inquiry, and for the cooperation and assistance of other counsel throughout this process. It's been a long year.

In – with respect to my oral submission, which should be relatively short – I relied, principally, on the materials and comments contained in our written submission. We were granted limited standing by the Commissioner, and it is on this basis that these submissions that we have made are limited to issues relating to the board itself.

Pursuant to Section 5 of the Order-in-Council which set out the Terms of Reference of this Inquiry – you are directed under subsection (c) to consider the powers, duties and responsibilities of a Crown corporation. It is on this basis, and upon the basis of your decision to grant the former board of Nalcor limited standing, that we attempted to elicit evidence from the various witnesses before the Commission relating to subsection 5 (c) and the efforts and reputations of the individual board members.

We, similarly, limited our written submissions to these matters, as I earlier indicated. Upon reflection, with respect to our written submissions, the portion of our submission entitled recommendations might more appropriately have been entitled suggestions – proposals of the Former Nalcor Board based up their experiences.

As discussed in our written submission, the former board had an unwavering commitment to Nalcor. The evidence discloses that they considered, amongst other things, the desire of the Government of Newfoundland and Labrador to use non-renewable resource revenue to fund the development of our renewable resources, from which the Government of Newfoundland and Labrador would then receive additional revenue.

They considered the benefits of the federal loan guarantee; interprovincial cooperation; the need for additional energy in the province and in Labrador; the unreliability of the existing infrastructure; the potential economic growth from employment; the environmental benefits of clean energy; an opening of communication and dialogue with Indigenous groups; potential power sales; and the value of the assets at conclusion of the construction phase of this project.

One has only to look at the Emera agreement, the New Dawn Agreement and the economic spinoffs detailed at page 191 to 192 of the written submission of the former Government of Newfoundland Officials 2003-2015 to recognize the importance that the Muskrat Falls Project has had for this province.

In considering the matters reviewed by the board, we address that at the time of the PUB hearing, although the PUB suggested Nalcor had not provided enough information to make its decision, the experts retained by the PUB and by the Consumer Advocate provided a full and comprehensive answer to the reference question placed before the board by the Government of Newfoundland. They determined that the Interconnected Option was the least-cost option for the power supply. At DG3, Manitoba Hydro International again expressed confidence in the work completed by Nalcor. The –

THE COMMISSIONER: So did the board actually – I can't recall the evidence, whether or not the board members indicated they actually read either of the MHI reports. Did they?

MS. G. BEST: The board had access to the MHI –

THE COMMISSIONER: Okay.

MS. G. BEST: – reports, what they –

THE COMMISSIONER: Yeah, I'm not asking you to give evidence on their behalf, but I can't recall in your evidence if they indicated they had actually reviewed the full reports.

MS. G. BEST: I – my recollection of their evidence is that they didn't review the entire report; they reviewed portions of the report and the executive summaries that were provided to them by Nalcor.

THE COMMISSIONER: Mm-hmm.

MS. G. BEST: The only report that they indicated that they had no recollection of having received at all was the April 2013 report of SNC-Lavalin; however, they did, with respect to that report, indicate that they had been aware of the matters that had been addressed as they had been communicated to them by the CEO and by the project management team.

It's unfortunate, as with the case with the Government of Newfoundland and Labrador, that all the documentation received by the board in its review was retained by Nalcor and that the minutes that were prepared by Nalcor employees were limited in their scope because of concerns relating to the access to information legislation and commercial sensitivity of the information that they were dealing with. And the board was clear about that. They retained nothing that they had been provided with. They did, however, give detailed examples of the volume and nature of materials that they were supplied and which they reviewed.

Each member of the board had a particular skill set upon which they built during their tenure as board members. These are detailed in our written submissions. They were committed to the task at hand and worked diligently to ensure that all material presented to them was reviewed and understood.

They were well aware, based on their evidence, of their fiduciary duties to the Government of Newfoundland and Labrador and to Nalcor and the citizens of this province. They knew that they were accountable to the shareholder and responsible to oversee the management and operations of Nalcor. These factors were considered by them in every decision that they made. These are matters that the Commission must consider when looking at their actions in hindsight.

Mr. Budden, on behalf of the Concerned Citizens Coalition, has chosen to question their individual abilities and their abilities to engage in robust discussions with the CEO and with the project management team and to challenge the information that was provided to them. We submit that this – his assertions are not supported by the evidence before the Commission.

At page 383 of his book, *Conduct of Public Inquiries: Law, Policy, and Practice,* Professor Ratushny wrote of the vested reputational interests of individuals in the conclusions and recommendations that be – may be made by an inquiry, noting that there was a heightened level of fairness required where a witness's reputation may be on the line.

Where adverse findings potentially affect professional reputations, the standard of proof is a civil – in the civil case should be applied. This is the standard of proof on the balance of probabilities. The evidence must be clear, convincing and cogent and must be scrutinized with care, taking into account the seriousness of the potential findings on these individuals.

Their decisions, as they indicated in their evidence, were made having consideration for the policy positions of government and the need for Nalcor to be a successful enterprise able to carry out the strategic plan that had been set for the management.

They developed policies and procedures for governance that had been lacking in the Nalcor-related subsidiaries that existed prior to Nalcor being established. They oversaw the operation of a multi-billion-dollar enterprise relying upon the information provided to them by the Crown corporation, by the numerous experts engaged by Nalcor, by the government, by the lenders and, when necessary, by the board.

A listing of 78 reports and studies, upon which they – the board relied as a part – apart from their own inquiries, is contained again at pages 92 to 97 of the written submission of the Former Provincial Government Officials.

In assessing their efforts in overseeing the operations of Nalcor, we encourage the Commission to focus upon the reasonableness-at-the-time standard. There has been extensive evidence placed before the Commission, which, if considered alone, without a review of the circumstances then existing, might suggest that the Muskrat Falls Project ought not to have proceeded. The Terms of Reference, as you have interpreted them at page 12, require you to review the overall integrity of the process leading to the sanction of the Muskrat Falls Project, as well as that followed in the

construction and the reason why the cost escalated from the initial estimates that had been made.

In assessing the board's involvement in the development, sanction and carrying out of this project, it is important to make judgment on the context of the day and not in hindsight, which you again recognized at page 8 of the Interpretation of the Terms of Reference, when you stated that: "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," and that "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."

In their submission, the Former Government of Newfoundland Officials provided extensive details of their rationale for proceeding with the Muskrat Falls Project. In his submission, Mr. Martin provided extensive details of the analysis undertaken by Nalcor, throughout the development, sanction and construction phases of the project. In Nalcor's submission, they outlined the extensive steps that had been taken to ensure proper management and implementation of the Muskrat Falls Project. The board, in its evidence before the Commission, spoke in detail of their efforts and their considerations. This is what was happening at the points in time that you are required to consider.

Were the decisions of the board flawless? The board members have never taken that position; they recognize that no decision that they made were – was perfect. The decisions they made were based upon the information available to them. The present CEO of Nalcor, Stan Marshall, in his testimony before the Commission, stated that the Muskrat Falls Project is the most over-governed project in the history of Newfoundland and Labrador.

The board, for its part, recognized that they might benefit from additional members and particularly board members with different skill sets. They pursued this with the government of Newfoundland, and, for a brief time during Mr. Marshall and Mr. Davis's tenure, there was additional board members added to the board. However, they lack the skill sets that had been requested of individuals and – as had been identified by the board.

The former Nalcor board members commend the government of Mr. Ball for its initiative in appointing additional numbers to the board with a broader range of skills. However, as stated in their written submission, they believed that further enhancement of the process for selecting and retaining board members is required.

Dr. Holburn provided considerable insight in the governance of Crown corporations and – before this Commission, and the board was pleased to note that they had complied with many of these best practices, policies and procedures. Cost overruns and schedule delays do not equate to poor governance or poor oversight.

The board remains optimistic that the Muskrat Falls Project will provide benefits to the people of this province despite these matters. As Dr. Jergeas stated in his testimony before the Commission: I think 5 years, 10 years from now, 20 years from now, say, wow, that was probably a good decision.

And those are my submissions on behalf of the board of – former board of directors of Nalcor 2004-2016. And I wonder if you have any questions for me.

THE COMMISSIONER: I do.

First of all, can you relay to the former board members my appreciation for their suggestions with regards to future board matters and –

MS. G. BEST: I will.

THE COMMISSIONER: – whatever. I certainly had a look through that, and I appreciate the suggestions that were made.

Now, I do want to speak to you about a few things. So, you talked about the efforts of the board in September – I think it was September 8, 2008, and then later in 2012 in letters that went to Robert Thompson, in particular, related to the request for further board members and, as well, board members with engineering and megaproject experience.

MS. G. BEST: Mm-hmm. Yes.

THE COMMISSIONER: Your – it seems to me, and having listened to the board members and now having reviewed their credentials, once again, these are not individuals who, by any stretch of the imagination, are naive about business matters. And it just strikes me, and it has struck me for some time, that knowing that they lacked that experience that was necessary and as well, here they were, they were burning themselves out working 100 hours a month on Nalcor matters and whatever, why was it that more effort was not taken to raise this issue, knowing that, you know, a huge project was going to be undertaken here that could have significant implications with regards to the province, not just the benefits –

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: – but also the potential liability? Why – you know, it strikes me that – somewhat strange that these individuals who again are – you know, they're not shrinking violets. Why it would be that they would not push harder and not even – and even to the point of saying look, we're not in a position where we can adequately do our job. They recognize they needed that experience.

MS. G. BEST: I think, first of all, that the – there were numerous other communications other than the September 8, 2012, (inaudible) and 2012 correspondence. Both Premier Dunderdale and Premier Marshall talked of their knowledge that the board was looking for additional members. And I know from my discussions with the board, although it's not before the Commission, so I'm reluctant to state that they actually sought out individuals who might have some interest in serving on the board.

The difficulties that they had with respect to that is finding individuals from Newfoundland who felt a need and felt they had an obligation to contribute to the province. One of the big issues as the board indicated to you was that there was no remuneration available to members of the Nalcor board and that the remuneration available to the members of the Nalcor board who are on the other subsidiary companies was minimal in effect.

So they felt constrained themselves and, given their personalities and their nature, as you've indicated based upon a review of the written submissions, they trudged ahead because they felt they had no other choice but to do so.

THE COMMISSIONER: So at page – well, at around page – I'm not sure they were numbered but around paragraphs 44 and 46 of your brief, you talk a little bit about Dr. Holburn indicating that: "Boards require accurate, timely, reliable, concise and complete information to discharge their duties. Information on operations, financial status, safety, environmental impacts and other salient dimensions facilitates monitoring of organizational performance and risk management, and allows the Board to ensure that the corporation's policies are implemented. Though management has responsibility for providing internal information, Boards must be satisfied that it is complete, reliable and tailored to their needs. Boards may also retain external professional advice on legal, financial and other matters where appropriate."

MS. G. BEST: Okay.

THE COMMISSIONER: Now, this board was – well, according to your brief and according to the evidence, and I accept it – this board was well aware of its ability to retain experts.

MS. G. BEST: Correct.

THE COMMISSIONER: So, the one area that I would've expected them to – and I think that could reasonably expected – where you might want to retain an expert is where you recognize yourself you don't have the expertise –

MS. G. BEST: Yes.

THE COMMISSIONER: – and you go out and you get the expertise; in other words, you get the engineers, you get the people with megaproject experience. You may not be able to get them to come on the board for free –

MS. G. BEST: Yes.

THE COMMISSIONER: – but when they're hired, you pay them.

Why is it – is it unreasonable for me to think, at this point in time, that even then they should've recognized the fact that they were over their head and they needed to get that expertise?

MS. G. BEST: I don't think it's unreasonable for you to make that assertion.

I think the board, as they indicated, especially when the panel appeared before you in October of 2018, they indicated that they felt, in some respects, overwhelmed by the volume of expert reports and executive summaries that they were receiving.

As I indicated, were their decisions flawless? No, they were not. In hindsight and in reflection, I think the board members would, if they had to do it over again, hire these experts. But at that particular point in time, they were receiving multiple expert reports and executive summaries of expert reports prepared by experts retained by Nalcor, experts retained by the Public Utilities Board, experts by the Toronto-Dominion Bank, the independent engineer, the Consumer Advocate.

So, they were inundated with a volume of materials that they took, and perhaps mistakenly took, to relay all of the information that they required in order to make an assessment.

THE COMMISSIONER: Right.

So – and I'm not speaking on a hindsight basis. I'm sitting –

MS. G. BEST: I understand that.

THE COMMISSIONER: – they're there in 2010, 2011, 2012, they recognize the need, they have a void in the sense they don't have engineering and expert advice.

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: They don't know anything, according to the board members, about the different categories of risk, for instance. So, they wouldn't know if a report refers to tactical risk, whether that means all risk or whatever.

MS. G. BEST: No.

THE COMMISSIONER: Again, I say, these are not individuals who are uneducated, unsophisticated; these are business people. I – it strikes me as being strange that it would not have occurred to them that they may well need to get some help outside of relying on what Nalcor was providing to it, because, as Professor Holburn said, you have to make – the board had to make sure that information –

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: – was accurate; couldn't do it, it's on its own, so why would it not go out and get expertise?

I don't think it's hindsight for me to suggest that. I think they knew it at the time, in the sense they knew they didn't have the expertise, they were faced with volumes of reports –

MS. G. BEST: Mmm.

THE COMMISSIONER: – they were saying, it was – you know, it was all encompassing. And it just strikes me as strange that they would not –

MS. G. BEST: Mmm.

THE COMMISSIONER: – proceed to do that when – you know, when it came to an issue of human resources or matrix planning or board governance, they were – went out and got the experts.

MS. G. BEST: They were, they relied substantially on the information provided to them by the project management team.

THE COMMISSIONER: Okay. Well, let's talk a little bit about that for a moment.

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: You referred to – I'm just gonna try to find it here now. In your brief, you referred to Westney's report –

MS. G. BEST: Yes.

THE COMMISSIONER: – and how it would've been a 400-page report and you're

talking about getting too much information, things of that nature.

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: So, that report would've referred to strategic risk and would've even stated a number of $497 million.

As well, there's no mention – and I think your clients have indicated that they never received a copy of the IPR report which had indicated that strategic risk should be included in the budget.

MS. G. BEST: Yes.

THE COMMISSIONER: They get – they don't get the Westney report, for $497 million.

Is that information that they should've received from the management –

MS. G. BEST: I – the board –

THE COMMISSIONER: – I wonder?

MS. G. BEST: – indicated that they felt that that was information that they would have liked to have received from management, correct.

THE COMMISSIONER: Well, it's normally what they would've liked, isn't it? Wouldn't they have needed that information to have properly assessed the situation?

MS. G. BEST: That was their position that that information would have been valuable in allowing them to conduct an assessment of the situation.

THE COMMISSIONER: Right. Similarly, we talked about schedule and the Westney report referring to it as a P1 schedule.

MS. G. BEST: Yes.

THE COMMISSIONER: Later, there was documentation where one of the PMT members, Jason Kean, wrote back to Westney and said he disagreed with a P1 schedule and said he felt it was a P20 to P30.

MS. G. BEST: Mmm.

THE COMMISSIONER: So, in other words, a 20 to 30 per cent chance it would – was going to be on time.

MS. G. BEST: Yes.

THE COMMISSIONER: Is that information that the board had?

MS. G. BEST: I believe it was information that the board had. They had the numbers with respect to the P-factor. Whether they – but what the board did state with respect to those issues is that at all times when the information was provided to them, the – excuse me – the project management team and the CEO at the time indicated that those were issues that were under control and were being mitigated by Nalcor and that they should have no concern with respect to those. And I know that that is probably not the reasonable approach to have taken, but that was the evidence of the board.

THE COMMISSIONER: Right. So again, understanding my – when I listen to the evidence, there was some limited understanding of a P-factor –

MS. G. BEST: Correct.

THE COMMISSIONER: – but not a full understanding. And I don't – and, to be honest with you, Ms. Best, I don't recall them saying that they were ever told that Jason Kean had said it was a P20 to a P30.

MS. G. BEST: I don't think they had that specific information –

THE COMMISSIONER: Right.

MS. G. BEST: – but they did have the information with respect to the P-factor.

THE COMMISSIONER: So would you agree that that is information that the board would've needed to properly assess – to assist in their proper assessment of the project?

MS. G. BEST: Would I agree or would the board members –?

THE COMMISSIONER: Well, would you agree? I can't ask the board, they're not here.

MS. G. BEST: That's correct. I think it was information that was relevant to their assessment process, absolutely.

THE COMMISSIONER: Okay. So, you'll recall in the Grant Thornton report number 2, there's reference to the fact that in April of 2013 – this was before financial close, shortly four months after the sanction of the project – that bids were coming in and they were aware that the strategic risk had been exhausted. They knew that the bids were coming in higher than the estimates that had been provided to them by SNC.

THE COMMISSIONER: Is that information that should've been provided to the board –

MS. G. BEST: Absolutely.

THE COMMISSIONER: – in your opinion? Okay.

And then we go on and look at the Grant Thornton report and indicate that there are FFCs, final forecast cost estimates of $7 billion. Now your – Mr. Marshall did testify on this, so I remind you of that. So, talking about $7 billion in July and then going from $7 billion to $6.9 billion –

MS. G. BEST: Nine.

THE COMMISSIONER: – six and – et cetera, but rounding out about $7 billion –

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: – with mitigation about $6.8 million [sp. billion].

Now, Stan Marshall who you've quoted as saying that the project was the most over-governed –

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: – if it was over-governed, I'm not sure, the results came the way they should've, but, in any event, he said those are numbers that he would've given to the board.

MS. G. BEST: Yes.

THE COMMISSIONER: Is those – notwithstanding Mr. Marshall's view, Ken Marshall's view that he doesn't – didn't think he should get those numbers, I think he waffled on that a little later on. Is that information that should've gone to the board?

MS. G. BEST: The board was receiving information with respect to the AFEs and not with respect to the FFCs. I think, as you said, Mr. Marshall did waver a little bit of that later on. It would have been he – I recall his evidence as having been that it would've been nice to have received that information, but that it didn't particularly affect what the board was doing at that point in time because the only thing that was being placed before them was the actual money that was going to be spent.

THE COMMISSIONER: Right, but –

MS. G. BEST: Mmm.

THE COMMISSIONER: – it might've been that the chairperson of the board might've wanted to have a discussion with the minister or somebody to advise him because, again, there wasn't – very little communication, by the sounds of things, to anybody in the upper echelons of government 'cause they all say they didn't – they knew nothing about it.

MS. G. BEST: No, I mean, it's clear from the submission of the board that the majority of the communications that took place with government occurred between Mr. Martin and government officials and not between the board. The instances where the board had communications with government officials were less than I can count on one –

THE COMMISSIONER: Right.

MS. G. BEST: – on one hand, and two of those interactions were, in fact, more of a social interaction than anything further than that.

THE COMMISSIONER: Right.

I wanna ask you about paragraph 51 of your brief. This –

MS. G. BEST: Fifty –?

THE COMMISSIONER: – deals with the – 51.

MS. G. BEST: Fifty-one, okay.

THE COMMISSIONER: This deals with the termination of Mr. Martin, and I – I'm not questioning the basis for the termination or anything of that nature, that's been dealt with by the Auditor General.

But again, from the board's – board members' perspective, as I understand it they knew at the time or they felt at the time that the government had lost trust in the board and they were meeting for the purposes of having a final meeting and the intention was they were going to resign. They were also aware that Mr. Martin had met with Mr. Ball, Premier Ball, and that he was leaving at the time.

And it struck me, and it continues to give me pause for thought, as to why the board felt it should be – it should then proceed, based upon what it knew; knew that – or felt that they had lost the confidence of the government, that in the circumstances the government had basically let Mr. Martin go.

Why was it for the – why was it that the board felt that it should go ahead and proceed to deal with Mr. Martin's severance package?

MS. G. BEST: As the board indicated during its panel discussion in October of 2018, they had sought and received external legal advice that they ought to proceed with the – dealing with the severance package and the contracts, given the potential liabilities that might exist for Nalcor.

THE COMMISSIONER: Right, but why did they need to do it that day? Why not wait 'til a new board came in, let the new board – things don't happen just overnight, especially with a wrongful dismissal or anything like that, if that was what was going to come.

You know, like, it just strikes me that if you don't have the confidence of your shareholder, what gives you the authority, at least, you know, the ethical authority, to go ahead and proceed to make decisions on behalf of the shareholder?

MS. G. BEST: They felt that they had the legal authority as the board to make those decisions. They sought external information and they acted upon the information.

They did, as Mr. Marshall indicated, attempt to communicate with the government of the day and were unable to do so.

THE COMMISSIONER: Okay.

MS. G. BEST: The – this board had a strong background in governance, in board governance, I would suggest, and they took their role as the board very seriously, and their responsibilities. They didn't want to leave the board or the organization or the government in shambles, although that they were going to resign.

So, they still felt an obligation and a responsibility to the various individuals and organizations that their leaving were going to impact.

THE COMMISSIONER: All right.

You did speak a few minutes ago with regard to the paucity of the board minutes –

MS. G. BEST: Yes.

THE COMMISSIONER: – and a suggestion that your clients are making is that perhaps there should be two sets of minutes. One would be a set that could be accessible to the public, which would not include things that needed to remain confidential for business purposes. And then you would have another that would basically be only available to the Executive Council. Who are you referring to as the Executive Council?

MS. G. BEST: I think –

THE COMMISSIONER: This is at paragraph 72 by the way.

MS. G. BEST: Yes, I understand where it is. I ought to have put in there: the Cabinet.

THE COMMISSIONER: Okay. All right.

MS. G. BEST: 'Cause we did later speak with regard to – of a group being established comprised of both Opposition and government

officials and others that would be able to have – to review and assess what was happening with the organization.

THE COMMISSIONER: Okay.

I wanted to speak to you about paragraph 82 which was one of, again, one of these suggestions that is being made by the board.

MS. G. BEST: Yes.

THE COMMISSIONER: And I'm not sure if I'm reading this right or not and you can perhaps help me with this. You're suggesting here that with regards to experts that are hired that they should be hired by the board as opposed to by the management of the company. Can you explain to me a little bit more what you're speaking of here?

MS. G. BEST: I think some of the concern that arose with regard to the board having access, for example, to the Westney report, the IPR report, the SNC-Lavalin report, the thought of the board was in order to alleviate those type of concerns, if they were to retain the experts on behalf of the organization, then they would have knowledge of what expert reports were being obtained and would have access to the expert reports themselves so that nothing could slip by with respect to those reports as it happened in – on the previous occasions.

So they could, of their own volition, continue to retain experts. But if there were experts that were required to be retained at the suggestion of the project management team or the CEO, those discussions would occur with the board so that there was an open and transparent communications between the management and the board itself.

THE COMMISSIONER: Okay. So if Nalcor management, the executive team and this – I'm assuming we're not talking about every report that –

MS. G. BEST: No, we're not –

THE COMMISSIONER: – would be received. This would be –

MS. G. BEST: – I'm only talking about the –

THE COMMISSIONER: – in megaprojects –

MS. G. BEST: Yes.

THE COMMISSIONER: – scenarios or high cost projects.

MS. G. BEST: Right.

THE COMMISSIONER: So, what would happen would be that if a project management team or the CEO or the executive team ordered some sort of an expert report, as opposed to it being provided to them, it should be provided to the board, and the board should also have occasion to speak about scope of work and –

MS. G. BEST: Correct.

THE COMMISSIONER: – and see drafts and things of that nature, this what –

MS. G. BEST: Correct.

THE COMMISSIONER: – you're getting at. Okay. All right.

I want to take you to paragraph 92

MS. G. BEST: Yes.

THE COMMISSIONER: So – and I recognize you haven't been here earlier this week, but you indicate here that the board feels that, notwithstanding the shortcomings with – I'm assuming, notwithstanding the shortcomings with regards to the provision of information, because there's been a lot of information that's been provided to the board that was not – apparently, the board was not aware of.

MS. G. BEST: Mm-hmm. There has been some information, yes.

THE COMMISSIONER: Or some information –

MS. G. BEST: Yes.

THE COMMISSIONER: – and if they were aware of other information, it was more in the general vein as opposed to this – to the exact specifics in many areas, as well. So, you talk about the waiting to 2041 option.

MS. G. BEST: Mm-hmm.

THE COMMISSIONER: What do you understand to be the 'wait until 2041 option' was?

MS. G. BEST: To –

THE COMMISSIONER: Because the suggestion you seem to be saying here is that you would do nothing for 29 years.

MS. G. BEST: No.

THE COMMISSIONER: Okay.

MS. G. BEST: The – as I understood, and as I understood from the board and from the evidence, that the 2041 was that there was – steps were going to be taken to maintain the infrastructure, to supplement the existing infrastructure and, during that time, to attempt to determine and assess the appropriate steps for 2041. And I know that there was discussion with respect to – that 2041 wasn't really 2041, because there would have to be – with respect to Quebec Hydro – discussions at least a decade before that. So the board did have that understanding; it's not that they did nothing until 2041. It was that they were going to be required to expend additional monies on failing infrastructure, and to establish small hydro projects.

THE COMMISSIONER: Okay. So, you acknowledge then that 2041, when you say that the province needed additional power generation, that there were other mechanisms by which that power –

MS. G. BEST: Correct.

THE COMMISSIONER: – generation could be provided –

MS. G. BEST: There were, yes.

THE COMMISSIONER: – in the short term.

MS. G. BEST: Yes, in the short term.

THE COMMISSIONER: Okay.

I also wanted to ask you about board composition. One of the things that the board didn't refer to and you didn't refer to in your conclusion when you were talking about the benefit of the project, is you never weighed that against the cost to the ratepayer.

I wonder where in the boards mind was the issue of the need to protect the ratepayer and to ensure that the ratepayer was paying the least cost for the power that was being provided.

MS. G. BEST: The board was always, in its decision-making process, cognizant of that. But they had to weigh that in – with respect to carrying out the objectives of the corporation and the policy objectives of the government because not only was the government trying to have the least impact on the ratepayers, they were also seeking benefit to the taxpayers of the province and to the province itself with regard to reduction in such things as debt load. So, the board was always cognizant of that.

When they proceeded, initially, with the project, they understood it to be the least-cost option, and they continue to believe that it's still the best option, recognizing that there have been scheduling and cost overruns. But they were – remained cognizant always of the government's desire to have – not have the rates increased to such an amount that it would be detrimental to the ratepayer.

There was recognition, however, that the rates being paid by individuals in the Province of Newfoundland were some of the lower – lowest rates in Canada. And that those rates, even absent the Muskrat Falls Project, they were going to increase in any event. So, there was never a sense that they neglected to take that into consideration when they were making their decisions.

THE COMMISSIONER: Mm-hmm.

So, again, this was – so other witnesses, including Nalcor's counsel, have told me that the decision at the end of the day and, as well, another government – or another person in government told me that the basis of the decision to proceed with Muskrat Falls was not on the basis of excess power sales, it was not on the basis of additional revenue. It was on the

basis of a pure utility based decision. So, in other words, you apply the utility principles to the decision, which is least-cost and whatever.

So having said that, one – the Consumer Advocate yesterday made a suggestion with regards to the board of Nalcor, and that is that there should be, on the board, the presence of a ratepayer representative.

MS. G. BEST: I believe that in this submission, there was also suggestion that there should be a representative of the consumer on the board. And I'm just going to find the paragraph where that's contained.

THE COMMISSIONER: Is it 84?

MS. G. BEST: Because it did talk about – there were other areas that the board felt it might be beneficial to have individuals on the board –

THE COMMISSIONER: Yeah. Paragraph 85 might be the one you're referring to.

MS. G. BEST: Yes. It said that: "While the goal of the Board is to provide oversight of the Crown corporation which necessarily requires skilled members, consideration ought to be given to regional representation, gender diversity, visible minority, cultural competence, public or consumer interest not to the exclusion of the necessary skill sets," but those individuals can offer substantial benefit.

I know when the panel had their discussion and they were talking about when the additional board members were added by – I believe it may have been Premier Davis's government – that they benefitted from the addition of Mr. Abbass to the board, as he brought a perspective from Labrador that they felt the board was lacking and which they weren't receiving from either the CEO or from the project management team.

THE COMMISSIONER: Right. So –

MS. G. BEST: And expanding on that is what that paragraph (inaudible) –

THE COMMISSIONER: Okay. So they accept the fact that consumer representation or ratepayer representation might be a thing to look to?

MS. G. BEST: Correct.

THE COMMISSIONER: Not to the exclusion of skilled people who –

MS. G. BEST: Right.

THE COMMISSIONER: – you know – okay, I understand.

MS. G. BEST: Right.

THE COMMISSIONER: Okay.

Finally, when I read your brief, and after listening to the evidence of Ken Marshall in particular, I had the feeling that he felt that this project continues to be, you know, a significantly positive project for the province and that, you know, you, yourself, referred to the fact that, you know, 25, 20, 10, 30 years – I guess most people are worried about the next 10 years – getting to the 20 or 30 years when it's properly paid off. But –

MS. G. BEST: That's a rate mitigation issue.

THE COMMISSIONER: Right. But I query, you know, as a – I query as a former board person. If I was sitting on the board and I was aware, now, of the fact that information that I should have received I didn't receive and I couldn't – and I did not have the opportunity to consider, to question or whatever at the time, I'm not so sure I would be as definitive about the fact that the decision I made was the correct one, ultimately, at the end of the day.

Any comment you want to make on that?

MS. G. BEST: I think – and you would, I expect, have heard from the tone and demeanour of the witnesses when they provided their evidence that there was occasion when they appeared surprised by the information that was being provided to them. But based upon the information that they had received and had an opportunity to review, they remained optimistic that, I guess, their decision hadn't been so detrimental to the province that there still wasn't going to be benefits to it.

They looked and considered in – before giving their evidence that the asset that has been

created has substantial value. They looked at the value of the interconnection, and they took some solace in those that, perhaps, the project wasn't the failure that some of the naysayers have suggested that it was, or it should be or it will be.

THE COMMISSIONER: All right.

Thank you very much, Ms. Best.

MS. G. BEST: Thank you very much.

THE COMMISSIONER: Okay.

All right, that's going to be it for today, and we'll start again tomorrow.

I do want to put on the record that we do have other written submissions from parties who have decided not to present, namely Todd Stanley and Terry Paddon, the Nunatsiavut Government, Manitoba Hydro International, the Newfoundland and Labrador Building and Construction Trades Council/Resource Development Trades Council of Newfoundland and Labrador and, as well, Grid Solutions ULC, ANDRITZ Hydro Canada and Barnard-Pennecon.

All of those parties have, in fact, provided submissions to the – written submissions but did not wish to make oral submissions.

So, tomorrow, we'll start at 9:30 and – so, we'll have the remaining two presentations and then we'll proceed to allow rebuttals from the province, should they wish to make any rebuttal arguments, and, as well, Nalcor Energy.

So, we'll adjourn, then, until tomorrow morning at 9:30.

CLERK: All rise.

This Commission of Inquiry is now concluded for the day.