



COMMISSION OF INQUIRY  
RESPECTING THE MUSKRAT FALLS PROJECT

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Transcript | Summations

Volume 4

*Commissioner: Honourable Justice Richard LeBlanc*

Thursday

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

The Honourable Justice Richard LeBlanc presiding as Commissioner.

Please be seated.

**THE COMMISSIONER:** Morning, Ms. Muzychka.

**MS. MUZYCHKA:** Morning, Commissioner.

Just before we start, I have three additional and, I guess, final exhibits to enter.

They are P-04556, which is submission of the Consumer Advocate to the report of A. J. Goulding; Exhibit 04557, which is correspondence from McInnes Cooper responding to a letter from the Resource Development Trades Council of Newfoundland and Labrador; and P-04558, which is a memorandum prepared by Nalcor Energy for the Commission regarding the Muskrat Falls Project.

**THE COMMISSIONER:** Okay, I thought there was one other exhibit that we were going to be putting in. It was a report that was – I believe Mr. Ralph provided it to Mr. Learmonth – related to a review of the regulatory agencies across the country.

**MS. MUZYCHKA:** And I believe that would be P-04559, but I didn't have that in my hand.

**THE COMMISSIONER:** Okay.

**MS. MUZYCHKA:** But I'll double-check that.

It is – okay. No, we're good with that one. So there's –

**THE COMMISSIONER:** Okay.

**MS. MUZYCHKA:** – four new exhibits.

**THE COMMISSIONER:** Okay, so those four exhibits will be entered as numbered.

**MS. MUZYCHKA:** Thank you.

**THE COMMISSIONER:** Thank you.

All right, Newfoundland Power.

**MR. L. O'BRIEN:** Good morning, Mr. Commissioner.

**THE COMMISSIONER:** Good morning.

**MR. L. O'BRIEN:** Liam O'Brien here on behalf of Newfoundland Power Inc. As you are aware, Newfoundland Power is a privately owned utility in this province, and as a utility, it's principally what we would call a poles-and-wires utility, so it's involved with distribution and customer service, mainly.

Newfoundland Power generates only about 7 per cent of its own electricity, which it supplies to customers. The bulk of the supply it receives wholesale from Newfoundland and Labrador Hydro. And since Newfoundland and Labrador Hydro will receive supply from the Muskrat Falls Project, that project will be an essential component of Newfoundland Power's electricity supply once it's fully commissioned. As a result, the findings and some of the recommendations of this Commission may therefore have some implications for the company and its operations in the future.

That said, the main reason that the company sought to – some standing before this Commission was out of concern for its customers, which number in excess of 268,000 on the Island. As Newfoundland Power's president, Mr. Alteen, indicated in his testimony, the company's customers are acutely concerned about where rates are going to go in the future and whether or not they are going to be affordable. And Newfoundland Power shares those concerns.

But the company was really granted standing on the basis of its knowledge and experience with the electricity industry, as well as with the regulatory processes around it and also to provide some perspective on potential impacts associated with the project. And the opportunity to participate in that fashion has been invaluable for Newfoundland Power, and the company hopes that its contribution will be of assistance to this Commission in carrying out its mandate.

So we have filed some written submissions addressing a number of issues which you believe

are within our – within the purview of our standing, and I'd like to just touch on those issues, if I could, today. And if you have any questions regarding those, I'd be happy to answer those.

The first issue we've outlined in our brief – you'll find some submissions providing a detailed overview of the provincial electrical power policy framework. So we've outlined the legislative background behind that, and I won't take you through that. But the framework essentially mandates that power be managed and operated efficiently in a manner which provides consumers with equal access to an adequate supply of power at the lowest possible cost which is consistent with reliable service.

So that is the mantra, really, of the policy and that seems to be – and I would say it's our company's two – or our customer's two key priorities: lowest cost, consistent with reliable service.

And it's the role of the Public Utilities Board to implement this power policy in accordance with generally accepted, sound public utility practice.

As a utility, Newfoundland Power's operations are subject to board oversight. So the company does have an extensive knowledge, and you've heard Mr. Alteen testify about the processes and the benefits with – associated with regulation. And we've outlined in our brief a number of the proceedings and tools that the Public Utilities Board used to both monitor financial and operational performance of utilities. There's general rate hearings for setting rates based on proven costs of a utility, and proposed investments of a utility are generally considered in capital budget applications and integrated resource planning processes.

And the board can initiate its own reviews into things such as reliability, which it has, as well as service, which it does on a regular basis. And the board also receives reference questions from the provincial government. The most recent being the reference into rate mitigation, which is ongoing right now. And in those cases, the board is expected to utilize its expertise and make recommendations to government.

So as a tribunal, the board has broad investigative powers. We've outlined those powers in our brief; and they're evidentiary based and they provide for full participation by interested parties. And they're transparent to the public, so they're open to view and participate for the public. They're fully tested – matters are fully tested, with written information requests and cross-examination during hearings when required. Experts are utilized by the parties and the board and in complex matters, technical conferences are used to bring experts and the parties together to clarify issues, and even narrow issues.

With respect to the Muskrat Falls Project, that was exempt from PUB oversight. And our brief sets out the legislative background for that, so I won't take you through that. But – as a result of that exemption and following that exemption, a decision was made in order to have the costs of that project recovered in rates.

Now that decision left ratepayers at risk for overruns and lower demand. And I'll talk about that in a minute, when I talk about the impacts into the future. And it'll be the Commission's mandate to consider whether the decision to exempt the project from oversight was justified and reasonable. I don't intend to get into any of that today.

I did – before I talk about impacts, I did want to touch briefly on the 2011 reference. And you've heard a fair bit of evidence on that and some submissions on it. And I really only wanted to touch on it in order to make a couple of observations and I think those are relevant when we look at where we go from a regulatory perspective to the future.

So the first observation I'd like to make is that the reference question was limited in scope. So the PUB did – or, sorry, the provincial government did engage the PUB, but the reference question was limited in scope from what you would see in a normal integrated resource process or additional generation process request by a utility. The reference posed two options, the Muskrat Falls Project Option and the Isolated Island Option, and asked the PUB to determine which was least-cost in terms of supply of power to the Island Interconnected

customers. It did not allow for consideration of other potential supply or generation sources.

So in framing the question in an either-or scenario, it essentially restricted the PUB's ability to apply the power policy and determine whether either of those options was in fact least-cost, consistent with reliable service. So that's an observation that in the normal regulatory process, would've been open to the PUB. So that differed from what you would normally see in a full regulatory review.

And the other observation I would make is to – just in terms of some of the evidence that you've heard, really points out that this was a limited and truncated review in terms of timing, in terms of concern the board raised about having sufficient documentation, some dated documentation. Participation was limited in that some interested parties – if you had – if this were an application for addition of generation in the normal course of things, certain parties such as industrial customers and Newfoundland Power would've had full standing. So there's some limitations there, and I only say that in the context of saying this is – wasn't, sort of, the full, robust review that the PUB would normally have in an application to add generation such as that.

**THE COMMISSIONER:** Can I just –

**MR. L. O'BRIEN:** Sure.

**THE COMMISSIONER:** – refer you to paragraph 32 of your brief –

**MR. L. O'BRIEN:** Sure.

**THE COMMISSIONER:** – if you would.

You make a submission there that “The revised hearing process issued by the Board limited the participation of all parties involved. The Consumer Advocate's role was reduced when new, specific guidelines were issued to govern its duties relative to the review process. It was no longer permitted to file an independent technical report, denied access to confidential information and exhibits, and prohibited from holding public sessions around the Province to collect input from electricity ratepayers as part of its own consultation process.”

So are you talking there – maybe you could expand a little bit about some of those processes so I understand how it would normally work, as opposed to how it worked for Muskrat Falls.

**MR. L. O'BRIEN:** Sure.

So in the normal course of things, as part of Consumer Advocate's role, the Consumer Advocate would retain an expert to review the process. And, in fact, many of the parties with standing would do so. Newfoundland Power would do the same sort of thing to retain an expert to review that.

I understand the Consumer Advocate, in this case, had retained an expert, but because of the truncated timing, had not really had the opportunity to ask questions of the Manitoba Hydro report and didn't feel there was an opportunity to present any expert evidence at the hearing.

So you'd normally have experts give testimony and be cross-examined for either party. So that, sort of, didn't occur in this case.

As far as confidential information and exhibits –

**THE COMMISSIONER:** Just to go back –

**MR. L. O'BRIEN:** Sure.

**THE COMMISSIONER:** – for a second. So on that point, I think the evidence that I've heard so far is that the Consumer Advocate of the day did actually retain an expert –

**MR. L. O'BRIEN:** Yes.

**THE COMMISSIONER:** – Knight Piésold. And they did provide some form of a report to the Consumer Advocate, which I don't think was ever filed with the PUB, but –

**MR. L. O'BRIEN:** Wasn't, I don't believe.

**THE COMMISSIONER:** So what was the difference there, I mean – so they would've gotten a report, I understand it was favourable – or I think it was favourable towards the Muskrat Falls being the least-cost option. What more could've been done by the Consumer Advocate if they had – if he had had more time or – like,

I'm trying to figure out, would normally their expert have spoken to MHI, who was the – who had –

**MR. L. O'BRIEN:** That's a possibility, yes. And I think Mr. Wells had talked about what had initially been scheduled was a – or planned was a technical conference that could have been one of the options here, and to have a discussion between experts in a technical conference.

So that would've been an opportunity – an opportunity to ask questions on the Consumer Advocate's report. If this was a full, robust hearing, other interested parties would have been able to ask information requests of that report. And that individual would've been present during a hearing to be cross-examined on the report.

**THE COMMISSIONER:** Okay. And so, in the normal course at technical conferences, who attends?

**MR. L. O'BRIEN:** In – well, when I say in a normal course, technical conferences are not necessarily normal courses but they do occur –

**THE COMMISSIONER:** But when they're held, yeah.

**MR. L. O'BRIEN:** When it happens, experts from all parties will attend as well as counsel. And, for example, we just had a number of technical conferences in the rate mitigation hearing – or review. And in each one of those technical conferences, all counsel and experts were either present or available by phone, and the experts presented their preliminary findings in a slideshow and parties were entitled to ask questions and get clarification.

**THE COMMISSIONER:** All right. So if for instance Knight-Piésold had prepared their report and depending on what information they had, they may have been able to gain additional information at –

**MR. L. O'BRIEN:** Sure.

**THE COMMISSIONER:** – a technical conference. Similarly, MHI or –

**MR. L. O'BRIEN:** Exactly.

**THE COMMISSIONER:** Okay.

All right. Thank you.

**MR. L. O'BRIEN:** Okay.

**THE COMMISSIONER:** And when you would say they were denied access to confidential information and exhibits, what did – what's that?

**MR. L. O'BRIEN:** So what normally happens now if there's confidential information which is included – which is presented before the board in a regulatory proceeding, that information is allowed – the parties are allowed to see that information on the basis of signing a non-disclosure documentation. The information may not be put on the board's website but the parties are entitled to review it and are entitled to make comment on it and ask questions on it.

**THE COMMISSIONER:** Okay. So –

**MR. L. O'BRIEN:** In this particular case, I understood that the Consumer Advocate was not entitled to see some of the confidential information.

**THE COMMISSIONER:** So I assume if that's the case, then if the Consumer Advocate wouldn't get it, neither would its expert?

**MR. L. O'BRIEN:** Neither would its expert. And that's my assumption. I don't have the answer to whether or not the expert actually got that, but I would've assumed that if the expert had it, the Consumer Advocate would have it and vice versa.

**THE COMMISSIONER:** Right. Okay.

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** And then prohibited holding public sessions, I think we had evidence from Mr. Wells on that and –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – also Mr. Alteen.

**MR. L. O'BRIEN:** Yes.

**THE COMMISSIONER:** Okay.

All right, anything else you want to add to that?

**MR. L. O'BRIEN:** Not to that I had, I don't think.

**THE COMMISSIONER:** Okay.

**MR. L. O'BRIEN:** I think that's –

**THE COMMISSIONER:** I apologize for interrupting.

**MR. L. O'BRIEN:** Oh, not at all. And I think I might have at the end of that section – and I did want to touch then on during Phase 3, Mr. Alteen gave some evidence in terms of impacts from the project. And if we back up just a little bit when we look at the – there may be reasons for exempting the project from regulatory approval or oversight, and I don't intend to debate those reasons at this point in time – may be public policy reasons for that. The issues that arise is when you consider the decision to require all of the costs attributable to the project to be recovered in electricity rates, especially when those costs include overruns of the size that we're looking at today.

So right now, the way things are projected – and we've heard Mr. Fagan give some evidence on that – these costs would certainly have significant effects on electricity rates for consumers, given the current framework of the legislation and those take-or-pay agreements.

And, ultimately, it's Newfoundland Power's position that it's unreasonable and unacceptable for its customers to bear the brunt of all of those costs; it's inconsistent with the power policy of the province. But the fact of the matter is, as Mr. Fagan had indicated, without mitigation customers are going to be unable to afford those projected rate costs.

For many of Newfoundland Power's customers, rates would be projected to increase in the neighbourhood of twice their existing rates.

And you've heard that consumer – you heard some evidence that consumer consumption has been on a decline since 2015, and that's without Muskrat Falls' costs being built into rates. And

you've heard some evidence in terms of the dynamics of pricing and price elasticity and that it's hard to predict, but I think it's reasonable to assume that this decline would intensify in the face of doubling rates. A sharp decline could even have the effect of increasing rates further. And we heard some evidence concerning the utility death spiral, that sort of thing – whether or not that's a – will occur, that – there's some evidence on that.

But the –

**THE COMMISSIONER:** So, again, it's sort of like a bit of a predicament.

**MR. L. O'BRIEN:** It is sort of a predicament. When rates rise, consumption drops. As consumption drops, in order to cover the cost of providing electricity, rates has to – rates have to further rise. So it's kind of a cyclical conundrum there.

So, without mitigation, that's the issue that we're dealing with here, and that's the issue that we're dealing with, with the rate mitigation review, and there's experts being retained by the board to look at options as to sort of how we bridge that gap.

**THE COMMISSIONER:** Right.

Just to take you a little off topic and –

**MR. L. O'BRIEN:** Sure.

**THE COMMISSIONER:** – it's not in your brief, but –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – the Concerned Citizens Coalition raised an issue earlier this week with regard to a situation that would arise if, for instance, Newfoundland Hydro was, as a result of customers not taking the power, not – and reducing their demand, a situation would arise where Newfoundland Power could not actually obtain the funds necessary from the ratepayers to actually meet the financial commitments under the financing.

**MR. L. O'BRIEN:** Yes.

**THE COMMISSIONER:** And the question that was posed and with no answer – no certain answer – but one that I think we talked about at the time – I talked about with Mr. Budden is what then happens? Who has recourse against whom? Are, for instance, Newfoundland Hydro's assets in jeopardy? Is the government, ultimately, the party who has to pay? Do you have any thoughts, or does Newfoundland Power have any thoughts, on what would happen in that situation?

**MR. L. O'BRIEN:** A difficult question and, to be honest, I really don't.

**THE COMMISSIONER:** Okay.

**MR. L. O'BRIEN:** In the event, I guess, if the question is in the event that Newfoundland and Labrador Hydro is not able to provide sufficient power to Newfoundland – or sorry – Newfoundland Power is unable to collect sufficient funds to pay for those – pay for that pay – I would assume – or pay for the power – I would assume it's the Power Agreements that would kick in and that Hydro would be the one that's – and taxpayers would be the ones that would be holding the burden.

**THE COMMISSIONER:** Okay.

**MR. L. O'BRIEN:** It's a thoughtful question, though.

So, my next – the next topic we covered off is – as I indicated before – is in terms of Phase 3, Mr. Alteen provided the – some evidence concerning cost, and we did give some evidence to the effect that – or there is some evidence before it to the effect that the provincial government has announced that rates would be held at 13.5 cents a kilowatt hour.

So, Newfoundland Power and its customers take some comfort in that, for now, and there's some potential, as we talked about earlier, about offsetting some of the balance – some of those costs with sales of exports, excess energy and there are other issues, such as electrification.

So, at the rate mitigation here – or review – experts are looking at other options for electrifying businesses in terms of having more government businesses take on electrification

and as well as other options. But those are not immediate answers to the problems, so that – it requires an ongoing focus.

**THE COMMISSIONER:** So, you talk about a predicament here.

We've had some evidence that, for instance, from Mr. Alteen, that last year there were something like 12,000 heat pumps or –

**MR. L. O'BRIEN:** Mmm.

**THE COMMISSIONER:** – those types of units that were installed by the customers.

So, you have a situation where you have your residential customer is trying to cut down their demand. The government trying to increase demand by electrification of public building, things of that nature –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – to offset the – it's not really adding to the amount of our demand; it's basically just trying to maintain it, by the sounds of it.

**MR. L. O'BRIEN:** That's right, yeah.

Now, there are options for adding to that. So, Synapse is one of the experts that's been retained by the board was looking at options for adding to that as well. Electrical vehicles is one. Now, that's something that we're looking at I would imagine long-term, but those are options to add to that. Excess sales, as well, is an option. There's some give-and-take on that as well. But there are other options that are presently on hold before the rate mitigation review and those involve sort of where the federal government lies in all of this.

**THE COMMISSIONER:** Just seems to me that when you think about what we're talking about here today – like, if you're planning a utility decision, wouldn't this be something that would've been thought about well before you spend billions of dollars?

**MR. L. O'BRIEN:** I'd have to agree with you. Those types of options affect on customer rates,

that sort of thing would be something you would look at.

So, if you had a full, robust PUB review on something like that, those types of things would be part of the board's mandate to consider how – what this effect would have on rates in the future.

**THE COMMISSIONER:** Right.

And just to follow through a little bit on your suggestions about – you know, and I've heard a lot about the fact that, you know, there was always an understanding that there were – if there were cost overruns, you know, there would be other income, there'd be savings from –

**MR. L. O'BRIEN:** Mm-hmm.

**THE COMMISSIONER:** – the federal loan guarantee, there would be – you know, that doesn't diminish the fact that you're still taking out a loan.

**MR. L. O'BRIEN:** Mm-hmm.

**THE COMMISSIONER:** That there would – you know, there would be money coming in from excess sales or whatever. But assuming we didn't have Muskrat Falls – or assuming we had it, it came in on budget and we were able to pay for the – the consumer was able to pay for it.

**MR. L. O'BRIEN:** Right.

**THE COMMISSIONER:** Those would be all monies that would go into the Treasury, wouldn't it? And –

**MR. L. O'BRIEN:** Sure.

**THE COMMISSIONER:** – so, it's not really free money. It's –

**MR. L. O'BRIEN:** No.

**THE COMMISSIONER:** – it's taking out of the pockets of one, of the taxpayer –

**MR. L. O'BRIEN:** Mmm.

**THE COMMISSIONER:** – and basically putting – assisting the ratepayer by trying to keep rates down.

**MR. L. O'BRIEN:** That's true.

**THE COMMISSIONER:** And ratepayers are taxpayers.

**MR. L. O'BRIEN:** Mmm.

And that's the difference. I mean, ratepayers and taxpayers are not necessarily the same thing.

**THE COMMISSIONER:** No, but there is –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – many – there's an overlap.

**MR. L. O'BRIEN:** There's an overlap, you're right. Yeah.

**THE COMMISSIONER:** Right.

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** Okay.

**MR. L. O'BRIEN:** So one of the other impacts Mr. Alteen spoke about was reliability. And I raise this just in the context that in addition to affordable –

**THE COMMISSIONER:** Oh, I just had one –

**MR. L. O'BRIEN:** Oh –

**THE COMMISSIONER:** – other –

**MR. L. O'BRIEN:** – sorry.

**THE COMMISSIONER:** – question. Sorry, before you –

**MR. L. O'BRIEN:** No –

**THE COMMISSIONER:** – get –

**MR. L. O'BRIEN:** – problem –

**THE COMMISSIONER:** – into the –



**MR. L. O'BRIEN:** – at all.

**THE COMMISSIONER:** – reliability issue.

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** The other thing that I'm trying to – I think I know the answer to this from – based on the evidence, but I just wanna confirm it.

So what about the ratepayers in Labrador?

**MR. L. O'BRIEN:** Mm-hmm.

**THE COMMISSIONER:** What benefit do they get aside from the fact that there might be energy that might be available because there's – we have – we'll have an excess, I think that was understood at the time Muskrat Falls was built and so if –

**MR. L. O'BRIEN:** Mmm.

**THE COMMISSIONER:** – so potentially, there's a possibility some of it could be used here in Labrador.

How does this impact the ratepayers, if at all, in Labrador?

**MR. L. O'BRIEN:** I'm not certain it impacts the ratepayers. It may impact Labrador more so than the Labrador ratepayers.

**THE COMMISSIONER:** How so?

**MR. L. O'BRIEN:** Well, just in terms of – I believe there was an understanding that excess revenues would be reinvested in Labrador in some way, shape or form. And this may be a lost opportunity in that excess revenues are now being focused toward – or sorry, excess sales revenue would be now focused towards rate mitigation.

The way the legislation is drafted, I guess ratepayers in Labrador are not on the hook for the Muskrat Falls cost, project costs.

**THE COMMISSIONER:** Okay. All right, thank you.

**MR. L. O'BRIEN:** And maybe to go further on that point, and I'm not sure whether or not this is a potential impact, but with respect to the balance between how much Labrador Interconnected customers pay versus Newfoundland customers pay on a rural deficit, that may have to be altered, I don't know. That's a board issue as to whether or not that ultimately becomes a policy issue for the purposes of rate mitigation. That's a potential impact (inaudible).

**THE COMMISSIONER:** Right, and I – so I – as I understand it, there's –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – some sort of – it's almost like some sort of subsidization –

**MR. L. O'BRIEN:** Right.

**THE COMMISSIONER:** – for rural – for the rural areas.

**MR. L. O'BRIEN:** For the rural areas that's covered by Newfoundland Power's customers and the Labrador Interconnected, but right now the bulk of that is covered by Newfoundland Power customers. Were that to be used as a – were there to be a spread of that or the lower percentage covered there for rate mitigation purposes, I don't know if that would impact Labrador's rates.

**THE COMMISSIONER:** Okay.

All right. So you were moving to reliability?

**MR. L. O'BRIEN:** Yes, to reliability. So there was – as I said earlier, in addition to affordable electricity, Newfoundland Power's customers expect reliable service. That's one of their two key priorities. And I think that's consistent with the expectation that the power policy of the province be implemented. So Newfoundland Power has raised in its brief and through some of the questions of some of the witnesses some potential long-term reliability impacts on the system once the Holyrood thermal generating station is decommissioned. So those are not new concerns raised and they are being considered presently before the PUB. One of those issues, for example, is with respect to the Labrador-Island Link and its design. So we've outlined

that in our brief, but to put it sort of briefly, the design of the Labrador-Island Link is in a number of sections.

And, there's some question that has arisen and it's arisen before the Board as to whether or not the segments are fully designed in accordance with CSA standards. Now, that's not necessarily to say that it's under-designed but standards look at whether or not it's designed to withstand a 1 in 50-year extreme weather event to 1 in 150, 1 in 500. So that's kind of debatable depending on the section and depending on whether or not the appropriate data is looked at.

What's important –

**THE COMMISSIONER:** So –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – there was evidence from Nalcor management that the – that reliability is actually – does meet the CSA standards and –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – that they have a 1 in 150 and even more robust system in various places.

**MR. L. O'BRIEN:** Mm-hmm.

**THE COMMISSIONER:** Your brief is suggesting that that's – that may well be partially true.

**MR. L. O'BRIEN:** For each section sort of for now.

**THE COMMISSIONER:** Right, for each section.

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** So can you explain a little bit –

**MR. L. O'BRIEN:** I guess –

**THE COMMISSIONER:** – more about your position?

**MR. L. O'BRIEN:** – it's more that when you look at the fact that there's a number of sections, 11 sections, and they're all going through a different climatic zones, from what we understand, not all the actual data that was available for each of those zones was considered in that assessment. So it could be that certain sections are designed lower than CSA standards whereas the entire cumulative one in certain areas – sorry, back that up – where certain areas may be at CSA standards when you look at the cumulative piece, it may not all be to CSA standard.

**THE COMMISSIONER:** Right. So who is – so is the PUB at the moment assessing that?

**MR. L. O'BRIEN:** It's assessing if – in the context of whether or not there are additional – there's additional generation needed in any particular area and I'll talk about that just in a second.

So essentially, right now, if the Labrador-Island Link – let's say one of the sections went down and failed, and they're engineered to a certain maximum ice load or wind load, so, I mean, from an engineering perspective, if you get over that maximum load, there's an expectation it could fail. So if that happens, depending on where it happens, you may have – you would need restoration time. So a time to restore, and in certain areas that restoration time may be upwards of 14 days. We've heard some evidence on that.

Now, if there's not adequate generation to supply at that point, then you need to look at whether or not there's a generation adequacy issue, or you need to look at where are we gonna get our generation in order to avoid rotating outages. And right now you have options such as other diesel generation, you have options such as interruptible customers, and you also have the Maritime Link.

So the Maritime Link is put forth as an option there. So if something happens on the Island, the Maritime Link is there for a backup supply. And there are a couple of issues with that in terms of the Maritime Link, and that is, from what we understand, there are no set contracts in place as of yet in order to permit Nova Scotia to provide that emergency support. So, that's not

necessarily an insurmountable issue, but that is an issue.

But the other issue that Mr. Alteen did touch on in his evidence was transmission constraints. So there is a concern – and that’s being talked about before the board right now in its post-Muskrat reliability review. There’s concerns whether or not there’s the ability to transfer the necessary power across lines while maintaining voltage. So you may need transmission upgrades to allow that to occur. So that’s being looked at, as well.

**THE COMMISSIONER:** So, can I just take you back for a second –

**MR. L. O’BRIEN:** Yeah.

**THE COMMISSIONER:** – to your reference to the Maritime Link?

**MR. L. O’BRIEN:** Sure.

**THE COMMISSIONER:** And the fact there’s no contract in place –

**MR. L. O’BRIEN:** No.

**THE COMMISSIONER:** – or no agreement in place right at the moment. And that has been – that evidence has been confirmed –

**MR. L. O’BRIEN:** Mm-hmm.

**THE COMMISSIONER:** – by Nalcor.

During the evidence of – the early evidence in the Inquiry, and I think it was evidence of Paul Humphries at Hydro. It was either him or Robert Moulton. They talked about the fact that, notwithstanding agreements, when you are linked to the North American grid, there’s some sort of a protocol that’s in place that if you – if somebody basically has an emergency and you lose power, that there’s a protocol in place or an understanding between the utilities that they’ll all help each other out – I’m paraphrasing here.

**MR. L. O’BRIEN:** Yeah.

**THE COMMISSIONER:** So is that – is – do you have – like, is there some sort of an informal protocol that exists –

**MR. L. O’BRIEN:** There is some –

**THE COMMISSIONER:** – between utilities?

**MR. L. O’BRIEN:** – protocol and that is – it’s part of the review that the board is looking at. In terms of firming up that – those contractual arrangements, it certainly put the parties in better stead. So that’s – and when I say that, it’s not insurmountable, I think that’s kind of the background that I say that in and that there is that protocol there.

**THE COMMISSIONER:** Okay.

All right, thank you.

**MR. L. O’BRIEN:** The bigger kind of reliability issue that was mentioned by Mr. Alteen and is part of the board review has to do with the Avalon. And that’s –

**THE COMMISSIONER:** Okay. Can I just take you –?

**MR. L. O’BRIEN:** Yeah, sure.

**THE COMMISSIONER:** I’m sorry, I threw you off a little bit, so –

**MR. L. O’BRIEN:** Yeah.

**THE COMMISSIONER:** – you were talking about transmission constraints.

**MR. L. O’BRIEN:** Yes.

**THE COMMISSIONER:** And I just need to understand that a little bit better. I don’t know if this leads into the Avalon; I think it does in some sense (inaudible) –

**MR. L. O’BRIEN:** It does, in some sense, yeah.

**THE COMMISSIONER:** But the issue of voltage and whatever, can you just sort of tell me what you were trying to say there, just before I interrupted you?

**MR. L. O’BRIEN:** In terms of getting what’s necessary for power across a long distance, there are constraints on those transmission lines and as coming – once it hits the Island and there are upgrades that are able to be done. And I’m not

certain that's a big issue before the board. The issue may be as to how much of those upgrades need to be done.

So it needs to – the electricity needs to be kept at a certain – in order to get it across, it needs to be kept at a certain voltage. And those – that constraint can be fixed with some upgrades to the transmission line.

**THE COMMISSIONER:** So when you talk about these upgrades that might be needed, like, can you – like, how much does an upgrade – is this an expensive process or is this just a couple of thousand dollars or is it hundreds of thousands?

**MR. L. O'BRIEN:** I don't have the answer for that and I'm not certain – there's transmission experts that had been retained by the board and by the parties in the reliability review, so there's a fair amount of evidence of that on record. But I don't think there's any – nobody has landed on kind of the costs of that.

But if there is a cost associated with that, that would be costs that would be further built into rates.

**THE COMMISSIONER:** Okay.

Again, good utility planning, I mean, would you – would it be reasonable to assume that Newfoundland Hydro and Nalcor would have known about this particular issue in planning for Muskrat Falls?

**MR. L. O'BRIEN:** To be fair, I don't know the answer to that question.

**THE COMMISSIONER:** Okay.

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** But you would think – I mean, Newfoundland Power, you only generate 7 per cent –

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** – of your total revenue, you're – you guys have identified it.

**MR. L. O'BRIEN:** Yeah. And I'm not certain the timing on when this was identified so, to answer that question, I don't want to necessarily say that that was information that was available at the time when the project was sanctioned –

**THE COMMISSIONER:** Okay, but –

**MR. L. O'BRIEN:** – to be fair to all parties on that.

**THE COMMISSIONER:** – but again looking at Mr. Humphries's testimony –

**MR. L. O'BRIEN:** Hmm.

**THE COMMISSIONER:** – in Phase 1 and you're probably not familiar with it but – and also the – Mr. Moulton and Mr. Stratton, you know, they – one of the – you know, we talked about the idea of the benefit of linkage –

**MR. L. O'BRIEN:** Hmm.

**THE COMMISSIONER:** – and the issue of – with the North American grid and the issue of the ability to exercise this protocol that I was talking about that you would get assistance.

**MR. L. O'BRIEN:** Right.

**THE COMMISSIONER:** So, in order to do that, somebody must of thought about the fact that – or you would reasonable think somebody would think about the fact, well, even if we have the protocol, we got to make sure we get the power; we're able to get the electricity over the lines to where we need it.

**MR. L. O'BRIEN:** I'd have to agree that's a reasonable assumption you'd have to look at.

**THE COMMISSIONER:** Okay.

**MR. L. O'BRIEN:** Mm-hmm.

**THE COMMISSIONER:** Thank you.

**MR. L. O'BRIEN:** And the bigger issue that was raised in terms of reliability was really with respect to the Avalon and that's not a design issue with the LIL – with the Labrador-Island Link and I'll explain that. At present, over 50 per cent of Newfoundland Power's customers

are located on the Avalon and with the Holyrood Thermal Generating Station in place, there's about 700 MW of capacity to service those customers. Once that is taken out of the mixture, there's 200 MW, roughly – I think Mr. Stan Marshall had confirmed that with his evidence, and that wouldn't be enough to meet customer demands if the LIL or the Labrador-Island Link were not able to be – to provide the load or meet the load.

The issue there, like I said, is not the design of the Labrador-Island Link, it's the reliance on the three AC transmission lines that come across the isthmus. So those – the Labrador-Island Link has a converter at Soldiers Pond and it relies on that AC transmission in order to convert and to provide power to the Avalon Peninsula. If something went wrong with those AC transmission lines and those lines are designed to a lower standard, that could affect the LIL – the Labrador-Island Link's ability to provide power to the Avalon. And if that's the case, there needs to be consideration – or there's being consideration now before the board as to whether or not there's a need for additional capacity on the Avalon.

And we're satisfied – Newfoundland Power is satisfied that the board right now has – is – has taken the reins and is looking at those issues. So if there is a need for additional capacity there on the Avalon, again, that's a cost issue. It has to – payment for that has to – come from somewhere, and we presume it would be built into rates.

So in terms of where we go into the future and the future implication for regulatory policy, we've had a – we've outlined a number of areas where we agree with some of the recommendations of the experts here.

The bigger one I wanted to point out here today is really with respect to regulatory oversight. So there's expert evidence before the Commission from London Economics that suggests that all costs to be recovered through electricity rates should be subject to full regulatory review, and that includes upfront evaluation and a final review of expenditures.

So, put simply, regulatory approval provides important perspective and balance. And regulatory scrutiny and oversight post-approval

provides incentive to management to control cost. That's the world that a utility lives in.

Now, our board is a specialized and competent and capable regulator. It's proven to be adapt at dealing with complex matters in the past. Its structure and operation is broadly consistent with the industry standard other jurisdictions, and I think there was some evidence to that effect.

And the board's record has shown it's been able to strike an appropriate balance between the interests of a utility and the customers. And I think the proof is in the pudding when you look at the fact that rates have remained stable – relatively stable – and below national average for some time.

So, we would support any recommendation that the board be empowered to review and provide oversight for all expenditures that are going to be funded through rates. That makes sense in terms of the power policy of the province, in particular, costs associated with larger projects.

**THE COMMISSIONER:** So, can that have any benefit now, with regards to Muskrat Falls?

**MR. L. O'BRIEN:** Not right now. It can, going forward.

**THE COMMISSIONER:** Right.

**MR. L. O'BRIEN:** Mmm.

**THE COMMISSIONER:** One of the issues that I've raised with some of the witnesses is the monitoring of costs –

**MR. L. O'BRIEN:** Hmm.

**THE COMMISSIONER:** And Nalcor has provided me with a document, which I believe was entered this morning, related to how costs are determined now that our – actually, fit into the rates on the basis of Muskrat Falls, and it's – from my reading of it, at least, it seems to me that it's a confirmation that the financing documents require that certain costs are going to be included and that there is no ability to somehow –

**MR. L. O'BRIEN:** Parse those out.

**THE COMMISSIONER:** Parse those out or review them or –

**MR. L. O'BRIEN:** Hmm.

**THE COMMISSIONER:** – anything of that nature at this stage because –

**MR. L. O'BRIEN:** Hmm.

**THE COMMISSIONER:** – legally, for the financiers, they wanted to ensure that the full costs were going to be recovered.

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** So, just to – just giving it some thought –

**MR. L. O'BRIEN:** Hmm.

**THE COMMISSIONER:** – I mean, it's one thing to – so, I guess I'm tipping my hat a little bit here, and I've already done it, basically, with the premier. It's one thing to sort of say, okay, well, there's a recognition here now that there's not much we can do about it, because the cost are the costs.

**MR. L. O'BRIEN:** Right.

**THE COMMISSIONER:** But, is there any advantage to, for instance, some sort of agency overseeing or at least having an opportunity to review those inputs of costs coming from Muskrat Falls to do – looking at the reasonableness of those, with regards to the obligation on the ratepayer? And at least making their views public. It may not be something that – there's no authority to change it –

**MR. L. O'BRIEN:** Hmm.

**THE COMMISSIONER:** – but isn't – would there be any benefit to ratepayers – Newfoundland Power or others – because you're a customer as well –

**MR. L. O'BRIEN:** Yeah,

**THE COMMISSIONER:** – to at least having that information?

**MR. L. O'BRIEN:** Well, I'd have to say that, in terms of benefit and transparency, certainly, there'd be that benefit. In terms of whether or not – as your initial point – whether or not the costs are the costs and there's nothing you can do about it.

I'm not certain that oversight and overview wouldn't necessarily allow an opportunity for some sort of cost control. That would depend on the circumstances, I guess. But, if it's already spent and there's no further incremental costs, then the benefit would be transparency, I would guess.

**THE COMMISSIONER:** Right. Okay.

**MR. L. O'BRIEN:** And the final comment I just wanted to make was in addition to oversight over any costs that are incurred in rates, I think that should include oversight over the area of export sales, and we touched that on that briefly in our report. The board plays a pivotal role in ensuring that a utility's costs are appropriately allocated to customers and ratepayers.

And as things sit right now, export sales of energy from the Upper Churchill and Muskrat Falls are exempt from oversight. So in those circumstances, there is at least a potential for adverse impact on ratepayers when you talk about cost allocation.

So the cost of actually getting those export sales to the borders is not necessarily – may not be recovered fairly or appropriately. And without oversight, there is a – there's at least a chance or a risk that domestic ratepayers will be footing more of their share of system costs.

So there are some recommendations there, I believe, from London Economics with respect to that, and we do support those.

**THE COMMISSIONER:** Right.

**MR. L. O'BRIEN:** Yeah.

**THE COMMISSIONER:** And so on this one, it's a little different from a review of the costs –

**MR. L. O'BRIEN:** Mmm. It is.

**THE COMMISSIONER:** – because there’s nothing in the financing agreements that I’m aware of that in any way restricts a review of –

**MR. L. O’BRIEN:** Export sales.

**THE COMMISSIONER:** – export sales.

**MR. L. O’BRIEN:** No, no.

**THE COMMISSIONER:** Right? So that’s a policy decision of government.

**MR. L. O’BRIEN:** Yes.

**THE COMMISSIONER:** Right now, they’re covered – it’s covered by the exemption order.

**MR. L. O’BRIEN:** Yes.

**THE COMMISSIONER:** – but it’s a policy decision of government to determine whether or not they will allow any review of costs related to export sales.

**MR. L. O’BRIEN:** Yes, from what I understand.

**THE COMMISSIONER:** Right, okay.

**MR. L. O’BRIEN:** Those are my comments, Mr. Commissioner, unless you have any further questions.

**THE COMMISSIONER:** I just want to have a look here.

No, I think I’ve covered off those issues that I wanted to cover off. Thank you.

**MR. L. O’BRIEN:** Thank you very much, Mr. Commissioner, and to all involved.

Thank you.

**THE COMMISSIONER:** All right, Dwight Ball and Siobhan Coady.

**MR. O’FLAHERTY:** Good morning, Mr. Commissioner. I appear this morning for the purpose of making brief oral submissions on behalf of my clients, Dwight Ball and Siobhan Coady. My comments this morning are intended

to be supplemental to the written brief filed with the Inquiry on August the 9th, 2019.

In terms of the materials I will refer you to this morning, I intend to refer briefly to the decision dated December 14, 2018, granting standing to my clients and, thereafter, primarily to the written submissions of my clients, dated August 19, 2019. [sp. August 9]

In terms of the organization of my presentation this morning, I’ve given it some thought and I’d like to divide it into two parts, beginning with some general comments relating to the role of my clients in relation to the matters of concern to this Inquiry and the content and context of their submissions.

And then in the second part of my presentation, I intend to turn to my specific submissions concerning the personal involvement of my clients and the actions of my clients, which involvement and actions relate to their positions as government ministers regarding four key project oversight issues which arise after the swearing in of the government on December 14, 2015.

So those four, what I would identify as, key project oversight issues in which they were personally involved and specifically took personal actions would be the decision to immediately order the independent EY review of the cost, schedule and associated risks on the Muskrat Falls Project; the decision during the first quarter of 2016 to proceed with the completion of the Muskrat Falls Project rather than to significantly delay the project, to split the project or to cancel the project all together.

The third project issue that I want to address this morning is the leadership and governance changes which occurred at Nalcor Energy commencing in the second quarter of 2016 and continued until the second quarter or late in the first quarter of 2017 – no, I should say, I’m sorry, the second quarter of 2017.

And the response – the fourth issue is the response commencing in the first quarter of 2016 almost immediately after the swearing in of the new government on December 14, 2015, to the calls for a reassessment of the potential human health impacts of methylmercury in the

food chain in the reservoir of the Churchill River and downstream into the Lake Melville ecosystem.

And in my submission, Mr. Commissioner, that fourth issue has, in fact, two aspects, which I believe that it would be appropriate for the Commission to address separately. And the first aspect is the substantive policy decision itself, which is made on January 9, 2019, to not accept the majority recommendation of the IEAC for soil and vegetation clearing in the reservoir and to accept the consensus recommendation of the IEAC for partial wetland capping in the reservoir.

And then the second aspect of the fourth issue is – if I could describe it this way, Mr. Commissioner – how and why the consensus measure for partial wetland capping in the reservoir was ultimately unable to be carried out after January 9, 2019, despite the policy decision of government.

Finally, in terms of my presentation, it is my intention to update the Inquiry on the status of a couple of questions or pieces of work which had been addressed with – in particular, with Ms. Coady during her evidence, which is with respect to the question of the impacts of the cost of the project and whether the department was made aware and what it did with respect to geological mapping issues on the North Spur.

I will, of course, Mr. Commissioner, attempt to address any questions which you may have at any point during my presentation, as is the normal process.

So Part I, then, is my general comments on my client's role and the content and context of my submissions, both written and oral. And in this part of my presentation, I want to touch on two areas.

First, I want to go back to the reasons why my clients were granted standing as parties commencing in part 2. And secondly, particularly in light of some of the submissions that were made by some of the parties, I wish to clarify that while my client's role in this Inquiry is a dual one in the sense that – as you would be well aware – they are members of the executive and members of the Cabinet that established this

Commission, and, therefore, their submissions must be slightly different from those of other parties on issues such as recommendations, that they, personally, have no special role or obligation to investigate or explain matters that are under the mandate of the Commission which go beyond their personal involvement, their personal actions, which arose in their positions in government.

And, in fact, I would submit, Mr. Commissioner, it would be arguably improper for them to be investigating matters while the – this Commission was established and under way and, potentially, influencing the work of the Inquiry.

So if I can turn to the first part, which are the general contents on – sorry – comments on the content and context of my submissions, I'd just like to briefly review what are the reasons why that you – you gave my clients standing and commencing in Phase 2, and that brings me to the first of the two documents and materials that I'm going to refer to, which is the decision of December 14, 2018, granting standing to clients.

I don't think it's necessary to bring it up. I mean, the decision speaks for itself. But I simply say that paragraph 4, page 2 of your decision, you stated as follows: "Phase 2 of the Inquiry ... will generally review section 4 (b) and (d) of the Commission of Inquiry's Terms of Reference. To be dealt with are the reasons for the difference between the estimated costs for the project from sanction until the conclusion of the project and" – this is the point I wanted to emphasize – "whether the government has put in place an appropriate oversight process during project execution and construction, focusing on government arrangements and decision making processes associated with the process."

In terms of my clients involvement and why they were given standing, you went on then at page 3, paragraph 6 to say the following: "Based upon the content of the application filed by both applicants," in which, as you pointed out, I had mentioned a bunch of touch points in which my clients were personally involved as they went through in the time period after December 14, 2015. You said the following: "... as a result of both individuals' roles in government and with this project after November 30, 2015, it is obvious that they meet the criteria for standing



set out in Section 5(2) of the *Public Inquiries Act* ...” And “I am satisfied that both applicants have had, and continue to have, significant involvement in the project subsequent to their election. Their participation during the Phase 2 and Phase 3 hearings will further the conduct of the Inquiry and contribute to the openness and fairness of the Inquiry. As well, due to the positions they hold in government and their actions taken regarding the project, it is clear that their personal interests could possibly be adversely affected by the Commission’s findings.”

So in keeping with the reasons why my clients were initially given standing – or granted standing, I should say – it is submitted that the proper focus of my submissions, both written and oral, on behalf of Mr. Ball and Ms. Coady is the evidence before the Inquiry regarding their personal involvement and their specific actions in relation to measures which the government has taken to oversee the project from and after December 14, 2015.

The proper focus of my submissions is not, however, all of the myriad oversight decisions and actions which were taken or ought to have been taken according to some of the submissions by Mr. Ball and Ms. Coady from and after December 14, 2015. And how I wish to approach and how I hope I have approached my summary of the evidence, and how I will make my submissions today on what the evidence actually reveals to you so that you can potentially be assisted in writing your report, is to be fair and accurate with what the evidence is as it stands on the record and, where there is no evidence on a matter, to acknowledge that fact as well. And that is how I intend to proceed.

My second general comment regarding the content and context of my submissions, regards what flows and does not flow from the fact that my clients have a dual role in this Inquiry, unlike all the other parties. Because this Commission of Inquiry was established on November 20, 2017, by the Cabinet led by the Premier of the day, Mr. Dwight Ball, a Cabinet of which both my clients were members, and the report of the Commission of Inquiry will be delivered to Ms. Coady in her role as the Minister of Natural Resources.

So this is not a completely unique situation in Canadian law, and I reflect upon the Gomery inquiry into the federal sponsorship program, which was established in 2004 by a federal Cabinet then led by the prime minister of the day, Mr. Paul Martin, and in which both a sitting and former prime minister testified before the inquiry. Given this dual role, it’s therefore important in terms of the independence of your process, that my clients, as personal parties, not be seen to make – sorry – submissions on what recommendations will in due course flow back to them, due to the positions they hold in the current Cabinet, and that is why I have not done so.

But given some of the submissions made by other counsel on behalf of their clients, which seem to imply otherwise, it is important, I submit, to clarify that what this dual role does not import is any obligation on the part of Mr. Ball or Ms. Coady, in the context of this Inquiry – and, as I’ve said, I believe it would be inappropriate to do so – as ministers of the Crown, to investigate, to provide wider explanations beyond their personal involvement, through their positions in government, or generally to be able to answer for every individual thing which occurred or did not occur in a department of the Government of Newfoundland and Labrador on every oversight decision and action taken by that government since December 14, 2015.

My clients are part of the Cabinet which decided to establish this Commission, to resource this Commission, to give it the mandate and authority to examine all these issues, including the issues in which they’ve been personally involved and taken personal actions themselves. And they have resourced, under your direction and your authority, counsel for the parties with public resources to ask appropriate questions at all instances during this Inquiry, including of my clients as the Premier and as the Minister of Natural Resources.

But in my submission it is a misapprehension of my clients’ role to suggest that they somehow have any obligation and, in fact, I would submit, I’d go further and say it would be inappropriate for them to get involved anything further than their own personal involvement through their positions in government to investigate what may

have happened in this department or that department in relation to this matter beyond their own direct responsible responsibilities.

**THE COMMISSIONER:** So what you're really talking about here, cutting to the chase, is that whatever, for instance, the Department of Environment did on the methylmercury issue with regard to permit granting or advice related to the timing of when you could actually do partial wetland capping, from your point of view it would have been improper for the Premier or Ms. Coady to have investigated that and advised the Commission as to what actually transpired in the department.

Are we talking about stuff like that?

**MR. O'FLAHERTY:** Well, that's – I'm suggesting that those issues were raised with my clients during the interview process, during the process of their testimony, and they did answer, in my view, honestly and sincerely as to what they knew about it.

**THE COMMISSIONER:** Right.

**MR. O'FLAHERTY:** But there has been a suggestion and I've read some of the submissions and I'm just – I'm putting it on the table on behalf of my clients – the suggestion is out there that they have somehow another obligation which is to provide an explanation about why a certain delay happened within a department or why a permitting decision was involved in another department. They're not involved with those issues. In my view, the answers are in the records which were obtained through the power of this Commission to get the documents from the department and they were answered in the evidence.

But insofar as any of the parties seems dissatisfied with the explanation which is provided, that does not rest with my clients to say: Well, we should have gone out and found more information about it. We did everything we could within the boundaries of what is expected, but it is not the job – and I don't want to repeat myself – to go out and find out why any particular technical issue that falls within the purview of a particular department was handled in a particular way.

So unless you have any other questions, Mr. Commissioner, I'd turn then to the second or main part of my presentation.

**THE COMMISSIONER:** Yeah, I'm not sure that it can be fully appreciated exactly what it is your saying. But I will say this to you, that I understand the – you know, the limits – you know, I expected government to act fully independently of this Commission and certainly the Commission has acted fully independent of the government.

**MR. O'FLAHERTY:** Mm-hmm.

**THE COMMISSIONER:** So in that regard, I – you know, I have no qualms in saying that that is the situation.

But I think there's a bit of a – it's not a fine line that can be drawn here. There's a bit of a blurring here, and I think particularly the blurring area is going to be related to the issue of what transpired in the Department of Environment in particular, issues related to – I agree with you – issues related to things like the tracking of commitments and things of that nature. There's other evidence that I will rely upon, and the Commission actually did its work in investigating that sort of thing. But it's not as black and white, so to speak, as to make these determinations.

I think you'll agree that it's – there is a bit of a blurring and I – and – but I'm going to be very cognizant of what I need to do and what I don't need to do.

**MR. O'FLAHERTY:** Certainly, and, Mr. Commissioner, there's an obvious distinction between what I would describe as political accountability and personal accountability issues.

And, you know, I'm simply making the point, in light of some of the submissions that were made – and I won't repeat it – that, you know, it is by nature, in the nature of a commission of inquiry, to focus on a lot of negatives because we are dealing with issues of public concern in which outcomes require examination. If those were positive outcomes, we wouldn't be involved in a commission of inquiry, I would submit.

But that doesn't mean that it's fair to attribute to individuals matters which are – you know, which clearly rest at other areas of the government, and I'll say no more about that and I'll pass on to the second part.

So before starting the second part of my presentation, I would reiterate what I noted in my written submissions, which is simply, based on the sheer volume of the evidence and documentation, the number of important issues under review and the time constraints, I have chosen to focus on the issues that I – on which I believe that I can be of the most assistance to the Commission with regard to the personal involvement of my clients.

My clients have, throughout their testimony, responded to questions on other issues on which they have either received information from other third parties, either within government or outside government, but that is simply, in most cases, in the great tradition of all parliamentary systems in which experts in the bureaucracy provide advice.

And as we've heard throughout from such witnesses as Mel Cappe and the provincial bureaucrats themselves, they provide information up, and the decisions are made based upon that advice. But there are many of those issues in which they haven't had specific personal involvement or specific – taken specific actions.

So, obviously, in my written submissions, I've decided to generally work in a chronological fashion from November 30, 2015, forward and, with your permission, I will follow the same approach this morning.

**THE COMMISSIONER:** Okay.

**MR. O'FLAHERTY:** So the first issue, then, that I just want to turn to is – and I will actually be referring, at this stage, just to highlight in my brief, which is the August – you have my written brief there.

So this is the decision to immediately order the independent EY review of the cost, schedule and associated risks on the project. In terms of my written submissions, Mr. Commissioner, my clients' personal involvement and their specific

actions in relation to this oversight issue are dealt with between paragraphs 31 and 37 of my clients' written submissions.

If you wouldn't mind, Mr. Commissioner, would I be able to just grab my water for a sec?

**THE COMMISSIONER:** Sure, no problem.

**MR. O'FLAHERTY:** Thank you very much.

I don't think it's a good use of your time or that of my colleagues and everybody else to review that evidence in great detail, because I've outlined it in my written submissions, but I would like to highlight a couple of points in evidence for your consideration this morning.

First, my clients became personally involved in the decision to order the EY review, which was announced on December 21, 2015, one week after the government was sworn into office. The decision itself was announced to the public in Exhibit P-03452, and I would commend that exhibit to you, Mr. Commissioner, for the specific reasons which it outlines for the decision to order the EY review.

The second submission – and this is what was drawn out by my learned friend Mr. Learmonth in his interviews and in his examinations – was that both Mr. Ball and Ms. Coady became very concerned by the disclosure of additional cost overruns in verbal briefings that they separately received, that they and the public did not have a full picture of what was happening with the cost, schedule and associated risks on this project.

That concern was a key reason why they personally recommended and felt it was appropriate that an independent review by subject-matter experts was necessary. It is submitted, Mr. Commissioner, that the response of the government and the personal response of Mr. Ball and Ms. Coady to this project oversight issue was based on a recognized need to ensure that they had reliable, up-to-date project information in making necessary oversight decisions going forward.

The decision was also based on a perceived need to improve project transparency, in respect of what was a project that was under challenge at that time, so that the public was made aware, in

as timely and complete a fashion as possible, of the real status of the project.

So, in my respectful submission, the result of that work and the release of that report and the acceptance of the recommendations in the report by government and the subsequent implementation of the recommendations of that report by government, were not only an appropriate and reasonable response to the project oversight issue, they helped ensure that the project was sent in an improved direction.

And secondly, Mr. Commissioner, as you reflect – as you will reflect, no doubt, on the conduct of the EY review and how that was fed in – how that – the evidence from the Oversight Committee process from March of 2014 forward fed into the conduct of the EY review, that bringing in EY subject-matter experts to do an independent review, not only informed the public and the government of the real status of the project but it also set down a marker that there would be a commitment to improved transparency on the project. Which, I think it's fair to say, did not resonate with the existing Nalcor executive group, and certain adjustments in leadership and governance flowed from that decision ultimately.

So unless you have any questions for me, Mr. Commissioner, on the decision to order the independent EY review, I'd move to the next issue.

**THE COMMISSIONER:** Yeah, I may have some other questions later, but –

**MR. O'FLAHERTY:** Okay.

**THE COMMISSIONER:** – that's fine.

**MR. O'FLAHERTY:** Thank you, Mr. Commissioner.

So the second issue, then, is the decision during the first quarter of 2016 to proceed with the completion of the project rather than significantly delay, split, bifurcate or cancel the project at that time. And this issue is one upon which my clients felt it was appropriate and necessary to address in the written submissions because, as I reflect back on your interpretation of the Terms of Reference, this was a specific

issue that you had indicated you would be addressing and they were personally involved and took personal actions with respect to this.

So, in terms of my written submissions, which is the brief, this aspect of my – or this issue is dealt with – sorry – this oversight issue, between paragraphs 38 and 43 of my clients' written submissions and I would commend those to you at the appropriate time. I do not intend to review that evidence in detail as I have done so in my written submissions. But, again, I'd just like to highlight a couple of points in the evidence which I hope is responsive to some of the submissions which have been made, particularly by the Concerned Citizens.

First, there was a consideration by my clients of appropriate legal advice from internal and external counsel on the option and legal effect and impacts of either significantly delaying or cancelling the project. There was also a consideration by my clients regarding rescoping or splitting the project and moving ahead with transmission only. And Ms. Coady testified that this had been assisted and supported in – to some extent, by some analysis from EY.

It has been suggested, Mr. Commissioner, that what the government ought to have done and what Mr. Ball and Ms. Coady ought to have done was to recommend the utilization of a blue-ribbon panel to examine these options further. And on that point, Mr. Commissioner, I would commend to you the exhibit in which my client, Ms. Coady, outlined the option of the blue-ribbon panel and, in fact, the specific involvement, as I recall, of both Mr. Vardy and Mr. Penney in such a panel, as an option to the premier. And I don't have the exhibit number but the date was March 7 of 2016.

So that issue was considered by both my clients and by government, but they declined to go that route. And you have their evidence in the paragraphs, which I've outlined, showing that it was primarily on the basis that they felt that the legal commitments which had been entered into, both by Nalcor and by the province, were such that the only viable option was to proceed with the project at that time.

I would submit, Mr. Commissioner, that the response of Mr. Ball and Ms. Coady to this

project oversight issue was based upon the exercise of due diligence. However, the spectrum of decisions which were available to the government in March of 2016 were extremely limited, based on decisions which had already been taken on the project. And the evidence indicates that the current government really had no viable option but to proceed and they decided to do that.

Now, as I indicated, Mr. Commissioner, there's been some suggestion in questioning by the Concerned Citizens and in paragraphs – around paragraphs 105 to 110 of their brief – I don't – I didn't think it's necessary to bring it to you right now – that what happened was or what – the decision or the way in which my clients proceeded was amounted to an acceptance of Nalcor's position that Nalcor's project must proceed. And from that, they appeared to draw some support for the proposition that there was a continuing lack of challenge to Nalcor and the project by the new government.

As I've said, when it comes to summarizing the evidence and making submissions on what the evidence actually reveals to you, the standard in my view is to be fair and accurate with the evidence as it stands. And with the greatest respect, given the reliance upon the internal and external counsel and subject matter advice and given what I've already outlined with respect to how from the very first week Mr. Ball and Ms. Coady were involved in challenging, in asking questions about the project, I would submit that this is – this amounts to an erroneous reading of the evidence.

I'm not suggesting that myself – that that reading of the evidence is intentional in any way, I'm simply saying that counsel and I have a clear difference of opinion as to what the evidence is, and I suggest that my opinion is correct on this point. It bears observing as well, Mr. Commissioner, perhaps, that this is one of those project oversight issues which could hardly provide a satisfactory response to all the interests who were engaged on this project.

And in my view – they – in my submission the views of the Concerned Citizens, the leadership of that group, may have been influenced by the fact that they had held the

view that this project should never have been approved from the outset.

As for the broader question of my clients' lack of challenge to Nalcor and the project, I'll return to that in the next section on leadership and governance changes, where I will again submit that those submissions are simply not borne out by the evidence, Mr. Commissioner.

I'll go then to issue number three. I take it your questions will – I'll get your questions at the end. The leadership and governance changes which occurred at Nalcor Energy then, Mr. Commissioner, commencing in the second quarter of 2016. In terms of my written submissions, my clients' personal involvement and the actions that they took in relation to this oversight issue are dealt with between paragraphs 44 and 57 of my clients' written submissions, which I will not review but I would like, again, to highlight a couple of those points in the evidence.

As I've said, I have chosen not to review the evidence around the conduct of the EY review, even though I – my letter requesting standing had addressed that as one of the matters in which my clients were personally involved and took personal actions, given time constraints.

However, you will recall from the evidence there was considerable evidence showing that from the outset Mr. Ball was directing that Nalcor, and the Nalcor executive in particular, should co-operate with the EY project review, even though Mr. Ball knew, when the review was ordered, that this would be opposed by Mr. Martin, the CEO of Nalcor. And the reference in the evidence to that is in the – is in both the evidence of Mr. Ball, but also there's a – an email on December 16, 2015.

So the second point in the evidence I would refer you to, in respect of this issue, is that there was also considerable evidence that Mr. Ball and Ms. Coady discussed with Nalcor executives – and in particular, Mr. Martin – the necessity of consulting with and involving EY, as recommended by Ms. Julia Mullaley and the deputy chief of staff, Mr. Tim Murphy, which was the body retained – the subject-matter expert body retained by government to advise on

the management and potential resolution of the Astaldi contract issues.

And, you will also know from the evidence, that this was perceived by the CEO, and not only by the CEO, but by others within the Nalcor executive team, as demonstrating a loss of confidence in Nalcor and a loss in confidence in the CEO. We also know from the evidence that Mr. Ball was provided with certain conditions by the CEO, which he placed on his continuation in that office. I'm not going to review that evidence in detail, it's all in the record.

In my submission, Mr. Ball reasonably and appropriately concluded that of the two options presented to him by the CEO that the departure of the CEO was in the best interest of the project at that time. This was a difficult decision, as testified to by my client; however, it was necessary, it was handled appropriately, respectfully and reasonably in the circumstances.

Similarly, when the board of directors resigned en masse on April 20, a new board of directors was put in place immediately. But by that point in time – pardon me, Mr. Commissioner – by that point in time, work was already under way to improve governance on the project by strengthening the board, including reaching out to Mr. Stan Marshall to engage him on whether he would be prepared to offer his considerable, world-class expertise to guiding this project to its most successful conclusion. As it turned out, due to events as they unfolded, Mr. Ball asked Mr. Marshall would he consider taking on the direct role of CEO and Mr. Marshall acceded to that request.

I'd just briefly mention or address, if I could then, Mr. Commissioner, the submissions by the Concerned Citizens on these issues, which suggest that the measures taken by Mr. Ball and Ms. Coady were accidental rather than by design.

I will leave to you to consider those submissions and I won't characterize them. But I would simply suggest that the decision to bring in EY to independently determine what was happening on this project in the context in which my clients knew, personally, this was going to be a difficult and challenging way to proceed. Taking those

decisions and the further steps thereafter to put appropriate controls and processes in place around the Astaldi contract negotiation and insist on the involvement of outside eyes, they led to the eventual leadership and governance changes. And you will see the discussion going on in the record among these individuals as to whether such changes will be made and when they would be made.

Finally, Mr. Commissioner, engaging Mr. Marshall as the new CEO and putting in place through the IAC process, which was another policy decision made by the government, a stronger and – eventually, a stronger, more robust board of directors and adding subject-matter expertise to the Oversight Committee in March of 2017.

And then bringing EY back in to review and report to the public on whether their initial recommendations had been implemented. Those were, in my respectful submission, appropriate and reasonable responses and, in my view, they contributed to ensuring accountability and a stronger finish on the project.

The final issue that I want to address in my oral submissions today, Mr. Commissioner, is the response commencing in the first quarter of 2016 to the calls for a reassessment of the potential human health impacts of methylmercury in the food chain, in the reservoir and downstream in the Lake Melville ecosystem.

So in terms of my written submissions, the reference paragraphs are paragraphs 58 to 80 of my clients' written submissions. And these are, perhaps, the most detailed references to the evidence which I've placed in my written submissions because I think this is probably one of the most controversial and complex issues, project oversight issues that was faced by my clients and by the government in the time frame December 14, 2015, forward.

So as I said at the outset, Mr. Commissioner, there are really two aspects to this issue. And the first is a substantive policy decision itself, which had two parts: not to accept the majority recommendation of the IEAC for soil and vegetation clearing in the reservoir and to accept the consensus recommendation for partial

wetland capping. And the second aspect, which is how and why the consensus measure was ultimately unable to be carried out after January 9, 2019, despite the policy decision of government.

So I'd like to highlight some of the specific evidence in relation to the two aspects of this decision. First of all, what is our context, what's happening at this particular point in time is, I think, important. So when the policy decision itself, which is the question of the reassessment of the issue of the impacts of methylmercury on the food chain, arises, this is almost immediately after the new government has been sworn in.

And while it's dealing with the other issues that we've already talked about and the myriad of financial issues, budgetary issues and other project issues, Mr. Ball directed that the department engage with this issue immediately. And it did so, according to the evidence – and the documents which were obtained by the Commission and placed in evidence – by attempting to get a better understanding of the issue of methylmercury and the methylation of mercury in the reservoir and in Lake Melville through workshops.

Later in 2016, the government ordered a monitoring program be established, which was later improved based upon the feedback and recommendations of the membership of the IEAC, whose involvement in the design of the program should be noted, and, furthermore, by ordering increased tree clearing in the reservoir by September 2016.

In your review of the evidence relating to the substantive policy decision and why the government did not accept the recommendation of the majority of the IEAC for full reservoir clearing, I have addressed that matter in close detail in my brief and I would commend to you the following two pieces of evidence.

First is the examination of Mr. Ball by Ms. Brown, counsel for the Innu Nation, which is found at paragraph 66 of my brief, and the following points, which I would highlight, commencing at page 18 of the transcript of July the 5th, 2019.

Ms. Brown says: “So, yesterday you spoke about how, in 2015, a report called the Calder report was released. And you would agree that that report predicted the methylmercury levels caused by flooding the Muskrat Falls reservoir were going to be much higher than had been previously been anticipated. Is that correct?” So that's the starting point of the debate.

And after she deals with a number of questions, which I think answer a lot of the points as to why the ultimate policy decision was taken, she comes down then to say, “You stated yesterday it was your understanding that four of the six western scientists on the expert committee did not support and were not in favour of soil and vegetation removal.” That's at page 26.

And she further pointed out, “Is it your understanding that there were concerns raised by those scientists about possible unintended impacts of that soil removal suggestion?” So potentially more methylmercury being released by that option.

And then finally she says, “And you are, of course, familiar with the position that Innu Nation took on the mitigation option. Is that correct?”

And that is the second piece of evidence then that I would refer you to, Mr. Commissioner, which is the Exhibits P-04172, which is the letter received by the Innu Nation on April 24, 2018, opposing any clearing of soil and vegetation in the reservoir, identifying their constitutional protected interests in respect of that area, citing an absence of scientific data to support the recommendation and citing their concerns that unintended environmental impacts could, in fact, result, according to what the four of the six scientists had concluded. That is the evidence why the recommendation for a full reservoir clearing was not accepted.

So then, Mr. Commissioner, why was the consensus recommended option accepted? Which is the recommendation for partial targeted soil clearing in the reservoir.

First of all, it bears repeating that the issue of human health concerns relating to methylmercury flowing through the food chain in this reservoir and downstream into Lake

Melville was addressed. I shouldn't say it was addressed in Lake Melville; I wasn't involved in the evidence about that. But, it's not my understanding that it was addressed in detail at the – in the environmental assessment process.

But the issue of methylmercury and methylation of mercury in the reservoir was addressed in detail as far back as the environmental assessment process pre-sanction. There were concerns in the general public about that issue. It's not a new issue, either in this river, in this province or in this country, and it was addressed.

The evidence before the Inquiry relating to the time period October 2015 forward, however, when the demands for reassessment arose, shows that these demands were based on a claim that new scientific data had been produced by a study showing that the proposed flooding of the reservoir would lead to much higher than predicted methylmercury and, potentially, lead to significant human health concerns relating to consuming traditional foods, like fish and seals.

The publication of the Harvard study and the reliance by the Make Muskrat Right protest on its conclusions raised in fairness a clear inference that there had been a scientific study of the structure and behaviour of this specific ecology, of this specific reservoir and, in the unique Lake Melville ecosystem, through observation and experiment, showing that flooding would result in significant human health concerns relating to eating seals and eating fish.

It was these findings – these conclusions – reliance upon those – that caused or contributed to significant widespread and, as my brief has made it clear, legitimate concerns among citizens of Labrador, but across this province and across the country, generally, about this issue, and that, ultimately, fuelled protests and hunger strikes in 2016.

So what Mr. Ball testified to was once the scientific work had been done, the feasibility studies – I mean, this is unproven anyway, what would happen with respect to wetland capping. But the information that was provided was that it would be estimated to decrease methylmercury production very nominally, by 1 to 2 per cent.

But given this background, given what had happened and given the widespread and legitimate concerns, there were, according to Mr. Ball, still intangible benefits of proceeding. He wanted to do this and directed that it be done.

So, in summary then – in my submission – Mr. Commissioner, the policy response – the first part of this issue – on the part of the Ball government to the concerns raised regarding methylmercury in the reservoir downstream, those were appropriate and reasonable responses. It was appropriate and reasonable to accept the consensus recommendation of the IEAC for partial wetland capping and it was also appropriate and reasonable not to accept the majority recommendation for soil and vegetation clearing.

The second aspect of this issue is the source of what I think, in fairness, is the most controversy, which is how and why the consensus measure of partial wetland capping in the reservoir was ultimately unable to be carried out after January 9, 2019, despite making the policy decision. And the submission has been made by some parties that questions about this remain unanswered – about the delayed response to the recommendation to carry out wetland capping in the reservoir area – or that there has been something less than a full explanation provided in particular by my clients.

I've already explained my clients' position on their involvement and their responsibility and I would submit that they have honestly and fully addressed their involvement and their knowledge about the issue. And I would submit that they have been examined and cross-examined vigorously on their personal involvement and their actions. And they've addressed those questions.

And with the greatest respect, in my view, the submission that there has not been somewhat of a fulsome explanation of this issue is not borne out by the evidence. Commission counsel has entered numerous documents in evidence showing how the wetland capping recommendation was made by IEAC; how the issue of wetland capping was considered by the government at the departmental level; the reasons why it was the option recommended by the department to the minister and then



ultimately to the Cabinet in the Cabinet paper – or, sorry, in the Cabinet document that was presented on January 9, 2019; and how and when the wetland capping program was planned to be executed by Nalcor in conjunction with a Fish Habitat Compensation Plan under an altered permit which they already had with respect to the water use, which is a matter within the Department of Municipal Affairs and Environment.

Through Commission counsel's examination and through the examination of my friends, you also have a great deal of viva voce evidence from my clients explaining what happened within the executive of government regarding this issue and their specific roles in responding to that issue, including why Mr. Ball, as I've said, as the Premier and as the minister responsible for this particular area and the involvement with respect to Indigenous matters, supported wetland capping based upon what he reasonably concluded were largely intangible benefits.

**THE COMMISSIONER:** So notwithstanding the fact that there's evidence certainly that he and Ms. Coady – particularly him – supporting it, I guess the bigger issue, and, really, the most telling sort of issue, to really consider is why – you know, why it took so long, I mean, for the government to make a decision that, eventually, they could not carry out because the project had proceeded to a stage where it would be impossible to do it.

So we know, for instance, that – it's one thing to say – I think some would suggest this: It's one thing to say, you know, the Premier is a busy person and there are other things on his plate or her plate, but this is not – based upon the evidence that we have, this is not an item that was, sort of, once the recommendation was made, it was just forgotten about everybody.

There were communications by the Nunatsiavut Government with politicians. There were attempts to get some answers. We have a letter from the chairperson of the IEAC recommending something happen, none of which seems to have moved the party – moved the government to publicly indicate they were – what they were doing or whatever the situation.

And then to leave the decision on wetland capping to January of 2019 – like, there was – it's over a year from the time that the recommendation was made to the time that a decision that the Premier admits himself he was fully supporting, he was – you know, there was going to be wetland capping.

Why – you know, the obvious question is how could it be that it would take so long?

**MR. O'FLAHERTY:** Well, I think there's a couple points I would make and I know you will deal fairly with all the evidence with respect to it, but the recommendations were made on April the 10th of 2018. We know that by November of 2018, the departmental officials were recommending to their minister – and Mr. Ball was aware – they were recommending, for the reasons that were set out, that wetland capping proceed.

But we also know, from the evidence of Mr. Ball, that he was not sitting on his hands, as has been suggested, about this issue. During the summer of 2018 he testified that they knew that he wanted to do the – Nalcor knew that he wanted to do the wetland capping. That was understood. Nalcor made an application for a permit to do the wetland capping at the same time as they were doing the fish habitat work with the same contractor.

We also know Mr. Ball has said that he was continually monitoring the results of the monitoring program that was going on in the – you know, in the reservoir at that point in time. He was alive to those issues. He just didn't know there was a permitting issue and he didn't know that the department had decided not to give the permit on the basis that they were waiting for a formal decision from their minister to do the work. He wasn't aware of it. He found out about it afterwards.

Yes, it's frustrating. Yes, it's a difficult situation that he's in, but he did not know about that. And there's no evidence otherwise that he did know about it. Nor, Mr. Commissioner, is there any – and as I've said to a couple of witnesses, you know, we are trained to ask: To whom is it a benefit? And how is it a possible benefit to Mr. Ball or to Ms. Coady or to the government?

**THE COMMISSIONER:** I don't think anybody could understand that.

**MR. O'FLAHERTY:** Right.

**THE COMMISSIONER:** I mean, clearly the political fallout is very negative.

**MR. O'FLAHERTY:** Yeah.

**THE COMMISSIONER:** So – but again, I guess for most people, you know, we have a government, an organized government, people who are being paid to get the work done. This was an item that was of significance to the Premier and, yet, it doesn't happen. It just – it's a bit confounding.

**MR. O'FLAHERTY:** It is confounding. I agree with you, Mr. Commissioner. And I agree that letters were being written by Dr. Reimer to – directly to the subject-matter expert that was appointed by government within the department to say: Well, what's going on with the recommendations? I know that was happening.

I mean, we know that in the record and, as I've said, Commission counsel has brought forward a complete documentary record about what's happened. And there is, in fact, a briefing note or – they all have different terms, but it's a governmental briefing note in the department which indicates – it's dated in March of 2019 after this had happened, which indicates – it talks about the permitting decision. But my clients weren't aware of that. They didn't know that granular detail that there was a permit that hadn't been issued.

And, in fact, it's even more confounding because the evidence that you do have in the record is that, consistently, three times in November presentations were made, which indicated that the consensus recommendation, the capping of wetlands could be carried out before impoundment during this Fish Habitat Compensation Plan.

So the department was advising the minister and the Premier and then later the full Cabinet, by the documentation presented on January 9, 2019, that the capping of wetlands would be carried out before impoundment in accordance with – it says it right in it – with the fish habitat program,

which was over by that point in time. It had been completed. So these briefings that were received were clearly incorrect.

However, in contrast to the significant body of evidence explaining why the executive accepted the recommendation for wetland capping, the consensus recommendation, there's no evidence – absolutely no evidence – that Mr. Ball intentionally delayed responding to the IEAC recommendations in order to make it impossible to carry out physical mitigation in the reservoir, or failed to conduct himself in good faith in dealing with this issue.

And, as I've said, I know we must focus, in the context of any inquiry, on difficult outcomes, but what we shouldn't do, in my respectful submission, is unfairly attribute motives or actions to persons who did not either hold those motives or take those actions.

And as to the issue of delay, which is – which clearly both Ms. Coady, under examination, said: Yeah, there is a delay, there's a timing issue. It's in her evidence of which I reproduced for you. Yes, it took a number of months for this decision to proceed which, in hindsight, is one of the factors leading to the – there being no time window to perform this work.

But the whole process of the IEAC was a long process, which was delayed, as was testified to by the Labrador Land Protectors witnesses, both within the IEAC and externally, which I would suggest, Mr. Commissioner, is understandable given the novel and complex issues that were engaged here. We're not pointing any fingers of blame. We're saying: What are the facts? What did happen here?

So the Inquiry will no doubt consider, and you have said you will consider, whether or not the commitments made by government were met with respect to the IEAC. Well, I would commend to you at paragraph 60 of my brief what those – what the commitment was, and I know you will fairly deal with that issue.

And you may recall when I was here in February, the point I was raising – and I think the witnesses agreed with – was that what is important for you, Mr. Commissioner, in doing your work, is what was the actual commitment

made, which was concurred with by the Indigenous leadership at that particular point in time.

And the Premier did commit to resourcing the establishment of the IEAC, which had been asked for since October of 2015 and for – perhaps, before that to – I mean, I don't know – to bring to bear scientific and Indigenous knowledge to this decision-making process; to reassess this entire issue; to consider the recommendations. But he did not, should not have, and could not, in my respectful submission, abdicate the responsibility of the department to make the necessary regulatory decision.

So with the greatest respect, Mr. Commissioner, any submissions to the effect that the commitment was not met, in my view, are not borne out by a fair reading of the evidence.

What Mr. Ball and Ms. Coady attempted to do – they are not subject matter experts on this issue. What they attempted to do was to ensure that they had the most accurate and up-to-date information about this issue. It took too long – perhaps in hindsight – yes, it took a long time to get the information. But as a result of getting the information, they now have – for all the benefit of all of the people of this area and all of the province, we have a world-class monitoring system in place. And if there are issues, which arise, they will be addressed.

And that is a process which engages directly the leadership of the Indigenous groups. They receive the monitoring results at the same time as the government receives them.

So unless you have any further questions about that issue, I'd just like to briefly turn to and address the Commission on the status of the take-aways that you had asked my client, particular Ms. Coady, about.

**THE COMMISSIONER:** Okay. Let me – just before you do, I – and I raise this based upon public hearings that occurred last week here in Labrador. And I'm gonna refer you to page 27 of your brief if it – have it there – and to Mr. Ball's evidence that you quote and, in particular, I want you to – I'm referring now about eight lines or nine lines up from the – from his

testimony. Actually, I think it's probably a good idea for me to read a little bit more.

He said: "... when you look at the capping and ... impact that it would have on methylmercury, the overall impact would have been intangible when you look at somewhere between 1 and 2 per cent. I've been keenly watching and closely watching all the data on methylmercury with the new monitoring plan that we would have in place. So we've been watching that, and certainly the plan – even though the benefits would've been intangible and ... minimal, we were still prepared ... to – and I know Nalcor wanted to, I wanted to and I know the minister's comments the other – a few days ago, properly reflects the view of government, that we wanted to do wetland capping, even though the impact wouldn't been intangible."

He goes on and he makes this comment: "There was still a lot of anxiety and stress that had been created by people who had been watching this closely and that was a commitment that I made and" the "one that I wanted to follow through ..."

And later in your brief, you also referred to – the reference to the concerns of the people, I'm not sure – exactly sure where it is right at the moment, but the anxiety that you talked about and the stress that was created could also be anxiety and stress that could relate to another issue which is an issue that he did not speak much to and that is the North Spur.

And I query whether in the circumstances his concern about that anxiety and the stress that was created by the people is something that could have equally applied to the North Spur.

**MR. O'FLAHERTY:** Yeah. And I think – in fairness, I think what he meant was it was anxiety and stress created that was being suffered by people in the local area. I don't think he –

**THE COMMISSIONER:** Right.

**MR. O'FLAHERTY:** – meant it was created by them, I think he –

**THE COMMISSIONER:** Right.

**MR. O'FLAHERTY:** – meant –

**THE COMMISSIONER:** And, I don't – right.

**MR. O'FLAHERTY:** – it was manifested in them, is what –

**THE COMMISSIONER:** Correct.

**MR. O'FLAHERTY:** – he was saying.

And in terms of the issue of the North Spur, I've reflected upon this with my clients as to, you know – and, again, bearing in mind the number of issues, the number of – the time constraints and the complexity of that particular issue and the fact that they are not subject matter experts in that and they were, again, removed outside by another layer of what was happening with respect to that issue.

I didn't include all their evidence which led to their decision not to proceed to order a further – or to direct that a further study be done on top of the number of studies – it's all in the evidence there, the 30 or 34 studies which had been done with respect to that.

I think in – you know, the – you know, I agree with you that there has been – again, this another example of – a suggestion has been made that there has been a scientific study. So, in other words, there has been a study of this particular environment, this particular structure and behaviour of this particular structure, itself, which is the dam, through some sort of observation and experiment which suggests that there is an issue with respect to the soil underneath.

My client's view on that is that that issue has been adequately and appropriately studied, it is the subject matter of extensive monitoring, and the monitoring system, itself, is beyond my, you know, ability to describe it to you. But my understanding is that it doesn't just relate to the area around the dam, it's right through the river to track the height of the water, et cetera, the flow of the water, and that there is an ongoing weekly or – I believe it's weekly dam updated which is published and made available. And I could be – Mr. Commissioner, I could be misunderstanding that it could be monthly, but I believe it was weekly – there is a dam update.

So, I agree with you that this is an issue about which the publication of the findings of Dr. Bernander – if I pronounced his name correctly – has, again, been relied upon, you know, to make the request that this issue be reassessed and be reopened.

Unlike methylmercury, the decision taken by Mr. Ball and Ms. Coady's government was that they would not reassess or reopen that issue, based upon the information and advice that they received from bureaucrats, which was fed into, of course, by this body of scientific knowledge.

Again, it's a difficult issue, Mr. Commissioner, and I have – and I would commend to you Mr. Ball's evidence on this and Ms. Coady's evidence which showed that they both have – in particular, Ms. Coady – have reviewed this issue in great detail and are continuing to monitor this issue.

And I think, Mr. Commissioner, that while it's important – and people certainly need to know whether their elected and appointed officials respond appropriately and reasonably to the threat of, for example, human health concerns about methylmercury, it seems to me that one of the issues that you will likely want to address is, well, what is the evidence that exists today about whether there is or is not a human health risk from consuming fish or seals in the river or in Lake Melville downstream of the reservoir.

**THE COMMISSIONER:** Actually, I'm not gonna be doing that.

**MR. O'FLAHERTY:** Pardon?

**THE COMMISSIONER:** I'm actually not going to be doing that.

**MR. O'FLAHERTY:** Okay.

**THE COMMISSIONER:** That's not part of the mandate that I have –

**MR. O'FLAHERTY:** Okay.

**THE COMMISSIONER:** – and I set that out clearly in my decision.

**MR. O'FLAHERTY:** And – I misunderstood then. But I do agree with you, there is a significant concern about that. So in any event then, unless you have further questions, Mr. Commissioner, I do have – I did want to address with you the status of the takeaways, if you wish to hear me on that.

**THE COMMISSIONER:** Yes, please.

**MR. O'FLAHERTY:** Thank you, Mr. Commissioner.

I provided my clients with a verbatim record of the takeaways in August of 2019, when I received their transcripts. And I've been following it and tracking it and I'm advised that the department – the department's work on cost impacts and the review of the records regarding whether issues of the – if I have this right – geological mapping of the North Spur were raised or, as you said, flagged with the department and when – and what response they had can be provided as soon as these pieces of work are completed, which I expect to be in the very near future.

I expect that you'll want me to do that in a written form, Mr. Commissioner, with a cover letter or perhaps – however I'll – perhaps I can deal with Commission counsel on –

**THE COMMISSIONER:** Yeah, I think that's a matter you can discuss with –

**MR. O'FLAHERTY:** Thank you.

**THE COMMISSIONER:** – Commission counsel as to how that's happening and, of course, I won't be making it public, so –

**MR. O'FLAHERTY:** No.

**THE COMMISSIONER:** – I'm assuming government will make it public –

**MR. O'FLAHERTY:** Yup.

**THE COMMISSIONER:** – themselves.

**MR. O'FLAHERTY:** Yup.

**THE COMMISSIONER:** Yeah, okay.

**MR. O'FLAHERTY:** So finally, do you have any other questions?

**THE COMMISSIONER:** No.

**MR. O'FLAHERTY:** No? I would like to – I'm not going to repeat what everyone else has said. I do want to thank, obviously, you, Mr. Commissioner, and this entire group –

**THE COMMISSIONER:** What – I do have one other question then. What about the comment I made to the Premier related to the issue of review of costs? At the end of the conversation, you recall that I felt that it was important, maybe not to wait for my report, but that I was sort of tipping my hat that one of the things I am going to be recommending is that, you know, somehow there'd be some review of the costs that are actually inputted into – from Muskrat Falls that are inputted into the rates.

**MR. O'FLAHERTY:** Right.

**THE COMMISSIONER:** And I'm not sure if you had an opportunity to address that, or if the Premier has yet or not.

**MR. O'FLAHERTY:** I'm sorry, that's probably a default by me. I haven't followed up with him on that point, but I will do so, Mr. Commissioner.

**THE COMMISSIONER:** Thank you.

**MR. O'FLAHERTY:** I'd just like to – just to say that my involvement in this matter since – well, I guess February in particular, but December, I am heartened by the passion and the commitment of not only the people involved with this Inquiry, but those who participated, the parties, and I do want to say that I think it bodes well for the province that people are so committed to this special place that we have and the amazing place that Labrador is.

Thank you.

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

All right, we'll take our break and then I'll inquire as to whether the government or, alternatively – and/or alternatively Nalcor have

any responding remarks. So we'll take 10 minutes.

**CLERK:** All rise.

**Recess**

**CLERK:** Please be seated.

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

**THE COMMISSIONER:** All right. Nalcor Energy, reply.

**MR. SIMMONS:** Thank you, Commissioner.

I do have a few points in reply to raise. I'm going to try to be as direct as possible and move us through it as quick as I can.

I have one point arising out of the presentation on behalf of the Concerned Citizens Coalition that was given by Mr. Budden on Monday when we started here, and it concerns one particular exhibit that was referred to. We don't need to bring it up, Madam Clerk, but it's Exhibit P-00206 for reference. And that was a presentation that was given by Mr. Martin for Nalcor to Premier Williams and Minister Dunderdale and some others on April 23, 2010. People may remember it. It's the one that has a slide in it that refers to a P75 value and that single slide was referred to a number of times in evidence with a number of people.

And Mr. Budden's submission – which he made orally – and which is also included in the Coalition brief – was to the effect that he says that presentation, which includes a notation by Mr. Gary Norris on it, saying it's – P75 is a conservative assessment. He says that presentation is evidence that can lead to a conclusion that Nalcor came out of that meeting with direction, or some wording to that effect, to reduce the cost of the Muskrat Falls Project to make it feasible.

And in the brief, Coalition refers to this as this being an instance of the thumb being on the scale, and our position is that – I'm going to refer to you some evidence related to that – our position is that there is absolutely no evidence to support that inference or that conclusion arising out of that presentation and what's available.

And the first thing is that the presentation, of course should be reviewed as a whole – and I suggest, Commissioner, that you do it. The timing of it – it's apparent when you read it – the timing is that this presentation was prepared before the Régie in Quebec had made a decision on whether there would be power transmission allowed through Quebec – before that was – before that application was denied.

And in the presentation, it is an examination of potential outcomes of the Régie decision and options that would be available depending on what those different options are, and the slide that talks about the assumptions that are made for all cases is the assumptions that were made for the examination of those options. So it's particular to a set of considerations that were being made at that time. The presentation does refer to the option of building the Muskrat Falls plant first as, quote: “emerging as a possible strategy.”

And the other exhibit related to it is Exhibit P-01676. That's Mr. Norris's affidavit. He confirms the handwriting on the copy of the presentation is his, but he has no other recollections to offer in relation to the presentation in addition to that.

And Commissioner, four witnesses were questioned on that presentation. Former Premier Williams testified on the 1st of October, 2018, and his evidence is in the transcript at pages 40-42. The examination there is a discussion, generally, of P-values, and there's really nothing in it specific to what happened at that meeting or at that presentation or anything supporting the conclusions suggested by the Coalition.

The former board members were examined on October 16, pages 12 to 15. And this presentation was referred to but it was only a reference point for what they knew about P-values, and there's nothing there about that meeting in which it was presented. And Mr. Kean was examined on November 7, 2018. The reference is pages 50 to 52. Again, it's the reference to the exhibit is a touchpoint for other examination, and he had nothing to offer about the meeting.

So the only testimony that I'm aware of that I could find concerning the meeting comes from

Mr. Ed Martin, and it was in his examination on December 10, 2018. It's found at pages 84 to 88, and he gave an explanation of what P-values were being used for what purpose at that time and gave the background. I'm not gonna work through it. I suggest, Commissioner, you look at it. There's nothing there that supports or is consistent with the contention put forward on behalf of the Coalition.

Commissioner, on behalf of Robert Thompson, Mr. Coffey has filed a brief and spoke to, in some detail, issues related to the exemption of the project from PUB oversight. And he includes in his brief an account from various exhibits of the involvement of a number of people – including Mr. Bown and some others – leading up to the decision to exempt this from PUB oversight.

And in that discussion, there was reference to the Granite Canal project as having been previously exempted. And I think this came up in the submission – the oral submission – from Ms. Best on behalf of Kathy Dunderdale – former Premier Dunderdale – also.

And in relation to the Granite Canal project, there are just a couple of points about it that I want to highlight. One is that it was exempted in 2000 – the year 2000. And it was not a power-export project; it was purely a domestic power-supply project. So its capital costs would have found their way into the rate base paid for by ratepayers. It is a – we can look it up – I'm not sure if this is directly in evidence, but it's a 40-megawatt plant. So in scale, it's considerably smaller than the Muskrat Falls Project.

So on its face, it would've seemed like the sort of project that would've been amenable to review by the PUB applying its ordinary expertise and ordinary principles, as they do for capital projects. But nevertheless, it was exempted from PUB oversight. So it is an example of government choosing to exercise its policy-making authority to take the policy decision about building a power plant unto itself, as opposed to passing it on to the PUB.

In Ms. Best's submission on behalf of former Premier Dunderdale, Commissioner, you had some discussion with her about information that was made available to the PUB and MHI during

the course of their review – in particular concerning the estimate. And I understood there to be some discussion about whether the base estimate was available and could've been provided and incorporated into that work.

So I just want to draw to your attention some of the timeline that we know from the evidence about the preparation of the base estimate.

**THE COMMISSIONER:** So this is the DG3 one?

**MR. SIMMONS:** This is the DG3 base estimate, correct, yeah.

So we know that SNC-L had – SNC-Lavalin had delivered its base-estimate work to Nalcor on December 15, 2011. We know that that covered about 80 per cent of what had to be done to complete the base estimate. We know that beginning in January, there was a process involving Nalcor personnel and those from SNC-L to do some revisions and complete the base-estimate process and that that continued on until probably sometime in May because it was the beginning of June that the estimate was available for Westney to do its risk work.

In the meantime, MHI had delivered its report on January 12 –

**THE COMMISSIONER:** Can I just –

**MR. SIMMONS:** – sorry, January 31.

**THE COMMISSIONER:** Can I just take you back a little bit on that. So – and you can correct me if I'm wrong on this, but I think that in – was – the workshops that were being conducted on tactical risk for that estimate, were they – did they not take place in May?

**MR. SIMMONS:** They did take place in May, correct, Commissioner.

**THE COMMISSIONER:** Right.

**MR. SIMMONS:** So I know by June it was completed, so by May – you're correct – for – and I think it was around May 24-25 maybe. So by that point, at some point in May, yes, the base estimate work, the completion work on it had to be done at that point; however, by that time,

MHI had delivered its report to the PUB on the 31st of January, and the PUB had delivered its own report on March 30.

So if any – so base estimate information that could possibly have been made available would not have been complete and would only have been partially done. So that's just a factual matter I wanted to review.

During the submission from Mr. Williams on behalf of Former Government Officials, there was some discussion in which I think it was – it came out that Nalcor's position had been that the sanction decision was a utility decision. And I addressed that in my original submission and in the written submission, and it's actually a little more nuanced than saying that the sanction decision was a utility decision. And I just refer you to the written submission at pages 23 and 24. And I did have a look at the transcript from Monday, and it's page 23 in the draft transcript.

And what we said was that at DG2, the considerations – at Decision Gate 2 – the consideration that went into selecting the Interconnected Island Option were broader than the question that got referred to the PUB in 2011. And the question that was referred by government to the PUB was more narrowly a utility-type decision, and from that point on, the discussion around the project took on more of the air of being a utility decision.

However, I would note that when it came to – for government to sanction the decision, I had asked former Premier Dunderdale whether the sanction decision was a public policy decision when it was made and she had, as I recall, stopped and thought and then confirmed that, yes, it was. And that testimony was on December 18 and it's found at page 81 of the transcript.

**THE COMMISSIONER:** So, notwithstanding that, you'll recall the evidence of Ms. Dunderdale and as well Mr. Kennedy, in particular, related to their concern that it be the least cost for the ratepayer was their – I think Mr. Kennedy said that was his – his major concern was to –

**MR. SIMMONS:** Mmm.

**THE COMMISSIONER:** – ensure that it was the least cost. So notwithstanding the fact that there may have been other, broader considerations, I think the focus of the government was on least cost and certainly that's what they were telling the public at the time.

**MR. SIMMONS:** Certainly a very significant consideration and I agree that it was emphasized with the public.

If we do look, though, at the collection of materials that were released by the Department of Natural Resources in November of 2012 leading up to sanction decision, you will see among – that there are other considerations that are discussed –

**THE COMMISSIONER:** Yeah.

**MR. SIMMONS:** – in those materials as well.

**THE COMMISSIONER:** Yeah.

**MR. SIMMONS:** In the brief filed on behalf of Former Government Officials, there are – there was some discussion between, Commissioner, you and Mr. Williams about statements made at page 209 in paragraph 290, where there's an enumeration of a number of factual matters that it's submitted the government officials weren't aware of. There are a couple of factual matters in there that I just want to comment on briefly.

In regarding paragraph 290(a), this is the one where it says that group 2003-2015 were not aware that management reserve had been removed from the capital cost estimate. Two points in relation to that. One is that the absence of the consideration of strategic risk and creation of a management reserve from the estimate at DG2 was certainly publicly known because it was in the PUB report. So there's no controversy around that.

**THE COMMISSIONER:** Well, yeah, there is no controversy around the fact that it was in the PUB report. But you would have to admit that it was a pretty – well, this was a – this PUB report was a pretty significant document. And unless you actually know what you're doing, to even read that and understand it would be something – which is the point that was being made by



some of the witnesses with the government – you wouldn't even understand what it meant. I think Mr. Bown even indicated that in his examination.

So I agree with you it's there, but whether or not somebody would actually catch it and be aware of it is another – it may have been publicly available, but was it publicly known? That may be a distinction that needs to be considered.

**MR. SIMMONS:** Mm-hmm, certainly, Commissioner.

I don't know if I'd go so far as to say that it's not a point that shouldn't have been picked up by government officials who – when a major part of the work they were doing was involvement –

**THE COMMISSIONER:** I –

**MR. SIMMONS:** – with this project –

**THE COMMISSIONER:** I agree with that.

**MR. SIMMONS:** – for a long period of time –

**THE COMMISSIONER:** That's right.

**MR. SIMMONS:** – and that the – those in the elected positions should be able to rely on those officials to be able to do that kind of analysis for them.

The other point in relation to that same statement is the use of the word "removed." They say the management reserve was removed from the capital cost estimate, and it's – may be a picky point, but it's not. I mean, the fact was that it was never included in the estimate. And removed carries the connotation of there being something that was supposed to be there that someone surreptitiously took out and hid away.

But if you follow through the development of the work for Decision Gate 2 and after that, there were recommendations made about strategic risk and management reserve, and there was a decision made not to include it in the project budget estimate, but there was never a decision to include it and then take it out.

In the next paragraph, 290(b), there's a statement there that the group 2003-2015 was not told that the P50 factor was contrary to the advice of Westney. Now, I understand that to be a general statement, but to be more specific – and you can refer to the Nalcor written submission at page 149 for this – Mr. Dodson's evidence from Westney was that he did recommend P50 for tactical risk and for the estimate contingency that was included in the budget number, and the P75 recommendation was separately for the strategic risk and management reserve.

And the other point in relation to this, the same recount of facts, is on paragraph 290(d), which is on page 210, and there's a statement there that it was Nalcor that had requested MHI, which had been retained on behalf of the Government of Newfoundland and Labrador by that point, to not address risk factors in their report. And that is – we've – it's very clear on the evidence, and this was recounted in the submission for Robert Thompson, that it was the government that determined the scope of work for MHI's work – MHI's report and that made that decision. There's a recount of the exhibits in the evidence in the submission on behalf of Robert Thompson.

There's two other exhibits I'd like to draw to your attention that can be added to that recount. One is Exhibit P-01115, it's 1,115 which was a message from Mr. Thompson himself in which he is contributing to the preparation of the statement of work. And the other one is Exhibit P-00261 which was a message from Mr. Crawley at Nalcor to, I believe, Mr. Bown where he says that the MHI statement of work is government's call.

Moving on to the presentation on behalf of the Consumer Advocate from Mr. Hogan and Mr. Peddigrew, most of the points that they addressed are already addressed in the Nalcor written submission and I won't refer to them now. There is one point raised in their brief at page 78, paragraph 191 and it's a reference to Ernst & Young in their report to government having confirmed – they say that Nalcor operated as if there were unlimited funds, and that there was no sense of responsibility for cost escalation.

And we know that that reference comes from Exhibit P-03086, which was Mr. Kelvin Parsons's notes of a verbal presentation that had been made to the premier and a couple of the Cabinet ministers early in 2016. The statements in that – in those notes to this effect of attributing, you know, lack of attention or care on the part of Nalcor to what the project was costing, you don't find those same statements in any of the written materials or reports that Ernst & Young presented.

And the evidence as a whole, if we think back over it, is much more consistent with there being a real concern and a real effort to control costs. I can refer you to evidence we'd heard regarding Mr. Martin's approach of wanting to hold the feet of not just contractors but the project management team to the fire and evidence that we'd heard which was critical, in fact, of the project management team's approach at times to contractors for being unwilling to entertain costs – applications for payment of increased costs.

The number of parties have made submissions suggesting Indigenous consultation – methylmercury in the North Spur. We are going to take advantage of the opportunity to file a short written reply just to point out some of the exhibits and other evidence in relation to those matters, just in a – as factual way as possible, and we hope to – we'll have that done by tomorrow.

There are a couple of points I want to address now, though, coming out of oral submissions, and one is from – two are from the submission by Ms. Brown on behalf of the Innu Nation. And I have some sympathy for the concern expressed by Ms. Brown about the difficulty of separating an assessment of the adequacy of consultation measures from constitutional responsibilities for consultation.

And I'm no great authority on the law in this area, but my understanding of it is that it's – the constitutional basis is not just for determining whether consultation should happen or not, but it's also for finding where on the range of available consultation the appropriate level of consultation is. So I'd submit that it is going to be a challenging thing to do to separate out an analysis of the appropriateness of levels of

consultation without having to compare it to a constitutional standard.

**THE COMMISSIONER:** I think that was responded to fairly well by Mr. Cooke –

**MR. SIMMONS:** Mm-hmm.

**THE COMMISSIONER:** – when he said one way to do it would be to look at it is – as opposed to a specific Indigenous group, notwithstanding that they are, is to look at it as an interested stakeholder.

**MR. SIMMONS:** I agree, Commissioner, and it's as if you were doing it the same way as considering consultation with Grand Riverkeeper and Labrador Land Protectors. And if we approach that way, I don't see – foresee there being any difficulty.

And the other point coming out of Ms. Brown's submission is that she did take some time to deal with the suggestion that there were allegations that there had been a premium paid for contracting with Innu-related companies. I just want to note that the examination of witnesses related to that was, of course, carried out by Commission counsel, not by – not on behalf of Nalcor, and it's not Nalcor's submission or assertion that there was any problem with premiums on contracts because of Innu involvement in them.

**THE COMMISSIONER:** And I think that primarily came, though, as a result of examination of my – I can't recall this fully, but I'm –

**MR. SIMMONS:** Mr. Hussey, I think.

**THE COMMISSIONER:** – of Pat Hussey.

**MR. SIMMONS:** Mm-hmm.

**THE COMMISSIONER:** So anyway, yes, I understand that.

**MR. SIMMONS:** And, in relation to that, I believe Mr. Hussey did explain that it wasn't the fact that there was Innu involvement. If there were any increased overheads it would be more related to the fact that there would be an extra – maybe an extra level of administration involved

in order to comply with the Impact and Benefits Agreement.

One point concerning the submissions on behalf of NunatuKavut Community Council by Mr. Cooke, and this is regarding the appropriateness of the level of consultation with NCC. And I just draw to your attention that in the decision of the Newfoundland and Labrador Supreme Court concerning the injunction application that was brought by NunatuKavut Community Council during the environmental assessment process when they sought to enjoin the process on the basis that there had been inadequate consultation. That decision is in evidence at P-01454, it's Justice Handrigan, and I draw your attention to page 20, paragraph 42, where he makes a finding that the consultation was, quote, "fulsome and generous."

So, Commissioner, concerning the presentation on behalf of Astaldi Canada by Mr. Burgess, you had some discussion with him regarding the Astaldi suggestion that Nalcor had acted as engineer and payment certifier and that this was contrary to best practice. The first point in response to that is that Nalcor's role was defined and set out in the contractual arrangements and documents entered into with Astaldi, so there – it was – it is to be evaluated in accordance with that contractual framework. And the second point regarding any evidence on best practice is that Grant Thornton did engage Miller Thomson and R. W. Block to review the appropriateness of the terms and conditions in the Astaldi contract and neither of those experts in their reports raised any concern about that particular feature.

Regarding the submission from Mr. O'Brien this morning on behalf of Newfoundland Power, I'm just going to flag this one. There was some discussion about – in the PUB process about whether or not the Consumer Advocate had access to confidential exhibits. And Mr. Hogan or Mr. Peddigrew may be able to confirm this or not. I personally can't recall any evidence in relation to that during the hearing. It may be there. But I was surprised to hear that and so that may be a point that's worth verifying in the evidence.

**THE COMMISSIONER:** Actually, I think there is evidence on that.

**MR. SIMMONS:** Mmm.

**THE COMMISSIONER:** But –

**MR. SIMMONS:** There may be.

**THE COMMISSIONER:** – I can't for the moment – as you might imagine, I've been doing a lot of review. I can't for a moment tell you where it is, but I'll bear that in mind and – when I look for it.

**MR. SIMMONS:** Well, Commissioner, I'm reaching the point where I can't remember who all the witnesses were, so that's understandable.

**THE COMMISSIONER:** Well, we had quite a number, so you're not losing your mind.

**MR. SIMMONS:** Okay.

And I think some care should also be taken to ensure that – regarding the submissions by Newfoundland Power – that, in fact, we do have evidence to support all the things that were discussed. I appreciate it was an opportunity to ask some questions about background on the point, for example, dealing with the reliability of the LIL. That's something, I think, where we'd have to look to the evidence that's actually been called at the Inquiry to assess that.

Okay.

And finally, Commissioner, you did make reference to the material that we just filed concerning determination of the amounts that would be payable under the commercial agreements for the project costs that would then find their way into rates to be paid by the ratepayers. And we provided that because we just wanted to give some description of the way the commercial agreements worked, and what you could see in it.

And one feature in there that is mentioned is that – and this is not external to the Nalcor organization – but Newfoundland and Labrador Hydro acting in its independent capacity as a regulated utility, under those agreements does have audit rights. And it's not to ensure – it's not to audit whether costs were appropriately incurred per se, but it is to audit to ensure that

only what the agreements say should be passed on are dealt with. So that particular point is contained there.

And, Commissioner, unless you have any other questions, that's it.

**THE COMMISSIONER:** Just on that last point though. Yeah, and I did see that the audit provision allows, you know, the auditor to go in and make sure. But there's a connection between – obvious connection between Newfoundland Hydro and Nalcor. So it's –

**MR. SIMMONS:** That's why I say (inaudible) independent.

**THE COMMISSIONER:** – a question of transparency and accountability and whatever. So – but, yeah, I appreciate that comment. Thank you. And I do appreciate you providing that as well.

Now, your suggestion about providing me with – have another written submission on the Indigenous issues, is a matter that I don't think I can just allow without having the consent of other parties on this because – or have you discussed this with the other parties?

**MR. SIMMONS:** Well, following our meeting of all counsel where we convinced you, Commissioner, to give us an extra four days for our written submissions – which I think I can speak for everybody, that we appreciated that very much.

**THE COMMISSIONER:** I didn't.

**MR. SIMMONS:** The proposal I had made then was that parties would still have the right to file written replies if they wished and – or to deal with it orally. And I did confirm that with Commission counsel after. So it's not intended to be argumentative or submissions – we just want to ensure that we list out what some of the pertinent exhibits and references are on those issues.

**THE COMMISSIONER:** All right.

**MR. SIMMONS:** So if it's any concern when we provide it, Commission counsel can vet it, we're happy to –

**THE COMMISSIONER:** Right.

**MR. SIMMONS:** – you know, deal with it.

**THE COMMISSIONER:** Okay.

**MR. SIMMONS:** Okay, thank you.

**THE COMMISSIONER:** All right, thank you very much.

So that now concludes the hearings in this matter. Again, I would reiterate my gratitude to all of the parties and counsel, as well as the witnesses who have appeared. I have a substantial amount of work to do, but at this particular point in time, there's nothing that indicates that I won't get it done in time.

I will say this: I think Mr. Williams yesterday indicated I had four months. Actually, I have less than four months because I'm told that the report, if it's going to be delivered before the end of the year, has to be provided to the Queen's Printer for printing by December 12.

So, you know, I have a large amount of work to do in a relatively short period of time and the pressure is on and I'm certainly feeling it. I don't think it's appropriate for me to request any form of extension at this time and I'm not going to do that. I think for all parties involved, including my own sanity, I think the date of December 31 is an adequate one at this stage of the game. So certainly the plan is to provide my report on time. So having said that, I guess I'd better get cracking and just want to leave it at that.

And Ms. Muzychka, did you have anything else you wanted to add?

**MS. MUZYCHKA:** Yes, Commissioner, I just wanted to draw to your attention that when we receive the Harris Centre reports, we would want to place those into evidence as exhibits. So if there's no issues with it, those would be the last – whether it comes as one report or two reports, depending on whether they do them separately for each consultation session, we'll simply have them numbered and entered.

**THE COMMISSIONER:** Right.

Is there any – does any counsel object to that? Obviously, I've (inaudible) – you know, these were not under oath so obviously, you know, I'm well aware of that. But I think the gist of what I've – what I heard during those public consultations is a matter that should be part of the public record of this Inquiry and I think it's appropriate to do that.

I'm not seeing any disagreement, so hopefully that's fine.

All right, thank you very much, and we're adjourned.

**CLERK:** All rise.

This Commission of Inquiry is concluded for the day.