



COMMISSION OF INQUIRY
RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Phase 1

Volume 40

Commissioner: Honourable Justice Richard LeBlanc

Saturday

17 November 2018

CLERK (Mulrooney): All rise.

This Commission of Inquiry is now open.

The Honourable Justice Richard LeBlanc
presiding as Commissioner.

Please be seated.

THE COMMISSIONER: Good morning.

I'm sure everybody has better things to do than to be here but – on a Saturday, but we are here and we're going to deal with what we need to deal with here this morning.

Okay, so this is – the matter comes before me this morning as a result of an application that's been filed by Nalcor Energy. Specifically it relates to Phase 1 of the Inquiry. It does allude to the fact that we may have some issues in Phase 2, which I'm going to try to deal with, or speak a little bit about later on this morning.

But particularly with regards to the Phase 1, there are two witnesses and there are – I've been given the documents, I think I have them all – related to what it is that are – concern to Nalcor Energy. So that being the situation, I'm prepared to hear from you this morning. I unfortunately forgot my evidence book upstairs, but I have, luckily, a thing of paper, so we'll start with you now this morning, Mr. Simmons.

MR. SIMMONS: Thank you, Commissioner.

Dan Simmons for Nalcor Energy.

And, yes, we did make a submission in response to the Commissioner's request to identify anything that we anticipated would be a commercial sensitivity concern for the remainder of Phase 1. You have the letter that we sent in on November 9, and in that we endeavour to try and identify what we could anticipate might be a commercial sensitivity issue coming up. The two main issues being matters related to an ongoing civil dispute with Astaldi and also anticipating that there'd be some confidential or commercially sensitive information coming out of the evidence of Mr. Jim Keating.

So, first of all, the Rules of Procedure that have been adopted do provide for redaction of commercially sensitive material, they provide for use of confidential exhibits and for redacting information from public exhibits. And, Commissioner, you've provided us with some written guidance on what's to be considered commercially sensitive information, which includes material that might be harmful to the competitive position of a party, interfere with its negotiating position or result in some financial harm, as well as information that's supplied confidentially by a third party. And the guidance includes that there's a presumption of disclosure and then a burden on the party seeking some protection to provide the justification for that.

THE COMMISSIONER: So just before we go off that, I think it's important to put that into perspective. This was done quite some time ago –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – and it was done for a reason. My hope had been that with the ability of counsel to speak to one another with regards to various issues, we would avoid spending our time at the hearings dealing with issues related to admissibility, commercial sensitivity and whatever.

My instructions to Commission staff – or Commission lawyers – were, look for relevance. If it's relevant we want it in, if it's not relevant, then we don't want it in. If it's relevant but it has some degree of commercial sensitivity, we have to – you have to look at it and decide whether or not you can get – you know, and discuss with the party – whether or not there is an ability to agree on what will go in.

That document was not meant to be a threshold document in the sense of deciding what is going to go in and what is not going to go in. The probative value of a particular piece of evidence has to be looked at. And, also, in line with the fact that this is a public inquiry, you know, I have to balance the interests of the public and the public's knowledge with the interests that are being put forward with regards to the issue of privacy.

This document was not meant to be a determinative document as to whether a document was going in or going out; it was just to give guidance on what may or may not be commercially sensitive. And I don't want this to be seen as the definitive document that determines whether something goes in or not.

So I just wanted to say that. I think you understand that and I'm hopeful other counsel understand it, but that was the basis upon which I did this: just to help the parties to avoid the need of us having to continually have to talk about admissibility during the hearings.

MR. SIMMONS: Right

And we do understand that and took it that way, Commissioner, and if I didn't say it a moment ago, we do regard it as being guidance, and respect that. And I wanted to say that in practice I think that the process has been working –

THE COMMISSIONER: Yeah.

MR. SIMMONS: – well, and I think it's also important to put on the record here that what we're talking about here has nothing to do with whether information gets disclosed to the Commission. If there's a commercially sensitive matter, it still gets disclosed to the Commission and has been. So that's not what any issue is –

THE COMMISSIONER: Right –

MR. SIMMONS: – here.

THE COMMISSIONER: – but what it's – just to follow up on that –

MR. SIMMONS: Yeah.

THE COMMISSIONER: – because the public are watching this.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: What is disclosed to the Commission does not necessarily come to me.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: It only comes to me if – when we're sitting here at these hearings. So Commission counsel has the opportunity to review this, and our staff, but I don't see it and I don't know anything about it and I can't consider it as evidence until it actually is produced at the hearings.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: So I don't want people to think that in the background I'm seeing all these documents and, you know, that somehow I can consider what I'm seeing, notwithstanding that fact it's not evidence before the Commission. Do you understand the point I'm making?

MR. SIMMONS: Certainly do, Commissioner.

And in practice what – the way it has been working, is that the parties will disclose information to the – to – when I say Commission, in the broad sense it is the Commission's investigation. We have, as party – I think other parties have as well – for documents that have been disclosed that are proposed to be used in the hearing, had an opportunity to suggest if there is commercially sensitive material and if redactions should be made, those suggestions are made to Commission counsel.

And for the most part, I don't think there's been any issue; any matters that have been raised have been resolved and I stand to be corrected on that, but I think for the most part that process has been working fairly well. I had understood that there – if there were to be a dispute regarding whether something should be treated commercially sensitive or not then it could be elevated to yourself as –

THE COMMISSIONER: Right.

MR. SIMMONS: – the Commissioner and that's a way of resolving those things. I don't think we've had any particular issues concerning that.

We've been doing this – handling transcripts from interviews in essentially the same way. Reviewing transcripts beforehand, identifying areas which may be regarded as commercially

sensitive – sometimes there's a bit of back and forth with Commission counsel until we can reach agreement on how transcripts should be redacted. And when it comes to hearing testimony, in practice it has been that process of dealing with documents and with transcripts that I think has provided the guidance for what we can expect to happen when witnesses take the witness stand.

We've considered that we're guided by the discussions around the redactions from those materials. And that's not to say that – Commission counsel, of course, call the witnesses. They determine the examination that they want to carry out, and there may be times when examinations go in directions other than what has been dealt with and already previously discussed in the context of transcripts and documents, and other counsel as well get to ask questions, and we can't always anticipate what direction those are going to go in.

So it's not impossible that things will come up in the course of testimony where there may be a commercially sensitive issue that will come up and have to be dealt with on the spot. There's been a couple of those along the way but considering how much evidence we've heard, I think generally that's been managed pretty well.

So the written submission, as I said, deals with a couple of things: one, is that we do know that there's a civil dispute between Astaldi Canada contractor and the Nalcor companies, which has taken on heightened importance since the end of September, when there was a notice of arbitration delivered by Astaldi. There have been some court proceedings since then. The Astaldi contract, I understand, has now been terminated, and even as recently as last week there was an injunction application filed by Astaldi, which is being heard on Monday.

We've provided a copy of the notice of arbitration and from it, we can see that it is a significant claim being brought by Astaldi. The basis of the claim, while not fully articulated in the notice of arbitration – there's enough there for us to see that what's being sought is essentially setting aside of the contractual arrangements and the claim for complete payment for Astaldi's construction costs with profit.

So it's a significant dispute with consequences for Nalcor Energy, and indeed, because of the many things we've heard here, we know that it has consequences ultimately, perhaps, for taxpayers and ratepayers in the province. So it is a – an important interest that needs to be taken into account.

Astaldi has limited standing, not full standing before the Inquiry. The standing relates primarily to Phase 2, which is the construction and cost escalation examination phase. And even then, I believe, reviewing, Commissioner, your decision on granting the standing, there are some limits in Astaldi's participation but they also have the right to be notified if there's other matters that affect their interests, which would come up here.

As background, it's important for us to remember that this proceeding is an Inquiry and it's not a proceeding that – like those most of us lawyers are used to dealing with in the courts, in that it's not an adversarial proceeding where the parties are adversarial to each other and are competing with each other's interests. Each party that has been granted standing, stands in relationship with the Commission directly, rather than back and forth with each other.

So it's the Commission's interest in conducting its Inquiry fully and doing as much as possible in public, which has to be considered. But it's not a forum for the parties with standing to be looking – to be protecting their interest vis-à-vis each other, or advancing their interest vis-à-vis each other. So our concern here regarding the Astaldi claim is that the financial claim asserted by Astaldi should be dealt with inside the arbitration and if necessary in any of the court proceedings that are brought.

There are rules of procedure that apply to both of those; documentary discovery, discovery of witnesses will take place to whatever extent is permissible at whatever times and in whatever manner is prescribed procedurally for those proceedings and that's where that should happen. The Commission's work, particularly here in Phase 1, I – we submit should take account of that and not allow any advantages to accrue to either Nalcor or Astaldi out of the way evidence is made public or dealt with in the course of the Phase 1 of the Inquiry.

So we've set forward in our submission a suggestion as to how this should be dealt with. We don't anticipate that there's much evidence that we expect to hear from the remainder of the Inquiry that would be sensitive in this regard because Phase 1 goes up to sanction, the Astaldi contract was awarded after sanction, the execution of their work has been post-sanction.

We've heard a fair bit about risk and examination of risk and assessment of risk in different areas; that's on the record, it's dealt with, there may be some limited areas related to that where we have concerns. There was an area in Mr. Lemay's evidence which raised a concern, and Mr. Lemay, I understand, is coming back in Phase 2 and that can be dealt with then.

So we have set out in our letter of submission – on page 3 of the letter – that we do not anticipate that it should be necessary to have to hold any in camera proceedings to deal with matters related to the Astaldi claim or that may disclose evidence which shouldn't be disclosed at this point. If it were to become necessary, though, and this is something that will have to be determined with Commission counsel as we move forward – they will control the evidence that they're going to call and, of course, we don't control that – if it were to be necessary to deal with any issues that would have to go in camera, our request is that that should be structured in such a way that Astaldi and its counsel are not a participant, in that in camera hearing.

Other – we have no objection to other counsel and parties being participants provided there is sufficient undertakings – suitable undertakings put in place. And we understand that Astaldi may have some submissions and a position to take in that regard, but that is the position of Nalcor Energy.

The other area concerns evidence –

THE COMMISSIONER: So before we – just if I –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – excuse me. Just before we go to the next area, I'd like to talk a little bit more about this area.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: Did you –?

MS. O'BRIEN: Yes. Sorry to interrupt my friend but just one factual correction. Our – Mr. Simmons, I think, just said we intended to recall Mr. Lemay in Phase 2.

MR. SIMMONS: Yeah.

MS. O'BRIEN: Our original intention was actually just to call Mr. Lemay in Phase 1 and if you may recall we stopped some of his Phase 1 evidence to deal with this application; that's what brings us here. I think our plan at this point would be to bring him back for a short period of time in Phase 1 to deal with these – what is not a very significant amount of evidence. I'm not saying that we would not call Mr. Lemay in Phase 2 but I can say that he's currently not on our list for Phase 2.

THE COMMISSIONER: Okay.

MR. SIMMONS: Thank you, yes, that's satisfactory. I had not been clear. I had thought he might have been coming back in Phase 2, but that's satisfactory.

THE COMMISSIONER: Okay.

So my understanding – and you can correct me if I'm wrong and – because you did add a – add something that now is giving me a little pause for thought – but my understanding was, is that the concern for Phase 1 really related to Mr. Lemay and then to Mr. Keating that we're going to talk about in a few minutes.

So as a result of that I'm – you know, I basically have a look at what it – assuming that the transcript was an area where I could find out what areas –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – because it's hard for me to decide this in a vacuum, in the sense of not knowing what the evidence is, what its

prejudicial – what its probative value is rather – that sort of thing. So I actually went to the transcript to figure out what it was that Nalcor was seeking to redact.

So one of the things I would like to do this morning if you're prepared to do this – and I don't want to catch you off guard in this regard –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – is actually look at the transcript and actually look at the areas. Because I've actually looked at them myself and there are some areas that, I think, are not relevant – specifically relevant to Phase 1 that might be relevant in Phase 2. And there are others that I'm still questioning whether or not, you know, the probative value is there and whether it should be disclosed. And I also look at, right now, what other evidence is already before the Inquiry and how this evidence would, in any way, be unknown to people in any event.

MR. SIMMONS: Mmm.

THE COMMISSIONER: So one of the things I'd like to do is go to Mr. Lemay's transcript – because I think these are the areas that would be obviously coming – seeking to be brought before me – and actually go through the various points.

Now, I realize other counsel don't have the un-redacted document. Because I'm now deciding this particular issue it's like a voir dire in some respects.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: I've now had the un-redacted document, compared it to the redacted – what the suggested redactions are and I'd like to specifically go over that so we can deal with Mr. Lemay.

Are you in a position to do that this morning?

MR. SIMMONS: I can in a general sense. I'm not clear how we're going to do that without going in camera. And that would –

THE COMMISSIONER: Well, we're not going –

MR. SIMMONS: – might require us to go in camera to do it.

THE COMMISSIONER: No, what I'd like to do is go to the page –

MR. SIMMONS: Yes.

THE COMMISSIONER: – and I would like to have a general comment from you on why it is that this – why you see this – and I may make a suggestion as to the fact that there's – well, isn't there a particular exhibit –

MR. SIMMONS: Hmm.

THE COMMISSIONER: – that's already in evidence that might well basically respond to this –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – that sort of thing. That's what I'd like to do this morning.

MR. SIMMONS: Okay.

THE COMMISSIONER: Because I –

MR. SIMMONS: Well, I didn't come prepared to do it at that level this morning; I, in fact, don't have Mr. Lemay's transcript with me.

THE COMMISSIONER: Okay.

MR. SIMMONS: I can talk generally –

THE COMMISSIONER: Okay.

MR. SIMMONS: – about what some of the reasons were for the requests that were made as I recall them. And our submission, of course, hadn't – that we'd filed hadn't dealt with Mr. Lemay in particular. My understanding had been that that – that issue had already been dealt with, with the arrangements that had been discussed by Ms. O'Brien.

In a general sense, I can tell you that some of the concerns with Mr. Lemay's anticipated evidence did concern assessment of risk that was getting more specific as opposed to more general as coming from SNC's assessment of more specific risk. And it – and because it was coming from

SNC as opposed to from Nalcor – because there's a lot of material in evidence that's been provided by Nalcor which deals with assessment of risk, risk ranges broken down in many different categories, all that's on the public record and that's out there.

But from SNC's own work, some of the – Mr. Lemay's evidence was anticipated to start to get more specific than that, and because it's coming from SNC as another participant assessing it and that piece was not already out on the record, that's something that we submitted should have had some commercial sensitivity around it, particularly considering that the current proceedings have been started by Astaldi and what's being claimed by Astaldi in those proceedings.

THE COMMISSIONER: Okay.

I think the best way for us to handle this then this morning – because I have a plan in my mind as to how I'm going to deal with this – is that I think counsel should have access to the Paul Lemay transcript. I don't think they should have – other counsel should have access to the un-redacted version. I think they have the redacted version of that and that's – I'm satisfied at the moment that's enough.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: And I'm going to give you the page numbers of the document that I want to refer to. And I – there are basically what I was able to determine, there are five areas that we may have to discuss this morning. The other redactions that have been suggested are redactions that I don't think are relevant to Phase 1, so they're not an issue for Phase 1 and I'll tell you what those are. Those are at page 78 and 79 –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – page 81 and 82 –

MS. O'BRIEN: These are not relevant.

THE COMMISSIONER: Not relevant.

MR. SIMMONS: Not relevant to Phase 1.

THE COMMISSIONER: And page 84.

So these are not documents that Commission Counsel will be seeking to have entered in Phase 1 –

MR. SIMMONS: Okay.

THE COMMISSIONER: – or have been referred to.

So the areas that I want to discuss are pages 26 and 27, page 38 and 39, page 48, page 54, 55, 56 and 57. Otherwise, there's nothing else that's redacted and I don't think there's an issue.

MR. SIMMONS: Okay.

THE COMMISSIONER: So we can get you access to the (inaudible).

MR. SIMMONS: I think I can access it on my computer.

THE COMMISSIONER: Okay.

MR. SIMMONS: So I can pull it up.

THE COMMISSIONER: So a party – and if any party here doesn't have a computer and needs to bring it up, we can actually bring up the un-redacted version, or the redacted version for other counsel, if you need it.

So I'd like to go into the specifics of –

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: – what actually it is here, and I'd like to make a ruling this morning as to what we're going to do in public and what we're not going to do in public.

MR. SIMMONS: Okay.

THE COMMISSIONER: If we can.

MR. SIMMONS: Yep.

So, Commissioner, I know counsel for Astaldi are here this morning.

THE COMMISSIONER: Mm-hmm.

MR. SIMMONS: Is it your intention that they be disclosed the un-redacted version of the transcript?

THE COMMISSIONER: No. Not at the moment.

MR. SIMMONS: Okay.

THE COMMISSIONER: I'm talking about the other counsel here. I'm gonna hear from Mr. Burgess in a few minutes –

MR. SIMMONS: Okay.

THE COMMISSIONER: – before we do – go into this exercise.

MR. SIMMONS: Okay.

THE COMMISSIONER: I'd like to hear what you have to say about Mr. Keating.

MR. SIMMONS: Okay, Mr. Keating.

The nature of – Mr. – so we can back up a little bit. We heard from Dr. Bruneau earlier concerning, you know, positions that he was putting forward as to the viability of bringing natural gas onshore by a pipeline and using that as a generation alternative. And we know that he was working from publicly available information at the time in 2012 when he did that work.

Mr. Keating has been with Nalcor Oil and Gas; he's currently the executive vice-president. He has information that is useful on that topic, and it's information that's derived from either communications with companies involved in the offshore oil industry in many cases under – for which non-disclosure agreements would have been in place, and also derived from the fact that the province, through Nalcor, is a participant in some of the offshore oil projects and has information obtained in – within that context.

Mr. Keating was interviewed, and we've now provided his interview transcript to Commission counsel with areas that we regard as falling under this umbrella of where confidentiality should be maintained.

Much of what Mr. Keating was interviewed on, and much of the information that relates to responding to the concerns raised by Mr. Bruneau, can be dealt with publicly. We've been provided with a number of documents from Commission counsel that we understand they intend to use as exhibits. We got the package on Thursday; we've cleared those now and responded, just this morning on some of them.

There's some other documents we've identified that we think would be useful. And, in one case, we've told Commission counsel that there is a summary document with some notes that Mr. Keating had made at the time.

THE COMMISSIONER: Is that the ones that I received early this morning?

MR. SIMMONS: Probably so. We –

THE COMMISSIONER: Okay, so there's two –

MR. SIMMONS: – sent some copies last night.

THE COMMISSIONER: – appears to be two documents.

MR. SIMMONS: Mm-hmm.

THE COMMISSIONER: One of which is a more extensive document, explaining – I think written by Mr. Keating.

MR. SIMMONS: Yes.

THE COMMISSIONER: And then there's the summary document –

MR. SIMMONS: Yeah.

THE COMMISSIONER: – that's ...

MR. SIMMONS: Both of these were drafts he worked on back in 2012 that were never brought to completion as a report, but they're useful tools 'cause they explain a lot of the information that was known and could be taken into account in relation to the potential for a natural gas option back at the time.

But they also contain identification of companies and parties which discussions were

undertaken which remains confidential, and we'd like the opportunity to be able to redact out identifying information of company names and some other identifying information.

But Mr. Keating is willing to speak publicly about that process and in somewhat more general terms. If we need to get into specifics that involve the confidential parts of it, it would be necessary, we're submitting, to have to go in camera to do it. We'd like to be able to think that we can address most of the concerns in public surrounding this.

And so that's where that stands at the moment. There's still discussions to be had with Commission counsel about the mechanics of how we work this out. Mr. Keating is their witness. They're calling Mr. Keating, so, in part, it's going to be a determination of how far Commission counsel think they need to go in order to present the evidence that needs to be presented to the Inquiry.

Our concern is that we don't step outside of undertakings that Nalcor has given to maintain confidentiality of information that's derived from these different companies, and in a larger sense, preserving the relationship with these oil companies who value their own confidential information highly. And we don't want to see we end up in a position where they don't have confidence that they can deal openly with Nalcor on some of these oil and gas issues without fear of the information becoming public.

So that's the sensitivity around Mr. Keating's evidence.

THE COMMISSIONER: All right, fine. Thank you.

MR. SIMMONS: Okay.

THE COMMISSIONER: All right.

So I'd like to hear from some of the other parties that are present this morning, just related to the general approach to this.

Am I correct in understanding that there was some documents that were sent out to counsel that I had requested be sent out related to the public – to the nature of a public inquiry and

when are civil disputes ongoing, criminal disputes, that sort of thing. Has that gone out?

MS. O'BRIEN: My understanding is yes, some research done by your associate counsel –

THE COMMISSIONER: Right.

MS. O'BRIEN: – on this was provided to all parties.

THE COMMISSIONER: So has everybody gotten that?

MR. SIMMONS: I can speak for myself.

Yes, we did receive a list of those cases. We've had a look at them and have some summaries prepared. A lot of it deals with questions of privilege and some other general guidance in them. So if there's question arising out them, I'm happy to do what I can –

THE COMMISSIONER: Well, I think the –

MR. SIMMONS: – to try to address them.

THE COMMISSIONER: – important part – the important thing to be taken from those cases is that, you know, if there's an issue where a person's rights are in question, for instance, if there's a potential criminal charge or alternatively ongoing criminal prosecution, that sort of thing, I think it's clear that commissions of inquiry generally basically take a back seat to that and they don't interfere with a person's right to a fair criminal trial or whatever.

In the civil sphere, the rules seems to be far less direct and far less significant. The cases that have gone out there basically indicate, except for two, and I think, again, they are more related to issues where a particular person's rights were in, you know, in jeopardy.

Generally speaking, if there's civil proceedings ongoing, whether it's a civic proceeding – as far as I'm concerned, whether it's a civil proceeding in a court, or alternatively, if it's an arbitration procedure, that that would not basically mean that somehow the Commission's work should be curtailed, or whatever. And I guess the one that is closest to home would be Madam Justice Cameron's inquiry on the testing.

And at that particular point in time, obviously, there were – there was a class action suit that had been commenced involving some of the individuals against the health authority and, as well, the government and various other individuals. And she made a ruling, at that particular time, that notwithstanding the fact that that was in place, the Commission of Inquiry had a purpose, and she was determined to meet that purpose. And if it involved, you know, some consequential disclosure of information, or whatever, she said that that was not – she basically found that was not a concern that she should in any way deride her from proceeding with the Inquiry. There are other cases, Krever and the other ones, that are there.

The reason I asked associate counsel to pull those out was because I wanted to get an understand, in my mind, just what limitations, if any, should be considered with regards to that sort of an approach.

Now, we're at a higher level, but this goes to the Phase 2 issue because, obviously, we have a situation, which if it's not dealt with before the 18th of February, when we start Phase 2 or when we begin dealing with Astaldi and some of the other claims, we're going to be back here talking about the same thing.

So, I wanted that to go out there, and, you know, there to be an understanding about what the Commission needs to do here.

MR. SIMMONS: Yeah.

THE COMMISSIONER: So did you want to say anything –

MR. SIMMONS: Sure.

THE COMMISSIONER: – about that?

MR. SIMMONS: So, for the purpose of – I agree, Phase 2 is going to be a challenge. And, at the moment, I can't suggest a way that we've recognized that – or that we can put forward that's going to adequately deal with Phase 2. We're going to have to do some more work on that.

But for the purposes of Phase 1, we're regarding our submissions here as being ones concerning

the exercise of discretion, by you, as Commissioner. There are interests to be balanced, and we recognize that. There – we're not dealing with issues of privilege where the question would be different because the parties have rights to have their privilege protected.

We know at the outset of the public hearings, Commissioner, that you did state that you wanted to ensure that in the process of the Inquiry did not add to the cost of the project, so that's, I think, important to continue to keep in mind here, and all we're asking is to have some reasonable limitations put on the way the evidence comes out here in order to strike the appropriate balance between the objective of doing as much as possible in public, and not creating, or contributing, to a risk that there would be increased costs of the project, which, of course, is still ongoing and not completed.

THE COMMISSIONER: Okay. Thank you.

Mr. Ralph.

MR. RALPH: Yes, Peter Ralph for the Government of Newfoundland and Labrador.

I'll be brief, Commissioner. There are really three points. The first is that, of course, the province chose to have a public inquiry, and it could have had other means of examining the Muskrat Falls Project. So clearly we want this to be as public and as transparent a process as possible.

On the other hand, of course, the province, as the Commissioner – as you've recognized, we don't want this process to actually affect rates or affect the cost or schedule.

So we would suggest that under the Public Inquiries Act there is sufficient means to address this. Clearly, you have the right to have in camera hearings, and clearly, you have the right to determine the level of participation of the parties. So we'd suggest that in the circumstances where there is – where there appears to the Commission that there is commercially sensitive information that could impact the project's cost or schedules that the Commissioner decides – in your discretion – how to deal with that.

THE COMMISSIONER: All right.

My problem here, Mr. Ralph, is this: now I'm looking more at Phase 2.

MR. RALPH: Yes.

THE COMMISSIONER: Phase 1 is easy.

MR. RALPH: Yes.

THE COMMISSIONER: Phase 2 is going to be the problem.

So I have, basically, the Government of Newfoundland and Labrador telling me to conduct an inquiry, and Phase 2, basically – here's what I'm inquiring into: why there are significant differences between the estimated cost of the Muskrat Falls Project at the time of sanction and the cost by Nalcor during project execution to the time of the Inquiry, together with reliable estimates to the cost – to the conclusions of the project including whether – and it goes on and lists a number of things – including the terms of contractual arrangements between Nalcor and various contractors, the conduct and retaining and subsequently dealing with contractors and suppliers, et cetera.

Now, this is a public inquiry. To me, at this point in time, I think what might be the expectation is that everything we do with Astaldi – which is, from what I can see, is probably about a third of the cost overrun of this particular project or –

MR. RALPH: Mm-hmm.

THE COMMISSIONER: – a third relates to what work they were doing – I'd like to know how in the world we could have what I call, and what the government has asked for, a public inquiry that we're going to basically conduct, you know, quite a lot of the time in Phase 2, potentially in camera without the public having the ability to scrutinize that. That is very problematic for me.

And you know, I'm not sure whether the government has put its mind to this or whatever. But it's not just my problem as far as I'm concerned. You know, there are people who set these Terms of Reference, and I think they need

to look at – and if they're serious, and they want this done, then they have to understand that it may well be in the public eye, potentially. And I'm assuming the government has considered that.

MR. RALPH: Absolutely. Certainly, there's been a great deal of discussion, I'd suggest, regarding the difficulties that the Commission has in addressing the issues that are in the Terms of Reference.

THE COMMISSIONER: There has been or there hasn't been?

MR. RALPH: There has been.

THE COMMISSIONER: Has been. Okay.

MR. RALPH: I assume you're not asking me for a solution today. Because I didn't come –

THE COMMISSIONER: Well, I –

MR. RALPH: I didn't come today –

THE COMMISSIONER: Right.

MR. RALPH: – expecting to address the issues that we'll have in Phase 2.

THE COMMISSIONER: Well, I think somebody better start thinking about a solution sooner than later.

MR. RALPH: That's totally fair enough. But I certainly didn't come with a solution this morning, Commissioner.

THE COMMISSIONER: Right. But I think the government needs to look at –

MR. RALPH: And certainly I'll take that message back –

THE COMMISSIONER: Right.

MR. RALPH: – if it hasn't already been heard.

THE COMMISSIONER: Okay.

MR. RALPH: Okay.

THE COMMISSIONER: You had three points?

MR. RALPH: I just – the – you do have – my point is that it should be public, we have to protect the projects and, the third, you have the power under the Public Inquiries Act to address the previous two issues.

THE COMMISSIONER: Okay. Anything else you'd like to add?

MR. RALPH: Nothing else.

THE COMMISSIONER: All right. Good, thank you.

Mr. Budden?

MR. BUDDEN: Good morning, Commissioner. Geoff Budden for the Concerned Citizens Coalition.

Firstly, although my submission has been circulated with the others, it really was restricted to the water management issue and was not intended to be – to really address the issue here today. I have not –

THE COMMISSIONER: Right. But you did allude to it in the last paragraph of your letter, so I assumed you would have an interest.

MR. BUDDEN: I have no problem with it being included. I obviously submitted it.

THE COMMISSIONER: All right.

MR. BUDDEN: But I just wanted to make it clear I wasn't making a general comment about all of the issues here before you today. I haven't filed a formal submission; I haven't had time to do it. But –

THE COMMISSIONER: That's okay.

MR. BUDDEN: – I have had the opportunity to read the Consumer Advocate's submission, and I agree completely with those arguments and adopt them. I just have two points I would like to make.

The – we're all aware that there is a tremendous amount of material that this Commission has to

deal with, the number of four-plus million documents that's been circulated of dozens of interviews, and we – from the transcripts, we've all seen that some vetting has been done.

So firstly, there is the great volume of material. The second is the compressed schedule that are established by the Terms of Reference and that we all are forced to live with, hence the schedule we have. However, what is happening in practice clearly is that redactions are taking place by Commission and staff in working with Nalcor's lawyers and staff.

So I would suggest that while it may be unavoidable to some degree, it's certainly not the preferred situation where other parties, not parties with standing at this Inquiry, are – or parties that, yes, have standing at this Inquiry, but not all of the parties which have standing at this Inquiry, are making determinations as to relevancy.

THE COMMISSIONER: Can I just stop you there?

MR. BUDDEN: Yes.

THE COMMISSIONER: Because first of all, not all parties are making those determinations.

MR. BUDDEN: That's my point.

THE COMMISSIONER: So what is happening here – no, I'm disagreeing with you on this. At least this was what my understanding and instruction was. Ultimately, Commission counsel determines whether something is going to be redacted or not going to be redacted.

If Commission counsel – notwithstanding the fact that Nalcor's counsel or, alternatively, the government's counsel, because those are the two main parties that we seem to be getting a request for redactions from – are making those requests, that doesn't necessarily mean they're all being made.

MR. BUDDEN: I realize that.

THE COMMISSIONER: So – and you have to remember and I hope the public understands this, is that Commission counsel's role here is not to be adversarial but, at the same time, it's to

protect the interest of the public, just like you're protecting the interest of your clients, the Consumer Advocate is protecting –

MR. BUDDEN: Yes.

THE COMMISSIONER: – the interests of the ratepayer. Well, our Commission counsel are protecting the interest of the general public. It's a public inquiry so they have strict standards to go by with regard to this.

So the fact that things are being redacted by Commission counsel, because it's ultimately them who are deciding on the redactions. It's only now that I'm coming to the first set of redactions where there's disagreement between the parties and nobody is willing to give; the other parties aren't willing to give. That's when I have to decide whether they're going to be redacted or not.

So I have full trust in Commission counsel, and I hope the public does as well, that they are reviewing what it is that is appropriate for me to determine considering, as you said, compressed schedule, considering the volume of documents. But also, more importantly, considering the Terms of Reference and what it is that we're looking at.

And I can only assure you and the public that we're not redacting everything – or the Commission counsel is not redacting everything just because we're being told or asked to do it. It's being reviewed, and I can assure you that there are occasions, and have been occasions likely – I don't know this for certain, but I'm assuming this is happening – where there is no agreement on those redactions. But, ultimately, the decision is made by Commission counsel.

MR. BUDDEN: May I comment in on that?

THE COMMISSIONER: Sure.

MR. BUDDEN: Firstly, if I understand correctly, Mr. Simmons' submission is that, on that latter point, that everything so far there has been agreement. So that's a fairly minor point, but I think the larger point –

THE COMMISSIONER: Well, that's an even – that should be a point that's comforting to you

because what – because everything's being agreed to, doesn't necessarily mean that Nalcor has gotten – for instance, just using Nalcor as a party – has gotten their way every time.

MR. BUDDEN: I think however, with respect, that's missing the point that my client wishes to make.

THE COMMISSIONER: Okay.

MR. BUDDEN: Firstly, there's two things happening here: one is relevancy, where I would conceive the Commission counsel perhaps have a certain role of primacy. The other is this determination of what is or is not commercially sensitive. And my point here is that that is taking place –

UNIDENTIFIED MALE SPEAKER: Sorry.

MR. BUDDEN: – is that it's taking place without input from the great majority of parties with standing, any input at all. We get the redacted transcripts, we have no idea even what's being redacted, there'll simply be a gap of half a page or a line or several pages, and we're not able to challenge it, we're not able to really properly assess it.

And, again, I'm not necessarily saying that given the compressed schedule, given the volume of material, that there is a better way. However, it is a significant departure, I would suggest, from the ideal of a public inquiry.

THE COMMISSIONER: Okay, so let me just, sort of, try to talk – feed that out a little bit more.

So, while commercially sensitive is different from relevant, there is a relevance part of the commercially sensitive argument because, you know, as we are trying to get – conduct this Inquiry, my thinking here is – and I'm hoping Commission counsel are following this thinking – is that if there are areas where it is not relevant to the Terms of Reference, while it might be a very nice thing for everybody to hear about and whatever, if it's not related to the Terms of Reference, then I don't want to be in a situation where I'm using Commission time, basically dealing with things that aren't relevant. So, first of all, relevance is extremely important.

On the issue of commercial sensitivity, the same thing is happening with commercial sensitivity as is happening with relevance. If the document, notwithstanding the fact that it may have some – based upon the guidelines, might be somewhat commercially sensitive, doesn't necessarily mean that the – that Commission counsel are basically saying okay it's out. They are making a determination whether or not it's important.

The example of that is this, because there are points here that Commission counsel want with Mr. Lemay, for example.

MR. BUDDEN: Mm-hmm.

THE COMMISSIONER: That they feel are pertinent to Phase 1. They may be commercially sensitive within the meaning of those guidelines that I prepared, but at the same time, there's a feeling that they are relevant. As a result of which, the – this – we're here, talking about this this morning.

So, again, it's not just an eraser that's being used just because there's commercial sensitivity. There's also eyes on the issue of relevance. And if it's relevant, notwithstanding it's commercially sensitive, then I suspect Commission counsel will bring it – will want it in. And that's where we are now.

MR. BUDDEN: I guess I'd like to challenge that with respect in this way. What I would suggest, again with respect, you're describing an ideal. What is happening in practice, given the volume of material is my understanding – and I stand to be corrected – is the term that I heard earlier this morning was Commission counsel and staff.

My concern – and again, I'm not – you know, I'm searching for an ideal way of addressing this, and given, again, the constraints which we're operating under, there may not be one, but the reality is that I would suggest in many different standards of relevancy and of commercial sensitivity are being applied, depending on who's actually doing the reviewing.

And that is a concern to my client, that this is all taking place, not at some apex where Mr. Simmons and my friends are sitting down and

hashing this out, this is being hashed out across a broad front. And that is what causes us concern, that we are utterly excluded from that vet and we don't even know what's being vetted.

THE COMMISSIONER: Okay. So just to put your mind at ease, I'm gonna hear from Commission counsel about exactly how this is being done because it's not being done the way you just described.

So I – because I believe Commission counsel, basically, are reviewing the redactions and they are – with the assistance of associate counsel that we have there working on that, it's not done just by – it's not done by the Clerk who answers the phone. It's actually –

MR. BUDDEN: I'm not suggesting that.

THE COMMISSIONER: Right, so –

MR. BUDDEN: Please, I'm certainly not suggesting that.

THE COMMISSIONER: Okay. So maybe I could just – if we could just hear Ms. O'Brien or Mr. Learmonth.

MR. BUDDEN: Okay.

MS. O'BRIEN: So we'll both speak to it, but I can certainly assure you, Commissioner, and I can assure the general public, that Mr. Learmonth and I and our associate counsel take nothing more seriously than our duty to the public to make sure at this public inquiry, we get before you in as public a way as possible, the relevant, important evidence that you will need to decide on your Terms of Reference.

We have, despite it being a two-year window, given the volume of material and the number of topics we have to cover, that is actually – has been and continues to be a very tight time frame for us. That is why it is so important that we spend our time identifying what is relevant and not wasting time either here in the hearing room or upstairs in our offices dealing with information that is really not relevant to what you need to decide.

So, our first cut on things is we look at what information do you need, do we believe in our

best professional judgment, for you to have to do what you need to do. If it's information that is we do not consider relevant, then we don't waste any further time on it going back and forth with Government of Newfoundland and Labrador or going back with Nalcor arguing about whether it is commercially sensitive or privileged or not. There's just – we don't have that time to waste.

When it is something that we consider to be relevant, we do enter into discussions back and forth with, primarily government or Nalcor, but it can be other parties as well, and we get their position on whether or not they consider that commercially sensitive.

We do not just roll over and agree every time they say they consider something commercially sensitive. We have this looked at by, always, lawyers on our staff, and ultimately the final decision always comes up to either Mr. Learmonth or Ms. O'Brien, and that's it.

And there has been a number of occasions where we have not initially agreed and there has been a fair bit of back and forth until we get to a point that we are satisfied that you are getting what you need to get and it's coming out publicly as much as possible.

There have really been in Phase 1 just a very couple, you know, the evidence that we're talking about with Mr. Lemay here on Phase 1 really is not a significant amount of evidence. It is of relevance, for certain, that's why we're here, but it's not a huge volume of evidence, and likewise with Mr. Keating it's going to be the same way.

This is the first time we've got to this point because you have told us to work co-operatively, efficiently, but also thoroughly and also keeping the transparency as a prime goal for us. So we have been doing that.

So I just want to assure Mr. Budden, that's the way it's working. I want to give that assurance to the public and I want to give that assurance to you.

THE COMMISSIONER: Mr. Learmonth.

MR. LEARMONTH: I'd just like to add that the Commission counsel and – spend an

inordinate – a huge – amount of time deciding what is relevant and making decisions on commercial sensitivity and so on. For example, last weekend, with the cooperation of the government, which has always been forthcoming, likewise Nalcor – I mean, people were working Saturday night at 9 and 10 o'clock reviewing documents. And finally the decision is made and, in some cases, we would go back to government and say – look, we've considered all your points – we don't agree with you – this is going in – thank you very much.

So I would just like to repeat what Ms. O'Brien said and emphasize that this is a very important part of our work. We take it seriously and there's people working at night and Sunday morning at 8 o'clock and so on doing this. So if there's any suggestion – I'm not saying Mr. Budden –

UNIDENTIFIED MALE SPEAKER:
(Inaudible.)

MR. LEARMONTH: – has made this but if there's any suggestion that we just, you know, accept the dictates of government or Nalcor and just say – we'll shrug our shoulders and say well that's it. That's completely wrong. And I emphasize the amount of time we spend on this is – I wouldn't say incredible but it's very large.

So Ms. O'Brien said that we take this very seriously and I want to emphasize that and we spend a lot of time and we will continue to do that. So we have a duty to the public and we are discharging that to the best of our ability and we're not – we're working on very short time schedules but we do our best to meet them and I think we have. I'm confident that we have so far.

THE COMMISSIONER: Right. So not to be argumentative or whatever but I don't – I think it's important for you and the public to understand exactly what the process is that's undertaken. I'm not involved in it myself. As I said, I'm involved in it when it comes to this level. But, you know, I have full confidence in my legal staff.

MR. BUDDEN: That – I was just provided with information I didn't have about the process. If at the apex, Mr. Learmonth and Ms. O'Brien are making the decisions I obviously take great

comfort from that but I didn't have that information until five minutes ago.

THE COMMISSIONER: Fair enough.

MR. BUDDEN: So I'll certainly consider that. The final point I wish to make – it's really picking up a comment that you made about the Cameron Inquiry. It caused me to reflect a bit – I think, virtually, every significant public inquiry we've had in Newfoundland since at least the Hughes Commission – all the ones I'm familiar with have pretty much all unfolded against a background of civil litigation. And they all, to some degree, overlapped with civil litigation. There's civil litigation around, obviously, the Hughes Commission, around Lamer, individuals who were making claims, likewise with the Cameron, likewise even with Dunphy and some of the lesser prominent ones.

And, even a civil trial I did in 2016 I used evidence – we applied for and were able to use evidence actually from the Hughes Commission. So we – there is a real distinction between not overlapping with the criminal process – but that is not at issue here. And past commissions have not appeared to have been overly concerned about the potential impact on civil litigation. And I suggest there's no reason this one need be particularly concerned either. It's an entirely different reality and the past practice in Newfoundland at least, is commissions haven't shrunk from going where they need to go because there's civil litigation slightly offstage.

THE COMMISSIONER: Right.

Can I just ask you – now I've heard two of your clients already testify – do they – if you can answer this – do they have any thoughts with regards to the issue of potential public disclosure of information that might well mean that ultimately the taxpayer and the ratepayer pays more?

MR. BUDDEN: That's a very specific issue I'd need to discuss with them. I think that as a general point they're of the view of that, that this is a process that benefits from sunlight; that while there may be specific areas that – in a very narrow sense – perhaps in some very specific matter of litigation – that should not be brought forward, those would be very much the

exceptions and the public can only benefit from light being shone on this process.

THE COMMISSIONER: Okay.

MR. BUDDEN: Okay. That much at least I'm sure of.

THE COMMISSIONER: Right. Okay.

Thank you, Mr. Budden.

MR. BUDDEN: Thank you.

THE COMMISSIONER: Mr. Hogan, or Mr. Peddigrew. I'm not sure which one.

MR. HOGAN: Commissioner, I just – first of all, it's John Hogan speaking for the Consumer Advocate. I had had one brief conversation with Mr. Learmonth probably last week about the process, and like Mr. Budden, we didn't know who was doing the redactions, what was going on in the agreement negotiations or anything like that so I, as a member of the public and as counsel for the Consumer Advocate do have confidence in Mr. Learmonth and Ms. O'Brien's competence and ability, et cetera, et cetera, to do their job to the public. So we want to get that on the record.

I just wanna briefly touch on a few points, I guess, stress a few points that were in our written submission, just for those members of the public that may not have read it and might be listening today. And that is a point that Mr. Ralph made, that this is a public inquiry, and in your decision, you know, you do say that the presumption must be that everything is disclosed.

We think it's important to examine everything as much as possible. It's hard to do – to get the full story, and I think you said a couple of times your job here is to hear the story; and to hear the full story, obviously, all information needs to be disclosed to the extent possible.

Obviously, there have been redactions to date, and despite the fact that we take comfort in Commission counsel looking at those, we don't know, as Mr. Budden says, what's been redacted, and we don't know the basis for those redactions, either.

And despite the fact that Commission counsel is here to represent the public, you've granted standing to the Consumer Advocate and you granted standing to Mr. Budden's client, assuming – I assume that you felt that those two clients would offer a different perspective than other parties involved. So despite the fact that we do have faith in Commission counsel, potentially, our perspective, and Mr. Budden's client's perspective, may view the redactions differently. Of course, it's hard to tell you that for sure in a vacuum, but that – we're all here for different reasons and offer different perspectives into all the information that's being presented.

You said Commission this morning – and I think it's probably the most important point – is that the Consumer Advocate does recognize that the Commission counsel – or Commissioner, has decided that certain commercially sensitive documents should not be disclosed – but as you said, this needs to be balanced with the interest of the public for full, open disclosure. I think the Terms of Reference governs you here, throughout this Commission, and not necessarily reference to other litigation that may or may not be ongoing.

We do have some concern that without having – we've seen some of the redactions in un-redacted form now, and we do have concern that potentially too broad a stroke is being applied to the commercial sensitivity definition.

THE COMMISSIONER: You've seen that – what the types of redactions that's been –

MR. HOGAN: Well –

THE COMMISSIONER: – requested or –?

MR. HOGAN: – Mr. Lemay's transcript, for example; we have the un-redacted version and the redacted version, so I'm not gonna comment on what's in it, but potentially and arguably some of those – we would take the position that some of that should not be redacted.

THE COMMISSIONER: Right.

MR. HOGAN: So I – has that happened in other documents? Again, I can't comment

because we haven't seen them, so it is an issue for the public, for the Consumer – for the –

THE COMMISSIONER: You already have both the redacted and un-redacted versions?

MR. HOGAN: I do, yes.

THE COMMISSIONER: Okay.

MS. O'BRIEN: Just to address that, because we had agreed – so, the redactions in Mr. Lemay's transcript are redacted for two primary reasons: one, is that some of it relates to Phase 2 –

THE COMMISSIONER: Mm-hmm.

MS. O'BRIEN: – and it's Phase 2 evidence, and we'll be dealing with that in Phase 2. So we have – that's why we redacted it now. The agreement with Nalcor is always been that if it's a Phase 2 redaction, it's not necessarily our final word; it's just we're not dealing with it right now until we have a framework for that.

The other redactions were made because we were anticipating doing that in camera. That is why our friends have the un-redacted transcript because it wasn't that we didn't – we considered it relevant evidence. We considered it evidence that you should have in Phase 1. But there was concern about its commercial sensitivity, and we were initially looking at doing it in camera, and that's why.

So – and then of course there was objections about the in camera hearing, and that's why we're here today for you to rule on that, but just to – just so that Mr. Hogan is clear, the redactions and the un-redactions there weren't about us saying it wasn't relevant. It was about how that evidence would be presented.

THE COMMISSIONER: Right.

MR. HOGAN: So therefore, that evidence that is – the plan was to hear that in camera. I guess we're here to talk about whether that should be public or not.

THE COMMISSIONER: Right.

MR. HOGAN: But again, it gives us the flavour of what the positions are in the parties of what –

THE COMMISSIONER: Right.

MR. HOGAN: – is commercially sensitive and what is not commercially sensitive.

THE COMMISSIONER: Yeah, I think you're getting a good sense of what it is that we're – what it is Commission counsel are being asked to look at, and –

MR. HOGAN: Yes.

THE COMMISSIONER: – you're going get a better – well, now you know that there are disagreements so ...

MR. HOGAN: Right.

And the – but the disagreements are now being held in camera, whereas maybe they shouldn't be.

THE COMMISSIONER: Well, we're not sure yet.

MR. HOGAN: Right, exactly.

The last point I want to make is just about Mr. Keating's evidence or potential evidence. And I do – just hearing this morning, I guess I have some concern that it was put to Dr. Bruneau when he was here that – it was put to him by Mr. Williams, counsel for former government officials, that – he said: you know, Dr. Bruneau you wouldn't have been able to base your judgment on information that you hadn't seen or base your conclusions on information that you hadn't seen and obviously the answer was that's correct.

So if there's going to be evidence, potentially, that natural gas was examined, and this is the reason why we can't proceed with it, and Dr. Bruneau was put forward by the Commission as the individual who was, sort of, a proponent of why we should have natural gas, he's not going to get the full story then. He may agree with the information that he doesn't – that he hasn't seen, or he may be able to poke holes in it.

So he's been put in a tough spot now, and so has the ratepayer, because they're not going to have the chance to have Dr. Bruneau examine that evidence.

THE COMMISSIONER: Okay.

MR. HOGAN: Yeah.

THE COMMISSIONER: All right. Thank you very much.

All right, counsel for Emera any submissions?

MR. POWER: No, Commissioner. Patrick Power for Emera.

We're here in observational capacity this morning, and we don't have any submissions. Thank you.

THE COMMISSIONER: Thank you very much.

Mr. Burgess?

MR. BURGESS: Good morning, Commissioner. Paul Burgess on behalf of Astaldi Canada Inc.

Commissioner, the – Astaldi Canada submitted its written submission on November 13, and I don't intend to go into great detail and reiterate or just read out from the submission. But there's a couple of points that I felt important and relevant to deal with this morning.

And Astaldi Canada's submission is in relation to only that evidence that is relevant to any issues impacting and affecting Astaldi, because as was noted earlier today, and as we say in our submission, that Astaldi has limited standing in relation to Phase 2, but certain rights, as outlined in our submission, with respect to Phase 1 if and when issues come up.

Astaldi's position as well is recognizing that we, at least in our position, because of our involvement to date, are dealing with a process, rather than specific documents or specific information. So those, if you will, is the backdrop for the comments and submissions of Astaldi at this time.

First though, I want to start and just reference – at the bottom of page 2 of Astaldi's submission the statement is made, which was made on November 13, that there are no other applications or court actions related to the

arbitration before the courts of either Newfoundland and Labrador, nor Ontario, at this time. And that was a true and correct comment of November 13, but I can advise the court that the following day, on November 14, Astaldi deemed it necessary, and had to file an injunction application ex parte with the Supreme Court of Newfoundland and Labrador, to stop Nalcor's attempts to call in letters of credit.

As Mr. Simmons has indicated when he spoke earlier today, that application will be heard by the Supreme Court of Newfoundland and Labrador on Monday. So I just wanted to update, if you will, the record with respect to the status, and that, other than the arbitration, are the only issues before an arbitration tribunal or the courts that I'm aware of.

THE COMMISSIONER: Well, are there not – I thought I understood your submissions to mean that there are actually other actions ongoing in the Supreme Court that involve Astaldi?

MR. BURGESS: There are. And in a separate matter, or separate matters, and there are probably close to 30 actions that have been commenced in the Supreme Court of Newfoundland and Labrador with respect to the claims as between third parties and Astaldi and Nalcor or Muskrat Falls Corporation and other related entities are named in many of those, if not all of those.

Certainly, with respect to the lien actions, they would be parties. And the point in the submission with respect to that issue is that – and is pointed out – it is Astaldi's intention that they will third party Muskrat Falls Corporation and/or Nalcor-related companies and then would be entitled to the provisions under the Rules of the Supreme Court and all that entails with disclosure of documents and discoveries.

THE COMMISSIONER: Just before I go on, I should just go back – maybe a question I should have asked Mr. Simmons. But in the arbitration, has there – I suspect I know the answer to this – has it progressed far enough – do we know, for instance, for disclosure purposes, are they using the – are you using the Redfern schedule? What are – what is – Redfern method – what is – what method were – are you using for disclosure?

Because I think the point that's being made is that disclosure in a civil proceeding in a court might well be different than what is in an arbitration procedure. So has that gotten that far?

MR. BURGESS: To my knowledge, it has not gotten that far. I'm not directly involved in the arbitration proceedings, but I do have knowledge of them.

The panel has been constituted, so it's a three-person panel. Astaldi appointed its nominee sometime – I think it was September 27, but sometime in September. And one of the issues that was brought before the Supreme Court of Newfoundland and Labrador was forcing Nalcor to appoint its nominee. That, by court order, was done, and the two appointees have now appointed a chair.

And as recently as November 15, I understand that there was an arbitration engagement agreement entered into between the parties. I do not understand that they have proceeded to the point where they have established what the procedural aspects of the arbitration will be, which would also deal with the disclosure of documents. I certainly acknowledge that oftentimes in arbitration proceedings there is not the level of disclosure that you would find in the Supreme Court Rules, but each arbitration is dealt with on its own.

THE COMMISSIONER: Right.

So is there – because having reviewed the documents with regards to the arbitration procedure and what transpired in the Supreme Court, there seemed to be an issue about jurisdiction. So is that something that the plan is to argue first, or is that coming subsequent, or do we know?

MR. BURGESS: I would anticipate that that would come early on. There is an emergency application presently scheduled to be heard by the arbitration panel on November 27. That relates more specifically to emergency relief. And I'll phrase it as almost a standstill kind of a request, and that is a request of Astaldi seeking the arbitration tribunal to rule that Nalcor or – and I'm saying Nalcor, it's Muskrat Falls Corporation, but I'll use Nalcor for purposes of this discussion – that they are prohibited from

doing things such as moving on the letters of credit.

I understand, and certainly the court ruling was it wasn't an acknowledgement that the arbitration tribunal would necessarily retain jurisdiction, but its jurisdiction was an issue that would go before the arbitration tribunals. So that is likely a very live issue for the arbitration tribunal.

THE COMMISSIONER: Okay.

That's fine. Thank you.

MR. BURGESS: Then if I could move in, Commissioner, to a second point. And if I understand Nalcor's submission correctly as it relates to Astaldi, is they are saying that because the parties are in arbitration proceedings, then they want to protect what they call commercially sensitive information. And I would respectfully submit that what they're really talking about is a veiled attempt to expand the litigation privilege and create a new class of privilege.

What Astaldi's position is, is that there's – and certainly the submission dealt not with the solicitor-client privilege or the litigation privilege, because my understanding the issue before the Commissioner and the Commission today was on commercially sensitive.

THE COMMISSIONER: Right, because as you know, if there is a privilege – for instance, solicitor-client, a litigation privilege and litigation privilege, obviously, only applies to documents that are prepared in anticipation of or preparation of litigation – that would not be within my jurisdiction to determine whether it goes in or not; that's a section 13 application.

MR. BURGESS: Correct.

THE COMMISSIONER: So I'm not hearing and I don't believe I'm hearing that these are privileged; in fact, I thought I heard Mr. Simmons say this morning these are not privileged.

MR. BURGESS: And that's my understanding. I just wanted to be clear that when I put forward Astaldi's position, it is limited to commercially sensitive information as opposed to any

privilege, whether it be solicitor-client or a litigation privilege.

THE COMMISSIONER: Mmm.

MR. BURGESS: But really, I submit, that what the request is, is saying because we're in litigation, somehow you have to protect that. And it's Astaldi's position that that's not a position that the Commission, with all due respect, should accept.

We certainly accept that if it's commercially sensitive, because it's going to impact another project or something of that nature, that's what the commercial sensitivity relates to, but not the litigation aspects of the – any potential sensitivity.

Astaldi is – the concern on any hearing where there's – legal counsel is entitled to attend and not a client – and, again, appreciate that Astaldi has had limited – well, almost no involvement, any more than the public has, at this point in time in these hearings. If there's any suggestion that the position should be in camera or otherwise and it's legal counsel to the exclusion of clients, we would have some concern with that because we see that putting legal counsel in an untenable position where they have information that their client does not have.

So we – Astaldi would be very concerned because what we're trying to address here now – and in the submission it states – we think that any process that is adopted now is likely the process that should be adopted for Phase 2.

THE COMMISSIONER: That's not happening.

MR. BURGESS: And – well, and that's your prerogative, but if you're talking about commercially sensitive information, why would a principle apply in Phase 1 that may be different in Phase –

THE COMMISSIONER: I think –

MR. BURGESS: – 2?

THE COMMISSIONER: I think you're reading – and perhaps it's a misunderstanding by

a lot of people, but I think that you're reading more into this, what we're dealing with here.

For instance, when I look at just Astaldi's interests here, I see them as – and because one of our, you know, principles is fairness, obviously, if somebody is going to be pointing fingers at Astaldi and saying that they did something wrong, Astaldi should have the right to respond to that in a public hearing. And that's important, and Astaldi will get that right; that's exactly why they've been given standing in Phase 2.

What I'm dealing with here in Phase 1 are issues related to estimates and things of that nature. It has nothing to do with the reputation of Astaldi and in the – or at least not I can see. So, in the circumstances, there may well be reasons why just because Astaldi's name is used, it doesn't necessarily mean that Astaldi needs to get the information.

Astaldi is part of the public, but the public I'm mostly concerned about, to be quite frank, is the public in Newfoundland and Labrador, okay? And so my sense of your application and what's going right now, it's a little bit of cat and mouse. And it's not just Astaldi, it also involves Nalcor. And the cat and mouse is this: You know, how do we get disclosure? We're in an arbitration procedure, how do we get disclosure?

Well, there's ways to get it. As I said, you can look at Redfern schedules, collaborative schedules, that sort of thing to arbitrations. And all of that will take place on its own, I have no involvement in any of that. But with regards to what's happening at the Inquiry, as I say, my mindfulness with regards to Astaldi will be where fingers are being pointed or where reputation is at issue, or whatever; that's when Astaldi should be engaged. And that's for which – that's the reason they got limited standing.

So there may be things that I hear in Phase 1 – and I knew this at the time that I made my decision – that while Astaldi – or, you know, it's more of a reference to a contract because of course, before Phase 1, Astaldi wasn't even – before sanction, Astaldi wasn't even in the picture in the sense of being a contracted party. So there may well be things in Phase 1 that will not relate to Astaldi.

And just because it might be of assistance to Astaldi with regards to disclosure in another proceeding, that's not a basis upon which I'm going to grant standing or grant disclosure for. But I recognize as well that if I do it in public – which I may well do – you may well get some information on the side, as the consequence of it. Be that as it may. It may happen.

But I think your expectations, or Astaldi's expectations need to be tempered a little bit with what the mandate of this Commission is and what we're doing in Phase 1.

MR. BURGESS: Commissioner, I can assure you that it's – the submissions, in no way, are trying to get information or documentation to assist in our arbitration. And that's not the submissions that are being made here today. In fact, what one of the submissions is – we have the rules – if we really want that information, with respect to the issues as between Astaldi and Nalcor, we can use the Rules of the Supreme Court under that litigation.

THE COMMISSIONER: Right.

MR. BURGESS: So any submissions that I make here today, or at any time, is not trying to get information that –

THE COMMISSIONER: Okay, so –

MR. BURGESS: – (inaudible) otherwise know.

THE COMMISSIONER: So I assume, then, Astaldi's concerns relates to having an opportunity to respond to issues that may well impact the reputation or position of Astaldi in their cases.

MR. BURGESS: Absolutely.

THE COMMISSIONER: (Inaudible.)

MR. BURGESS: So the relevance, if I could just address that. 'Cause Commissioner, you raised the issue of estimates, or things of that nature, and the relevancy or not. And while my submission was related to a process rather than specific information, let's use that as an example to see process. It's Astaldi's position, again, not knowing what the information is that's trying to be protected. So again, we're relying on a

process – that we have no problem with the process. No issues.

But if it's issues in relation to estimates and scheduling of projected costs, we fully anticipated that in Phase 2, the evidence and the issues before this Commission will relate to, and a position with Astaldi will be: We made certain assumptions and we placed a contract, a bid in place and went forward on the understanding of productivity rates and estimates and things of that nature. And that if Nalcor knew and had information that would say: You shouldn't have relied on that. Or if you said that to us we didn't tell you different. Astaldi would say: You had an obligation – as part of its argument – that you ought to have informed us of that. So that's the relevancy.

THE COMMISSIONER: But wait now. This is – I'm not deciding that issue. I'm not deciding whether Nalcor had information that they should've disclosed or if there's some duty of good faith or whatever. That's all matters separate and apart from what I'm dealing with here at this Inquiry.

MR. BURGESS: But isn't part of your Phase 2 gonna be: Why was Astaldi's bid what it was, and why did it go over that cost?

THE COMMISSIONER: Well, I can't say exactly what it's going to be because I haven't really thought about it.

But what I do think is going to happen is – is that there was a cost that was equated to this project, 6.2 billion, without financing; how did it go to 12.7? Part of that might be a question of what Nalcor and Astaldi did, and that's what I intend to inquire into. I'm not inquiring into whether or not somebody should've given somebody else notice or whatever. That's not what I'm going to do. I'm basically just trying to determine: How did it go from 6.2 to whatever it is at this point in time? So –

MR. BURGESS: But with all due respect, would you not anticipate that productivity rates may be an issue that the Commission will look at?

THE COMMISSIONER: Perhaps, we'll see. I have no idea.

MR. BURGESS: So then what Astaldi's position is, to the extent that productivity rates may relate – may come out in Phase 1, there's an overlap, and the concern is that at this point in time without in camera – we're not concerned about redacting or anything like that –

THE COMMISSIONER: Oh, wait now. We're not going to be dealing with productivity rates as they were. I'm not dealing with how it happened.

Right now all I'm doing in Phase 1 is trying to determine whether or not all the options that should've been considered by Nalcor, with regards to the provision of electricity, the future electricity needs of the province, were followed through and whether or not this was the least-cost option. That has nothing to do – we're not getting into the weeds with regards to the level that you're talking about. That's – there is gonna be things in Phase 2. And as I said, in Phase 2, when there's something that relates to Astaldi that relates to its reputation or whatever it will obviously be involved.

MR. BURGESS: Right. So it's not the disclosure aspect, it's the in camera aspect that is of more of a concern to Astaldi; that if there's anything that's –

THE COMMISSIONER: Oh, wait now. I'm not dealing with Phase 2 right now.

MR. BURGESS: No –

THE COMMISSIONER: I'm not deciding how we're handling Phase 2 right now. I'm only trying to deal with Phase 1.

MR. BURGESS: Right. But as part of that you're gonna deal with commercially sensitive information of which we don't know – Astaldi has no idea what that commercially sensitive –

THE COMMISSIONER: If I thought –

MR. BURGESS: – information is.

THE COMMISSIONER: – if Commission counsel feels it's commercially sensitive information that could impact the reputation of Astaldi, I suspect that they will basically

(inaudible) – they will contact you. They have direction. So –

MR. BURGESS: And that's all we're asking for.

THE COMMISSIONER: Well –

MR. BURGESS: We're asking for no more than that.

THE COMMISSIONER: Okay.

MR. BURGESS: Yeah. I just – you had raised an issue at one point that it may be an opportunity for Astaldi to reach out and get documents, and I'm saying, no, what – all we're saying is, if it's anything that may be an overlap into – an anticipated overlap into Phase 2, that Astaldi be made aware of what that information is that's being accepted by the Commission for consideration. That's what our submission is limited to.

THE COMMISSIONER: Okay.

MR. BURGESS: Okay.

So again, the Commission – and I did read all of the cases that were circulated, it is – I respectfully submit – a very rare exception that when that evidence will be excluded or not divulged publicly; as you've indicated so many times, this is a public Inquiry.

What Astaldi is doing and has done – is co-operating, it sought standing for this – before this Commission and its – wants to help this Commission to have an open and transparent process, so that not only the Commission but, as you said, the people of Newfoundland and Labrador, who are the public, have confidence. And that's the limit of what Astaldi is looking for in this process.

THE COMMISSIONER: All right.

Thank you, Mr. Burgess, I appreciate that.

MR. BURGESS: Thank you.

THE COMMISSIONER: All right.

Let's take a few minutes now. I would like the parties to review the – you can be seated there, thanks.

I'd like the parties to have a look at the transcript of the pages that I've referred to, because I'd like to deal with that specifically without actually saying what's on the page in – on the record, obviously. But I wanted – I want comments with regards to – particularly to the five pages that I've referred to that are in issue. And then I'll make a decision with regards to that.

On Mr. Keating – I'm gonna make a suggestion on Mr. Keating. But I think I'll do that after the break. I need to think it out a little bit more.

So we'll take a break here now and come back in about 10 minutes.

CLERK: All rise.

Recess

CLERK: Please be seated.

THE COMMISSIONER: I have an apology to make to Mr. Coffey.

MR. COFFEY: No, no, no, Commissioner (inaudible).

THE COMMISSIONER: I didn't see you there

MR. COFFEY: (Inaudible.) No, I would have spoken up. I'm just (inaudible).

THE COMMISSIONER: Okay, I'm sorry, I just didn't see you there. I don't know how I missed you. You're too small behind that screen.

Did you wish to make any other submissions?

MR. COFFEY: No, Sir. Thank you very much.

THE COMMISSIONER: Okay. My – again, my sincere apologies for that. I just saw you as I was walking in. I said, oh, my gosh.

All right. Mr. Simmons, have you had an opportunity now to review the transcript and – as I understand it, the other parties now have a copy of that. So I'll hear your submissions on

any redactions or comments with regards to whether it needs to be in camera or public.

MR. SIMMONS: We're doing it on the fly and I'm not all the way through the page numbers that –

THE COMMISSIONER: Okay.

MR. SIMMONS: – you gave me. And I'm just – as a little bit of background –

THE COMMISSIONER: Do you need more time?

MR. SIMMONS: Probably a few minutes would help, but maybe I'll give it a try after adjusting a couple of things now.

THE COMMISSIONER: Okay.

MR. SIMMONS: We had a good description this morning of what the process has been for dealing with redactions from transcripts and with this particular one, these passages are ones where we had not had the back and forth with Commission counsel to the extent of seeing how far it could be collapsed down based on other information that we may have known.

And the challenge with this all the way through has been that there's been such an immense volume of documentation that we don't always catch when things are already included somewhere else and have been released. Sometimes they've been released 'cause they get on the record 'cause we haven't caught them and they get out there and when that happens we realize that, well, you know, we have to be consistent with that moving forward.

So, in this case, there is a bit of that going on here. There is a narrow point with these that we'd like to maintain some confidentiality over and, I think, we can work through and redact that down. I'm not quite through all the pages yet.

THE COMMISSIONER: Okay.

MR. SIMMONS: And what I'm going to suggest is that I finish that, provide it to Commission counsel, see if we can come to some consensus on what's appropriate and then

determine what consultation we've got to make with other counsel in order to make a suggestion as to how to deal with it.

THE COMMISSIONER: The only problem with that is that we still don't have it finalized today and we're getting close to the end of Phase 1, so we have to figure out –

MR. SIMMONS: No, I'm suggesting we do that now.

THE COMMISSIONER: Oh, we do that now.

MR. SIMMONS: Mmm.

THE COMMISSIONER: Okay. Well, yes, is everybody okay with that? And I think you guys now have – my understanding is all counsel – full standing counsel – have a copy of both versions so your comments should be also made known to Commission counsel.

MR. HOGAN: Commissioner, I mean, as the process is going to be to work through the redactions and possibly not have an in camera hearing. Is that the goal?

THE COMMISSIONER: That's the plan.

MR. SIMMONS: Well –

THE COMMISSIONER: I'd like to think.

MR. SIMMONS: – there – well, we are – there is an aspect of it that our position will be, should be in camera –

THE COMMISSIONER: Okay.

MR. SIMMONS: – to the extent that there is one piece in here that our position is should not be disclosed publicly, considering that Astaldi is part of the public.

THE COMMISSIONER: Okay.

MR. SIMMONS: One narrow piece of information.

THE COMMISSIONER: All right.

Should we figure out what that is and then let you look at this and then I can hear submissions

on that, because if it only comes down to one thing –

MR. SIMMONS: Mmm.

THE COMMISSIONER: – then I can basically proceed to review it afterwards, but I think I should give everybody the opportunity to have a bit of back and forth on this a little bit?

MR. HOGAN: Yeah, I guess we're saying we have faith that the continued – this is the way it's been ongoing since day one, if you guys can come to an agreement, then so be it. If there's one –

THE COMMISSIONER: Right, but –

MR. HOGAN: – piece of information –

THE COMMISSIONER: But in this –

MR. HOGAN: – (inaudible).

THE COMMISSIONER: – particular case, you also are going to have a role –

MR. HOGAN: Okay.

THE COMMISSIONER: – with regards to that because you have the transcript.

MR. HOGAN: Yes.

THE COMMISSIONER: Right?

MR. HOGAN: Okay.

THE COMMISSIONER: So we invite your comments, and you can do that through Commission counsel now.

MR. SIMMONS: Commissioner, I can identify the issue, which might be helpful to my friends.

Mr. Lemay has already given evidence that he – that SNC had included a \$300 million contingency in the estimating work that they did. In his –

MS. O'BRIEN: I believe that was an allowance.

MR. SIMMONS: Allowance? An allowance, okay – \$300 million figure.

In his interview, he further broke it down into some narrower categories. It is the number of dollars that are allocated in that breakdown that we want to have – if that's going to be disclosed here, it should be done in camera. That's – the point is that narrow right now.

THE COMMISSIONER: All right.

Well, let's let you have some discussions with Commission counsel and other counsel and then we'll try to work this out. I'll wait in the wings until I'm needed.

So we'll just adjourn for a few minutes then.

MR. SIMMONS: Thank you.

CLERK: All rise.

Recess

CLERK: All rise.

Please be seated.

THE COMMISSIONER: Okay.

Now my understanding is, is that we have made some progress with regards to those areas of the transcript that will eventually be, potentially public, but that there are basically two areas; one area but covering a couple of different parts of the transcript that need to be reviewed.

I've been advised of what it is that – Mr. Simmons, you have pointed out you feel is commercially sensitive and I believe all other counsel have the same information. Yes?

So the real issue now is – but as I understand it, there's no, yet, agreement, and my understanding is that Commission counsel basically are at a stage where they believe it's a decision that I should make and I agree with that.

So I'm prepared to hear arguments with regards to that. Did you have something else?

MS. O'BRIEN: Just one important clarifying point, that Mr. Paul Burgess who's here for Astaldi is not aware of the highlighted information but the other counsel are.

THE COMMISSIONER: Right, I'm aware of that.

Okay, so, Mr. Simmons, did you want to address this first?

MR. SIMMONS: Thank you, Commissioner, yes. And just a moment to speak of some of the background again.

This is an example where there had been redactions initially identified in Mr. Lemay's transcript, where we hadn't had the extent of back and forth with Commission counsel about the detail of it that we're doing here today. So I expect, had we engaged in that, the initially requested redactions would have been narrowed down considerably.

And another piece of information; as I mentioned earlier, there's so much documentation that there are times we don't catch when pieces of information have already found their way out into the public record or been disclosed. There is an example of that here. So a number of the pages you'd – been identify, the discussion there is already contained in some email messages that are contained in another document, so we're removing any request for redaction of that portion and those documents.

So what it's down to is Mr. Lemay did give evidence of a \$300 million allowance that had been included in the estimate that had been prepared by SNC. And in the transcript and in his interview, he had given some breakdown of the values within that 300 million that he – had been allocated to two particular areas. And one of those areas relates to concrete production, which is very relevant to the matters at stake in the Astaldi matter. And we believe that that breakdown is not something that's otherwise on the public record or known at this point. We don't believe that it is – that detail is something that has any high degree of relevance in Phase 1 of the Inquiry.

We have no objection to the information being disclosed in Phase 1, but our request simply is that it be done in camera so that that sort of information, if it becomes relevant in the dispute with Astaldi and the arbitration or other legal matters, would get dealt with according to whatever the applicable rules of procedure are

there. And we don't see that Astaldi has an interest in play in Phase 1, which can be affected by whether or not the particular breakdown of that number is disclosed at this point.

So that's –

THE COMMISSIONER: Okay.

MR. SIMMONS: – it's a balancing of interests.

THE COMMISSIONER: So, I may be missing something here, and I just want to make sure I understand it. But I'm not aware from what Mr. Lemay said that he's actually broken the numbers down into concrete production per se. It's – I think it – I would've read this as being more general in terms of the allowance that he would have allowed for a couple of various things that are referred to, which are basically, I think, labour productivity and geotechnical pieces.

So maybe your – maybe I missed something here, but I went through – I read the transcript last evening and I thought that with regards to this he was speaking more in general terms with regards to the general contingency that was allowed for. He did not break down it into specific things. He said that – he did in the sense of labour productivity and geotechnical things of that nature. But he didn't break it down further from – at least, from what I can see here.

MR. SIMMONS: The concern is reading it in the context of the whole discussion, that there is discussion about the – elsewhere in the transcript about what sort of productivity is being talked about. So that is – the concern is tying these things together at this stage and it's, I would suggest, Commissioner, it's going to come down to how significant and important a point this is for the work of the Commission in Phase 1 versus the potential impact which is very, very difficult for anyone to judge at this point what the impact's going to be on the very large claim that Astaldi had brought here.

So this is a precautionary approach that we want to take with regard to this at this point.

THE COMMISSIONER: Okay. Thank you, Mr. Simmons.

Mr. Ralph?

MR. RALPH: The province has no submissions on this issue.

THE COMMISSIONER: Mr. Budden?

MR. BUDDEN: Just very briefly, I am not making submissions myself but I have read and endorsed – or I've spoken to and endorsed the comments Mr. Peddigrew is about to make.

THE COMMISSIONER: All right. Mr. Peddigrew?

MR. PEDDIGREW: Thank you, Commissioner.

And I'll be brief as well, I mean, I guess our point is that, you know, the global figure is out there. The discussion about labour productivity and the geotechnical information forms part of the base estimate, the cost estimate which of course forms part of the CPW which we would submit is very relevant. And while the breakdown of that figure certainly is relevant and it goes into the ultimate decision that was used to compare the two options.

So we don't see how that's not relevant at this stage of the Inquiry. And, you know, to the extent of dealing with it in an in camera session, we think this is something that the public should hear. The onus being on Nalcor, being on Mr. Simmons to establish why these details should not be heard in public. And we don't feel that burden or that onus has been met in this case.

To us, the breakdown is relevant. It goes into how those figures were ultimately arrived at.

THE COMMISSIONER: All right. Thank you.

MR. PEDDIGREW: Thank you.

THE COMMISSIONER: Mr. Coffey?

MR. COFFEY: No questions – no comments.

THE COMMISSIONER: Emera?

MR. O'KEEFE: No questions, Commissioner. Thank you.

THE COMMISSIONER: Okay.

All right. So I guess to give my decision on this is that I go back to the comments I referred to earlier with regard to this being a public inquiry. It would be unusual, although not necessarily impossible, to have an in camera hearing. To be quite frank, for efficiency reasons, I don't see this as being necessary for an in camera hearing, just looking at efficiency reasons alone.

I've read this transcript, and from my point of view, what is being referred to at pages 26 and 27, as well as at page 38, which are the areas that have been identified, are general in scope and do not break down specifically into, you know, various contracts or whatever. And I'm not saying here, in saying that, that necessarily would mean that it should be private, either.

In the circumstances, to be quite frank, I don't see how this information is in any way information that should not be made available to the public. And in the circumstances, that information will be information that basically can come before the public Inquiry in its public hearings.

I've listened to what Nalcor has had to say, and I – carefully – and I just don't believe in the circumstances weighing the relevance of this, and – because I do think it is relevant to the issue of risk and how it was managed or how it was assessed. I think in the circumstances it needs to be out there, and therefore, I'm not prepared to have that in a private hearing, in the circumstances, and I'm not prepared to find that it is not relevant either, so it's available for the public hearing.

Now, whether or not Mr. Lemay is recalled now or recalled in Phase 2, or, alternatively, this information comes out through other witnesses, that will be left to Commission counsel to review. Obviously it's available now to counsel to cross-examine on, all the counsel with full standing, and in the circumstances, I see nothing here that in any way engages Astaldi, and therefore, the transcript will continue to be maintained only by counsel with standing with the undertakings and, of course, with the understandings that they already have with the Commission with regards to confidentiality – if

there are any applicable confidentiality provisions.

I want to deal now with the issue of Mr. Keating. I consider Mr. Keating to be a bit of a work in progress. Now, he is testifying next week, and there's a fair bit of work that needs to be done here.

From my point of view – again, I've read his transcript. So the first thing I'm gonna say with regards to Mr. Keating's transcript – and I know this is a transcript that all counsel don't have – is that it is more far-ranging than the point of Mr. Keating's testimony. There are things that Mr. Keating is asked about that go beyond the issue of telling the story as to how the option of natural gas and/or LNG was considered and the reasons why, in the circumstances, it was not considered to be a viable option by government and/or by Nalcor.

So there is much in that transcript that I think Commission counsel needs to look at in their normal process of vetting the documents for public disclosure that needs to be considered, but I would make the comment first of all that really the thing that is relevant relates to what was done by Nalcor and/or GNL – Government of Newfoundland and Labrador – with regards to the natural gas option and LNG and then why they basically – declined to go with that option.

I obviously – for Mr. Keating, I believe that it – we can basically avoid an in camera hearing. Not saying I've made that determination fully, because I want to give the parties an opportunity now to sort of do what they did this morning with regards to Mr. Lemay's transcript – to try to see if we can whittle that down to what is relevant and then if there are – if there's a disagreement, well then I'll deal with it at that particular point in time.

I will say that, in the circumstances – out of fairness – and I say this now looking at it from my point of view. Out of fairness, not only to public, to get the full story on natural gas, because they got part of the story from Mr. Bruneau. In fairness, I think the public should have the story on natural gas that is on the other side, so to speak, from Nalcor and the Government of Newfoundland and Labrador. So not only is it in the interest of the Government of

Newfoundland and Labrador and Nalcor, in my view, that that part of the story be told, but I think it's also advantageous to the public so that they can fully assess what has been done.

So I would like to have as much of that done as possible in the public eye, and from my perspective, I think it can be done in a way that so-called commercially sensitive information, particularly as described by Mr. Simmons this morning, is – can be avoided.

I see no reason, for instance, that the names of oil companies, for instance, if it's oil companies that have provided some of the information, why that cannot be disclosed, particularly where are confidentiality agreements or relationships that are basically – you know, that could be brought into question. And obviously, information that is related to things that are not directly concerning the decision made and a consideration given to natural gas and LNG could be excluded.

So I think that what can be made public here is the story of what Nalcor and/or the Government of Newfoundland and Labrador did on the – with regards to their consideration of the option of natural gas and/or LNG and, as well, why they decided that they would not see this as a viable option. I don't see any of that being specifically commercially sensitive.

There are – we have to remember, this is a bit historical, and I make this note as well. In reading Mr. Keating's transcript, there's – he's asked questions that I think require more up-to-date information. What I want this restricted to is what was in the minds of Nalcor, GNL and in – with regards to the parties that were investigating natural gas at that particular point in time. I don't want it to be based upon what the prices of natural gas are now or whatever the scenario is. That's not what I'm interested in, and I don't see that as being relevant.

So I think that this is a story that can be told without the need – being the need for an in camera hearing. I think that there are going to need to be some obvious redactions to Mr. Keating's interview transcript, in that regard. And I have reviewed two other documents that have been provided to me. One is a document that was prepared, as I understand it, by Mr. Keating, notwithstanding it's a draft, it was

prepared, I think there was a lot in that document that should be able to be disclosed, as well as the summary document.

But there are things that are there that relate to the names of oil companies that are – and other things that are commercially sensitive with regards to the oil and gas business that is not the business of this inquiry, that can be redacted, and I – because I don't think it goes to the mandate of – or the Terms of Reference of this Inquiry.

So as I said earlier, I have full trust in Commission counsel to review this. If it's relevant, and notwithstanding the fact that it's commercially sensitive, then I expect we will be back if there's no agreement. If it's not relevant to what I've just described, then, in the circumstances, I don't think I need to see it or hear about it.

So I'm hopeful that with – and I know it puts everybody under a bit of pressure 'cause we have witnesses this week, but we need to get this taken care of before next Friday, and then if there's an issue on Friday that requires – you know, there is a point that might require a – because there's no agreement, or – you know, on it – or Commission counsel can't get their way, then, in the circumstances, I'll hear that at that stage, and I'll decide whether there's gonna be some in private, in the in camera, or, alternatively, outside. But I – to be quite frank, I don't think that I – that there's much there that needs to be in camera, from – based upon what I've read. So that's my view of that at this stage.

Now, having said all that, I want to say to the parties that we've had a good discussion this morning about commercial sensitivity, about in camera, the public nature of inquiries, things of that nature.

I've asked Mr. Ralph to go back to government and to basically look at this because much of it is in their hands, with regards to Phase 2, but I can clearly say it's not my intention to conduct Phase 2 in camera. That is not in the public interest, and nor do I think it's necessary.

But there may be – that's not to say there won't be parts of it that may well be, because there are some other areas, aside from Astaldi, that may

well be potentially commercially sensitive that I may want to deal with in an in camera hearing.

But for the most part I think some messages have been given this morning, and I think people need to take that away and consider where we – how we're going to deal with Phase 2, because I don't wanna be sitting on February 18 trying to figure out how we're dealing with Phase 2. This is gonna be dealt with far ahead of that, because on February 18, as you know with my allegiance to a schedule, we're gonna keep to that schedule. So if there's things to be dealt with, we need to deal with it before February 18.

All right, thank you for the – for your morning this morning, and hopefully now we can get this moved on at least with regards to Phase 1.

CLERK: All rise.

This Commission of Inquiry is concluded for the day.