



COMMISSION OF INQUIRY RESPECTING THE MUSKRAT FALLS PROJECT

Transcript | Phase 1

Volume 18

Commissioner: Honourable Justice Richard LeBlanc

Tuesday

16 October 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.

All right, Ms. O'Brien.

MS. O'BRIEN: Thank you, Commissioner.

I'll just remind the witnesses that you all
continue to be under oath or affirmation.

I'm gonna move now to your resignations from
the board of directors, and Mr. Styles I'm gonna
start with you.

If we could please have Exhibit P-00404 brought
up, which will be tab 27 of the binder in front of
you, and it will appear on your screen, Mr.
Styles, it's not a long exhibit. So it's a letter
from you to Minister Derrick Dalley,
Department of Natural Resources, and the date
of the letter is February 21, 2014, and this is
your letter where you resign your position as
chair.

I know you touched on this yesterday, Mr.
Styles, but if you could just – a little more
thoroughly, just explain why you resigned from
the board.

MR. STYLES: As I indicated yesterday, when
you're running your own business I found that
the commitments – I may have underestimated
the level of commitment that the position
demanded, and I felt that it was starting to affect
my other business – my personal business
interests.

MS. O'BRIEN: Okay.

Now I understand this is – this was just after the
DarkNL period. So DarkNL happened in
January 2014 and I understand that you actually
might've been thinking of leaving the board
earlier but –

MR. STYLES: Yes.

MS. O'BRIEN: – had ultimately delayed the
decision. So if you could just explain that,
please.

MR. STYLES: Yes, I had kind of come to my
own conclusions about leaving late in 2013 and
had thought that early in the new year would be
the appropriate time to do – but I deferred doing
that when we're in the midst of DarkNL 'cause I
just thought it would be sending the wrong
message.

MS. O'BRIEN: So there was no link between
DarkNL and your decision –

MR. STYLES: None whatsoever.

MS. O'BRIEN: – to resign? Okay.

Okay, thank you.

The – next I'm gonna turn to the other three
members of the board because they resigned,
essentially, collectively. And there is one
document here that may be of assistance, P-
00408, please, and this is tab 32 of the book
before you.

And this is an email from Ken Marshall to the
Premier, Dwight Ball, and also Minister Siobhan
Coady, copied to Ed Martin and to Tom Clift,
Gerry Shortall – who are both here – and Leo
Abbass.

So, Mr. Marshall, I'll start with you. The email
is here for your reference. But can you explain –
please, for the Commissioner – the events that
led up to your decision to resign? And we know
at the same time the entire board of directors
resigned.

MR. K. MARSHALL: It was a very difficult
and tumultuous period, of course, through the –
through this proceedings and leading up to this.
This was a somewhat regularly scheduled board
meeting – or not a regularly scheduled, but a
scheduled board meeting for the purpose of
dealing with the performance program for
employees that had been – the discussion had
been deferred for quite some period of time. And
coming out of, I guess, the changes in
administration, I had met with the Premier and
the minister on a number of times just, you
know, bringing them up to speed on the file,

because a lot of information was out in the public and a lot of information was going to and fro, and I wanted to ensure that the project continued to move forward.

When – so this meeting, ostensibly, was scheduled after having – I had had a meeting with the Premier the previous Friday to this, on a number of issues. So this was Wednesday the 20th, and the previous Friday, I guess, would've been the 15th. I had had a meeting with the Premier that previous Friday because I wanted to talk about a number of things. Notably the – at that – when the meeting – when that meeting was scheduled, to talk about the Ernst & Young report; however, the Budget Speech of the Thursday, I guess it was – I can't remember days exactly – kind of knocked that off the priority list of things that I wanted to talk to the Premier about by the time the meeting actually arrived.

MS. O'BRIEN: So this was a Budget Speech that had been delivered by then minister of Finance, Cathy Bennett. Is that right?

MR. K. MARSHALL: Correct.

MS. O'BRIEN: Okay.

And so what was the concern with the Budget Speech?

MR. K. MARSHALL: Well, essentially the Budget Speech was a – I'm not sure of the word to use, but it was extremely critical of the project, extremely critical of the organization and it essentially was constructively dismissing the CEO and negating the good, hard work of 1,400 people around the province to keep the lights on, to get the project over the finish line. It sent shock waves throughout the organization and through the board, through everybody associated with it.

And I was quite shocked, particularly given that – and I had some dealings with the Minister of Finance for that piece because we had been – in unprecedented fashion the CEO and I were called in to some Treasury Board meetings over the previous two months and we – and in my 12 years on the board I had never been to a Treasury Board meeting so – but clearly we took that as a sign that the new administration just

wanted to get up to speed on the project and we went in there open and willing to provide whatever information was necessary to continue to run the organization and to get the project through.

MS. O'BRIEN: But at this time, to be fair –

MR. K. MARSHALL: At –

MS. O'BRIEN: – costs had gone up significantly.

MR. K. MARSHALL: At this time costs had gone up.

MS. O'BRIEN: – over what had been anticipated and the province did have the contingent –

MR. K. MARSHALL: Correct.

MS. O'BRIEN: –equity piece. Yes. Okay.

MR. K. MARSHALL: So, when the budget speech came into play, we were all quite blindsided, to say the least, because it was rather vicious in its condemnation of the organization and the project, particularly from an ex-board member, an ex chair who had formerly established an outside business group after she left the board, to rally behind the Muskrat Project and had letters to the board indicating how proud she was of the project.

I realize opinions can change and costs had changed. However, this was, effectively, a constructive dismissal of the CEO, and my comment to the premier, when we finally got to this meeting, –

MS. O'BRIEN: So, just in there – you are, and some might say, expressing a legal opinion, in that you're saying constructive dismissal, so –

MR. K. MARSHALL: I'm not a lawyer but it was –

MS. O'BRIEN: – yeah. So, exactly. I understand.

MR. K. MARSHALL: Yeah.

MS. O'BRIEN: Okay.

MR. K. MARSHALL: But the issue when I got to this premier's meeting – originally it was to talk about the performance program for 40 or 50 people in the organization. I can't remember the exact number with respect to that quote, unquote short-term incentive program that we talked about yesterday. And when we went through the year, everybody was tracking according to the objectives, and there was a lot of things that were actually right and there were some things that were very wrong with respect to the cost (inaudible) on the Muskrat Falls Project.

But, you know, that did not mean that everything in the organization had been thrown out as a result of a short-term incentive program which had been established for, well, our 12 years on the board and at least 10 years prior to that. So, the premier and the minister felt strongly that – first year and we don't really want to see this being paid and I indicated that – sorry but we've got – the board has a fiduciary duty to the corporation and to the employees.

It has a fiduciary duty to the shareholder as well but overarching, you know, to the organization is what we're here for and these – this short-term incentive program has been established for quite some period of time and we can't just turn it to zero just because. We can, if you give us a Cabinet directive to do so, but we have to follow the properly established board procedure, and do our review of the amounts and adjust accordingly, and then if you wish it to be zero, then it can be zero. But we can't arbitrarily make it zero.

So we will do as the board feels that we have to do – and I had consulted outside governance experts at Stikeman Elliott on this position as well, so I wasn't going in just on our musings.

MS. O'BRIEN: Okay, so this was the second point that you're raising in the email here on the short-term incentive program.

MR. K. MARSHALL: Correct.

MS. O'BRIEN: Okay.

MR. K. MARSHALL: In any event, the issue – you know, while we were talking about many hundreds of millions of dollars here, and we were trying to ensure that we had Astaldi

moving in the right direction in the face of a sea of difficulty, we were essentially stuck now for three months on the issue of \$1.2 million for the organization which was for the entire organization.

And I understand it was a matter that it wouldn't go over with the public, it wouldn't go over with the media in the face of Muskrat Falls, however there was still a lot of things that had been done coming – going through the organization, through Hydro, through CF(L)Co, through Muskrat Falls – outside of the cost side – through Bull Arm, through all of the various entities and associations which we reviewed yesterday.

So we went ahead and proceeded on with this board meeting that was scheduled for the Wednesday. In any event that meeting – and I believe I've referred previously to an email that I sent to my fellow board members coming out of that meeting which I know is not in evidence but hopefully we can –

MS. O'BRIEN: I can advise you, we've located the email now and we will be working to have it entered as an exhibit.

MR. K. MARSHALL: Okay, thank you.

So coming out of that meeting, you know where I indicated: look, I can't even talk about the regularly scheduled event that we wanted to speak on – which was the Ernst and Young report that had largely fallen to a distant place on the priority list – the priority now was the Finance speech, the minister of Finance speech, and its impact on the organization and on the CEO, if the CEO was to negotiate with Astaldi.

It's very difficult to have the CEO negotiate with Astaldi to try to resolve a matter on behalf of the organization when the shareholder was publicly being very critical. It just basically cut the legs out from underneath the CEO, and I expressed that opinion to the Premier.

So following that meeting I wrote my position to the board in terms of some capping – capping the essence of the meeting that I had with premier and in – on the short-term incentive program, I indicated look, we will be proceeding with a meeting to talk about this short-term

incentive program. It's scheduled for Wednesday.

This was Friday and then events proceeded. The media and the public issue continued. There were conversations – I was not in those discussions; the CEO was on vacation at the time, and he contacted me – I believe it was Sunday – and said he was flying back in order to meet with the premier Saturday. He (inaudible) to say he was going to meet with the premier on Sunday.

They met, and he called me that night and said: we're going to take 48 hours to determine next course of action and then on Tuesday evening and it's – everybody sensed – all board members sensed – Leo Abbass was in Happy Valley-Goose Bay; Gerry Shortall was in Toronto, I believe, at the time – but everybody sensed that this had such as cloud of frenzy, that they sensed that they should be there in person. And even though the meeting was ostensibly scheduled to call for approval of the short-term incentive program of \$1.2 million, everybody knew that this was going to be something much bigger than that.

The CEO had interrupted his vacation, as I said, to come back to – to be able to negotiate and – again, I was not in the meeting so I can't comment as to what was discussed between the parties. Suffice to say that on Tuesday night, at around 11 o'clock I was contacted and told by the CEO that: I'm out.

MS. O'BRIEN: And the circumstances around Mr. Martin's departure from Nalcor was investigated by the Auditor General –

MR. K. MARSHALL: Correct.

MS. O'BRIEN: – is that right?

MR. K. MARSHALL: Yes.

MS. O'BRIEN: Yes and we will be filing that report and it's not an area that the Commissioner is going to be making new findings on so –

MR. K. MARSHALL: Yeah –

MS. O'BRIEN: – all right.

MR. K. MARSHALL: – I understand.

MS. O'BRIEN: Okay.

MR. K. MARSHALL: So coming into the – so that day – that morning actually, at 7 o'clock, I contacted, again, Stikeman Elliott from a governance perspective, and said the board has a very difficult situation to deal with. We've got discussions between the CEO and the premier which resulted in, the CEO will no longer be with the organization. The board is not in support of that position, the board advocated that we wanted to get this project finished.

We felt that the CEO – he had had the backing of the board up to that period of time and that – but clearly, you know, it became untenable to continue; but the board and everybody made – I think, the essence that I say here, the board will be discussing an en masse resignation in light of these matters. It should be noted that it wasn't a group decision, it wasn't – it was everybody individually to make their own decision as to what we do from this point forward, but it was very clear that the shareholder had reached in directly and decided on the continuation – or discontinuation – of the CEO's employment and the government didn't have the proper faith and confidence in the board and certainly didn't have proper faith and confidence in the board's choice and position in the CEO.

So individually we all submitted our resignations on that day to take effect on Friday, April 22.

MS. O'BRIEN: Thank you, and just for completeness, can we please bring up P-00409 please? This is at tab 33 of the book.

So this is the board meeting on April 20, 2016. So you were here at this time, Mr. Marshall, as chairman – and Clerk could you bring my mouse over, thank you – as chair. Mr. Martin is present; Mr. Abbass is present, Mr. Clift and Mr. Shortall. M. Roberts, who is that?

MR. K. MARSHALL: He was the vice-president of human resources for Nalcor.

MS. O'BRIEN: Okay, what was his first name?

MR. K. MARSHALL: Pardon me?

UNIDENTIFIED MALE SPEAKER:

Michael.

MS. O'BRIEN: First –

MR. K. MARSHALL: Michael.

MS. O'BRIEN: Michael, okay thank you. And this would be John Green.

MR. K. MARSHALL: John Green was outside counsel.

MS. O'BRIEN: Okay, and then secretary Peter Hickman. So this – the minute has been filed. The part of the resignation – sorry.

Oh, sorry, I have to go down. This was – this resignation of the board.

So here is where the entire board vote to resign, effective 5 p.m., April 22.

MR. K. MARSHALL: Correct.

MS. O'BRIEN: And this was, again, passed unanimously. Okay.

Since you obviously had spent a long – lot of years with Nalcor.

MR. K. MARSHALL: Yup.

MS. O'BRIEN: Since that time and, in particular, leading up to giving your evidence today, have you had any communications with anyone about the project and where it is today, prior to coming and giving your evidence here?

MR. K. MARSHALL: I have great interest in this project. I've devoted 12 years of my life to making sure that the project was beneficial for the province, so I talk about it in social terms. I have no knowledge inside in terms of what's happening with the project since we left, in any constructive fashion. I've not reached within Nalcor to see where it sits, what's going on, what the temperature is, no.

MS. O'BRIEN: Okay.

And since – I know the Grant Thornton report came out; it's been out publicly. Have you discussed that with anyone other than your

fellow board members and your legal counsel? Have you discussed that with anybody else who would've been working on the project at the time that –

MR. K. MARSHALL: The Grant –

MS. O'BRIEN: – you were there?

MR. K. MARSHALL: – Thornton report?

MS. O'BRIEN: Yes.

MR. K. MARSHALL: No, I was not interviewed for phase 1. I was interviewed for phase 2 recently, but I've not discussed it with anybody other than my fellow board members and not even in great detail with my fellow board members, in fact.

MS. O'BRIEN: Thank you.

All right.

Mr. Clift, I'll go to you. Obviously, Mr. Marshall has just given us evidence about the resignation. You were obviously there; you resigned on that day. I don't need you to repeat the evidence, but if there's anything that – in addition that you'd like to add, or in any way your perspective differs from that offered by Mr. Marshall, can you please let us know.

MR. CLIFT: No, it doesn't.

It was clear that the shareholder, as Mr. Marshall had suggested, had reached in and had, by default, left me with the impression that they were no longer satisfied with the kinds of decisions that we were willing to support, and that was enough for me.

MS. O'BRIEN: Okay. Thank you.

And in preparing for your evidence here today, have you reached out to anyone and had discussions with anyone about what happened?

MR. CLIFT: No.

MS. O'BRIEN: Okay.

Mr. Styles, I will just ask you the final question. I know we covered your resignation. But in

prepping for your evidence today, have you spoken with anyone about who you worked with who was on the project while you were working there?

MR. STYLES: No one at all.

MS. O'BRIEN: Okay. Thank you.

And Mr. Shortall, obviously you also resigned in April of 2016. You've heard what Mr. Marshall has had to say and Mr. Clift. Is there anything in addition that you'd like to add or any way your perspective differs?

MR. SHORTALL: No.

I think Mr. Marshall gave a very good summary of the occurrences on that day. I would emphasise that as a board we were very upset with the dismissal of Mr. Martin as the CEO. He was, in our opinion, an excellent CEO throughout the period, so it just added to the frustration level that we had with the Budget Speech from Minister Bennett.

MS. O'BRIEN: Okay.

And I'll ask you the same question about – to speaking with anyone in advance of your testimony here today, because I understand you may have spoken to someone. So can you just – please.

MR. SHORTALL: I have –

MS. O'BRIEN: Yes.

MR. SHORTALL: – which I told you on – in discovery. After I read the Grant Thornton report for the second time, I had some difficulty with some of their conclusions, so I called Mr. Martin to discuss, to see whether he would validate my opinion on a certain matter, which he did, so –

MS. O'BRIEN: And what was that opinion? What was the –

MR. SHORTALL: Well, it was around the discussion of the P50 versus a higher P-factor against the Interconnected Island. They wanted a higher P-factor but not on the Isolated Island. I thought that was flawed, and we could discuss it

more if you like, but I thought that was flawed that the P – if we're going to go a higher P-factor on the Interconnected, the Isolated also needs a higher P-factor.

And they dismissed the need for a higher P-factor because basically one little sentence saying that well, they were smaller projects, so there's less risk of overages. I found that inconclusive.

MS. O'BRIEN: Is the – but was the point that was being made in the Grant Thornton report not saying that there would be different P-factors for the two options, but that a higher P-factor would more greatly affect the Interconnected because it had more in the way of capital investment?

MR. SHORTALL: Right, well, I completely disagree with that. So – which – I think that's a flawed conclusion. The Isolated Island, it has a substantial capex in it. They're smaller projects, but there are three small hydro projects; there are three substantial refurbishments of the Holyrood plant, and there's a bunch of combustion turbines.

On the combustion turbines, I'd agree the risk is much lower because they're a known factor – you buy them, set them up, and –

MS. O'BRIEN: Mm-hmm.

MR. SHORTALL: So the only risks there I would think would be supply – are they available? And price – you know, is the price increasing? And those two risks are easy to mitigate, because you supply – you order it well in advance, so it's there when you need it. And if you order it well in advance, you might also fix the price in advance, so it won't go up.

So on those, yes, the P-factor should be lower. On the others – the three small hydros, the refurbishments – we had a lot less engineering done on those then we did on the Muskrat Falls Project. And the less engineering you have, the more the risk of over – of going over budget. And the main thing on the Isolated Island Option is the fuel. It's the biggest number in that CPW. And the fuel risk, we put it in at PIRA reference.

If you wanna go higher on the P-factor, that PIRA reference would go close to PIRA high,

and PIRA high on the Isolated Island would add \$2-\$3 billion to the CPW –

MS. O'BRIEN: And –

MR. SHORTALL: And they excluded that as a consideration because – basically because combustion turbines are easy to predict. But none of the rest of the costs on the Isolated Island are easy to predict. But none of the rest of the costs on the Isolated Island are easy to predict.

MS. O'BRIEN: Okay, I'm just gonna clarify a few things there, because I understand the concern would be, for the P-factor, the confidence level on your capital cost expenditures. So that's where we've had the evidence with respect to the P-factor. So we'd be looking at the capital cost as opposed to the fuel – you know, how – the proper fuel forecast to use, so these would be different concepts.

But with respect to the capital costs, I'm just – are you saying that your understanding, confirmed by Mr. Martin, was that the capital cost expenditures on the Isolated Island were the same as or more than they were for the Interconnected Island?

MR. SHORTALL: The capex on the Isolated Island, I think it was at \$8 billion. So, yeah, it's substantial.

MS. O'BRIEN: Okay. And, obviously, that can be confirmed. And the other point too, I do believe there was evidence from Grant Thornton that the contingencies used for the Isolated Island Option were significantly higher for the capex projects than what was used for the Interconnected Island.

I'm not – I don't want to misquote Mr. Shaffer, but he said he confirmed 80 per cent of them and it was an average of some 16 per cent. I'm not sure if I have the right number there – the transcript will say – but that it was much higher than it was for the Interconnected. Were you aware of that evidence?

MR. SHORTALL: No, but I would expect that to be the case because, as I just said a few minutes ago, the engineering done on the Isolated Island is much thinner than the

engineering done on the Muskrat – on the Interconnected Island. So –

MS. O'BRIEN: So –

MR. SHORTALL: – you can expect a higher contingency in that case.

MS. O'BRIEN: So if that was the case, then, would it be that the Isolated Island had a higher P-factor than did the Interconnected?

MR. SHORTALL: Possibly.

MS. O'BRIEN: Okay. All right.

Those are my questions for you. I'll just give you each an – okay – just to let you know that the email that you raised earlier, Mr. Marshall, has been entered as exhibit P-00554.

MR. K. MARSHALL: Thank you.

MS. O'BRIEN: And this was an email – just to be clear – from you to Mr. Shortall, Mr. Abbass, Mr. Marshall, Ed Martin and Tom Clift; subject: Meeting with the premier. So that's been filed.

I'd like to give, before you go to cross-examination, I know we've covered an awful lot of evidence spanning almost a decade or so on the board, so I'm just going to give you each an opportunity to ensure that you've had a chance to give the evidence that you wanted to.

Mr. Shortall, I'll start with you. Have you had a chance to say what you felt needed to be said?

MR. SHORTALL: Yes, I have.

MS. O'BRIEN: Thank you.

Mr. Styles?

MR. STYLES: Yes. I guess the only thing I would add is that, you know, being relatively new to the board process that every decision that I partook in, I did so with the best of my ability and made decisions based on the expert evidence that we had in front of us in terms of arriving at those decisions and conducted myself with honesty and integrity.

MS. O'BRIEN: Okay, thank you.

Mr. Marshall?

MR. K. MARSHALL: No, I think we've expressed, I've expressed what my position, and, you know, I just want to say that it was a privilege and honour to serve for so long on the board. And I don't know, there's probably two Rs in terms of coming off the board: regret and relief of being off the board. But it was a lot of work and done so with the best interests of the people of the province at heart.

MS. O'BRIEN: Okay. Thank you.

Mr. Clift?

MR. CLIFT: No, nothing else to add. I would echo the comments of Mr. Marshall and Mr. Styles, in particular. Not sure if I'd do it again. But we did it to the best of our abilities and we discharged our duties as directed.

MS. O'BRIEN: Thank you.

Those are all my questions for you. Other counsel may have questions, as may the Commissioner.

THE COMMISSIONER: Okay. All right.

Province of Newfoundland and Labrador?

MR. RALPH: No questions, Commissioner.

THE COMMISSIONER: Concerned Citizens Coalition?

MR. BUDDEN: Good day, gentlemen. My name is Geoff Budden. I'm the lawyer for the Concerned Citizens Coalition, (inaudible).

I apologize. Gentlemen, my name is Geoff Budden. I'm the lawyer for the Concerned Citizens Coalition, which, as you probably know, is an organization, which the leaders of which have been critics and followers of the project since well before sanction and which has standing at this Inquiry.

I'm going to start by asking you some questions about the P50 factor that was used in the DG3 for the Muskrat Falls Project. I'll direct them to you, Mr. Styles, as chair, but if you can't answer

them, obviously, other panelists will have the opportunity to.

Were you aware, Mr. Styles, at the time of sanction, that megaprojects frequently run over budget? Was that something you were aware of?

MR. STYLES: In a general sense I can say yes.

MR. BUDDEN: Okay.

MR. STYLES: But, you know – yes, that I was aware that megaprojects did, you know, incur that level of risk and did have, you know, some history.

MR. BUDDEN: Okay. Other panelists: Does anybody have a different understanding?

UNIDENTIFIED MALE SPEAKER: No.

MR. BUDDEN: Okay.

Did you then see it as likely that the \$6.2 billion Muskrat Falls Project estimate at DG3 would be exceeded? Mr. Styles?

MR. STYLES: I wouldn't have been surprised by the fact that it would be.

MR. BUDDEN: You would have been or would not have been?

MR. STYLES: I would not have been. The fact that there – it would – that there would be some things that would add additional expense to the project.

MR. BUDDEN: So, in other words, you did see it likely that the project costs would be exceeded?

MR. STYLES: I'm not surprised that it would.

MR. BUDDEN: Okay. Other panelists: Does anybody disagree with that, have a different conclusion?

Okay.

Mr. Styles, do you recall where the P50 came from?

MR. STYLES: No, and I think – I differ to Mr. Shortall here.

MR. BUDDEN: Okay. Perhaps, Mr. Shortall, are you aware where it came from?

MR. SHORTALL: My understanding is that the P50 was commonly used and was good utility practice. Obviously, the Grant Thornton report is refuting that somewhat, although they don't present very convincing evidence of that.

MR. BUDDEN: Okay.

MR. SHORTALL: So, I would differ to the experts internal to Nalcor such as Mr. Martin or Gilbert Bennett to give a more definitive answer to that question.

MR. BUDDEN: Okay.

So, am I correct then in saying that your understanding that the P50 factor was commonly used in megaprojects came from within Nalcor, from Mr. Martin and Mr. Gilbert, in particular – Mr. Bennett, rather, in particular?

MR. SHORTALL: That was my understanding.

MR. BUDDEN: Gentlemen, Mr. Clift, Mr. Marshall, anything different to say?

MR. CLIFT: No, that was my understanding as well.

MR. BUDDEN: And yours as well, Mr. Marshall.

MR. K. MARSHALL: Yeah, it was felt at the time and discussed with the board that, you know, there's a range of P-factors you can use and P50 was certainly an established norm to be using for projects of this nature.

And, I think, in addition to that, we had also – on the benefit side – had been conservative with respect to benefits that would be achieved from excess water sales and federal loan guarantee loan rate benefits, et cetera. So, there were some – there was a discussion and P50 was determined to be the proper prudent approach to go forward, in light of what the previous projects that had been done and also applied a principle

of conservatism to some of the benefits that could be seen from the project.

MR. BUDDEN: Of course, the P50 was applied to capital cost estimates, you do acknowledge that?

MR. K. MARSHALL: Right.

MR. BUDDEN: Okay.

There was talk as well in your direct evidence that part of the reason why a P50 was used – and correct me if I'm wrong – was because of a fear that if contractors were aware there was a higher factor being used that they might then increase their costs, or have I misunderstood that, Mr. Styles?

MR. STYLES: I think Mr. –

MR. K. MARSHALL: Go ahead, Gerry.

MR. STYLES: – Ken, I'm sorry.

MR. K. MARSHALL: (Inaudible.)

MR. BUDDEN: I guess, I'll – Mr. Styles, you were the chair, so I will ask you. What was your understanding of how a contractor – that contractor factor would factor into the P50 calculation?

MR. STYLES: I have – I really have nothing to add to that. I guess, I have no understanding of it other than the references that were made to it yesterday in terms of if – that if you put it out there that the contractors would interpret it as an opportunity to kind of go over.

MR. BUDDEN: That was your understanding.

MR. STYLES: Yeah.

MR. K. MARSHALL: I'd like to clarify the position in direct evidence.

MR. BUDDEN: Perhaps –

MR. K. MARSHALL: I –

MR. BUDDEN: – Mr. Styles can answer first to say, well, that was your understanding. And your answer was yes?

MR. STYLES: Yes.

MR. BUDDEN: Okay, Mr. Marshall?

MR. K. MARSHALL: I'd like to clarify the direct evidence yesterday was not in relation to P50, it was in relation to a line for strategic reserve and a dollar figure that would be associated and carried in the estimate. It wasn't in relation to the P-factor, it was in relation to the amount of a reserve estimate that should be published and carried. That's when I said I didn't like to have that flagged and available to contractors for visibility to be able to see what their real number is that they're going to achieve from the project.

MR. BUDDEN: Okay, so it's a strategic risk reserve we're talking about there. Am I correct?

MR. K. MARSHALL: All the elements of risk. And we had a certain amount of risk in there, but I want to untie because you indicated that the risk, the P50, was tied to direct evidence from yesterday indicating that we didn't want that to be available to contractors.

MR. BUDDEN: Yeah, I stand corrected, but we are talking strategic risk.

MR. K. MARSHALL: Yes.

MR. BUDDEN: We are talking about risk.

MR. K. MARSHALL: Risk.

MR. BUDDEN: And the theory was that the strategic risk would be – okay, well, tell me how did the presentation of strategic risk – how did the contractor factor and the strategic risk factor interplay?

MR. K. MARSHALL: As we discussed in direct yesterday, it was – there was risk elements that were identified that we mitigated for, that we had mitigation plans in place for and there was a contingency put in place with respect to the capital cost estimates.

Whether you classify them as tactical risks, environmental risks or strategic risks, we – you know, there was a series of classifications for them. So I don't want to get into, you know, what they were classified as and whether or not

strategic risk in and of itself as a definition was zero or 500 million.

MR. BUDDEN: Okay.

So, again, tell me what was the fear related to contractors?

MR. STYLES: What was the question again?

MR. BUDDEN: Okay, my question was what was the – there was a fear expressed yesterday in relation to contractors, what contractors would do –

MR. STYLES: Oh, I'm –

MR. BUDDEN: – if they were aware that these contingencies were made known.

MR. STYLES: I'm sorry; I probably misunderstood your earlier question.

MR. BUDDEN: Okay.

MR. STYLES: (Inaudible.)

MR. BUDDEN: Well, that may be but this particular question here, what is – what are you saying, I guess, or with respect to what contractors – how contractors would respond if the contingencies were made publicly known?

MR. STYLES: It would've been my understanding that if there was a higher P-factor attached to this that somehow it would be an invitation to contractors to inherently go over in their work. And I'm not specifically relating that to any particular contractor, it's just my general understanding of the process.

MR. BUDDEN: So you're saying that contractors would interpret a higher P-factor as an opportunity to do what?

MR. STYLES: I just would've thought they would've – could've looked at it as the, you know, as an opportunity to say, okay, if there's more to be had here we will – you know, we will either – we will do what we do – do what we need to do in terms of our work to try to access that.

MR. BUDDEN: Okay.

MR. STYLES: And, again, I'm probably not – I'm probably the least qualified of the people here at the table to be answering these questions, so I'm ...

MR. BUDDEN: You were, though, the chair, Mr. Styles.

MR. STYLES: Yes.

MR. BUDDEN: So, presumably, if you were – accepted the position of the chair, you accept some responsibility with that.

MR. STYLES: Yes, I do.

MR. BUDDEN: Okay. Anyway, you've told us your understanding.

Mr. Marshall, is your understanding different from Mr. Styles's?

MR. K. MARSHALL: No.

MR. BUDDEN: Okay.

MR. K. MARSHALL: It was – as Commission counsel indicated yesterday, it was the red meat principle that was discussed previously in the previous evidence.

MR. BUDDEN: Okay.

Is it not the role of the project manager to anticipate that red meat strategy, I suppose, on the part of contractors and allow for it, adjust for it, supervise in anticipation of it?

MR. K. MARSHALL: I'm not sure of your question. And it's – I'm not sure what your question is. I mean, yes, we identified; we discussed as a board what the risks were. We also discussed as a principle that we don't want to flag a big public number. And you saw yesterday that there was a contingent equity reserve in the event of things like that happening.

MR. BUDDEN: Okay.

And, again, the contingent equity reserve, just explain again what that was, what that is, how it was identified?

MR. K. MARSHALL: Gerry, do you want to go?

MR. STYLES: Do you want to go?

MR. SHORTALL: The contingent equity?

MR. K. MARSHALL: Yeah.

MR. BUDDEN: Yes

MR. SHORTALL: You're talking about the contingent equity?

MR. K. MARSHALL: As identified at DG2, I think.

MR. SHORTALL: No, I don't have a clear recollection of that. I mean, I think we discussed the strategic risk. The fact that there was a promise by the shareholder to inject equity to cover that strategic risk is a recollection, but not a clear recollection. And that's just all – it's all I can say about it. It's –

MR. BUDDEN: So you're being backstopped by the shareholder?

MR. SHORTALL: Yeah. That was my understanding, yes.

MR. BUDDEN: Okay.

And to what extent did you anticipate being backstopped by the shareholder?

MR. SHORTALL: Well, we'd hoped that it would never occur. I mean the strategic risk is risk that's – it's like unknown, uncontrollable risk and it's not something that you can do anything about. You can't mitigate it; it happens or it doesn't happen. We just hope that it doesn't happen.

MR. BUDDEN: But we've all acknowledged, we've all, just 10 minutes ago, agreed that megaprojects are prone to those kind of risks.

MR. SHORTALL: Well, they're prone to overruns but not necessarily overruns because of unknown, uncontrollable risks. Sometimes, you know, because the ground conditions are different than we thought they were and we have to do more work and, you know, it takes longer

to pour concrete and all kinds of things that drive up costs, it doesn't mean that they're driven up because there are costs that are uncontrollable or unknown at the time you sanction the project.

MR. BUDDEN: Which is why P75s are frequently used, I would suggest to you.

MR. SHORTALL: Which is why ...?

MR. BUDDEN: A P75 factor is frequently used.

MR. SHORTALL: If you say so. I mean I have seen no evidence of that.

MR. BUDDEN: You have read Grant Thornton though?

MR. SHORTALL: I have read it, yes, and I saw no evidence of that in the report.

MR. BUDDEN: Okay.

MR. SHORTALL: It's hearsay evidence.

MR. BUDDEN: Well, this might be a good time to turn to Exhibit P-00206, please, Madam Clerk.

THE COMMISSIONER: So that's one that we would not have in our books, right?

MR. BUDDEN: Perhaps it isn't. It's one that was referred to, I believe, in the evidence of Mr. Williams.

THE COMMISSIONER: Okay.

P-00206 – that'll come up on the screen.

MR. SHORTALL: I can't even see the screen.

THE COMMISSIONER: We're going to have to try to –

MR. SHORTALL: I can see your screen, but I –

THE COMMISSIONER: Can you see mine?

MR. SHORTALL: I can't read it though, but –

THE COMMISSIONER: Okay.

Maybe we could just sort of angle the screen so that all of you can see it.

MR. K. MARSHALL: Yup.

MR. BUDDEN: Gentlemen, my understanding is that this was a – and I'm reading really from the title page which we can all read. This was a Lower Churchill Update prepared by Nalcor in 2010 – April of 2010 to be specific. It's marked confidential up in the upper left-hand corner.

And my understanding – I stand to be corrected – but this was prepared by Nalcor for the Premier's office or perhaps the Cabinet. Do we – and I realize it's just a cover page, but do any of you recall a briefing of this nature from this time frame?

Mr. Styles, obviously, this – I'm not really directing these questions at you because you weren't on the board at this time, but the other three gentlemen were. So is this document, based on this brief look –

THE COMMISSIONER: Maybe what we could do is just scan through the –

MR. BUDDEN: Yeah.

THE COMMISSIONER: – document just to see if the others –

MR. SHORTALL: Sure.

THE COMMISSIONER: – may have seen it.

MR. BUDDEN: I ultimately wish to land on page 17, but we can scan through it to get to it.

THE COMMISSIONER: Just continue on.

MR. BUDDEN: Yeah, 17 is where – Madam Clerk, if we could go back to that.

And, again, I'm not attempting to ambush you here, but in the base of this very brief look, does this look familiar to you at all?

MR. K. MARSHALL: The specific document itself, I can't say, it's 8½ years ago.

MR. BUDDEN: Of course.

MR. K. MARSHALL: The fact of the cover page would be because in each of our board meetings we would have been given a Lower Churchill update with that exact title on it.

MR. BUDDEN: So, this is the kind of thing that would have been presented to you at board meetings but you cannot recall, in all fairness, that this specific one was.

MR. K. MARSHALL: No.

MR. BUDDEN: Mr. Clift and Mr. Shortall, you agree with Mr. Marshall.

MR. CLIFT: I agree.

MR. SHORTALL: I agree.

MR. CLIFT: Under some circumstances we would get a presentation. If Mr. Martin was going to the province, subsequent, we would get a presentation in advance that had either a summary – I don't recall if that was the case in this instance.

MR. BUDDEN: Fair enough.

I'd like to read you a little section from the very beginning of page 17. The headline here is: Scenario Economics - Key Assumptions, and then the first bullet point is: General Assumptions for all cases, then the first notation under that is P75 capital cost estimates and then somebody has handwritten in, and to this point we haven't – there's been no evidence before the Commission whose handwritten this is. But it is written, quote: "more stress placed on the project cost – very conservative approach."

Gentlemen, I would take it from this that at some point in – well, not some point, in April of 2010, Nalcor was coming forward to government and it was working from a P75 capital-cost estimate. Would you agree with that assertion?

MR. K. MARSHALL: You're asking us to agree with the position that Nalcor was going forward. I would agree that Nalcor would have tested, in its analysis, a variety of circumstances concerning all of the inputs: P75, I see the

financing rate there at 7.5 per cent and the exchange rate. Those factors, they would all have varied and the final position would have been put forward.

So, at this point in time, this was six or eight months prior to DG2 decision, there was varying levels of testing the model. And, again, that would be standard practice.

MR. BUDDEN: What it in fact says, though, is: General Assumptions for all cases: P75 capital cost estimates. You agree with me there?

MR. K. MARSHALL: That's what it says.

MR. BUDDEN: Yes. And it is a Nalcor document?

MR. K. MARSHALL: Yes.

MR. BUDDEN: Yes.

Do you also agree – and you may not agree, but I would suggest, and looking at the plain wording of that handwriting, that somebody is saying that a P75 capital-cost estimate is placing stress on the project cost and is a very conservative approach. You would agree that is what that wording is saying?

MR. K. MARSHALL: No.

MR. BUDDEN: No? What do you take it as?

MR. K. MARSHALL: No, I have no idea what's in the mind of the author of that note.

MR. BUDDEN: Sure, anymore than we know what's in the mind of the person who wrote assumptions, but would you agree that the obvious interpretation of more stress placed on the project cost is that a P75 factor and a capital-cost estimate was putting more stress on the project cost – the Muskrat Falls Project cost? Do you disagree with that?

MR. K. MARSHALL: You're asking me to have an opinion on a note that somebody put on a PowerPoint that's not my handwriting. No, I can't have an opinion.

MR. SHORTALL: No comment.

MR. K. MARSHALL: No, no comment.

MR. BUDDEN: Okay. That means nothing to you, the fact that somebody is saying more stress placed on the project cost in response to Nalcor coming forward with a P75.

MR. CLIFT: It would be impossible for us to know if they were making a note of what someone said to them or it was their impression.

MR. BUDDEN: Okay.

MR. CLIFT: So it would be very challenging to try and make that –

MR. BUDDEN: Okay, fair enough.

MR. CLIFT: – definition.

MR. BUDDEN: So there's no suggestion here that P75 shouldn't be used because it might make contractors greedy? Nothing like that, is there? It's not complicated. There's no suggestion like that there, is there?

MR. K. MARSHALL: It is because it's back to the point of the definition of a line of a reserve estimate, what – the principle as we discussed. It was not about the P75 or the P50 or – you're tying two elements in. So, no, there's no suggestion but nor was there any link to pin this to.

MR. BUDDEN: However, you would acknowledge that handwriting, there is a suggestion that a P75 leads to more stress placed on the project cost?

MR. K. MARSHALL: I acknowledge that that is not my handwriting and no board member here is taking ownership of that handwriting, so I cannot make any –

MR. CLIFT: No, not mine either.

MR. K. MARSHALL: – assumptions as to what it means.

MR. BUDDEN: I think we know it's not your handwriting. We don't yet know who it is, but no body is suggesting it's you guys. But, anyway, I'll move on since you're clearly not going to acknowledge it.

You are aware that the difference between using a P50 and a P75 amounts to hundreds of millions of dollars in project costs? You are aware of that? Does anybody disagree with that?

MR. K. MARSHALL: No.

MR. BUDDEN: Okay.

Also, I would suggest, based on the – this note from 2010 that the real reason the project went with the P75 rather than a P50 is to project a lower-cost figure and thus make the Churchill Falls – the Lower Churchill Project seem more affordable and attractive than it really was.

THE COMMISSIONER: I think you may have mixed it up. Going with the P50 as opposed to the P75 would result in the –

MR. BUDDEN: Did I?

THE COMMISSIONER: Right. So you may just want to just –

UNIDENTIFIED MALE SPEAKER:
(Inaudible) P75.

THE COMMISSIONER: – answer the question.

MR. BUDDEN: I got a bit carried away with myself. I was thinking ahead. Let me rephrase that.

So, I would suggest that the real reason that the Muskrat Falls Project ultimately went with the P50 rather than the P75 that was suggested in 2010 was because a P50 would lead to a lower-cost project and thus a more attractive, affordable – make the project seem more affordable and attractive than it really was versus the Isolated Island Option?

Gentlemen, agree or disagree with that?

MR. K. MARSHALL: I disagree.

MR. BUDDEN: Disagree?

You as well, Mr. Clift?

MR. CLIFT: Yes.

MR. BUDDEN: Mr. Shortall?

MR. SHORTALL: I disagree.

MR. BUDDEN: Mr. Styles?

MR. STYLES: I'm really not sure what to make of it.

MR. BUDDEN: Fair enough.

And so, even after this, you hold to your assertion that the strategic risk calculation as backed up by government was to defeat, essentially, overreaching contractors.

UNIDENTIFIED MALE SPEAKER:
(Inaudible.)

MR. BUDDEN: Mr. Shortall?

MR. SHORTALL: I'm sorry. I didn't hear the question.

MR. BUDDEN: Okay. So even after examining this document you still hold your position that the P50 was used, or out of these the strategic risk allocation that was used, contingency was used to defeat overreaching contractors – greedy contractors.

MR. STYLES: I'd like to kind of clarify my answer to say could have been as opposed to was.

MR. BUDDEN: Okay.

MR. SHORTALL: I'm still not understanding your question, Mr. Budden.

MR. BUDDEN: Okay. Fair enough. I'll move on.

I'd like to go to another exhibit that, unfortunately, won't be before you, I don't imagine. It's exhibit P-0004, which is the Professor Bent Flyvbjerg report. Perhaps we could call it up. It's page 25, I'm interested in.

I'm sorry, Gentlemen, you're going to have to crowd around the screen a bit, but if we go to page 25 and down to the very last paragraph.

For context, this is a report that was prepared for the Commission. It was the very first witness we heard. This gentleman is an academic who has an interest in some of the issues around megaprojects.

I'll just read the first couple of sentences there and ask you to comment on it – quote: "In practice, some decision makers are concerned about large contingencies. They fear what has been called the 'red-meat syndrome', i.e. that the mere fact that contingencies are available will incentivize behavior with contractors and others that means the contingencies will be spent." Is that a fair description of the thinking at Nalcor at the time of sanction, Mr. Shortall?

MR. SHORTALL: You're asking me?

MR. BUDDEN: I am.

MR. SHORTALL: I don't know.

MR. BUDDEN: You were on the board.

MR. SHORTALL: Yes, I was.

MR. BUDDEN: Okay.

Is that a fair description of the thinking –

MR. SHORTALL: But –

MR. BUDDEN: – at Nalcor at the time?

MR. SHORTALL: Putting out red meat for contractors, if we put too high a contingency? Is that ...?

MR. BUDDEN: Yeah.

MR. SHORTALL: Yeah, yeah.

MR. BUDDEN: Mr. Clift, Mr. Marshall, Mr. Styles: Anybody disagree with that?

MR. K. MARSHALL: I don't agree with the notion that, specifically, the P-factor was assigning your levels of risk associated with all aspects of the project, not necessarily just your contractor. So I – your continued assertion that the P-factor was solely put in place or changed I actually find quite shocking, quite frankly, because you're suggesting that we changed P75

to P50 as a board to make the project look better, and that was not the case.

MR. BUDDEN: Okay.

MR. K. MARSHALL: And to suggest that this was the thinking, and tying it to the P-factor, we discussed contractor risk and we discussed lines of contingences, but we did not tie it to P-factors. They were elements of risk that we discussed overall.

MR. SHORTALL: That's correct.

MR. STYLES: That's right.

MR. SHORTALL: The P-factor doesn't relate to red meat to the contractor –

MR. K. MARSHALL: Right.

MR. SHORTALL: – it relates to what we need to cover contingencies in the cost overruns.

MR. BUDDEN: Okay.

MR. STYLES: And what might the –

MR. BUDDEN: You're answering about P-factor, which was a – previous questions, but those two – the first two sentences, what I asked you to comment on, do you agree that this was the thinking, just taking these two first sentences as they are, that underlay the – was that similar to the thinking of Nalcor around these issues?

MR. CLIFT: I think that we tried to discuss risk and allow for contingencies in a way that would be consistent with best practice and reasonable practice for a project of this magnitude. The discussion around P50 was something that took place at numerous junctures and we fairly consistently landed at P50, so that was a discussion. And then there was a discussion around project risk. And they may have happened in the same meeting in consequence, but not necessarily.

MR. BUDDEN: They're not unrelated concepts I know

MR. CLIFT: No.

MR. BUDDEN: But, again, just dealing with this here – quote: The fear that “what has been called the ‘red-meat syndrome’, i.e. that the mere fact that contingencies are available will incentivize behavior with contractors and others that means the contingencies will be spent,” was that also a fear shared within Nalcor?

MR. CLIFT: We talked about contingencies in general and what range might be acceptable, recognizing that in projects like that, there would be the possibility that the contractors would have a sense for what that contingency was and that there are times when those contingencies are used up.

MR. BUDDEN: Okay.

All right, so it then goes on to say – quote: “The data for hydro-electric dams and other large projects show clearly that even large contingencies are not excessive but realistic.”

So we'll skip over that but it's the next two sentences are of interest to me: “Instead of avoiding realistic contingencies projects need to put in place incentive schemes ... accountability and transparency ... to ensure that contingencies are spent only if and when needed, so the ‘red-meat syndrome’ may be avoided. Good project leaders know how to do this.”

Firstly, do you recall any talk of such incentive schemes – of accountability, of transparency – to keep the contractors in line? Is that something that was discussed at the board level?

MR. CLIFT: Not that I can recall.

MR. BUDDEN: Mr. Styles, Mr. Shortall? You're shaking your head no. Obviously we need a bit more than that.

MR. SHORTALL: I'm – what's the question again?

MR. BUDDEN: I'm – my question was, the – from that quote, Professor Flyvbjerg says that: “Instead of avoiding realistic contingencies projects need to put in place incentive schemes ... accountability and transparency ... to ensure that contingencies are spent only if and when needed”

I'm asking: To your knowledge, what incentive schemes, what accountability and transparency mechanisms were –

MR. SHORTALL: Yeah.

MR. BUDDEN: – put in place?

MR. SHORTALL: I don't know. I can't answer that question. I think you'd need to ask it to someone a level or two down, more closer to the actual project execution.

MR. BUDDEN: Okay.

MR. CLIFT: Project execution, yeah.

MR. BUDDEN: Okay, so it never made it to the board? If it existed, it never made it to the board level?

MR. SHORTALL: No.

MR. BUDDEN: No, okay.

MR. SHORTALL: Not in my recollection.

MR. BUDDEN: Gentlemen, anybody disagree with that?

MR. CLIFT: I don't recall.

MR. BUDDEN: With respect to – I'm going to jump around a little bit here with a number of specific questions; I've moved off the P50 – P-factors for now. With regard to Decision Gate 3, Mr. Styles, whom did you understand the Gatekeeper to be?

MR. STYLES: Mr. Martin.

MR. BUDDEN: Mr. Martin. Anybody disagree with that?

Mr. Shortall.

MR. SHORTALL: No, it was Mr. Martin.

MR. K. MARSHALL: No.

MR. BUDDEN: Okay.

What role did the board have? If Mr. Martin was the Gatekeeper, what role did the board have to play?

MR. SHORTALL: The role of the Gatekeeper was to ensure that all of the tasks and processes that get you to that gate have been completed properly. Then the Gatekeeper can come to the board to approve the passage through that gate.

So the Gatekeeper brings you to the gate, establishes that all the processes have been properly met, then the board would approve the passage through the gate. So he's the one that gets you to the approval – the board approval level.

MR. BUDDEN: Okay.

Though, I would merely think that the plain meaning of Gatekeeper would seem to suggest the person who decides whether the gate is open or shut.

MR. SHORTALL: Yeah, it's an unfortunate term. I never liked it.

MR. BUDDEN: Okay.

MR. SHORTALL: But that's how the process works. So he doesn't have the final say, the board does.

MR. BUDDEN: So he's the Gatekeeper, but –

MR. SHORTALL: Yeah, but he's keeping the gate for all the people who are reporting to him and then he reports to us.

MR. BUDDEN: Okay, so you guys are the ultimate authority over him as to whether you move through the gate?

MR. SHORTALL: Yeah, Mr. Marshall was the Gatekeeper.

MR. BUDDEN: Okay, so Mr. Marshall was the Gatekeeper. Do you accept that, Mr. Marshall?

MR. K. MARSHALL: No, Mr. Styles was the chair at the time of DG3, I think you're asking. The board was the Gatekeeper as a whole.

MR. BUDDEN: Okay.

Do you stand corrected, Mr. Shortall?

MR. SHORTALL: Mm-hmm.

MR. BUDDEN: Okay.

As a general practice, was there a threshold level of expenditure or project size beyond which it was the board, and not management, which had to approve decisions?

MR. SHORTALL: Are you talking to me?

MR. BUDDEN: I'll ask Mr. Styles – I was looking at you so I'd understand your confusion, but Mr. Styles. What I'm getting at here –

MR. STYLES: He started talking to you.

MR. SHORTALL: I didn't hear what he said so ...

MR. STYLES: No.

MR. BUDDEN: Okay, my question was: Was there a threshold amount beyond which it was the board that had to approve a particular project or purchase below which the executive can make those decisions without coming to the board?

MR. STYLES: Not that I'm aware of.

MR. BUDDEN: Okay.

Mr. Marshall, as a former chair, can you answer that question?

MR. K. MARSHALL: Yes, there was established – and I would suggest that Mr. Shortall, as the head of the Audit Committee, would be able to go in great more detail. I don't have the details here with me now, but there was a very established line of hierarchy with respect to expenditure limits.

And I can certainly say that we got very involved when it came to energy trading and swaps and those types of things –

MR. BUDDEN: Mm-hmm.

MR. K. MARSHALL: – to ensure that what levels were required within the organization for sign-off and entering into different contracts,

and in approval for change orders, which would come to the board.

MR. BUDDEN: Okay.

And can you identify a specific amount beyond which you guys you would get involved, below which you would not?

MR. K. MARSHALL: No, I cannot.

MR. BUDDEN: Okay.

Mr. Shortall?

MR. SHORTALL: I can't recall a specific amount either, and I think it varied, because if we had signed a contract and had it approved, and then it went over budget, it had to come back to the board when it exceed – the over-budget amount exceeded, I think it was, like, 10 per cent, or something, so –

MR. BUDDEN: Okay, sure.

MR. SHORTALL: But you know, I don't have the specifics of the amounts and ...

MR. CLIFT: Those could be detailed, certainly.

MR. BUDDEN: Pardon?

MR. CLIFT: Anytime when something came to the board that would have been recorded and approved and signed for, there was a fairly standard, formalized process that when expenditures went above a certain amount over and above what was budgeted for, if they were beyond a certain amount, they would have to come to the board for approval.

MR. BUDDEN: Okay.

MR. CLIFT: And in almost every case there was a relatively thorough discussion of and explanation as to why they went over.

MR. BUDDEN: Okay.

Getting back to sanction, a couple of questions around that.

Was it a concern at sanction that no water management agreement was in place with

Hydro-Québec with regard to water flow on the Churchill River? Was that even an issue for consideration at DG3?

MR. STYLES: (Inaudible.)

MR. SHORTALL: No, yes, of course it was. It was discussed thoroughly at sanction, but it wasn't considered a major roadblock.

MR. BUDDEN: Okay.

Gentlemen, anybody have anything to ask? You appear to wish to say something, Mr. Marshall.

MR. K. MARSHALL: No, I'm just looking at counsel.

MS. O'BRIEN: Sorry (inaudible).

Sorry, just to be clear, I told the witnesses in advance that we were gonna be doing a special session on water management so, to the extent they can answer questions and not get into the details of – I think the last question was, was it discussed. The answer was yes. I think that's fine, but just to let you know that in terms of more detailed-level water management, we'll save that for the water management day.

MR. SHORTALL: Yeah, because it's before the courts.

MR. BUDDEN: We're all aware it's before the courts, but yes, we'll park that and come back to it another day.

This one is a little safer. Was it a concern to the board that the only export contract – and I stand to be corrected, but I'm understanding, as of the time of sanction, the only export contract was one with Emera. Was that a concern to the board, that this power would be generated but no purchasers had been lined up?

Mr. Styles, as chair, was that something that you were concerned about?

MR. STYLES: I don't recall any amount of discussion around it, but again, largely acting on the recommendation of the CEO, I didn't have any concerns with it.

MR. BUDDEN: Okay.

Mr. Shortall?

MR. SHORTALL: No, I wasn't concerned about it.

MR. BUDDEN: Okay.

MR. SHORTALL: We'd been selling excess power from the recall block for years and never had problems finding customers. And in fact, not having a contract was beneficial to us, because we were selling in the spot market and getting – we actually got about, I think, on the average, about 30 per cent more than the average NEISO price for our power, because we were selling into the spot market, picking and choosing times when the demand was really high and we could supply.

MR. BUDDEN: Okay.

MR. SHORTALL: So no, I, in fact, probably would like to have not a contract in place for a substantial portion of the excess power, because we can sell it that way.

MR. BUDDEN: Okay.

MR. CLIFT: In fact, we had thought about it as a portfolio model not unlike what you would do in investing whereby you would strive for a fairly longer term power purchase agreement for a certain portion of the available block. And then you might go to the spot market for other portions of that block.

So for example, in the past, we had longer term power purchase agreements with the government of New Brunswick when it was involved in restructuring and refurbishing a plant that we did very well on, and we anticipated that those kinds of opportunities might be available again in the future.

We had also, as we moved into energy marketing, had had numerous discussions with various state governments in the US. Obviously, you can have preliminary discussions on that, but until such time as you have power and you know how much power is available and for how long and in consideration of things like the state of their various facilities, their production capacity, how severe their winters are, how hot their summers are, there's quite a number of

variables over a long period of time that can influence availability of customer demand.

And so we were working through all of that; we were aware of that and monitoring it to think about what long-term availability might be available and from where. Clearly, we were back in the early part of the 2010s then, knowing that it was going to be some time in the future before that power would be available.

So you would have negotiations; you would do upfront discussions to talk about availability, pitch the project, those kinds of things as you go to meetings of say, for example, New England Governors and Atlantic Premiers, I recall there having been a discussion and even tours of the facility.

MR. BUDDEN: So if I can tie it together, you were satisfied that to trade off, I suppose, the certainty of a contract for the potential upside of more profitable spot market sales.

MR. CLIFT: You would be balancing your portfolio, I think, would be how I would describe it.

MR. BUDDEN: Okay.

Okay, at the time of the Power Purchase Agreement was arrived at, which of you would've been on the board of both Nalcor and Newfoundland Hydro? Mr. Styles, obviously, you weren't, I don't believe.

Mr. Shortall, were you on both boards at that time?

MR. SHORTALL: When the Power Purchase Agreement –

MR. BUDDEN: Yes, was arrived at.

MR. SHORTALL: Which power purchase agreement?

MR. BUDDEN: The – hmm, that's a good question. The – which ones are you thinking of? Just to help me out there.

MR. SHORTALL: I'm asking you which one you're inquiring about.

MR. BUDDEN: Okay.

The – I guess I'm thinking of the one by which the – Hydro is agreeing to purchase this block of power –

MR. SHORTALL: Oh –

MR. BUDDEN: – from –

MR. SHORTALL: – the agreement –

MR. BUDDEN: – Nalcor.

MR. SHORTALL: – between Muskrat Falls and –

MR. BUDDEN: Yes.

MR. SHORTALL: – NLH?

MR. BUDDEN: Yeah.

MR. SHORTALL: Yeah, and what are you asking? Was I on –

MR. BUDDEN: My question, were you on both the Hydro and Nalcor boards at the time that was arrived at?

MR. SHORTALL: Yes.

MR. BUDDEN: Okay.

Would that've been true for you as well, Mr. Marshall?

MR. K. MARSHALL: Yes.

MR. BUDDEN: And you Mr. Clift?

MR. CLIFT: Yes.

MR. BUDDEN: You Mr. Styles?

MR. STYLES: Yes.

MR. BUDDEN: Okay.

Did – how did you reconcile your fiduciary duties to each of those companies, them being on either side of this purchase agreement?

MR. SHORTALL: The fiduciary duty was to Nalcor, the entity. All of these companies we're talking about are subsidiaries of Nalcor, so it's an inter-company transaction within a corporate group. So there's no conflict of interest –

MR. BUDDEN: Yeah.

MR. SHORTALL: – to have a power purchase agreement between the parties. The main thing is to make sure that the cash flow is there to meet the debt servicing requirements in Muskrat Falls Corporation for the production of the power that's delivered to Newfoundland and Labrador Hydro.

MR. BUDDEN: So you saw no conflict of interest, nor a potential conflict of interest –?

MR. SHORTALL: None whatsoever.

MR. BUDDEN: Thus no engagement of a possible conflict of your fiduciary duties to –?

MR. SHORTALL: It's all within one corporate group.

MR. BUDDEN: Okay.

MR. SHORTALL: How – where's the conflict?

MR. BUDDEN: Either of you gentleman have a different answer to that, either –

MR. K. MARSHALL: No.

MR. BUDDEN: – the other –

UNIDENTIFIED MALE SPEAKER: Nope.

MR. BUDDEN: – three of you? Okay.

I guess Mr. Styles first, what was your understanding of that Power Purchase Agreement and how rates would unfold throughout the life of that agreement?

MR. STYLES: You know, my understanding was that the rates would actually raise for the first four or five years and then stabilize.

MR. BUDDEN: Okay.

One of the documents you were put to yesterday referred to a bump. I believe it was a Nalcor document, so that's the bump you're thinking of, I assume?

Okay, you're nodding, Mr. Shortall, do you agree with Mr. –

MR. SHORTALL: Yes.

MR. BUDDEN: – Styles's answer?

MR. SHORTALL: Yes, when Muskrat Falls came on stream – comes on stream, there will be a bump.

MR. BUDDEN: Okay.

MR. SHORTALL: It's totally anticipated.

MR. BUDDEN: Okay.

MR. SHORTALL: Once we've reached the bump though, over time the rate of increase declines and becomes closer to a straight line; whereas the Isolated Island Option is totally a hockey stick.

MR. BUDDEN: Okay.

The – I realize – I'm not going there now, but I do realize that obviously there are competing arguments with regard to how rates will rise in either scenario, so I'm – I accept your – what you're saying there.

However, my next question is – I guess I'll direct to you, Mr. Shortall – what was your understanding of how demand or possible lack of demand if the rate projections that Nalcor were relying on turned out to be too – not the – the load projections turned out to be too ambitious, how would that impact the return on equity for each of the generation and transmission aspects of the Muskrat Falls Project?

MR. SHORTALL: Well, the power purchase – frankly, the Power Purchase Agreement between Muskrat Falls and NLH was a take-or-pay agreement.

MR. BUDDEN: Yes.

MR. SHORTALL: So the return on equity, unless the shareholder decided to wave it, was guaranteed to be recovered from the rates.

MR. BUDDEN: Okay.

MR. SHORTALL: So –

MR. BUDDEN: So that leaves two scenarios: in a case of a lower demand rates go up or the shareholder waives some portion of its return on equity. There's no other possible scenarios.

MR. SHORTALL: Well, there's rate mitigation scenarios.

MR. BUDDEN: Yes. Yes. So other than a rate mitigation scenario where government mitigates through some –

MR. SHORTALL: But the – no –

MR. BUDDEN: – other funds –

MR. SHORTALL: – the way the project was structured – the financing of it was structured in a take-or-pay agreement that made the cash flow move towards Muskrat Falls to give – to pay all of the costs, the debt servicing, the operations and the return on equity, from the ratepayers.

MR. BUDDEN: All of which was contingent on the demand projections, the load forecast of Nalcor –

MR. SHORTALL: Irrelevant of demand.

MR. BUDDEN: The load – it's not irrelevant of load forecast though.

MR. SHORTALL: Wouldn't matter.

MR. BUDDEN: Pardon?

MR. SHORTALL: It would not matter.

MR. BUDDEN: It would not matter. It would matter to the shareholder, would it not?

MR. SHORTALL: It would matter to the ratepayer.

MR. BUDDEN: Yeah.

MR. SHORTALL: Yeah, of course.

MR. BUDDEN: So therefore it matters.

MR. SHORTALL: Yeah. Well, it depends on what you mean by "matter." I would say it wouldn't affect the arrangement.

MR. BUDDEN: Okay. Assuming that either – it wouldn't affect the arrangement, but rates would either have to go up or the shareholder would have to walk away from some of its return on equity.

MR. SHORTALL: Right.

MR. BUDDEN: Okay. Or use other resources to mitigate rates.

MR. SHORTALL: Sorry?

MR. BUDDEN: Or use other government resources to mitigate rates.

MR. SHORTALL: Yes.

MR. BUDDEN: Yeah.

MR. SHORTALL: Yeah, or other Nalcor resources.

MR. BUDDEN: Okay.

To what degree – and again, I'll direct it to Mr. Styles first, as chair – to what degree was the board aware of and engaged with the methylmercury issue?

MR. STYLES: Again, it was something that was identified, I guess, in the environmental piece and, you know, what was brought to me – to my (inaudible) with the board – is that it was within safe levels.

MR. BUDDEN: Okay. Does anybody have a disagreement with that –

UNIDENTIFIED MALE SPEAKER: No.

MR. BUDDEN: – anybody see it otherwise?

UNIDENTIFIED MALE SPEAKER: No.

UNIDENTIFIED MALE SPEAKER: No.

MR. BUDDEN: So you're all agreeing with what Mr. Styles has said?

UNIDENTIFIED MALE SPEAKER: Yeah.

MR. BUDDEN: Okay.

So at the time of sanction, you had no information that would suggest that the Muskrat Falls hydroelectric project would cause methylmercury to rise beyond what were regarded as safe levels?

MR. STYLES: I don't recall what the actual numbers were, but I think there were – for Mr. Bennett there was – that it would be monitored.

MR. BUDDEN: Okay, anybody, then, need to add to that?

MR. SHORTALL: It was not expected to be a massive increase in methylmercury. It was a very small reservoir attached to the Muskrat Falls Project, nothing like the reservoir that Churchill Falls has.

MR. BUDDEN: Of course, yeah.

MR. SHORTALL: And the methylmercury from Churchill Falls was miniscule. We expected some, but a low level of methylmercury downstream of Muskrat Falls.

MR. BUDDEN: Okay.

It was either explicit or implicit in some of your answers – I'm thinking of Mr. Marshall in particular – that part of the attraction of Muskrat Falls was that it was a more environmentally friendly project than what Newfoundland was using to generate power on the Island – Holyrood in particular. I guess is that a correct characterization of your view, Mr. Marshall?

MR. K. MARSHALL: That was an opinion, but it did not factor into the decision making of approval.

MR. BUDDEN: Okay. So okay – so if I understand correctly, the pros or cons of Muskrat Falls, from an environmental point of view, played no weight at all in the recommendation to go with the Interconnected

Island Option rather than the Isolated Island Option?

MR. K. MARSHALL: No, our decision making came down to a strictly financial business case and the environmental issues and concerns were noted. There was a desire to move away from fossil fuel burning and to – as per the Energy Plan – utilize the resources that we were harvesting for the benefit of the people in the province not to burn within and not to have nothing at the end of it. But from a strict financial analysis – business case analysis that was done, it was – that was how the project was decided on. There were benefits – side benefits, much like many other side benefits but that was not a driving factor in our decision that this has to go at all costs because it's a cleaner solution.

MR. BUDDEN: Okay. So the cleaner solution factor wasn't a consideration at all in terms of decision made at DG3?

MR. K. MARSHALL: Not for me.

MR. BUDDEN: Not for you. Mr. Shortall?

MR. SHORTALL: No. No. It was strictly icing on the cake. It had nothing to do with the decision. The decision was financial based.

MR. BUDDEN: Okay.

UNIDENTIFIED MALE SPEAKER: Right.

MR. BUDDEN: The concerns have been expressed that on the Nova Scotia side of the Maritime Link contract the UARB had both an oversight role and a veto power over the contract, and as we all know they didn't hesitate to invoke that veto power – at least one instance. While on the Newfoundland side of the contract there is no equivalent role for the PUB.

Did that give rise to any concerns of the board that Newfoundland was thus being put into an unequal bargaining position with regard to the Maritime Link? Was that a concern that the board had? Mr. Styles?

MR. STYLES: Those decisions were made before my tenure.

MR. BUDDEN: Fair enough. Mr. Marshall?

MR. K. MARSHALL: No.

MR. BUDDEN: Wasn't a concern at all?

MR. K. MARSHALL: It was. We were monitoring the situation and we had to –

UNIDENTIFIED MALE SPEAKER: Mm-hmm.

MR. K. MARSHALL: – live within the regulatory regime of new – of Nova Scotia to satisfy them. But as for, you know, the imbalance and the different approaches between Newfoundland and New Brunswick – that was not a – that was not for board consideration.

MR. BUDDEN: Newfoundland-Nova Scotia you mean, obviously?

MR. K. MARSHALL: Newfoundland – yeah, sorry – Nova Scotia.

MR. BUDDEN: Fair enough, yeah. Mr. Shortall?

MR. SHORTALL: Agree. Agree.

MR. BUDDEN: Same answer. You as well?

MR. CLIFT: Yeah. Mr. Martin kept us apprised – or whomever else, as his delegate – kept us apprised over a period of time as to what was happening in those kinds of developments.

MR. BUDDEN: Okay.

A fair bit of the evidence of yesterday, led by Commission counsel, was some of your frustrations with the fact that: you were a small board; you were lacking in compensation, such as other boards of a similar nature in Canada; you, as individuals, were not receiving the financial compensation that board members typically would receive; that you lacked somebody on the board with a history, with expertise in megaproject development. These were all concerns I heard yesterday. Nobody's taking issue with that, I assume?

MR. K. MARSHALL: Our positions were well documented.

MR. BUDDEN: Okay.

That's my next point and particular, Mr. Clift – but not only Mr. Clift – Mr. Shortall as well and I believe you, Mr. Marshall, brought your concerns forward to the shareholder, repeatedly.

UNIDENTIFIED MALE SPEAKER: Correct.

MR. BUDDEN: Have you any idea why the government was so unresponsive to your concerns? Do you Mr. Clift?

MR. CLIFT: There was a period of time, as Mr. Marshall referenced yesterday, post-2010 when there was a fair amount of change in the premier's office. Almost one every year for a five-year period. Our experience had been – in the past with bringing people up to speed on that side – that it always took a period of time. So, in a sense, we were moving forward post-2010, and then moving back. And moving forward, and moving back. So the level of change up there, in part, may have explained why that happened.

MR. BUDDEN: I'd like to jump in there because, as of the date of sanction, there'd only been two premiers in the previous 10 years. And Mr. Williams for most of that period of time, and then the two years prior to sanction with Ms. Dunderdale.

MR. CLIFT: Right.

MR. BUDDEN: So, I hear what you're saying about perhaps some of the confusion later, but –

MR. CLIFT: Mm-hmm.

MR. BUDDEN: – we're only really looking at pre-sanction here.

MR. CLIFT: Mm-hmm.

MR. BUDDEN: So do you have any idea why these complaints that you're bringing forward as early as 2006 – year after year after year – they weren't being addressed. Have you any idea why that was?

MR. SHORTALL: I think that question should be directed towards the parties involved, so –

MR. BUDDEN: Oh, we plan to. But since you're here –

MR. SHORTALL: It would be only be speculation on our parts (inaudible). It's, you know, it's no point.

MR. BUDDEN: Well, it might be speculation, or perhaps you –

MR. SHORTALL: It would only be speculation. How else would we know?

MR. BUDDEN: Well, you might know because you were told. A minister may have said something.

MR. K. MARSHALL: I was asked –

MR. BUDDEN: The premier may –

MR. K. MARSHALL: – that question –

MR. BUDDEN: – have said something.

MR. K. MARSHALL: – yesterday by Ms. O'Brien. We were not told.

MR. BUDDEN: And that's true of all four you? None of you were informed –

MR. K. MARSHALL: No.

MR. BUDDEN: – as to these reasons?

MR. K. MARSHALL: No, and I'd also like to point out as – and I think in conversation with Ms. O'Brien that there may be a perception that there's only four of us who were ever on the board, and when we were going through that period from 2005 through to 2009, we had established quite a number of corporations, quite a number of board positions. And I'm not sure the exact number that we eventually –

MR. SHORTALL: It was –

MR. K. MARSHALL: – staffed.

MR. SHORTALL: – 30-something.

MR. K. MARSHALL: But it was 30 to 40 board members, unique. And so there was a big corporate establishment, with respect to the structure that's required, and all the boards had to be staffed properly. We were 30-plus individual, unique board members. Some were

independent, some were super independent. So there was an onslaught of requirements from that perspective.

And we were meeting, certainly, the fiduciary responsibilities to properly staff and equip those boards. We had made our positions known clear in terms of additional people that we would've liked, but certainly not to suggest that there was complete unresponsiveness, because we did have a lot of things that did get staffed as per the reorganization of the plan. But, again, as the evidence showed yesterday, we were persistent with respect to what we felt was required for the board.

MR. BUDDEN: And I believe the term suboptimal was used at one point. So, again, I'm not suggesting that you were knowingly in breach of your fiduciary duties, but I am suggesting to you that you were quite aware that you were under-resourced. It was a concern you were expressing at many opportunities.

MR. CLIFT: We were and as I noted yesterday it was not our responsibility to place people on this board. One piece of information that I was made aware of at one juncture, and I do not recall who within the province told me this, was that there was one individual in the Premier's office who was responsible for staffing 160 plus boards – agencies, boards, commissions, et cetera.

So if you think about the average board size and the number of boards, that's a fairly significant responsibility for that individual.

MR. BUDDEN: So you're suggesting there might have been a bottleneck at that level?

MR. CLIFT: I don't know. That was the fact that was made aware – I was made aware of. I have no –

MR. BUDDEN: And the inference you are suggesting confirm that fact?

MR. CLIFT: – sense for the infinite capacity of the government to do those kinds of things. That to me seems like a lot but –

MR. BUDDEN: Okay.

MR. CLIFT: – not familiar with the process; unsure as to how difficult it might be to attract people –

MR. BUDDEN: Mmm.

MR. CLIFT: – to serve on boards. It would depend on the nature of the board, the types of requirements, et cetera. I would be speculating to go further.

MR. BUDDEN: Yeah. You realize one of the roles of this commission is to hear evidence and then make suggestions that hopefully will lead to better governance in the future, so I'm going to ask you here, now, and it's a very important question I'd like you to think about. And I accept your belief that this did not impact your fiduciary – your carrying out of your fiduciary duty.

I'll just ask you first, Mr. Clift: do you believe this combination of a thin board, as you called it; of lack of megaproject experience; of the inability to attract board members because of the low remuneration – do you believe that had any negative impact at all in your – in the process leading up to sanction and the decision to sanction the Muskrat Falls Project?

MR. CLIFT: We exercised our duties as best we could. We were as thorough as possible and in my letter to Mr. Ottenheimer, I outlined what I felt the optimal requirements would be.

MR. BUDDEN: And I repeat my question: do you believe those factors had any negative impact whatsoever on the operation of the board and these very important decisions?

MR. CLIFT: I think that the board operated with all due intentions towards the shareholder and exercised its fiduciary responsibility to the best of its ability. It was challenging, I would grant you that.

MR. BUDDEN: Okay. And did that challenge lead to a negative impact on your ability to do your job?

MR. CLIFT: I did not personally feel compromised, if that's what you're asking?

MR. BUDDEN: I'm thinking more in terms of the board as a whole.

MR. CLIFT: When you said you, did you mean me as an individual, or the board as a collective?

MR. BUDDEN: Do you believe, as an individual, that the board collectively was negatively impacted by these circumstances?

MR. CLIFT: I think the board would have benefited from that additional expertise and that's what we as a governance committee agreed upon, and that's what we wrote to the chair about, and that's what the chair spoke to the province about.

MR. BUDDEN: Mr. Marshall, have you anything to add to that?

MR. K. MARSHALL: I agree with Mr. Clift, and I was on the record yesterday saying that we agreed the board would have benefited from that, that's why we took the position that we did. Do I think the board acted in full professional fashion and had outside expertise, and had access to – we hired staff and contractors to ensure that we had expertise required to make those decisions – so if you're asking if the board, if we feel the board was negatively impacted, that's speculative.

I think the board acted in full professional manner and pointed out, quite frankly, the issues that we raised – I hope find their way into the Commission report for improving the governance – and it's a governance initiative that we brought the organization from a very remote stage of infancy, into a very advanced level within the public service and Crown corporations.

MR. BUDDEN: Okay.

Mr. Styles, have you an answer to that.

MR. STYLES: I don't think so.

MR. BUDDEN: Okay.

Mr. Shortall.

MR. SHORTALL: I agree. I agree with Mr. Marshall and Mr. Styles.

MR. BUDDEN: Okay.

The – much talk was – there was much talk yesterday about cold eyes –

THE COMMISSIONER: Can I just stop you there and –

MR. BUDDEN: Take a break?

THE COMMISSIONER: – probably a good time this morning to take a break so we'll take our break now for 10 minutes.

CLERK: All rise.

Recess

CLERK: All rise.

Please be seated.

THE COMMISSIONER: All right, Mr. Budden.

MS. O'BRIEN: Sorry, Commissioner, before –

THE COMMISSIONER: I'm sorry.

MS. O'BRIEN: – Mr. Budden begins, before the break I rather presumptively said that an exhibit had been entered without getting an order from you, and, of course, that's what's needed to make an exhibit. So I'd be seeking an order to enter P-00554, which is the email from Mr. Marshall that we referred to earlier this morning.

THE COMMISSIONER: Right, so that would be marked as 00554.

MS. O'BRIEN: Thank you.

THE COMMISSIONER: Mr. Budden.

MR. BUDDEN: Gentleman, just before we broke I was – I asked a question, I'll repeat it.

I'll ask Mr. Styles first: What did you understand the expression cold eyes to mean, as we used it yesterday; a cold eyes review?

MR. STYLES: I would think cold eyes review is an external review; someone that's not biased by the subject matter that they're reviewing.

MR. BUDDEN: Okay, anybody else take issue with that definition?

UNIDENTIFIED MALE SPEAKER: No.

MR. K. MARSHALL: It can also be internal; somebody not working on the project but somebody that's brought in to look, who's not directly involved in the project, so it could be internal or external, just to clarify.

MR. SHORTALL: Sure.

MR. BUDDEN: Okay.

MR. CLIFT: Mmm.

MR. BUDDEN: Though, obviously, an internal review by somebody who answers to somebody who is promoting the project is clearly of, you know, is not as cold an eyes of review as if you went totally external. You'd agree with me there?

MR. CLIFT: Agreed. But normally there's a process where you'd do an internal cold eyes review and then subsequently do an external cold eyes review.

MR. BUDDEN: And, in this case, there was in fact such an internal review by Mr. Rowe and (inaudible), Mr. Mallam and others, I believe. You agree with me there?

MR. K. MARSHALL: Yes.

MR. CLIFT: Yes.

MR. BUDDEN: Okay. I'll have a question too about that in a minute. But, first, would you agree that the Public Utilities Board of Newfoundland meets the definition of a cold eyes review of the project? Anybody disagree with that?

MR. K. MARSHALL: I don't think it's a question – I don't think that's a decision for the board.

MR. BUDDEN: Okay.

MR. K. MARSHALL: And it wasn't a position for the board. It was a position for government.

MR. BUDDEN: Pardon?

MR. K. MARSHALL: That was a position for government to take with respect to whether or not it met a cold eyes review. I don't think it was the board's mandate to determine whether or not the Public Utilities Board should be cold eyes review.

MR. BUDDEN: I would suggest to you, however, it was within the mandate of the board to consider and have particular regard, perhaps, to a cold eyes review as a check on your own internal processes. That's the purpose of the cold eyes review, isn't it?

MR. K. MARSHALL: Yes.

MR. BUDDEN: Okay. And so, therefore, it is relevant to that board that what the PUB did was or was not a cold eyes review. You agree with me, I presume?

MR. K. MARSHALL: I don't think you can presume that I agree. I –

MR. BUDDEN: Okay. Well –

MR. K. MARSHALL: – I think that's unfair (inaudible).

MR. BUDDEN: Okay. Do you agree with me or disagree with me on that?

MR. K. MARSHALL: I don't –

MR. BUDDEN: Pardon?

MR. K. MARSHALL: Sorry, what's your question?

MR. BUDDEN: My question was: You're on the board?

MR. K. MARSHALL: Yeah.

MR. BUDDEN: You are getting information up through the chain of command, ending with Mr. Martin. It's a recognized practice that boards will sometimes seek out or consider cold eyes

reviews so that they get another cold perspective on the project. You would agree with me so far?

MR. K. MARSHALL: Yes.

MR. BUDDEN: Would you further agree with me that the PUB was such a cold eyes review?

MR. K. MARSHALL: In some respects I – and they were asked to do so with respect to reviewing the documents that we had in place at the time.

MR. BUDDEN: Yes. So, therefore, they were a cold eyes review for the board to give weight to and consider, along with its various other assessments?

MR. CLIFT: Presumably –

UNIDENTIFIED MALE SPEAKER: Go ahead.

MR. CLIFT: Sorry. We also would have thought about the benefit of bringing in some external agency that was familiar with large-scale projects of this nature that had done these kinds of reviews before and had a kind of an international expertise, thus –

MR. BUDDEN: Sure.

MR. CLIFT: – going to someone like Manitoba Hydro International.

MR. BUDDEN: And we'll get to that, but talking about the PUB. The PUB was indeed a cold eyes review. You may or may not have accepted or agreed with it, but surely you would agree it meets a definition of a cold eyes review of the project.

Mr. Marshall?

MR. K. MARSHALL: I have no comment. I have no agreement or disagreement.

MR. BUDDEN: Okay. You're indifferent to whether that was in fact a cold eyes review?

MR. K. MARSHALL: No, I say –

MR. BUDDEN: Were you indifferent –

MR. K. MARSHALL: – I don't agree or disagree.

MR. BUDDEN: – at the time?

MR. K. MARSHALL: I'm not saying I'm indifferent. I can't say – I have no comment. I – no, can't agree, can't disagree.

MR. BUDDEN: Let me try one last time.

Did, at the time, you as a board member regard the PUB report as a cold eyes review of the Muskrat Falls Project? Not a complicated question.

MR. SHORTALL: Which report are you talking about?

MR. BUDDEN: I'm talking about the PUB report – the reference that was made to the PUB.

MR. SHORTALL: The one where they –

MR. BUDDEN: I'm asking, Mr. Marshall.

MR. SHORTALL: – came to no conclusion.

MR. BUDDEN: Yes.

MR. K. MARSHALL: The one where they came to no conclusion –

MR. BUDDEN: Right.

MR. K. MARSHALL: – and that was a cold eyes review for which they hired a cold eyes in Manitoba Hydro to help them in their assessment.

MR. BUDDEN: And – well, I'm asking again – did – was – you, at the time, as a board member remember – regard the PUB report as a cold eyes review?

MR. K. MARSHALL: I don't even think it was thought of in that context. We supported the release of information to the PUB. I don't think we ever contemplated whether or not they were classified as a cold eyes review. So it's kind of irrelevant in the – in our line of consideration.

MR. BUDDEN: Okay.

MR. K. MARSHALL: We provided information that – and the organization did and we were aware it was ongoing.

MR. BUDDEN: So Nalcor did have the opportunity to present to the PUB? No question about that.

MR. K. MARSHALL: Absolutely not at the board level, and Nalcor responded to the questions of the PUB through that process.

MR. BUDDEN: And the PUB, at the time, unlike yourselves, consisted of a full-time, supplement by part-time, well-compensated individuals who were presumably put in place as individuals who had expertise in matters around power generation and so forth. Was that your understanding of the –

MR. K. MARSHALL: If you say so, yeah.

MR. BUDDEN: – PUB?

MR. K. MARSHALL: I don't know.

MR. BUDDEN: Well, was that your understanding?

MR. K. MARSHALL: Yeah.

MR. BUDDEN: Yes?

MR. K. MARSHALL: Yes.

MR. BUDDEN: Okay.

You were – as you've said, the PUB found that it was unable to come to a conclusion as to whether the Isolated Island Option or the Interconnected Island Option was the best choice for Newfoundland. Is that a fair characterization of their conclusion?

MR. K. MARSHALL: Yes.

MR. BUDDEN: Okay.

What weight did you, as a board member – and I'll ask each of you in turn – give to the fact that the PUB felt unable to come to a conclusion on the merits of the project? What that a concern?

MR. K. MARSHALL: Confusing; I don't know if it was a concern.

MR. SHORTALL: Yeah. Well, didn't their independent consultant come to a conclusion that the Interconnected was the cheaper option?

MR. K. MARSHALL: Yes.

MR. SHORTALL: And the board didn't take their advice?

MR. K. MARSHALL: Correct.

UNIDENTIFIED MALE SPEAKER: Yeah.

MR. SHORTALL: So, you know, it's – what do you want me to say?

MR. BUDDEN: You've said a lot. Thank you.

Are you familiar, as well, with – I'll ask Mr. Shortall first – with the Joint Review Panel that had hearings and gave a report in August of 2011? Are you familiar with the Joint Review Panel and its report?

MR. SHORTALL: I was familiar with it. I forget the details of it now but –

MR. BUDDEN: Sure. That's understood. It has been a number of years.

MR. SHORTALL: Yeah.

MR. BUDDEN: But at the time, as a Nalcor board member, you were familiar with the Joint Review Panel.

MR. SHORTALL: Absolutely, yes, of course.

MR. BUDDEN: Okay.

And would you have regarded that also as a cold eyes review?

MR. SHORTALL: Yeah, yes.

MR. BUDDEN: Anybody have a different answer of the other – I won't ask Mr. Styles because he wasn't there.

UNIDENTIFIED MALE SPEAKER: No.

MR. BUDDEN: Okay.

So the same answer as Mr. Clift and Mr. Marshall?

MR. CLIFT: Yes.

MR. BUDDEN: Okay.

Perhaps we could turn to – and, again, this is one you won't have in front of you, but it's Exhibit 00041, which is the actual report, the August 11 report of the Joint Review Panel.

And, Madam Clerk, when you do, you could bring up – go straight to page 68.

CLERK: What page?

MR. BUDDEN: Sixty-eight. Scroll down 'til you get to the grey box. There it is.

Mr. Shortall, perhaps you could read the – what's in grey there in that. But, no, actually I won't ask you, you're too far away.

Mr. Marshall, perhaps you could read what's in that grey box? Read it out loud, I'm sorry.

MR. K. MARSHALL: "The Panel concludes that Nalcor's analysis that showed Muskrat Falls to be the best and least cost way to meet domestic demand requirements is inadequate and an independent analysis of economic, energy and broad-based environmental considerations of alternatives is required."

That was the panel. That was not something that we had commissioned, but is reading somebody else's report, yeah.

MR. BUDDEN: Sure, on a cold eyes review commissioned by the federal and Newfoundland governments. That's what it is, right?

MR. K. MARSHALL: Yes.

MR. BUDDEN: Okay.

As a board member were you concerned that this set of cold eyes, yet another set of cold eyes that, in this case, concluded – quote: "The Panel concludes that Nalcor's analysis that showed Muskrat Falls to be the best and least cost way

to meet domestic demand requirements is inadequate” Was that a concern to you?

MR. K. MARSHALL: Of course it was.

MR. BUDDEN: Okay.

Mr. Shortall, was it a concern to you?

MR. SHORTALL: Yes, of course.

MR. BUDDEN: Okay.

Gentlemen – Mr. Styles, was it to you?

MR. STYLES: This predates my involvement.

MR. BUDDEN: Of course, but at the time of sanction it was out there. Were you aware of it?

MR. STYLES: I’m sorry, what was the ...?

MR. BUDDEN: At the time you were making the sanction decisions – this had been approximately a year, 16 months before that so you were on the board at the time of the sanction – were you aware of this report and this conclusion?

MR. STYLES: Yes.

MR. BUDDEN: Okay. And were you concerned by this particular conclusion?

MR. STYLES: Yes.

MR. BUDDEN: Okay.

Mr. Clift?

MR. CLIFT: Yes.

MR. BUDDEN: How did the board – you were all concerned, you all read this, you all acknowledged a pair of cold eyes. You all see that it found that the Nalcor’s analysis was inadequate. How did you act on your concerns, the concerns that were generated by this?

Mr. Styles, you first as the chair.

MR. STYLES: I’m only assuming, because I have no direct recollection of this, that our

concerns would have been put back to the CEO –

MR. BUDDEN: Okay.

MR. STYLES: – Mr. Martin.

MR. BUDDEN: All right, Mr. Shortall?

MR. SHORTALL: I can’t recall the exact response that was made to this comment but I’m sure it was dealt with. But, you know, I don’t have the details to rattle off what exactly happened.

MR. BUDDEN: Okay.

MR. SHORTALL: But we would’ve addressed that for sure.

MR. BUDDEN: Okay.

Mr. Marshall.

MR. K. MARSHALL: The same. I don’t have exact details but, again, I can recall a general conversation that this report was concerning, that the organization was taking the recommendations that were felt to get into compliance. And, ultimately, the project received approval from the federal government and the loan guarantee.

This was – these wouldn’t have been left hanging. I don’t think that this would’ve been the last report and all of those issues would’ve been satisfied to the requirement in order for the project to succeed.

MR. BUDDEN: Okay.

Are you aware of a subsequent report that addresses this or that goes beyond this conclusion that the Nalcor analysis is inadequate?

MR. K. MARSHALL: No direct knowledge. It’s not before me and it’s a long while ago.

MR. BUDDEN: Okay and you don’t recall it?

MR. K. MARSHALL: All I recall is that we were working on the requirements that were needed from this report in order to make sure

that we satisfied – or the issues were understood and we would move on to approval and financing.

MR. BUDDEN: Okay.

I'll direct the next question to Mr. Clift, because it came up in your interview with counsel. You were aware that other individuals in the community – credible individuals – were also expressing concerns about the Muskrat Falls development. That is correct, isn't it, Mr. Clift?

MR. CLIFT: Yes.

MR. BUDDEN: Okay.

And in your interview you spoke in particular of Mr. David Vardy, one of the members of the coalition; also Mr. Jim Feehan, James Feehan, the economist, who we've heard from already in our evidence. Do you recall what your – when that came up to Commission counsel? Do you want me to refresh your memory by reading what –

MR. CLIFT: Yes, please.

MR. BUDDEN: – you had to say about those?

MR. CLIFT: Yeah.

MR. BUDDEN: Okay, I'll just quote here – this is from your transcript, quote – and this is you: I did pay attention to what David Vardy was saying. He was a former chair of the PUB and I've known him for a long time. And I've always thought of him as a very thoughtful, considerate person. And so when David had a point of view I tried to pay attention where I was made aware – where I was made aware of a point that he had.

There were all kinds of critics out there, some more informed than others. But when an informed critic had something to say and I was – either found it myself or was made aware of it, I usually spend some time thinking about it in the context. So Jim Feehan and David Vardy, for example, would have been people who I met professionally and whose opinions I value.

Do you adopt those words here today?

MR. CLIFT: Yes.

MR. BUDDEN: Okay.

MR. CLIFT: My opinion of him hasn't changed.

MR. BUDDEN: Your opinion of Mr. Vardy and Mr. Feehan is as you said it here?

MR. CLIFT: Yes.

MR. BUDDEN: Okay.

And you would have held that opinion in this pre-sanction period, 2011, 2012?

MR. CLIFT: Yes.

MR. BUDDEN: Okay. You would know Mr. Ron Penney as well?

MR. CLIFT: Yes.

MR. BUDDEN: Okay. Where – served on boards with him, worked with him?

MR. CLIFT: Yes.

Uh-huh.

MR. BUDDEN: Had a high regard for him as well?

MR. CLIFT: Yes.

MR. BUDDEN: Okay.

You were aware that these individuals I've mentioned – you know, Mr. Feehan, Mr. Penney, Mr. Vardy, and many others – were bringing forward critiques of the project, the financing, the projections and so forth?

MR. CLIFT: Yes.

MR. BUDDEN: What weight did you give to those concerns? How did you act on them?

MR. CLIFT: You would consider them in the context of all of the information that we had. And we had discussions on occasion as to various points of view. I would be unable to attach a specific weighting to them other than to

that information was out there, you made yourself aware of it or you became aware of it, you thought about it, you thought about it.

Oftentimes, I thought about it in the context of the amount of information that they might have had relative to the amount of information that we may have had, and wondering what the disparity was between the two. And I think some time recently they had noted that there were some gaps in the information that they had.

MR. BUDDEN: Okay.

But it does appear that they were perhaps – had more foresight than did others with regard to where the budget ended up on Muskrat Falls.

MR. CLIFT: It would appear that they had done more analysis than others and had an opinion as to where it might have ended up.

MR. BUDDEN: Okay.

Any of the other three –

MR. CLIFT: Certainly they were the most – they seemed to me to be the most consistently attending to the information as it was becoming available.

MR. BUDDEN: Thank you.

Mr. Marshall, Mr. Styles, Mr. Shortall, have you anything to add to that? I'm thinking in particular of the, I guess, civilian critics of Muskrat Falls.

MR. K. MARSHALL: No.

MR. SHORTALL: No.

MR. BUDDEN: Mr. Styles?

MR. STYLES: No.

MR. BUDDEN: Thank you.

MR. STYLES: I'm sorry.

MR. BUDDEN: So we've talked about some cold eyes. Let's talk about other cold eyes, I suppose. MHI – Manitoba Hydro International. You – did you also, I'll ask each of you in turn,

regard them as cold eyes as we've been using the term?

Mr. Shortall?

MR. SHORTALL: Yes.

MR. BUDDEN: Mr. Styles?

MR. STYLES: Yes.

MR. K. MARSHALL: Yes.

MR. CLIFT: Yes.

MR. BUDDEN: All four of you say yes. I guess I put it to you, since they had already – at the time they were brought forward to be a set of cold eyes to you guys, they had already opined on this for the PUB. So does that not suggest that perhaps – so, I guess what I'm asking: you're buying a known quantity at that point – a known quality. You know what you're getting when you buy those cold eyes.

Would agree or disagree with that?

Mr. Marshall?

MR. K. MARSHALL: I'm not sure of the nature of your question. I think you're asking us to opine whether or not they were truly cold and independent, and I can only suggest that they were working at that instance for the Public Utilities Board, and not for us in compiling their report. They had previously worked for Nalcor. But they still adhere to a professional code of conducts and ethics, and when they were engaged to do a report, they're independent code eyes. That's –

MR. BUDDEN: I'm not suggesting anybody here is being unethical. Not the PUB, not the Joint Panel, not MHI, nobody. But my point is that, when they were sought out to opine, my question is are they truly cold eyes if they've already opined on the very project you're bringing them in to opine on?

Your answer would be: yes they are?

MR. K. MARSHALL: Yeah.

MR. BUDDEN: Okay. Anybody disagree with that?

MR. STYLES: No, I don't disagree.

UNIDENTIFIED MALE SPEAKER: Nope.

MR. BUDDEN: Okay. Navigant was another pair of cold eyes on whom you relied on in arriving at your sanction decision. Am I correct on that?

MR. K. MARSHALL: Yes.

MR. CLIFT: Yes.

MR. BUDDEN: Okay. Navigant – are you aware that Navigant had a long-term relationship with Nalcor – had been a contractor to Nalcor in the past? Was that something that was known to you at the time?

MR. K. MARSHALL: Yes.

MR. BUDDEN: Okay.

Did that cause you concern that they may not truly be in a position to be a pair of cold eyes if they already had an existing relationship with Nalcor?

MR. K. MARSHALL: Same answer again. Professional –

UNIDENTIFIED MALE SPEAKER: Mmm.

MR. K. MARSHALL: – group, professional individuals that – you're suggesting that we can't bring back somebody who had worked before? I think they're still cold eyes.

MR. BUDDEN: Okay. Thank you.

Anybody disagree with that?

MR. CLIFT: No, and at the same time, it's common practice that – at least it has been my experience – that companies re-engage with consultants that they've used in the past based on the quality of their work, and in fact one of the criteria that you're looking for to engage a consultant is the long-term nature of the relationships that that consultant might have

with a client, 'cause it's reflective of the quality of their work.

MR. BUDDEN: Okay.

We're all agreed, step back a bit, like, the purpose of cold eyes is somebody who comes in, who doesn't really care whether this – whose feelings get hurt, they just are in to opine on a specific question or questions – to come at it cold. We're all agreed, that is what a cold eyes review really is looking for.

Anyone disagree –

MR. SHORTALL: No, no, I think that's too narrow a definition.

MR. BUDDEN: Okay.

MR. SHORTALL: You know I – we're talking about professionals here. It's – you know I spent my whole career doing cold eye reviews, auditing things, and I'd have long-term relationships with clients. But when it came to opining on a set of financial statements that relationship was just not there, right, if you're professional, you're independent.

The fact that we're using a consultant we've used in the past is a good thing if we know they're good consultants; they're qualified, they're professional, and now they don't have to get up to speed as much as another person who you might call cold eyes because they've never seen this before.

So we'd use that consultant repeatedly because they do good, quality work; good, quality, professional, independent work, so –

MR. BUDDEN: Okay, yeah, I can see your –

MR. SHORTALL: So (inaudible).

MR. BUDDEN: – argument, but what you're basically saying, I guess, is that by going to people you know, you're getting a known quality, and if they've been good in the past they're likely to be good in the future.

MR. SHORTALL: Plus they've already got a degree of knowledge of your business and the issues, so you'd – it takes them less time to do

the work, which means they'd be more reasonably priced as well.

UNIDENTIFIED MALE SPEAKER: Yup.

MR. SHORTALL: So ...

MR. BUDDEN: The downside, of course, is that they're coming into a structure working with individuals they've worked with before and perhaps those individuals hold strong views.

MR. SHORTALL: Yeah, but then, see, you're questioning their –

UNIDENTIFIED MALE SPEAKER: Their integrity.

MR. K. MARSHALL: Exactly.

MR. SHORTALL: – integrity, yeah.

MR. BUDDEN: Okay, fair enough.

Did the board consider seeking a cold eyes assessment from somebody who had no previous involvement whatsoever with the project, with Nalcor, with Newfoundland?

MR. SHORTALL: I never did.

MR. BUDDEN: Mr. Styles?

MR. STYLES: No.

MR. BUDDEN: Mr. Marshall?

MR. K. MARSHALL: No. I think that we've – as we've seen, has been entered into evidence, there was a lot of independent reviews, cold eyes reviews internally and externally. We've not mentioned the fact that ultimately the Toronto-Dominion Bank had a substantial loan involved and they would've done their assessment, and the federal government also did their assessment in the involvement, so from a board perspective, no, we did not consider getting additional –

MR. BUDDEN: Okay.

MR. K. MARSHALL: – consultants independently.

MR. CLIFT: You know, the engineer of Canada – for Canada would've –

MR. K. MARSHALL: And the independent engineer for the federal government.

MR. BUDDEN: Yes.

MR. CLIFT: – would've been involved as well.

MR. BUDDEN: Okay.

We heard evidence with regard to Mr. Clift and Mr. Marshall. You obviously both had a previous relationship with Premier Williams under whose government you were appointed.

Mr. Shortall, the question wasn't asked of you; I know from your interview that you did have a previous relationship with Mr. Williams. Can you please, just briefly, speak to that?

MR. SHORTALL: I met him in Grade Four at St. Bon's. He was in the other Grade Four – he used to live on Winter Avenue. I lived on Winter Avenue. He lived up the street. We'd walk home from school together. I've known him pretty much all my life.

MR. BUDDEN: Okay. And you've done professional work – you had done professional work for his companies.

MR. SHORTALL: Yes.

MR. BUDDEN: Okay. So he was somebody who – you knew him and he knew you.

MR. SHORTALL: Exactly.

MR. BUDDEN: Okay.

Mr. Styles, did you have a previous relationship with Premier Williams at the time you were appointed to the board?

MR. STYLES: No.

MR. BUDDEN: Okay.

Now, of course, you were appointed well after his premiership. Just a couple of questions – what was the nature of your business? What did you do?

MR. STYLES: Two businesses – one was alcohol beverage distribution company and the other one was a real estate-land development company.

MR. BUDDEN: Okay.

Previous to being appointed to Nalcor you spoke about being on the board of CONA.

MR. STYLES: Yes.

MR. BUDDEN: Had you ever been on the board of a publicly held – a publicly traded or privately held company?

MR. STYLES: No, I have not.

MR. BUDDEN: Okay.

You were recommended – I understand, from your evidence that you were recommended to this board by your local MHA, and, I believe, cabinet minister Ms. Joan Shea.

MR. STYLES: No. It's my understanding that the direction came from the premier's office – which would have been Premier Dunderdale.

MR. BUDDEN: Okay.

You and Ms. Shea – what was your – the nature of your relationship with (inaudible) –

MR. STYLES: We have a personal relationship.

MR. BUDDEN: Okay. You had a personal, romantic relationship at that time?

MR. STYLES: Yes.

MR. BUDDEN: Thank you.

Gentlemen, I guess I'll ask the – not you, Mr. Styles – but of the other three of you – were you aware, at the time of your appointment, that Mr. Williams – Danny Williams – had a – expressed a desire to develop the Lower Churchill?

Were you, Mr. Clift?

MR. CLIFT: I can't recall the timing of that.

MR. BUDDEN: Okay.

MR. CLIFT: I do recall that perhaps it was on an agenda – long-term agenda.

MR. BUDDEN: Okay.

So you were aware that he was an advocate of developing the hydroelectric potential of Lower Churchill.

MR. CLIFT: Yes. But I can't remember exactly when that was – when I became aware of that.

MR. BUDDEN: Sure.

Mr. Marshall.

MR. K. MARSHALL: Not specifically. Not through direct conversations, only through, you know, a platform, because it was a – we came in after a general election. That was all.

MR. BUDDEN: Okay.

Mr. Shortall?

MR. SHORTALL: No, I didn't know he was interested in it at all. I hadn't been living in Newfoundland for 20 years by the time I got the phone call to ask me to go on the board, so ...

MR. BUDDEN: Okay.

MR. SHORTALL: I hadn't spoken to Danny for years before that, so ...

MR. BUDDEN: Sure. Mr. Williams resigned in late 2010. The sanction decision of course was two years later. Over that two-year period – Mr. Shortall, I guess you first – how much contact did you have with Mr. Williams?

MR. SHORTALL: I don't think I had any contact.

MR. BUDDEN: Okay.

Did Mr. Williams directly or indirectly encourage you, as a board member, to sanction the Muskrat Falls –

MR. SHORTALL: No.

MR. BUDDEN: – Project?

MR. SHORTALL: No.

MR. BUDDEN: Mr. Marshall, same questions.

MR. K. MARSHALL: No.

MR. BUDDEN: So –

MR. K. MARSHALL: Did I see him?
Absolutely, I saw him through that period. I know him socially. I've seen him at some occasions, but not frequently.

MR. BUDDEN: Sure. So you're friends, and you've seen –

MR. K. MARSHALL: I worked with him for 20 years.

MR. BUDDEN: Yeah.

MR. K. MARSHALL: So it's, you know, it's a small town.

MR. BUDDEN: Sure. So you'd see him like you'd see any friend?

MR. K. MARSHALL: Correct.

MR. BUDDEN: Despite that, and your interactions with him – or I guess not despite that – did he at any point suggest to you, look you guys, you know, it's a great project, you really got to sanction it. Anything like that?

MR. K. MARSHALL: No.

MR. BUDDEN: Okay.

Mr. Clift? Same question to you. During the two-year period between Mr. Williams' resignation and the sanctioning, did you have any contact with Mr. Williams? And the second part – you know where I'm going – did he say anything to you to encourage you towards a decision of sanction?

MR. CLIFT: I'm sure I would have had contact with him during that period. One – I think – when did we have AHL hockey the second time around? 2011?

MR. K. MARSHALL: Yeah, probably.

MR. CLIFT: Yeah. It would have been in the context of the American Hockey League team that came, and there was an advisory board for that team that I was on, so I would have definitely had contact with him on those kinds of – and as Mr. Marshall said, social kinds of – you know, it's a relatively small town. We all sort of live in the northeast area, so you would bump into someone occasionally, whether you were at the supermarket or the drug store or wherever.

And your second question was?

MR. BUDDEN: Did he directly or indirectly –

MR. CLIFT: No.

MR. BUDDEN: – suggest to you that you should – encourage you to sanction the Muskrat Falls Project?

MR. CLIFT: Not that I recall.

MR. BUDDEN: Okay, thank you.

I'll ask this one – just since it's out there in the public discourse. It has been suggested by certain unkind critics of the board – and there have been a few over the years – that Mr. Williams, or perhaps others in government, actively desired a small, under-resourced board made up of – primarily of friends, supporters of Mr. Williams so that no truly independent oversight of the plan to develop Muskrat Falls would take place.

You now have a chance, I guess, to respond to that. What do you have to say to that Mr. Shortall?

MR. SHORTALL: I'd say that's nonsense.

MR. BUDDEN: Fair enough.

Mr. Marshall?

MR. K. MARSHALL: The same. I – people are entitled to their opinions, but that's all. They're not entitled to the facts, and we worked hard and independently.

MR. BUDDEN: Okay.

MR. K. MARSHALL: I disagree wholeheartedly.

MR. BUDDEN: Mr. Clift?

MR. CLIFT: I'd agree with Mr. Marshall.

MR. BUDDEN: Okay.

Do you have an opinion, Mr. Styles?

MR. STYLES: Yeah. Insulting.

MR. BUDDEN: Okay.

In your interviews – I'm thinking, Mr. Marshall, of you in particular – you speak of – and I think it was you, but I read all the interviews and may be getting mixed up – that you were approached in approximately 2011, maybe into early 2012, by Cathy Bennett, a former board member whom obviously you would have known, who's putting together local business people and others in, sort of, a booster advocacy program for the Muskrat Falls development, and it had a catchy name. I can't remember what it was off the top of my head.

This, of course, was prior to the sanction decision. Do you remember being approached in that fashion and did you –

MR. K. MARSHALL: I wasn't approached directly. I can recall that there was an email that came to a group, and I don't even – I never did respond to her directly.

MR. BUDDEN: Okay.

Mr. Clift, were you – did you receive similar –

MR. CLIFT: I may have.

MR. BUDDEN: – treaties. Okay.

MR. CLIFT: I may have received an email, and it may have just been just copied on it.

MR. BUDDEN: Sure.

Mr. Shortall?

MR. SHORTALL: No.

MR. BUDDEN: Okay.

I take it from your answer that you chose not to get involved in any such campaign.

MR. K. MARSHALL: I very much chose not to get involved in any such campaign because we were board members and we could not be. We had not reached sanction. We did not wish to be perceived or – and we were not in a conflict, and to be taking one side over the other, which – of a decision which had yet to be reached when we had significant level of analysis and work to go.

You know, as the individuals that you represent have their right to go forward, as do others. I just personally didn't feel that as a board member I was comfortable with becoming a part of that because it would have questioned, you know, our motives for becoming part of the group to – as we found out, you know, this high-paying gig that we have on the board of directors and also that we would be impacted with respect to – as we were asked yesterday – the bias with respect before decision.

So I felt strongly that the board members had to not participate in those type of activities.

MR. BUDDEN: So do I take it your view is that Nalcor is being faced, going into DG3 in the fall of 2012, with a difficult decision, whether to develop Muskrat Falls or whether to preserve – go forward with the Isolated Island Option, and you didn't feel it was appropriate for you as a board member or, I presume, for Nalcor as an organization to involve itself in advocacy on one side or the other of that debate?

MR. K. MARSHALL: Correct.

MR. BUDDEN: Okay. Does anyone disagree with that?

MR. CLIFT: No.

MR. BUDDEN: Okay.

MR. SHORTALL: No.

MR. BUDDEN: Okay. These are my last handful of questions, but perhaps we could turn

to Exhibit 00130. Again, sorry, guys, it's probably not before you. Okay.

Perhaps just – you can scroll through the first couple of pages – maybe even that – just to give you guys a sense – or perhaps you can tell me what you understand this document to be. You might – I think the first page or two might give us all we need.

MR. SHORTALL: What is it?

MR. BUDDEN: Okay.

Do you recognize this document, Mr. Marshall?

MR. K. MARSHALL: I'd have to see it in its entirety. It's – I guess you're telling me it's a schedule risk analysis report?

MR. BUDDEN: Is that something that you would expect to have been brought to the board?

MR. K. MARSHALL: I can't comment. The board received so many documents that I can't specifically say whether or not this particular version or this particular – I don't even know what the date on this is and what the issues were. We would've – we would – at the board level, we would've discussed –

MR. SHORTALL: (Inaudible.)

MR. K. MARSHALL: – risks. Whether –

MR. SHORTALL: (Inaudible.)

MR. K. MARSHALL: – we saw a specific report –

MR. SHORTALL: (Inaudible.)

MR. K. MARSHALL: – like this? I can't comment.

MR. BUDDEN: Wanna scroll a little further?

MR. SHORTALL: Scroll up.

MR. BUDDEN: It's dated October 1, 2012.

MR. SHORTALL: 2012?

MR. BUDDEN: Yes. See there –?

MR. SHORTALL: It doesn't look like a board document.

MR. K. MARSHALL: No.

MR. BUDDEN: Okay.

It's –

MR. SHORTALL: I don't –

MR. BUDDEN: But it is clearly a Nalcor – perhaps you can scroll back to that same page with the dates on it? It's clearly a Nalcor document. I see here it's signed by Messrs. Harrington, Kean and Bennett. They were all –

MR. SHORTALL: Yeah, but documents that came to board wouldn't have signatures on them –

MR. K. MARSHALL: No.

MR. SHORTALL: – like that. They – that's –

MR. BUDDEN: Okay. And that's –

MR. SHORTALL: Yeah, that's some kind of a working –

MR. CLIFT: The only ones that I recall that had signatures specifically were budgetary overruns on ongoing projects.

MR. SHORTALL: Yeah.

MR. CLIFT: They would've had signatures.

MR. SHORTALL: When we were getting board approval on those, but that's –

MR. CLIFT: 'Cause whoever was in charge of the project would've had their signature on it –

MR. SHORTALL: Yeah.

MR. CLIFT: – before ours went on it.

MR. SHORTALL: Yeah. That's a lower-level document. I think it's a working document. I don't believe that was presented to the board (inaudible).

MR. BUDDEN: Sure. It may be lower level, but these are – below Mr. Martin, I believe this is the next level of seniority within the executive of Nalcor. Looking here: Gilbert Bennett –

MR. SHORTALL: Who are there?

MR. BUDDEN: – Harrington.

MR. SHORTALL: Gilbert Bennett? Yeah?

MR. BUDDEN: Yeah. Harrington and Kean.

MR. SHORTALL: I – see, I can't read it.

MR. BUDDEN: Could we perhaps scroll onto page 158 of that document?

MR. SHORTALL: 158?

MR. BUDDEN: Yes. It's a big document.

MR. SHORTALL: Definitely not a board document.

MR. K. MARSHALL: It's definitely not a board document. I –

MR. BUDDEN: Perhaps scroll just a tiny bit more?

I'm going to read you a little bit here. I see – under Risk Lead we see the name Dawn Dalley. Firstly, who is Dawn Dalley?

MR. SHORTALL: Dawn Dalley?

MR. BUDDEN: Yeah.

MR. SHORTALL: She was the vice-president of communications.

MR. BUDDEN: Okay.

MR. SHORTALL: I'm not sure that's her exact title but that was her function.

MR. BUDDEN: Again, a senior person within the Nalcor executive.

MR. SHORTALL: Mm-hmm.

MR. BUDDEN: I'm looking here – I'm just going to read this bit here and there's a question, too, on it.

“R19

“Non-governmental organization / stakeholder protest

“As a result of a lack of proactive stakeholder engagement, stakeholders may be misinformed on matters relevant to them, leading to/resulting in adverse community relations and protest against the Project.”

And then there's a bunch of bullet points:

“Develop and fully implement a stakeholder communication and consultation plan.” Excuse me. “Focus on getting Nalcor's message out on the benefits of the Project (i.e. sell the project in order to leverage public support). Convince our 'silent' supporters to speak-out for the Project. Monitor public and media pulse and focus strategic messages accordingly.

“Avoid risk through: Develop and fully implement a stakeholder communication and consultation plan. Monitoring public and media pulse and focus strategic messages accordingly.

“Mitigate impact by: Focusing on getting Nalcor's message out on the benefits of the Project

“Concern is not really ... to NGOs, rather public support. Risk must be monitored for trends.”

Perhaps we can scroll down the page.

“Mitigate impact by: Focusing on getting Nalcor's message out on the benefits of the Project (i.e. sell the project in order to leverage public support). Convincing our 'silent' supporters to speak-out for the Project. Leverage Quebec versus” – Newfoundland – “debate to rally support for this venture.

“Accept the fact that Nalcor will receive some negative attention for undertaking a project like” Lower Churchill power.

I guess – how, Mr. Marshall, would you describe what the senior vice-president of Nalcor is proposing here?

MR. K. MARSHALL: She was doing her job.

MR. BUDDEN: And her job includes, for instance: “Leverage Quebec versus” – Newfoundland – “debate to rally support for this venture”?

MR. K. MARSHALL: Her job would’ve include planning for if the approval had been obtained. You can’t wait until after approval obtains or – and I will ask Mr. Clift to address it, as he was the head of the committee which she would’ve reported into.

MR. CLIFT: Not at that time.

MR. K. MARSHALL: But she was doing her job with respect to ensuring that stakeholders were communicated with respect to the benefits and the nature of this project. It was – it’s an important part of any communications plan.

MR. BUDDEN: “Leverage Quebec versus” – Newfoundland – “debate to rally support for this venture.” Do you think a Crown corporation is – should be attempting to inflame public opinion against a neighbouring province? Is that what you’re saying as a board member?

MR. K. MARSHALL: I cannot comment on the specific wording that’s in here. I think we’ve established that this was not a board document, it is 332 pages of a risk register assessment. And with respect to the specific wording, I – you know, you’ll have to ask Ms. Dalley that. I do believe she’s still at the organization.

MR. BUDDEN: Is there any similar program that you’re aware of for advising as to the risks or advantages and perhaps a PR campaign in favour of the Isolated Island Option? Are you aware of anything like that?

MR. K. MARSHALL: No.

MR. BUDDEN: Okay.

Do you find it appropriate that Nalcor would be advocating, even before sanction, for the Lower Churchill Project?

MR. K. MARSHALL: As I said, it looks like she’s planning to do her job for post-sanction.

MR. BUDDEN: And her job includes leveraging Newfoundland versus Quebec?

MR. K. MARSHALL: I can’t comment. She didn’t report to me. It’s was – it’s part of her task and responsibility as head of communications for the organization.

MR. BUDDEN: Okay.

Anybody else have anything to add to that? You, Mr. Shortall?

MR. SHORTALL: I have no comment on that document. I’ve never seen it before. I’d only be speculating on what it is.

MR. CLIFT: I don’t recall seeing it either.

MR. BUDDEN: If that had been brought to the board, would you have been concerned about that kind of wording?

MR. SHORTALL: Would I be?

MR. BUDDEN: Yes.

MR. SHORTALL: No. No, I would not.

MR. BUDDEN: Would any of you?

MR. K. MARSHALL: No.

MR. CLIFT: I would see that to be within the range of the types of advocacy, advertising and communications that corporations would contemplate.

MR. BUDDEN: Okay. Mr. Styles?

MR. STYLES: (Inaudible.)

MR. BUDDEN: Okay.

Last couple of questions – I haven’t heard a word critical of Mr. Martin from any of you. You all worked with him for many years; you all appear to hold him in high regard. Any disagreement there?

MR. K. MARSHALL: No.

UNIDENTIFIED MALE SPEAKER: No.

UNIDENTIFIED MALE SPEAKER: No.

MR. BUDDEN: Okay, no.

Two questions. Given that none of you have any experience with hydro project management at all, why do you feel you're qualified to judge his ability to supervise a hydroelectric project on the scale of Muskrat Falls?

MR. K. MARSHALL: I think our qualifications as board members were addressed yesterday morning and I think our independence and our ability to see through strategic financial, complex marketing issues are there, and we had hired additional expertise to assist us in that regard. Other than that, I'm not quite sure what you're asking. If you're asking us if we're unqualified, I would say the answer is no –

MR. BUDDEN: Okay –

MR. K. MARSHALL: – we're very qualified (inaudible).

MR. BUDDEN: – you believe you are qualified to judge his hydroelectric – hydro megaproject, rather, megaproject experience –

MR. K. MARSHALL: We were qualified –

MR. BUDDEN: – project management experience.

MR. K. MARSHALL: – to judge his performance as CEO at the organization.

MR. BUDDEN: Okay.

UNIDENTIFIED MALE SPEAKER: Agree. Agree.

MR. BUDDEN: It's now several years later, and we all talk about hindsight, but I'm really more interested in your foresight. Mr. Marshall – or rather Mr. Martin was part of an executive team that advised you that this project could be built for \$6.2 billion. That appears to be, by the figures we have today, at best a serious underestimate of what the ultimate cost will be.

Do you have any reason – knowing what you know now, having heard the evidence that you've heard so far – any reason to believe that

you, as board members, were misinformed by Mr. Martin or the Nalcor team, in any respect, at arriving at the sanction decision you arrived at?

MR. K. MARSHALL: No.

MR. CLIFT: No, absolutely not.

MR. SHORTALL: Absolutely not.

MR. STYLES: No.

MR. BUDDEN: Okay.

No further questions.

THE COMMISSIONER: Edmund Martin.

MR. CLIFT: Who does he represent?

MR. K. MARSHALL: Ed.

MR. CLIFT: (Inaudible.)

MR. SHORTALL: Ten to 12.

MR. SMITH: Good morning, gentlemen.

Harold Smith, I'm representing Mr. Ed Martin. I have a few questions.

I'll start with Mr. Clift on the governance question, of the nature of the governance of the board at Nalcor. I understand that there are different models for boards such as – sorry – management type board, a board that actually tries to manage the enterprise, and there are boards that are effectively advisory, they advise the executive team.

And I just wanted to know where you felt, from your experience of governance and this particular board, where you felt it lay?

MR. CLIFT: Sorry, are you speaking to the different models of governance such –

MR. SMITH: Different models, yeah.

MR. CLIFT: – as the Carver model versus a more – an alternate version?

MR. SMITH: Yes.

MR. CLIFT: We were not a management board in the – I think you used the term management board.

MR. SMITH: Yes, management board.

MR. CLIFT: Which implies more fingers in and more involved on a day-to-day basis. That was not the nature of our role. It was more to take the information as it was presented to us and exercise oversight over that.

MR. SMITH: So you're, for the most part, oversight.

Who would do the day-to-day management? Who was responsible to do the day-to-day management of these corporations that you were directors of?

MR. CLIFT: So that would be the CEO and his or her delegates.

MR. SMITH: And when it come to the day-to-day management, what would you expect the CEO to do in terms of his reporting to the board? What would you – what was your expectation?

MR. CLIFT: Throughout the day-to-day operations?

MR. SMITH: Yes.

MR. CLIFT: Those are not things that would typically come to us in terms of day-to-day operations. That's not the way, under good governance, the process works. I mean, part of the process is you appoint the CEO, the CEO is charged with a series of activities which includes appointing a senior executive team and delegating authority down through the organization.

MR. SMITH: Now, when the issues were coming forward with respect to possible sanction, was there only one meeting? I think it was referenced, the December 4 meeting. Was that the only meeting that the board considered, you know, the issues of sanction?

MR. CLIFT: No.

MR. SMITH: How long and how many meetings would you say that that took?

MR. CLIFT: Well, it's a Decision Gate process –

MR. SMITH: Yes.

MR. CLIFT: – in which by definition involves multiple stages and many years of analysis and decisions and back and forth and interim decisions. And, by definition, that is what Decision Gate processes are like.

MR. SMITH: Now, looking at –

MR. K. MARSHALL: I think, actually, Mr. Smith, –

MR. SMITH: Yeah.

MR. K. MARSHALL: – if I could comment. We had been taking about a number yesterday of the number of Nalcor meetings since Nalcor was established in 2006, I believe, it was. And, typically, you'd have a quarterly meeting, which would be four per year. So throughout the decade when we left, you'd expect 48 meetings.

I think we were at 102 and 104, and they would've been extremely backend loaded with respect to when we were going through the sanction process. So we would've had double the amount of meetings over that period, but when you look at the period in question from 2010 to 2012 –

MR. SMITH: Mm-hmm.

MR. K. MARSHALL: – there certainly would've been an inordinate amount of meetings.

MR. CLIFT: In my notes I recall 70 board and committee meetings in one year. I don't recall which year that was. And it does speak to the volume and the level of (inaudible).

MR. SMITH: And you weren't considering the same information each time, I assume?

MR. CLIFT: On an ongoing basis?

MR. SMITH: Yes.

MR. CLIFT: Each time there would be incremental changes in the information that was made available to us, based on the feedback, based on the fact that further analysis became available and so on.

MR. SMITH: Now, did the board devote any part of its time to dealing with the issues of risk and risk management?

MR. CLIFT: Are you asking that of me?

MR. SMITH: Anyone.

MR. CLIFT: Yes.

MR. SMITH: Mr. Marshall.

MR. K. MARSHALL: In discussion, it was a common area of discussion. I mean, everything that the board discusses is, in essence, an issue of risk management.

MR. SMITH: Okay.

MR. CLIFT: And one of the discussions that we had, again, in the area of good governance, was Mr. Shortall and I had this discussion over a number of years. It has become practice in Canada that the whole identification of risk and the development of risk registers has moved somewhat from the Audit Committee and, occasionally, is resident in Governance Committees, and we did find that our orientation towards risk and the amount of time, the attention to detail continued to increase as we moved forward. And there were specialized staff people appointed that were designed to develop risk registers. Not just for major project but for all the various things that the organization was involved in.

MR. SMITH: Yeah, and –

MR. CLIFT: So it's a higher level of attention to detail in the area of risk.

MR. SMITH: So, with respect, again, I don't like to pick on your, Mr. Clift, but it's a governance issue and –

MR. CLIFT: Yes.

MR. SMITH: – the issue that comes to mind is whether or not the board was solely responsible for risk management.

MR. CLIFT: We would be acting on the information that was presented to us and we would be considering that in the context of whether or not we thought it was complete. Whether or not there were things that also needed to be identified that may not have been identified at that time. And advocating for more detail as we moved forward.

MR. SMITH: And in part of risk management, would that include the retention of experts to isolate and develop –

MR. CLIFT: Yes.

MR. SMITH: – strategies?

MR. CLIFT: Yes.

MR. SMITH: Okay.

MR. CLIFT: When I referred to a risk register earlier, that was my more general reference.

MR. SMITH: Now, does a risk register – is that like a physical document that has been –

MR. CLIFT: That's what you would move towards over time. You would like to have a complete – well, complete in the sense that, at any one point in time, it might seem complete. Things can change fairly quickly. So, you would be constantly updating something like that, I would expect.

MR. SMITH: Now, did Mr. Martin or Mr. Bennett, either one of both, did they regularly summarize and discuss the risks that were being identified to the project team and to executive? Did they bring that to the board?

MR. CLIFT: To the board? Yes.

MR. SMITH: Yes. And I noted that in some of the exhibits yesterday, there was reference to some of those risks, specifically, the – and I think you addressed them, but they did mention the labour availability and the issue of labour productivity. Okay.

MR. CLIFT: And labour continuity.

MR. SMITH: And continuity.

MR. CLIFT: Yes.

MR. SMITH: And when one looks at those risks, how would you identify those risks? I mean, we – you know, there’s been a lot of suggestion about tactical risk and strategic risk. Where does the, if you will, the vagaries of labour fall?

UNKNOWN MALE SPEAKER: Tactical.

MR. SMITH: And what about the productivity?

MR. SHORTALL: Same.

UNKNOWN MALE SPEAKER: Same, yeah.

MR. SMITH: Okay.

Now, when you, you know, consider the risks that were, I believe, identified at some point in time of – quote, unquote – the strategic risk, et cetera, one of the things that was brought forward by counsel for the Commission was the concept of P1 level for scheduling. Okay? And there didn’t seem to be a degree of understanding, you know, that P1 was being sanctioned.

Is it possible that P1 was a result of all the strategic risk going badly? Is that a possibility? That the P1 was found to effectively be the result of strategic risks that were identified going horribly wrong?

MR. SHORTALL: I have no idea.

MR. SMITH: Okay. You have no idea.

MR. SHORTALL: No.

MR. SMITH: Okay.

MR. K. MARSHALL: That would be speculative on our part.

UNIDENTIFIED MALE SPEAKER: Yeah.

MR. SMITH: Okay.

MR. K. MARSHALL: Again, you would stress – any level of risk you would stress all your

factors – the – to, you know, to – in the worst-case scenario it happens, but I can’t comment on that specifically, the report yesterday, as we said.

MR. SMITH: One of the strategic risks that I believe has been identified is the weather windows. Okay? That, I understand, was a strategic risk.

Do you, as a board, recall taking any steps or any measures to deal with the risk of missing a weather window for the project?

MR. SHORTALL: I guess the – I think we authorized Astaldi to build that –

UNIDENTIFIED MALE SPEAKER: Canopy.

MR. SHORTALL: What is it called?

UNIDENTIFIED MALE SPEAKER: I think we called it a canopy.

UNIDENTIFIED MALE SPEAKER: The dome.

UNIDENTIFIED MALE SPEAKER: The dome.

MR. SHORTALL: What’s it called?

UNIDENTIFIED MALE SPEAKER: The dome or a canopy.

MR. SHORTALL: The dome, yeah, to build a structure over the powerhouse to enclose the works inside and also hang big cranes to move big heavy equipment and concrete and stuff around and protect the workers from the winter weather so that they could continue to work through the worst of the Labrador winter.

MR. SMITH: Did the board take any action even prior to sanction to deal with some of the critical processes that might be affected by bad weather or poor weather?

MR. SHORTALL: I can’t recall in detail. I know we had a lot of it – discussions around it – but can you –?

MR. CLIFT: I recall looking at the critical path for the project and thinking about various

junctures and where there may have been challenges to the path. I don't recall a specific as per your question.

MR. SMITH: Okay.

I'm wondering whether or not, prior to sanction, there was any efforts to – for excavation or for some of the earthworks being done earlier, prior to sanction.

MR. SHORTALL: Oh yes, after Gate 2 there was – yeah, we did some early works after Gate 2.

MR. SMITH: Do you recall what they were?

MR. SHORTALL: Well, I think they're around access roads, maybe some clearing in the –

MR. CLIFT: Clearing of trees and things.

MR. SHORTALL: – reservoir. Access roads for sure. It's – you know, to get things so that once it was sanctioned we could get up to speed quickly.

MR. SMITH: And did bulk excavation come to mind?

MR. SHORTALL: Excavation of what?

MR. SMITH: Bulk – B-U-L-K – excavation. As part of the –

MR. SHORTALL: Quite possibly, yeah. Quite possibly.

MR. SMITH: With respect to – I think there was some indication in terms of the tactical risk, at least from your perspective, on labour availability and labour productivity. There was some discussion yesterday from you – I believe it was Mr. Clift that actually raised it – that you upgraded the camp facilities to assist in the productivity question, is that correct?

MR. CLIFT: Correct, yes.

MR. SMITH: Can you recall any other things that were done? I think you mentioned one more, and if I'm not sure – not mistaken it was you were monitoring some of the projects that had a lot of Newfoundland people engaged.

MR. CLIFT: That's right. We were thinking about when the completion dates might be and as various stages of projects close, certain types of workers become available, whether it's sheet metal workers or steel workers or whatever, so you would be looking at other projects and thinking about what stage of the construction was, how many people might become available, what building trades would've been represented within that group? Trying to satisfy yourself that there would be enough labour available in a particular demonstrated trade that would be of – required by us.

MR. SMITH: Okay.

And what about working with – and I'm just looking at other opportunities that you had. I think you mentioned something about the Hebron arrangement and your bargaining – your collective bargaining that was being done with your – with the workforce?

MR. CLIFT: I think we were in consultation with the CEO, moving to get life of project labour terms in place so that we could mitigate against strikes and things like that. Or losses of productivity associated with the work stoppages.

MR. SMITH: Now – and you also mentioned yesterday, in terms of labour productivity, of shifting the burden of that risk to the contractors.

Could you explain what you meant by shifting the burden to the contractors?

MR. CLIFT: Are you sure that was my comment?

MR. SMITH: Well, it was –

MR. SHORTALL: I think it was my comment.

MR. SMITH: It could – might have been – it might have been yours, Sir –

MR. CLIFT: Yeah, I think it was Mr. Shortall's comment.

MR. SMITH: – I'm sorry. I didn't –

MR. SHORTALL: I think – and I wasn't – I'm not 100 per cent sure we did this, but I would

have expected one strategy you try to do when you're – is shift the risk to someone else, right?

MR. SMITH: Yeah.

MR. SHORTALL: So you – in the contracting, you would try and take the productivity risk and shift it to the contractors by placing a fixed-price contract on the work. So if the work doesn't get done productively, the problem is the contractor's, not the owner's.

MR. SMITH: Now, one of the other strategic risks was meeting the concrete pouring schedule. Do you recall if the board had any involvement at all in managing or approving the management of the concrete pouring schedule?

MR. SHORTALL: Do you?

MR. K. MARSHALL: No, I just recall it being discussed and there was concern over weather windows and, again, that the contractor had been working on procedures, technologies to ensure that they got as much done before the weather window – 'cause Labrador, you can certainly count on – the one thing you can bank on is a cold winter – and also that it was the contractor's, kind of, premise – their original bid to build the dome over the powerhouse such that they could enclose, protect from weather elements and also, I guess, use technologies to pour concrete in adverse weather conditions.

MR. SMITH: And do you recall, specifically, whether or not the concrete objective – I think, if I'm not mistaken – was – several thousand cubic metres a year was achieved.

MR. K. MARSHALL: I can't recall, specifically, the achievement percentage. Tom?

MR. CLIFT: No, I do recall it being a little less than anticipated at the beginning and discussions around – or at least maybe we were given information around what the mitigation strategies might have been to increase that productivity, but I certainly don't recall the numbers or the percentages.

MR. SMITH: But in any event, the chief executive or the project management team leader would bring these issues –

MR. CLIFT: Yes.

MR. SMITH: – to the board for discussion.

MR. CLIFT: Yes.

MR. SHORTALL: Oh, yeah.

We absolutely discussed concrete –

MR. CLIFT: Yeah.

MR. SHORTALL: – pour a lot.

MR. CLIFT: Yeah.

MR. SHORTALL: Yeah.

MR. SMITH: And did Mr. Martin or his team, particularly Mr. Bennett, have any conversations or representations to the board that the \$6.2 billion projected number would – or could – increase?

MR. K. MARSHALL: At what time? I'm just –

MR. SMITH: At – around sanction.

MR. K. MARSHALL: It was always a risk; I think we knew that.

MR. SHORTALL: Oh, yeah.

I mean, we had lots of discussions around the risk of overruns.

MR. SMITH: Okay.

So – and in terms of those discussions, would you – do you recall if Mr. Martin identified them, or categorized them as strategic, tactical and other types of risk, or was it just a risk discussion?

MR. SHORTALL: It was more just a general, specific risk-by-risk assessment and not categorized in buckets.

MR. CLIFT: So – no, probably categorized by priority. The larger –

MR. SHORTALL: Yeah – the –

MR. CLIFT: – the anticipated risk –

MR. SHORTALL: Oh, sure – yeah, it would be graded –

MR. CLIFT: – they would – they would have been graded in advance –

MR. SHORTALL: – higher risk to lower risk.

MR. CLIFT: – for the discussion.

MR. K. MARSHALL: And I think as we saw this morning, we had a 350-plus-page risk assessment put in front of us which would not have been expected to be a board document, but the summaries out of those risks and the key risks certainly would have been brought and discussed and debated with it at the board level.

MR. SMITH: And I don't know who is the appropriate person to address this to but there seems to be a little confusion over the issue of how the red meat syndrome applies to the cost, particularly in relation to the identifiable amount for the capital cost. And what I'm interested in is have your views as to whether or not the red meat applies only to contingency or does it apply generally to the capital cost; the red meat syndrome which is effectively putting out into the public –

MR. SHORTALL: Yeah.

MR. SMITH: – the full cost of what you know to be the full cost.

MR. SHORTALL: Right.

So it would apply to the total cost number that gets into the public domain.

MR. SMITH: Okay and then –

MR. SHORTALL: And it wouldn't be broken down between the actual expected cost and contingencies, it'd just be one number.

UNIDENTIFIED MALE SPEAKER: Just the one.

MR. SMITH: Yeah.

And I guess, finally, I'd like one of you to describe or give us an overview of the Emera arrangements. It's been a lot of discussion, both

prior, Tom, to your attendance at these meetings or these – at the Commission hearings and otherwise and I'd like your understanding, I haven't heard anybody ask that question yet so I wanted to find out what your understanding is of the Emera arrangements –

MR. SHORTALL: Okay.

MR. SMITH: – because it's important to the (inaudible).

MR. CLIFT: I (inaudible).

MR. SHORTALL: No, I'll take that one. Yeah.

MR. CLIFT: Yeah.

MR. SHORTALL: Okay, so the Emera arrangement – there is a lot of confusion around it. Even in this Inquiry the current CEO made the statement that Nova Scotia is getting the power for free, but that's ridiculous. They're not.

So here's how the Emera arrangement works. There's two pieces to it; one is fairly straightforward. It's an investment there Emera is making in the Labrador-Island Link. The only complicated piece about that is the way we structured the Labrador-Island Link entities by inserting a limited partnership. And the reason we did that was that Emera is a taxable entity, Nalcor is not.

We didn't want Emera's taxability – taxable status – tainting our non-taxable status. So we created the limited partnership to take the equity interest of both Nalcor and Emera. And when I say Emera or Nalcor, I mean Nalcor and all its subsidiaries and Emera and all its subsidiaries. So we take the equity interest in as limited partnership notes, and then when the profit is being distributed from that entity, it goes out as partnership taxable income to the partners. So if one partner's taxable, fine; and if the other one's not taxable, fine. They're not tainted. Lawyers will understand this because it's the same as in a legal partnership. So that's the easy piece.

The more complex piece is the Maritime Link. When you get through – go through all the agreements surrounding the Maritime Link and reduce them to their essence, what the Maritime

Link is is a Power Purchase Agreement between Emera and Nalcor. So Nalcor's going to supply X amount of power for 35 years in return for the dollar value that Emera invests in the Maritime Link.

So it's a non-monetary transaction for accounting purposes because Emera's paying for the Maritime Link and they're pre-paying for the power. So they're not getting power for free; they're actually pre-paying for the power by building the Maritime Link and giving it to Nalcor. Because – excuse me – if you also look through all of those agreements, you'll find that Nalcor has all the rights of ownership of the Maritime Link from day one. We have all the rights, obligations of ownership from day one.

And for accounting purposes, the Maritime Link is recorded as an asset in Nalcor's balance sheet. Most people don't know that. It's in the capital assets; \$1.7 billion at the end of December 2017 with an offsetting liability called deferred revenue, which is the – sorry, deferred liability, which is the value of the power that will be delivered over the next 35 years. So it will be drawn down as the Maritime Link is depreciated.

So the complicating factor in the deal is that it's a non-monetary transactions – barter, basically, but they are pre-paying for the power. And we deliver the power or Nalcor delivers the power when the plant comes on and so it's a Power Purchase Agreement. The Maritime Link is an asset of Nalcor, not Emera, and that's the deal.

MR. SMITH: With respect to that, is the transmission limited to just what you're giving over the next 35 years?

MR. SHORTALL: Oh no, the Maritime Link is a fantastic asset and it makes this deal, the whole structure, so attractive. And none of this attractiveness shows in the CPW calculations that we've been talking about because the Maritime Link has a capacity of 500 megawatts. We're delivering to Emera, I think it's 160. So the remaining balance of that capacity is available to Nalcor for free for taking excess power from Muskrat Falls and delivering it to the border of Nova Scotia for sale.

MR. SMITH: Are there any transmission tariffs?

MR. SHORTALL: No transmission costs on that piece. If we decide to sell it into New England, for instance, we've got arrangements made with Emera and with New Brunswick to transmit the power to the US border, but we would pay for that as we use it.

MR. SMITH: I believe that's all – just give me one second. Yes, that's all.

Thank you very much, gentlemen.

MR. K. MARSHALL: Thank you.

MR. SHORTALL: Thank you.

THE COMMISSIONER: Okay.

Kathy Dunderdale?

MS. E. BEST: Good afternoon, I guess it is now. I'm Erin Best; I am counsel for Kathy Dunderdale.

I'm wondering if I'm going to fit my questions in, in 15 minutes or so.

THE COMMISSIONER: Did you want to – if we start, and then when you feel it's an appropriate place to break, we can break because we have about 15 minutes.

MS. E. BEST: Sure. That sounds great.

Thank you.

So, yesterday, Commission counsel asked you all about shareholder relations strategy and communications with government, so I want to go back to that – excuse me.

In your response, one of you mentioned the energy corporations act and I'd like to bring that up. I think it's in Exhibit P-00432. Now, this was the act that was in place from 2008 to 2010. Probably, the subsequent one would be more accurate, but the sections that I want to look at here today are the same.

So if we can go to section 5.1. No, that's 5(1) so if you can keep going we'll get to 5.1. There you go.

So you see there in 5.1 – if you can take a look – that's a section that requires an annual general meeting that's open to the public. I'm wondering if you can tell me more about that meeting: How did it come about, what happens at this meeting, who's there, that sort of thing. I think –

UNIDENTIFIED MALE SPEAKER: Gerry.

MR. K. MARSHALL: I got it.

With respect to – this came about, and I had never actually seen this direct writing, but we had brought this process in when we developed Nalcor as a whole. And there was an effort, again, as consultation with the province, to make sure that the organization was more transparent, more accountable.

And while Nalcor previously had been releasing these statements on an annual basis as an organization, recognizing, as Mr. Shortall indicated, the financial realities of what we foresaw with respect to needing to get financing for the Muskrat Falls development and for all of the other activities, that this organization: (a) needed to be more financially responsible and positioned, but also more publicly accountable and transparent as well.

So this meeting was held, you know, outside of our regularly scheduled board meetings. But on an annual basis we would host at a local hotel. The chair and I hosted a few. I'm not sure if Mr. Styles hosted but others did. The CEO and the CFO and other senior executives would present to the public. And it was an open invitation to any and all and to present the operations of the last year, the results from the last year in all the various lines of businesses and the progress with respect to all the activities that were going on in the organization.

Generally speaking, you know, I can't recall the timing, but we always ran over. And we also had an open question period at the end which we had an hour allocated for and it always went to about four hours. And the, you know, the issue was we were there to respond to the public and make

sure that the issues and concerns were addressed.

MS. E. BEST: Thank you.

So you say an open question period, so you mean anyone who was there could ask any question that they wanted?

MR. K. MARSHALL: Very much so.

MS. E. BEST: Thank you.

And this, these meetings, these public meetings, these occurred during the pre-sanction period?

MR. K. MARSHALL: Yes.

MS. E. BEST: Okay.

And I understand or I've heard that there was – actually, I watched a video of one of these meetings, actually, a meeting during the pre-sanction period. And I heard that there was also a meet-and-greet afterwards where the public could meet with –

MR. K. MARSHALL: Yes.

MS. E. BEST: – the board as well as Nalcor employees.

MR. K. MARSHALL: Yes.

MS. E. BEST: And I think it was mentioned that there were quite a lot of Nalcor employees who were actually present at that meeting.

MR. K. MARSHALL: Well, they were proud of the organization and they wanted it to basically – while they live and breathe the intricacies of what they were going through on a daily basis, this was like a – you know, it was a public town hall and they were invited along with members of the public, as long as, you know, they were – you know, if it was approved by their supervisors, et cetera. But they was – it was a matter of pride to see what exactly the – I work in my corner but what is going on in the organization as a whole.

MS. E. BEST: Okay.

And I understand that most or all of the board was present.

MR. K. MARSHALL: Yes, whoever was in town generally was present.

MR. SHORTALL: Yeah.

MS. E. BEST: Thank you.

UNIDENTIFIED MALE SPEAKER: Right.

MR. SHORTALL: I missed one or two, but I was there mostly.

MS. E. BEST: Thank you.

And as I said, I watched a video of it. So at least some of them were taped and I believe live webcasts, is that right?

MR. K. MARSHALL: They were, yes.

UNIDENTIFIED MALE SPEAKER: They were.

MS. E. BEST: Thank you.

So would you consider that to be part of the shareholder relations strategy? Sometimes we talk about the shareholder being the Government of Newfoundland and Labrador, and sometimes we talk about the shareholders being the people of the province. But, regardless of that, would this be part of the shareholder relations strategy?

MR. K. MARSHALL: Certainly, and I mean the shareholder would have been well aware of the – and I spoke with – in my time as chair I would speak with the – not the premier but with the minister of Natural Resources and ensure that they were invited. I can't recall whether they attended or not, but there was always an open line of communication between, you know, this AGM is coming and if you feel that it's significant, it's something that the organization is quite proud of.

MS. E. BEST: Okay.

And, obviously, it's part of the shareholders relation strategy in terms of –

MR. K. MARSHALL: Yes.

MS. E. BEST: – relating with the public. And, also, the press were there of course, right?

MR. K. MARSHALL: Very much so.

MS. E. BEST: Thank you.

And in section 5.2(1) there it talks about a report that's put together by Nalcor. And you can see in 5.1, I think (b), if we go down a little bit – sorry 5.2(b) down a little bit further – that the board participates in the creation of that report. And so I just wanted to – I don't think it was really mentioned or described fully yesterday that that report actually goes to the minister. Is that right?

MR. K. MARSHALL: Yes, on an annual basis. I think it was called the public accountability report, as I recall. And I can't recall the exact title.

MS. E. BEST: Okay.

MR. K. MARSHALL: But it was a report that went to –

MR. SHORTALL: Yeah, plus there was our annual report.

MR. K. MARSHALL: Plus the annual report. Yes.

MR. CLIFT: Yeah.

MS. E. BEST: Right and that would go to the minister. Correct?

MR. K. MARSHALL: Correct.

MR. SHORTALL: Of course.

MS. E. BEST: Okay, so that would be part of your communication strategy with the minister as well.

MR. K. MARSHALL: Yes.

MR. SHORTALL: Yeah and it would be distributed at the annual meeting as well.

MS. E. BEST: But that's what I was going to get to next,

MR. SHORTALL: Yeah.

MS. E. BEST: Actually, it was made public.

MR. SHORTALL: Yeah, absolutely public.

MS. E. BEST: And I think that that actually – if we go down a bit further in the act there, there we go, at 2, right in the middle. So the report: “The report required under subsection (1) shall be made public by the minister” and it’s presenting the report to the House of Assembly; and other effective means, including electronically.

And wasn’t the public meeting that we were just talking about, wasn’t that – didn’t that occur 60 days after this report was made public?

MR. K. MARSHALL: Correct.

MS. E. BEST: So the public had time to digest this report.

MR. K. MARSHALL: Yes.

MS. E. BEST: And then they could arrive at this public meeting and ask any –

MR. SHORTALL: Right.

MS. E. BEST: – questions that they wanted. And, in fact, they did so. Is that right?

MR. K. MARSHALL: Oh, did they ever.

MR. CLIFT: Yes.

MR. SHORTALL: Yeah.

MS. E. BEST: Thank you.

MR. CLIFT: Yeah, 60 days, that’d be about right.

MS. E. BEST: Okay.

And just a bit further on the topic of communications with government and reporting to government, so Mr. Martin was present on – at the Nalcor board meetings. Correct?

MR. K. MARSHALL: Yes.

MS. E. BEST: Okay.

So part of his role would have been briefing government and communicating with government.

MR. K. MARSHALL: Certainly.

MS. E. BEST: Thank you.

MR. K. MARSHALL: Very much so.

MS. E. BEST: So you’re certainly not denying that reports were made to government.

MR. K. MARSHALL: No. No.

MS. E. BEST: Okay. It just wasn’t you personally.

MR. K. MARSHALL: Right.

MS. E. BEST: Thank you.

Okay, switching gears to a different topic now, Mr. Styles, Commission counsel raised – or perhaps suggested yesterday, I think, that there may have been someone who said that you or – indicated that you might not be qualified to act as the chair of the board. So I wanted to just touch on that for a moment.

I wanted to ask about the role of the chair. I mean, it’s not the role of the chair of a board to be – to have the most expertise on the subject matter, to be that person who’s has the most expertise in the room, is it?

MR. STYLES: I would agree.

MS. E. BEST: Okay.

In fact, do you think it would be more valuable to have experience chairing a board?

MR. STYLES: It was pretty much my role within this existing board. You know, Mr. Shortall and I have talked about this very thing on a number of occasions that, you know, the – this probably is a misconception out there that, you know, the chair is going to be the guy with these, you know, massive skill sets that – and that’s not always the case.

MS. E. BEST: Okay.

MR. STYLES: And yet, you know, I feel that discharging my duties as the chair of the board I did effectively well.

MS. E. BEST: And you had experience chairing boards though, right?

MR. STYLES: Yes, I did.

MS. E. BEST: Yes. Thank you.

Okay, switching gears again I'd like to go to the topic of compensation of board members. And I have a question for Mr. Clift.

MR. CLIFT: Mm-hmm.

MS. E. BEST: Mr. Clift, if other board members had been brought on, people from the Mainland, say, with megaproject experience, and they had been paid for their work on the Nalcor board, would you have also wanted to be paid or would you have continued to act for free?

MR. CLIFT: I think our – as an individual board member, I would expect that we would all be treated equally.

MS. E. BEST: Thank you.

And a separate question: If government had decided, say, for example, at this time to pay the health care boards but not the Nalcor board, how would you have reacted to that?

MR. CLIFT: I, at least as chair, was – of the Governance Committee – was generally aware of what the compensation structure was for all of the boards or some – at some of the boards. I put –

MS. E. BEST: You mean all of the boards within Nalcor? All of the boards –

MR. CLIFT: No, within government. It was my understanding that there were three tiers based on – I'm not sure what the criteria were to be a tier one; presumably, importance, relevance to government, those kinds of things.

MS. E. BEST: Mm-hmm.

MR. CLIFT: And we were aware that some were compensated and some weren't and we didn't really spend a lot of time thinking about how others were compensated.

MS. E. BEST: Okay.

MR. CLIFT: And, quite frankly, we were much more concerned, in a relative sense, about making sure we had the right complement –

MS. E. BEST: Right.

MR. CLIFT: – as opposed to the compensation.

MS. E. BEST: I think you know what I'm getting at, which is that if the Nalcor board is paid, then how could government not pay all the tier-one boards? Would that be right or do you think they should've been paying all the tier-one boards?

MR. CLIFT: I'm not sure exactly which boards are a part of that group. I think that generally government spends –

MS. E. BEST: Take the health care boards for an example.

MR. CLIFT: – expects a lot from the people who are on the tier-one boards. And that may have ramped up even in recent times, relatively speaking.

MS. E. BEST: Okay, so they expect a lot. So I'm gathering what you're saying is that you feel that these tier-one board members should be compensated.

MR. CLIFT: I think each individual circumstance – it would be hard to compare, for example, the amount of activity on the workplace, health and safety, or health board or –

MS. E. BEST: Education?

MR. CLIFT: – education, you know. The frequency of meetings – it's my understanding that most of those other boards meet on a regular basis and it hasn't changed much. I think our situation was very different than others, but whether or not it should been university applied, not really my decision to make.

MS. E. BEST: Okay.

Any idea of the range that would have been paid to the – say, the people with expertise coming on to the Nalcor board that you were requesting, any idea of how much these people would have been paid?

MR. CLIFT: Would have expected to be paid?

MS. E. BEST: Sorry, that's what I mean. In order to get these people to come on to the board –

MR. CLIFT: That was presented yesterday as evidence. We had a matrix developed that talked about what the compensation was on other boards that were either in the similar industry or of a similar vein.

MS. E. BEST: Right.

MR. CLIFT: And that had been detailed.

MS. E. BEST: Right. And I saw – I had a look at that and some of them were around 25,000 to – up to \$110,000 just annual fee.

MR. CLIFT: Right.

MS. E. BEST: Right, plus then a fee to be – and the chair got more.

MR. CLIFT: Right.

MS. E. BEST: Plus then a fee to be on – you're paid to be on a committee, right?

MR. CLIFT: Exactly.

MS. E. BEST: Say, whatever, 5,000 or \$10,000 for each committee.

MR. CLIFT: Right.

MS. E. BEST: And then you're paid a fee for the meetings as well. Is that right?

MR. CLIFT: Yes, I think Mr. Shortall mentioned yesterday it was never our expectation that we would be compensated at that level. Those were private energy companies and the private ones always pay out at a higher level than the public ones.

MS. E. BEST: Well, now I just put to you a range, 25 to 110, but I think that 25 range was in the public sector.

MR. CLIFT: Yes, for some.

MR. K. MARSHALL: Yeah.

MS. E. BEST: Yeah.

Okay. And you said how many people again were on the Nalcor boards in total?

MR. K. MARSHALL: I can't recall the exact number. I know we discussed it a couple of days ago and I direct my question to counsel because we were going on eight here –

MS. E. BEST: I think, Ken, you said this morning that –

MR. SHORTALL: Eight, I think.

MR. K. MARSHALL: There was eight boards but the number of individual –

MR. SHORTALL: No, eight members of – on the board.

MR. K. MARSHALL: No, on the Nalcor board, but a total –

MS. E. BEST: On all boards.

MR. K. MARSHALL: – number of boards for all the boards.

MS. E. BEST: I think you said this morning, actually –

MR. K. MARSHALL: It's in the 30s.

MS. E. BEST: – you said the number 30.

MR. K. MARSHALL: Yeah.

MS. E. BEST: And I won't hold you to that exact number but –

MR. K. MARSHALL: Yeah.

MS. E. BEST: Okay.

And, Mr. Clift – and I'll finish up soon but, Mr. Clift, you mentioned about 70 meetings in a given year –

MR. CLIFT: Mm-hmm.

MS. E. BEST: – for between board and committees. So, I mean, did you ever calculate how much in total it would have cost the province to pay all the Nalcor board members for their entire contribution, say, over the course of a year?

MR. CLIFT: Not as a summary number.

MS. E. BEST: Okay.

MR. CLIFT: No.

MR. SHORTALL: Actually, Derrick would have calculated because they were accruing it, right?

MR. CLIFT: Yes, they were accruing –

MR. K. MARSHALL: Derrick Sturge, yes.

MR. CLIFT: Yes, Derrick Sturge would have those numbers.

MS. E. BEST: I just have another couple of quick questions and I would like to finish up.

I note that, Mr. Shortall, your email that you sent with respect to compensation is P-00396, if we could pull it up really quickly.

MR. SHORTALL: My famous email.

THE COMMISSIONER: That would be tab 96.

MS. E. BEST: I see at the top there – sorry, I don't know the tab number.

MS. O'BRIEN: Eighteen.

THE COMMISSIONER: Thank you.

MS. E. BEST: Thank you.

MR. SHORTALL: Twenty?

MS. E. BEST: Eighteen.

MS. O'BRIEN: Eighteen.

MR. SHORTALL: Eighteen? Right.

MS. E. BEST: I see at the top there that Cathy Bennett was on this email, right?

MR. SHORTALL: Mm-hmm.

MS. E. BEST: And she was chair of the Nalcor board for a time, right, around that time?

MR. SHORTALL: Yes.

MS. E. BEST: Yeah.

So she was supportive of the idea that board members ought to be compensated, Nalcor board members?

MR. SHORTALL: I would think so but I don't think I ever discussed it with her directly.

MS. E. BEST: Okay.

MR. SHORTALL: Did any of you?

MR. CLIFT: Not that I recall.

MR. SHORTALL: Yeah.

MS. E. BEST: Okay.

And Cathy Bennett went to government after that time in 2014 and resigned this past summer. Is that right?

MR. SHORTALL: Mm-hmm.

MS. E. BEST: Yes.

So do you know: Are Nalcor board members paid now?

MR. SHORTALL: Don't know.

MR. K. MARSHALL: I have no idea.

MS. E. BEST: You don't know?

UNIDENTIFIED MALE SPEAKER: Not aware.

MS. E. BEST: So I had a look at the Independent Appointments Commission website last night and under the Nalcor board heading page it says: No remuneration.

MR. SHORTALL: So it hasn't changed.

MS. E. BEST: Thank you.

Those are my questions.

THE COMMISSIONER: All right, I think we'll break here now for lunch and we'll come back at 2 o'clock.

Recess

CLERK: This Commission of Inquiry is now in session.

Please be seated.

THE COMMISSIONER: All right, good afternoon.

Former Provincial Government Officials '03 to '15

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

Good afternoon, gentlemen.

My name is Tom Williams. I'm representing the group known as former government elected officials for the period of 2003 to 2015. And I have just a couple of brief questions. And again, it's mostly focused on the appointment compensation issue, which we seem to have put a fair bit of time in on in your direct testimony and some of your cross.

But I trust that, while we focused on your tenure of Nalcor – and the predecessor Newfoundland Hydro would have been the parent board, I would trust, before Nalcor was established. The appointment process and the compensation process, is that similar for the years that you were on the board as it was for predecessor boards, to the best of your knowledge?

MR. K. MARSHALL: To the best of our knowledge, yes.

MR. T. WILLIAMS: It was.

So this is something that has been inherent with Newfoundland Hydro and its related companies over an extended period of time?

MR. SHORTALL: Probably since the 1960s, would be my guess.

MR. T. WILLIAMS: And there's been no – that you're aware of – and I realize you can only speak to the period you were there. But you're not aware of any substantial changes in that appointment process or that compensation process?

MR. SHORTALL: I'm not.

MR. CLIFT: No, not – I'm not.

MR. T. WILLIAMS: Yeah.

We also –

MR. K. MARSHALL: (Inaudible) –

MR. T. WILLIAMS: – had some evidence in your direct with respect to –

MR. K. MARSHALL: Should we clarify?

MR. T. WILLIAMS: Sure, go ahead.

MR. K. MARSHALL: I should clarify that, through my last period as chair, the Independent Appointments Commission came in. Now, whether – I don't know where that sits, but that was the only differential that came in at any point in time since. Where that sits with respect to approval of ultimate directors, I can't say.

MR. T. WILLIAMS: And I think that the follow-up evidence from Ms. Best was that, in her review, it doesn't appear there's been any changes, at least to the compensation –

MR. K. MARSHALL: Oh, no –

MR. T. WILLIAMS: – process.

MR. K. MARSHALL: – not in the compensation.

MR. T. WILLIAMS: Okay.

In regards to the panelists – and I refer to all members of the panel. You had indicated in your direct testimony that each of the members of the board had participated to some degree in subsidiary boards. Would that be correct?

MR. K. MARSHALL: Yes.

MR. T. WILLIAMS: And we also have some evidence that there was probably in the vicinity of 30 total board members associated with all the boards?

Can you address for me what benefits you would see? I trust that the relationship between subsidiary boards and the parent company would be somewhat interrelated and that there – the interests of the subsidiaries would be, you know, along the lines of the interests of the parent. Would that be a fair assessment?

MR. SHORTALL: Yes.

MR. T. WILLIAMS: Do you see any benefit of having at least some shareholders – some directors, I'm sorry – some directors from the parent company sitting on some of the subsidiary boards for purposes of consistency and for alignment of interests, et cetera?

MR. SHORTALL: Absolutely.

MR. K. MARSHALL: Yes.

MR. CLIFT: And communications –

MR. T. WILLIAMS: And communications.

MR. CLIFT: – to ensure that they had information as required, and if we didn't have it at the subsidiary meeting, we would bring it back subsequently.

MR. T. WILLIAMS: Okay.

MR. SHORTALL: Yeah.

MR. T. WILLIAMS: And in terms of the composition of the subsidiary boards, can you give me a percentage of how many members of subsidiary boards would be members of the Nalcor board. Any rough idea or is it –?

MR. K. MARSHALL: Well, if – and I think Tom would be able to address this better from governance perspective. But we had – at the point of sanction, we had eight, and there was 30-plus members in total for all members – for all boards for the overall organization.

So I'm not sure if that answers your question or not, but in terms of – there was consistency for those members down through most of the subsidiaries, but not all. Those eight did not sit on all eight of the subsidiary boards.

MR. T. WILLIAMS: Go ahead, Mr. Clift.

MR. CLIFT: And our goal would've been to have at least one Nalcor board member on each subsidiary board.

MR. T. WILLIAMS: So – and that's what I'm getting at. So there'd be a mix of new input –

MR. CLIFT: Yes.

MR. T. WILLIAMS: – in terms of new appointees as well as consistency from the existing –

MR. CLIFT: Correct.

MR. T. WILLIAMS: Because there was – there may have been an image created that these subsidiaries may have been merely mirrors of the Nalcor board. That wouldn't be the case?

MR. SHORTALL: No, no, not at all.

MR. T. WILLIAMS: Okay.

MR. CLIFT: No, and there were requirements for independents and super-independents.

MR. T. WILLIAMS: Okay.

With respect to the learning curve that you had mentioned again in your direct testimony – that because of the various interests at Nalcor, there was a certain learning curve for all members of the board, either when you initially came in or during various stages.

Given the fact of your extensive board experience outside of Nalcor – and you've all indicated that you've had fairly extensive

experience – how would you rate the calibre of the advice and the guidance that you would have received either at the initial orientation stages or throughout your tenure on the board from the Nalcor staff and executives?

MR. SHORTALL: I would rate it as excellent.

MR. T. WILLIAMS: Okay, anybody else?

MR. CLIFT: The most detailed and most comprehensive that I had ever been a party to.

MR. K. MARSHALL: I would concur with that.

MR. T. WILLIAMS: Okay, and how far down into the management level would you have occasion to deal with, either from your committee levels or from your board engagement. So obviously, you know, it's fairly – a fairly involved corporation. How far down into that corporation would you have had an opportunity to witness the expertise and the knowledge of individuals?

MR. SHORTALL: Well, on the Audit Committee, we went fairly far down. I mean, mostly at the board level, it was, like, CEO and vice-presidents, mostly. But at the Audit Committee level, we'd go down two or three levels below that so, say, CEO, vice-presidents, directors and at least one level below that.

MR. CLIFT: (Inaudible.)

MR. SHORTALL: Yeah, four.

MR. T. WILLIAMS: And I know there was – or sorry, go ahead Mr. Clift.

MR. CLIFT: And in my experience with Safety, Health and Environment, we would be meeting with – and the senior person in each of those areas would report to the committee. So we would have exposure to director-level, senior-manager-level people.

MR. T. WILLIAMS: Okay.

MR. CLIFT: The lead person in the organization who was responsible for occupational health and safety or environment or whatever.

MR. T. WILLIAMS: Okay.

And your experience would have been the same regardless of the level of seniority of the individuals you were dealing with?

MR. CLIFT: Yes.

MR. T. WILLIAMS: Your experiences – positive experiences?

MR. CLIFT: Yeah – oh, yes. Yeah.

MR. T. WILLIAMS: Okay.

Now, during your tenure – I know it varies to different degrees with each of the individuals on the board – what would you attribute to some of the contributions or enhancements that you feel your tenure on the Nalcor board over all these years has made? I know, Mr. Clift, you can –

MR. CLIFT: In terms of process? Well, in – our goal in governance was to take it from its relative infancy to the best possible, best in class type of governance that one would expect for an organization of that size operating in an environment such as the one we were operating in.

MR. T. WILLIAMS: And how far – were you able to not only design those plans, were you able to implement them as well, to a certain degree?

MR. CLIFT: Just about. There were a couple of limiting factors.

So, for example, when we think about our ability to execute a whistle-blower policy and procedure, we were asked by the provincial government to wait until they were ready to implement theirs before we could implement ours. If I recall correctly, ours was ready in advance of theirs.

So that would have been an item that we would have used as a checklist item to see whether or not we were adhering to best practice. And at that point, we were unable to implement because we'd been asked – and I assume the province was wanting to implement that right across the board. And so until they were ready, we couldn't execute. So there was a couple of things like

that, that we couldn't get to, but the vast majority of things that we strove to achieve, we achieved.

MR. T. WILLIAMS: And with respect to transparency and accountability, were there – had there been any enhancements in those areas?

MR. CLIFT: As Mr. Marshall outlined this morning, the annual reporting, the annual meetings, those kinds of things.

MR. SHORTALL: We took the financial reporting that was sleepy, old Crown corporation and brought it right up to the top level of a public company reporting, including quarterly reports, management's discussions and analysis, annual reports, analysis of every piece of the operating – the operations of the business. It was a vast improvement over what we began with.

MR. CLIFT: With significant insight and input from Mr. Shortall I would regard.

MR. K. MARSHALL: Yes.

MR. T. WILLIAMS: Given the fact that the Commissioner will have an opportunity to make recommendations to government in his final report – obviously, this is an aspect of interest to all and that's why we're concentrating on it today – is there anything that any one of you can identify now that if you were asked to say this is somewhere I think we need to put some attention, whether it be on the reporting, whether it be on the appointment side, whether it be on the compensation side that you think Nalcor and, maybe any other significant Crown corporations could deal – we'll stay away from the others, obviously, but focusing on Nalcor on a go-forward basis.

MR. K. MARSHALL: I'm not sure I can come up with anything. We've been pretty focused with respect to the happenings of the Inquiry over the last few days and in preparation. We're fairly well documented with respect to our request as to, again, what is the ideal situation with respect to the type of board of directors which you want, and in order to get that, the type of compensation that you would expect.

I don't think any of us – we're very pragmatic, as I said yesterday, in realizing the realities of a

Crown corporation. So there's a balance that has to be taken into consideration. So from that perspective, I think we've been forthright.

I think the biggest thing, as we see in the corporation, we feel, under our tenure, has brought the financial reporting miles from where it was, the transparency and accountability miles from where it was, the openness, the annual general meeting process miles from where it was. I think in the larger social context there is a desire for everything to be open and I think that that's, you know, a growing expectation and growing issue that has to be managed.

As to managing the affairs of the corporation yet ensuring that confidentiality of certain information for the benefit of long-term planning and business execution – has got to be factored in. Everybody wants a right to see everything, but that just is a difficult proposition. And – but you can't deny the fact that, you know, things are moving to a more open process and we brought the organization quite a long way. And I think it's still – not that the organization is behind, but I think those demands will continue to be pressed on the organization and others.

MR. T. WILLIAMS: One question that came up this morning or suggestion that was put out by counsel for the coalition – that I want to just go back to it – he stated that there was some suggestion or alleged rumours and it was said out there that you may have been under some undue influence or some pressure to make decisions in relation to this project.

You're all very seasoned professionals and board experienced. Did anybody on this panel ever feel at any point in time during your tenure that you were subject to any undue pressures, influence from anybody inside Nalcor or inside government during your entire tenure on the board?

MR. SHORTALL: Never.

MR. CLIFT: No.

MR. K. MARSHALL: Never.

MR. T. WILLIAMS: Okay.

And I guess it also begs the question in wrap-up as to – we’ve spoken as to what little pay was in recognition of the services provided. Why did you stay with it? I mean you all had long terms, you got busy careers. Why did you stay on a board that you weren’t getting compensated appropriately for?

MR. SHORTALL: Well, I did it to give back to the province.

MR. K. MARSHALL: As did I. And there was no – as we said yesterday, we were – you know, we were making those recommendations in the interest of what it would take. The fact that, you know, some of us were there for 12 years, it was clearly just a pure love of the province, love of the organization’s goals and the long-term future planning for this province. I think any other suggestion would be a folly to consider.

MR. CLIFT: I would agree with my colleague’s assessment.

MR. T. WILLIAMS: Anything else?

MR. SHORTALL: Yeah, I’d add it was also very interesting work.

MR. K. MARSHALL: Yes, it was. As I said, it was a privilege and an honour. It was very interesting.

MR. SHORTALL: It was professionally rewarding to work on it.

MR. T. WILLIAMS: Thank you.

MR. K. MARSHALL: Thank you.

THE COMMISSIONER: Thank you.

Julia Mullaley, Charles Bown.

MR. FITZGERALD: No questions, Commissioner.

THE COMMISSIONER: Robert Thompson.

MR. COFFEY: Good afternoon, gentlemen.

My name is Bernard Coffey. I represent Robert Thompson.

I’m just trying to first of all establish who was chair of the board of directors at various points in time, okay? And I’ll direct my questions, I suppose, to Mr. Marshall initially because you have the longest tenure amongst yourselves.

MR. K. MARSHALL: Longest tenure on the board.

MR. COFFEY: Yes, on the board.

MR. K. MARSHALL: Not as chair.

MR. COFFEY: Correct. Not as chair – oh no, not as chair.

MR. K. MARSHALL: Right.

MR. COFFEY: No, I appreciate that.

So when you joined Newfoundland and Labrador Hydro, I think, in 2004 –

MR. K. MARSHALL: Correct.

MR. COFFEY: – who was the chair?

MR. K. MARSHALL: Dean MacDonald.

MR. COFFEY: And Mr. MacDonald was there until when? Do you know?

MR. K. MARSHALL: I believe 2006, I think.

MR. COFFEY: Okay.

And if it would help, Nalcor itself, as a legal entity, was established October 11, 2007. So do you recall whether Mr. MacDonald was chair – ever chair of Nalcor itself?

MR. K. MARSHALL: I think the record would state definitively but I do not recall. I don’t think he – I don’t believe he was.

MR. COFFEY: Okay.

And then who replaced Mr. MacDonald?

MR. K. MARSHALL: It would be –

MR. CLIFT: John Ottenheimer.

MR. K. MARSHALL: – John Ottenheimer.

MR. COFFEY: And Mr. Ottenheimer was there until when?

MR. K. MARSHALL: 2011, '10?

MR. CLIFT: '10 or '11, somewhere (inaudible).

MR. K. MARSHALL: '10 yeah.

MR. CLIFT: There's a chart that outlines that –

MR. COFFEY: Okay.

MR. CLIFT: – somewhere in this –

MR. K. MARSHALL: Okay.

MR. COFFEY: In the materials –

MR. CLIFT: – in the final number.

MR. COFFEY: – yes, and –

MR. K. MARSHALL: I'm not exactly sure where –

MR. COFFEY: – there may well be. Okay.

MR. K. MARSHALL: Yeah.

MR. COFFEY: And then – and whatever time –

MR. K. MARSHALL: But I know Mr. Ottenheimer was there at Decision Gate 2 in December 2010.

MR. COFFEY: In November 2010 –

MR. K. MARSHALL: Yeah. November, sorry.

MR. COFFEY: – Mr. Ottenheimer was still chair.

MR. K. MARSHALL: Right.

MR. COFFEY: Okay. That kind of places it.

And his successor was whom?

MR. K. MARSHALL: Cathy Bennett.

MR. COFFEY: And she was there until what time? Do you recall?

MR. K. MARSHALL: Sometime early 2012, I think, until –

MR. COFFEY: Yes –

MR. K. MARSHALL: – Terry came in.

MR. COFFEY: I think you're – you're probably spot on.

MR. K. MARSHALL: Yeah.

MR. COFFEY: April or May 2012 would be the time. And she was succeeded by?

MR. K. MARSHALL: Mr. Terry Styles.

MR. COFFEY: Mr. Styles, thank you,

MR. STYLES: June 2012 to February 2014.

MR. COFFEY: And then yourself, Mr. Marshall.

MR. K. MARSHALL: Correct.

MR. COFFEY: Okay.

Now, in communicating with the – the board's communications with the shareholder – and in this context the shareholder, you know, in a practical way would be the Government of Newfoundland and Labrador. Correct? Okay.

Again, I'll direct my questions, at least initially, to yourself, Mr. Marshall, for the same reason. You were there the longest.

Looking back on it now, beginning with Mr. MacDonald, who communicated, from your perspective, on behalf of the board of directors, with the government of the day?

MR. K. MARSHALL: That would be the CEO.

MR. COFFEY: Okay. That would be Mr. MacDonald.

MR. K. MARSHALL: No, the CEO.

MR. COFFEY: CEO.

UNIDENTIFIED MALE SPEAKER: Mr. Martin.

MR. K. MARSHALL: Mr. Martin.

MR. COFFEY: I'm sorry, I apologize. Mr. Martin.

MR. K. MARSHALL: Correct.

MR. COFFEY: And in fact, Mr. Martin – in – I think you predate Mr. Martin, technically.

MR. K. MARSHALL: Yes.

MR. COFFEY: Yeah. All right.

MR. K. MARSHALL: We were involved –

MR. COFFEY: Yes.

MR. K. MARSHALL: A number of us were involved in the selection –

MR. COFFEY: Yes.

MR. K. MARSHALL: – of Mr. Martin as CEO.

MR. COFFEY: And you described that.

So – but when you arrived on the scene initially, it would be Mr. Wells, I think it is?

MR. K. MARSHALL: Correct.

MR. COFFEY: And the organization you went into, it was the CEO's job to communicate with the government of the day?

MR. K. MARSHALL: Yes, that was my understanding.

MR. COFFEY: Yes, okay. And that's what I want to canvass with you really.

And did I understand from your or your evidence – or at least a member of this panel's evidence – though that at times, the communication would occur – instead of through the CEO, it would occur through the chair of the board? Because I believe, for example, you've said, Mr. Marshall, yourself,

that you would have meetings with the premier at times.

MR. K. MARSHALL: The only meetings I had with the premier was the fifth premier for which we served, and that was more concerning the CEO issues. So generally, if I met – and it was exceptionally rare that I would meet with the premier – it would be with the CEO.

MR. COFFEY: Okay.

And I – so – then in dealing with that subject matter, there was – and I'd ask you to cast your mind, Mr. Marshall, back to – I – the early years when you were there – it was initially Mr. Wells did the communications with the government. After Mr. Martin was in place, it would have been Mr. Martin.

MR. K. MARSHALL: Correct.

MR. COFFEY: And it was your observation, I take it – and I'm not getting to the time you were the chair, right? Before that, it was your observation, understanding that communications with the shareholder occurred primarily, if not exclusively, through the CEO?

MR. K. MARSHALL: Absolutely.

MR. COFFEY: Okay.

And you did – I did ask you about your – briefly about your meetings with the premier, right, you know, premiers. How about ministers?

MR. K. MARSHALL: Ministers, again, the – from a ministerial level, that would be primarily the CEO's responsibility. And I had met with, again, Minister Dalley and Minister Coady, again, with the CEO at all times. Just in terms of getting them up to speed. And – 'cause again, I was also getting up to speed in terms of a chair's responsibility –

MR. COFFEY: Yes.

MR. K. MARSHALL: – bringing them up to speed with respect to the history. But that was nothing formal, more so on a, kind of, an issue-by-issue basis and familiarizing them with the issues of the organization.

MR. COFFEY: Okay.

Now, the issue of the number of members on the board and the background slash qualifications of members on the board and remuneration for members of the board were live issues, I take it, during all your tenures?

MR. K. MARSHALL: Oh yes.

MR. COFFEY: Is that – it's true of everybody?

MR. SHORTALL: Mm-hmm.

MR. COFFEY: Is that – and we have had references to – you've been referred to certain exhibits. One is P-00395 – in particular, Mr. Clift was referred to that by Ms. O'Brien – and P-00401, I believe.

If we could bring up, please, P-00401?

MS. O'BRIEN: Tab 23.

MR. COFFEY: Oh, thank you.

MR. SHORTALL: Is that 22?

THE COMMISSIONER: Twenty-three. Twenty-three.

MR. SHORTALL: Twenty-three. Thank you. Oh, that. Yeah.

MR. COFFEY: Now, Mr. Clift, this is an email, September 26, 2012, to Robert Thompson from yourself. It has an attachment – a scanned attachment. And if we can just scroll down through that, please? And to the next page. Oh, right there. Go back up a bit? Right there.

On page 2, the original message is from buslab@mun.ca, sent September 7, 2012, 10:25 a.m., to yourself. And I take it that this would've been the scan of the September – sorry, the 2008 letter you wrote to Mr. Ottenheimer?

MR. CLIFT: Right.

MR. COFFEY: So back on September 7, 2012, you actually scanned it and sent it to yourself?

MR. CLIFT: So that I could send it to him.

MR. COFFEY: Okay.

And if we can go – just go back up a bit, please? And do you – about just over three weeks later sent it to Mr. Thompson?

MR. CLIFT: Yes.

MR. COFFEY: On September 26, 2012.

Now, if we could, again, please, scroll to the letter itself, which is pages 3, I believe, through 6.

Now, the letter is dated – it's on Energy Corporation of Newfoundland and Labrador letterhead – September 2, 2008, addressed to John – Mr. John Ottenheimer, Chairperson of Newfoundland and Labrador Hydro. In fact – is there any reason you addressed it to him at Hydro as opposed to at Nalcor or the Energy Corporation of Newfoundland and Labrador?

MR. CLIFT: Not that I can think of.

MR. COFFEY: Okay.

MR. SHORTALL: Actually, Tom – you're referring to an "in-camera session of the Board of Directors" of Hydro. And at the time –

MR. CLIFT: Right.

MR. SHORTALL: At the time, the Governance Committee may have not been moved up to –

MR. K. MARSHALL: Right.

MR. SHORTALL: – (inaudible).

MR. COFFEY: Okay, so –

MR. CLIFT: (Inaudible.)

MR. COFFEY: – there may be a technical reason, is what you're saying –

MR. CLIFT: Yes.

MR. SHORTALL: Yep.

MR. COFFEY: – Mr. Shortall, which is fair enough.

And – now, that – and if I can just go – I’m sorry – scroll back down again, please? Just a little bit. No, not down, I’m sorry – up. I apologize.

Okay, September 2, 2008. The – not all of the board minutes have been entered as Exhibits here, okay, there are quite a number of board minutes – quite a number of meetings and therefore minutes, as you pointed out. But there is a – there was a board – there are minutes for a board meeting – go June 22 – I’m sorry, 26, 2008. It was the seventh ECNL board meeting.

And in paragraph 89, which is in camera: “Messrs. Sturge and Chamberlain returned to the meeting after conclusion of an in camera meeting.” And then: “The Chair advised that the issue of Board compensation is a critical issue that needs to be addressed as currently there is no mechanism in place for the remuneration of the Board of Directors.”

Okay, so that’s back late June 26, 2008. And, you know, amongst the minutes we have – made available to us, that’s the first reference to compensation that I can find, okay? So I’d like to direct, really, these questions to Mr. Marshall, Mr. Clift and Mr. Shortall. Now, Mr. Styles, I can leave you out of it for now because you didn’t come along until years later.

Gentlemen, what is your first recollection of the issue of qualifications and compensation being raised for board members?

MR. K. MARSHALL: My first – I can comment on this specific note that you suggested here, but it was fairly early in the tenure. It was – it’s always been an issue with respect to this organization and again, as we say, many Crown corporations.

MR. COFFEY: Yeah.

MR. K. MARSHALL: And, again, as Mr. Clift alluded to earlier the tier 1, tier 2, tier 3.

This particular issue was one that the chairman at the time, Mr. Ottenheimer, was fairly engaged in and fairly active with respect to raising the issue with us. But I suggest that at that point in time, in June 26, the issue – and you read – as Mr. Shortall just indicated, that the reason it’s

addressed to the chair of Newfoundland and Labrador Hydro, as he pointed out, is our committees were at the Newfoundland and Labrador Hydro level before they were moved up.

UNIDENTIFIED MALE SPEAKER: Mm-hmm.

MR. K. MARSHALL: And the minutes that you’re referring to are from an Energy Corporation, Newfoundland and Labrador. So the issue, at that point in time, is – and again recall in general and not specific – was that Newfoundland and Labrador Hydro had compensation for its board of directors and you can make positions with respect to the level of compensation. But at Energy Corporation, Newfoundland and Labrador there was zero compensation. So the risk was that you could be bringing people into the board at the parent organization for zero compensation yet they would be receiving pay for the subsidiary organization, which is a little bit backwards in terms of how you’d expect your board compensation to take place depending on the level of director that you’d like.

MR. COFFEY: Okay.

And for the three of you, I’ll pose this question: How did you feel about the level of compensation at that time for a directorship in the Newfoundland and Labrador Hydro Corporation? Newfoundland and Labrador Hydro – how did you feel about the level of compensation? I mean, Nalcor it was zero.

MR. K. MARSHALL: Yeah.

MR. COFFEY: How about at the Hydro level?

MR. K. MARSHALL: Personally, as I said, I wasn’t there for the money. It was there for the purpose and the goal. But it was – the money was raised as an issue with respect to the imbalance across organizations and if we wished to attract the level of skill set that we required that this would have to be addressed.

MR. COFFEY: Okay.

And so, I’m not suggesting that there were never before June or September of 2008 any

communications with the shareholder about compensation, but is this your first memory of board members, finally in September of 2008, putting pen to paper and making – taking a formal stance on it?

MR. SHORTALL: I think so.

MR. K. MARSHALL: I wouldn't be able to say definitively.

MR. CLIFT: There may have been – not to this level of detail –

MR. COFFEY: Yes.

MR. CLIFT: – this would've been the first complete detailed comment from us on this topic – or these topics, I guess.

MR. COFFEY: And you said “us” because although you signed the letter – was it done with the consensus of the remaining other board members, including the two of yourselves?

UNIDENTIFIED MALE SPEAKER: Yes.

MR. COFFEY: Mr. Shortall, would you have concurred with –?

MR. SHORTALL: Oh, yes, absolutely.

MR. CLIFT: This would've been discussed at the Governance Committee level and subsequently at the board level.

MR. SHORTALL: In fact, it refers to the majority of the committee and board members are quite concerned, so it's (inaudible) –

MR. COFFEY: Okay, so Mr. Clift was tasked with drafting a letter and a –

UNIDENTIFIED MALE SPEAKER: Yeah.

MR. CLIFT: Yes.

MR. COFFEY: – presumably sending it –

MR. K. MARSHALL: Yeah, as the chair of the Governance Committee.

MR. CLIFT: Yes.

MR. COFFEY: And so it goes to Mr. Ottenheimer, who is in fact one of yourselves. And in fact, he happens to be the chair, but he is one of yourselves. Do you know what happened with the letter?

MR. K. MARSHALL: No.

MR. CLIFT: No, I do not. We were told by the chair that – he told us that he would be discussing it with government –

MR. COFFEY: Yes.

MR. CLIFT: – and that he had.

MR. COFFEY: Okay.

And in furtherance of that – again, I apologize for not having identified this, Mr. Commissioner, you know, beforehand. But if one checks ones records, or the Commission's records, you'll find there are minutes of the tenth ECNL board meeting, dated October 8, 2008, which is about just over three months after the initial reference by Mr. Ottenheimer, bringing it up, and just over a month after your September 2 letter, Mr. Clift.

And it reads as follows, paragraph 114, Board Governance: “T. Clift advised that the issues of Board composition and Board compensation remain outstanding and was seeking an update on the resolution of these matters. The Chair reported that a meeting was scheduled with this week with the Minister but has been postponed to October 14, 2008. The correspondence drafted by T. Clift will form the basis of the discussions with the Minister regarding Board composition, size and compensation.”

So that accords with your memories, I take it?

UNIDENTIFIED MALE SPEAKER: Yes.

UNIDENTIFIED MALE SPEAKER: Yes.

MR. COFFEY: Now, gentlemen, the Compensation Committee which was eventually formed, its task was to deal with compensation for whom?

MR. K. MARSHALL: The organization at the executive level and below.

MR. COFFEY: Okay, so not for yourselves?

MR. K. MARSHALL: No.

MR. CLIFT: No.

MR. COFFEY: Okay. That's ...

MR. K. MARSHALL: I would say, if it was for ourselves I did a pretty poor job as the chair of the compensation commission.

MR. COFFEY: And as – again, following on in relation to – in late 2008 there was a twelfth ECNL board meeting, November 21, 2008, and that's paragraph 128, Governance Committee. And T. Clift – Mr. Clift “circulated the Board Committee Structure table at the meeting.” And it goes on to detail what you were telling him.

But then it refers to the following: A compensation committee was required for Newfoundland and Labrador Hydro and also for the corporation. Critical issue with board committee is having a sufficient number of members on the respective boards to populate these committees. Chair advised that he met with the Minister of Natural Resources to discuss several board-related concerns including board composition, issue with being unable to fully staff committees and board compensation, and expects to receive some news on these issues soon.

And, finally I'm going to refer to one more meeting, and then ask you – I'll pose a question – that there's a thirteenth Nalcor board meeting, January 29, 2009, the paragraph number is 161, “In Camera,” and after talking about telephone reception issues, you know, for board meetings, there's a sentence in the middle of that paragraph that says, “Secondly, the Chair confirmed once again that the Board continues to be concerned about Board and Board committee composition and size and Board compensation.”

And – there are other things in that paragraph, but they don't relate to this issue.

Now the question I have is this – is that, again, based on my review of the minutes available, that's it. That's the last – I'm not saying there isn't any other, but based upon what I've been

able to find – that's the last reference in the board minutes to this issue.

So, do you recall whether or not it was discussed at board meetings afterward and not minuted? This is early '09.

MR. K. MARSHALL: And then you have the '12, 2012.

MR. COFFEY: Oh yes, and I'll get to that, I'm going to get to that in a moment. But –

MR. K. MARSHALL: I can't recall.

MR. COFFEY: You can't recall.

MR. K. MARSHALL: Now again, in the backdrop, the issue was particularly – and not from a compensation perspective per se – as I said, Mr. Ottenheimer was very active in this role with respect to it being an issue. but it was one of, you know, thousands of issues, which were being dealt with. But that was also at the time whereby the number of organizations in the energy corporation – kind of – grouping, in terms of moving forward had to be staffed.

So it was more about staffing and so I would certainly not suggest again that there was no action with respect to these initiatives. There was an issue of making sure we got the boards complemented, and we were submitting lists in terms of – informal lists, of people who we felt would be qualified –

UNIDENTIFIED MALE SPEAKER: Yup. Yup.

MR. K. MARSHALL: – to be considered, to provide to.

MR. COFFEY: Who would you submit them to? That was a question I had, because you referred to that, who would you submit those lists to?

MR. K. MARSHALL: That would be in to the chair, as I recall.

MR. SHORTALL: Yeah, I can't recall.

MR. K. MARSHALL: It was informal discussion, taking names –

MR. SHORTALL: Okay.

MR. K. MARSHALL: – and just – it was –

MR. COFFEY: Yeah.

And so in the '08, '09 era, up to November, 2010, it would have been Mr. Ottenheimer?

MR. K. MARSHALL: Correct.

MR. COFFEY: (Inaudible) of – making a list or lists –

MR. K. MARSHALL: Yeah.

MR. COFFEY: – of possible board appointees and providing them to Mr. Ottenheimer and – what came out of that?

MR. K. MARSHALL: That's when all the organizations were staffed with board members. That's when LIL and Muskrat Falls Corp. and Bull Arm Corp. and et cetera.

MR. COFFEY: Well LIL didn't occur until long –

MR. K. MARSHALL: No, no, but the overall sense of organization – LIL came later, but there were still a number of the subsidiary boards which had to be staffed. And so we submit a list – and they weren't guaranteed that they were people to be chosen – that wasn't our mandate; we were just trying to assist in the generation of discussion with respect to who we felt would be beneficial to the board as a possibility.

MR. COFFEY: Yeah.

And I appreciate, you know, looking back on it, some of it may have meld in time in your mind.

MR. K. MARSHALL: Very much so.

MR. COFFEY: I mean, you know, that's, in particular in your case, Mr. Marshall.

But I'm going to suggest to you that the first substantial addition to board members occurred, I believe, in June of 2012. I'd be right on that? Ms. Breen, Mr. – well, Mr. Styles, but he was replacing someone – Mr. Abbass, and Mr. Hawkins.

MR. K. MARSHALL: At the Nalcor level.

MR. CLIFT: At the Nalcor level, yes.

MR. COFFEY: At the Nalcor level, okay.

MR. K. MARSHALL: Yes. Not at the subsidiary level. Before that there would have been – 'cause I can recall there being an orientation for all of the new board members for all of the subsidiary boards. And that would have been – again, time melds – but it would have been before 2012.

MR. COFFEY: And, well – crud.

MS. O'BRIEN: (Inaudible), Mr. Coffey?

MR. COFFEY: Yes, sure.

MS. O'BRIEN: Mic.

MR. COFFEY: Yup.

MS. O'BRIEN: If it is of assistance, the board of directors – the lists of the board of directors for the various subsidiaries have all been filed in evidence, so I can assist. So this is CF(L)Co; that's for Nalcor Energy Marketing Corp., so that's showing appointments in 2014.

MR. COFFEY: Oh yeah, no, I'm interested (inaudible). And I appreciate that –

MS. O'BRIEN: Sorry.

MR. COFFEY: I apologize.

I appreciate that, Ms. O'Brien. I'm interested, right now, in what was going on before and up to December 17, 2012.

MR. K. MARSHALL: Okay.

MR. COFFEY: Okay; that's kind of where I'm focused because this is phase 1.

MR. K. MARSHALL: Yup.

MR. COFFEY: So. The creation of the subsidiaries – a substantive number of subsidiaries in relation to the Muskrat Falls Project – occurred, I'm going to suggest, in the middle of 2012

MR. K. MARSHALL: No, the subsidiaries for the energy corporation would've occurred before that.

MR. COFFEY: Yeah.

MR. K. MARSHALL: For the establishment of Muskrat Falls development would've been, again maybe 2011 or 2012.

MR. COFFEY: Yes, yeah – okay. Well, then, we can look that up, but – the actual dates.

Now, do I understand – is my – would I be correct in understanding then, that other than the references to what Mr. Ottenheimer was reporting in the last months of 2008, and the reference in January of 2009 – January 29, 2009 – to this issue, that from the board's perspective, on behalf of the board itself, the chair, Mr. Ottenheimer, kind of had this issue, and he was handling it. Whatever he was doing with it, he was handling it.

MR. K. MARSHALL: Well, it was discussed at board minutes as you've referenced, and he would manage that process and it's not an issue that the CEO would be responsible for – board composition or compensation –

MR. COFFEY: Yep.

MR. K. MARSHALL: – it would be an issue for the chair.

MR. COFFEY: (Inaudible.) So it wouldn't be Mr. Martin's problem, it would be Mr. Ottenheimer's problem?

MR. K. MARSHALL: Correct.

MR. COFFEY: Now if we could bring up please P-00401.

Apologizing.

THE COMMISSIONER: Tab 23.

UNIDENTIFIED MALE SPEAKER: 23.

MR. COFFEY: Thank you – Madam Clerk? Now if we could – could we just stop there please? Thanks.

Now this, Mr. Clift, looking at the first three, four, or five paragraphs – we'll say five paragraphs – of your email to Mr. Thompson. This really was a follow-on to your January 2012 email exchange with him.

MR. CLIFT: Yes.

UNIDENTIFIED MALE SPEAKER: Can we turn it –?

MR. COFFEY: If we could bring up, please P-00395? And go down to – down through the page, please, I wanna go to the last email, or the first email in time. This is it here.

So, if you scroll up, please, to right here. Thank you. This is from yourself, Mr. Clift, January 26, 2012, to Robert Thompson, subject is: Board Governance at Nalcor. And you're asking about having a few minutes for a chat about some board governance issues that we have at Nalcor. And then you – in the paragraphs below – outline them.

Mr. Clift, is this the first time since your September 2008 letter to Mr. Ottenheimer, who is, in fact, a member of the board, he wasn't a member of government, per say, is this the first time you've written about this issue to government since then?

MR. CLIFT: I believe so.

MR. COFFEY: In fact, I'm gonna suggest to you this is the first time you've written the government at all about this issue.

MR. CLIFT: Yes.

MR. COFFEY: And at the time, at that moment – now, back in 2008, this is not on the record yet, but Mr. Thompson was not a clerk nor a deputy minister. Well, he became deputy minister late in December of 2008, but in 2012 he was the clerk.

Now, why, Mr. Clift, did you email Mr. Thompson? Why pick him?

MR. CLIFT: I believe it was our understanding at the time that he would be familiar with the progress on various files related to Nalcor.

MR. COFFEY: Oh, yeah, and he had been deputy minister of Natural Resources –

MR. CLIFT: Right.

MR. COFFEY: – for some period, but before that.

But, I'm just trying to get a sense of why in January of 2012, late January, 2012, in fact, on January – if I could just, Madam Clerk – on January 26 at 11:35 that morning, why did you send this email? Were you doing it on behalf of the board?

MR. CLIFT: Yes.

MR. COFFEY: Okay, so this was – this had been, I take it, informally discussed and you were the, again, the scribe.

MR. CLIFT: And there was a meeting upcoming and we were trying to get a sense for if anything had changed.

MR. COFFEY: Okay.

If we could go up the page, please. Thank you. Right there, thanks.

So, you wrote late on the morning of January 26. On the next day at 4:12 p.m., January 27, 2012, Mr. Thompson responded to you saying:

“Tom

“Just wanted to acknowledge your email. Let me look into these points and get back to you soon about starting a dialogue.

“Robert.” Okay?

And if we could go again up further. Thank you. And a bit more, please. Thanks.

And four days later, January 31, 2012, just after 4 p.m. on the day, you made reference to having seen Mr. Thompson at a luncheon on that day, and made reference to having reminded you that you found some documents that may be of interest to him.

MR. CLIFT: Correct.

MR. COFFEY: Now, you didn't actually send them – the documents – at that time. That's that September 2008 letter that was sent in September. In 2012, isn't it?

MR. CLIFT: Yes.

MR. COFFEY: Yes. So – but you do describe it in the third paragraph.

So prior to January, late January, 2012, had you ever spoken with Mr. Thompson about this issue?

MR. CLIFT: Not that I recall.

MR. COFFEY: No, I'm not suggesting you did.

MR. CLIFT: Hmm.

MR. COFFEY: This is your first time. And as you point out here in the one, two, three, the fourth paragraph, you point out: “That would bring us back to the fall of 2007 – some four and one half years ago.” And I take it here you were trying to – would you agree – impress upon Mr. Thompson that this issue had been around for awhile?

MR. CLIFT: Yes.

MR. COFFEY: Unaddressed, from your perspective?

MR. CLIFT: Agreed.

MR. COFFEY: Okay.

Now, that's the end of January, 2012. Correct?

MR. CLIFT: Yes.

MR. COFFEY: By June of 2012, members had been added to the board, hadn't they?

UNIDENTIFIED MALE SPEAKER: Right.

MR. CLIFT: Correct.

MR. COFFEY: So in terms of additional personnel, that was addressed?

MR. CLIFT: Yes.

MR. COFFEY: And it was addressed where it, for whatever reason or reasons, had not been addressed in the previous 3 to 4 years?

MR. CLIFT: Yes. And in relative terms, that would have been a relatively quick response.

MR. COFFEY: Oh, yeah, that's what I was going to suggest to you; bearing in mind government.

MR. CLIFT: Yes.

MR. COFFEY: And way it works.

MR. CLIFT: Yup.

MR. COFFEY: It would be relatively swift.

MR. CLIFT: When you consider the challenges and finding for individuals in that relatively short period of time.

MR. COFFEY: Yes.

MR. CLIFT: Yes.

MR. COFFEY: Now, the issue of money or the amount of compensation repaid, that is not a – that – well, (inaudible).

MR. CLIFT: Yes, that would not be within the purview –

MR. COFFEY: No.

MR. CLIFT: – of Mr. Thompson.

MR. COFFEY: No, it wouldn't.

MR. CLIFT: I was sending the letter by way of background –

MR. COFFEY: Yes.

MR. CLIFT: – recognizing that it would be easier to refresh his memory under relevant issues of board complement and that was passed along as an entity.

MR. COFFEY: Yes.

MR. CLIFT: Yes.

MR. COFFEY: And, in fact, the letter itself went about 8 months later, but – the actual letter. But my point being here, would you agree that the response in terms of numbers by government after you contacted Mr. Thompson was, from your perspective relatively, prompt?

MR. CLIFT: Yes.

MR. COFFEY: In a government context. And you acknowledge that your understanding was it wasn't within his purview or authority to decide the compensation issue.

MR. CLIFT: Agree.

MR. COFFEY: And as you've pointed out, I believe a number of times, the compensation issue arguably had some relevance to the expert relative expertise one might attract in megaproject or heavy engineering. Correct?

MR. CLIFT: Correct.

MR. COFFEY: In other words, for Mr. Thompson, it was outside his authority –

MR. CLIFT: Absolutely.

MR. COFFEY: – to address either of those aspects of the matter.

MR. CLIFT: Yes.

MR. COFFEY: But he apparently was able to facilitate additional members. Whatever was required, he got it done.

MR. CLIFT: Yes.

MR. COFFEY: Now, in relation to expertise, okay, that might be added to the board –

MR. CLIFT: Mm-hmm.

MR. COFFEY: – and I think you named someone or some – person or persons with megaproject experience. And with – what else – what other kind of experience?

MR. CLIFT: Large financing.

MR. COFFEY: Large financing.

MR. SHORTALL: Electrical engineering.

MR. COFFEY: Electrical engineering.

MR. CLIFT: Labor relations. International labor relations contracts, those kinds of things.

MR. K. MARSHALL: And legal.

MR. CLIFT: And legal, generally.

MR. COFFEY: Now, as a practical matter, and of course you weren't sitting here, but former premier Williams has told the Inquiry, when he was asked about compensation, he said, I'm gonna paraphrase, it was politically undoable – politically unpalatable or undoable – or words to that effect. It just wasn't on politically. And he explained why.

From your perspective as a group, okay – or as individuals – members of a group – would you have understood that that was the case? That it was a problem with the premier – whomever he or she happened to be – singling out the Nalcor board to give them, you know, a substantial amount of money, enough –

MR. K. MARSHALL: Certainly.

MR. COFFEY: – to bring in to attract others.

MR. CLIFT: Yes, and as Mr. Shortall had indicated this morning, we were not expecting the kinds of compensation that one might expect from a private energy corporation or so on.

MR. COFFEY: Oh yeah, and one would understand that.

MR. CLIFT: Absolutely.

MR. COFFEY: But even in the context of a Crown corporation –

MR. CLIFT: (Inaudible.)

MR. COFFEY: – in order to attract somebody out of – with those kinda – or people with those kind of skill sets you've just described –

MR. CLIFT: Mm-hmm.

MR. COFFEY: – out of – other than within this province – you would have to pay them presumably a significant amount of money. Unless they happen to be expats who – other than that –

MR. CLIFT: And at one juncture, we had in fact attempted to come up with a list of expats who would've had something close to that experience.

MR. COFFEY: Okay.

MR. CLIFT: And we developed that list and subsequently gave that to the CEO as our revised list. I don't recall the date – would've been after the period that we're questioning here.

MR. COFFEY: Okay, so –

MR. CLIFT: Sometime after –

MR. COFFEY: This is after 2012?

MR. CLIFT: It would've been in 2013 or 2014, I think.

MR. COFFEY: Okay, thank you.

MR. CLIFT: Again, that was – our thinking was evolving, and how else – you know, we had one Gerry, could we find three more with other relevant types of expertise? I believe we talked about a woman from Calgary who had oil and gas experience who had recently retired from one of the major Canadian oil companies, just for one example.

MR. COFFEY: Now, with respect to that – so yourselves, you all recognized there was a problem from your perspective. You know – well, at least there could be a more desirable situation?

MR. K. MARSHALL: Yeah, I wouldn't classify it as a problem. We all stayed. We were –

MR. COFFEY: And that's why I rephrased it.

MR. CLIFT: Yeah.

MR. COFFEY: Okay? That's why I rephrased it. Yeah.

MR. K. MARSHALL: Yeah.

MR. COFFEY: Was there anything to prevent you as a board from going out and hiring that directly yourselves?

MR. CLIFT: I don't recall it was anything we ever considered.

MR. COFFEY: Okay. Fair enough.

I just –

MR. CLIFT: And I defer to my colleagues –

MR. COFFEY: Yes.

MR. CLIFT: – for their recall.

MR. SHORTALL: Mm-hmm.

MR. COFFEY: Because in effect, by bringing in such board members, you're hiring them in practice.

MR. SHORTALL: Well –

MR. COFFEY: And that wasn't practical.

MR. SHORTALL: It's not quite the same thing. I mean, if you're hiring someone, you give them an assignment to do, and we had lots of that going on –

MR. COFFEY: Oh yeah.

MR. SHORTALL: – experts, independent experts. But we were looking for someone who's available at board meetings, constantly available, and part of the decision making process and the questioning process and all that. It's not the same as just hiring somebody to do a specific task.

MR. COFFEY: Well, it might be depending on how you fashion it.

MR. SHORTALL: Well –

MR. COFFEY: One could debate that. But my point being – but it didn't come up. Is that –

MR. SHORTALL: No, it did not, no.

MR. COFFEY: Okay.

Now, Mr. – my note indicates that Mr. Marshall made a comment. Because you were being asked, I believe, by Ms. O'Brien, about the PUB reference or referring the matter to the PUB, in that context. Anyway, and you made a comment that – to the effect of all major developments were or had been taken out of the hands of the PUB.

MR. K. MARSHALL: Yes.

MR. COFFEY: Yes.

And Mr. Marshall, because you – of course, your tenure, in that whole process, predated Nalcor – in fact, arguably predated even the gleam of Nalcor. In relation to that – so it was your understanding from your early days that major hydro-generation projects had not gone to the PUB and would not go to the PUB.

MR. K. MARSHALL: I can only say they had not gone –

MR. COFFEY: Had gone –

MR. K. MARSHALL: – to the PUB.

MR. COFFEY: Well, yeah – well – and your expectation –

MR. K. MARSHALL: I couldn't speculate.

MR. COFFEY: Well, your expectation was?

MR. K. MARSHALL: I didn't have any expectation, but I certainly – that was a government decision and had been done, I think, as recently as 1999, prior to our tenure –

MR. COFFEY: Yes.

MR. K. MARSHALL: – on the board.

MR. COFFEY: Yeah, and it had.

And in fact, we could check. I think it's 2000 and 2002 where there are actual exemptions, and they're all listed online.

But what I'm getting at is this – is that the, kind of, institutional expectation by a member of the board that you joined, Mr. Marshall – when you joined – was that, well, generation projects hadn't, up to then – or had been exempted from the PUB. And unless something – you know, a decision in government's practices changed, they would not in future go the PUB.

MR. K. MARSHALL: (Inaudible.)

MR. COFFEY: Unless the government actually – chose not to have an exemption.

MR. K. MARSHALL: I don't think the board actually had that firm position.

MR. COFFEY: (Inaudible.)

MR. K. MARSHALL: I think the board had no position with respect to the PUB. Again, it was a decision of government up to that point in time.

MR. COFFEY: Okay.

And of course, the granting of an exemption is by the Lieutenant-Governor in Council, which is the Cabinet of the day. So –

MR. K. MARSHALL: Certainly.

MR. COFFEY: That is the case.

Did you have any understanding – 'cause you just referred to 1999, Mr. Marshall, which is when section 5.2 and – of the EPCA, 1994 – and 4.1 of the *Public Utilities Act* were enacted. Did you have any view, or form any view, beginning in 2004 as to what the role of the PUB was in relation to Newfoundland Hydro?

MR. K. MARSHALL: No. Other than the capital budget approval process and the operating approval process and the impact on rate adjustments.

MR. COFFEY: Okay.

You didn't – I'm not suggesting you should, but – have – but you didn't delve back into why, philosophically, the 1999 amendment was made?

MR. K. MARSHALL: No.

MR. COFFEY: Okay.

And in relation to particular exemptions that occurred before you arrived, did you make any inquiries about why they had occurred? Like –

MR. K. MARSHALL: No.

MR. COFFEY: – not in an individual basis?

MR. K. MARSHALL: No.

MR. COFFEY: And during your tenure – because there were exemptions while you were there – and is this true of Mr. Clift and Mr. Shortall – there were exemptions made. Did you – did the board ever make any inquiries about why these exemptions were occurring?

MR. K. MARSHALL: I can't recall.

MR. SHORTALL: No.

MR. CLIFT: No, I don't recall.

MR. COFFEY: No, okay.

I want to thank you, Mr. Commissioner. Thank you.

Thank you, gentlemen.

UNIDENTIFIED MALE SPEAKER: Thank you.

THE COMMISSIONER: All right.

Consumer Advocate?

MR. HOGAN: Hanging in there?

My name's John Hogan, I'm counsel for the Consumer Advocate. The Consumer Advocate represents the approximately 300,000 ratepayers in the province.

Just first off, if we could just bring up P-00093, please. Just scroll down a little bit.

So we went through this – you guys went through this yesterday. This is the package for DG2 and there's a similar package for DG3. You would recall these packages presented at your board meetings?

MR. K. MARSHALL: Yes.

MR. CLIFT: Yes.

MR. HOGAN: Just there's – yesterday, I think you all sort of said you relied on the staff of Nalcor. So do you know who would have prepared these documents specifically before the meetings or for the meetings?

MR. K. MARSHALL: It would have been a sea of people. It would have been –

MR. HOGAN: A sea of people?

MR. K. MARSHALL: Yeah, it would have been the CFO. It would've been –

MR. CLIFT: And a group under the CFO.

MR. K. MARSHALL: Yeah.

MR. CLIFT: An experienced, deep, broad group of individuals. I can't recall all their names.

MR. K. MARSHALL: Mr. Bennett's group, Mr. Sturge's group; it would've been a lot of people that prepared this.

MR. SHORTALL: Auburn Warren.

MR. K. MARSHALL: Yeah.

MR. CLIFT: That's right.

MR. HOGAN: Is that – just to get the names on the (inaudible).

MR. SHORTALL: Yeah, some of the people you had testifying in Happy Valley-Goose Bay, actually. The three gentlemen from Nalcor –

MR. HOGAN: Okay, can you recall their names?

MR. SHORTALL: – who were number-cruncher types, they would have been involved in documents like this.

MR. HOGAN: Can you recall their names just for the record?

MR. SHORTALL: Not at – Auburn Warren was one of them. I can't remember the other two.

MR. CLIFT: Would Rob Hull have been around at that juncture or did he come later?

MR. SHORTALL: I don't know. He'd be on your interview list.

MR. HOGAN: Okay.

So these are the group of people who you would have relied on as having prepared the documents.

MR. CLIFT: Yes, you might ask Mr. Shortall as to their qualifications. He'd be the most qualified.

MR. SHORTALL: Mmm.

MR. CLIFT: Probably more – you know, my experience in dealing with these individuals is that they were extremely knowledgeable –

MR. SHORTALL: Oh yes.

MR. CLIFT: – in the areas of finance and accounting and projection – financial projections.

MR. SHORTALL: Yeah.

MR. HOGAN: Okay.

Well, on that, Mr. Clift, actually you said yesterday that – and you all said, I think, you asked questions, ongoing process, not just at this meeting to be fair to you guys. But you did say, Mr. Clift, yesterday, you tested the assumptions that were presented to you. I'm wondering if you could give me examples of some of the assumptions you would be referring to when you said that?

MR. CLIFT: Hard to recall specific examples. As information was presented to us in various areas, I – you know, you would sit there and you would listen and you would interpret, try to think of questions you could ask back. The most challenging always was to think of the things that may have been missing or overlooked; quite a volume of information, so you're going back

through your own mind and thinking about internal consistencies of their presentations, et cetera.

Very challenging at this point to try to remember specifics.

MR. HOGAN: I understand that but I guess then, it sounds more like the testing of the assumptions was more along the lines of asking questions as opposed to doing any formal testing –

MR. K. MARSHALL: Yeah.

MR. HOGAN: – amongst yourselves.

MR. CLIFT: That's what I was –

MR. K. MARSHALL: Yes.

MR. CLIFT: – referencing yesterday, yes.

MR. K. MARSHALL: Yes.

MR. HOGAN: Okay. That's correct.

Mr. Shortall?

MR. SHORTALL: Yes, absolutely.

MR. K. MARSHALL: Yes.

MR. HOGAN: No assumptions stand out to you, now that you specifically might have thought more about than others? And I'll give you one example – go ahead, Mr. Shortall.

MR. SHORTALL: Oil.

MR. HOGAN: You look like you have one now.

MR. SHORTALL: PIRA – PIRA oil is one.

MR. HOGAN: What's that?

MR. SHORTALL: PIRA oil –

MR. HOGAN: Okay.

MR. SHORTALL: – assumptions.

MR. HOGAN: And so what was discussed about then? If that was one that stands out now, what was the issue in 2010?

MR. SHORTALL: Well, it wasn't so much the issue, it's more – the oil price – it suffers from the volatility normally applied to commodities with an added volatility that is applied because of geopolitical risks. So it's doubly troublesome to try and nail down and project.

So, you know, it's one that you really think about a lot. And if you read the PIRA reports it's like – you know, it's like reading a history –

MR. HOGAN: Mm-hmm.

MR. SHORTALL: – you know.

MR. CLIFT: And you do see a fair amount of variability during this period of time where oil prices had risen by a significant amount and drop by a significant amount.

MR. HOGAN: Right, so that's one assumption that was made that you – stands out. Anything else?

Mr. Marshall?

MR. K. MARSHALL: Oh, I think, you know, we would question – there was a long list of assumptions ranging from interest rates to weather patterns to hydrology. And, again, it was just –

MR. SHORTALL: Load forecasts.

MR. CLIFT: Yeah, load forecasts.

MR. K. MARSHALL: Yeah, load – it was just questioning, okay, what has been taken into account and what stress testing has been done, and why have we arrived at these various assumptions for this final session. And it was –

MR. SHORTALL: Yeah.

MR. K. MARSHALL: Again, I can't recall specifics but we asked a lot of questions over a, you know, long period of time. And this wasn't just one meeting in order to approve this; this was a series of meetings, a series of discussions. So it was generally a to-and-fro but, yeah, your

issue is: Did we hire an outside party to stress test that? No.

MR. HOGAN: Okay.

MR. K. MARSHALL: We asked the questions at the meetings and were given the information from those – from the –

MR. HOGAN: Team, the Nalcor team?

MR. K. MARSHALL: – the team that were presenting, yes.

MR. HOGAN: Okay. Thanks.

I'm just going to move on to some questions about DG3 and the timeline. Maybe we could bring up P-00005, page 6, please.

MR. SHORTALL: Can't see it at all.

MR. HOGAN: So just to jog your memories, the DG3 meeting was December of 2012, which I'm sure you all remember.

So if we just scroll down a little bit, starting here in November 1, 2012, so this is just the month before your sanction meeting the Government of Newfoundland and Labrador releases a report by Ziff energy. November 9 it releases 3 reports related to 2041, then related to Gull Island and related to section 92A. November 26 it releases a report by Wood Mackenzie and November 30 it releases the term sheet for the federal loan guarantee.

There's a flurry of activities in the month right before DG3. So my question is: When did you all receive these reports? These are the release dates from the government so I don't know if that means you received them then or if you would have received them sooner or later.

MR. SHORTALL: I certainly can't recall. I can remember we had a board meeting around the federal government term sheet, the loan term sheet.

MR. HOGAN: Okay.

MR. SHORTALL: Because I asked a whole pile of questions around that. So I can't recall if we got them.

MR. HOGAN: Anyone else?

MR. SHORTALL: We got –

MR. CLIFT: I don't recall the specifics. Typically, we met, as Mr. Marshall noted yesterday, on or around his birthday. It was part of the regular schedule of meetings.

MR. K. MARSHALL: (Inaudible) DG2 it was, yeah.

MR. CLIFT: Sometimes it was mine the week later, but we did have those sort of –

MR. HOGAN: Is it possible that all these reports were in the binders you would have received for that particular meeting?

MR. K. MARSHALL: I don't believe those reports, but we were advised – if they weren't in the binders, then reference would have been made at the board meetings in the period through November as we headed towards a sanction decision. And in a kind of summary basis up here is what those reports say.

MR. HOGAN: Okay, so do you guys recall if you've all read those reports or not, or relied on the summaries from Nalcor?

Maybe we'll just – Mr. Clift?

MR. CLIFT: More likely relied on the summaries.

MR. HOGAN: Mr. Marshall?

MR. K. MARSHALL: Yes.

MR. STYLES: Yes.

MR. HOGAN: Mr. Styles.

Mr. Shortall?

MR. SHORTALL: I'm not sure.

MR. HOGAN: Okay.

MR. SHORTALL: The term sheet for the loan guarantee I definitely read –

MR. HOGAN: Okay.

MR. SHORTALL: – the whole thing. The other ones I may have been relying on quotes pulled out and put into presentations.

MR. HOGAN: Oh. I just want to compare that to the DG2 meeting. There wasn't this level of external reports, I'll call it; you relied on Nalcor individuals, executives at the time. Was there any concern at DG3 – which, I guess, I would submit is a more important decision than DG2 because that's the sanction date.

Was there any concern that just a month before there was a flurry of these reports right before this major decision and maybe there should have been a little more time to analyze those? Was that an issue to you guys at all?

MR. SHORTALL: Not really.

MR. HOGAN: No?

MR. SHORTALL: I think we had plenty of time to study them.

MR. HOGAN: Who did?

MR. SHORTALL: We did, as board members. I know from the term sheet –

MR. HOGAN: But you didn't, I mean, nobody studied them from what I heard, it was just that you relied on the summaries.

MR. SHORTALL: No, the term sheet, I read the whole thing.

MR. HOGAN: Right. That's one of several reports I pointed out (inaudible).

MR. SHORTALL: Yeah, I realize that, but I'm just saying, you know, we had plenty of time to study it because I did study it –

MR. HOGAN: If you (inaudible).

MR. SHORTALL: – and that's the last one to come out, so the other ones had even more time.

MR. K. MARSHALL: And I think from the board perspective, you know, these weren't – these were reports which have since, I think in some of the tangential process going from Grand

Thornton, had their commentary with respect to natural gas.

And on the 2041 piece, we were at the premise initially about – the issue was replacement of Holyrood and it wasn't about developing Muskrat Falls at any cost. It was the replacement of Holyrood, the aging of the plant, the issues with respect to sustained provision of power to the province through the Island portion of the province.

So this wasn't kind of – I won't say this was new information, these were new reports. But it was information with respect to the natural gas discussions on 2014 and Gull, and Gull had been visited previously. These weren't new issues.

And we may not have seen these full reports, but, again, you had to be living through that period, and in those boardrooms and meetings, it was a flurry of activity and information that was being prepared and distributed as we moved toward the sanction decision.

MR. HOGAN: Thank you.

Mr. Shortall, you said you spent a lot of time reading the federal loan guarantee. Would the board have proceeded with the sanction without the federal loan guarantee?

MR. SHORTALL: Would the board have received –?

MR. HOGAN: Would the board have proceeded to sanction the project without the federal loan guarantee?

MR. SHORTALL: Yes.

MR. HOGAN: Yes?

MR. SHORTALL: Yeah.

MR. HOGAN: You all agree with that?

MR. K. MARSHALL: I believe so.

MR. HOGAN: I know that you've been asked about who's reporting to who and the CEO reported to the shareholders/the Government of Newfoundland and Labrador.

If we could just go to P-00403, please? Page 2.

THE COMMISSIONER: Tab 26.

MR. HOGAN: Page 2. Keep scrolling down a little bit please. A little more, a little more. Right there. Oh, no, sorry, keep going. I have this sentence here: “Mr. Martin confirmed that the Shareholder has been informed of the benefits and risks related to the Maritime Link and the other Lower Churchill projects.”

So I think that’s in accordance with what you’ve all been saying, is that the CEO was the one who’d report to government on any issue. Correct?

MR. CLIFT: Yes, there was – where the communication generally flowed, yes.

MR. HOGAN: So there was no or very little communication between the board and the shareholder. Is that correct?

UNIDENTIFIED MALE SPEAKER: Correct.

MR. HOGAN: Okay. And I’m not trying to say anything was nefarious here from Mr. Martin or anything like that, but could there be – looking at this now – any concern that Mr. Martin – you’re not aware of the actual conversations that Mr. Martin would have with the shareholder. Is that fair to say? Other than what Mr. Martin was telling you?

MR. CLIFT: Mr. Martin reported back to us on an ongoing basis. I’m not sure if it was every time he talked to the shareholder. But I seem to recall a fairly consistent pattern of – any time there was communication with the shareholder, Mr. Martin would have reported back –

MR. HOGAN: Yeah.

MR. CLIFT: – some kind of summary commentary.

MR. HOGAN: Sure. Okay.

MR. K. MARSHALL: And I think in fairness, to add to that, as we discussed yesterday, there was a fairly rigorous process to ensure that before it went to shareholder, there was alignment and understanding by the board as to

what was going to be going to shareholder in a presentation format, and then the presentation would go. So the board understood what was – understood what Mr. Martin had intended to bring to the shareholder.

MR. HOGAN: Right.

MR. K. MARSHALL: That was a very regular process.

MR. HOGAN: I understand that, but there was no direct communication, then, with – from you –

MR. K. MARSHALL: You’re gonna have to –

MR. HOGAN: – to the shareholder.

MR. K. MARSHALL: – ask Mr. Styles. He was the chair of the board –

MR. HOGAN: Fair enough.

MR. K. MARSHALL: – at that time.

MR. STYLES: At that time, no.

MR. HOGAN: No. Okay.

If we could just turn to P-00093. Page –

THE COMMISSIONER: Screen.

MR. HOGAN: Page 102, please.

I think it was Mr. Budden asked you about this, around the middle of that page the: bump can be managed. So I think it was you, Mr. Shortall, said there would be a bump when Muskrat Falls came on stream. Was that –

MR. SHORTALL: Yeah.

MR. HOGAN: – your understanding of what that means?

MR. SHORTALL: Yeah.

MR. HOGAN: Was there a discussion about what that bump would be in terms of kilowatt hours to the ratepayer?

MR. SHORTALL: Yes, we had rate predictions with Muskrat Falls, with the Isolated Island Option.

MR. HOGAN: Do you recall what the bump was –

MR. SHORTALL: No, I don't recall.

MR. HOGAN: – going to be?

MR. SHORTALL: I can't recall exactly numbers off hand.

MR. HOGAN: Anyone recall the numbers?

MR. SHORTALL: They're probably in the material that's been put into –

MR. HOGAN: Okay.

MR. SHORTALL: – testimony already, I would think.

MR. HOGAN: And it says: it can be managed. What was the discussion around how the bump was going to be managed?

MR. K. MARSHALL: The role, as we saw, of the organization was to provide the rates that would be put in place. And, again, the bump can be managed would have been with respect to, as Mr. Shortall indicated yesterday, adjustment of the shareholders' return on equity, whether or not proceeds from other activities of the organization would be directed back in, in order to mitigate those rates at a consumer level.

MR. CLIFT: So that would be the activities of oil and gas or other – or Bull Arm, for example.

MR. HOGAN: Okay, so that was – the theory was discussed but obviously nothing put in place to deal with that at that time.

MR. K. MARSHALL: That would be the shareholders' decision.

MR. CLIFT: It wouldn't have been our decision.

MR. HOGAN: Okay.

Mr. Shortall, you said this morning that when you were talking about the PPA between Nalcor and Hydro, you used the words: it didn't matter, right, about the rates. I don't think you were meant to say that it – but it did matter to the ratepayer, it mattered – that's what Geoff Budden was asking you about, Mr. Budden said (inaudible).

MR. SHORTALL: Yes, I recall, and all I was saying is that the structure of the agreement, the purchase – the Power Purchase Agreement between Muskrat Falls and Hydro is designed to recover the full cost of building and operating Muskrat Falls.

MR. HOGAN: Okay. So you're aware there was an order-in-council that guarantees that that cost is going to be recovered. That's how this –

MR. SHORTALL: Yes.

MR. HOGAN: – is structured, right?

MR. SHORTALL: Yeah.

MR. HOGAN: Do you know how that came about?

MR. SHORTALL: Well, it would have been a requirement of the federal loan guarantee for one thing, because –

MR. HOGAN: Okay.

MR. SHORTALL: – you know, the cash flow has to be in place to meet the debt repayment requirement.

MR. HOGAN: The federal – the feds were saying: Yes, we'll guarantee it because we know that it's guaranteed through the ratepayers.

MR. SHORTALL: Well, sure, they will put in: We'll guarantee it. But you need to do this, this, this, this, this, this and you're not – and one of those 'thises' would be make sure the cash flow is there to service the debt.

MR. HOGAN: So, the question I have then, you actually said that you could – you were happy, I think, that there's no export contracts in place because you can sell on the spot market. I'll put it to you that if there were export contracts in

place for guaranteed rates of return, effectively that would be more security and the ratepayers wouldn't be on the hook for as much and the federal – the feds could have still guaranteed that –

MR. SHORTALL: It's possible.

MR. HOGAN: – with the contracts in place.

MR. SHORTALL: It's possible, but, you know, when you put in a long-term Power Purchase Agreement, you're going to put it in at a lower price or you won't have a customer.

So I'm saying to the extent we've got power that's not committed to customers, we can generally realize a higher price because we pick spot markets to put it in.

MR. HOGAN: The ratepayers are still on guarantee –

MR. SHORTALL: Well, the ratepayers, if the – if this revenue stream from excess power sales is going to be diverted to rate mitigation, then the ratepayers would benefit from that because –

MR. K. MARSHALL: Right.

MR. SHORTALL: – they'll get a higher price.

MR. CLIFT: And we spoke this morning about –

MR. HOGAN: If –

MR. SHORTALL: A higher price than a long-term Power Purchase Agreement. What the Power Purchase Agreement gives you is more a guarantee of steady cash flow. So there's a trade-off.

MR. HOGAN: There's a trade-off.

MR. CLIFT: So you're balancing risk.

MR. SHORTALL: Yeah.

MR. CLIFT: The security of long-term agreement versus –

MR. SHORTALL: Yeah, and then you'd probably –

MR. CLIFT: – the incremental –

MR. SHORTALL: – want both.

MR. CLIFT: – profitability associated with a short-term.

MR. SHORTALL: Yeah.

MR. CLIFT: And under normal circumstances you would want a balance in your portfolio –

MR. SHORTALL: Yeah, you'd want a mixture of both the long-term and –

MR. CLIFT: – based on your ability to assume risk within that portfolio.

MR. HOGAN: So in the trade-off, where do the ratepayers fit in? In your level of priority? 'Cause it sounds fairly low.

MR. SHORTALL: I'm sorry –?

MR. HOGAN: It was a trade-off. I mean, it was Mr. Clift's word. The security for the – and you're securing the –

MR. CLIFT: I was speaking generally about –

MR. HOGAN: Okay.

MR. CLIFT: – those types of portfolio arrangements.

Our objective was to maximize the return through both types of sales. And you would not necessarily know six years in advance what that portfolio might look like. And you would not know, for example, whether or not – as we had in – around 2012, we had a contract for supply with the Government of New Brunswick. We would not be able to predict, in advance, the availability of other arrangements like that in the future.

MR. K. MARSHALL: And I think –

MR. CLIFT: Other than we would have looked at the state of readiness of all the other power generation facilities in the country and had a sense of the quality, reliability and long-term production capacity of ours – our collective abilities relative to everyone else, so for

example, the current situation in Ontario relative to here.

MR. K. MARSHALL: I think, as well, one of the processes that was put in place in one of the organizations that was structured was the Energy Marketing Corporation. And we put that in place – or not we – Nalcor put it in place a number of years prior to this in anticipation that – well, first of all, we started with the recall power from CF(L)Co.

And initially, that power was marketed through an arrangement with Emera, and then, ultimately, it was done in-house, and that was the plan with respect to the surplus power of Muskrat Falls. This business case was done with – initially, just on a business-case basis alone to say: the province needs to replace the generating facility at Holyrood and we need to replace that power.

And the – so the initial business case was run – that there was no surplus or that it was spilled, which was not the desire of anybody to see. But the benefits I was – Mr. Shortall outlined earlier today – the benefits of having the relationship with Emera, being able to flow power outside, of having established the Energy Marketing Corporation.

When you suggest that the ratepayer priority was low, I don't think that's the case. I mean, the case was we looked for the lowest cost alternative to be able to replace that power to satisfy the needs of the province on an ongoing basis on into the future at the lowest possible cost, which is to the benefit of the ratepayer. And then where do you separate the ratepayer and a taxpayer? 'Cause ultimately, the taxpayer is the one that owns the organization.

So the benefits from that surplus sales of energy would go along with the other process in the quote, unquote, energy warehouse of oil and gas that could be used by administrations of the day as a go forward, but it wasn't our role to set that in policy at that point in time as to how that would impact the ratepayer. Our role was to find the least-cost alternative to replace the power at Holyrood and satisfy the supply of electricity in a reliable, consistent fashion, and that was done.

And the benefit of establishing this relationship with Emera and having energy marketing was that we could get access to the proceeds and the profits that would be generated, and as well, the federal loan guarantee, I think, dropped our interest rate by a couple of points and saved another couple of billion dollars with respect to the long-term cost.

So the ratepayer was always paramount with respect to coming up with the lowest cost alternative.

MR. HOGAN: Okay.

MR. K. MARSHALL: That's in my estimation.

MR. SHORTALL: No, I think that's correct.

And we weren't into the rate mitigation business.

MR. K. MARSHALL: No.

MR. SHORTALL: And you know, if we're saying there's a risk trade-off if we go spot rate versus long-term power purchase agreement, that doesn't mean we're trading risk off to the ratepayer, because the risk – the rate mitigation process will protect the ratepayer, because most likely, they would say your rate is going to be X per kilowatt hour, right? And it's up to Nalcor and government to find the funds to underwrite that X per kilowatt hour, so the ratepayer has no risk. It just has a known rate, right?

And Nalcor will be designed – is designed – to maximize the revenue from the surplus power.

MR. HOGAN: Mr. Clift, did you have something to add?

MR. CLIFT: Other than, you know, as Mr. Marshall indicated, we talked about and thought about the ratepayer and we looked at price of electricity on a per-kilowatt-hour basis in all the jurisdictions in Canada. We had reference points to countries in Western Europe.

We were – as we thought about the long-term progression of rates, we thought about the potential for long-term stability post-the bump period that people are referring to, and we're confident that over time, as other constituencies

in Canada replaced their infrastructure, their rates will go higher than ours and that – you know, part of this –

MR. SHORTALL: Most of them are higher than ours now.

MR. CLIFT: Very much a long-term view of long-term protection to the ratepayer where possible.

MR. HOGAN: Okay.

I just want to ask a few questions about the PUB.

Mr. Marshall, you said yesterday – and I think again, today, you talked about the exemptions other hydro projects have had. Ultimately, a decision was made to refer to the PUB with, I would say, a limited question.

MR. K. MARSHALL: Yes, I would say that. Yeah.

MR. HOGAN: A or B.

Once it was referred to the PUB, how do you feel about the fact that the question was limited as opposed to maybe giving the PUB an open-ended question to find the least-cost option themselves?

MR. K. MARSHALL: I don't think I had a position. I think that was the decision of the government of the day to refer to the Public Utilities Board and the analysis was done. As a board level we just had to accept the process that went.

MR. HOGAN: Anyone else have anything to add to that?

MR. STYLES: No.

MR. HOGAN: Mr. Shortall, you said they were – you felt that the PUB was incompetent to the job.

MR. SHORTALL: I'm sorry, I can't hear –

MR. HOGAN: You said that the PUB was incompetent to do the job yesterday.

MR. SHORTALL: I said they didn't have the competence in-house to do the job.

MR. HOGAN: Okay. What specifically did they not – what specifically were they lacking in terms of competency?

MR. SHORTALL: Well, they don't have the expertise in-house. They would have to outsource the assignment.

MR. HOGAN: As opposed to –

MR. SHORTALL: Having the staffing –

MR. HOGAN: – the board, the Nalcor board. Is that what you mean? 'Cause you're only four guys sitting on a board at that point in time; I mean, what expertise did you have that the PUB didn't have, to make the same decision?

MR. SHORTALL: Oh, well, we had staff of hundreds of people who were –

MR. HOGAN: At Nalcor.

MR. SHORTALL: Exactly.

MR. HOGAN: Okay.

MR. SHORTALL: Yeah. The PUB doesn't have that.

MR. HOGAN: You see there that there's not a lot – there's not as much independence, though, because Nalcor is the proponent, whereas the PUB would be an independent body.

MR. SHORTALL: That's a whole different issue.

MR. HOGAN: Well, competency is the issue I'm talking about.

MR. SHORTALL: I didn't say the PUB wasn't independent.

MR. HOGAN: No, you said it was incompetent.

MR. SHORTALL: I said –

MR. HOGAN: And I –

MR. SHORTALL: – they don't have the competency in-house.

MR. HOGAN: Let's flow through what you said. You said it was incompetent because it didn't have the staff and the expertise. I said who has the staff and expertise for you guys, and you said, Nalcor. So then my question is they're not entirely independent of you –

MR. SHORTALL: No, no, no, that's not what –

MR. HOGAN: – because they're the proponent of the project –

MR. SHORTALL: – that's not what we said. You said, you're just four guys. I said, no, we're four guys with hundreds of qualified employees working for us. That's why we can talk. They don't have that in-house.

MR. HOGAN: Nalcor employees and staff, right?

MR. SHORTALL: Right.

MR. HOGAN: That's what you mean.

MR. SHORTALL: Yeah, I'm not saying Nalcor should do the review, I'm just saying that's a whole different position.

MR. HOGAN: But that's my point, though. Nalcor did the review and nobody else did.

MR. SHORTALL: No, the PUB hired MHI – wasn't it?

MR. K. MARSHALL: Yes, I believe.

MR. CLIFT: MHI.

MR. SHORTALL: Yeah.

MR. HOGAN: Let me put it this way to you, Mr. Shortall. If the PUB had gotten the extension and the amount of information that they wanted. They're the body responsible to regulate electric utilities in the province. That's their legislative mandate, is to ensure that the rates charged are just and reasonable, and that the utility services provided are safe and reliable.

So is it possible that the PUB could have analyzed these projects – or this project and determine what the least-cost option was? Or do you think that that's not possible for the PUB to do?

MR. SHORTALL: PUB internally or with external consultants?

MR. HOGAN: Well, you know, in – within their mandate.

MR. SHORTALL: If they hire external consultants, sure they could do it.

MR. HOGAN: Okay.

You understand that that's how it works. The PUB – those panelists, don't make up their minds without talking to experts and getting evidence and things like that.

MR. SHORTALL: Yeah, of course I understand that.

MR. HOGAN: I still don't understand why you thought that they weren't competent to do the job.

MR. SHORTALL: I didn't say they were incompetent.

MR. HOGAN: That they lacked the competency (inaudible) –

MR. SHORTALL: In-house, that's all I said.

MR. HOGAN: Okay, fair enough.

If we could just go back to P-00005, please?

THE COMMISSIONER: Is this a good spot maybe, Mr. Hogan, to break, or do you have much more?

MR. HOGAN: I have a few more minutes, so we can break, sure.

THE COMMISSIONER: Okay. All right.

Let's take 10 minutes here now then.

MR. SHORTALL: Oh my.

CLERK: All rise.

Recess

CLERK: Please be seated.

THE COMMISSIONER: All right, Mr. Hogan, when you're ready.

MR. HOGAN: Okay, now –

THE COMMISSIONER: I think you were going to P-00005.

MR. HOGAN: No, I'm going to skip P-00005, actually. That's okay.

THE COMMISSIONER: Okay.

MR. HOGAN: Commissioner, at this time I'm just wondering if Commission co-counsel maybe can clarify, if possible, what we're – if there's any update on the water management issue.

I've been asking questions on it and I know Mr. Budden asked a question on it today. I'm happy to ask questions later but, you know, is everybody coming back? And if there's any update that can be given at this time I would appreciate it. If not, then that's fine as well.

MS. O'BRIEN: Other than we're working on it. We expect to have the details confirmed soon. That's all I can give you at this time, I'm sorry.

THE COMMISSIONER: Right.

MR. HOGAN: What about witnesses coming back? Is that – update on that as well?

THE COMMISSIONER: That's not the plan right now –

MR. HOGAN: Okay.

THE COMMISSIONER: – from what I understand as the discussion. But, you know, on this issue – well, obviously, I want to be very careful.

You know, there may be – there had been some questions asked about water management already. I haven't stopped the questions from being asked but it depends on the nature of the

questions. What I don't want to be going into is, you know, positions of parties, you know, the actual discussions that were taking place with regard to the strategy and things of that nature for obvious reasons. But if you can – you know, I'm not restricting your ability –

MR. HOGAN: Correct.

THE COMMISSIONER: – to ask these guys questions, these witnesses questions if you want to. I'm not sure how much they know about it anyway, but – at least the nitty-gritty of it. But, you know, I think you understand, as well as every lawyer in this room understands, sort of the line I'm trying to draw here.

And so I'll leave it to you. If I feel that you're going beyond or, alternatively, if either witness feels that they're going beyond, they can look at me and they can ask me: Should I answer that? And I'll tell them if they should or they shouldn't.

MR. HOGAN: I have been asking questions and –

THE COMMISSIONER: I know.

MR. HOGAN: – no one's cut me off yet, but I think Mr. Budden was cut off a little bit today, that's why I'm bringing it up now. And I'm not – I can't even recall what his question was, to be honest with you.

THE COMMISSIONER: Neither can I, but you go ahead and we'll see what –

MR. HOGAN: It's just a couple of questions.

THE COMMISSIONER: Sure.

MR. HOGAN: Obviously, it's an issue that we've been talking about here at the Inquiry or I've been raising –

THE COMMISSIONER: Yeah.

MR. HOGAN: – maybe others as well. You were aware that it was an issue during your time on the board? I ask that broadly.

UNIDENTIFIED MALE SPEAKER: Yes.

MR. HOGAN: Lots of issues, obviously; this was one of them. Did you feel –

MR. K. MARSHALL: Yes.

MR. HOGAN: Did you feel that you had certainty on that issue at the time of DG3?

MR. K. MARSHALL: I would say – probably over to the chair, I would say yes.

MR. STYLES: I would say yes as well, based on, you know, the advice that was channelled back through the CEO.

MR. HOGAN: Okay. You had enough certainty, obviously, to proceed with the vote.

MR. STYLES: Yes.

MR. HOGAN: Okay. Thank you.

I just want to back up to the Energy Plan. This doesn't mean that my questions are going to start – get longer, but it just happens to be the way it is. I think it was sort of described as a blueprint. Do you guys all agree with that?

MR. K. MARSHALL: Yes.

MR. HOGAN: Or you guys – the three of you guys which you operated.

UNIDENTIFIED MALE SPEAKER:
(Inaudible.)

MR. HOGAN: My understanding is the Energy Plan talked about the Lower Churchill Project being Gull Island and Muskrat Falls. Is that correct?

MR. K. MARSHALL: Yes.

MR. HOGAN: We're only here talking about Muskrat Falls. That was the project that's sanctioned. The evidence that came out so far I would put to you is that both were still on the table until fairly close to DG2. Do you agree with that?

MR. SHORTALL: Both were at DG2, both were on the table?

MR. HOGAN: Close to DG2.

MR. SHORTALL: Yes, yeah, just sort of.

MR. HOGAN: And I guess to be fair, even when DG2 was done, Gull Island was still to follow.

MR. SHORTALL: Gull Island is phase 2 of the project.

MR. HOGAN: Oh, okay.

MR. SHORTALL: So it's still alive. I mean, it was probably pretty much eliminated by the time we got through Gate 2.

MR. HOGAN: So that's what my question is: When did it switch from that you guys are working through – on the Lower Churchill Project being Gull and Muskrat. What was your understanding of why it switched to just Muskrat fairly close to DG2?

MR. SHORTALL: I'll take a shot at that. When we were initially looking at the Lower Churchill Project the Maritime Link didn't exist. So our main aim, the whole driver behind the whole project, was we needed to replace the baseload of power that we're going to lose when Holyrood dies. So that's only 300 to 500 megawatts. Gull Island is 2,200 or 2,300 megawatts, it's too big.

We had no way of monetizing or even moving the excess energy from Gull unless we did a deal with HQ. So we – eventually the cost drove us to Muskrat, the smaller of the two. Our plan at that time was probably to spill a lot of the water at Muskrat because we couldn't move it over transmission lines, but to produce enough power at Muskrat to replace the Holyrood baseload.

It was only the Maritime Link, which gave us the opportunity then to monetize that water that would've been spilled, which made it far more attractive because now we can generate all 824 megawatts. And so it – Gull just was put back on the shelf for later. That's – you know, that's going to need a big power purchase agreement with somebody like the province of Ontario to see the light of day.

MR. HOGAN: And some –

MR. K. MARSHALL: And –

MR. HOGAN: Sorry, go ahead.

MR. K. MARSHALL: And other political issues that would have to happen with respect to transmission and – but, again, I concur with Mr. Shortall that, you know, it was always discussed as still available, still there, the water is still flowing, but Muskrat was the first priority to be able to replace the aging plant in Holyrood and to develop a reliable power for the residents of the Island portion.

MR. HOGAN: If I'm hearing you right, at some point it was envisioned that Muskrat would be done without the Maritime Link to meet the domestic needs.

MR. SHORTALL: Initially that was the plan, yeah.

MR. HOGAN: When you three resigned – everyone but Mr. Styles – do you know what the cost of the project was at that time?

MR. K. MARSHALL: Put that to Mr. Shortall. We had a discussion on that late yesterday.

MR. SHORTALL: At which time, DG2?

MR. K. MARSHALL: When we resigned.

MR. HOGAN: No, when you resigned.

MR. CLIFT: When we resigned.

MR. SHORTALL: When we resigned, yes. It had been reported to us, as a board, not publicly at the time, at 8.2 billion, with only one major issue outstanding and that was the settlement with Astaldi. So we have no visibility into the difference between 8.2 and 10.1 that's now been put out as the ultimate cost.

MR. HOGAN: So it's obviously higher than the DG3 cost. And this question has been asked to a number of witnesses, you know, was there a cost – I know, looking back now, was there a price where you would have said it's too much for this project?

MR. SHORTALL: I'm sorry, I can't hear you very well.

MR. HOGAN: Was there a price for the Muskrat Falls Project, a cost, where you would have said, no, we can't proceed, that's too much? And if so, what was that – what is that cost?

MR. SHORTALL: Well, it would have to exceed the Isolated Island Option.

MR. HOGAN: Okay. Do you all agree?

MR. K. MARSHALL: Right.

MR. HOGAN: Actually the first person I heard say that, I thought that was the right answer. It would be that plus a dollar, right?

MR. SHORTALL: Yeah. Figures don't lie.

MR. HOGAN: Price is right. Yeah.

Just a couple of questions on the dome, which you brought up, Mr. Shortall. Can you just give some background about, again, how that came about, the dome?

MR. SHORTALL: The dome?

MR. HOGAN: Yeah.

MR. SHORTALL: No. I – no. I mean, it was explained to us, but how it originated, I don't know that.

MR. K. MARSHALL: I – I mean, my recollection, and, again, it was explained at the board table, not in terrific detail, but it was a part of Astaldi's bid for how they wanted to proceed with the project. It wasn't ours to question because that is how they presented their bid and that's how they were selected.

I think the question is best asked of the technical representatives and the bid evaluators and the executive from Nalcor to address.

MR. HOGAN: So it would have been part of the overall cost when you agreed to retain Astaldi to do this? That was part of –

MR. K. MARSHALL: Yes.

MR. HOGAN: – the costing?

MR. K. MARSHALL: Yes.

MR. HOGAN: Okay. So there wouldn't have been no additional cost to Nalcor for the construction or decommissioning of the dome?

MR. K. MARSHALL: Not in our understanding.

MR. HOGAN: Not in your understanding.

MR. K. MARSHALL: We had asked that question at the table as well to see that this was what they were going to do and they're going to put this in place as part of that. And that was their plan.

MR. HOGAN: Okay. So – and you don't – you wouldn't – not going to remember what the breakout of that specific part of their contract –

MR. K. MARSHALL: No.

MR. HOGAN: – was, are you?

Not to go back to this again, but, you know, you were looking for certain expertise on the board, including board members who might have expertise in megaprojects, which you didn't ever manage to get.

Was there any thought or discussion about going out and getting some training yourself on that issue, any of the board members?

MR. SHORTALL: On which issue?

MR. HOGAN: Megaprojects.

MR. SHORTALL: Not I.

MR. K. MARSHALL: Other than the fact that we had Mr. Martin, but I don't know how much you'd be able to actually do when we consider the discussions we've had over the last two days with respect to the commitments of the board and to go out and do training. I'm not sure, you know, a seminar or a week long course would necessarily bring you to the level of expertise that we would like to have. And, again, we had Mr. Martin on the board, even though he was an executive member of the board and he had megaproject experience.

MR. HOGAN: Okay. Just a couple of more quick questions.

You're familiar with the Hebron Project, yes?

MR. K. MARSHALL: Yes.

MR. SHORTALL: Yes.

MR. HOGAN: Cost overruns on the Hebron Project, is that correct?

MR. SHORTALL: Yeah.

MR. HOGAN: Yes. Do you know what the size of those cost overruns are in rough numbers?

MR. K. MARSHALL: Rough numbers are cost would have doubled.

MR. HOGAN: Doubled. Okay.

MR. SHORTALL: I think they went from something like eight to 15.

MR. K. MARSHALL: Yeah.

MR. HOGAN: Okay.

So, you were aware of this at the time of DG3?

MR. SHORTALL: No, I don't think so.

MR. K. MARSHALL: I can't recall specific timing, no.

MR. CLIFT: I don't think so.

MR. HOGAN: Okay. So how did –

MR. CLIFT: It could have been a bit later.

MR. HOGAN: I just – so I'm just – as your experience as board members then you've had experience with cost overruns. I'm just wondering how much of that was discussed, specifically, with regards to Muskrat Falls and it being an issue. And, secondly, then: What's the effect on ratepayers?

MR. K. MARSHALL: It was always a concern of the board. You know, we went through, and you can do the best, as Mr. Shortall indicated yesterday, you do – you have your analysis, you

have your engineering assessments, you have your financial analysis, you lock down whatever can be locked down. And, as it was presented to us, we made the decision based on the information, the analysis and the stress testing that had been done as it was presented to us with respect to that. And we took our – we made our decision based on all of that analysis.

MR. HOGAN: Okay.

MR. SHORTALL: And the implication to ratepayers remains to be seen.

UNIDENTIFIED MALE SPEAKER: It does.

MR. SHORTALL: It's up to the government to come through with their mitigation rate promise.

MR. HOGAN: Mr. Coffey took you through the history of the chairs, you've all sat with on the board. I just want to ask: Did any one of them, more so than the others, spend more time on work for the board that stands out? And this is not a trick question or anything, I'm just interested in the amount of time, maybe one chair versus another, spent.

MR. K. MARSHALL: I can't comment. The issue was when you got to Nalcor, where you didn't – necessarily your hours didn't matter because the rate was zero, so there was no reason to track your hours.

All I can do is speak for myself in terms of the number of hours and they were huge.

MR. HOGAN: So your numbers went up as the chair, I assume.

MR. K. MARSHALL: Numbers went up as the project got closer and as just a member of the board as we got to DG3 and also as chair thereafter.

MR. HOGAN: Was anyone there full time? Did anyone have an office at Nalcor as a chair member?

MR. K. MARSHALL: No, I can't – I didn't, so I can't recall.

MR. CLIFT: I don't think anyone was there full time. I do recall having a meeting or two with

Mr. Ottenheimer. I don't think you would say it was his office, it was just in an empty office. I don't recall it being his office.

MR. HOGAN: Okay. Nothing else to add?

MR. SHORTALL: No.

MR. HOGAN: You didn't have your own office?

MR. SHORTALL: I think John Ottenheimer did have an office; just a little office, cubbyhole place.

MR. CLIFT: Yeah, that's what I'm recalling, I was never sure if it was his or just an empty space.

MR. SHORTALL: Yeah. No, I thought it was his, but I think he was the only one to ever have an office there.

MR. HOGAN: What was different about him, was it –?

MR. SHORTALL: Say it again.

MR. HOGAN: What was different about him as opposed to the other chairs?

MR. SHORTALL: He asked for an office, nobody else did.

MR. HOGAN: As simple as that.

MR. SHORTALL: Yeah.

MR. CLIFT: I think so.

MR. HOGAN: That all the questions. Thank you.

MR. SHORTALL: Yeah.

MR. K. MARSHALL: Thank you.

MR. SHORTALL: Thank you.

THE COMMISSIONER: All right, I had initially indicated that I would only be going to full – parties with full standing and as well parties with special standing. I don't see the special standing party here. I do see somebody

from Emera and because Emera has been raised, I wondering if Emera have any questions you want to pose?

No. Okay, good. Thank you.

All right, so Nalcor?

MR. SIMMONS: Good afternoon, gentlemen. Dan Simmons from Nalcor Energy. You'll be happy to see I brought no paper with me. So, I'm not going to be very long.

MR. SHORTALL: Delighted to see that.

MR. SIMMONS: I just have a couple questions about minutes.

I gather from the evidence that you gave yesterday that the minutes of the board meetings are kept or recorded by, I'm going to suggest, the corporate secretary of the corporation.

MR. SHORTALL: Yes.

MR. K. MARSHALL: Yes.

MR. SIMMONS: And the corporate secretary at different times has been a senior lawyer who's been employed in that capacity with the corporation?

MR. SHORTALL: That's correct.

MR. CLIFT: Yes.

MR. K. MARSHALL: Yes.

MR. SIMMONS: Okay.

Do the minutes, after they've been drafted, come back to the board for review and approval?

MR. SHORTALL: Yes.

MR. CLIFT: Yes.

MR. SIMMONS: Okay. Do – as board members, do you actually review those minutes for accuracy?

MR. SHORTALL: Yes.

MR. K. MARSHALL: Yes.

MR. CLIFT: Absolutely.

MR. SHORTALL: It's the first item on the next agenda was the review and approval of the previous minutes.

MR. SIMMONS: Right. So if there were any concerns about the accuracy of the minutes that we have presented in evidence, those things would have been picked up and corrected along the way, I presume, wouldn't they?

MR. SHORTALL: Presumably.

MR. K. MARSHALL: Correct.

MR. CLIFT: Agree.

MR. SIMMONS: So although you've said that the minutes are not what I'd take to be a transcript of board meetings and that they don't necessarily report all the discussion that happens. Generally, are the important points that are taken out of board meeting recording in those minutes?

MR. SHORTALL: They were typical minutes in my experience. I mean, the other board I was on at the same time, the minutes read very much the same way.

MR. SIMMONS: That's good.

Now, we do have, as an exhibit, you've been brought to it, the minutes of the board meeting on December 5, 2012, which is when the project was sanctioned. And the Commissioner, who has said that he's read all the minutes. And, Mr. Marshall, you've referred to there being minutes – being meetings conducted in the lead-up to that –

MR. K. MARSHALL: Correct.

MR. SIMMONS: – one on December 5, I think. So this is a, you know, this is a non-controversial point, so I'm gonna suggest that in addition to the meeting on December 5, there was one on December 4 and one on December 3 and four in the month of November before that and another 12 or 14 in 2012 before that. Does that sound approximately right?

MR. K. MARSHALL: Quite likely. Again, I – without the schedule of meetings in front of us –

MR. SHORTALL: Mm-hmm.

MR. K. MARSHALL: – I would sound (inaudible).

MR. SHORTALL: We did have a –

MR. SIMMONS: So –

MR. SHORTALL: We did have a lot of meetings.

MR. SIMMONS: So my question, simply, then is if we go back now and look at those minutes, are you satisfied that the minutes of those meetings are gonna be an accurate account of – what's contained in those minutes is an accurate – is accurate representation of what happened at those meetings?

MR. SHORTALL: I would say so.

MR. K. MARSHALL: If they'd been reviewed, signed and approved, yes.

MR. SIMMONS: Right, right.

MR. CLIFT: Yes.

MR. SIMMONS: And although all the discussion may not be captured, there's no reason to think that there's anything inaccurate in what's stated in those minutes?

MR. SHORTALL: No.

MR. SIMMONS: Okay. Good. Thank you.

That's all the questions I have.

MR. SHORTALL: Thank you.

THE COMMISSIONER: Thank you. All right.

Ms. Best?

MS. G. BEST: Good afternoon.

My name is Glenda Best, and I'm here representing the board. I just have a few

questions. And the reason I have so much paper is 'cause I have exhibits in my hand.

I wanted to just, first of all, clarify a question that was asked to you by Mr. Budden with respect to the MHI report.

I understood that the MHI reports had been requested and prepared at the – by MHI at the request of the PUB and at the request of government. Mr. Budden made reference to the MHI report that Nalcor had requested, and I just want a clarification: Nalcor did not request an MHI –?

MR. K. MARSHALL: I don't think so, and again, you can confirm that with Mr. Martin during his testimony as well. But I think that it was a report that we used and relied upon, but it was not commissioned by Nalcor.

MS. G. BEST: Okay.

And in response to a further question that Mr. Budden asked you, you all stated that the basis of your sanctioning of the project was financial – it was a cost issue, and that it wasn't environmental. But in actual fact, did you not review and ensure that all of the projects that you studied had met or were going to meet the environmental standards or requirements that were put in place?

MR. K. MARSHALL: Yes. I'd like to clarify that, because I think the question as posed was with respect to the fossil fuel burning at Holyrood –

MS. G. BEST: Right.

MR. K. MARSHALL: – and, directionally, did we assign additional weight to something that didn't burn fossil fuel. And every analysis that was done, every alternative that was considered, it wouldn't have passed the first level of analysis if it wasn't environmentally sound and approved. So our role and our task, and other board members can comment, is it had to be environmentally sound in order for us to consider it.

When we went to do this – as we just went through previous cross – the issue was the impact on ratepayers and what was the cost –

what were the cost analyses? There was no weights assigned to the cost, you know, increasing the weight of fuel costing because it wasn't as green as we would like it to be. There was no directional bias towards a greener solution versus another.

This level of analysis, it was a – they had assumed – or they had passed an environmental standards process, that they were sound possibilities, and this was a financial analysis designed to conduct apples-to-apples comparison.

The fact, at the end of the day, when we were able to get off the reliance of fossil fuels and come to a solution which had, at the point in the assumption – at the point in the analysis, passed the financial tests and also brought the benefits of being interconnected off the Island, getting off the reliance of fossil fuels. There was a whole host of benefits which came along with the project. But it's not that environment was not considered by us by any stretch of the imagination.

MS. G. BEST: Okay. Thank you very much.

Mr. Shortall, there was some discussion with you with Ms. O'Brien about director selection. And we know, of course, that the board itself did not have the ability to appoint or select directors. You had mentioned that you thought that one of the better opportunities would be to remove government from the process of selecting directors.

MR. SHORTALL: Yes. That was in response to Ms. O'Brien's question about the concern of paying Nalcor board members more than other Crown corporations and the chance that that would get citizens up in arms because they'd be thinking it's a political appointment and they're going to put their buddies in there and that kind of stuff.

And I said well, maybe one way of dealing with that would be to move the politics from the appointment process. So some kind of an independent board would make the appointments that – where politics just doesn't enter into it, and they'd hire people based on skill sets.

MS. G. BEST: Okay.

Do you know if that has been undertaken by Nalcor or by the government?

MR. SHORTALL: I don't know. I think – is there one in place now?

MR. K. MARSHALL: Well, there's an Independent Appointments Commission, but the process – the machinations, I wouldn't be able to comment on. How – the appointments, I think, still rest with, ultimately –

MR. CLIFT: Ultimately with government.

MR. K. MARSHALL: – with government.

MS. G. BEST: Thank you.

And there was some discussion with respect to governance and the management of the board of directors. To your knowledge, prior to Mr. Martin being hired as CEO, had the board of directors ever been involved in the selection of the CEO or in a search for the CEO?

MR. K. MARSHALL: To my knowledge, no, but I can't say definitively. But to my knowledge, no.

MR. CLIFT: Not to my knowledge.

MR. SHORTALL: I have no idea.

MS. G. BEST: There was some discussion yesterday with Ms. O'Brien that the appointment of the CEO – or the selection of the CEO – was the responsibility of Cabinet and that you, in the documentation prepared for the Human Resources Committee, had written into the document that you would be involved in the process of selecting a CEO. Mr. Clift?

MR. CLIFT: Yes, we were involved in the process. The ultimate approval would have come from – we would have made a recommendation to the province, and they would have approved it.

MS. G. BEST: Okay.

And that – was that what happened in Mr. Martin's case?

MR. CLIFT: Yes.

MS. G. BEST: Okay.

And to your knowledge – and I understand that you haven't been involved in Nalcor since your resignation. The personnel who prepared the internal reports for the Nalcor board leading up to DG3, is it your understanding whether or not they remain with the organization now?

MR. CLIFT: As far as I understand –

MR. K. MARSHALL: Yeah.

MR. CLIFT: – the vast majority do. I wouldn't know for sure, perhaps, that one might have left for whatever reason, but my understanding is –

MR. K. MARSHALL: They are all still there.

MR. CLIFT: They are all –

MR. K. MARSHALL: Yeah.

MR. CLIFT: – still there?

MS. G. BEST: Okay.

MR. CLIFT: I hadn't heard that they weren't.

MR. K. MARSHALL: (Inaudible) – yeah.

MS. G. BEST: Okay. Thank you.

I wonder, Madam Clerk, if we could pull up Exhibit 00014.

THE COMMISSIONER: Fourteen?

MS. G. BEST: And actually, if you could go to the very last page – the conclusion? It's page 65 in the copy that I have. I'm not sure what it is in your ...

No. Further.

CLERK: (Inaudible.)

MS. G. BEST: No, down further.

Ah, there. Thank you.

Can you see that, Mr. Shortall?

MR. SHORTALL: Yes, ma'am.

MS. G. BEST: Okay.

I know you have had – and you have expressed that you had a particular interest in the Grant Thornton report and that you had some concerns with regard to the P-factors. We've already dealt with that, so I don't want to deal with that again. But I wonder as being the auditor and having auditing experience if you might explain to me – because I have very little financial background – what that conclusion says from your perspective?

MR. SHORTALL: From my perspective it says almost nothing. It's all may's: they may have done this, they may have done that and because of that they may have done this. And so it's inconclusive and it kind of implies that we may have picked the wrong project, but it won't come out and say it. So I just – I don't like it as a conclusion because it's inconclusive.

MS. G. BEST: Okay. And would those be words similar – or would those be similar words that you might have used if you were doing the audit?

MR. SHORTALL: I've written several forensic auditing reports and I've never used words as grey as those in my conclusions.

MS. G. BEST: Okay.

Now, Mr. Marshall, I want to refer you – or to have – to speak with you with regard to the resignation of the board.

MR. K. MARSHALL: Yes.

MS. G. BEST: Okay. There's a suggestion in the media that when the E&Y report came in and the budget disclosed cost overruns that the board, itself, bolted for the door. I believe that was the matter that was quoted in the media. So I'd like to refer you to Exhibit 00554. If you could scroll down just a bit? Okay, it's fine there.

So this Exhibit also deals with an article that Ms. Bennett wrote to *The Telegram* on May 19, 2012, and I don't want to deal with that particular aspect of the Exhibit. But I would like

to refer you to paragraphs four, five and six, the full paragraphs. Just up a little – if you could just move up one paragraph? Nope, one more paragraph. Sorry. Thank you.

Now, Mr. Marshall, I wonder if – you’ve had an opportunity to review this Exhibit and is this an accurate account, from your perspective, of what led to the resignation of the board?

MR. K. MARSHALL: Yes. I mean, I had had – this was a meeting that I’d had with the Premier on the Friday before our ultimate resignation. And I had had previous meetings with the Premier indicating that, you know, I was coming to personal decisions with respect to work and health and a whole bunch of other things. And I was looking to move forward from Nalcor, having served for 12 years.

And I had a very open relationship with Premier Ball, and a couple of times discussed tendering my resignation and once, formally, in February to say: You know, I think it’s time that you should move this forward. And – but this particular meeting in April – and he had asked me to consider staying until such time as the Independent Appointments Commission could see it’s work through and could get to the process of recommending some new board members.

But I had this meeting – particular meeting on the Friday heading into a very contentious week with respect to the release of the E&Y report and then the speech – the Budget Speech. And asked again if – again the context of the discussion – I wanted to make sure the board was aware of the context because I had this meeting by myself. And the minister’s chief of staff was there. And Mr. Martin likely would’ve been there for part of it, but likely not, because it was to discuss, you know, issues with respect to Mr. Martin. And I wanted to convey the essence of that meeting back to the board so that I captured, as soon as I could after the meeting, the essence of the discussion.

So this indicates that there was no – or at least this communicated to me, there was no plan immediately to replace the board and the CEO. But events of the weekend and the following week certainly proved otherwise because if we bolted for the door, I would suggest it’s the

slowest bolt in the history of mankind. I mean, we were here for – I mean, in my case, for 12 years and I think through a lot of difficult periods for the board’s – through the board’s activity, through the company’s activity. We certainly weren’t bolting through the door and we attempted to make sure that we delivered a smooth transition to the next administration and we offered our assistance to make sure that, as we said in early testimony, this organization can take a long period of time to get up to speed on. And we wanted to offer our assistance in terms of bringing some members on and making sure, as Mr. Clift indicated, the staggered nature of appointments.

So we did abruptly leave, but it certainly wasn’t the first time that it was suggested that we go. And with respect to the series of events that happened that week, we felt that there was no choice but to go.

MS. G. BEST: Okay, I wanted to refer you specifically to the paragraph beginning with: I closed in saying.

MR. K. MARSHALL: Yes.

MS. G. BEST: And if you can have a look at that. And at the time of the resignation of the board was that, in fact, your position?

MR. K. MARSHALL: Very much so. You know, I think that – I firmly believe that the – to – the position that was taken – and it stemmed from the concern over the tone of the Budget Speech and that was this becomes a self-fulfilling prophecy – if from the top – you know, you haven’t got to be a cheerleader for the project.

If you have concerns let’s work on them, but this is a project that the province has embarked upon that we’ve got to just put our shoulder into it and make work at this stage of the game. And this is gonna take some effort with respect to working with the contractor, with respect to working with all of the factors and all of the individuals who were working a lot of long hours and a lot of late nights to make sure that they brought this and enabled the province to move on and have a reliable electricity provision for the period of time to come.

And there was a lot of elements of tangential benefits with respect to, as it says there, you know, “clean, green energy, on the North American grid for the first time in our history, with a capacity to” import and export. And again it was done on the basis that it was stacked up against a very thorough, rigid analysis – internal, external, federal, provincial governments – to review this.

It is still my firm belief – but again, not having had the ability to be involved in the management of it for the last two and a half years – that it is there for the long-term benefit of the province. And I – it saddens me to think that it would be thought of as otherwise because the gentlemen at this table and the other members of the board did so with the full interest of the future of this province.

MS. G. BEST: Just a couple more questions.

Had government provided you with a formal mandate, had government provided the board with a formal mandate or a shareholder’s expectation letter – and we had some discussions about those yesterday, outside of the Energy Act – would you have acted or felt any differently about the necessity for each of you to carry out your fiduciary responsibilities to the board?

UNIDENTIFIED MALE SPEAKER: No.

MR. K. MARSHALL: Oh, I guess it depends what would’ve been in the letter but, you know, I think that every – I can only speak personally, but my observation and my personal feeling is that we carried out our fiduciary duty to the utmost care, attention and ability. And certainly sacrificed in many levels but, again, it was done willingly, it was interesting and it was important for the future of the province.

MS. G. BEST: One final question. I know there’s been a lot of discussion about the hours of work that were involved in being a board member and the fact that there was no compensation. But knowing what you know now, would you have – either of you – served on the board if you were asked today?

MR. K. MARSHALL: Tough question.

MR. CLIFT: Tough question.

MR. STYLES: Yeah.

MS. G. BEST: Really tough.

Mr. Shortall, why don’t you begin?

MR. SHORTALL: Yeah. Yes – sorry, yes.

MS. G. BEST: You would?

MR. SHORTALL: Mm-hmm.

MS. G. BEST: Is there any reason why in particular?

MR. SHORTALL: It’s a very interesting project. I’d love to see it to its end.

MS. G. BEST: Okay.

Mr. Styles?

MR. STYLES: Yeah, well, if, you know, the other aspects of my life would have allowed me to continue, yes, but – and due to the fact that they weren’t, the answer would be no.

MS. G. BEST: Okay.

Mr. Marshall?

MR. K. MARSHALL: I would say, yes, because it was so strategic and interesting in making sure that we were there for the benefit of the province. But if my kids were to ask me should I go on a board, I would just have to look at them and say: Go in with your eyes wide open and know what you’re going to be getting in for and be able to withstand, you know, the ride through the process, because it’s a huge responsibility and it’s a huge amount of work.

MS. G. BEST: Okay.

Mr. Clift?

MR. CLIFT: I would say, yes, and, again, with the full support of my family. And I would also reference – for those of you who are interested in my ICD training – one of the things they gave us was a list of questions to ask before you go on a board; an updated, thorough list that includes things like the term and the turnover and all of those things that you should be asking.

But, yes, I would – again, belief in the project, a tremendous group of individuals, learned a lot from them, occasionally was in awe of them.

MS. G. BEST: Okay.

MR. CLIFT: Particularly, Mr. Shortall and his auditing and accounting capacity; absolutely outstanding.

MS. G. BEST: Okay. Thank you very much.

I have no further questions.

THE COMMISSIONER: Thank you, Ms. Best.

Redirect?

MS. O'BRIEN: I don't have much, but I do have a few questions and a couple of clarifications. First, I believe, Mr. Marshall, you had requested yesterday to get some sense of the number of new board members that had been appointed with the – when the various subsidiaries were created.

All the board lists have been filed as exhibits. One of our associate counsel did a quick count. So it's – I'm not giving – not meaning to give evidence here, it's there in the documents, but it's approximately 37 is the number she came up with –

MR. K. MARSHALL: Okay.

MS. O'BRIEN: – which is in between the 30 to 40, which you had said.

MR. K. MARSHALL: Right.

MS. O'BRIEN: I also wanted to note that there has been some discussion of the board minutes. The board minutes – they should have – it's a bit of an oversight of Commission counsel. They should have been filed on the first day with the first large batch of exhibits. They will all be filed, Commissioner, so they're there.

A few questions, first one for you, Mr. Shortall: On your – on – when you were under cross-examination, one of the pieces of information you gave is that the Maritime Link is on the books of Nalcor. So when you go to the Emera

website and you look through it and they have, you know, posts there on the Maritime Link, you know, they say the Maritime Link will be owned and operated by essentially an Emera subsidiary.

So can you just clarify – so we've heard that Emera owns the Maritime Link, at least for the first 35 years, now you're telling us it's on Nalcor's books? Can you –

MR. SHORTALL: Correct.

MS. O'BRIEN: – clarify that for us, please?

MR. SHORTALL: Well, I haven't looked at Emera's accounting, but I would be surprised if it's not included in the rate base. The Nalcor accounting has the Maritime Link included in the balance sheet as a capital asset, \$1.7 billion at December 31, 2017. I looked it up.

MS. O'BRIEN: Okay.

MR. SHORTALL: And a credit, a liability, deferred credit of equal amount, \$1.7 billion, relating to the power that has to be delivered in the future. Emera is the legal owner of the Maritime Link but, in substance, Nalcor owns the Maritime Link because it has all the rights and obligations of ownership for the whole life of the infrastructure.

MS. O'BRIEN: And so under – with, you know, generally accepted accounting principles or whatnot, would it be possible that both companies are carrying this asset on their books?

MR. SHORTALL: It shouldn't be but with a rate-regulated utility it quite could be. Normally, you know, in general accepted accounting principles the accounting would mirror, but not necessarily.

MS. O'BRIEN: Okay. Thank you for clarifying that.

The next question I wanted to ask – I'll stay with you. There was some discussion about the PUB and – in your examination and cross-examination. One point I'd like to clarify: Were you aware at the time that the PUB was looking for further information from Nalcor following the reference question being made and that there was significant delay in that information coming

from Nalcor to the PUB. And that, in part, led to the PUB requesting an extension, that extension being denied and then, ultimately, the report that was given. Was that something that was on the board table?

MR. SHORTALL: I was aware that there were some information requests, but I'm not aware of the details. No, I can't really expand on that.

MS. O'BRIEN: Okay.

Do any of the other board members have a clearer memory of what was going on there in terms of the delay in getting information from Nalcor?

MR. K. MARSHALL: No, I think that, from my recollection – again quite a while back now – but in essence it was – the request was for Decision Gate 3 numbers which weren't quite ready yet. So I don't know how we could provide them if they weren't provided to – even ready internally. And all parties that had made a position, with respect to analyzing whether this was the lowest cost option, were all dealing with a consistent set of figures.

So I don't know how the questions would have been asked to say can we have updated numbers and they just weren't ready at that point in time. That's my understanding.

MS. O'BRIEN: Okay, so you don't have any memory of them looking, Nalcor sort of saying we're going to get you information and then it not coming by the date?

MR. K. MARSHALL: No.

MS. O'BRIEN: Okay.

Finally, the last section – I'll stay with you, then, Mr. Marshall. This is on the question of the P50 because I believe at one point you said you considered the P50 to be good utility practice.

MR. K. MARSHALL: Again, I would have relied on our outside analyst to present that. It was documentation provided to us earlier that showed it would have been analyzed at P75 as well, and we talked about various P-factors. And, again, that would be a question, I guess, from – for the CEO when he appears later before

the Commission. But we asked the question, what is the appropriate, and P50 was felt to be the appropriate number.

And, again, from another perspective, Mr. Shortall can comment –

MR. SHORTALL: That was my answer.

MR. K. MARSHALL: – that P50 was the appropriate figure for.

MS. O'BRIEN: Okay, so that's why I just wanted to clarify, where did you get that information from because you said it was good utility practice? Are you saying you got it from Mr. Martin and from other people from within Nalcor?

MR. K. MARSHALL: Yes, from board discussions.

MS. O'BRIEN: Did you get it from any other of the external consultants?

MR. K. MARSHALL: I did not.

MS. O'BRIEN: Okay.

Mr. Shortall, any different answer here?

MR. SHORTALL: No, but it would've been included in the numbers looked at by MHI –

MR. K. MARSHALL: Right.

MR. SHORTALL: – and all the others. So external eyes have looked at the P50 and passed it as being appropriate.

MS. O'BRIEN: I think the word was good – you know, good utility price or whatever.

MR. SHORTALL: Right, right.

MS. O'BRIEN: Is that something you had from one of the consultants?

MR. SHORTALL: It was my understanding was P50 was commonly used and it was good utility practice.

MS. O'BRIEN: Okay, that's right.

So from where was that understanding? Was it – I understand it was from Ed Martin and from other people within Nalcor. Did that come directly from any of the consultants?

MR. SHORTALL: I think it probably would have come from both, wouldn't it, because I'd have to go back and reread the MHI report. But it certainly came to us from Mr. Martin and his team and I would have thought it was examined and accepted by our external consultants as well.

MS. O'BRIEN: If I tell you that there's no mention of a P-factor in either of the MHI reports, does that assist you with your answer?

MR. SHORTALL: No, it doesn't but – they may have looked – I mean they do come back and say the costs are reasonably compiled, right? And so they would have to look at P-factors to do that to make that statement –

MS. O'BRIEN: Okay.

MR. SHORTALL: – I assume.

MS. O'BRIEN: Those are my follow-up questions.

Thank you.

THE COMMISSIONER: Thank you.

MR. SHORTALL: Thank you.

THE COMMISSIONER: Thank you, gentlemen. You can step down.

MR. SHORTALL: Thank you, Sir.

THE COMMISSIONER: So what's your wish at this stage, Ms. O'Brien?

MS. O'BRIEN: I'm fine to go either way. The witness is here, I'm happy to start. But I do appreciate it is late in the day so I'll leave it in your hands.

THE COMMISSIONER: Well, I was anxious to start with the next witness today. How are people feeling about sitting till 5 o'clock today?

Nobody's shaking their head yes or no. So I can assume that there's –

UNIDENTIFIED MALE SPEAKER:
(Inaudible.)

THE COMMISSIONER: – obvious agreement. So, let's call your next witness.

MS. O'BRIEN: Mr. John Mallam, please.

THE COMMISSIONER: Can you pass the binders?

John Mallam.

MS. O'BRIEN: We'll get the clerk (inaudible) –

THE COMMISSIONER: Fresh water.

MS. O'BRIEN: – in just a few minutes (inaudible).

MR. MALLAM: Thank you, yeah.

THE COMMISSIONER: All right. Mr. Mallam, if you could just stand, and I'll ask you if you wish to be sworn or affirmed this time.

MR. MALLAM: Affirmed.

THE COMMISSIONER: Affirmed, thank you.

CLERK: Do you solemnly affirm that the evidence you shall give to this Inquiry shall be the truth, the whole truth and nothing but the truth?

MR. MALLAM: I do.

CLERK: State your full name for the record please?

MR. MALLAM: John Mallam.

CLERK: Thank you.

MS. O'BRIEN: So, Mr. Mallam, you're being called as a witness primarily because of your involvement on the Independent Project Review team, which we've had some evidence about already.

Before we get to that though, I'd like to start by asking you to give us a short summary of your education and work history, please.

MR. MALLAM: Thank you.

I graduated from Memorial University in 1975 with a bachelor's degree in mechanical engineering. Shortly after I graduated, I started to work with Newfoundland and Labrador Hydro, and I worked there for 37 years; retired in 2012. During that time, I worked on design, construction, commissioning, operation, maintenance, repair, refurbishment, feasibility studies of all sorts of generating plants: thermal and hydro.

MS. O'BRIEN: And in terms of the hydro plants in particular, can you give us some details of the ones that you were involved with?

MR. MALLAM: Oh, the first one would have been Bay D'Espoir Unit 7, which was also known as Bay D'Espoir stage 3, but Upper Salmon, Cat Arm, virtually every power plant that was built from 1975 until the present day.

MS. O'BRIEN: So you were a member of the Independent Project Review team for Muskrat Falls, both at DG2 and DG3. Before – I'm going to ask if you could please give us – you're the first member of that – one of those teams to give evidence, so I'm going to ask you to give us a brief introduction to what an Independent Project Review is.

MR. MALLAM: The intent was to have a group of people who were not fully engaged in the project, previously, to look over a set of data to determine if the information that had been collected was sufficient, both in quantity and in quality, to make a decision of whether to proceed to the next phase of the project.

MS. O'BRIEN: Thank you.

I'm going to bring up an exhibit, but before I do that, I'm gonna ask to enter the exhibits.

Commissioner, could we please have an order to enter Exhibits P-00475 to P-00510, P-00516 to P-00520 and P-00522.

THE COMMISSIONER: All right. Those exhibits will be marked as entered.

MS. O'BRIEN: Thank you.

THE COMMISSIONER: (Inaudible.)

MS. O'BRIEN: Madam Clerk, could you please bring up P-00488. It's in tab 14 of – Mr. Mallam doesn't have his binder. I'll ask associate counsel to please bring Mr. Mallam the – his witness binder. It will be there shortly, but it's gonna appear on the screen in front of you, Mr. Mallam.

So, could we please – I'm gonna start with –

MR. MALLAM: Which tab?

THE COMMISSIONER: Tab 14.

MR. MALLAM: Tab 14. Thank you.

MS. O'BRIEN: There you go. It's good service from the Commission.

Okay. So what we have here is a September 2010 PowerPoint: "The Fundamentals... Independent Project Review." So that's the name of the slideshow.

And I was going to go – this slide here. It says: "What is an IPR?" And if you could just – the slide's there, it's up on the screen, can you just review that, Mr. Mallam, and tell us if you agree that that's an accurate description of how you would have understood an Independent Project Review?

MR. MALLAM: Yes, it is.

MS. O'BRIEN: Prior to your involvement at DG2, had you ever been involved in an Independent Project Review?

MR. MALLAM: Not a formalized process like this. But during my career with Hydro, I've been involved in many reviews of feasibility studies and other sorts of studies, done either by external consultants or by other groups within the company.

MS. O'BRIEN: Okay. While you were at Hydro, did they – the formalized process that you went for, for the Muskrat Falls Project, when you say you've done other reviews, were they as formalized as what was done for Muskrat Falls?

MR. MALLAM: Oh, no, not as formalized, no.

MS. O'BRIEN: Okay.

So, we're gonna look at various documents, but there would have been – at Muskrat Falls we had a, you know, an IPR charter, a number of focus areas that had to be checked and verified. Would that have been at all similar to what was going on at Newfoundland and Labrador Hydro?

MR. MALLAM: No, what – generally what would happen, if we had a, for instance, if we had a feasibility study performed by an external engineering firm, the draft report of that would have been circulated to a group within the company, and we would have been expected to review it both for, you know, the quality of the content, the assumptions made and so forth. But there was nothing formally written down about it.

The company was staffed by highly experienced people in the utility business and we all knew what we had to do.

MS. O'BRIEN: Okay, so you would be reviewing the projects you were working on yourselves in Hydro? So you wouldn't be independent from that point of view to the projects necessarily?

MR. MALLAM: That's correct.

MS. O'BRIEN: Okay.

Now, who asked you to join the IPR team? And we'll start at DG2.

MR. MALLAM: At DG2, I cannot remember. At DG3, I received an email from Paul Harrington.

MS. O'BRIEN: Okay. Would you have known Mr. Harrington, previously?

MR. MALLAM: Yes, I'd met him. I can't say I knew him well, but he was working on the Muskrat Falls Project, I was not. But in normal dealings within the company, I had met him.

MS. O'BRIEN: And when – in terms of the time you were asked to join the DG2 IPR team,

would that have been approximately the summer of 2010?

MR. MALLAM: That sounds right, yes.

MS. O'BRIEN: Okay. And prior to that time, had you had any involvement with the Muskrat Falls Project?

MR. MALLAM: None at all.

MS. O'BRIEN: And you said you retired from Newfoundland and Labrador Hydro in 2012. So you were working at Newfoundland and Labrador Hydro on other projects though, but nothing that – Muskrat Falls had crossed your desk?

MR. MALLAM: No, for the last year-and-a-half, from approximately around Christmas, I think, 2010 or early 2011, until I retired, I was working on Muskrat Falls and operational issues. Looking at things like how the plants would be maintained, what staffing levels would be required, reviewing drawings to see that the equipment that was being purchased and installed could be easily and effectively maintained. And I also worked on assembling the operating cost estimate.

MS. O'BRIEN: Okay, well that was work you did after DG2, though, was it?

MR. MALLAM: Yes.

MS. O'BRIEN: Okay, so let's just, for now, just stick up at the DG2 time, when you came on the IPR team at DG2. You were still an employee of Newfoundland and Labrador Hydro?

MR. MALLAM: No, at the time I was an employee of Nalcor, but –

MS. O'BRIEN: Oh, okay.

MR. MALLAM: – none of my work involved Muskrat Falls.

MS. O'BRIEN: Okay, I understand. All right.

So when you said – I have noted that you said you retired from Hydro in 2012.

MR. MALLAM: To me Hydro and Nalcor are one in the same.

MS. O'BRIEN: Okay, that's fine, absolutely.

MR. MALLAM: After 37 years, yeah.

MS. O'BRIEN: Okay, so you were working – technically working with Nalcor at that time, but nothing to do with the Muskrat Falls Project.

MR. MALLAM: That's correct.

MS. O'BRIEN: Okay.

Who are the other members of the IPR DG2? And to assist you in this, actually, I can ask Madam Clerk to bring up P-00475.

MR. MALLAM: Well, there's Richard Westney, as the information says. He's with Westney Consulting Group, a project management firm.

MS. O'BRIEN: Okay.

MR. MALLAM: Bernie Osiowy, who was a retired – a former employee of Manitoba Hydro.

MS. O'BRIEN: And he was retired at this time when he came to do DG2?

MR. MALLAM: Yes, he was, yeah.

MS. O'BRIEN: Okay.

MR. MALLAM: Derek Owen from – well, he had his own consulting firm, RDO Consulting. He'd been involved mainly in the oil business, I believe.

MS. O'BRIEN: Okay.

MR. MALLAM: Then myself.

MS. O'BRIEN: Okay.

And so it was four members of the team, total. Is that right?

MR. MALLAM: Mm-hmm.

MS. O'BRIEN: Now, as I alluded to a few minutes ago, for both DG2 and DG3 there was a

charter document for the IPR team and it essentially set out what you had to do. Is that a fair summary?

MR. MALLAM: That's correct. Yes.

MS. O'BRIEN: Okay and we are going to look at them in a little detail. But, first, did you have any involvement in drafting the charter for DG2?

MR. MALLAM: I don't think so. I may have been shown a draft but I don't remember it specifically.

MS. O'BRIEN: Okay, if we can go P-00485, please. This will be at tab 11 of the book before you, Mr. Mallam.

So this is email correspondence between you and Derek Owen. And I should clarify: Mr. Owen, I understand, was the lead of the IPR team. Is that right?

MR. MALLAM: That's correct. Yes.

MS. O'BRIEN: Okay.

So – and we will hear from Mr. Owen. But what's happening in this email, just to – sorry, I lost my mouse, if we could just put it on the screen there, please. Thank you.

So what we see here –and I'll just scroll down. So what we see here, it's a draft of the Independent Review Charter that's being sent to you for Decision Gate 2. And when we look at the covering email here, it appears that what it is, is Mr. Owen is circulating this to you and the other members of the team – so Mr. Osiowy, and maybe it was just you and Mr. Osiowy at this point – and asking you to identify areas of – where you can make contributions.

And, specifically, he's asking you if you could highlight areas where you – in the first category – focus areas where you have specific expertise in red and other areas where you can make a contribution in green.

MR. MALLAM: Mm-hmm.

MS. O'BRIEN: So he's asking you to review it and specific expertise, red and other areas of contribution, green.

And if I could just – give me one moment. And in this email what we have, what's attached here, if we go up further the line we see that this is you sending this document back to Mr. Owen with your highlighting done, okay?

MR. MALLAM: Yeah.

MS. O'BRIEN: So can we please go to page 10 of this document, Madam Clerk?

So in this section of the document it's Focus Areas. And I'm not going to go through each one, but is it fair to say – there's a number of bullets here, I believe, ultimately 34 bullets. Mr. Mallam, is it fair to say that those 34 identified areas were the areas that the IPR team was asked to investigate and provide comment or recommendation on?

MR. MALLAM: That's correct. Yes.

MS. O'BRIEN: Okay.

And you have gone through and highlighted some in green and some in red and some you've just left black. I'm not going to take you to every single one, but there's a few I'm just going to ask you to talk about why you categorized them as you did.

So the first one that you're being asked – that you highlighted in red – was that the quality and completeness of the source data used by the project is suitable. So can you just please tell us why you would have considered that you had specific expertise in that area?

MR. MALLAM: Well, the sort of data that was gathered for this project is similar to what would have been gathered for many of the hydro plants – well, actually all the hydro plant studies we had done. This would be things like field studies, the results of test pits, boreholes, detailed surveys, selection of routes for access roads, laydown areas and such. This is common to all hydro projects and I'd seen this many times before.

MS. O'BRIEN: Okay.

The one right under that is in green: "That the processes and methods used for Risk Analysis, Estimating and Economic analysis comply with appropriate standards, best practices or are equivalent." So this is one you highlighted as an area where you could make a contribution. Why did you put this in that second category?

MR. MALLAM: Okay, well, this is a bit of a mixed bag. On the estimating I had quite a bit of experience, again, from all these other hydro plants, and thermal plants for that matter.

Economic analysis was usually done by our systems planning department. The way we would select projects and evaluate them is generally a group in engineering would prepare the capital cost estimates and then detail all the characteristics of the project – how much power it could produce, how much energy and so forth – and then estimate the operating cost. All this would go to system planning and they would do the economic analysis.

MS. O'BRIEN: Okay.

MR. MALLAM: Similarly, for risk analysis, we would do the risk analysis and advise system planning on what to use in their analysis for things like contingency or sensitivity analysis.

MS. O'BRIEN: Okay.

So, generally, do you know, like, when you were looking at contingencies, in your experience what types of contingencies would you use in terms of ranges?

MR. MALLAM: It depends on the individual study. We did not use the P-system –

MS. O'BRIEN: Okay.

MR. MALLAM: – to classify the contingencies; we had a hierarchy of studies. And the least accurate one we would call either a screening study or a desktop study and that's equivalent to a P50 or less. And then it would proceed up to through a pre-feasibility, a feasibility, final feasibility. And the most accurate one, which we always didn't do – or didn't always do – was called a cost control estimate. But, generally speaking, the studies

that we did would fall in the range of P70 to P90 at the time of project release.

MS. O'BRIEN: Okay.

And in terms of the percentage of contingency that you would normally include in those projects, are you able to provide us with a range of what would've been normal practice for you?

MR. MALLAM: Typically 10 to 20 per cent, but probably most of them fell within a range of 10 to 15 per cent. This is for large generation projects I'm speaking of now, not small capital projects.

MS. O'BRIEN: Okay.

Okay, so those two areas – so, okay, the next one you didn't highlight at all. So is that fair to say you didn't believe – you didn't have any particular ability to make a contribution on those black areas.

MR. MALLAM: That's correct.

MS. O'BRIEN: Okay.

MR. MALLAM: We did not prepare project charters and project execution plans for projects. We all knew what had to be done and we went about doing it.

MS. O'BRIEN: Okay.

And the next one that I wanted to look at is actually right below that and that's: "That the development of the Project Contracting Strategy was carried out in accordance with a defined process and that this complies with the appropriate standards, best practices or equivalent and the contracting plan."

So this is a red category for you. Can you tell us what you would've understood the project contracting strategy to be and why you felt you had the expertise in this area?

MR. MALLAM: Well, on any projects, regardless of its size, you have to decide how you're going to carve up the work to send it out in individual contracts to gain the maximum benefits. If you have contracts that are much too

large, then you're going to reduce the number of contractors who can bid on it.

Other contracts lend themselves to being divided up; for instance, on a large project you might have a mechanical contract, you might have a civil contract, you might have a turbine contract. On very small projects you might only have one or two, so it's to obtain the most competitive pricing and allow you to most effectively manage the project.

MS. O'BRIEN: Okay.

And under the idea of project contracting strategy, would you also have included whether you were going with an EPCM – so an engineering, sort of a turnkey-type contract as opposed to doing – internally managing your contract. Would those concepts have also fallen under –?

MR. MALLAM: Yes, exactly.

MS. O'BRIEN: Okay. Thank you.

And, just generally, when you did work on the significant large generation projects with Hydro, how – what was the – or was there a typical way in which you pursued the contracting strategy?

MR. MALLAM: Most of them we would hire an external consulting firm. They would do the engineering, they'd do their procurement and they do the contract management. And we would split the contracts up, again, depending on the project.

On a hydro plant, you might have two to three major civil contractors. You'd probably have a major machinery contractor and probably a contractor to do the balance of electrical mechanical on the powerhouse, for instance, and then you do the transmission separately. That was generally the way they were done.

MS. O'BRIEN: Okay.

And I – it's my fault for the way I posed the question earlier. I mentioned EPCM; I should have been clear about what that was, but that is an engineering, procurement and contract management structure, which is what you just

described, that you would normally have done in Hydro.

MR. MALLAM: That's right.

MS. O'BRIEN: Okay.

I'm just going to go – if we could just go to the next page. As I said, I'm not going to go through all 34 areas. The next one I wanted to talk about – and you may have already actually addressed this, Mr. Mallam, and say if you did, that's this one here, that you highlighted in red: "That the development of the Project cost estimates were carried out in accordance with a defined process and ... this complies with the industry standard or is equivalent."

Anything to add from what you'd previously said?

MR. MALLAM: Not really. I have experience with studies at all levels from a desktop level to a final feasibility, so I've been through this on many projects.

MS. O'BRIEN: Thank you.

The next one, again, you have it categorized as a red, and that's: "That the Project Schedule has been developed in accordance with an agreed process and identifies the critical path in the correct sequence of key events."

So what was your experience with – in relation to project scheduling?

MR. MALLAM: Similar to cost estimating. I've been involved in many projects, thermal and hydro, and of course, a key part of any project planning is to have a project schedule, and I've done this many times.

MS. O'BRIEN: Okay.

And another one, and it may be the same answer that you've given already, but one for red, for you, is: "That a project cost and schedule estimate in the appropriate range of accuracy is available."

Do you have anything to add to your expertise on that other than what you've already said?

MR. MALLAM: No, my response would be the same.

MS. O'BRIEN: Okay.

And here's one that you have in green, down here, "That the strategic and tactical project risks are understood and a risk management plan is in-place and being actively pursued."

Can you please describe what your – why you would have categorized that as just area I can contribute as opposed to an area where you have a particular expertise?

MR. MALLAM: On large projects, typically, the engineering contractor would have performed this task. So my role would have been to review it, not to actually prepare it.

MS. O'BRIEN: If we could please go to P-00486, and this is at tab 12 in your book.

And I just – I'm just pointing this out in part to just help orient people to the exhibits. This is from Derek Owen to the other three members – so Mr. Westney is now included – the other three members of the IPR team. And he – what he has done is – I take it this time he has probably got everybody's red and green categorizations back and he has collated this information here in a table for – with all the – every member of the team has a red category and a green category and all the Focus Areas are listed and they go right down through to number 34.

On this – this covering email is August 30, 2010, and he says: "I would like to discuss this at our Wednesday telephone conference."

So is it fair to say it is around this time that you were gearing up to begin the DG2 IPR review?

MR. MALLAM: Yes, that's correct.

MS. O'BRIEN: Okay.

And this email may be a bit a helpful in a moment when we talk about process.

At – can we bring up one quick question for you – P-00439 [sp P-00493]. It's at tab 19 of your book. We just looked at the draft DG2 charter,

Mr. Mallam, that you had. That's the one you highlighted with the red and the green.

At P-00493, tab 19, it appears – sorry, I'm just waiting for it to come up. This appears to be the final document. It's no longer marked draft. I think you'll recall that that one we just looked at a few minutes ago was water stamped draft. This one's been signed off as the B1, issued-for-use document. It hasn't been issued until January 10 of 2011, which was after DG2.

Do you have any knowledge as to why the document doesn't appear to be, at least, finalized 'til after Gate 2?

MR. MALLAM: No idea.

MS. O'BRIEN: Okay.

And just, Commissioner, for your information, I can't say I've done a word-for-word-for-word comparison of the two exhibits, but I have generally looked at them, and the most important parts, I'm not seeing that there's any differences between the documents that I've noted. So it may just be an issue of when it finally got, you know, formally signed off, but we will raise that with other witnesses. Okay.

So I'm going to ask you now, Mr. Mallam, can you generally describe – and the email we were just at may assist you somewhat in that, and that was P-00486, because in that email Mr. Owen is talking about at least some of the first steps.

But if you could give, please, the Commissioner a description of how the IPR team went about doing its work?

MR. MALLAM: The – once we had decided on the focus areas for each of us, documentation was made available to us. And I think that was done either by an FTP site or by a secure website. The documents were all noted there, and prior to our actually meeting physically, we had a chance to review all this documentation, which related to all these questions they wanted us to consider.

Once we got together, then, we divided ourselves into focus groups, or focus areas, and we interviewed people – I think there's a list here somewhere of what the – the specific

individuals we talked to – to get more detail on the documentation, on how things were prepared and what the level of accuracy was – all these sorts of things.

And at the end of each day we would meet as a group, the individual sub-groups, and we would discuss our findings of the day, agree on our findings, and then move on to the next day's activity. And towards the end of the week – I think it was probably on a Thursday – we prepared our final report, which was a very – in a very brief PowerPoint format, agreed on the content among ourselves, and then the following day we made a presentation to a larger group of Nalcor.

MS. O'BRIEN: Okay.

So, when you went to the FTP site to view the documents, was it just a mass collection of documents there, or had the documents been broke – categorized along the lines of the focus areas?

MR. MALLAM: I can't remember.

MS. O'BRIEN: Okay.

And in terms of who placed the documents there would that have been, to your knowledge, would that have been people internal to Nalcor or would that've been something done by other members of the IPR team?

MR. MALLAM: No, I think that was done by Nalcor.

MS. O'BRIEN: Okay.

And so when you say then – you as – so you had time to review them in advance, then the IPR group came together here in St. John's?

MR. MALLAM: That's correct, yes.

MS. O'BRIEN: Okay.

And you then organized yourselves into the focus areas, so the areas where you felt you could contribute or had expertise?

MR. MALLAM: That's correct, yes.

MS. O'BRIEN: And you divided and conquered a bit in terms of interviewing people? Is –

MR. MALLAM: We did that, and we always made sure there were at least two of us present at every interview –

MS. O'BRIEN: Okay.

MR. MALLAM: – so that no biases would creep in, or misunderstandings.

MS. O'BRIEN: Okay.

And in terms of the people that you interviewed, did you choose who you wanted to interview, or were these people that Nalcor put forward for the interviews?

MR. MALLAM: They were – the people that Nalcor had selected, based on their familiarity with the particular focus areas.

MS. O'BRIEN: Okay.

And would they have all been people within Nalcor? For example, you know, did you interview anybody from Government of Newfoundland and Labrador, or anybody from one of the consultants that Nalcor had used?

MR. MALLAM: I remember interviewing some people from the consultant, SNC. I don't remember if we interviewed government individuals or not.

MS. O'BRIEN: Okay.

So SNC, I – they would've been a contractor, the EPCM contractor.

MR. MALLAM: They were the EPCM contractor –

MS. O'BRIEN: Okay.

MR. MALLAM: – yes.

MS. O'BRIEN: So, you – would you – for consultants, like, would you have interviewed anyone from, say, Navigant, which was a consultant that Nalcor had used?

MR. MALLAM: I don't think so, no.

MS. O'BRIEN: Okay.

Commissioner, would you like me to keep going until 5 o'clock?

THE COMMISSIONER: It's up to you, whatever you – what's your –

MS. O'BRIEN: That's a good place for me to break –

THE COMMISSIONER: Okay.

MS. O'BRIEN: – for the day, so.

THE COMMISSIONER: All right.

All right, well thank you very much.

So, Sir, you're – at this point in time you're in the midst of your testimony, so the less you talk about it the better. In the meantime, we'll come back tomorrow and we'll continue on with you tomorrow morning.

9:30 tomorrow morning.

CLERK: All rise.

This Commission of Inquiry is concluded for the day.