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<p>1 February 25, 2010</p> <p>2 9:00 a.m.</p> <p>3 CHAIRMAN:</p> <p>4 Q. Good morning, everybody. My name is Andy</p> <p>5 Wells. I'm the Chairman of this illustrious</p> <p>6 organization. On my left is Commissioner</p> <p>7 Darlene Whalen, the Vice Chairman of the</p> <p>8 Board, and on my right and extreme right are</p> <p>9 James Oxford, Commissioner, and Dwanda Newman.</p> <p>10 I also want to acknowledge the presence of</p> <p>11 Cheryl Blundon, the Board Secretary, and, of</p> <p>12 course, our own Board Counsel, Dan Simmons.</p> <p>13 Mike McNiven is over on, I guess, your left,</p> <p>14 my right. Mike is the Board's Information</p> <p>15 Technology Officer and he will be assisting</p> <p>16 with the hearing with electronically</p> <p>17 retrieving evidence reference by various</p> <p>18 lawyers present. Discoveries Unlimited are</p> <p>19 here. Judy Moss is assisting with the</p> <p>20 transcription, and I think those copies will</p> <p>21 be available later on in the day.</p> <p>22 MS. BLUNDON:</p> <p>23 Q. Tomorrow.</p> <p>24 CHAIRMAN:</p> <p>25 Q. Okay, good. We've set aside today and</p>	<p>1 MR. CAROT:</p> <p>2 Q. That's fine.</p> <p>3 CHAIRMAN:</p> <p>4 Q. Ian Kelly is here for Nalcor Energy, and Jamie</p> <p>5 Smith for Churchill Falls Labrador</p> <p>6 Corporation, and I think I see Mr. Young, also</p> <p>7 from Nalcor Energy. Mr. Simmons, I'll now</p> <p>8 defer to you, sir, to get the proceedings</p> <p>9 under way.</p> <p>10 MR. SIMMONS:</p> <p>11 Q. Thank you very much, Mr. Chairman. Just a</p> <p>12 brief comment on the procedural history that's</p> <p>13 brought us here. This is Nalcor's Application</p> <p>14 that was filed on November 10th, 2009, for the</p> <p>15 establishment of a water management agreement.</p> <p>16 The Application was brought under Section 5.5</p> <p>17 of the Electrical Power Control Act, concerns</p> <p>18 the Churchill River in Labrador. The Board</p> <p>19 published notice of the Application and the</p> <p>20 intervenor status was granted, as you've</p> <p>21 noted, to The Conseil des Innus de</p> <p>22 Ekuanitshit, and The Innu of Uashat mak Mani-</p> <p>23 Utenam. Intervenor status was also granted on</p> <p>24 a limited basis to Twin Falls Power.</p> <p>25 The Water Management Regulations required</p>
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<p>1 tomorrow's hearing dates. We want to make</p> <p>2 sure that everybody who participates has</p> <p>3 sufficient time to be heard and to ensure the</p> <p>4 highest possible standard of procedural</p> <p>5 fairness. I understand Mr. Simmons has</p> <p>6 discussed the schedule with the various</p> <p>7 lawyers and I think there's been some common</p> <p>8 ground found. The order of presentation, Mr.</p> <p>9 Schulze, that is you, sir.</p> <p>10 MR. SCHULZE:</p> <p>11 Q. I'm Mr. Schulze.</p> <p>12 CHAIRMAN:</p> <p>13 Q. Thank you, sir. You're representing The</p> <p>14 Conseil des Innus de Ekuanitshit, and I assume</p> <p>15 your colleague next is Mr. Carot, is that</p> <p>16 correct, sir.</p> <p>17 MR. CAROT:</p> <p>18 Q. Yes, good morning.</p> <p>19 CHAIRMAN:</p> <p>20 Q. And Mr. Carot is representing The Innu of</p> <p>21 Uashat mak Mani-Utenam, The Innu Takuaikan,</p> <p>22 Uashat mak Mani-Utenam Band Council, and</p> <p>23 certain traditional families of The Uashat mak</p> <p>24 Mani-Utenam Innu Nation. I hope my</p> <p>25 pronunciation was sufficient, sir.</p>	<p>1 submissions from the parties with interest on</p> <p>2 the river within 30 days of the filing of the</p> <p>3 Application. That's been complied with and</p> <p>4 those submissions were filed. Procedurally</p> <p>5 there's been requests for information</p> <p>6 exchanged among the parties and with the Board</p> <p>7 and responses provided. There's also been a</p> <p>8 technical conference facilitated among the</p> <p>9 parties, which were followed by supplementary</p> <p>10 requests for information and responses. There</p> <p>11 had been written submissions filed on the</p> <p>12 matters in issue raised in the Application and</p> <p>13 in the interventions, with some reply</p> <p>14 submissions as well. The Board had set aside</p> <p>15 this time for hearing argument on issues by</p> <p>16 request. There's been correspondence received</p> <p>17 from Mr. Carot requesting oral argument on</p> <p>18 three points that's contained in Mr. Carot's</p> <p>19 letter of February 12th, 2010, and the first</p> <p>20 point is, "Does the establishment of the Water</p> <p>21 Management Agreement for the management of</p> <p>22 water thereunder trigger a duty to consult and</p> <p>23 accommodate the intervenors". The second is,</p> <p>24 "Does the Board of Commissioners of Public</p> <p>25 Utilities have the jurisdiction and obligation</p>

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<p>1 to decide whether this duty to consult and 2 accommodate has been triggered and whether 3 this duty has been discharged". The third is, 4 "In all circumstances, and in any event, 5 should the Board of Commissioners of Public 6 Utilities order Nalcor and CF(L)Co to consult 7 and to accommodate the intervenors. There's 8 also been a motion filed by Mr. Schulze on 9 behalf of his client asking the Board to 10 suspend these proceedings citing two grounds. 11 One is reliance upon Section 68 of the 12 Environmental Protection Act, and the other is 13 to allow meaningful consideration of the issue 14 of the duty to consult.</p> <p>15 There's been discussion among the 16 parties, as you've noted, and the order of 17 presentations today is going to begin with Mr. 18 Schulze, followed by Mr. Carot, and I expect 19 then it will be Mr. Kelly, followed by Mr. 20 Smith, with an opportunity for reply then from 21 Mr. Schulze and Mr. Carot. There are a number 22 of exhibits that have been filed by parties 23 which have been placed on the proceeding 24 record that have been recognized by the Board 25 as being confidential in nature, and those</p>	<p>1 about, if I didn't, is the matter of the exact 2 relief we're seeking, and I can say it took me 3 some time to get used to the procedure of the 4 Board, but now that I'm used to it, I'll 5 perhaps change some of my thinking from my 6 first submissions to my last. Initially, I 7 think we sought a suspension in order to make 8 better evidence with respect to the 9 consultation issue. I think we've modified 10 our position somewhat on that. If the Board 11 wants or my friends for the other parties, 12 want any amended pleadings, we can come back 13 to that, but I'll just try and summarize our 14 position and where I think that takes us in 15 terms of the relief we're seeking today.</p> <p>16 Our essential position is that the Board 17 should not and can not approve the Water 18 Management Agreement in the absence of 19 consultation with my clients, The Innu de 20 Ekuanitshit, and I understand Mr. Carot will 21 make similar submissions. So one conclusion I 22 could lead this Board to is that in the 23 absence of consultation, it simply has to 24 reject the agreement before it if it believes 25 that we've made our case for consultation.</p>
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<p>1 have not been made part of the public record 2 of the proceeding. If in their presentations 3 counsel intended to refer to any of those 4 exhibits, we'd ask that you identify 5 beforehand that you intend to do so, so it 6 will give the Board an opportunity to 7 determine whether the hearing needs to proceed 8 in camera for consideration of any of the 9 matters that arise out of those documents, and 10 also it will assist the transcriber, since the 11 transcript that will be placed on the public 12 record will have to have references to content 13 from documents that are considered 14 confidential redacted out. Mr. Chairman, 15 that's all the opening comments I have to 16 make.</p> <p>17 CHAIRMAN: 18 Q. I would now call on Mr. Schulze. Sir, the 19 floor is yours.</p> <p>20 MR. SCHULZE: 21 Q. Thank you, Mr. Chairman. Good morning, Madam 22 Commissioners, Mr. Commissioner. The first 23 issue I think I need to sort out for the 24 benefit of the -- that I imagine the Board 25 might actually have some questions for me</p>	<p>1 The clarification I wanted to make on our 2 relief side is this; if the Board came to the 3 conclusion, that as I understand counsel for 4 Nalcor to submit, there's no case for 5 consultation. I realize they have other 6 grounds or other reply arguments, but one of 7 their answers to our submissions is they say, 8 well, even if everything else Mr. Schulze is 9 pleading is true, he hasn't shown any real 10 adverse effects, so the test for consultation 11 isn't trigger. If that were the Board's 12 principal reservation about our case for 13 consultation, then I submit that would be the 14 only circumstances where we would maintain our 15 original position that there needs to be a 16 suspension to allow us to adduce more 17 evidence. I think in the end we're able to 18 make our case on the other points. I think 19 we've made a case on adverse effects, but if 20 the Board came to the conclusion that we 21 hadn't made our case on adverse effects, then 22 I would respectfully submit we've made the 23 best case we could with very limited resources 24 in about three weeks, and if the principal 25 concern of the Board is that we haven't shown</p>

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<p>1 that there are any adverse effects, then I</p> <p>2 would say, well, that would be a hasty</p> <p>3 conclusion for the Board to come to from a</p> <p>4 party that has far fewer resources than Nalcor</p> <p>5 and CF(L)Co, and was an exceptionally tight</p> <p>6 timeline.</p> <p>7 I think we heard from the Board on</p> <p>8 January 22nd and we wrapped up our submissions</p> <p>9 around the 12th. If the Board on the contrary</p> <p>10 concluded that or thought there was a prima</p> <p>11 facie case, notwithstanding Nalcor's</p> <p>12 submissions, then our position is simpler. We</p> <p>13 simply would say then the Board's choice is</p> <p>14 this; reject because there's no consultation,</p> <p>15 or suspend and direct consultation. I think</p> <p>16 in the submissions that we've given you,</p> <p>17 you'll see that certainly the language of the</p> <p>18 Chief Justice in the Haida case suggests that</p> <p>19 the court prefers more creative solutions</p> <p>20 rather than the blunt instrument. Chief</p> <p>21 Justice McLachlin is talking about</p> <p>22 injunctions, but rather than blunt instruments</p> <p>23 in terms of either/or remedies. In any case,</p> <p>24 as Mr. Simmons alluded to, and as I'll come</p> <p>25 back to, our position is that the Board can't</p>	<p>1 between us and counsel for -- especially for</p> <p>2 Nalcor on the statute, and I think they're</p> <p>3 useful because they frame what we see and what</p> <p>4 my friends from the other side see as being</p> <p>5 the Board's job on this file. As I understand</p> <p>6 it, and I thought this morning I would</p> <p>7 especially try to answer some of what I see as</p> <p>8 Nalcor's position.</p> <p>9 One of the position's Nalcor takes is</p> <p>10 that our argument about the Environmental</p> <p>11 Protection Act, it doesn't work. As you'll</p> <p>12 recall, our position is fairly simple.</p> <p>13 Section 68 of the Environmental Protection Act</p> <p>14 says, "There are no approvals pending</p> <p>15 environmental assessment". I don't think</p> <p>16 there's any dispute that there's an</p> <p>17 environmental assessment of the larger project</p> <p>18 of Lower Churchill going on, and so our</p> <p>19 argument is, in any case, whether or not you</p> <p>20 are to agree with us ultimately on the</p> <p>21 aboriginal consultation issue and also in, how</p> <p>22 shall I say, as a complement to our -- as a</p> <p>23 support to our argument that you should</p> <p>24 suspend for the purpose of consultation, in</p> <p>25 any case, Section 68 of the Environmental</p>
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<p>1 approve the Water Management Agreement pending</p> <p>2 environmental assessment, that Section 68 of</p> <p>3 the Environmental Protection Act prohibits the</p> <p>4 Board from doing so.</p> <p>5 I was going to, as a first step, take the</p> <p>6 Board through our arguments on the statutory</p> <p>7 arguments about our argument on how the</p> <p>8 Environmental Protection Act, the Electrical</p> <p>9 Power Control Act, and the Water Management</p> <p>10 Regulations, have to be read together and</p> <p>11 where that takes the Board on this file. Then</p> <p>12 I could summarize as well our position on the</p> <p>13 aboriginal rights and consultation issue, but</p> <p>14 if the Board would prefer to hear me on the</p> <p>15 general constitutional arguments first, I'd be</p> <p>16 happy to do that.</p> <p>17 CHAIRMAN:</p> <p>18 Q. Carry on, sir, whatever suits your fancy.</p> <p>19 MR. SCHULZE:</p> <p>20 Q. Thank you. I think -- well, I mean, we</p> <p>21 generally thought we should look for the -- we</p> <p>22 don't need to move to the constitutional issue</p> <p>23 if there are non-constitutional elements first</p> <p>24 that can dispose of a case. So I think that's</p> <p>25 why I want to begin with some of the arguments</p>	<p>1 Protection Act says don't issue anything until</p> <p>2 the environmental assessment is completed, and</p> <p>3 as the Board may know, the environmental</p> <p>4 assessment is far from completed, the Joint</p> <p>5 Review Panel has declined to go to public</p> <p>6 hearings.</p> <p>7 My friend, as I understand it, says,</p> <p>8 well, no, that's not what Section 68 says</p> <p>9 because Section 68 is about permits that allow</p> <p>10 undertakings. That's not actually what Section</p> <p>11 68 says. Section 68 says, "No approvals or</p> <p>12 permits" and so forth, "pertaining to an</p> <p>13 undertaking". Nalcor says, well, no, no, Mr.</p> <p>14 Schulze has misunderstood because it's not the</p> <p>15 Public Utilities Board that will allow Lower</p> <p>16 Churchill to be built, and that I'm in perfect</p> <p>17 agreement with, but the Legislature has said,</p> <p>18 "No approvals pertaining to an undertaking",</p> <p>19 and this approval that is before you today</p> <p>20 pertains to Lower Churchill. It may not be</p> <p>21 the approval that is make or break for Lower</p> <p>22 Churchill, but it pertains to it, and the</p> <p>23 Environmental Protection Act says not to go</p> <p>24 ahead in that case.</p> <p>25 Then I understand Nalcor to say, in any</p>

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<p>1 case, that can't be the intent of the whole 2 legislative scheme because we need the Water 3 Management Agreement first, that's the logic 4 of the Electrical Power Control Act and the 5 Water Management Regulations. With respect, I 6 don't see that. That's not in the regulation 7 or the statute. There's a certain timeline in 8 the legislation and the statute, but there's 9 absolutely nothing to say you need this first 10 because one could easily imagine a situation 11 where the timeline was different and there'd 12 be an environmental assessment, and then 13 simultaneously the parties were in discussions 14 and for whatever reason they didn't come to an 15 agreement, or they had come to an agreement, 16 and in any case, it came before you. There's 17 nothing really in the Act that tells us that 18 nothing can happen if the water power licensee 19 doesn't hold this agreement stamped by you in 20 his hand.</p> <p>21 Then Nalcor has another argument, and 22 this is, I think, now we're getting more into 23 the heart of the issue we're trying to bring 24 before you. They say, well, in any case, the 25 Electrical Power Control Act ousts the</p>	<p>1 One is trying to do something about 2 managing flows of water between water licence 3 holders, and the other is trying to do 4 something much more general about protection 5 of the environment of Newfoundland and 6 Labrador. It seems to me it runs contrary to 7 the whole logic of environmental assessment to 8 say, oh, well, the EPA is supposed to take 9 precedence, but if there's an Electrical Power 10 Control Act that says that it can take 11 precedence, well, there's a precedence that 12 takes precedence. I realize we're getting 13 into a fairly -- as I said, it's a fairly 14 complicated issue of statutory interpretation 15 which Mr. Simmons has set out with a number of 16 the rules and the case law, but I think 17 there's something more basic here. What are 18 the two statutes meant to do? Surely what the 19 EPA is meant to do on a policy basis and on a 20 functional basis, if it says it takes 21 precedence, it takes precedence. The whole 22 idea of environmental assessment is to sort 23 out a variety of issues before projects go 24 ahead, and Nalcor in a lot of its submissions, 25 I would say, ends up in a slightly -- often in</p>
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<p>1 Environmental Protection Act, and Mr. Simmons 2 in his submissions has gone through in some 3 detail the whole exercise of how do we 4 reconcile. Each statute says this statute 5 applies notwithstanding other statutes, but 6 I'd submit the language of the EPA, 7 Environmental Protection Act, is extremely 8 broad whereas the language of the Electrical 9 Power Control Act is technical, but more than 10 that I think we have to think about what the 11 two different statutes are trying to do. I 12 mean, what we're bringing to the attention of 13 the Board is the provision in the 14 Environmental Protection Act that says the 15 Legislature doesn't want approvals pertaining 16 to an undertaking to be handed out until an 17 environmental assessment is done, and we're 18 bringing to the attention of the Board the 19 provision in the EPA that says the EPA takes 20 precedence over other statutes. My friend for 21 Nalcor says, well, but we've got something 22 similar in the Electrical Power Control Act, 23 so it's sort of a Mexican standoff. I think 24 at that point we have to think about what are 25 these two statutes trying to do.</p>	<p>1 a contradictory position.</p> <p>2 On the one hand, they tell us a Water 3 Management Agreement is just something 4 technical; on the other hand, they tell us 5 it's important, you have to have it 6 beforehand. On the one hand, they tell us 7 everything will be dealt with in environmental 8 assessment, the issues that Ekuanitshit and 9 Uashat mak Mani-Utenam are bringing up, that 10 will all be dealt with in environmental 11 assessment, but on the other hand, they tell 12 us this process is urgent and this process 13 takes precedence over environmental 14 assessment. I'm not accepting their 15 proposition that all the issues can be dealt 16 with in environmental assessment, on the 17 contrary, but if that were true, it seems to 18 me that would actually support our argument on 19 Section 68. You couldn't both take -- it 20 seems to me you couldn't both take Nalcor's 21 position that any problems dealt with in 22 environmental assessment, and then say, oh, 23 that provision of the EPA that says don't hand 24 out approvals before environmental assessment 25 is done, that doesn't apply. There's kind of</p>

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<p>1 a similar problem that comes up, it seems to</p> <p>2 me, when Nalcor takes issue with our view that</p> <p>3 the Board has the power to suspend. We say</p> <p>4 there's 120 day timeline in the regulation,</p> <p>5 but there's a general power to consider an</p> <p>6 issue, notwithstanding the timelines.</p> <p>7 Nalcor says, well, no, no, the</p> <p>8 regulations are what was meant and the Board</p> <p>9 is bound by the regulations. Again Mr.</p> <p>10 Simmons submissions take the Board through</p> <p>11 this and the different views, but I think I</p> <p>12 would boil our argument down to something</p> <p>13 simpler, and it's that the tail doesn't wag</p> <p>14 the dog. The problem it seems to me with</p> <p>15 Nalcor's submissions is we have the House of</p> <p>16 Assembly saying the Board has the power to</p> <p>17 stop and consider an important issue, and we</p> <p>18 have the Lieutenant Governor in Council</p> <p>19 adopting a regulation saying we'd like this</p> <p>20 done in 120 days. There's a difference</p> <p>21 between the elected Legislature and the</p> <p>22 Cabinet, the Executive. There's a difference</p> <p>23 which is the difference between a statute and</p> <p>24 a regulation. I would submit the Board's</p> <p>25 power under the statute trumps what the</p>	<p>1 a much simpler answer to that. As I said,</p> <p>2 they say, well, look, 5.4 and 5.5, we know</p> <p>3 it's technical because it only comes in when</p> <p>4 there are two different rights owners on the</p> <p>5 same river, and it so happens they're CF(L)Co</p> <p>6 and Nalcor, so this has to be before you, but,</p> <p>7 you know, maybe we would have owned both and</p> <p>8 then we wouldn't even be here. My problem</p> <p>9 with that also comes back to what I think is</p> <p>10 presumed Legislative intent. The provisions,</p> <p>11 as the Board has pointed out in its annual</p> <p>12 reports, they were only enacted in 2007/2008.</p> <p>13 I'm not from Newfoundland, but it seems to me</p> <p>14 if there's something we could fairly assume</p> <p>15 that the Members of the House of Assembly</p> <p>16 might have had on their mind in 2007 when they</p> <p>17 were thinking about rivers with two different</p> <p>18 rights holders, it seems to me it would be the</p> <p>19 Churchill River. I admit to my ignorance of</p> <p>20 the rest of the electrical system in this</p> <p>21 province, but I think if in 2007, not decades</p> <p>22 ago, if in 2007 the Legislature turned its</p> <p>23 mind to a river where you might have two</p> <p>24 different rights holders, I think they meant</p> <p>25 that something -- and they said and when two</p>
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<p>1 Executive has said it would like to see as a</p> <p>2 timeline. If the Legislature gave the Board</p> <p>3 the power to stop and consider something, and</p> <p>4 they didn't say that the Board is nonetheless</p> <p>5 bound by the Regulations, then it's the</p> <p>6 Regulations that fall by the wayside when the</p> <p>7 issue is important enough.</p> <p>8 This brings me to two other issues that</p> <p>9 Nalcor has brought up with respect to how it</p> <p>10 seems the Electrical Power Control Act and the</p> <p>11 Water Management Regulations operating, and as</p> <p>12 I understand their argument, their principal</p> <p>13 ones is this is an essentially technical</p> <p>14 exercise because if these two dams belong to</p> <p>15 the same owner, we wouldn't even be here,</p> <p>16 there wouldn't have to be a Water Management</p> <p>17 Agreement because Section 5.4 and 5.5 wouldn't</p> <p>18 apply, there wouldn't have to be an agreement.</p> <p>19 I have some questions about whether there</p> <p>20 wouldn't be some jurisdiction for the Board</p> <p>21 under Section 6 anyway on its powers to look</p> <p>22 at electrical power issues, but you're the</p> <p>23 experts on that, and I started reading the</p> <p>24 statute just before Christmas, so I don't</p> <p>25 think the case turns on that. I think there's</p>	<p>1 rights holders on the same river can't agree,</p> <p>2 it goes to the Board, they were thinking about</p> <p>3 this river and they were sending it to the</p> <p>4 Board for a reason. That's the other problem,</p> <p>5 it seems to me, with the argument that this is</p> <p>6 a purely technical matter because -- for</p> <p>7 whatever reason, because if it was the same</p> <p>8 owner, it wouldn't come up.</p> <p>9 The Legislature knew this issue would</p> <p>10 come to this Board about this development. We</p> <p>11 can either assume they did that because they</p> <p>12 just wanted the Board to put a check mark on</p> <p>13 an agreement, or we can assume they did it</p> <p>14 because they thought the Board has some powers</p> <p>15 and expertise that should be applied to this</p> <p>16 issue, and it makes more sense to me to think</p> <p>17 it was the latter, not the former, because</p> <p>18 otherwise they didn't need to bother adopting</p> <p>19 5.4 and 5.5 of the Act and the whole</p> <p>20 Regulations. If that's true, then the Board</p> <p>21 has its full role to play, including its</p> <p>22 powers to suspend, including applying its</p> <p>23 entire judgment to all the issues in this</p> <p>24 file, which brings me back to the more</p> <p>25 fundamental issues about what does it mean to</p>

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<p>1 approval Water Management Agreement, does it 2 bring in issues of environmental protection, 3 does it bring in the case of this project 4 issues of the duty to consult the aboriginal 5 peoples who are affected. In other words, I 6 don't think -- I've taken you through a long 7 discussion of my view of how to read the 8 legislation, but I don't think we can walk 9 away from the other issues raised by the Water 10 Management Agreement on the basis that it's 11 just a technical exercise because if there was 12 a single utility, we wouldn't even be here. 13 We are here. The Legislature, I think, knew 14 we would be here because I think they knew 15 about this river, and if they knew that this 16 was an issue on this river and said it was the 17 Board's duty to look at it, then I think the 18 Board has to look at all the issues and not 19 narrow its focus to dealing with this as a 20 purely technical matter. 21 The Board has seen, I think, all our 22 submissions on the various reasons why we 23 think consultation is required, not just on 24 constitutional grounds, but because the 25 regulations call for good utility practice.</p>	<p>1 Q. Do you know where it is, Cheryl? 2 MS. BLUNDON: 3 Q. No. 4 MR. MCNIVEN: 5 Q. This is for the final submissions there now. 6 MR. SCHULZE: 7 Q. Oh, I see. No, I think we want on the -- 8 MR. CAROT: 9 Q. Initial submission maybe. 10 MR. SCHULZE: 11 Q. No, it's the reply submissions. Sorry, the 12 reply submissions. There you go. 13 MR. CAROT: 14 Q. January 14th. No, you're on the right -- 15 January 14th. That one right there. One up, 16 that one. 17 MR. SCHULZE: 18 Q. And if you scroll down, there is a judgment of 19 the Supreme Court from 1994. Gosh, I don't 20 know what page that would be. 21 MR. MCNIVEN: 22 Q. I'll just go by page, you tell me when to 23 stop. 24 MR. SCHULZE: 25 Q. I'll show you. It looks kind of like this.</p>
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<p>1 I'd be happy to talk to that more at length if 2 the Board has questions, but I thought I might 3 want to draw the Board's attention to -- it's 4 one of my friends, Mr. Carot's authorities. 5 Mr. Simmons, do I need to ask for the 6 technicians help in taking the Board to this 7 authority? 8 MR. SIMMONS: 9 Q. Sure. If you can identify the authority that 10 you want to refer to, Mike can see if he can 11 bring it up on the screen for us. 12 MR. SCHULZE: 13 Q. It was produced in support of -- 14 MR. CAROT: 15 Q. It's the reply submissions dated January 14th. 16 MR. SIMMONS: 17 Q. And is it a case reference? 18 MR. SCHULZE: 19 Q. It's Quebec vs. National Energy Board. It's 20 one of the authorities in support of -- 21 MR. MCNIVEN: 22 Q. The Intervenor's Submissions? 23 MR. SCHULZE: 24 Q. Go to IUM Documents. 25 MR. SIMMONS:</p>	<p>1 MR. MCNIVEN: 2 Q. There's no page number on the bottom there, is 3 there? 4 MR. SCHULZE: 5 Q. No, I'm afraid there's not. 6 MR. CAROT: 7 Q. I apologize for that. 8 MR. MCNIVEN: 9 Q. It's called again? I'm sorry -- 10 MR. SCHULZE: 11 Q. At the top it says, "Quebec AG vs. Canada 12 NEB", but it's in support of that. 13 MR. SIMMONS: 14 Q. Mike, it looks like you can probably jump to 15 page 150 and go forward from there because it 16 looks like it's more than half way through the 17 book. 18 MR. SCHULZE: 19 Q. Yes, I think that's right. Okay, great, and 20 keep going a bit further. It's going to be 21 after that, is it? No -- it's about ten pages 22 further maybe. Okay, good, and I want to take 23 the Board to page 190 to 192. Not your 190, 24 the 190 of this, sorry. See there we're at 25 159. I want to go to 190.</p>

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<p>1 MR. MCNIVEN: 2 Q. Yes. 190. 3 MR. SCHULZE: 4 Q. Yes, thanks, and maybe if you could make the 5 page a bit smaller, then I don't need to make 6 you jump around. So I'll just draw this 7 Board's attention to what the Supreme Court 8 was agreeing with the Federal Court of Appeal 9 on the National Energy Board's jurisdiction, 10 and you'll see midway through that page in the 11 citation, they say they agree with the Court 12 of Appeal and it says, "I do not think anyone 13 would dispute for a moment that in considering 14 an Application for Leave to export 15 electricity, the Board must be concerned about 16 the environmental consequences, since the 17 public interest is involved", and if you go to 18 page 191, at the very bottom, midway through 19 that last paragraph, "Nevertheless, in my 20 opinion, the Board did not err in giving some 21 weight to the environmental effects of the 22 construction of the planned facilities. To say 23 that such effects cannot be considered unless 24 the Board finds that but for the export 25 contracts, the facilities would not be</p>	<p>1 the United States, and the question was, among 2 many other questions in that case, whether the 3 National Energy Board was entitled to look at 4 the environmental effects separately from the 5 environmental assessment, and the Supreme 6 Court said, yes, because one of the Board's 7 duties is to look to the public interest, and 8 my submission would be the Board has a broad 9 jurisdiction in this case; one, because you 10 are the defenders of the public interest; two, 11 because I think that we don't need to give a 12 narrow reading to what efficient power 13 production under the Electrical Power Control 14 Act means. 15 Maybe I'll just come back to some of our 16 basic submissions. In essence, I think the 17 Board probably knows the Innus de Ekuanitshit 18 have their reserve on the Lower North Shore 19 near Mingan. They were in the negotiations 20 with the Federal Government regarding a 21 comprehensive claim. That comprehensive claim 22 included Labrador. The general pattern of 23 land use of the Innu is to go up and down 24 rivers. So while the Lower North Shore can 25 seem very far from the Lower Churchill, given</p>
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<p>1 constructed, is to create a situation in which 2 the construction of a generating facility may 3 be contemplated solely for the purpose of 4 fulfilling the demands of a number of export 5 contracts, but because no one export contract 6 can be said to be the cause of the facility's 7 construction, its environmental effects will 8 never be considered". If you go to page 194, 9 please, at the very top, Mr. Iacobucci in that 10 top paragraph says, "It is also worth noting 11 that the Board is the forum in which the 12 environmental impact attributable solely to 13 the export, that is to the impact of the 14 increase in power output needed to service the 15 export contracts will be considered. A 16 focused assessment of these effects may be 17 lost if subsumed in a comprehensive evaluation 18 by the province of the environmental effects 19 of the projects in their totality". I assume 20 the Board is familiar with this case, but in 21 NEB the issue was export contracts for hydro 22 electric production in Quebec, there had been 23 or was ongoing provincial environmental 24 assessment, there needed to be National Energy 25 Board permits because the power was going to</p>	<p>1 the way that the Innu traditionally use the 2 land, it's actually -- logically it's their 3 backyard because traditionally they would go 4 up the La Romaine River and then further into 5 the Churchill River Basin in one part of the 6 year and come back down the river at another 7 part of the year. They had a comprehensive 8 claim as part of a larger group that was 9 accepted by the Federal Government, in which 10 negotiations have currently been suspended. 11 The Government of Newfoundland has always 12 taken the position that they wouldn't speak to 13 Quebec aboriginal groups until they'd finished 14 settling with communities in Labrador, which 15 effectively meant there were no negotiations 16 with Newfoundland, but as we pointed out in 17 submissions to the Board, as recently as 2005 18 when Newfoundland Hydro and the Government of 19 Newfoundland were thinking about having the 20 project developed privately, in their request 21 for proposals, they explicitly referred to the 22 Quebec Innu claim. We've made -- so that's 23 the appearance of right, and I think that's 24 not contested by my friends, so I won't go on 25 about it at length. I think the nub of the</p>

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<p>1 issue is what are the effects of the Water 2 Management Agreement on the interests that my 3 clients are alleging.</p> <p>4 As I said to you, we were somewhat 5 inhibited by the fact that we had a very short 6 timeline in which to make submissions on this, 7 but I think there is another central 8 contradiction, I think, in Nalcor's position 9 in this file. They say there aren't adverse 10 effects because this is just about daily flow, 11 and it'll all take place within operating 12 parameters that will be established elsewhere, 13 but the problem is the elsewhere they refer 14 you to is the Joint Review Panel and the 15 environmental assessment, but my friend, Mr. 16 Carot, just put before this Board the 17 information request of the Joint Review Panel 18 that say to Nalcor we're not satisfied with 19 the information you've given us on how this 20 Water Management Agreement will operate. There 21 is a real danger -- on a procedural level, 22 there is a real danger that no one ends up 23 dealing with what the effects of this Water 24 Management Agreement are. If before this 25 Board Nalcor says it'll be taken care of in an</p>	<p>1 sure that it's optimal use of the water for 2 power purposes. Well, that's fine, I 3 understand that as a technical proposition, 4 but at the same time they say because if we 5 didn't have this, there'd be spillage. I 6 understand that too, but if we're saying if we 7 didn't have this there to be spillage, and 8 because we have this, the water will be 9 managed differently, then it seems to me we're 10 saying environment will be different with this 11 Water Management Agreement than it would be 12 without it. So to call it technical, we can 13 call it technical, but we can't say it doesn't 14 matter if we agree the environment will be 15 different with the WMA than without out, we 16 can't say it's just about an engineering 17 matter, and it's obviously -- the whole river 18 system will be different with the Water 19 Management Agreement than it would be without 20 it.</p> <p>21 I think there's some more complicated 22 issues about who consults, how, who's the 23 Crown. I think in our submissions, we 24 basically are content to adopt the position 25 that the BC Court of Appeal did in the Carrier</p>
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<p>1 environmental assessment, but in an 2 environmental assessment, Nalcor tells the 3 Joint Review Panel, well, it'll be what the 4 Board approves, we end up with nobody really 5 looking at what the effects of the Water 6 Management Agreement are, and the effects -- I 7 don't think we can -- it's enough to say, 8 well, it's just about daily flow, or in my 9 friend's submission, hourly or less than 10 hourly flow, and, therefore, there's no 11 effect. The Board asked us to respond to that 12 submission by Nalcor, and we put before the 13 Board a study done with respect to Hydro 14 Quebec's La Grande Dam on James Bay that 15 concluded that daily flow matters. Daily flow 16 matters to vegetation, daily flow matters. In 17 that study, they said daily flow changes 18 vegetation and changed vegetation changes 19 wildlife patterns.</p> <p>20 9:45 AM Just because it's daily doesn't mean 21 there's no effect, and again there's a 22 contradictory position because Nalcor says, 23 well, it's just about flow -- it's just about 24 managing the water back and forth between 25 these two dams, you know, and we'll just make</p>	<p>1 Sekani matter, that a regulatory body's duty 2 is to make sure that -- it's a judicial body, 3 but it's there to make sure the honour of the 4 Crown is upheld, and as I understand it, the 5 solution the National Energy Board has adopted 6 to this problem is to ask proponents to show 7 them that they've consulted. So we're not 8 here to say nothing can go until the Minister 9 of Natural Resources has sat down with our 10 client. We're just here to say the Board, as 11 the decision maker on behalf of the Government 12 of Newfoundland, is obliged to make sure that 13 Nalcor has sat down with our client.</p> <p>14 I'm aware in all of this that we've 15 brought a lot of new issues before the Board, 16 and I wonder if the members -- if the 17 Commissioners have questions before I hand off 18 to Mr. Carot.</p> <p>19 COMMISSIONER NEWMAN:</p> <p>20 Q. I have a question. I wonder if you see the 21 Board's role here any different in our job in 22 approving the Water Management Agreement than 23 it would be in the ordinary course in its 24 operations under the Public Utilities Act, and 25 does that impact the breadth and the public</p>

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<p>1 interest issue that you raised earlier?</p> <p>2 MR. SCHULZE:</p> <p>3 Q. That's an excellent question. Could I take</p> <p>4 some time to look at the Public Utilities Act</p> <p>5 before I gave an answer. I'm aware that I'm</p> <p>6 probably the person in the room that knows the</p> <p>7 least about your Public Utilities Act, so I'd</p> <p>8 like to take some time to think about my</p> <p>9 answer, if that's okay.</p> <p>10 COMMISSIONER NEWMAN:</p> <p>11 Q. Certainly.</p> <p>12 CHAIRMAN:</p> <p>13 Q. Anybody else? No. Okay, I guess then, sir,</p> <p>14 we're finished with you, and we'll go to Mr.</p> <p>15 Carot.</p> <p>16 MR. CAROT:</p> <p>17 Q. Good morning. I'm here on behalf of the Innu</p> <p>18 of Uashat mak Mani-Utenam. For greater</p> <p>19 certainty, I'm here on behalf of the entire</p> <p>20 community, I'm here on behalf of the Band</p> <p>21 Council, and I'm here also on behalf of</p> <p>22 certain traditional Innu families of the</p> <p>23 Uashat mak Mani-Utenam Nation. The</p> <p>24 Uashaunnuat is the global term to refer to</p> <p>25 both the Uashaunnuat generally or the Innu of</p>	<p>1 specifically, the traditional lands include</p> <p>2 the Churchill River. More specifically, the</p> <p>3 traditional lands of the intervenors include</p> <p>4 the entire area of the Upper Churchill</p> <p>5 Project, a portion of the Lower Churchill</p> <p>6 Project, and all transmission lines that will</p> <p>7 connect both those projects, but also the</p> <p>8 transmission lines that go from the Upper</p> <p>9 Churchill Project to Quebec. Those</p> <p>10 transmission lines are in our client's or</p> <p>11 intervenor's traditional territory. We take</p> <p>12 the position that there's no way to</p> <p>13 distinguish a project from its production to</p> <p>14 its transmission, and for that reason, the</p> <p>15 transmission lines are an integral part of any</p> <p>16 project. I state that also because the Upper</p> <p>17 Churchill Project and the transmission lines</p> <p>18 were built without our client's consent,</p> <p>19 without consultation, without compensation,</p> <p>20 and here we are in front of the Board today</p> <p>21 who has the power to establish a Water</p> <p>22 Management Agreement for the entire Churchill</p> <p>23 River, and there's a lot of talk in all the</p> <p>24 documents about the project, and the project</p> <p>25 that is referred to is the Lower Churchill</p>
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<p>1 Uashat mak Mani-Utenam, and the Innu families.</p> <p>2 What happens with the term Uashat mak Mani-</p> <p>3 Utenam, that actually refers to two different</p> <p>4 communities. There's a community called Uashat</p> <p>5 and there's another community called Mani-</p> <p>6 Utenam, but they're actually one group.</p> <p>7 They're actually also with the Innu of</p> <p>8 Schefferville, Matimekush-Lac-John. They're</p> <p>9 actually part of the same group, but all these</p> <p>10 Innu are part of the greater Innu Nation,</p> <p>11 which includes several groups in Quebec and in</p> <p>12 Labrador, and in our submissions we have</p> <p>13 alluded to those family ties with the</p> <p>14 communities in Sheshatshit, and I invite you</p> <p>15 to look at our submissions when we go over</p> <p>16 that in more detail.</p> <p>17 We are here today because we're talking</p> <p>18 about the Churchill River. The Churchill River</p> <p>19 and its watershed lies within the traditional</p> <p>20 territory of our clients, or intervenors, as</p> <p>21 I'll call them for sake of ease. For greater</p> <p>22 certainty, the traditional territory includes</p> <p>23 all the natural resources that are there,</p> <p>24 including living and inanimate things, and</p> <p>25 also surface and sub-surface waters. So</p>	<p>1 Project. We take the position that we can't</p> <p>2 look at the Lower Churchill Project alone, it</p> <p>3 has to be taken as a whole, and we have to</p> <p>4 look at both the Upper Churchill Project and</p> <p>5 the Lower Churchill Project. In fact, if a</p> <p>6 Water Management Agreement is established</p> <p>7 without consultation of our clients, we submit</p> <p>8 that, in fact, it will be perpetuating the</p> <p>9 historical infringements of our client's</p> <p>10 rights. For that reason, and others as I will</p> <p>11 get to, there is a duty to consult that is</p> <p>12 specific to the establishment of the Water</p> <p>13 Management Agreement. Just for greater</p> <p>14 certainty, when I refer to a Water Management</p> <p>15 Agreement, I'm referring to both the agreement</p> <p>16 and the management of water thereunder.</p> <p>17 Obviously, the agreement is a piece of paper,</p> <p>18 but the actual effects will be in the</p> <p>19 implementation of that agreement.</p> <p>20 I'll just get into the description of my</p> <p>21 clients, the Innu of Uashat mak Mani-Utenam.</p> <p>22 They have continuously occupied, possessed,</p> <p>23 and controlled, as well as managed their</p> <p>24 traditional territory, which includes the</p> <p>25 Churchill watershed. They have used the</p>

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<p>1 Churchill watershed for hunting, for trapping, 2 for fishing, and for other subsistence 3 activities. They've also used the Churchill 4 River for transportation. As my colleague, 5 Mr. Schulze, was indicating, the Innu of 6 Quebec are on the North Shore of Quebec and 7 they use the rivers to head north, and from 8 what I understand, the river system was a form 9 of highway and my clients do not use the same 10 rivers as David Schulze clients, my clients 11 use the Moisie River, as well as Sainte- 12 Marguerite River, as well as the Sheldrake 13 River, but it's an upper portion to reach the 14 lands in Labrador, which include the Upper 15 Churchill area as well as parts of the Lower 16 Churchill area. I invite you to look at our 17 answer to PUB-IUM 1. If we could pull that 18 up, please. This answer here, and I'm not 19 going to -- I mean, we could read it, but 20 essentially I would invite the Board to read 21 with careful attention that answer. It is the 22 basis for our assertion of aboriginal rights 23 and title and treaty rights in that region. 24 It explains that, as I indicated earlier, the 25 area that we are concerned with has been used</p>	<p>1 KELLY, Q.C.: 2 Q. The attachment, Mike, and the page numbers are 3 on the very top right-hand corner. 4 MR. MCNIVEN: 5 Q. Okay. The page again, I'm sorry? 6 MR. CAROT: 7 Q. Pardon me? 8 MR. MCNIVEN: 9 Q. What page was that again? 10 MR. CAROT: 11 Q. It's attachment 2. I guess you're at 12 attachment 1. That's Attachment 1. It's 13 Attachment 2. 14 MR. MCNIVEN: 15 Q. Page number again? 16 MR. CAROT: 17 Q. Page 159. Yeah, probably a little bit 18 further. It's 159, NE-47, attachment -- oh, 19 attachment 3, I apologize. Attachment 3. I 20 just want to read this letter because it does 21 expose -- or sorry, think it's in French -- 22 but it does present our client's position, at 23 least with respect to the caribou hunt and if 24 we just could move to the top of the letter, 25 please, there is a stamp that that was</p>
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<p>1 continuously by our clients. 2 Most recently, and actually as we speak, 3 the Innu of Sept Iles and I believe Mingan as 4 well are involved in the caribou hunt, the 5 annual caribou hunt, and that forms part of a 6 traditional practice that's been going on for 7 time immemorial, and the Innu of Uashat have 8 taken a strong position with respect to their 9 hunting rights in Labrador, which includes the 10 Churchill River watershed, and if we could 11 please pull up a letter that the Chief Ernest 12 Gregoire, he's the Chief of the Innu of Uashat 13 mak Mani-Utenam. I'm looking at a letter that 14 was in actually Nalcor's submissions. It's at 15 PUB NE 47 and I'm looking at pages 159 to 161. 16 MR. MCNIVEN: 17 Q. Is that Attachment 1? 18 MR. CAROT: 19 Q. It's page 159 to 161. It's the answer NE-47. 20 I guess there is no -- oh, NE-47, is that what 21 I said? 22 MR. MCNIVEN: 23 Q. PUB NE-47? 24 MR. CAROT: 25 Q. Yeah.</p>	<p>1 received by the office of the Premier. So the 2 Government of Newfoundland is aware of our 3 claims here in Newfoundland and I will read 4 the letter. 5 "Dear Mr. Premier: I write to you as 6 chief of Uashat Maniutenam, the Uashaunnuat, a 7 nation under international law having 8 authority on its traditional lands, 9 Nitassinan, part of which is in what is known 10 today as Labrador. Our respective governments 11 obviously are in conflict with respect to the 12 occupation and use of our traditional lands 13 and the natural resources thereof and in 14 respect of our traditional practices on these 15 lands. The construction of the Upper 16 Churchill Hydro Electric Project is a striking 17 example of a very live and divisive issue 18 between us. Presently, there is a serious 19 crisis which has arisen from our ancestral 20 caribou hunt on our traditional lands in 21 Labrador. This crisis has assumed" -- and I 22 put in quotation marks, Labrador, obviously 23 for our clients because they do not recognize 24 any borders or anything like that. It's just 25 one land.</p>

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<p>1 "This crisis has assumed even greater 2 proportions because of your Government's 3 interference with our community's hunt, an 4 integral part of our traditions. Hunters from 5 our community and Sheshatshit are currently 6 engaged in a community hunt on part of our 7 Nitassinan situated in Labrador and which 8 includes the area to the west of Goose Bay. 9 The community hunt is a traditional practice 10 of the Innu and its purpose is to bring back 11 caribou to community members who cannot 12 themselves hunt, particularly children, the 13 elderly and the handicapped. These hunters 14 are presently being harassed, bothered and 15 threatened with arrest and seizures by the 16 game wardens in Labrador. Through these acts, 17 the Government of Newfoundland Labrador is 18 interfering with the legitimate exercise of 19 the Aboriginal rights of the Uashaunnuat, 20 especially by preventing hunters from our 21 community from hunting caribou on our own 22 traditional lands. The Newfoundland and 23 Labrador government, through these acts, is 24 also once again violating the Indian title and 25 Aboriginal and treaty rights of the</p>	<p>1 have not hesitated to have recourse through 2 the Courts to obtain the recognition of their 3 Indian title and Aboriginal treaty rights on 4 these family territories of our nation 5 situated in Labrador. We intend to pursue 6 these proceedings before the Federal Court and 7 the Courts of Newfoundland Labrador without 8 prejudice to other measures, assuming you do 9 not wish to find other solutions to our 10 fundamental conflicts. However, as one 11 government to the other and as a diplomatic 12 gesture, we are asking you to cease all 13 coercive measures against and all harassment 14 of the hunters of Uashat Maniutenam who are 15 participating in the traditional community 16 hunt of caribou. 17 Now unless, if your government continues 18 to interfere with the movement of our hunters 19 or their return to Seven Islands or continues 20 to arrest them and seize their hunting weapons 21 and the product of their traditional community 22 hunt, we intend to counteract with vigour and 23 implement in its entirety the law of the Innu 24 Nation of Uashat Maniutenam respecting use of 25 the traditional territory. The choice is</p>
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<p>1 Uashaunnuat. 2 We will never accept that the Government 3 of Newfoundland Labrador can deprive us of 4 food which we harvest for our children, our 5 elderly or our handicapped. This harassment, 6 oppression and breach of the rights of our 7 hunters is not something new. Each year 8 several members of our community have been 9 arbitrarily and illegally arrested, their 10 hunting weapons confiscated and the products 11 of the traditional hunt seized in an 12 unreasonable and illegal matter. In so doing, 13 the Government of Newfoundland Labrador has 14 demonstrated total contempt for the rights of 15 the Uashaunnuat and for the practice of our 16 traditional activities on our traditional 17 lands. 18 The Government of Newfoundland Labrador 19 knows very well that we assert the title to 20 our traditional lands. In 1979, Canada took a 21 few small steps forward by acknowledging and 22 accepting our claims and Quebec did likewise 23 in 1980, although neither Canada nor Quebec 24 has met its obligations to us in regard to our 25 rights. As you also know, the Uashaunnuat</p>	<p>1 yours as to whether an attempt will be made to 2 reconcile the differences or whether you will 3 continue our path of confrontation. In any 4 event, you can rest assured that we will 5 abandon our land, nor our traditional 6 activities, nor our responsibilities to our 7 Nitassinan." 8 This is quite a forceful letter and I've 9 read it so that the Board can have the benefit 10 of appreciating the position of our clients 11 and this is specific to the caribou hunt, but 12 one of our allegations is that water 13 management and the alteration of flows on an 14 hourly basis will have an effect, an impact on 15 the environment and the natural resources of 16 the Churchill watershed. There may be an 17 effect on caribou, and I will get to that 18 later. 19 The law of the Innu Nation of Uashat 20 Maniutenam respecting the use of the 21 traditional territory, that refers to new 22 development without the consent of the 23 Uashaunnuat and essentially consent derives 24 from Aboriginal title, which essentially 25 grants proprietary rights to the Uashat and</p>

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<p>1 eventually that that title is recognized. 2 There has been no consent to the water 3 management agreement. We are looking for 4 consultation and accommodation. 5 The Supreme Court has described 6 Aboriginal rights as sui generis. I refer to 7 Guerin and the Queen at page 382. That's 8 fine, we don't have to go -- it's just a quick 9 mention, but if the Board wishes to see Guerin 10 and the Queen at page 382. There's a 11 reference to Aboriginal rights as being sui 12 generis. 13 If we can pull out the decision in 14 Mikisew Cree Nation, First Nation, and I'm 15 looking at my submissions of 14th of January 16 2010. Look at -- I would go to approximately 17 page 120. Perfect. And I need to go to page 18 393, and I'm just going to read the 19 introduction. "The fundamental objective of 20 the modern law of Aboriginal and treaty rights 21 is the reconciliation of Aboriginal peoples 22 and non-Aboriginal peoples and their 23 respective claims, interests and ambitions. 24 The management of these relationships take 25 place in the shadow of a long history of</p>	<p>1 MR. CAROT: 2 Q. Perfect, paragraph 138. I'll read. "The 3 picture which emerges from Adams is that the 4 Aboriginal rights which are recognized and 5 affirmed by Section 35.1 fall along a spectrum 6 with respect to their degree of connection 7 with the land. At the one end, there are 8 those Aboriginal rights which are practices, 9 customs and traditions that are integral to 10 the distinctive Aboriginal culture of the 11 group claiming the right. However, the 12 occupation and use of the land where the 13 activity is taking place is not sufficient to 14 support a claim of title to the land. 15 Nevertheless, those activities receive 16 constitutional protection." 17 In the middle, there are activities which 18 out of necessity take place on land and indeed 19 might be intimately related to a particular 20 piece of land. Although an Aboriginal group 21 may not be able to demonstrate title to the 22 land, it may nevertheless have a site specific 23 right to engage in a particular activity. I 24 put the point this way in Adams at paragraph 25 30. "Even where an Aboriginal right exists on</p>
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<p>1 grievances and misunderstanding. The 2 multitude of smaller grievances created by the 3 indifference of some government officials to 4 Aboriginal people's concerns and the lack of 5 respect inherent in that indifference has been 6 as destructive of the process of 7 reconciliation as some of the larger and more 8 explosive controversies." This is, in fact, 9 the basis for the duty to consult which was 10 actually in much the same language referred to 11 in Haida. Again, I'll get into that later. 12 I'm just here talking about the nature of 13 Aboriginal rights. 14 Aboriginal rights, there's a spectrum of 15 Aboriginal rights. There's title and there's 16 Aboriginal rights which are linked to 17 activities and I think it's important for the 18 benefit of the Board to read the distinction 19 or the variety of Aboriginal rights as its 20 described in Delgamuukw and specifically, I'm 21 referring to paragraph 138 of Delgamuukw. 22 Again, this is in -- this is my submissions of 23 February 8th, if we can please go to that. 24 MR. MCNIVEN: 25 Q. Page reference again, please?</p>	<p>1 a tract of land to which the Aboriginal people 2 in question do not have title, that right may 3 well be site specific with the result that it 4 can be exercised only upon that specific tract 5 of land. For example, if an Aboriginal people 6 demonstrate that hunting on a specific tract 7 of land was an integral part of their 8 distinctive culture, then even if the right 9 exists apart from title to that tract of land, 10 the Aboriginal right to hunt is defined as and 11 limited to the right to hunt on a specific 12 tract of land." 13 At the other end of the spectrum, there 14 is Aboriginal title itself. As Adams makes 15 clear, Aboriginal title confers more than the 16 right to engage in site specific activities 17 which are aspects of the practice, customs and 18 traditions of distinctive Aboriginal cultures. 19 Site specific rights can be made out of even 20 if title cannot. What Aboriginal title 21 confers is a right to the land itself. 22 The Innu of Uashat Maniutenam and certain 23 families from that community assert Aboriginal 24 title, assert Aboriginal rights and treaty 25 rights in Labrador and specifically the</p>

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<p>1 Churchill watershed. More specifically, title</p> <p>2 grants to the intervenors, the exclusive right</p> <p>3 to use, possess, occupy and control the</p> <p>4 Churchill River. They have the right to</p> <p>5 choose to what use, and underline use, the</p> <p>6 Churchill River watershed and the natural</p> <p>7 resources therein can be put, and again, we're</p> <p>8 going to read from Delgamuukw at paragraph</p> <p>9 117.</p> <p>10 "Despite the fact that the juris prudence</p> <p>11 on Aboriginal title is somewhat</p> <p>12 underdeveloped, it is clear that the uses to</p> <p>13 which lands held pursuant to Aboriginal title</p> <p>14 can be put is not restricted to the practices,</p> <p>15 customs and traditions of Aboriginal people</p> <p>16 integral to distinctive Aboriginal cultures.</p> <p>17 In Guerin, for example, Dickson J. described</p> <p>18 Aboriginal title as an interest in land which</p> <p>19 encompasses a legal right to occupy and</p> <p>20 possess certain lands. The right to occupy</p> <p>21 and possess is framed in broad terms and</p> <p>22 significantly is not qualified by reference to</p> <p>23 traditional and customary uses of those lands.</p> <p>24 Any doubt that the right to occupancy and</p> <p>25 possession encompasses a broad variety of uses</p>	<p>1 established again or reaffirmed and somewhat</p> <p>2 modified in R. and Marshall and R. and Bernard</p> <p>3 and that appears in our submissions from</p> <p>4 February 8th and I won't go over it right now,</p> <p>5 but I invite you to look at paragraphs 55 to</p> <p>6 59 of that judgment.</p> <p>7 In this context, the Upper Churchill</p> <p>8 Project was built, again as I mentioned,</p> <p>9 without consent, without consultation, without</p> <p>10 compensation of our clients. Territories of</p> <p>11 the Uashat families were flooded and otherwise</p> <p>12 affected by the Upper Churchill River. Those</p> <p>13 impacts are ongoing. Our clients frequent the</p> <p>14 reservoirs and it's a constant reminder of the</p> <p>15 impact and infringement that goes on every</p> <p>16 day.</p> <p>17 There has been no environmental</p> <p>18 assessment and no ongoing environmental</p> <p>19 monitoring in regard to the operating</p> <p>20 parameters or the operations generally of the</p> <p>21 Upper Churchill River Project, and this was</p> <p>22 admitted as much by CF(L)Co. in their response</p> <p>23 to our request for information and we might go</p> <p>24 to that. It's request for information IUM-</p> <p>25 CF(L)Co No. 1, and could we go to the --</p>
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<p>1 of land was put to rest in Paul where the</p> <p>2 Court went even further and stated that</p> <p>3 Aboriginal title was more than the right to</p> <p>4 enjoyment and to occupancy. Once again, there</p> <p>5 is no reference to Aboriginal practices,</p> <p>6 customs and traditions as a qualifier on that</p> <p>7 right. Moreover, I take the reference to more</p> <p>8 as evidence of the broad notion of use and</p> <p>9 possession."</p> <p>10 I jump to paragraph 119, or no, sorry,</p> <p>11 that was 119. Sorry, 166, and I'm looking at</p> <p>12 the bottom paragraph. Well, I guess it's a</p> <p>13 different page. I'm looking at halfway</p> <p>14 through that paragraph. "Three aspects of</p> <p>15 Aboriginal title are relevant here. First,</p> <p>16 Aboriginal title encompasses the right to</p> <p>17 exclusive use and occupation of land. Second,</p> <p>18 Aboriginal title encompasses the right to</p> <p>19 choose to what uses land can be put, subject</p> <p>20 to the alternate limit that those uses cannot</p> <p>21 destroy the ability of the land to sustain</p> <p>22 future generations of Aboriginal peoples."</p> <p>23 And third, "lands held pursuant to Aboriginal</p> <p>24 title have inescapable economic component."</p> <p>25 The test for title was actually</p>	<p>1 that's the question. Basically the question</p> <p>2 was whether or not there was any environmental</p> <p>3 assessment or ongoing environmental monitoring</p> <p>4 and the Upper Churchill -- and this is the</p> <p>5 response. "The Upper Churchill Hydro Electric</p> <p>6 Plant is not a project but a fully operational</p> <p>7 hydroelectric facility that has been in</p> <p>8 operation since 1971. The Upper Churchill</p> <p>9 facility was not subject to environmental</p> <p>10 assessment, is not subject to ongoing</p> <p>11 environmental assessment or monitoring</p> <p>12 pursuant to federal or provincial</p> <p>13 environmental legislation. This facility</p> <p>14 predates any such legislation and was designed</p> <p>15 and constructed in accordance with the laws of</p> <p>16 the day."</p> <p>17 With respect to water management, if we</p> <p>18 just go to the next answer, which is number</p> <p>19 two, "the water management agreement and the</p> <p>20 management of water at the Upper Churchill</p> <p>21 facility, including its reservoirs, the Upper</p> <p>22 Churchill River basin, tributaries and</p> <p>23 adjoining watersheds have not been subject to</p> <p>24 an environmental assessment nor is such</p> <p>25 assessment required pursuant to applicable</p>

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<p>1 environmental legislation. The water 2 management agreement operates wholly within 3 the existing operating parameters of the 4 CF(L)Co facility and existing customer 5 requirements for seasonal and hourly 6 flexibility." And again, we're going back. 7 The operating parameters have never been 8 object of an environmental assessment.</p> <p>9 In response to IUM-CF(L)Co. 3, which is 10 the next one, I had asked if there was any 11 permit or similar government authorization for 12 which the Upper Churchill Project was 13 operating under, and the answer is "the Upper 14 Churchill facility operates pursuant to the 15 Churchill Falls (Labrador) Corporation Limited 16 Lease Act, 1961." And that's it. There's no 17 other authorization, and I think it is 18 worthwhile to look at the list of 19 authorization that Nalcor has to go through 20 right now to proceed with the Lower Churchill 21 development and that appears at PUB-NE No. 50, 22 and I'm not going to go over it. It's just 23 for -- as you move down, the next page, 24 there's several pages and we'll just scroll 25 down and it is fairly extensive, the amount of</p>	<p>1 conclude on the sufficiency of the 2 environmental impact statement for the purpose 3 of proceeding to public hearing."</p> <p>4 If we turn to page 11, please, and here 5 it's specifically respect to Aboriginal 6 consultation and traditional lands and 7 resource use. "The proponent has not provided 8 adequate information on the current use of 9 lands and resources for traditional purposes 10 by Aboriginal persons and has not carried out 11 adequate consultation with each identified 12 Aboriginal group," and the identified 13 Aboriginal group, the Uashat are one of those 14 identified Aboriginal groups.</p> <p>15 I apologize for the long introduction but 16 essentially, this is where it takes us today. 17 We have an Upper Churchill project for which 18 there was never any consultation, no 19 environmental assessment, no compensation. We 20 have a Lower Churchill Project which is in the 21 works. There's been no consultation with our 22 clients, and here we are in front of the Board 23 for the establishment of a water management 24 agreement which will affect the entire 25 Churchill watershed with the Upper Churchill</p>
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<p>1 permits that are required to build a 2 hydroelectric facility. Thank you. That 3 speaks for itself.</p> <p>4 As for the Lower Churchill Project, it 5 will also affect the environment and 6 traditional lands, as well traditional 7 activities of the intervenors. However, there 8 has been no consultation in respect to the 9 Lower Churchill Project.</p> <p>10 We referred to the letter that the Joint 11 Panel sent to Nalcor as recently as last month 12 and I don't know where -- it's the letter 13 dated January 26th, 2010, on the first page, 14 and my colleague referred to the -- alluded to 15 this earlier in respect to the inadequacy with 16 respect to water management agreement, but it 17 also refers specifically to the inadequacy of 18 consultation, and just at the first paragraph 19 there, "I stated in a letter dated January 20 18th, 2010, the Joint Review Panel, after 21 considering all the information and comments 22 received from Nalcor and interested parties 23 has determined that the information provided 24 by Nalcor is not sufficient. Additional 25 information is required before the panel can</p>	<p>1 River.</p> <p>2 It is our submissions today that the 3 water management agreement and the management 4 of water thereunder will impact the 5 traditional lands of intervenors and affect 6 them socially, culturally, spiritually and 7 economically. It will also perpetuate the 8 historical infringements of the rights of the 9 intervenors.</p> <p>10 At PUB NE-17, if we can please bring that 11 up? It's specifically admitted by Nalcor that 12 there has been no consultation, and I'm 13 looking at the second -- "Nalcor has not 14 consulted in particular regarding the water 15 management agreement." I mean, that's pretty 16 clear.</p> <p>17 What water management will do is that -- 18 or water management agreement will do is that 19 it will permit Nalcor and CF(L)Co. to modify, 20 to control, to manage, to regulate the 21 hydrology of the Churchill River, which 22 includes the reservoirs. For greater 23 certainty, we're talking about the use of the 24 waters. We're talking about the flow of the 25 waters. Talking about water levels, water</p>

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<p>1 volumes, the runoff that reaches the river 2 basin, as well as ice formation and breakup, 3 and I would just like to turn the Board to the 4 public notice that was published on November 5 18th. I'm looking at the first paragraph 6 there, and I'll read it. "On November 10th, 7 2009, the Board of Commissioners of Public 8 Utilities received an application from Nalcor 9 Energy to establish the terms of a water 10 management agreement with respect to the use," 11 and I underline that term "of the Churchill 12 River for the production of power." 13 I also invite the Board to read, which 14 they've done obviously, or to look again at 15 the Nalcor pre-filed evidence, which appears 16 at pages 3 -- from pages 3 to 17, and I point 17 to those submissions because the terms that 18 are being used there, we talk about -- I'm 19 just going to pull that out as well. 20 MR. SIMMONS: 21 Q. That's the application. It's Volume 2, the 22 application? 23 MR. CAROT: 24 Q. It's pre-filed evidence, this one right here. 25 You're on the right one. No, no, you were on</p>	<p>1 value of power energy that can be produced 2 from the Churchill River. Coordination of 3 production at the generation station regulates 4 the flow," again, regulates the flow "of water 5 between the stations to best utilize the river 6 system storage capability and the facilities' 7 generating capacity. Flow regulation 8 increases the control and predictability of 9 energy production at a generating station and 10 optimizes the use of the available water 11 within the constraints of existing contractual 12 supply obligations." 13 I won't go through the whole document, 14 but again, from the face of it, the terms of 15 Nalcor itself lead credence to our submissions 16 that it's about the use of the waters. 17 At PUB NE-28, I'm looking at the answer, 18 Nalcor admits that -- sorry, can we go down a 19 bit. Keep on going. There. "The proposed 20 water management" -- I'm looking at line five 21 of that page. "The proposed water management 22 agreement may cause water levels and flows at 23 any point in time to vary from what would have 24 occurred without the water management 25 agreement." The effects are very real. Flows</p>
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<p>1 the right one before. 2 MR. SIMMONS: 3 Q. Volume 1. 4 MR. MCNIVEN: 5 Q. Page number again, please? 6 MR. CAROT: 7 Q. Pages 11. So from pages 11 to subsequent, 8 it's where Nalcor describes the purpose of the 9 water management agreement, and the -- we 10 won't go over it, but essentially there's 11 terms here where we talk about regulating the 12 flow, controlling the flow. These are not my 13 words. These are Nalcor's words, and for 14 instance, in the first paragraph, the last 15 phase or the before last, or the third before 16 last, "however, natural flows are not 17 synchronized to production requirements. 18 Therefore reservoir storage is required to 19 regulate the flow. For a downstream operator, 20 control of flows from upstream facilities may 21 also be required in order to regulate flow to 22 the downstream generating station." And I 23 mean, it's -- and then we'll go to the next 24 paragraph actually. "Coordinating power and 25 energy production maximizes the amount of</p>	<p>1 will change, and more specifically, they will 2 change on an hourly basis. Again, this is 3 admitted by Nalcor at PUB NE-23. Again, at 4 page six. "The water management" -- sorry, 5 excuse me. Line seven, "the water management 6 agreement may affect flows on an hourly 7 basis." 8 If we look at Nalcor's submissions, final 9 submissions at page 19 - 10 MR. MCNIVEN: 11 Q. Page 17? 12 MR. CAROT: 13 Q. Page 19. I'm looking at paragraph 48. "The 14 water management agreement is simply a 15 commercial agreement between the two suppliers 16 on the same body of water." Obviously we 17 disagree with that position. "Because of the 18 provisions of existing power contracts which 19 may not be adversely affected, water 20 management is required on an hourly basis." 21 Unfortunately, even Nalcor is uncertain 22 as to exactly how flows will be affected, but 23 from what we have just read, it's obvious that 24 there will be at least hourly changes, 25 modifications or regulation of flows. For</p>

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<p>1 this reason, it's also difficult to pinpoint 2 actual terms of the water management agreement 3 which will adversely affect our client's 4 rights, because essentially most of the 5 management of water will be left to the 6 independent coordinator who will actually set 7 production schedules and will thus impact 8 flows according to those schedules, and he 9 will set those up in the exercise of 10 reasonable judgement. Reasonable judgement 11 will take into account good public utility 12 practice, but again, we're not much more 13 advanced as to actually pinpointing exactly 14 how flows will be affected.</p> <p>15 Nevertheless, the environmental impact 16 statement that was generated by Nalcor Energy 17 for the Lower Churchill Project does provide 18 some indications as to the environmental 19 impacts of water management in the Lower 20 Churchill River basin. In fact, the 21 environmental impact statement is predicated 22 on a water management agreement in place and 23 that's been acknowledged by Nalcor at EU NE-2 24 and PUB NE-29. We don't have to go see it, 25 but just -- and I don't think that is</p>	<p>1 "Water management may affect future fish 2 populations." Again, that appears in the EIS. 3 "Water management could impede caribou 4 movement. Water management will cause sensory 5 disturbance for the Red Wine Mountain Caribou 6 Herd. Water management may affect through 7 water fluctuation the quantity and quality of 8 forage, including shoreline habitat and 9 aquatic plants, available to moose. Water 10 management will influence black bear shoreline 11 habitat and will result in black bear 12 avoidance during this activity. Water 13 management may result in changes to individual 14 black bear health during operation and 15 maintenance phases. Spring staging options 16 for Canada Goose will become more limited once 17 ashkui along the Lower Churchill are lost to 18 more persistent and extensive ice cover on the 19 reservoirs as a result of the water management 20 and operating regime. The increased extent 21 and persistence of ice cover as a result of 22 the water management operating regime may 23 affect Surf Scooter habitat. The persistence 24 of ice on the reservoirs for an additional one 25 to two weeks because of the water management</p>
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<p>1 contested by Nalcor, and I think it is 2 important to go over those lists of impacts 3 from the EIS and I'll refer to my submissions 4 at paragraph 53, my final submissions, 5 paragraph 53, and I'll just read from my 6 submissions here.</p> <p>7 "More specifically, the establishment of 8 a water management agreement and the 9 management of water thereunder will have the 10 following negative environmental effects, 11 among others, in the Lower Churchill River 12 basin: a. water management will affect runoff, 13 water flow, water levels and water volumes in 14 the Churchill River basin." That we've 15 already gone over. "Altered flow and water 16 levels resulting from impounding and water 17 management will affect ice formation and 18 breakup. This can affect some wildlife 19 species that use the ice, as well as migratory 20 waterfowl that use open water areas during ice 21 breakup." That's -- and my reference there is 22 directly from the EIS, the reference is there. 23 I invite the panel to go look at the 24 reference. 25 (10:30 a.m.)</p>	<p>1 and operating regime may influence breeding, 2 nest initiation and foraging of osprey. Water 3 management and fluctuating water levels may 4 reduce the availability of shallow waters 5 preferred by Harlequin Duck for feeding."</p> <p>6 Unfortunately, those effects are, I would 7 say, related to both water management and 8 operating regime, but as I indicated before, 9 we haven't been consulted in regard to either. 10 More importantly, there has been no 11 environmental assessment with respect to the 12 effects of water management in the Upper 13 Churchill. One can only assume that if water 14 management will have effects on the Lower 15 Churchill like I just described, there will be 16 necessarily environmental impacts on the Upper 17 Churchill, and my colleagues, Mr. Schulze, 18 referred to a study done for La Grande and I 19 will adopt those submissions as well. In any 20 event, water management, and again, I will 21 repeat this, water management agreement will 22 perpetuate the ongoing impacts of the Upper 23 Churchill Project.</p> <p>24 These environmental impacts will directly 25 affect the intervenors culturally,</p>

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<p>1 spiritually, socially and economically, and 2 I'd like to turn to my factum at paragraphs 3 110 to 114. Those are my final submissions, 4 and I'd like to read that because this is how 5 we categorize the infringement or the adverse 6 effect. 7 "The water management agreement or the 8 management of water thereunder will have a 9 negative impact on the Uashaunnuat culturally 10 and spiritually by interfering with the 11 Uashaunnuat's special attachment to the land 12 and the ability to carry out various spiritual 13 and traditional practices. Indeed, because 14 water management will modify and control the 15 hydrology of the Churchill River, including 16 water flow, water levels, water volumes, 17 runoff, and ice formation/breakup and cause 18 negative environmental effects, the 19 Uashaunnuat's traditional lands and their 20 special relationship to those lands will be 21 permanently and irreparably modified. 22 Similarly the water management agreement 23 or the management of water thereunder will 24 negatively affect the Uashaunnuat socially. 25 More particularly, as previously indicated,</p>	<p>1 fish and trap in the area affected by water 2 management and the management of water 3 thereunder. 4 In other words, altered flow and water 5 levels could result in, among other things, 6 reduced opportunity for hunting, particularly 7 migratory birds." And they are more 8 references to the EIS again. Actually, it 9 might be worthwhile to go to that page, the 10 EIS. I'm looking at Volume 3, page 517. 11 MR. MCNIVEN: 12 Q. 517? 13 MR. CAROT: 14 Q. Yeah, 517. You'll see at the bottom of the 15 page, there's page numbers. 529. And here, 16 it's a section on the impacts on land and 17 resource use and this isn't -- the impacts 18 here are not necessarily specific to 19 Aboriginal communities, and I'll read here. 20 "Altered flow and water levels resulting from 21 impoundment and water management will affect 22 ice formation and breakup. This can affect 23 some wildlife species that use the use, as 24 well as migratory waterfowl that use open 25 water areas during ice breakup. Thus, altered</p>
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<p>1 the establishment of a water management 2 agreement will deny or impede the Uashaunnuat 3 exclusive or shared right to use, possess, 4 occupy and control the Churchill River 5 watershed and the natural resources therein. 6 The establishment of a water management 7 agreement and the management of water 8 thereunder will deny the Uashaunnuat right to 9 choose to what use the Churchill River 10 watershed and the natural resources therein 11 can be put and interfere with the particular 12 and unique way of life and particular 13 traditional Innu family territories. The 14 establishment of a water management agreement 15 and the management of water thereunder is a 16 denial of Aboriginal jurisdiction and the 17 right to self-government and self- 18 determination of the Uashaunnuat. 19 Moreover, the water management agreement 20 or the management of water thereunder will 21 negatively impact, among other things, fish 22 populations, the movement of the caribou and 23 the migration of birds," and that's from the 24 list I just read to you, "thus impeding and 25 infringing the Uashaunnuat's right to hunt,</p>	<p>1 flow and water levels could result in reduced 2 opportunity for hunting, particularly 3 migratory birds." 4 So for all these reasons, it is submitted 5 that the water management agreement will 6 infringe the Aboriginal title, Aboriginal 7 rights and treaty rights of the intervenors. 8 It will perpetrate the historical infringement 9 of the rights of the intervenors. It will 10 also make less satisfactory any resolution of 11 claims in the future, and there was a specific 12 request for information in that regard, and 13 I'd like the Board to look at our response to 14 that. I've also alluded to that in my factum 15 at paragraphs 123 to 124, and I'll read. 16 "Moreover the establishment of water 17 management and the management of water 18 thereunder will make a less satisfactory 19 resolution of the Uashaunnuat's claimed right 20 to, among other things, use, manage and 21 control the water resources in the future, 22 namely the Churchill River and adjoining 23 watersheds and tributaries. 24 More particularly, the establishment of 25 water management and the management of water</p>

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<p>1 thereunder will deprive the Uashaunnuat from</p> <p>2 some or all the benefits of the Churchill</p> <p>3 River watershed and the natural resources</p> <p>4 therein. Moreover, if further damage is done</p> <p>5 to the Uashaunnuat's traditional lands and</p> <p>6 resources therein and if these lands and</p> <p>7 resources are further impacted by projects</p> <p>8 such as the hydroelectric development within</p> <p>9 the Churchill River watershed, any resolution</p> <p>10 of the claims of the Uashaunnuat will likely</p> <p>11 prove to be very unsatisfactory because the</p> <p>12 traditional lands and the resources therein</p> <p>13 may have been irreparably damaged and impacted</p> <p>14 by then. The lands may be rendered unusable</p> <p>15 and some of the natural resources may be gone.</p> <p>16 This is, of course, unjust and unacceptable."</p> <p>17 And I forgot to mention earlier on the</p> <p>18 impacts is that the economic impact is obvious</p> <p>19 and the Supreme and Delgamuukw and I referred</p> <p>20 to one of the passages at paragraph 166 and in</p> <p>21 the words of the Chief Justice at the time,</p> <p>22 Aboriginal title has an -- well, has an</p> <p>23 economic component that is implicit to that</p> <p>24 right.</p> <p>25 So today, we are faced with several</p>	<p>1 recognized that the term sound utility</p> <p>2 practice and good utility practice are</p> <p>3 synonymous and my colleague, Dan Simmons had</p> <p>4 alluded to that statutory interpretation or</p> <p>5 that conflict in his submissions, but we</p> <p>6 submit that there is no conflict or any</p> <p>7 contradiction. They're actually essentially</p> <p>8 synonymous.</p> <p>9 At page five of Nalcor's reply</p> <p>10 submissions, Nalcor essentially admits that</p> <p>11 sound utility practice does involve</p> <p>12 consultation with Aboriginal groups, and I</p> <p>13 will read that paragraph. "With respect to</p> <p>14 paragraphs 36 to 41 of the CIE submissions,</p> <p>15 Conseil des Ekuanitshit, Nalcor acknowledges</p> <p>16 that good utility practice includes</p> <p>17 environmental protection and environmental</p> <p>18 protection in turn involves consideration of</p> <p>19 the interrelationships between land and water</p> <p>20 and plant and animal life on the one hand and</p> <p>21 the social, cultural and economic life of</p> <p>22 humans on the other. Nalcor also acknowledges</p> <p>23 that the Canadian Electrical Association is</p> <p>24 committed to informing and consulting</p> <p>25 Aboriginal communities at an early stage with</p>
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<p>1 issues that the Board must decide. The first</p> <p>2 issue is whether the establishment of water</p> <p>3 management agreement will trigger a duty to</p> <p>4 consult and accommodate? If so, who can</p> <p>5 discharge that duty? Was that duty discharged</p> <p>6 in the circumstances? Does the Board have the</p> <p>7 jurisdiction and obligation to decide if a</p> <p>8 duty has been triggered and discharged? If</p> <p>9 so, and the duty has not been discharged, what</p> <p>10 powers are available to the Board?</p> <p>11 The duty to consult and accommodate finds</p> <p>12 two sources. My colleague referred earlier to</p> <p>13 a statutory duty that's grounded in good</p> <p>14 utility practice. The other duty is grounded</p> <p>15 in a constitution, section 35. I will talk</p> <p>16 first about the statutory duty.</p> <p>17 The Board must act according to sound</p> <p>18 utility practice. It is our submissions that</p> <p>19 that will necessarily involve consultation</p> <p>20 with Aboriginal groups. I'm not saying that</p> <p>21 the Board must consult, but they must direct</p> <p>22 Nalcor and CF(L)Co to consult, Nalcor and</p> <p>23 CF(L)Co, as parties to an eventual water</p> <p>24 management agreement. Just on that note, my</p> <p>25 friend, counsel for CF(L)Co, admitted or</p>	<p>1 respect to planned activities and projects</p> <p>2 that will have an impact on them." Obviously</p> <p>3 Nalcor and us disagree as to the actual</p> <p>4 impacts, but it is our submissions that there</p> <p>5 is impacts of the water management agreement,</p> <p>6 thus good utility practice will dictate a</p> <p>7 consultation and accommodation of the</p> <p>8 intervenors.</p> <p>9 Just on that point, that duty can be</p> <p>10 discharged by Nalcor and by CF(L)Co, both as</p> <p>11 companies or utilities that propose to utilize</p> <p>12 the Churchill River, and I just want to make</p> <p>13 one point clear is that in no way in any of</p> <p>14 our submissions, and this will lead to my next</p> <p>15 point with respect to the constitutional duty,</p> <p>16 have we requested that CF(L)Co be imposed a</p> <p>17 constitutional duty to consult as an agent of</p> <p>18 the Crown. I'd just like to make that clear</p> <p>19 because unfortunately, I believe there has</p> <p>20 been a bit of misunderstanding from our</p> <p>21 submissions, but in no way do we allege that</p> <p>22 CF(L)Co owes a constitutional duty to consult.</p> <p>23 It is just a statutory duty, if any, that</p> <p>24 CF(L)Co would owe.</p> <p>25 (10:45 a.m.)</p>

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<p>1 With respect to the constitutional duty 2 to consult, the leading case in that is Haida 3 Nation and again, the foundation for a duty to 4 consult is the reconciliation of Aboriginal 5 and non-Aboriginal people. That duty is 6 triggered when the Crown has knowledge, real 7 or constructive, of the potential existence of 8 the Aboriginal right or title and contemplates 9 conduct that might adversely affect it. We 10 submit that the Crown, acting through Nalcor, 11 will -- is contemplating action that will 12 adversely affect our rights and title. The 13 Crown has knowledge of that right or that 14 claim and I'm not going to go over that 15 knowledge of those, of our claims because my 16 colleague went into that to a certain extent. 17 The same applies with us. But I also read you 18 a letter which was directly addressed to the 19 Premier and that was acknowledged receipt from 20 the Premier, so there's no doubt that the 21 Government of Newfoundland is aware of our 22 claims for Aboriginal right. 23 To be clear, this Aboriginal -- this duty 24 to consult and accommodate is triggered prior 25 to the proof of claim and determination of</p>	<p>1 resolution of a claim. To unilaterally 2 exploit a claimed resource during the process 3 of proving and resolving Aboriginal claim to 4 that resource may be to deprive the Aboriginal 5 claimants of some or all of the benefit of the 6 resource. That is not honourable." 7 So in this circumstance, a duty to 8 consult and accommodate specifically arises to 9 protect Aboriginal rights and title and treaty 10 rights even before the proof of claim and the 11 determination of rights are made. There is a 12 distinction between knowledge sufficient to 13 trigger a duty to consult and accommodate and 14 the content of the scope of the duty to 15 consult and accommodate in a particular case. 16 Again, according to the Court in Haida, 17 and I'm at paragraphs 37 and 39, "there is a 18 distinction between knowledge sufficient to 19 trigger a duty to consult and if appropriate, 20 accommodate, and the content or scope of the 21 duty in a particular case. Knowledge of a 22 credible, but unproven claim, suffices to 23 trigger a duty to consult and accommodate. 24 The content of the duty however varies with 25 circumstances discussed more fully below. A</p>
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<p>1 rights. We're not asking the Board here to 2 determine any Aboriginal rights. We're just 3 asking the Board to order consultation pending 4 the resolution of our claims, and I'm just 5 going to read from a passage from the Supreme 6 Court in Haida, if we could pull that up, 7 please? Paragraph 27. 8 MR. MCNIVEN: 9 Q. 27? 10 MR. CAROT: 11 Q. Yeah. Okay, I'll read the whole paragraph. 12 "The answer once again lies in the honour of 13 the Crown. The Crown acting honourably cannot 14 cavalierly run roughshod over Aboriginal 15 interests where claims affecting these 16 interests are being seriously pursued in the 17 process of treaty negotiation and proof. They 18 must respect these potential but yet unproven 19 interest. The Crown is not rendered impotent 20 and may continue to manage the resources in 21 question pending claims resolution, but 22 depending on the circumstances discussed more 23 fully below, the honour of the Crown may 24 require it to consult with and reasonably 25 accommodate Aboriginal interests pending</p>	<p>1 dubious or peripheral claim may attract a mere 2 duty of notice, while a stronger claim may 3 attract more stringent duties. The law is 4 capable of differentiating between tenuous 5 claims, claims possessing a strong prima facie 6 case and established claims. Parties can 7 access these matters and if they cannot agree, 8 tribunals and courts can assist. Difficulties 9 associated with the absence of proof and 10 definition of claims are addressed by signing 11 appropriate content to the duty, not by 12 denying the existence of a duty." 13 And if we turn to just paragraph 39, "the 14 content of a duty to consult and accommodate 15 varies with the circumstances. Precisely what 16 duties arise in different circumstances will 17 be defined as the case law in this emerging 18 area develops. In general terms, however, it 19 may be asserted that the scope of the duty is 20 proportionate to a preliminary assessment of 21 the strength of the case supporting the 22 existence of the right or title and to the 23 seriousness of the potential adverse effect 24 upon the right or the title claimed." I 25 believe what's in issue really is the second</p>

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<p>1 part of that, is the adverse effect.</p> <p>2 In Nalcor's submissions, final</p> <p>3 submissions page 17, paragraph 43, "The</p> <p>4 Conseil des Innus de Ekuanitshit and the Innu</p> <p>5 of Uashat mak Mani-Utenam have asserted a</p> <p>6 potentially credible claim of Aboriginal</p> <p>7 interest in relation to land and resources</p> <p>8 usage. Nalcor has accepted that there is a</p> <p>9 sufficiently credible claim to engage a duty</p> <p>10 of consultation in relation to the Lower</p> <p>11 Churchill Project itself."</p> <p>12 As for CF(L)Co, if you can turn to</p> <p>13 paragraph 43 of their submissions, "it is not</p> <p>14 proposed to contest at this stage whether the</p> <p>15 Aboriginal intervenors have a sufficiently</p> <p>16 credible claim. Thus the immediate issue is</p> <p>17 whether the Aboriginal intervenors have</p> <p>18 demonstrated any adverse effect of any such</p> <p>19 claim and if so, the seriousness of such</p> <p>20 adverse effect."</p> <p>21 We have a strong prima facie case. The</p> <p>22 adverse impacts are real and will severely</p> <p>23 impact on the Aboriginal rights and title of</p> <p>24 the intervenors. If we refer to paragraphs</p> <p>25 128 and 129 of my factum, this is more of a</p>	<p>1 Aboriginal jurisdiction and the right to self-</p> <p>2 government and self-determination."</p> <p>3 For these reasons, the duty to consult is</p> <p>4 at the high end of the spectrum. That said,</p> <p>5 if there is consultation and accommodation at</p> <p>6 the high end of the spectrum with respect to</p> <p>7 the establishment of water management</p> <p>8 agreement, the actual implementation of the</p> <p>9 water management agreement will still trigger</p> <p>10 an ongoing duty of consultation, but that will</p> <p>11 be more at the lower end of the spectrum and</p> <p>12 could be discharged by notice of decisions of</p> <p>13 the independent coordinator or reports of the</p> <p>14 independent coordinator. Obviously such</p> <p>15 practices would have to be developed through a</p> <p>16 process of consultation at an initial stage at</p> <p>17 the high end of the spectrum.</p> <p>18 As I mentioned earlier, the statutory</p> <p>19 duty to consult can be discharged by CF(L)Co</p> <p>20 and Nalcor. As for the constitutional duty,</p> <p>21 that duty lies in the Crown and the Crown</p> <p>22 alone, but for the sake of these proceedings</p> <p>23 and for these proceedings alone, the</p> <p>24 intervenors acquiesce and consent that Nalcor</p> <p>25 consult in the name and on behalf of the Crown</p>
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<p>1 summary of the submissions that I've done up</p> <p>2 to date.</p> <p>3 "The establishment of water management</p> <p>4 agreement and the management of water</p> <p>5 thereunder will negatively and irreparably</p> <p>6 impact: the Aboriginal rights and title and</p> <p>7 treaty rights of the Uashaunnuat; the</p> <p>8 traditional lands of the Uashaunnuat and</p> <p>9 natural resources therein; the way of life of</p> <p>10 the Uashaunnuat culturally, spiritually,</p> <p>11 socially and economically; the hunting,</p> <p>12 fishing and trapping activities and</p> <p>13 opportunities of the Uashaunnuat.</p> <p>14 Furthermore, the establishment of water</p> <p>15 management agreement and the management of</p> <p>16 water thereunder will: perpetuate the</p> <p>17 historical infringement of the Aboriginal</p> <p>18 rights and title of the Uashaunnuat; deny or</p> <p>19 impede the Uashaunnuat's exclusive or shared</p> <p>20 right to use, possess, occupy and control the</p> <p>21 Churchill River watershed and natural</p> <p>22 resources therein; deny the Uashaunnuat's</p> <p>23 right to choose to what use the Churchill</p> <p>24 River watershed and the natural resources</p> <p>25 therein can be put; deny the Uashaunnuat's</p>	<p>1 with the intervenors, and this is without</p> <p>2 prejudice to our position in other</p> <p>3 proceedings.</p> <p>4 Has this duty been discharged? Well, as</p> <p>5 admitted by Nalcor, there has been no</p> <p>6 consultation with respect to the water</p> <p>7 management agreement. There has also been no</p> <p>8 consultation with the Government of</p> <p>9 Newfoundland Labrador with respect to water</p> <p>10 management agreement or the Government of</p> <p>11 Canada in that respect, or CF(L)Co. As for</p> <p>12 the environmental assessment of Lower</p> <p>13 Churchill, that also cannot satisfy the duty</p> <p>14 to consult. There has been no consultation</p> <p>15 with respect to the Lower Churchill Project.</p> <p>16 That's a process that's ongoing, but up to</p> <p>17 now, and this is recognized by the Joint Panel</p> <p>18 in their letter to Nalcor, there has been no</p> <p>19 consultation with respect to Lower Churchill.</p> <p>20 In any event, there's been no consultation or</p> <p>21 accommodation with respect to Upper Churchill.</p> <p>22 Just for sake of reference, I'm referring to</p> <p>23 paragraphs 139 and subsequent in my factum.</p> <p>24 Again, I just want to return to the Upper</p> <p>25 Churchill Project. There's been no</p>

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<p>1 consultation, no environmental assessment in 2 that respect, and that's -- this is despite 3 the fact, and I did mention this earlier, that 4 the Upper Churchill reservoirs will act as the 5 main source for the modification and control 6 management and regulation of flow water and 7 water levels of the Churchill River, and 8 there, I can refer to Nalcor. If we could go 9 to Nalcor pre-filed evidence at pages 12 to 10 13, please? I'm looking at line 27. 11 "Because of the ability to store 12 tremendous quantity of water, the Upper 13 Churchill reservoirs will provide the primary 14 flow regulation required on the Churchill 15 River." Yeah, we don't know what those 16 impacts will be with respect to the Upper 17 Churchill River. 18 In any event, returning to the Lower 19 Churchill, and I apologize, I'm going back and 20 forth here because -- but in any event, it's 21 because we have a Lower Churchill Project 22 that's under way that's going an environmental 23 assessment, but in any event, the panel 24 reviewing the Joint -- the Lower Churchill 25 Project cannot consider the adequacy of</p>	<p>1 consultation and accommodation of Aboriginal 2 interests by the Crown." And here, this is 3 quoted from that agreement, "the Panel will 4 not have a mandate to make any determinations 5 or interpretations of: the validity or the 6 strength of any Aboriginal group's claim to 7 Aboriginal rights and title or treaty rights; 8 the scope or nature of the Crown's duty to 9 consult Aboriginal persons or groups; whether 10 Canada or Newfoundland and Labrador has met 11 its respective duty to consult and accommodate 12 in respect of potential rights, recognized and 13 affirmed by Section 35 of the Constitution 14 Act, 1982; the scope, nature or meaning of the 15 Labrador Inuit Land Claims agreement." 16 Finally, environmental assessment is not 17 equivalent to consultation and accommodation. 18 The focus is different and I just invite the 19 panel to read my submissions from 153 and 20 onwards and I will not go into more detail 21 under that, but I'd just like to stress that 22 the decision in Taku River whereby the Supreme 23 Court decided that consultation did occur in 24 the environmental assessment is very different 25 from the facts here before us. Our clients</p>
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<p>1 consultation and accommodation of Aboriginal 2 rights by the Crown. It essentially means 3 that the joint panel does not have the 4 authority to determine whether or not the 5 constitutional duty to accommodate or to 6 consult and accommodate the intervenors with 7 respect to Lower Churchill has been satisfied, 8 and that's not to say that environmental 9 assessment through Lower Churchill will 10 satisfy the duty to consult water management. 11 It's just to reenforce the fact that there has 12 been no consultation with respect to water 13 management. There has been no consultation 14 with respect to Lower Churchill Project, and 15 in any event, the panel cannot decide issues 16 of constitutional duties to consult and 17 accommodate. 18 I believe it is important to just read 19 exactly what the limits on the Panel's powers 20 are and here I'm at paragraph 152 of my 21 factum, and I'll read. "As a matter of law, 22 the federal-provincial agreement produced by 23 Nalcor expressly forbids the Lower Churchill 24 Hydroelectric Generation Project Joint Review 25 Panel from considering the adequacy of</p>	<p>1 are not participants in the sense that the 2 intervenors or the participants were in Taku 3 River. All we've done here is that we've -- 4 we're looking to be consulted with respect to 5 Lower Churchill Project. We sent comments to 6 the Churchill Panel and we provided those 7 comments to the Board, and this is also a 8 false claim that is important to rectify is 9 that we have never received any funding from 10 the environmental -- for the environmental 11 assessment of the Lower Churchill, and Nalcor 12 refers twice in its submissions and its 13 evidence that we have received funding, but 14 that is categorically false. So the decision 15 in Taku River is distinguishable from the 16 facts of this case, and in any event, there 17 just hasn't been any consultation in that 18 respect. 19 (11:00 a.m.) 20 Does the Board wish to take a break or 21 should I continue with my Submissions? 22 CHAIRMAN: 23 Q. How -- can you give us any kind of an idea? 24 MR. CAROT: 25 Q. I would say I got another 15 minutes.</p>

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<p>1 CHAIRMAN:</p> <p>2 Q. Why don't we -- is that acceptable to</p> <p>3 everybody? Why don't we let you then finish</p> <p>4 it off, sir, and then we can adjourn at that</p> <p>5 point.</p> <p>6 MR. CAROT:</p> <p>7 Q. Okay, that's great.</p> <p>8 CHAIRMAN:</p> <p>9 Q. Is that okay with you?</p> <p>10 MR. CAROT:</p> <p>11 Q. Yes, thank you.</p> <p>12 CHAIRMAN:</p> <p>13 Q. Okay.</p> <p>14 MR. CAROT:</p> <p>15 Q. Then I turn to the powers of the Board and</p> <p>16 whether or not the Board has the jurisdiction</p> <p>17 and obligation to consider consultation and</p> <p>18 accommodation. Again, there's two separate</p> <p>19 duties here. There's a statutory duty and a</p> <p>20 constitutional duty. I will first address the</p> <p>21 statutory duty.</p> <p>22 The Electrical Power Control Act</p> <p>23 explicitly grants jurisdiction to the PUB to</p> <p>24 determine issues in regard to sound public</p> <p>25 utility practice, and I'll read from Article</p>	<p>1 Yeah, no, stop it there. I'm going to go to</p> <p>2 page -- if we can go to page 185, and I'm</p> <p>3 looking at the third paragraph.</p> <p>4 "It is obvious that the Board must</p> <p>5 exercise its decision-making function,</p> <p>6 including the interpretation and application</p> <p>7 of its governing legislation in accordance</p> <p>8 with the dictates of the Constitution,</p> <p>9 including Section 35.1 of the Constitution</p> <p>10 Act, 1982."</p> <p>11 I'd like to read from the Carrier Sekani</p> <p>12 case, which is a case from the B.C. Court of</p> <p>13 Appeal. I believe that's been submitted</p> <p>14 several times. Specifically, I'm looking at</p> <p>15 paragraph 45. Excuse me one second. I'm just</p> <p>16 going to read certain excerpts from this</p> <p>17 judgment because it is, it's quite telling.</p> <p>18 Paragraph 45, "I do not accept B.C.</p> <p>19 Hydro's argument. The rule in question sought</p> <p>20 to be enforced through proceedings before the</p> <p>21 Commission arise not as an internal</p> <p>22 prescription, as in British Columbia Hydro and</p> <p>23 Power Authority versus British Columbia</p> <p>24 Utilities Commission decisions just discussed,</p> <p>25 but from the Constitution itself. Haida, at</p>
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<p>1 4. "In carrying out its duties and exercising</p> <p>2 its powers under this Act or under the Public</p> <p>3 Utilities Act, the Public Utilities Board</p> <p>4 shall implement the power policy declared in</p> <p>5 Section 3, and in so doing shall apply tests</p> <p>6 which are consistent with generally accepted</p> <p>7 sound public utility practice." Sound utility</p> <p>8 practice would mean that before establishing a</p> <p>9 water management agreement, the Board would</p> <p>10 have to be satisfied that Nalcor and CF(L)Co</p> <p>11 did consult with the intervenors and Nalcor</p> <p>12 admitted as much that sound utility practice</p> <p>13 does involve consultation with aboriginal</p> <p>14 communities if there is adverse impacts.</p> <p>15 Second, the constitutional duty to</p> <p>16 consult and accommodate. The Public Utilities</p> <p>17 Board must exercise its decision-making</p> <p>18 function in accordance with the dictates of</p> <p>19 the Constitution, including Section 35 of the</p> <p>20 Constitution Act, 1982.</p> <p>21 I'm going to refer to the case of Quebec</p> <p>22 versus National Energy Board that we were at</p> <p>23 before, and that was in my submissions of</p> <p>24 January 14th, and I believe that pages 170 or</p> <p>25 something like that, if we can go to that.</p>	<p>1 paragraph 66, contemplates review of</p> <p>2 consultation by administrative tribunals. It</p> <p>3 is not necessary to find explicit grant of</p> <p>4 power in the statute to consider</p> <p>5 constitutional questions. So long as the</p> <p>6 legislator intended that the tribunal decide</p> <p>7 questions of law, that is sufficient."</p> <p>8 Paragraph 51, "Not only has the</p> <p>9 Commission the ability to decide the</p> <p>10 consultation issue, it is the only appropriate</p> <p>11 forum to decide the issue in a timely way.</p> <p>12 Furthermore, the honour of the Crown obliges</p> <p>13 it to do so as a body to which powers have</p> <p>14 been delegated by the Crown and must not deny</p> <p>15 the appellant timely access to a decision</p> <p>16 maker with authority over the subject matter."</p> <p>17 Paragraph 54, "While the Commission is a</p> <p>18 quasi-judicial tribunal bound to observe the</p> <p>19 duty of fairness and to act impartially, it is</p> <p>20 a creature of government, subject to</p> <p>21 government direction on energy policy. The</p> <p>22 honour of the Crown requires not only the</p> <p>23 Crown act to consult, but also that the</p> <p>24 regulatory tribunal decide any consultation</p> <p>25 dispute which arises within the scheme of its</p>

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<p>1 regulation. It is useful to remember the 2 relationship between government and 3 administrative tribunals generally." I won't 4 go into that here specifically.</p> <p>5 At paragraph 57, "the honour of the Crown 6 as a basis for the duty to decide is 7 compelling on the facts here. One Crown 8 entity, the responsible ministry, granted the 9 water license allegedly infringing Aboriginal 10 interests without prior consultation. Another 11 Crown entity, B.C. Hydro, purchases 12 electricity generated by the alleged 13 infringement of a long-term contract, and 14 third, the tribunal dismisses the appellant's 15 claim for consultation on a preliminary 16 point."</p> <p>17 And I just want to draw a parallel here 18 in terms of the historical infringement I was 19 referring to with the Upper Churchill, how 20 there was no consultation in that respect and 21 how we are before the Board here for the 22 establishment of water management agreement 23 which will affect the Churchill River 24 including the Upper Churchill.</p> <p>25 The principle that the Public Utilities</p>	<p>1 terms of having to decide in terms of the 2 dictates of the Constitution, it is submitted 3 that that decision is nevertheless 4 distinguishable from the facts before us here. 5 In Standing Buffalo and the case before the 6 National Energy Board, there was actual 7 consultation with Aboriginal communities. 8 This has not been the case. The National 9 Energy Board provides a process for 10 consultation with Aboriginal communities. So 11 on the facts of that case, the Federal Court 12 of Appeal decided that that consultation was 13 sufficient to discharge its obligations under 14 the Constitution.</p> <p>15 Similarly, the case of Brokenhead, and 16 I'm not going to go into this decision, but 17 Brokenhead is the other decision that's been 18 raised by my colleagues, Nalcor and CF(L)Co, 19 and again, that decision is clearly 20 distinguishable because again, before the 21 National Energy Board, there was consultation, 22 and in fact, accommodation of the Aboriginal 23 concerns that were at stake there. This has 24 not been the case here.</p> <p>25 As indicated, the Public Utilities Board</p>
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<p>1 Boards might exercise its decision making in 2 accordance with the dictates of the 3 Constitution was also accepted by the Federal 4 Court of Appeal in Standing Buffalo and if we 5 could go to that decision, please. Standing 6 Buffalo, which was submitted by my colleagues 7 and which was referred to also by my 8 colleague, Mr. Simmons. It's probably in 9 Nalcor's. There it is, and I'm looking at 10 paragraph 36.</p> <p>11 "In asserting that the NEB erred in 12 failing to undertake the Haida analysis before 13 reaching its decisions, the appellants state 14 the NEB must exercise its decision-making 15 function in accordance with the dictates of 16 the Constitution, including subsection 1 17 thereof." I agree with that statement, which 18 is supported by the decision in the Supreme 19 Court of Canada in Quebec Attorney versus 20 Canadian National Energy Board.</p> <p>21 My colleagues, Nalcor, will use this 22 decision to support their position that the 23 PUB does not have the -- the Public Utilities 24 Board does not have jurisdiction, but despite 25 that general statement made by the Court in</p>	<p>1 is a quasi-judicial tribunal with authority to 2 decide questions of law on proceedings. It is 3 not necessary to find an explicit grant of 4 power to consider constitutional questions. 5 So long as legislator intended that the Public 6 Utilities Board decide questions of law, that 7 is enough. And I'll specifically refer to 8 Public Utilities Act, Section 16, 99(1), 9 118(2). We don't have to go see that, but we 10 can just take those and note where the Board 11 is granted jurisdiction over legal matters. 12 We can also look at the Board regulations at 13 Article 27. And I'll repeat it, the honour of 14 the Crown requires not only that the Crown 15 consult, but also that the Public Utilities 16 Board decides any consultation dispute which 17 arises within the scheme of its regulation.</p> <p>18 So we submit that the Board must 19 determine whether or not a duty has been 20 triggered and whether that duty has been 21 consulted, and we submit that that duty has 22 been triggered, but has not been discharged. 23 If that is the case, what remedy is open to 24 the intervenors? And I'm sorry, I'm wrapping 25 up right here.</p>

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<p>1 If the Board has the power and the</p> <p>2 obligation to consider whether the duty to</p> <p>3 consult and accommodate the intervenors has</p> <p>4 been discharged, it necessarily follows that</p> <p>5 the Public Utilities Board has the power to</p> <p>6 effect a remedy if it decides that the duty to</p> <p>7 consult and accommodate has not been</p> <p>8 discharged in the circumstances. Otherwise,</p> <p>9 the intervenors will be driven to seek an</p> <p>10 interlocutory injunction, which is often an</p> <p>11 unsatisfactory route and that point was taken</p> <p>12 up specifically in Haida, as well as in</p> <p>13 Carrier Sekani.</p> <p>14 At Section 30.1 of the EPCA it is stated,</p> <p>15 "in carrying out its duties under this Act,</p> <p>16 the Public Utilities Board has and may</p> <p>17 exercise all the powers given to it under the</p> <p>18 Public Utilities Act." Then I referred you to</p> <p>19 the Public Utilities Act at Section 118, "this</p> <p>20 Act shall be interpreted and construed</p> <p>21 liberally in order to accomplish its purposes</p> <p>22 and where a specific power or authority is</p> <p>23 given the Board by this Act, the enumeration</p> <p>24 of it shall not be held to exclude or impair a</p> <p>25 power or authority otherwise in this Act</p>	<p>1 should, if it doesn't decide to refuse to</p> <p>2 establish a water management agreement,</p> <p>3 exercise that power to leave -- to suspend the</p> <p>4 proceedings until meaningful consultation of</p> <p>5 the intervenors.</p> <p>6 We are also asking for an order from the</p> <p>7 Public Utilities Board to order the Crown to</p> <p>8 consult and accommodate the intervenors. We</p> <p>9 had thought that the Attorney Generals would</p> <p>10 be present here today, but they're not. We'd</p> <p>11 ask for an order directing the Attorney</p> <p>12 Generals to consult the intervenors, but</p> <p>13 they're not before us today, so as we said, we</p> <p>14 acquiesce and we consent, for the present</p> <p>15 proceedings only, that Nalcor be ordered, in</p> <p>16 the name and on behalf of the Crown, to</p> <p>17 consult with the intervenors and accommodate</p> <p>18 the intervenors.</p> <p>19 In any event, we're asking for an order</p> <p>20 that Nalcor and CF(L)Co, as per their</p> <p>21 statutory duty, consult and accommodate the</p> <p>22 intervenors.</p> <p>23 In the alternative, we request that the</p> <p>24 Board establish terms of the water management</p> <p>25 agreement that will direct the Crown or</p>
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<p>1 conferred on the Board."</p> <p>2 Section 2, "the Board created has, in</p> <p>3 addition to the power specified in this Act,</p> <p>4 all additional implied and incidental powers</p> <p>5 which may be appropriate or necessary to carry</p> <p>6 out all of the powers specified in this Act."</p> <p>7 The Board has the obligation to establish</p> <p>8 a water management agreement. The only way</p> <p>9 that it can do that is if it satisfied that</p> <p>10 the duty to consult and accommodate has been</p> <p>11 discharged and if it hasn't, then the Board</p> <p>12 has no choice but to either refuse to</p> <p>13 establish the water management agreement or in</p> <p>14 the alternative, suspend the proceedings</p> <p>15 pending meaningful consultation of the</p> <p>16 intervenors.</p> <p>17 (11:15 a.m.)</p> <p>18 With respect to the power to suspend, my</p> <p>19 colleague alluded to that earlier, in terms of</p> <p>20 the general power and the specific power from</p> <p>21 the regulations. The Act reads, at Section</p> <p>22 27.1(b) "the Public Utilities Board may set</p> <p>23 aside for future examination an issue that in</p> <p>24 its opinion requires a more prolonged</p> <p>25 examination." We submit that the power</p>	<p>1 Nalcor, as its agent, Nalcor and CF(L)Co to</p> <p>2 consult and accommodate the intervenors.</p> <p>3 Indeed, under Section 5.5 of the EPCA, the</p> <p>4 Board is granted the power to establish a</p> <p>5 water management agreement and its terms. The</p> <p>6 EPCA specifically provides the power to the</p> <p>7 Public Utilities Board to establish a term of</p> <p>8 a water management agreement which imposes</p> <p>9 reporting requirements. So not only are we</p> <p>10 asking for an order -- a term which directs</p> <p>11 consultation, but also reporting. The Public</p> <p>12 Utilities Board is also granted the specific</p> <p>13 power to order a defaulting person to comply</p> <p>14 with the terms and conditions of a water</p> <p>15 management agreement, and I refer to Section</p> <p>16 5.6 of the EPCA, Section 2, "the Public</p> <p>17 Utilities Board may require reporting</p> <p>18 commitments and impose monitoring requirements</p> <p>19 as it considers appropriate to ensure that the</p> <p>20 persons to an agreement approved by the Public</p> <p>21 Utilities Board under subsection 5.3 or</p> <p>22 established under subsection 5.5 comply with</p> <p>23 the terms and conditions of the agreement."</p> <p>24 So for these reasons, we are seeking the</p> <p>25 following orders. First, we're seeking an</p>

order refusing to establish the terms of a water management agreement or, in the alternative, an order staying the proceedings in regard to the establishment of the terms of water management agreement, the hold pending meaningful consultation and accommodation of the intervenors, and I'll refer you to my factum, paragraphs 185 and subsequent for those orders.

We're also looking for an order that the provincial and federal Crown, and I indicated, as represented by the Attorney General of Newfoundland and Attorney General of Canada, but again, they're not here before us today, so I don't expect an order in that regard, meaningfully consult and accommodate the intervenors in regard to water management agreement. In the alternative, that they order Nalcor as an agent of the Provincial Crown to consult and accommodate the intervenors.

We're looking for an order in any event that Nalcor and CF(L)Co meaningfully consult and accommodate the intervenors in regard to the establishment of water management

agreement and the management of water thereunder.

In the further alternative, we're looking for an order establishing a term of the water management agreement that directs the Provincial and Federal Crown, as represented by the Attorney General of Newfoundland, or the alternative, as represented by its agent, Nalcor, to meaningfully consult and accommodate the intervenors in regard to the water management agreement or the management of water thereunder and two, to report back to the Public Utilities Board thereon.

We're also looking for an order establishing a term of water management agreement that directs Nalcor and CF(L)Co to meaningfully consult and accommodate the intervenors in regard to a water management agreement and the management of water thereunder and to report back to the PUB.

Finally, we're also looking for an order, in any event, that in the cause that Nalcor pay all the expenses incurred by the intervenors in connection with these proceedings, and if the PUB orders that all

expenses of the PUB in connection with these proceedings be paid by the parties, we request an order that these expenses be paid by Nalcor and CF(L)Co, and I appreciate the time this morning, and I thank you for your attention.

CHAIRMAN:

Q. Thank you. I guess it's time to take a little break, so we'll break say for around a half an hour. Is that acceptable to everybody? All right.

(BREAK at 11:25 a.m.)

(RECONVENE at 11:52 a.m.)

CHAIRMAN:

Q. So I think, Mr. Kelly, we are in your hands, sir.

KELLY, Q.C.:

Q. Thank you, Mr. Chairman. Mr. Chairman and Commissioners, as I understand it, this oral hearing is limited to addressing the issues that have been raised, first of all, in the motion by the Ekuanitshit and in Mr. Carot's letter of February 12, 2010 on behalf of the Uashat. Consequently, I will not be addressing how -- the broader questions of how the water management agreement fulfils the

requirements of the EPCA and the water management regulations, in particular the efficiency policy of the statute and the coordinated production objectives of the regulations, and while at the same time ensuring that the provisions of prior power contracts are fulfilled and not adversely affected. Those matters are addressed in our written submissions as well as in our pre-filed evidence and the responses to the various RFIs.

So as we turn to consider the issues that have been raised here, there's a couple of important points to remember first of all. First of all, the laws of the Province of Newfoundland and Labrador require that there be a water management agreement, and so as Nalcor has noted in the response to several of the requests for information, the Lower Churchill Project is predicated upon there being a water management agreement in effect, because the law requires it. Simple as that. In fact, it would be wrong, not in accordance with law, if the project had been put forward without a water management agreement. So the

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<p>1 predication of the project is that there will 2 be a water management agreement in accordance 3 with the laws of the province.</p> <p>4 So the question that the Board has got to 5 kind of start with is what's your job, put it 6 kind of bluntly. What's the question that you 7 have to address? And it is a rather limited 8 question or matter which is before you. Under 9 Section 5.5 of the EPCA, the Board has to 10 establish the terms of a water management 11 agreement between Nalcor and CF(L)Co for the 12 purpose of achieving the policy objective set 13 out in subparagraph 3.b.1. So you have to 14 establish the terms of the water management 15 agreement to achieve the efficiency policy. 16 That's the task that has been set for you, and 17 that's a rather limited jurisdiction because 18 the Board does not decide whether the Lower 19 Churchill Project should proceed or how the 20 Lower Churchill should proceed.</p> <p>21 Unlike other regulators, this Board is 22 not called upon to consider whether a 23 certificate of public convenience and 24 necessity should issue for the Lower Churchill 25 Project, and if you've looked at the cases,</p>	<p>1 the nub of the question. Now before I get to 2 the question, let me first say that in the 3 various written submission that have been 4 filed there's a lot of discussion about 5 whether this is a procedural question or 6 whether it's simply a matter of the Board's 7 substantive jurisdiction, and as you've seen 8 from the written submissions, different courts 9 have approached the issue in different ways. 10 The Federal Courts seem to be of the view that 11 Boards should simply do their jobs, which in 12 this case is to decide, having heard all of 13 the evidence from all of the parties, 14 including that of the intervenors here, what 15 are the most appropriate terms of the Water 16 Management Agreement, and that approach seems 17 consistent with the Supreme Court of Canada's 18 decision in the Taku River case, amongst 19 others.</p> <p>20 Now recently the BC Court decided that 21 its regulator, at least in the context of two 22 specific cases before it, should approach the 23 matter a bit differently, and I don't intend 24 to get into a discussion of the nuances of the 25 law on that because the Supreme Court of</p>
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<p>1 some of the Federal Court cases dealing with 2 the NEB and the British Columbia cases dealing 3 with the BCUC, you'll see that those boards 4 have a much broader power that they have to 5 exercise, which is to consider whether a 6 certificate of public convenience and 7 necessity should issue in relation to the 8 specific project. That's not the job that's 9 been assigned to you. You've got to simply 10 establish the terms of the water management 11 agreement. And the EPCA requires that the 12 Board establish the terms. It says the Board 13 shall do so.</p> <p>14 Now Mr. Schulze and Mr. Carot assert that 15 there is a duty to consult, but any duty to 16 consult at this stage if there is one, or 17 could be one, would have to be in relation to 18 the particular matter or transaction which is 19 before the Board. It's not a duty that exists 20 in a vacuum. So you ask yourself what's the 21 question that's before you; it's to establish 22 the terms of the Water Management Agreement. 23 So the question becomes can the terms of the 24 Water Management Agreement as proposed have 25 any effect on aboriginal interests. That's</p>	<p>1 Canada has taken up that Carrier Sekani case 2 from BC, and in about a year from now we're 3 going to have a learned decision from the 4 Supreme Court of Canada on how all that should 5 play out. The question for the Board is you've 6 got a rather practical job, you've got to do 7 something at this stage. So what does all that 8 discussion mean for the Board, and frankly it 9 means very little because whether you treat it 10 as a procedural question or whether you treat 11 it as a substantive question within your own 12 jurisdiction doesn't much matter because the 13 question comes out essentially the same; can 14 the terms of the proposed Water Management 15 Agreement adversely affect any aboriginal 16 interest.</p> <p>17 Now before we come to that, let me say a 18 word about what this discussion is not about. 19 It is not about the environmental impacts of 20 the Lower Churchill Project itself. The 21 Ekuanitshit and the Uashat, in their RFI 22 responses and in their submissions today, have 23 referred to the environmental issues set forth 24 in Nalcor's environmental impact statement and 25 their view of the project's impact, but the</p>

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<p>1 Lower Churchill Project is not the matter 2 that's before this Board. The only matter 3 that's before this Board is the terms of the 4 Water Management Agreement. So the question of 5 adverse effect has to be considered in 6 relation to the terms of the Water Management 7 Agreement, not the construction, development, 8 or operation of the Lower Churchill Project.</p> <p>9 Now the aboriginal groups before you have 10 asserted claims of land and resource usage in 11 relation to the Churchill River and its 12 watershed. Those claims go to whether and how 13 the project should be developed and subject to 14 what operating parameters, but nothing in what 15 they've said goes to the terms of the Water 16 Management Agreement. Before we get to the 17 Water Management Agreement terms, there's two 18 little points you've got to keep in mind. 19 First, the Water Management Agreement itself 20 contains no operating parameters, it doesn't 21 tell you what the reservoir levels are going 22 to be, doesn't tell you what water flows there 23 are going to be. It will work and it is 24 designed to work in relation to whatever 25 operating parameters are established after the</p>	<p>1 terms which the law says you, the Board, make 2 sure that we, Nalcor and CF(L) Co, get into 3 the agreement.</p> <p>4 Now neither of the two aboriginal groups, 5 in either their written submissions, in their 6 responses to the RFIs, or in the submissions 7 today, have pointed to any specific term or 8 any specific provision in the Water Management 9 Agreement which has any adverse effect on 10 them. It's rather telling that here we are in 11 a hearing which involves establishing the 12 terms of the Water Management Agreement, and 13 we've talked very little about what does it 14 say, what are the terms that are in the 15 agreement. The Board staff asked the 16 intervenors in PUB CIE-4 and in PUB IUM-4 to 17 identify the specific provisions of the Water 18 Management Agreement that they say will 19 adversely affect them. I'm not going to take 20 you through the answers in detail now, but you 21 can look at them in due course, but neither 22 intervenor in the answers could point to any 23 specific provision of the Water Management 24 Agreement that was going to adversely affect 25 them and explain how it would do so. The</p>
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<p>1 environmental assessment process, the 2 consultation process, and the permitting 3 process for the Lower Churchill Project. The 4 Water Management Agreement will operate within 5 the existing parameters for the Upper 6 Churchill Project or facilities and within the 7 parameters to be established for the Lower 8 Churchill. The existing parameters for the 9 Upper Churchill have to be respected because 10 those operating parameters enable CF(L)Co to 11 fulfil its prior power contracts, and the EPCA 12 requires that those prior power contracts not 13 be adversely affected. So that's the first of 14 the two points. The Water Management Agreement 15 doesn't contain operating parameters. It's, in 16 essence, a neutral document. It will operate 17 in relation to whatever parameters are 18 ultimately decided for the Lower Churchill. 19 The second point is that many of the terms 20 contained in the Water Management Agreement, 21 and in essence, the important structure of the 22 Water Management Agreement, are prescribed by 23 the Water Management Regulations. They are 24 required terms required by law. So you got no 25 operating parameters and you have a number of</p>	<p>1 answers are phrased in generalities, and as 2 the courts have said, evidence of adverse 3 effect is not to be found in generalities, and 4 you'll find that particularly in the 5 Brokenhead Ojibway decision which is at Tab 2 6 in the case books that we've filed, and I just 7 wanted to read you this small little piece. 8 It's at Paragraph 30 of the case where the 9 court says, "The fundamental problems with the 10 claims advanced in these proceedings by the 11 Treaty One First Nations is that the evidence 12 to support them is expressed in generalities", 13 and then if you go over to Paragraph 34, the 14 court says this, "I do not question that the 15 above statements", and he's referring to the 16 evidence that the Chief had given, many of the 17 type of comments that Mr. Carot made this 18 morning on behalf of his clients, "I do not 19 question that the above statements reflect a 20 profoundly held concern not only of Chief 21 Nelson, but of others in the Manitoba 22 aboriginal community. The problem is that to 23 establish a procedural breach around projects 24 such as these, there must be some evidence 25 presented which establishes both an adverse</p>

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<p>1 impact on a credible claim to land or to 2 aboriginal rights, accompanied by a failure to 3 adequately consult". The first thing is, 4 where's the adverse impact. "The Treaty One 5 First Nations are simply not correct when they 6 assert in their evidence that a duty to 7 consult is engaged whenever the Government of 8 Canada makes any decision related to lands in 9 our traditional territory inside the 10 boundaries of Treaty One. There is no at-large 11 duty to consult that is triggered solely by 12 the development of land for public purposes. 13 There must be some unresolved non-negligible 14 impact arising from such develop to engage the 15 Crown's duty to consult".</p> <p>16 In this case, we're not talking about the 17 development, we're talking about where in the 18 terms of the Water Management Agreement, and 19 generalities just don't get you there, you've 20 got to be able to look at the term and say, 21 okay, well, what's wrong with that. Now I'm 22 not going to take you through the terms of the 23 Water Management Agreement one by one, but 24 let's just have a very quick look at the basic 25 provisions of it, and we can pull up that</p>	<p>1 Page nine deals with establishing the Water 2 Management Committee. So that can't have any 3 effect. Article VI on page 10 deals with the 4 independent coordinator, and the independent 5 coordinator is required under the terms of the 6 Water Management Agreement. He establishes 7 the production schedule, which is in 6.2(a), 8 but that's a specific requirement contained in 9 Section 3.2(c) of the Water Management 10 Regulations, and none of that affects 11 aboriginal interests. Energy storage simply 12 provides the mechanics of how you do it, and 13 the rest of the Articles then, Articles VIII 14 dealing with metering and measurement, IX 15 dealing with maintenance, X dealing with 16 deficiencies, XI dealing with costs and 17 expenses, XII effective date, XIII dispute 18 resolution, and XIV are a bunch of 19 miscellaneous provisions, none of those have 20 any impact on land or resource usage. And 21 Annex "A" is simply in very simple terms the 22 mechanics of how you -- the mathematics of how 23 you convert water to energy and back again. So 24 when you look at it, what you will not find in 25 this agreement is anything that tells you</p>
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<p>1 document, it's Schedule "A" to our 2 Application. If you go to page one, there are 3 recitals. Well, the recitals don't have any 4 impact on aboriginal interests. If you go to 5 pages two, three, four, we have definitions. 6 Well, they don't have any impact on aboriginal 7 interests. If we go to page five, there are a 8 bunch of general provisions. Nothing in that 9 is going to affect any aboriginal interests. 10 When you get over to page six, we have Article 11 II, which is the objective of the agreement 12 which is taken from the Water Management 13 Regulations. Article III deals with prior 14 power contracts. Those provisions are 15 essentially required by the EPCA. None of 16 those have any impact on aboriginal interests. 17 Article IV deals with the suppliers 18 obligation, and if you look at 4.2, it is to 19 adhere to the production schedules. That's 20 required by the terms of the Water Management 21 Regulations. In particular, Section 3.2(d) of 22 the Water Management Regulations require that 23 term to be included. When you turn over 24 through the next bit, there are administrative 25 provisions on page eight. Nothing in that.</p>	<p>1 about what the reservoir levels are going to 2 be, what the flows are going to be, because 3 this document is very carefully prepared to 4 ensure that it can work with whatever those 5 parameters are ultimately defined to be.</p> <p>6 So there's nothing in this Water 7 Management Agreement that has any adverse 8 effect on aboriginal interests because there's 9 nothing here that stipulates what water flows 10 or reservoir levels will be on any particular 11 hour, on any particular day, in any particular 12 season, or in any particular year. All those 13 things are matters for discussion in the 14 environmental assessment consultation 15 permitting processes. It's designed to be 16 that way. Even now under the existing 17 operation flows, of course, can vary hourly 18 under the existing operations at CF(L) Co, 19 because the HQ power contract requires that 20 flows may vary on an hourly basis because HQ 21 puts in its demand request every hour as to 22 what power it wishes to have produced.</p> <p>23 So the limitations that will ultimately 24 come on the operation of the Lower Churchill 25 Project will come through the environmental</p>

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<p>1 assessment, consultation, and permitting 2 processes, and aboriginal groups, including 3 these groups, are and will be consulted during 4 those processes. In fact, this is made 5 abundantly clear in the information requests 6 made by the Joint Review Panel, which both Mr. 7 Carot and Mr. Schulze referred to earlier 8 because the Joint Review Panel, just like this 9 Board, goes through an extensive information 10 request process. It's clear that the Joint 11 Panel, as it is mandated to do, is considering 12 aboriginal interests because it has an 13 obligation under the agreement to assemble all 14 that information and report it ultimately to 15 the Ministers. The panel doesn't decide 16 itself, but it goes to the Crown because then 17 the Crown has got to decide what to do with 18 it. It assembles the information to make sure 19 that ultimately the Ministers have the 20 relevant information before them, and you can 21 see this in -- if you go to the IR in Mr. 22 Carot's letter, IR-151, you can see this 23 consultation process. It's in the IR 24 documents from the Joint Review Panel. While 25 you've got the letter there, just to save a</p>	<p>1 not going to read it to you fully, you'll see 2 that the panel is looking for more information 3 with respect to the consultation, they're 4 looking for the consultation agreements, et 5 cetera, because that's part of that process, 6 that's where that process is going to unfold 7 because that's in relation to the issues 8 surrounding the project which are described in 9 Nalcor's environmental impact statement, and 10 to which Mr. Carot referred in some detail 11 this morning. Now this is actually the fourth 12 round of RFI. Just like we've had three 13 rounds of RFIs in the general rate proceeding, 14 this Board has numerous rounds of RFIs. The 15 panel has a number of rounds of RFIs that it 16 will go through before you get to the ultimate 17 hearing process. What's interesting is -- 18 just take a quick minute to look at some of 19 the other groups which are involved in that 20 process. Can I get you just to turn back, for 21 example, 148. The IR itself is not all that 22 important, but just look at some of the other 23 groups which are participating; Fisheries and 24 Oceans Canada, Memorial University, Hydro 25 Quebec, Innu Nation, Sierra Club, Environment</p>
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<p>1 bit of time, just scroll down to Paragraph 3 2 in the letter, you'll see that with respect to 3 the information requested in 151 which would 4 deal with aboriginal interests, the panel will 5 communicate directly with aboriginal groups to 6 encourage their participation and cooperation 7 and making information on aboriginal land and 8 resource use available in a timely fashion, 9 and the panel's letter will be posted in the 10 registry. So the panel itself will be engaged 11 in that process, as Nalcor is also engaged in 12 that process. So if you just then go to 151, 13 you'll see -- under related comments, you'll 14 see some of the aboriginal groups which are 15 involved in the process. We have the Labrador 16 Metis Nation, we have the Nunatsiavut 17 Government, we have the Uashat, the group 18 here, which is the third one down, we have the 19 Innu Nation, and we have the Innus de 20 Ekuanitshit. So we have two of the aboriginal 21 groups here, but we have a large number of 22 other aboriginal groups, and there are nine 23 involved in the process altogether. 24 12:15 P.M. 25 If you go down through that RFI, and I'm</p>	<p>1 Canada, and various departments of the 2 Government of Newfoundland and Labrador. So 3 there's a whole lot of discussion that has got 4 to go on about how the project will operate, 5 what the parameters will be, what the minimum 6 flow requirements, for example, will be, and 7 ultimately this agreement will work in 8 relation to all those things, that will 9 function out of that process. All of those 10 groups are involved in providing information 11 and also seeking additional information. The 12 process is unfolding exactly as it should and 13 as it ought to do because that's the 14 appropriate forum for considering all of the 15 environmental impacts that my friends have 16 referred to this morning, including the 17 impacts on aboriginal culture and their land 18 usage, et cetera, arising from the Lower 19 Churchill Project. 20 Now Mr. Schulze, supported by Mr. Carot, 21 had raised the question of Section 68 of the 22 Environmental Protection Act, and that kind of 23 takes us to, well, what's the 24 interrelationship of what this Board is doing 25 and what that Joint Review Panel is doing, and</p>

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<p>1 the basic principle of statutory 2 interpretation is clear. Mr. Simmons, I 3 think, has done a very good job in his brief 4 laying it all out for the Board. Statutes are 5 to be interpreted to avoid conflict wherever 6 possible. They're to be given an 7 interpretation which best facilitates the 8 achievement of the objectives of the statutes, 9 and that's the objectives of both statutes, 10 both the Environmental Assessment Act, and in 11 this case, the Electrical Power Control Act. 12 The EPCA is very clear, it requires, if you 13 look at Section 5.4, that if there is a 14 proposed development, then you need a Water 15 Management Agreement. The suppliers are told 16 you don't wait until it's all done and in 17 place, when it's simply a proposal, not when 18 it's released from EA and you got a 19 construction project, when it's a proposal, 20 you get your Water Management Agreement in 21 place. It's at the proposal stage. Then you 22 have an Environmental Assessment Act, and in 23 particular the whole process that operates 24 under it, and you cannot have a licensed 25 permit approval or other document of</p>	<p>1 well together, they're designed to work well 2 together, and that's the logical 3 interpretation that makes sure you fulfil both 4 of the objectives. Just stop and think about 5 it. Let's say you take my friend's position 6 that, well, we shouldn't get the terms of the 7 Water Management Agreement worked out, we 8 should have an environmental assessment 9 process first. Well, the problem with that is 10 then the environmental assessment panel, as 11 it's considering the operating parameters, 12 does not have before it one of the documents 13 which is what's the Water Management Agreement 14 going to look like, and because it's a neutral 15 document, it makes logical sense you get that 16 established first and then the parameters can 17 be determined so the panel can have before it 18 exactly how that's going to work. 19 So the point that comes out of that is 20 the environmental effects of the project can 21 best be assessed if the panel has before it 22 not only the technical information as to the 23 project, but also the terms of the Water 24 Management Agreement itself. Now with that as 25 the background, just have a look at</p>
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<p>1 authorization. Now as we've laid out in the 2 brief, the case law is when you've got words 3 like permit, approval -- licence, permit, or 4 approval, you've got to read it all together 5 to see what the Legislature is really meaning, 6 and it's licence, permit, approval, or other. 7 You don't forget the word "other". It's other 8 document of authorization. So it's a licence, 9 permit, or approval, which is going to amount 10 to some form of authorization. This Board 11 doesn't do anything that authorizes the Lower 12 Churchill Project. You are simply 13 establishing the terms of the Water Management 14 Agreement, which in turn is going to be of 15 utility, as I'll come to in a moment, in that 16 environmental assessment process, but there's 17 no conflict between the Acts. In fact, the 18 Acts are set up to work perfectly logically 19 together because the EPCA says at the proposal 20 stage, you establish the Water Management 21 Agreement, that's going to feed into the 22 environmental assessment process and then are 23 you issuing a licence, permit, approval, or 24 other document of authorization; no. So 25 there's no conflict, the two statutes work</p>	<p>1 Information Request 149, and get that brought 2 up on the screen, because if you look down 3 through 149, you'll see that towards the end 4 of the second paragraph, the panel is actually 5 asking about the status of the establishment 6 of the Water Management Agreement before the 7 Public Utilities Board, and then when you go 8 to what is actually now being asked of Nalcor 9 under "A" at the bottom, an assessment of the 10 role of the pending Water Management Agreement 11 with respect to risks, the project viability, 12 environmental implications. In other words, 13 if you don't get a Water Management Agreement; 14 gee, what does it mean. Well, the logic is 15 there must be a Water Management Agreement 16 because the law requires it, so the project 17 will have a Water Management Agreement. What 18 will be of assistance to the panel is this 19 Board is going to establish it, it will then 20 feed into that process, out of which all of 21 these groups from the Sierra Club, to the 22 aboriginal groups, to the Environment Canada, 23 will have their say as to what minimum flows 24 should be, what the reservoir levels should 25 be, and if anybody can establish that there</p>

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<p>1 should be a particular flow on a particular 2 hour or a particular day, all those things to 3 the extent that is deemed then appropriate 4 will work within the context of this Water 5 Management Agreement, and that's how the whole 6 thing goes together, why it makes logical 7 sense.</p> <p>8 So, Mr. Chairman, on a proper 9 interpretation of the EPCA and the EPA, 10 there's no conflict between the statutory 11 provisions, there's a logical sequence of what 12 is required. The statutory provisions reflect 13 that the Water Management Agreement gets 14 established early while the project is still 15 only a proposal because it's an important 16 input then into that environmental assessment 17 process. To further ensure that there's a 18 timely decision with respect to water 19 management because these two processes are 20 going on together, the Lieutenant Governor in 21 Council has, in fact, enacted a regulation 22 that requires the Board's decision within 120 23 days, and that regulation is obviously 24 intended to ensure that a timely decision is 25 made because that becomes available then, the</p>	<p>1 permit this project to proceed. So there is no 2 dishonour in the Crown in having established - 3 - in the Board having established the terms of 4 the Water Management Agreement, which are then 5 going to funnel into a rather comprehensive 6 process of consultation, environmental 7 assessment, and permitting. My friend, Mr. 8 Carot, I believe, put up on the screen this 9 morning all of the permits and approvals that 10 will be required for this project, so that 11 that can be assessed then in the environmental 12 assessment process.</p> <p>13 Mr. Chairman, there's no basis for the 14 Board to suspend Nalcor's Application or to 15 reject it or to suspend your decision. 16 Frankly, nor is there any jurisdictional basis 17 for the Board to do so. The Board has been 18 entrusted with an important function by the 19 Legislature of the Province of Newfoundland 20 and Labrador, and that's to establish the 21 terms of the Water Management Agreement, and 22 nobody has put forward any basis to suggest, 23 let alone provided proof, that there are any 24 terms of the Water Management Agreement, as 25 both Nalcor and CF(L)Co have proposed, which</p>
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<p>1 Water Management Agreement becomes available 2 for the EA process. I think it goes without 3 saying, frankly, that the Board is bound by 4 the provisions of the Environmental Assessment 5 Act -- sorry, by the provisions of the 6 Electrical Power Control Act, and the 7 provisions of the Water Management Agreement, 8 or the Water Management Regulations, rather.</p> <p>9 Mr. Chairman, I just want to say when you 10 look at this agreement, it is a good agreement 11 because look what it does. First of all, it 12 fulfils the statutory purposes of ensuring 13 efficiency and the water management objectives 14 under the regulations. It works 15 administratively between Nalcor and CF(L) Co, 16 it works with the prior power contracts, most 17 significantly the Hydro Quebec power contract 18 which is important, and it doesn't adversely 19 affect any aboriginal interests. In 20 establishing the terms of the Water Management 21 Agreement doesn't involve any exploitation of 22 the resources by the Crown, whether the Crown 23 is the Government or Nalcor, because 24 establishing the terms of the Water Management 25 Agreement does not in any sense allow or</p>	<p>1 are not appropriate. So the Board should 2 continue to fulfil its Legislative mandate and 3 the suspension Application should be 4 dismissed. In whole, Nalcor submits that the 5 Board should approve the Water Management 6 Agreement as proposed by Nalcor and CF(L)Co. 7 It achieves all of the objectives of the Act 8 and the Regulations, it respects the existing 9 prior power contracts, and it has no adverse 10 impact on aboriginal interests. There is a 11 consultation, environmental assessment, 12 permitting process still to be followed, but 13 that does not -- the establishment of the 14 terms of the agreement facilitates those 15 processes without in any sense having any 16 adverse impact on aboriginal interests. Mr. 17 Chairman, those are my submissions.</p> <p>18 12:30 p.m.</p> <p>19 CHAIRMAN:</p> <p>20 Q. Okay. I think then next we've got Mr. Smith 21 from the Churchill Falls (Labrador) 22 Corporation.</p> <p>23 SMITH, Q.C.:</p> <p>24 Q. Thank you, Mr. Chairman, and 25 Commissioners. Mr. Chairman, I intend to be</p>

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<p>1 brief. Perhaps the first order of business</p> <p>2 I'd like to address is to indicate for the</p> <p>3 record, and to the Board, that I'm joined this</p> <p>4 morning and this afternoon by Mr. Peter</p> <p>5 Hickman, who's senior counsel of CF(L)Co. I</p> <p>6 had intended to indicate that earlier this</p> <p>7 morning, as I say, for the record.</p> <p>8 Mr. Chairman, I don't propose to revisit</p> <p>9 my written submissions. Counsel for Nalcor, I</p> <p>10 think, indicated in his reply submissions that</p> <p>11 the submissions of both Nalcor and CF(L)Co are</p> <p>12 broadly, I think the term he used, broadly</p> <p>13 consistent. I've listened to Mr. Kelly's</p> <p>14 further remarks here this morning, and that</p> <p>15 hasn't changed, there's nothing that causes me</p> <p>16 to, as I say, revisit those submissions.</p> <p>17 I do like the exercise Mr. Kelly took the</p> <p>18 Board through just now, and that is the</p> <p>19 specific provisions of the Water Management</p> <p>20 Agreement, and again driving home and</p> <p>21 establishing the point that there is nothing</p> <p>22 in that agreement that's before the Board that</p> <p>23 adversely affects the interest of Mr.</p> <p>24 Schulze's and Mr. Carot's clients. I was</p> <p>25 prepared this morning, Mr. Chairman, to speak</p>	<p>1 submission, there's no duty whatsoever, and</p> <p>2 that flows most directly from the concession</p> <p>3 made by counsel, as I say, that CF(L)Co is not</p> <p>4 a Crown agent. Mr. Carot goes further and</p> <p>5 submits that there is a statutory duty, quite</p> <p>6 independent apparently of a constitutional</p> <p>7 duty, a statutory duty on CF(L)Co to consult</p> <p>8 with aboriginal peoples in this matter.</p> <p>9 Interestingly enough, Mr. Schulze, on behalf</p> <p>10 of his client, CIE, does not assert, as I</p> <p>11 understand it, that there is such a statutory</p> <p>12 duty. In my submission, Mr. Chairman, there</p> <p>13 is clearly no such statutory duty. I note</p> <p>14 that Mr. Carot provides the Board no authority</p> <p>15 whatsoever. There's no authority for that</p> <p>16 proposition, there's nothing filed in the</p> <p>17 materials, and he's referred the Board to</p> <p>18 nothing further this morning. Presumably, and</p> <p>19 as I understand the argument, the fact that</p> <p>20 the Electrical Power Control Act makes</p> <p>21 reference to good utility practice, sound</p> <p>22 public utility practice, somehow gives rise</p> <p>23 and imposes a statutory duty to consult</p> <p>24 aboriginal peoples. In my submission, Mr.</p> <p>25 Chairman, if the Legislature intended a</p>
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<p>1 to whether CF(L)Co is a Crown agent. I think</p> <p>2 it's fair to say that that is not an issue now</p> <p>3 before the Board. My sense from earlier</p> <p>4 submissions, certainly by Mr. Carot, was that</p> <p>5 it was a live issue in this proceeding. As</p> <p>6 well, my sense was that reviewing the legal</p> <p>7 brief provided by Board Counsel, that the</p> <p>8 Board may well have seen it as a live issue.</p> <p>9 It is clear to me as a result of submissions</p> <p>10 by Mr. Carot this morning that that is not an</p> <p>11 issue. I would go further and indicate to the</p> <p>12 Board that on the break a short time ago, I</p> <p>13 spoke to Mr. Schulze and Mr. Carot, and they</p> <p>14 may wish to confirm this to the record, I</p> <p>15 leave it to themselves and the Board how you</p> <p>16 might wish to handle that, but they have</p> <p>17 confirmed to me at least that they take no</p> <p>18 issue with the fact that CF(L)Co is not an</p> <p>19 agent of the Crown, is not a Crown agent, and</p> <p>20 they accept that CF(L)Co is not an agent of</p> <p>21 the Crown.</p> <p>22 It follows, of course, Mr. Chairman, that</p> <p>23 there is no duty to consult on CF(L)Co.</p> <p>24 Certainly there is no, as Mr. Carot would</p> <p>25 frame it, constitutional duty. In my</p>	<p>1 statutory duty on the part of CF(L) Co,</p> <p>2 Nalcor, or any other entity to consult</p> <p>3 Aboriginal peoples in this circumstance or any</p> <p>4 circumstance, it would be worded loudly and</p> <p>5 clearly in the statute, and there's no such</p> <p>6 language in the statute to that effect or any</p> <p>7 effect, Mr. Chairman.</p> <p>8 As I said, Mr. Chairman, there is no</p> <p>9 constitutional duty as Mr. Carot suggests or</p> <p>10 has conceded, there's no statutory duty on</p> <p>11 CF(L)Co and in all the circumstances and on</p> <p>12 the record that is before the Board, it's</p> <p>13 clearly open to the Board to find and hold</p> <p>14 that there is no such duty on the part of</p> <p>15 CF(L)Co in this circumstance arising from the</p> <p>16 Electrical Power Control Act or in any way</p> <p>17 related to the application that is before you</p> <p>18 and I would invite the Board to so find.</p> <p>19 Those are my submissions, Mr. Chairman, thank</p> <p>20 you and Commissioners.</p> <p>21 CHAIRMAN:</p> <p>22 Q. I think Mr. Schulze you have the right to some</p> <p>23 closing remarks.</p> <p>24 MR. SCHULZE:</p> <p>25 Q. Well first I should clear one thing up, I do--</p>

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I guess I wasn't clear enough but I do take the position that pursuant to the Water Management Regulations that sound utility practice includes consulting Aboriginal people and I believe in our original application to intervene, we put before the Board the Canadian Electricity Association's statement on that. So I think Mr. Carot and I have the same view on that.

I'll come back to the question that Commissioner Newman asked me. She asked me whether there is a different duty here than under the Public Utilities Act and I'll still--my understanding of the Public Utilities Act has probably only slightly improved since the question was asked, but I would say there's a difference in the similarity from my understanding. The difference would be that unless I've misunderstood the activities of the Board under the Public Utilities Act, it would seem to me the issues raised--the issue sufficient to raise the duty to consult would rarely arise under the Public Utilities Act because it would rarely--it would rarely be decision making with this kind of

Carot's client intervenor status is that decisions can have impacts on parties who aren't immediately before the Board if they don't intervene or they aren't represented through other means like the Consumer Advocate.

I want to come back to--I don't want to take up too much more of the Board's time, but some of Mr. Kelly's submissions. I won't--I think I'd like to just make a few quick comments on his summary of the case law. He said, he was talking about the decisions, the review of decisions by the National Energy Board especially where he said that the Federal Courts are of the view that the Board should do their job. We're not in here to disagree with that proposition. I mean, the difference I think is though that the National Energy Board does have fairly complex rules on how proponents before it do consult with Aboriginal people and I entirely take Mr. Kelly's point about the problem of statements that are excessively general. That was the complaint of the Federal Court when they looked at one of those cases, but we're not

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environmental, potential environmental impact. Certainly rate setting, I wouldn't want to deny rate setting has an environmental aspect to it, but it's indirect, rather than direct. So in this, I'd say that the duty is different--I'll come back to some of what Mr. Kelly said, but I mean, water management is, unless I'm missing something about managing water and the Lower Churchill is a large significant body of water, so the duty is different in a sense that it's a more active decision-making role with respect to an important part of the environment and that more directly engages the duty to consult. The similarity I would flag though, I guess, is that to my limited, my limited understanding of what Boards like this one do when they're engaged in rate setting, for instance, often that the most affected party of the other affected party can be absent, I thinking of the consumer, I know that before this Board that's dealt with by having a Consumer Advocate, but I guess the similarity which to some extent I think the Board has recognized by granting my client and Mr.

here--we're--and I'll come back to this, we have tried to hone in on the particular, there's some impediments to doing that, but we have, I think if the Board looks at the information responses that we filed, we tried to address very specific issues of what flow and water level mean. The other caution I would make about environmental assessment generally is Mr. Kelly said well, the Supreme Court said that environmental assessment--the Federal Court said environmental assessment is good and the Supreme Court said in the Taku River case environmental assessment is, it can be where consultation of Aboriginal peoples take place. That's absolutely true, that is what the Supreme Court said in Taku River. If you actually read the case, though, you'll be struck by the level of involvement that the Taku River First Nation had in that environmental assessment. It's, I would say it's unparalleled for any First Nation that is not a party to a Land Claim's Agreement, except the Voisey's Bay--other than the Voisey's Bay Environmental Assessment. The Taku River First Nation named members of the

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<p>1 panel, raised issues which resulted in</p> <p>2 studies, had approval on the mandate of the</p> <p>3 scientific advisor. That's light years from</p> <p>4 what's going on currently before the Joint</p> <p>5 Review Panel. My client got a very small</p> <p>6 amount intervenor funding and is a party and</p> <p>7 that is otherwise a party, like any citizen of</p> <p>8 Happy Valley-Goose Bay who might want to turn</p> <p>9 up. We're not part of the environmental</p> <p>10 assessment like Taku River First Nation was</p> <p>11 with respect to that mine.</p> <p>12 I want to now just--I want to get to the</p> <p>13 heart of my, if you will my challenge or my</p> <p>14 dilemma here. Mr. Kelly says well there's</p> <p>15 nothing in the Water Management Agreement that</p> <p>16 the Intervenor can point to that affect them.</p> <p>17 And I think we did try to take this up in our</p> <p>18 answer, in our information responses. Nalcor</p> <p>19 says yes, water flow will be different with</p> <p>20 the Water Management Agreement than without</p> <p>21 and then when they're asked for sort of more--</p> <p>22 sorry, I need to just go to our submissions on</p> <p>23 this, but they say it's very hard to predict</p> <p>24 what that would be. Well, with all due</p> <p>25 respect, Nalcor has significantly more</p>	<p>1 want to take the Board to that same document</p> <p>2 that Mr. Kelly just referred to. If we go</p> <p>3 back to the letter from the Joint Review</p> <p>4 Panel? Yes, thank you, that's excellent, and</p> <p>5 if you go to page 9 and this become really,</p> <p>6 now we're getting to the heart of my problem,</p> <p>7 the same one I tried to identify this morning.</p> <p>8 Nalcor says here, well, the operating</p> <p>9 parameters will be set in the environment</p> <p>10 assessment and the environmental assessment</p> <p>11 will, is a preliminary to permitting by the</p> <p>12 Minister of National Resources and also by</p> <p>13 Fisheries & Oceans Canada.</p> <p>14 MR. CAROT:</p> <p>15 Q. Page 7.</p> <p>16 MR. SCHULZE:</p> <p>17 Q. Pardon me? Page 7. Yes, page 7 at the</p> <p>18 bottom, page 9 of 34 which is paginated 7 at</p> <p>19 the bottom. There's an expression in French,</p> <p>20 you know, when something gets missed, they say</p> <p>21 it falls between two chairs. I have a feeling</p> <p>22 like the actual concrete effect of this Water</p> <p>23 Management Agreement is falling between your</p> <p>24 chairs and those of the Joint Review Panel</p> <p>25 because if you go to the information or</p>
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<p>1 resources than my client and has significantly</p> <p>2 more time to think about this agreement and</p> <p>3 water flows on the Lower Churchill than my</p> <p>4 client has. So how can Nalcor come and say</p> <p>5 we're going to do a Water Management</p> <p>6 Agreement, the flow will be different before</p> <p>7 and after the Water Management Agreement, we</p> <p>8 can't tell you exactly how and then say, but</p> <p>9 neither can Ekuanitshit, so there must not be</p> <p>10 any adverse effect. But I can't--I can't on,</p> <p>11 as I said, I can't on three week's notice with</p> <p>12 Nalcor saying we can't predict it, I can't</p> <p>13 provide the Board with a prediction that will</p> <p>14 say this will happen and it will be bad for</p> <p>15 the fish for this species or this island. I</p> <p>16 can do, I think, we can do what we did do</p> <p>17 which was we said Nalcor said water flow and</p> <p>18 water levels will be different before than</p> <p>19 they are after. Water flow difference</p> <p>20 variations not just seasonably but even daily</p> <p>21 make a difference. Our concerns are about the</p> <p>22 resources, the natural features and the</p> <p>23 literature says daily flows make a difference</p> <p>24 to that. To ask me to do more than that, I</p> <p>25 think sets the bar incredibly high. I also</p>	<p>1 request of the Joint Review Panel, what do we</p> <p>2 see? The proponent is asked to provide the</p> <p>3 following: an assessment of the role of the</p> <p>4 pending Water Management Agreement with</p> <p>5 respect to risks, to project viability and</p> <p>6 environmental implications. Somehow it seems</p> <p>7 to me that something's going missing if the</p> <p>8 Nalcor's answer to that to the Joint Review</p> <p>9 Panel will be none and to you it will be none,</p> <p>10 and yet they've told us that flows will be</p> <p>11 different before or after. Everything to do</p> <p>12 with flow will happen in the Joint Review</p> <p>13 Panel and the permitting that the Federal and</p> <p>14 Provincial Governments will do once they get</p> <p>15 that report because incidentally don't forget</p> <p>16 environmental assessment doesn't make</p> <p>17 decisions, it makes recommendations. The</p> <p>18 ultimate decision will be Fisheries and Oceans</p> <p>19 will say that this flow is good or bad for</p> <p>20 fish; the Minister, the Provincial Minister of</p> <p>21 Natural Resources will say I'll put these or</p> <p>22 those conditions on your water lease or I</p> <p>23 won't. But in any case, either Nalcor is</p> <p>24 saying that's where all the action is and this</p> <p>25 is just, this is just a technical mechanism or</p>

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else it's true what they told us, that the flow will be different because of the Water Management Agreement and I guess my other-- where my problem with that moves from the practical to the legal is, surely that's what the Legislature had in mind in giving this to the Public Utilities Board because as I said at the beginning of this hearing, otherwise if it's just a matter of a--if it were just a matter of simply allocating, how shall I say, if it was matter of just approving an agreement between two dam owners, I don't know why it would require the mechanism the Water Management Regulations allow for. Either there's nothing happening here, and then I'm not sure why the Legislature even gave you this issue, or there's something happening here that's not entirely before the Joint Review Panel, and it seems to me, just to repeat, it seems to me difficult to understand how Nalcor could both tell this Board water flows will be different after then than they are before, and say, but nothing is really happening because everything to do with flow will be done in the permitting that comes out

Management Agreement. The proposed Water Management Agreement is just a proposed Water Management Agreement. The Board is not bound by those terms. In fact, it must establish its own Water Management Agreement. For that reason, the proposed Water Management Agreement is unsatisfactory as it stands, and to actually pinpoint articles that adversely affect our clients, it is difficult, because as my colleague, Mr. Schulze, was saying, is that ultimately Nalcor doesn't even know, but what is certain is that flows will be different with water management had there not been a Water Management Agreement in place.

The impacts of water management are very real, and I took you through the pre-filed evidence of Nalcor. I also took you through some of the evidence from the Environmental Impact Statement. There's no doubt that water management will have an environmental effect, and as my colleague, Mr. Schulze, was saying, is this going to fall through the cracks, and the Board here today has the obligation to establish a Water Management Agreement. I mean, we ask that you suspend, or at least

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of environmental assessment, and I can't -I'll say to you very frankly, I can't give you a more complete answer than that because the capacity we had to study these issues and the times we had in which to do it was limited.

MR. CAROT:

Q. I agree with my colleagues submissions in reply. I just want to note, though, that our clients have not made a Section 68 argument and we haven't taken a position on that, but just to clarify a comment that Mr. Kelly had made. I just want to continue on from where my colleague, Mr. Schulze, was talking about. What is quite telling from Mr. Kelly's submissions is that they're entirely focused on (a) the terms of the proposed Water Management Agreement, and (b) focuses solely on the Lower Churchill. The Public Utilities Board is responsible for managing water for the entire Churchill River, Upper and Lower Churchill; can't distinguish between the two when it comes to establishing Water Management Agreement. Second of all, the Board has the power, the jurisdiction, the obligation, as is noted by Mr. Kelly, to establish a Water

refuse or suspend pending meaningful consultation, but once you're satisfied that there is meaningful consultation and accommodation, then you will by all means establish a Water Management Agreement, and in so doing, and respecting the dictates of the Constitution, you must take into account the adverse impact on the environment, on the natural lands of the traditional territory of our client. This is not being addressed currently through the Lower Churchill Project. It only addresses, as I said before and I'll repeat again, the lower part of the river, but nothing has to do with the Upper Churchill, and, sure, the Upper Churchill was built in a time where there were no permits, there were no authorizations, there was no environmental assessment, and I'm not questioning, you know, necessarily what happened then, but what I am saying is that there was infringement at that time and that that infringement of our clients' right with the construction of the Upper Churchill will be perpetuated in the absence of consultation and accommodation with respect to the Water Management Agreement.

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<p>1 The terms of proposed Water Management 2 Agreement, sure, they're just words on paper, 3 but their effect are really real. We're 4 talking about management of water, and the 5 management of water will be predicated on the 6 terms of the Water Management Agreement, and 7 that'll be left up to an independent 8 coordinator, using reasonable judgment and so 9 forth, but that is quite big. What is true is 10 that flows will be affected on an hourly 11 basis, which has been acknowledged by Nalcor, 12 and there's no way around it. In that sense, 13 the Water Management Agreement is not a 14 neutral document, and those are the terms of 15 my comment.</p> <p>16 I just want to talk briefly about 17 operating parameters. Counsel for Nalcor 18 repeatedly says that Water Management 19 Agreement will work within operating 20 parameters that will be set in consultation, 21 at least with respect to the Lower Churchill, 22 in consultation with aboriginal groups. I 23 don't disagree if consultation occurs in that 24 respect, but operating parameters establish 25 minimums and maximums, but what about -- and</p>	<p>1 the establishment of the terms pending 2 meaningful consultation, to order, and again 3 to order consultation, or in the alternative, 4 to provide terms in the Water Management 5 Agreement which will provide for such 6 consultation. Again those are my orders 7 sought.</p> <p>8 CHAIRMAN: 9 Q. Okay, I think that concludes the hearing. 10 Thank you all very much, and the Board will 11 not dally in making a decision, but I can give 12 you no timeframes.</p> <p>13 MR. SCHULZE: 14 Q. May I ask the Board a question, Mr. Chairman? 15 CHAIRMAN: 16 Q. Yes, sir. 17 MR. SCHULZE: 18 Q. I'll just -- it's not so much -- it's a 19 question with respect to costs, will the Board 20 seek further submissions or take that under 21 advisement now?</p> <p>22 CHAIRMAN: 23 Q. Oh, I think we'll be taking that under 24 advisement, sir. We can't give you any 25 conclusive position on that.</p>
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<p>1 again I might be repeating myself, but again 2 this is the crux, what happens to daily 3 fluctuations within those operating 4 parameters. Even the Joint Review Panel is 5 wondering about that, and my colleague, David 6 Schulze, referred to at page seven that 7 concern from the Joint Panel. The operating 8 parameters for the Upper Churchill Project, 9 those operating parameters, and again I've 10 said this several times today, they've never 11 been subject to environmental assessment, they 12 never been subject to consultation with my 13 client. So in those circumstances, the Board 14 today is faced with the responsibility and the 15 obligation to ensure that water management, 16 either in the form of an agreement or the 17 implementation of an agreement, will not 18 adversely impact the aboriginal title, rights, 19 and treat rights of our clients. We've 20 established real impacts on traditional 21 activities, on resource uses, and just 22 generally over the control of our traditional 23 lands. These are not generalities, these are 24 very real. In those circumstances, the Board 25 has no choice but to either refuse or suspend</p>	<p>1 MR. SCHULZE: 2 Q. No, sir, I'm sorry, I wasn't asking for a 3 position. I wanted to know whether the Board 4 felt that the matter was closed or would be 5 seeking further submissions.</p> <p>6 MR. SIMMONS: 7 Q. I guess the question, Mr. Chair, is if there's 8 a decision to be made on costs, is this the 9 opportunity for counsel to make any 10 submissions now or would the Board soliciting 11 further submissions in the future about how to 12 deal with costs arising out of the 13 Application. Mr. Schulze, is that your 14 question?</p> <p>15 MR. SCHULZE: 16 Q. Very well stated.</p> <p>17 COMMISSIONER WHALEN: 18 Q. It's the Board's practice is to seek further 19 submission on costs in particular.</p> <p>20 CHAIRMAN: 21 Q. Our Vice-Chairman has spoken. Okay, thank you 22 all very much. 23 (UPON CONCLUDING AT 12:55 P.M.)</p>

1 CERTIFICATE

2 I, Judy Moss, hereby certify that the foregoing is
3 a true and correct transcript in the matter of an
4 application by Nalcor Energy to establish the terms
5 of a water management agreement between Nalcor
6 Energy and Churchill Falls (Labrador) Corporation
7 Limited for the Churchill River, Labrador, heard on
8 the 25th day of February, A.D., 2010 before the
9 Board of Commissioners of Public Utilities, Prince
10 Charles Building, St. John's, Newfoundland and
11 Labrador and was transcribed by me to the best of
12 my ability by means of a sound apparatus.

13 Dated at St. John's, Newfoundland and Labrador
14 this 25th day of February, A.D., 2010

15 Judy Moss

<p>-&-</p> <p>& [1] 135:13</p> <p>---</p> <p>-I'll [1] 138:1</p> <p>-my [1] 129:14</p> <p>-1-</p> <p>1 [8] 37:17 38:17 39:12 39:12 51:25 58:3 90:16 92:8</p> <p>10 [1] 111:3</p> <p>10:30 [1] 62:25</p> <p>10:45 [1] 72:25</p> <p>10th [2] 3:14 57:6</p> <p>11 [3] 55:4 58:7,7</p> <p>110 [1] 65:3</p> <p>114 [1] 65:3</p> <p>117 [1] 49:9</p> <p>118 [2] 92:9 93:19</p> <p>119 [2] 50:10,11</p> <p>11:00 [1] 84:19</p> <p>11:15 [1] 94:17</p> <p>11:25 [1] 99:11</p> <p>11:52 [1] 99:12</p> <p>12 [2] 81:9 99:22</p> <p>120 [4] 17:4,20 45:17 121:22</p> <p>123 [1] 68:15</p> <p>124 [1] 68:15</p> <p>128 [1] 77:25</p> <p>129 [1] 77:25</p> <p>12:15 [1] 114:24</p> <p>12:30 [1] 124:18</p> <p>12:55 [1] 144:23</p> <p>12th [2] 4:19 9:9</p> <p>13 [1] 81:10</p> <p>138 [2] 46:21 47:2</p> <p>139 [1] 80:23</p> <p>148 [1] 115:21</p> <p>149 [2] 120:1,3</p> <p>14th [5] 22:15 23:14,15 45:15 86:24</p> <p>15 [1] 84:25</p> <p>150 [1] 24:15</p> <p>151 [2] 114:3,12</p> <p>152 [1] 82:20</p> <p>153 [1] 83:19</p> <p>159 [5] 24:25 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