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9:00 a.m.

Q. Good morning, everybody. My name is Andy Wells. I’m the Chairman of this illustrious organization. On my left is Commissioner Darlene Whalen, the Vice Chairman of the Board, and on my right and extreme right are James Oxford, Commissioner, and Dwanda Newman. I also want to acknowledge the presence of Cheryl Blundon, the Board Secretary, and, of course, our own Board Counsel, Dan Simmons. Mike McNiven is over on, I guess, your left, my right. Mike is the Board’s Technology Officer and he will be assisting with the hearing with electronically retrieving evidence reference by various lawyers present. Discoveries Unlimited are here. Judy Moss is assisting with the transcription, and I think those copies will be available later on in the day.

MS. BLUNDON:

Q. Tomorrow.

CHAIRMAN:

Q. Okay, good. We’ve set aside today and tomorrow’s hearing dates. We want to make sure that everybody who participates has sufficient time to be heard and to ensure the highest possible standard of procedural fairness. I understand Mr. Simmons has discussed the schedule with the various lawyers and I think there’s been some common ground found. The order of presentation, Mr. Schulze, that is you, sir.

MR. SCHULZE:

Q. I’m Mr. Schulze.

CHAIRMAN:

Q. Thank you, sir. You’re representing The Conseil des Innus de Ekuanitshit, and I assume your colleague next is Mr. Carot, is that correct, sir.

MR. CAROT:

Q. Yes, good morning.

CHAIRMAN:

Q. And Mr. Carot is representing The Innu of Uashat mak Mani-Utenam, The Innu Takuakan, Uashat mak Mani-Utenam Band Council, and certain traditional families of The Uashat mak Mani-Utenam Innu Nation. I hope my pronunciation was sufficient, sir.

MR. SIMMONS:

Q. Thank you very much, Mr. Chairman. Just a brief comment on the procedural history that’s brought us here. This is Nalcor’s Application that was filed on November 10th, 2009, for the establishment of a water management agreement. The Application was brought under Section 5.5 of the Electrical Power Control Acct, concerns the Churchill River in Labrador. The Board published notice of the Application and the intervenor status was granted, as you’ve noted, to The Conseil des Innus de Ekuanitshit, and The Innu of Uashat mak Mani-Utenam. Intervenor status was also granted on a limited basis to Twin Falls Power.

The Water Management Regulations required submissions from the parties with interest on the river within 30 days of the filing of the Application. That’s been complied with and those submissions were filed. Procedurally there’s been requests for information exchanged among the parties and with the Board and responses provided. There’s also been a technical conference facilitated among the parties, which were followed by supplementary requests for information and responses. There had been written submissions filed on the matters in issue raised in the Application and in the interventions, with some reply submissions as well. The Board had set aside this time for hearing argument on issues by request. There’s been correspondence received from Mr. Carot requesting oral argument on three points that’s contained in Mr. Carot’s letter of February 12th, 2010, and the first point is, “Does the establishment of the Water Management Agreement for the management of water thereunder trigger a duty to consult and accommodate the intervenors”. The second is, “Does the Board of Commissioners of Public Utilities have the jurisdiction and obligation...
to decide whether this duty to consult and accommodate has been triggered and whether this duty has been discharged". The third is, "In all circumstances, and in any event, should the Board of Commissioners of Public Utilities order Nalcor and CF(L)Co to consult and to accommodate the intervenors. There’s also been a motion filed by Mr. Schulze on behalf of his client asking the Board to suspend these proceedings citing two grounds. One is reliance upon Section 68 of the Environmental Protection Act, and the other is to allow meaningful consideration of the issue of the duty to consult.

There’s been discussion among the parties, as you’ve noted, and the order of presentations today is going to begin with Mr. Schulze, followed by Mr. Carot, and I expect then it will be Mr. Kelly, followed by Mr. Smith, with an opportunity for reply then from Mr. Schulze and Mr. Carot. There are a number of exhibits that have been filed by parties which have been placed on the proceeding record that have been recognized by the Board as being confidential in nature, and those have not been made part of the public record of the proceeding. If in their presentations counsel intended to refer to any of those exhibits, we’d ask that you identify beforehand that you intend to do so, so it will give the Board an opportunity to determine whether the hearing needs to proceed in camera for consideration of any of the matters that arise out of those documents, and also it will assist the transcriber, since the transcript that will be placed on the public record will have to have references to content from documents that are considered confidential redacted out. Mr. Chairman, that’s all the opening comments I have to make.

CHAIRMAN:

Q. I would now call on Mr. Schulze. Sir, the floor is yours.

MR. SCHULZE:

Q. Thank you, Mr. Chairman. Good morning, Madam Commissioners, Mr. Commissioner. The first issue I think I need to sort out for the benefit of the -- that I imagine the Board might actually have some questions for me about, if I didn’t, is the matter of the exact relief we’re seeking, and I can say it took me some time to get used to the procedure of the Board, but now that I’m used to it, I’ll perhaps change some of my thinking from my first submissions to my last. Initially, I think we sought a suspension in order to make better evidence with respect to the consultation issue. I think we’ve modified our position somewhat on that. If the Board wants or my friends for the other parties, want any amended pleadings, we can come back to that, but I’ll just try and summarize our position and where I think that takes us in terms of the relief we’re seeking today.

Our essential position is that the Board should not and can not approve the Water Management Agreement in the absence of consultation with my clients, The Innu de Ekuanitshit, and I understand Mr. Carot will make similar submissions. So one conclusion I could lead this Board to is that in the absence of consultation, it simply has to reject the agreement before it if it believes that we’ve made our case for consultation.

The clarification I wanted to make on our relief side is this; if the Board came to the conclusion, that as I understand counsel for Nalcor to submit, there’s no case for consultation. I realize they have other grounds or other reply arguments, but one of their answers to our submissions is they say, well, even if everything else Mr. Schulze is pleading is true, he hasn’t shown any real adverse effects, so the test for consultation isn’t trigger. If that were the Board’s principal reservation about our case for consultation, then I submit that would be the only circumstances where we would maintain our original position that there needs to be a suspension to allow us to adduce more evidence. I think in the end we’re able to make our case on the other points. I think we’ve made a case on adverse effects, but if the Board came to the conclusion that we hadn’t made our case on adverse effects, then I would respectfully submit we’ve made the best case we could with very limited resources in about three weeks, and if the principal concern of the Board is that we haven’t shown...
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I think we heard from the Board on January 22nd and we wrapped up our submissions around the 12th. If the Board on the contrary concluded that or thought there was a prima facie case, notwithstanding Nalcor’s submissions, then our position is simpler. We would simply say then the Board’s choice is this; reject because there’s no consultation, or suspend and direct consultation. I think in the submissions that we’ve given you, you’ll see that certainly the language of the Chief Justice in the Haida case suggests that the court prefers more creative solutions rather than the blunt instrument. Chief Justice McLachlin is talking about injunctions, but rather than blunt instruments in terms of either/or remedies. In any case, as Mr. Simmons alluded to, and as I’ll come back to, our position is that the Board can’t approve the Water Management Agreement pending environmental assessment, that Section 68 of the Environmental Protection Act prohibits the Board from doing so.

I was going to, as a first step, take the Board through our arguments on the statutory arguments about our argument on how the Environmental Protection Act, the Electrical Power Control Act, and the Water Management Regulations, have to be read together and where that takes the Board on this file. Then I could summarize as well our position on the aboriginal rights and consultation issue, but if the Board would prefer to hear me on the general constitutional arguments first, I’d be happy to do that.

CHAIRMAN:

Q. Carry on, sir, whatever suits your fancy.

MR. SCHULZE:

Q. Thank you. I think -- well, I mean, we generally thought we should look for the -- we don’t need to move to the constitutional issue if there are non-constitutional elements first that can dispose of a case. So I think that’s why I want to begin with some of the arguments between us and counsel for -- especially for Nalcor on the statute, and I think they’re useful because they frame what we see and what my friends from the other side see as being the Board’s job on this file. As I understand it, and I thought this morning I would especially try to answer some of what I see as Nalcor’s position.

One of the position’s Nalcor takes is that our argument about the Environmental Protection Act, it doesn’t work. As you’ll recall, our position is fairly simple. Section 68 of the Environmental Protection Act says, "There are no approvals pending environmental assessment". I don’t think there’s any dispute that there’s an environmental assessment of the larger project of Lower Churchill going on, and so our argument is, in any case, whether or not you are to agree with us ultimately on the aboriginal consultation issue and also in, how shall I say, as a complement to our -- as a support to our argument that you should suspend for the purpose of consultation, in any case, Section 68 of the Environmental Protection Act says don’t issue anything until the environmental assessment is completed, and as the Board may know, the environmental assessment is far from completed, the Joint Review Panel has declined to go to public hearings.

My friend, as I understand it, says, well, no, that’s not what Section 68 says because Section 68 is about permits that allow undertakings. That’s not actually what Section 68 says. Section 68 says, "No approvals or permits" and so forth, "pertaining to an undertaking". Nalcor says, well, no, no, Mr. Schulze has misunderstood because it’s not the Public Utilities Board that will allow Lower Churchill to be built, and that I’m in perfect agreement with, but the Legislature has said, "No approvals pertaining to an undertaking", and this approval that is before you today pertains to Lower Churchill. It may not be the approval that is make or break for Lower Churchill, but it pertains to it, and the Environmental Protection Act says not to go ahead in that case.

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

1. a similar problem that comes up, it seems to me, when Nalcor takes issue with our view that the Board has the power to suspend. We say there’s 120 day timeline in the regulation, but there’s a general power to consider an issue, notwithstanding the timelines.

2. Nalcor says, well, no, no, the regulations are what was meant and the Board is bound by the regulations. Again Mr. Simmons submissions take the Board through this and the different views, but I think I would boil our argument down to something simpler, and it’s that the tail doesn’t wag the dog. The problem it seems to me with Nalcor’s submissions is we have the House of Assembly saying the Board has the power to stop and consider an important issue, and we have the Lieutenant Governor in Council adopting a regulation saying we’d like this done in 120 days. There’s a difference between the elected Legislature and the Cabinet, the Executive. There’s a difference which is the difference between a statute and a regulation. I would submit the Board’s power under the statute trumps what the Executive has said it would like to see as a timeline. If the Legislature gave the Board the power to stop and consider something, and they didn’t say that the Board is nonetheless bound by the Regulations, then it’s the Regulations that fall by the wayside when the issue is important enough.

3. This brings me to two other issues that Nalcor has brought up with respect to how it seems the Electrical Power Control Act and the Water Management Regulations operating, and as I understand their argument, their principal exercise because if these two dams belong to the same owner, we wouldn’t even be here, there wouldn’t have to be a Water Management Agreement because Section 5.4 and 5.5 wouldn’t apply, there wouldn’t have to be an agreement. I have some questions about whether there wouldn’t be some jurisdiction for the Board under Section 6 anyway on its powers to look at electrical power issues, but you’re the experts on that, and I started reading the statute just before Christmas, so I don’t think the case turns on that. I think there’s a much simpler answer to that. As I said, they say, well, look, 5.4 and 5.5, we know it’s technical because it only comes in when there are two different rights owners on the same river, and it so happens they’re CF(L)Co and Nalcor, so this has to be before you, but, you know, maybe we would have owned both and then we wouldn’t even be here. My problem with that also comes back to what I think is presumed Legislative intent. The provisions, as the Board has pointed out in its annual reports, they were only enacted in 2007/2008. I’m not from Newfoundland, but it seems to me if there’s something we could fairly assume that the Members of the House of Assembly might have had on their mind in 2007 when they were thinking about rivers with two different rights holders, it seems to me it would be the Churchill River. I admit to my ignorance of the rest of the electrical system in this province, but I think if in 2007, not decades ago, if in 2007 the Legislature turned its mind to a river where you might have two different rights holders, I think they meant that something -- and they said and when two rights holders on the same river can’t agree, it goes to the Board, they were thinking about this river and they were sending it to the Board for a reason. That’s the other problem, it seems to me, with the argument that this is a purely technical matter because -- for whatever reason, because if it was the same owner, it wouldn’t come up.

4. The Legislature knew this issue would come to this Board about this development. We can either assume they did that because they just wanted the Board to put a check mark on an agreement, or we can assume they did it because they thought the Board has some powers and expertise that should be applied to this issue, and it makes more sense to me to think it was the latter, not the former, because otherwise they didn’t need to bother adopting 5.4 and 5.5 of the Act and the whole Regulations. If that’s true, then the Board has its full role to play, including its powers to suspend, including applying its entire judgment to all the issues in this file, which brings me back to the more fundamental issues about what does it mean to
approval Water Management Agreement, does it bring in issues of environmental protection, does it bring in in the case of this project issues of the duty to consult the aboriginal peoples who are affected. In other words, I don’t think -- I’ve taken you through a long discussion of my view of how to read the legislation, but I don’t think we can walk away from the other issues raised by the Water Management Agreement on the basis that it’s just a technical exercise because if there was a single utility, we wouldn’t even be here. We are here. The Legislature, I think, knew we would be here because I think they knew about this river, and if they knew that this was an issue on this river and said it was the Board’s duty to look at it, then I think the Board has to look at all the issues and not narrow its focus to dealing with this as a purely technical matter. The Board has seen, I think, all our submissions on the various reasons why we think consultation is required, not just on constitutional grounds, but because the regulations call for good utility practice.

I’d be happy to talk to that more at length if the Board has questions, but I thought I might want to draw the Board’s attention to -- it’s one of my friends, Mr. Carot’s authorities. Mr. Simmons, do I need to ask for the technicians help in taking the Board to this authority?

Q. Sure. If you can identify the authority that you want to refer to, Mike can see if he can bring it up on the screen for us.

Q. It was produced in support of --

Q. It’s the reply submissions dated January 14th.

Q. And is it a case reference?

Q. It’s Quebec vs. National Energy Board. It’s one of the authorities in support of --

Q. The Intervenor’s Submissions?

Q. Go to IUM Documents.

Q. Do you know where it is, Cheryl?

Q. This is for the final submissions there now.

Q. Oh, I see. No, I think we want on the --

Q. No, it’s the reply submissions. Sorry, the reply submissions. There you go.

Q. January 14th. No, you’re on the right --

Q. January 14th. That one right there. One up, that one.

Q. And if you scroll down, there is a judgment of the Supreme Court from 1994. Gosh, I don’t know what page that would be.

Q. I’ll just go by page, you tell me when to stop.

Q. It’s called again? I’m sorry --

Q. At the top it says, "Quebec AG vs. Canada NEB", but it’s in support of that.

Q. It’s called again? I’m sorry --

Q. At the top it says, "Quebec AG vs. Canada NEB", but it’s in support of that.

Q. Mike, it looks like you can probably jump to page 150 and go forward from there because it looks like it’s more than half way through the book.

Q. Yes, I think that’s right. Okay, great, and keep going a bit further. It’s going to be after that, is it? No -- it’s about ten pages further maybe. Okay, good, and I want to take the Board to page 190 to 192. Not your 190, the 190 of this, sorry. See there we’re at 159. I want to go to 190.
the United States, and the question was, among
many other questions in that case, whether the
National Energy Board was entitled to look at
the environmental effects separately from the
environmental assessment, and the Supreme
Court said, yes, because one of the Board’s
duties is to look to the public interest, and
my submission would be the Board has a broad
jurisdiction in this case; one, because you
are the defenders of the public interest; two,
because I think that we don’t need to give a
narrow reading to what efficient power
production under the Electrical Power Control
Act means.

Maybe I’ll just come back to some of our
basic submissions. In essence, I think the
Board probably knows the Innu de Ekuanitshit
have their reserve on the Lower North Shore
near Mingan. They were in the negotiations
with the Federal Government regarding a
comprehensive claim. That comprehensive claim
included Labrador. The general pattern of
land use of the Innu is to go up and down
rivers. So while the Lower North Shore can
seem very far from the Lower Churchill, given

constructed, is to create a situation in which
the construction of a generating facility may
be contemplated solely for the purpose of
fulfilling the demands of a number of export
contracts, but because no one export contract
can be said to be the cause of the facility’s
construction, its environmental effects will
never be considered”. If you go to page 194,
please, at the very top, Mr. Iacobucci in that
top paragraph says, "It is also worth noting
that the Board is the forum in which the
environmental impact attributable solely to
the export, that is to the impact of the
increase in power output needed to service the
export contracts will be considered. A
focused assessment of these effects may be
lost if subsumed in a comprehensive evaluation
by the province of the environmental effects
of the projects in their totality”. I assume
the Board is familiar with this case, but in
NEB the issue was export contracts for hydro
electric production in Quebec, there had been
or was ongoing provincial environmental
assessment, there needed to be National Energy
Board permits because the power was going to
issue is what are the effects of the Water Management Agreement on the interests that my clients are alleging.

As I said to you, we were somewhat inhibited by the fact that we had a very short timeline in which to make submissions on this, but I think there is another central contradiction, I think, in Nalcor’s position in this file. They say there aren’t adverse effects because this is just about daily flow, and it’ll all take place within operating parameters that will be established elsewhere, but the problem is the elsewhere they refer to you is the Joint Review Panel and the environmental assessment, but my friend, Mr. Carot, just put before this Board the information request of the Joint Review Panel that say to Nalcor we’re not satisfied with the information you’ve given us on how this Water Management Agreement will operate. There is a real danger -- on a procedural level, there is a real danger that no one ends up dealing with what the effects of this Water Management Agreement are. If before this Board Nalcor says it’ll be taken care of in an environmental assessment, but in an environmental assessment, Nalcor tells the Joint Review Panel, well, it’ll be what the Board approves, we end up with nobody really looking at what the effects of the Water Management Agreement are, and the effects -- I don’t think we can -- it’s enough to say, well, it’s just about daily flow, or in my friend’s submission, hourly or less than hourly flow, and, therefore, there’s no effect. The Board asked us to respond to that submission by Nalcor, and we put before the Board a study done with respect to Hydro Québec’s La Grande Dam on James Bay that concluded that daily flow matters. Daily flow matters to vegetation, daily flow matters. In that study, they said daily flow changes vegetation and changed vegetation changes wildlife patterns.

9:45 AM Just because it’s daily doesn’t mean there’s no effect, and again there’s a contradictory position because Nalcor says, well, it’s just about flow -- it’s just about managing the water back and forth between these two dams, you know, and we’ll just make sure that it’s optimal use of the water for power purposes. Well, that’s fine, I understand that as a technical proposition, but at the same time they say because if we didn’t have this, there’d be spillage. I understand that too, but if we’re saying if we didn’t have this there to be spillage, and because we have this, the water will be managed differently, then it seems to me we’re saying environment will be different with this Water Management Agreement than it would be without it. So to call it technical, we can call it technical, but we can’t say it doesn’t matter if we agree the environment will be different with the WMA than without, we can’t say it’s just about an engineering matter, and it’s obviously -- the whole river system will be different with the Water Management Agreement than it would be without it.

I think there’s some more complicated issues about who consults, how, who’s the Crown. I think in our submissions, we basically are content to adopt the position that the BC Court of Appeal did in the Carrier Sekani matter, that a regulatory body’s duty is to make sure that -- it’s a judicial body, but it’s there to make sure the honour of the Crown is upheld, and as I understand it, the solution the National Energy Board has adopted to this problem is to ask proponents to show them that they’ve consulted. So we’re not here to say nothing can go until the Minister of Natural Resources has sat down with our client. We’re just here to say the Board, as the decision maker on behalf of the Government of Newfoundland, is obliged to make sure that Nalcor has sat down with our client. I’m aware in all of this that we’ve brought a lot of new issues before the Board, and I wonder if the members -- if the Commissioners have questions before I hand off to Mr. Carot.

Q. I have a question. I wonder if you see the Board’s role here any different in our job in approving the Water Management Agreement than it would be in the ordinary course in its operations under the Public Utilities Act, and does that impact the breadth and the public
interest issue that you raised earlier?

MR. SCHULZE:

Q. That’s an excellent question. Could I take some time to look at the Public Utilities Act before I gave an answer. I’m aware that I’m probably the person in the room that knows the least about your Public Utilities Act, so I’d like to take some time to think about my answer, if that’s okay.

COMMISSIONER NEWMAN:

Q. Certainly.

CHAIRMAN:

Q. Anybody else? No. Okay, I guess then, sir, we’re finished with you, and we’ll go to Mr. Carot.

MR. CAROT:

Q. Good morning. I’m here on behalf of the Innu of Uashat mak Mani-Utenam. For greater certainty, I’m here on behalf of the entire community, I’m here on behalf of the Band Council, and I’m here also on behalf of certain traditional Innu families of the Uashat mak Mani-Utenam Nation. The Uashaunnuat is the global term to refer to both the Uashaunnuat generally or the Innu of specifically, the traditional lands include the Churchill River. More specifically, the traditional lands of the intervenors include the entire area of the Upper Churchill Project, a portion of the Lower Churchill Project, and all transmission lines that will connect both those projects, but also the transmission lines that go from the Upper Churchill Project to Quebec. Those transmission lines are in our client’s or intervenor’s traditional territory. We take the position that there’s no way to distinguish a project from its production to its transmission, and for that reason, the transmission lines are an integral part of any project. I state that also because the Upper Churchill Project and the transmission lines were built without our client’s consent, without consultation, without compensation, and here we are in front of the Board today who has the power to establish a Water Management Agreement for the entire Churchill River, and there’s a lot of talk in all the documents about the project, and the project that is referred to is the Lower Churchill Project. We take the position that we can’t look at the Lower Churchill Project alone, it has to be taken as a whole, and we have to look at both the Upper Churchill Project and the Lower Churchill Project. In fact, if a Water Management Agreement is established without consultation of our clients, we submit that, in fact, it will be perpetuating the historical infringements of our client’s rights. For that reason, and others as I will get to, there is a duty to consult that is specific to the establishment of the Water Management Agreement. Just for greater certainty, when I refer to a Water Management Agreement, I’m referring to both the agreement and the management of water thereunder. Obviously, the agreement is a piece of paper, but the actual effects will be in the implementation of that agreement. I’ll just get into the description of my clients, the Innu of Uashat mak Mani-Utenam. They have continuously occupied, possessed, and controlled, as well as managed their traditional territory, which includes the Churchill watershed. They have used the
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Churchill watershed for hunting, for trapping, for fishing, and for other subsistence activities. They’ve also used the Churchill River for transportation. As my colleague, Mr. Schulze, was indicating, the Innu of Quebec are on the North Shore of Quebec and they use the rivers to head north, and from what I understand, the river system was a form of highway and my clients do not use the same rivers as David Schulze clients, my clients use the Moisie River, as well as Sainte-Marguerite River, as well as the Sheldrake River, but it’s an upper portion to reach the lands in Labrador, which include the Upper Churchill area as well as parts of the Lower Churchill area. I invite you to look at our answer to PUB-IUM 1. If we could pull that up, please. This answer here, and I’m not going to -- I mean, we could read it, but essentially I would invite the Board to read with careful attention that answer. It is the basis for our assertion of aboriginal rights and title and treaty rights in that region. It explains that, as I indicated earlier, the area that we are concerned with has been used continuously by our clients.

Most recently, and actually as we speak, the Innu of Sept Iles and I believe Mingan as well are involved in the caribou hunt, the annual caribou hunt, and that forms part of a traditional practice that’s been going on for time immemorial, and the Innu of Uashat have taken a strong position with respect to their hunting rights in Labrador, which includes the Churchill River watershed, and if we could please pull up a letter that the Chief Ernest Gregoire, he’s the Chief of the Innu of Uashat mak Mani-Utenam. I’m looking at a letter that was in actually Nalcor’s submissions. It’s at PUB NE 47 and I’m looking at pages 159 to 161.

Q. Is that Attachment 1?

Q. It’s page 159 to 161. It’s the answer NE-47. I guess there is no -- oh, NE-47, is that what I said?

Q. Page number again?

Q. It’s attachment 2. I guess you’re at attachment 1. That’s Attachment 1. It’s Attachment 2.

Q. Page 159. Yeah, probably a little bit further. It’s 159, NE-47, attachment -- oh, attachment 3, I apologize. Attachment 3. I just want to read this letter because it does expose -- or sorry, think it’s in French -- but it does present our client’s position, at least with respect to the caribou hunt and if we just could move to the top of the letter, please, there is a stamp that was received by the office of the Premier. So the Government of Newfoundland is aware of our claims here in Newfoundland and I will read the letter.

"Dear Mr. Premier: I write to you as chief of Uashat Maniutenam, the Úashaunnuat, a nation under international law having authority on its traditional lands, Nitassinan, part of which is in what is known today as Labrador. Our respective governments obviously are in conflict with respect to the occupation and use of our traditional lands and the natural resources thereof and in respect of our traditional practices on these lands. The construction of the Upper Churchill Hydro Electric Project is a striking example of a very live and divisive issue between us. Presently, there is a serious crisis which has arisen from our ancestral caribou hunt on our traditional lands in Labrador. This crisis has assumed the very top right-hand corner.
"This crisis has assumed even greater proportions because of your Government’s interference with our community’s hunt, an integral part of our traditions. Hunters from our community and Sheshatshit are currently engaged in a community hunt on part of our Nitassinan situated in Labrador and which includes the area to the west of Goose Bay. The community hunt is a traditional practice of the Innu and its purpose is to bring back caribou to community members who cannot themselves hunt, particularly children, the elderly and the handicapped. These hunters are presently being harassed, bothered and threatened with arrest and seizures by the game wardens in Labrador. Through these acts, the Government of Newfoundland Labrador is interfering with the legitimate exercise of the Aboriginal rights of the Uashaunnuat, especially by preventing hunters from our community from hunting caribou on our own traditional lands. The Newfoundland and Labrador government, through these acts, is also once again violating the Indian title and Aboriginal and treaty rights of the Uashaunnuat.

We will never accept that the Government of Newfoundland Labrador can deprive us of food which we harvest for our children, our elderly or our handicapped. This harassment, oppression and breach of the rights of our hunters is not something new. Each year several members of our community have been arbitrarily and illegally arrested, their hunting weapons confiscated and the products of the traditional hunt seized in an unreasonable and illegal matter. In so doing, the Government of Newfoundland Labrador has demonstrated total contempt for the rights of the Uashaunnuat and for the practice of our traditional activities on our traditional lands.

The Government of Newfoundland Labrador knows very well that we assert the title to our traditional lands. In 1979, Canada took a few small steps forward by acknowledging and accepting our claims and Quebec did likewise in 1980, although neither Canada nor Quebec has met its obligations to us in regard to our rights. As you also know, the Uashaunnuat have not hesitated to have recourse through the Courts to obtain the recognition of their Indian title and Aboriginal treaty rights on these family territories of our nation situated in Labrador. We intend to pursue these proceedings before the Federal Court and the Courts of Newfoundland Labrador without prejudice to other measures, assuming you do not wish to find other solutions to our fundamental conflicts. However, as one government to the other and as a diplomatic gesture, we are asking you to cease all coercive measures against and all harassment of the hunters of Uashat Maniutenam who are participating in the traditional community hunt of caribou.

Now unless, if your government continues to interfere with the movement of our hunters or their return to Seven Islands or continues to arrest them and seize their hunting weapons and the product of their traditional community hunt, we intend to counteract with vigour and implement in its entirety the law of the Innu Nation of Uashat Maniutenam respecting use of the traditional territory. The choice is yours as to whether an attempt will be made to reconcile the differences or whether you will continue our path of confrontation. In any event, you can rest assured that we will abandon our land, nor our traditional activities, nor our responsibilities to our Nitassinan."

This is quite a forceful letter and I’ve read it so that the Board can have the benefit of appreciating the position of our clients and this is specific to the caribou hunt, but one of our allegations is that water management and the alteration of flows on an hourly basis will have an effect, an impact on the environment and the natural resources of the Churchill watershed. There may be an effect on caribou, and I will get to that later.

The law of the Innu Nation of Uashat Maniutenam respecting the use of the traditional territory, that refers to new development without the consent of the Uashaunnuat and essentially consent derives from Aboriginal title, which essentially grants proprietary rights to the Uashat and
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MR. MCNIVEN:

Q. Page reference again, please?

A. Perfect, paragraph 138. I’ll read. "The place in the shadow of a long history of management agreement. We are looking for consultation and accommodation. The Supreme Court has described Aboriginal rights as sui generis. I refer to Guerin and the Queen at page 382. That’s fine, we don’t have to go -- it’s just a quick mention, but if the Board wishes to see Guerin and the Queen at page 382. There’s a reference to Aboriginal rights as being sui generis.

If we can pull out the decision in Mikisew Cree Nation, First Nation, and I’m looking at my submissions of 14th of January 2010. Look at -- I would go to approximately page 120. Perfect. And I need to go to page 393, and I’m just going to read the introduction. "The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships take place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to Aboriginal people’s concerns and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies." This is, in fact, the basis for the duty to consult which was actually in much the same language referred to in Haida. Again, I’ll get into that later. I’m just here talking about the nature of Aboriginal rights.

Aboriginal rights, there’s a spectrum of Aboriginal rights. There’s title and there’s Aboriginal rights which are linked to activities and I think it’s important for the benefit of the Board to read the distinction or the variety of Aboriginal rights as its described in Delgamuukw and specifically, I’m referring to paragraph 138 of Delgamuukw. Again, this is in -- this is my submissions of February 8th, if we can please go to that.

Mr. McNiven:

Q. Page reference again, please?

A. Perfect, paragraph 138. I’ll read. "The picture which emerges from Adams is that the Aboriginal rights which are recognized and affirmed by Section 35.1 fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, the occupation and use of the land where the activity is taking place is not sufficient to support a claim of title to the land. Nevertheless, those activities receive constitutional protection."

In the middle, there are activities which out of necessity take place on land and indeed might be intimately related to a particular piece of land. Although an Aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site specific right to engage in a particular activity. I put the point this way in Adams at paragraph 30. "Even where an Aboriginal right exists on a tract of land to which the Aboriginal people in question do not have title, that right may well be site specific with the result that it can be exercised only upon that specific tract of land. For example, if an Aboriginal people demonstrate that hunting on a specific tract of land was an integral part of their distinctive culture, then even if the right exists apart from title to that tract of land, the Aboriginal right to hunt is defined as and limited to the right to hunt on a specific tract of land."

At the other end of the spectrum, there is Aboriginal title itself. As Adams makes clear, Aboriginal title confers more than the right to engage in site specific activities which are aspects of the practice, customs and traditions of distinctive Aboriginal cultures.

Site specific rights can be made out of even if title cannot. What Aboriginal title confers is a right to the land itself. The Innu of Uashat Maniutenam and certain families from that community assert Aboriginal title, assert Aboriginal rights and treaty rights in Labrador and specifically the
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<td>1. Churchhill watershed. More specifically, title grants to the intervenors, the exclusive right to use, possess, occupy and control the Churchill River. They have the right to choose to what use, and underline use, the Churchill River watershed and the natural resources therein can be put, and again, we're going to read from Delgamuukw at paragraph 119. &quot;Despite the fact that the jurisprudence on Aboriginal title is somewhat underdeveloped, it is clear that the uses to which lands held pursuant to Aboriginal title can be put is not restricted to the practices, customs and traditions of Aboriginal people integral to distinctive Aboriginal cultures. In Guerin, for example, Dickson J. described Aboriginal title as an interest in land which encompasses a legal right to occupy and possess certain lands. The right to occupy and possess is framed in broad terms and significantly is not qualified by reference to traditional and customary uses of those lands. Any doubt that the right to occupancy and possession encompasses a broad variety of uses of land was put to rest in Paul where the Court went even further and stated that Aboriginal title was more than the right to enjoyment and to occupancy. Once again, there is no reference to Aboriginal practices, customs and traditions as a qualifier on that right. Moreover, I take the reference to more as evidence of the broad notion of use and possession.&quot; I jump to paragraph 119, or no, sorry, that was 119. Sorry, 166, and I'm looking at the bottom paragraph. Well, I guess it's a different page. I'm looking at halfway through that paragraph. &quot;Three aspects of Aboriginal title are relevant here. First, Aboriginal title encompasses the right to exclusive use and occupation of land. Second, Aboriginal title encompasses the right to choose to what uses land can be put, subject to the alternate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples.&quot; And third, &quot;lands held pursuant to Aboriginal title have inescapable economic component.&quot; The test for title was actually established again or reaffirmed and somewhat modified in R. and Marshall and R. and Bernard and that appears in our submissions from February 8th and I won't go over it right now, but I invite you to look at paragraphs 55 to 59 of that judgment. In this context, the Upper Churchill Project was built, again as I mentioned, without consent, without consultation, without compensation of our clients. Territories of the Uashat families were flooded and otherwise affected by the Upper Churchill River. Those impacts are ongoing. Our clients frequent the reservoirs and it's a constant reminder of the impact and infringement that goes on every day. There has been no environmental assessment and no ongoing environmental monitoring in regard to the operating parameters or the operations generally of the Upper Churchill River Project, and this was admitted as much by CF(L)Co. in their response to our request for information and we might go to that. It's request for information IUM-CF(L)Co No. 1, and could we go to the --</td>
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<td>That's the question. Basically the question was whether or not there was any environmental assessment or ongoing environmental monitoring and the Upper Churchill -- and this is the response. &quot;The Upper Churchill Hydro Electric Plant is not a project but a fully operational hydroelectric facility that has been in operation since 1971. The Upper Churchill facility was not subject to environmental assessment, is not subject to ongoing environmental assessment or monitoring pursuant to federal or provincial environmental legislation. This facility predates any such legislation and was designed and constructed in accordance with the laws of the day.&quot; With respect to water management, if we just go to the next answer, which is number two, &quot;the water management agreement and the management of water at the Upper Churchill facility, including its reservoirs, the Upper Churchill River basin, tributaries and adjoining watersheds have not been subject to an environmental assessment nor is such assessment required pursuant to applicable</td>
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environmental legislation. The water management agreement operates wholly within the existing operating parameters of the CF(L)Co facility and existing customer requirements for seasonal and hourly flexibility." And again, we’re going back. The operating parameters have never been object of an environmental assessment.

In response to IUM-CF(L)Co. 3, which is the next one, I had asked if there was any permit or similar government authorization for which the Upper Churchill Project was operating under, and the answer is "the Upper Churchill facility operates pursuant to the Churchill Falls (Labrador) Corporation Limited Lease Act, 1961." And that’s it. There’s no other authorization, and I think it is worthwhile to look at the list of authorization that Nalcor has to go through right now to proceed with the Lower Churchill development and that appears at PUB-NE No. 50, and I’m not going to go over it. It’s just for -- as you move down, the next page, there’s several pages and we’ll just scroll down and it is fairly extensive, the amount of permits that are required to build a hydroelectric facility. Thank you. That speaks for itself.

As for the Lower Churchill Project, it will also affect the environment and traditional lands, as well traditional activities of the intervenors. However, there has been no consultation in respect to the Lower Churchill Project.

We referred to the letter that the Joint Panel sent to Nalcor as recently as last month and I don’t know where -- it’s the letter dated January 26th, 2010, on the first page, and my colleague referred to the -- alluded to this earlier in respect to the inadequacy with respect to water management agreement, but it also refers specifically to the inadequacy of consultation, and just at the first paragraph there, "I stated in a letter dated January 18th, 2010, the Joint Review Panel, after considering all the information and comments received from Nalcor and interested parties has determined that the information provided by Nalcor is not sufficient. Additional information is required before the panel can conclude on the sufficiency of the environmental impact statement for the purpose of proceeding to public hearing."

If we turn to page 11, please, and here it’s specifically respect to Aboriginal consultation and traditional lands and resource use. "The proponent has not provided adequate information on the current use of lands and resources for traditional purposes by Aboriginal persons and has not carried out adequate consultation with each identified Aboriginal group," and the identified Aboriginal group, the Uashat are one of those identified Aboriginal groups.

I apologize for the long introduction but essentially, this is where it takes us today. We have an Upper Churchill project for which there was never any consultation, no environmental assessment, no compensation. We have a Lower Churchill Project which is in the works. There’s been no consultation with our clients, and here we are in front of the Board for the establishment of a water management agreement which will affect the entire Churchill watershed with the Upper Churchill River.

It is our submissions today that the water management agreement and the management of water thereunder will impact the traditional lands of intervenors and affect them socially, culturally, spiritually and economically. It will also perpetuate the historical infringements of the rights of the intervenors.

At PUB NE-17, if we can please bring that up? It’s specifically admitted by Nalcor that there has been no consultation, and I’m looking at the second -- "Nalcor has not consulted in particular regarding the water management agreement." I mean, that’s pretty clear.

What water management will do is that -- or water management agreement will do is that it will permit Nalcor and CF(L)Co. to modify, to control, to manage, to regulate the hydrology of the Churchill River, which includes the reservoirs. For greater certainty, we’re talking about the use of the waters. We’re talking about the flow of the waters. Talking about water levels, water
volumes, the runoff that reaches the river basin, as well as ice formation and breakup, and I would just like to turn the Board to the public notice that was published on November 18th. I’m looking at the first paragraph there, and I’ll read it. "On November 10th, 2009, the Board of Commissioners of Public Utilities received an application from Nalcor Energy to establish the terms of a water management agreement with respect to the use," and I underline that term "of the Churchill River for the production of power."

I also invite the Board to read, which they’ve done obviously, or to look again at the Nalcor pre-filed evidence, which appears at pages 3 -- pages 3 to 17, and I point to those submissions because the terms that are being used there, we talk about -- I’m just going to pull that out as well.

MR. SIMMONS:
Q. That’s the application. It’s Volume 2, the application?

MR. CAROT:
Q. It’s pre-filed evidence, this one right here.
You’re on the right one. No, no, you were on the right one before.

MR. SIMMONS:
Q. Page number again, please?

MR. MCNIVEN:
Q. Volume 1.

MR. CAROT:
Q. Pages 11. So from pages 11 to subsequent, it’s where Nalcor describes the purpose of the water management agreement, and the -- we won’t go over it, but essentially there’s terms here where we talk about regulating the flow, controlling the flow. These are not my words. These are Nalcor’s words, and for instance, in the first paragraph, the last phase or the before last, or the third before last, "however, natural flows are not synchronized to production requirements. Therefore reservoir storage is required to regulate the flow. For a downstream operator, control of flows from upstream facilities may also be required in order to regulate flow to the downstream generating station." And I mean, it’s -- and then we’ll go to the next paragraph actually. "Coordinating power and energy production maximizes the amount of value of power energy that can be produced from the Churchill River. Coordination of production at the generation station regulates the flow," again, regulates the flow "of water between the stations to best utilize the river system storage capability and the facilities’ generating capacity. Flow regulation increases the control and predictability of energy production at a generating station and optimizes the use of the available water within the constraints of existing contractual supply obligations."

I won’t go through the whole document, but again, from the face of it, the terms of Nalcor itself lead credence to our submissions that it’s about the use of the waters. At PUB NE-28, I’m looking at the answer, Nalcor admits that -- sorry, can we go down a bit. Keep on going. There. "The proposed water management" -- I’m looking at line five of that page. "The proposed water management agreement may cause water levels and flows at any point in time to vary from what would have occurred without the water management agreement." The effects are very real. Flows will change, and more specifically, they will change on an hourly basis. Again, this is admitted by Nalcor at PUB NE-23. Again, at page six. "The water management" -- sorry, excuse me. Line seven, "the water management agreement may affect flows on an hourly basis."

If we look at Nalcor’s submissions, final submissions at page 19 -

MR. MCNIVEN:
Q. Page 17?

MR. CAROT:
Q. Page 19. I’m looking at paragraph 48. "The water management agreement is simply a commercial agreement between the two suppliers on the same body of water." Obviously we disagree with that position. "Because of the provisions of existing power contracts which may not be adversely affected, water management is required on an hourly basis."

Unfortunately, even Nalcor is uncertain as to exactly how flows will be affected, but from what we have just read, it’s obvious that there will be at least hourly changes, modifications or regulation of flows. For
this reason, it’s also difficult to pinpoint actual terms of the water management agreement which will adversely affect our client’s rights, because essentially most of the management of water will be left to the independent coordinator who will actually set production schedules and will thus impact flows according to those schedules, and he will set those up in the exercise of reasonable judgement. Reasonable judgement will take into account good public utility practice, but again, we’re not much more advanced as to actually pinpointing exactly how flows will be affected.

Nevertheless, the environmental impact statement that was generated by Nalcor Energy for the Lower Churchill Project does provide some indications as to the environmental impacts of water management in the Lower Churchill River basin. In fact, the environmental impact statement is predicated on a water management agreement in place and that’s been acknowledged by Nalcor at EU NE-2 and PUB NE-29. We don’t have to go see it, but just -- and I don’t think that is contested by Nalcor, and I think it is important to go over those lists of impacts from the EIS and I’ll refer to my submissions at paragraph 53, my final submissions, paragraph 53, and I’ll just read from my submissions here.

"More specifically, the establishment of a water management agreement and the management of water thereunder will have the following negative environmental effects, among others, in the Lower Churchill River basin: a. water management will affect runoff, water flow, water levels and water volumes in the Churchill River basin." That we’ve already gone over. "Altered flow and water levels resulting from impounding and water management will affect ice formation and breakup. This can affect some wildlife species that use the ice, as well as migratory waterfowl that use open water areas during ice breakup." That’s -- and my reference there is directly from the EIS, the reference is there. I invite the panel to go look at the reference.

(10:30 a.m.)
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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, and I’d like to read that because this is how
4  we categorize the infringement or the adverse effect.
5  "The water management agreement or the
6  management of water thereunder will have a
7  negative impact on the Uashaunnuat culturally
8  and spiritually by interfering with the
9  Uashaunnuat’s special attachment to the land
10  and the ability to carry out various spiritual
11  and traditional practices. Indeed, because
12  water management will modify and control the
13  hydrology of the Churchill River, including
14  water flow, water levels, water volumes,
15  runoff, and ice formation/breakup and cause
16  negative environmental effects, the
17  Uashaunnuat’s traditional lands and their
18  special relationship to those lands will be
19  permanently and irreparably modified.
20  Similarly the water management agreement
21  or the management of water thereunder will
22  negatively affect the Uashaunnuat socially.
23  More particularly, as previously indicated,
24  More particularly, as previously indicated,
25  the establishment of a water management
26  agreement will deny or impede the Uashaunnuat
27  exclusive or shared right to use, possess,
28  occupy and control the Churchill River
29  watershed and the natural resources therein.
30  The establishment of a water management
31  agreement and the management of water
32  thereunder will deny the Uashaunnuat right to
33  choose to what use the Churchill River
34  watershed and the natural resources therein
35  can be put and interfere with the particular
36  and unique way of life and particular
37  traditional Innu family territories. The
38  establishment of a water management agreement
39  and the management of water thereunder is a
denial of Aboriginal jurisdiction and the
right to self-government and self-
determination of the Uashaunnuat.

Moreover, the water management agreement
or the management of water thereunder will
negatively impact, among other things, fish
populations, the movement of the caribou and
the migration of birds," and that’s from the
list I just read to you, "thus impeding and
infringing the Uashaunnuat’s right to hunt,
fish and trap in the area affected by water
management and the management of water
thereunder.

In other words, altered flow and water
levels could result in, among other things,
reduced opportunity for hunting, particularly
migratory birds." And they are more
references to the EIS again. Actually, it
might be worthwhile to go to that page, the
EIS. I’m looking at Volume 3, page 517.

MR. MCNIVEN:

Q. 517?

MR. CAROT:

Q. Yeah, 517. You’ll see at the bottom of the
page, there’s page numbers. 529. And here,
it’s a section on the impacts on land and
resource use and this isn’t -- the impacts
here are not necessarily specific to
Aboriginal communities, and I’ll read here.
"Altered flow and water levels resulting from
impoundment and water management will affect
ice formation and breakup. This can affect
some wildlife species that use the use, as
well as migratory waterfowl that use open
water areas during ice breakup. Thus, altered
flow and water levels could result in reduced
opportunity for hunting, particularly
migratory birds."

So for all these reasons, it is submitted
that the water management agreement will
infringe the Aboriginal title, Aboriginal
rights and treaty rights of the intervenors.
It will perpetrate the historical infringement
of the rights of the intervenors. It will
also make less satisfactory any resolution of
claims in the future, and there was a specific
request for information in that regard, and
I’d like the Board to look at our response to
that. I’ve also alluded to that in my factum
at paragraphs 123 to 124, and I’ll read.

"Moreover the establishment of water
management and the management of water
thereunder will make a less satisfactory
resolution of the Uashaunnuat’s claimed right
to, among other things, use, manage and
control the water resources in the future,
namely the Churchill River and adjoining
watersheds and tributaries.

More particularly, the establishment of
water management and the management of water
thereunder will deprive the Uashaunnuat from some or all the benefits of the Churchill River watershed and the natural resources therein. Moreover, if further damage is done to the Uashaunnuat’s traditional lands and resources therein and if these lands and resources are further impacted by projects such as the hydroelectric development within the Churchill River watershed, any resolution of the claims of the Uashaunnuat will likely prove to be very unsatisfactory because the traditional lands and the resources therein may have been irreparably damaged and impacted by then. The lands may be rendered unusable and some of the natural resources may be gone. This is, of course, unjust and unacceptable.”

And I forgot to mention earlier on the impacts is that the economic impact is obvious and the Supreme and Delgamuukw and I referred to one of the passages at paragraph 166 and in the words of the Chief Justice at the time, Aboriginal title has an -- well, has an economic component that is implicit to that right. So today, we are faced with several issues that the Board must decide. The first issue is whether the establishment of water management agreement will trigger a duty to consult and accommodate? If so, who can discharge that duty? Was that duty discharged in the circumstances? Does the Board have the jurisdiction and obligation to decide if a duty has been triggered and discharged? If so, and the duty has not been discharged, what powers are available to the Board?

The duty to consult and accommodate finds two sources. My colleague referred earlier to a statutory duty that’s grounded in good utility practice. The other duty is grounded in a constitution, section 35. I will talk first about the statutory duty.

The Board must act according to sound utility practice. It is our submissions that that will necessarily involve consultation with Aboriginal groups. I’m not saying that the Board must consult, but they must direct Nalcor and CF(L)Co to consult, Nalcor and CF(L)Co, as parties to an eventual water management agreement. Just on that note, my friend, counsel for CF(L)Co, admitted or recognized that the term sound utility practice and good utility practice are synonymous and my colleague, Dan Simmons had alluded to that statutory interpretation or that conflict in his submissions, but we submit that there is no conflict or any contradiction. They’re actually essentially synonymous.

At page five of Nalcor’s reply submissions, Nalcor essentially admits that sound utility practice does involve consultation with Aboriginal groups, and I will read that paragraph. “With respect to paragraphs 36 to 41 of the CIE submissions, Conseil des Ekuanitshit, Nalcor acknowledges that good utility practice includes environmental protection and environmental protection in turn involves consideration of the interrelationships between land and water and plant and animal life on the one hand and the social, cultural and economic life of humans on the other. Nalcor also acknowledges that the Canadian Electrical Association is committed to informing and consulting Aboriginal communities at an early stage with respect to planned activities and projects that will have an impact on them.” Obviously Nalcor and us disagree as to the actual impacts, but it is our submissions that there is impacts of the water management agreement, thus good utility practice will dictate a consultation and accommodation of the intervenors.

Just on that point, that duty can be discharged by Nalcor and by CF(L)Co, both as companies or utilities that propose to utilize the Churchill River, and I just want to make one point clear is that in no way in any of our submissions, and this will lead to my next point with respect to the constitutional duty, have we requested that CF(L)Co be imposed a constitutional duty to consult as an agent of the Crown. I’d just like to make that clear because unfortunately, I believe there has been a bit of misunderstanding from our submissions, but in no way do we allege that CF(L)Co owes a constitutional duty to consult. It is just a statutory duty, if any, that CF(L)Co would owe.
With respect to the constitutional duty to consult, the leading case in that is Haida Nation and again, the foundation for a duty to consult is the reconciliation of Aboriginal and non-Aboriginal people. That duty is triggered when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. We submit that the Crown, acting through Nalcor, will -- is contemplating action that will adversely affect our rights and title. The Crown has knowledge of that right or that claim and I’m not going to go over that knowledge of those, of our claims because my colleague went into that to a certain extent. The same applies with us. But I also read you a letter which was directly addressed to the Premier and that was acknowledged receipt from the Premier, so there’s no doubt that the Government of Newfoundland is aware of our claims for Aboriginal right. To be clear, this Aboriginal -- this duty to consult and accommodate is triggered prior to the proof of claim and determination of resolution of a claim. To unilaterally exploit a claimed resource during the process of proving and resolving Aboriginal claim to that resource may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable."

So in this circumstance, a duty to consult and accommodate specifically arises to protect Aboriginal rights and title and treaty rights even before the proof of claim and the determination of rights are made. There is a distinction between knowledge sufficient to trigger a duty to consult and accommodate and the content of the scope of the duty to consult and accommodate in a particular case.

Again, according to the Court in Haida, and I’m at paragraphs 37 and 39, "there is a distinction between knowledge sufficient to trigger a duty to consult and if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible, but unproven claim, suffices to trigger a duty to consult and accommodate. The content of the duty however varies with circumstances discussed more fully below. A
In Nalcor’s submissions, final submissions page 17, paragraph 43, "The Conseil des Innus de Ekuanitshit and the Innu of Uashat mak Mani-Utenam have asserted a potentially credibly claim of Aboriginal interest in relation to land and resources usage. Nalcor has accepted that there is a sufficiently credible claim to engage a duty of consultation in relation to the Lower Churchill Project itself.”

As for CF(L)Co, if you can turn to paragraph 43 of their submissions, "it is not proposed to contest at this stage whether the Aboriginal intervenors have a sufficiently credible claim. Thus the immediate issue is whether the Aboriginal intervenors have demonstrated any adverse effect of any such claim and if so, the seriousness of such adverse effect."

We have a strong prima facie case. The adverse impacts are real and will severely impact on the Aboriginal rights and title of the intervenors. If we refer to paragraphs 128 and 129 of my factum, this is more of a summary of the submissions that I’ve done up to date.

"The establishment of water management agreement and the management of water thereunder will negatively and irreparably impact the Aboriginal rights and title and treaty rights of the Uashaunnuat; the traditional lands of the Uashaunnuat and natural resources therein; the way of life of the Uashaunnuat culturally, spiritually, socially and economically; the hunting, fishing and trapping activities and opportunities of the Uashaunnuat.

Furthermore, the establishment of water management agreement and the management of water thereunder will: perpetuate the historical infringement of the Aboriginal rights and title of the Uashaunnuat; deny or impede the Uashaunnuat’s exclusive or shared right to use, possess, occupy and control the Churchill River watershed and natural resources therein; deny the Uashaunnuat’s right to choose to what use the Churchill River watershed and the natural resources therein can be put; deny the Uashaunnuat’s

Aboriginal jurisdiction and the right to self-government and self-determination."

For these reasons, the duty to consult is at the high end of the spectrum. That said, if there is consultation and accommodation at the high end of the spectrum with respect to the establishment of water management agreement, the actual implementation of the water management agreement will still trigger an ongoing duty of consultation, but that will be more at the lower end of the spectrum and could be discharged by notice of decisions of the independent coordinator or reports of the independent coordinator. Obviously such practices would have to be developed through a process of consultation at an initial stage at the high end of the spectrum.

As I mentioned earlier, the statutory duty to consult can be discharged by CF(L)Co and Nalcor. As for the constitutional duty, that duty lies in the Crown and the Crown alone, but for the sake of these proceedings and for these proceedings alone, the intervenors acquiesce and consent that Nalcor consult in the name and on behalf of the Crown with the intervenors, and this is without prejudice to our position in other proceedings.

Has this duty been discharged? Well, as admitted by Nalcor, there has been no consultation with respect to the water management agreement. There has also been no consultation with the Government of Newfoundland Labrador with respect to water management agreement or the Government of Canada in that respect, or CF(L)Co. As for the environmental assessment of Lower Churchill, that also cannot satisfy the duty to consult. There has been no consultation with respect to the Lower Churchill Project. That’s a process that’s ongoing, but up to now, and this is recognized by the Joint Panel in their letter to Nalcor, there has been no consultation with respect to Lower Churchill. In any event, there’s been no consultation or accommodation with respect to Upper Churchill. Just for sake of reference, I’m referring to paragraphs 139 and subsequent in my factum.

Again, I just want to return to the Upper Churchill Project. There’s been no
consultation, no environmental assessment in that respect, and that's -- this is despite the fact, and I did mention this earlier, that the Upper Churchill reservoirs will act as the main source for the modification and control management and regulation of flow, water and water levels of the Churchill River, and there, I can refer to Nalcor. If we could go to Nalcor pre-filed evidence at pages 12 to 13, please? I’m looking at line 27. "Because of the ability to store tremendous quantity of water, the Upper Churchill reservoirs will provide the primary flow regulation required on the Churchill River." Yeah, we don’t know what those impacts will be with respect to the Upper Churchill River.

In any event, returning to the Lower Churchill, and I apologize, I’m going back and forth here because -- but in any event, it’s because we have a Lower Churchill Project that’s under way that’s going an environmental assessment, but in any event, the panel reviewing the Joint -- the Lower Churchill Project cannot consider the adequacy of consultation and accommodation of Aboriginal rights by the Crown. It essentially means that the joint panel does not have the authority to determine whether or not the constitutional duty to accommodate or to consult and accommodate the intervenors with respect to Lower Churchill has been satisfied, and that’s not to say that environmental assessment through Lower Churchill will satisfy the duty to consult water management. It’s just to reinforce the fact that there has been no consultation with respect to water management. There has been no consultation with respect to Lower Churchill Project, and in any event, the panel cannot decide issues of constitutional duties to consult and accommodate.

I believe it is important to just read exactly what the limits on the Panel’s powers are and here I’m at paragraph 152 of my factum, and I’ll read. "As a matter of law, the federal-provincial agreement produced by Nalcor expressly forbids the Lower Churchill Hydroelectric Generation Project Joint Review Panel from considering the adequacy of consultation and accommodation of Aboriginal interests by the Crown." And here, this is quoted from that agreement, "the Panel will not have a mandate to make any determinations or interpretations of: the validity or the strength of any Aboriginal group’s claim to Aboriginal rights and title or treaty rights; the scope or nature of the Crown’s duty to consult Aboriginal persons or groups; whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights, recognized and affirmed by Section 35 of the Constitution Act, 1982; the scope, nature or meaning of the Labrador Inuit Land Claims agreement."

Finally, environmental assessment is not equivalent to consultation and accommodation. The focus is different and I just invite the panel to read my submissions from 153 and onwards and I will not go into more detail under that, but I’d just like to stress that the decision in Taku River whereby the Supreme Court decided that consultation did occur in the environmental assessment is very different from the facts here before us. Our clients are not participants in the sense that the intervenors or the participants were in Taku River. All we’ve done here is that we’ve -- we’re looking to be consulted with respect to Lower Churchill Project. We sent comments to the Churchill Panel and we provided those comments to the Board, and this is also a false claim that is important to rectify is that we have never received any funding from the environmental -- for the environmental assessment of the Lower Churchill, and Nalcor refers twice in its submissions and its evidence that we have received funding, but that is categorically false. So the decision in Taku River is distinguishable from the facts of this case, and in any event, there just hasn’t been any consultation in that respect.

(11:00 a.m.) Does the Board wish to take a break or should I continue with my Submissions?

Q. How -- can you give us any kind of an idea?

MR. CAROT:

Q. I would say I got another 15 minutes.
February 25, 2010

Application by Nalcor Energy

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1 CHAIRMAN:
2 Q. Why don't we -- is that acceptable to everybody? Why don't we let you then finish it off, sir, and then we can adjourn at that point.
3 MR. CAROT:
4 Q. Okay, that's great.
5 CHAIRMAN:
6 Q. Is that okay with you?
7 MR. CAROT:
8 Q. Yes, thank you.
9 CHAIRMAN:
10 Q. Okay.
11 MR. CAROT:
12 Q. Then I turn to the powers of the Board and whether or not the Board has the jurisdiction and obligation to consider consultation and accommodation. Again, there's two separate duties here. There's a statutory duty and a constitutional duty. I will first address the statutory duty.
13 The Electrical Power Control Act explicitly grants jurisdiction to the PUB to determine issues in regard to sound public utility practice, and I'll read from Article 7.

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4. "In carrying out its duties and exercising its powers under this Act or under the Public Utilities Act, the Public Utilities Board shall implement the power policy declared in Section 3, and in so doing shall apply tests which are consistent with generally accepted sound public utility practice." Sound utility practice would mean that before establishing a water management agreement, the Board would have to be satisfied that Nalcor and CF(L)Co did consult with the intervenors and Nalcor admitted as much that sound utility practice does involve consultation with aboriginal communities if there is adverse impacts.

Second, the constitutional duty to consult and accommodate. The Public Utilities Board must exercise its decision-making function in accordance with the dictates of the Constitution, including Section 35 of the Constitution Act, 1982.

I'm going to refer to the case of Quebec versus National Energy Board that we were at before, and that was in my submissions of January 14th, and I believe that pages 170 or something like that, if we can go to that.

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Yeah, no, stop it there. I'm going to go to page -- if we can go to page 185, and I'm looking at the third paragraph.

"It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation in accordance with the dictates of the Constitution, including Section 35.1 of the Constitution Act, 1982."

I'd like to read from the Carrier Sekani case, which is a case from the B.C. Court of Appeal. I believe that's been submitted several times. Specifically, I'm looking at paragraph 45. Excuse me one second. I'm just going to read certain excerpts from this judgment because it is, it's quite telling.

Paragraph 45, "I do not accept B.C. Hydro's argument. The rule in question sought to be enforced through proceedings before the Commission arise not as an internal prescription, as in British Columbia Hydro and Power Authority versus British Columbia Utilities Commission decisions just discussed, but from the Constitution itself. Haida, at paragraph 66, contemplates review of consultation by administrative tribunals. It is not necessary to find explicit grant of power in the statute to consider constitutional questions. So long as the legislator intended that the tribunal decide questions of law, that is sufficient."

Paragraph 51, "Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so as a body to which powers have been delegated by the Crown and must not deny the appellant timely access to a decision maker with authority over the subject matter."

Paragraph 54, "While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only the Crown act to consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its
regulation. It is useful to remember the relationship between government and administrative tribunals generally." I won’t go into that here specifically. At paragraph 57, "the honour of the Crown as a basis for the duty to decide is compelling on the facts here. One Crown entity, the responsible ministry, granted the water license allegedly infringing Aboriginal interests without prior consultation. Another Crown entity, B.C. Hydro, purchases electricity generated by the alleged infringement of a long-term contract, and third, the tribunal dismisses the appellant’s claim for consultation on a preliminary point."

And I just want to draw a parallel here in terms of the historical infringement I was referring to with the Upper Churchill, how there was no consultation in that respect and how we are before the Board here for the establishment of water management agreement which will affect the Churchill River including the Upper Churchill.

The principle that the Public Utilities Boards might exercise its decision making in accordance with the dictates of the Constitution was also accepted by the Federal Court of Appeal in Standing Buffalo and if we could go to that decision, please. Standing Buffalo, which was submitted by my colleagues and which was referred to also by my colleague, Mr. Simmons. It’s probably in Nalcor’s. There it is, and I’m looking at paragraph 36.

"In asserting that the NEB erred in failing to undertake the Haida analysis before reaching its decisions, the appellants state the NEB must exercise its decision-making function in accordance with the dictates of the Constitution, including subsection 1 thereof." I agree with that statement, which is supported by the decision in the Supreme Court of Canada in Quebec Attorney versus Canadian National Energy Board.

My colleagues, Nalcor, will use this decision to support their position that the PUB does not have the -- the Public Utilities Board does not have jurisdiction, but despite that general statement made by the Court in terms of having to decide in terms of the dictates of the Constitution, it is submitted that that decision is nevertheless distinguishable from the facts before us here. In Standing Buffalo and the case before the National Energy Board, there was actual consultation with Aboriginal communities. This has not been the case. The National Energy Board provides a process for consultation with Aboriginal communities. So on the facts of that case, the Federal Court of Appeal decided that that consultation was sufficient to discharge its obligations under the Constitution.

Similarly, the case of Brokenhead, and I’m not going to go into this decision, but Brokenhead is the other decision that’s been raised by my colleagues, Nalcor and CP(L), and again, that decision is clearly distinguishable because again, before the National Energy Board, there was consultation, and in fact, accommodation of the Aboriginal concerns that were at stake there. This has not been the case here.

As indicated, the Public Utilities Board is a quasi-judicial tribunal with authority to decide questions of law on proceedings. It is not necessary to find an explicit grant of power to consider constitutional questions. So long as legislator intended that the Public Utilities Board decide questions of law, that is enough. And I’ll specifically refer to Public Utilities Act, Section 16, 99(1), 118(2). We don’t have to go see that, but we can just take those and note where the Board is granted jurisdiction over legal matters.

We can also look at the Board regulations at Article 27. And I’ll repeat it, the honour of the Crown requires not only that the Crown consult, but also that the Public Utilities Board decides any consultation dispute which arises within the scheme of its regulation.

So we submit that the Board must determine whether or not a duty has been triggered and whether that duty has been consulted, and we submit that that duty has been triggered, but has not been discharged. If that is the case, what remedy is open to the intervenors? And I’m sorry, I’m wrapping up right here.
If the Board has the power and the obligation to consider whether the duty to consult and accommodate the intervenors has been discharged, it necessarily follows that the Public Utilities Board has the power to effect a remedy if it decides that the duty to consult and accommodate has not been discharged in the circumstances. Otherwise, the intervenors will be driven to seek an interlocutory injunction, which is often an unsatisfactory route and that point was taken up specifically in Haida, as well as in Carrier Sekani.

At Section 30.1 of the EPCA it is stated, "in carrying out its duties under this Act, the Public Utilities Board has and may exercise all the powers given to it under the Public Utilities Act." Then I referred you to the Public Utilities Act at Section 118, "this Act shall be interpreted and construed liberally in order to accomplish its purposes and where a specific power or authority is given the Board by this Act, the enumeration of it shall not be held to exclude or impair a power or authority otherwise in this Act conferred on the Board."

Section 2, "the Board created has, in addition to the power specified in this Act, all additional implied and incidental powers which may be appropriate or necessary to carry out all of the powers specified in this Act."

The Board has the obligation to establish a water management agreement. The only way that it can do that is if it satisfied that the duty to consult and accommodate has been discharged and if it hasn’t, then the Board has no choice but to either refuse to establish the water management agreement or in the alternative, suspend the proceedings pending meaningful consultation of the intervenors.

(11:15 a.m.)

With respect to the power to suspend, my colleague alluded to that earlier, in terms of the general power and the specific power from the regulations. The Act reads, at Section 27.1(b) "the Public Utilities Board may set aside for future examination an issue that in its opinion requires a more prolonged examination." We submit that the power should, if it doesn’t decide to refuse to establish a water management agreement, exercise that power to leave -- to suspend the proceedings until meaningful consultation of the intervenors.

We are also asking for an order from the Public Utilities Board to order the Crown to consult and accommodate the intervenors. We had thought that the Attorney Generals would be present here today, but they’re not. We’d ask for an order directing the Attorney Generals to consult the intervenors, but they’re not before us today, so as we said, we acquiesce and we consent, for the present proceedings only, that Nalcor be ordered, in the name and on behalf of the Crown, to consult with the intervenors and accommodate the intervenors.

In any event, we’re asking for an order that Nalcor and CF(L)Co, as per their statutory duty, consult and accommodate the intervenors.

In the alternative, we request that the Board establish terms of the water management agreement that will direct the Crown or

Nalcor, as its agent, Nalcor and CF(L)Co to consult and accommodate the intervenors.

Indeed, under Section 5.5 of the EPCA, the Board is granted the power to establish a water management agreement and its terms. The EPCA specifically provides the power to the Public Utilities Board to establish a term of a water management agreement which imposes reporting requirements. So not only are we asking for an order -- a term which directs consultation, but also reporting. The Public Utilities Board is also granted the specific power to order a defaulting person to comply with the terms and conditions of a water management agreement, and I refer to Section 5.6 of the EPCA, Section 2, "the Public Utilities Board may require reporting commitments and impose monitoring requirements as it considers appropriate to ensure that the persons to an agreement approved by the Public Utilities Board under subsection 5.3 or established under subsection 5.5 comply with the terms and conditions of the agreement."

So for these reasons, we are seeking the following orders. First, we’re seeking an...
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<td>morning, and I thank you for your attention.</td>
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<td>Q. Thank you. I guess it’s time to take a little</td>
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<td>break, so we’ll break say for around a half an</td>
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<td>hour. Is that acceptable to everybody? All</td>
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<td>right.</td>
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<td>CHAIRMAN:</td>
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<td>Q. So I think, Mr. Kelly, we are in your hands,</td>
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<td>Q. Thank you, Mr. Chairman. Mr. Chairman and</td>
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<td>Commissioners, as I understand it, this oral</td>
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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
the nub of the question. Now before I get to
the question, let me first say that in the
various written submission that have been
filed there’s a lot of discussion about
whether this is a procedural question or
whether it’s simply a matter of the Board’s
substantive jurisdiction, and as you’ve seen
from the written submissions, different courts
have approached the issue in different ways.
The Federal Courts seem to be of the view that
Boards should simply do their jobs, which in
this case is to decide, having heard all of
the evidence from all of the parties,
including that of the intervenors here, what
are the most appropriate terms of the Water
Management Agreement, and that approach seems
consistent with the Supreme Court of Canada’s
decision in the Taku River case, amongst
others.

Now recently the BC Court decided that
its regulator, at least in the context of two
specific cases before it, should approach the
matter a bit differently, and I don’t intend
to get into a discussion of the nuances of the
law on that because the Supreme Court of
Canada has taken up that Carrier Sekani case
from BC and in about a year from now we’re
going to have a learned decision from the
Supreme Court of Canada on how all that should
play out. The question for the Board is you’ve
got a rather practical job, you’ve got to do
something at this stage. So what does all that
discussion mean for the Board, and frankly it
means very little because whether you treat it
as a procedural question or whether you treat
it as a substantive question within your own
jurisdiction doesn’t much matter because the
question comes out essentially the same; can
the terms of the proposed Water Management
Agreement adversely affect any aboriginal
interest.

Now before we come to that, let me say a
word about what this discussion is not about.
It is not about the environmental impacts of
the Lower Churchill Project itself. The
Ekuanitshit and the Uashat, in their RFI
responses and in their submissions today, have
referred to the environmental issues set forth
in Nalcor’s environmental impact statement and
their view of the project’s impact, but the

predication of the project is that there will
be a water management agreement in accordance
with the laws of the province.
So the question that the Board has got to
kind of start with is what’s your job, put it
to kind of bluntly. What’s the question that you
have to address? And it is a rather limited
question or matter which is before you. Under
Section 5.5 of the EPCA, the Board has to
establish the terms of a water management
agreement between Nalcor and CF(L)Co for the
purpose of achieving the policy objective set
out in subparagraph 3.b.1. So you have to
establish the terms of the water management
agreement to achieve the efficiency policy.
That’s the task that has been set for you, and
that’s a rather limited jurisdiction because
the Board does not decide whether the Lower
Churchill Project should proceed or how the
Lower Churchill should proceed.

Unlike other regulators, this Board is
not called upon to consider whether a
certificate of public convenience and
necessity should issue for the Lower Churchill
Project, and if you’ve looked at the cases,
some of the Federal Court cases dealing with
the NEB and the British Columbia cases dealing
with the BCUC, you’ll see that those boards
have a much broader power that they have to
exercise, which is to consider whether a
certificate of public convenience and
necessity should issue in relation to the
specific project. That’s not the job that’s
been assigned to you. You’ve got to simply
establish the terms of the water management
agreement. And the EPCA requires that the
Board establish the terms. It says the Board
shall do so.

Now Mr. Schulze and Mr. Carot assert that
there is a duty to consult, but any duty to
consult at this stage if there is one, or
could be one, would have to be in relation to
the particular matter or transaction which is
before the Board. It’s not a duty that exists
in a vacuum. So you ask yourself what’s the
question that’s before you; it’s to establish
the terms of the Water Management Agreement.
So the question becomes can the terms of the
Water Management Agreement as proposed have
any effect on aboriginal interests. That’s
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<td>1. Lower Churchill Project is not the matter</td>
<td>1. environmental assessment process, the consultation process, and the</td>
<td>1. terms which the law says you, the Board, make sure that we, Nalcor</td>
</tr>
<tr>
<td>2. that’s before this Board. The only matter</td>
<td>permitting process for the Lower Churchill Project. The Water Management</td>
<td>and CF(L)Co, get into the agreement.</td>
</tr>
<tr>
<td>3. that’s before this Board is the terms of the Water Management Agreement,</td>
<td>Agreement will operate within the existing parameters for the Upper</td>
<td>Now neither of the two aboriginal groups, in either their written</td>
</tr>
<tr>
<td>4. So the question of adverse effect has to be considered in relation to</td>
<td>Churchill Project or facilities and within the parameters to be</td>
<td>submissions, in their responses to the RFIs, or in the submissions</td>
</tr>
<tr>
<td>5. the terms of the Water Management Agreement, not the construction,</td>
<td>established for the Lower Churchill. The existing parameters for the</td>
<td>today, have pointed to any specific term or any specific provision in</td>
</tr>
<tr>
<td>6. development, or operation of the Lower Churchill Project.</td>
<td>Upper Churchill have to be respected because those operating parameters</td>
<td>the Water Management Agreement which has any adverse effect on them. It’s</td>
</tr>
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<td>7. Now the aboriginal groups before you have asserted claims of land</td>
<td>enable CF(L)Co to fulfil its prior power contracts, and the EPCA requires</td>
<td>rather telling that here we are in a hearing which involves establishing</td>
</tr>
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<td>8. and resource usage in relation to the Churchill River and its watershed.</td>
<td>those prior power contracts not to be adversely affected. So that’s the</td>
<td>the terms of the Water Management Agreement, and we’ve talked very little</td>
</tr>
<tr>
<td>9. Those claims go to whether and how the project should be developed and</td>
<td>terms of the Water Management Agreement. Before we get to the Water</td>
<td>about what does it say, what are the terms that are in the agreement.</td>
</tr>
<tr>
<td>10. what operating parameters, but nothing in what they’ve said goes to</td>
<td>Management Agreement terms, there’s two little points you’ve got to keep</td>
<td>The Board staff asked the intervenors in PUB CIE-4 and in PUB IUM-4 to</td>
</tr>
<tr>
<td>11. to the terms of the Water Management Agreement. Before we get to</td>
<td>in mind. First, the Water Management Agreement itself contains no</td>
<td>identify the specific provisions of the Water Management Agreement that</td>
</tr>
<tr>
<td>12. the project should be developed and subject to</td>
<td>operating parameters, it doesn’t tell you what the reservoir levels are</td>
<td>they say will adversely affect them. I’m not going to take you through</td>
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<tr>
<td>13. to be, doesn’t tell you what water flows there are going to be. It</td>
<td>going to be. It will work and it is designed to work in relation to</td>
<td>the answers in detail now, but you can look at them in due course, but</td>
</tr>
<tr>
<td>14. operating parameters are established after the</td>
<td>whatever operating parameters are established after the</td>
<td>neither intervenor in the answers could point to any specific provision</td>
</tr>
<tr>
<td>15. environmental assessment process, the consultation process, and the</td>
<td>Page 108</td>
<td></td>
</tr>
<tr>
<td>16. process for the Lower Churchill Project. The Water Management</td>
<td>answers are phrased in generalities, and as the courts have said,</td>
<td></td>
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<tr>
<td>17. Agreement will operate within the existing parameters for the Upper</td>
<td>evidence of adverse effect is not to be found in generalities, and you’ll</td>
<td>evidence of adverse effect is not to be found in generalities, and you’ll</td>
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<tr>
<td>18. Churchill Project or facilities and within the parameters to be</td>
<td>find that particularly in the Brokenhead Ojibway decision which is at Tab</td>
<td>find that particularly in the Brokenhead Ojibway decision which is at Tab</td>
</tr>
<tr>
<td>19. established for the Lower Churchill. The existing parameters for the</td>
<td>2. in the case books that we’ve filed, and I just wanted to read you this</td>
<td>2. in the case books that we’ve filed, and I just wanted to read you this</td>
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<td>20. Upper Churchill have to be respected because those operating</td>
<td>little piece. It’s at Paragraph 30 of the case where the court says,</td>
<td></td>
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<td>21. parameters enable CF(L)Co to fulfil its prior power contracts, and</td>
<td>“The fundamental problems with the claims advanced in these proceedings</td>
<td></td>
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<td>22. the EPCA requires that those prior power contracts not be</td>
<td>by the Treaty One First Nations is that the evidence to support them is</td>
<td></td>
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<td>23. adversely affected. So that’s the first of the two points. The</td>
<td>expressed in generalities”, and then if you go over to Paragraph 34, the</td>
<td>expressed in generalities”, and then if you go over to Paragraph 34, the</td>
</tr>
<tr>
<td>24. Water Management Agreement doesn’t contain operating parameters. It’s</td>
<td>court says this, &quot;I do not question that the above statements&quot;, and he’s</td>
<td>court says this, &quot;I do not question that the above statements&quot;, and he’s</td>
</tr>
<tr>
<td>25. in relation to whatever parameters are ultimately decided for the</td>
<td>referring to the evidence that the Chief had given, many of the type of</td>
<td>referring to the evidence that the Chief had given, many of the type of</td>
</tr>
<tr>
<td>26. Second point is that many of the terms contained in the Water</td>
<td>comments that Mr. Carot made this morning on behalf of his clients, &quot;I do</td>
<td></td>
</tr>
<tr>
<td>27. Management Agreement, and in essence, the important structure of the</td>
<td>not question that the above statements reflect a profoundly held concern</td>
<td></td>
</tr>
<tr>
<td>28. Water Management Agreement, are prescribed by the Water Management</td>
<td>not only of Chief Nelson, but of others in the Manitoba aboriginal</td>
<td></td>
</tr>
<tr>
<td>29. Regulations. They are required terms required by law. So you got no</td>
<td>community. The problem is that to establish a procedural breach around</td>
<td></td>
</tr>
<tr>
<td>30. operating parameters and you have a number of</td>
<td>projects such as these, there must be some evidence presented which</td>
<td></td>
</tr>
</tbody>
</table>

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1. impact on a credible claim to land or to
arabian rights, accompanied by a failure to
adequately consult". The first thing is,
where’s the adverse impact. "The Treaty One
First Nations are simply not correct when they
assert in their evidence that a duty to
consult is engaged whenever the Government of
Canada makes any decision related to lands in
our traditional territory inside the
boundaries of Treaty One. There is no at-large
duty to consult that is triggered solely by
the development of land for public purposes.
There must be some unresolved non-negligible
impact arising from such develop to engage the
Crown’s duty to consult".

In this case, we’re not talking about the
development, we’re talking about where in the
terms of the Water Management Agreement, and
generally just don’t get you there, you’ve
got to be able to look at the term and say,
okay, well, what’s wrong with that. Now I’m
not going to take you through the terms of the
Water Management Agreement one by one, but
let’s just have a very quick look at the basic
provisions of it, and we can pull up that

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1. document, it’s Schedule "A" to our
Application. If you go to page one, there are
recitals. Well, the recitals don’t have any
impact on aboriginal interests. If you go to
pages two, three, four, we have definitions.
Well, they don’t have any impact on aboriginal
interests. If we go to page five, there are a
bunch of general provisions. Nothing in that
is going to affect any aboriginal interests.
When you get over to page six, we have Article
II, which is the objective of the agreement
which is taken from the Water Management
Regulations. Article III deals with prior
power contracts. Those provisions are
essentially required by the EPCA. None of
those have any impact on aboriginal interests.
Article IV deals with the suppliers
obligation, and if you look at 4.2, it is to
adhere to the production schedules. That’s
required by the terms of the Water Management
Regulations. In particular, Section 3.2(d) of
the Water Management Regulations require that
term to be included. When you turn over
through the next bit, there are administrative
provisions on page eight. Nothing in that.

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1. Page nine deals with establishing the Water
Management Committee. So that can’t have any
effect. Article VI on page 10 deals with the
independent coordinator, and the independent
coordinator is required under the terms of the
Water Management Agreement. He establishes
the production schedule, which is in 6.2(a),
but that’s a specific requirement contained in
Section 3.2(c) of the Water Management
Regulations, and none of that affects
aboriginal interests. Energy storage simply
provides the mechanics of how you do it, and
the rest of the Articles then, Articles VIII
dealing with metering and measurement, IX
dealing with maintenance, X dealing with
deficiencies, XI dealing with costs and
expenses, XII effective date, XIII dispute
resolution, and X1V are a bunch of
miscellaneous provisions, none of those have
any impact on land or resource usage. And
Annex "A" is simply in very simple terms the
mechanics of how you -- the mathematics of how
you convert water to energy and back again. So
when you look at it, what you will not find in
this agreement is anything that tells you

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1. about what the reservoir levels are going to
be, what the flows are going to be, because
this document is very carefully prepared to
ensure that it can work with whatever those
parameters are ultimately defined to be.

So there’s nothing in this Water
Management Agreement that has any adverse
effect on aboriginal interests because there’s
nothing here that stipulates what water flows
or reservoir levels will be on any particular
hour, on any particular day, in any particular
season, or in any particular year. All those
things are matters for discussion in the
environmental assessment consultation
permitting processes. It’s designed to be
that way. Even now under the existing
operation flows, of course, can vary hourly
under the existing operations at CF(L) Co,
because the HQ power contract requires that
flows may vary on an hourly basis because HQ
puts in its demand request every hour as to
what power it wishes to have produced.

So the limitations that will ultimately
come on the operation of the Lower Churchill
Project will come through the environmental

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Assessment, consultation, and permitting processes, and aboriginal groups, including these groups, are and will be consulted during those processes. In fact, this is made abundantly clear in the information requests made by the Joint Review Panel, which both Mr. Carot and Mr. Schulze referred to earlier because the Joint Review Panel, just like this Board, goes through an extensive information request process. It’s clear that the Joint Panel, as it is mandated to do, is considering aboriginal interests because it has an obligation under the agreement to assemble all that information and report it ultimately to the Ministers. The panel doesn’t decide itself, but it goes to the Crown because then the Crown has got to decide what to do with it. It assembles the information to make sure that ultimately the Ministers have the relevant information before them, and you can see this in -- if you go to the IR in Mr. Carot’s letter, IR-151, you can see this consultation process. It’s in the IR documents from the Joint Review Panel. While you’ve got the letter there, just to save a bit of time, just scroll down to Paragraph 3 in the letter, you’ll see that with respect to the information requested in 151 which would deal with aboriginal interests, the panel will communicate directly with aboriginal groups to encourage their participation and cooperation and making information on aboriginal land and resource use available in a timely fashion, and the panel’s letter will be posted in the registry. So the panel itself will be engaged in that process, as Nalcor is also engaged in that process. So if you just then go to 151, you’ll see -- under related comments, you’ll see some of the aboriginal groups which are involved in the process. We have the Labrador Metis Nation, we have the Nunatsiavut Government, we have the Uashat, the group here, which is the third one down, we have the Innu Nation, and we have the Innus de Ekuanitshit. So we have two of the aboriginal groups here, but we have a large number of other aboriginal groups, and there are nine involved in the process altogether.

If you go down through that RFI, and I’m not going to read it to you fully, you’ll see that the panel is looking for more information with respect to the consultation, they’re looking for the consultation agreements, et cetera, because that’s part of that process, that’s where that process is going to unfold because that’s in relation to the issues surrounding the project which are described in Nalcor’s environmental impact statement, and to which Mr. Carot referred in some detail this morning. Now this is actually the fourth round of RFI. Just like we’ve had three rounds of RFIs in the general rate proceeding, this Board has numerous rounds of RFIs. The panel has a number of rounds of RFIs that it will go through before you get to the ultimate hearing process. What’s interesting is just take a quick minute to look at some of the other groups which are involved in that process. Can I get you just to turn back, for example, 148. The IR itself is not all that important, but just look at some of the other groups which are participating; Fisheries and Oceans Canada, Memorial University, Hydro Quebec, Innu Nation, Sierra Club, Environment Canada, and various departments of the Government of Newfoundland and Labrador. So there’s a whole lot of discussion that has got to go on about how the project will operate, what the parameters will be, what the minimum flow requirements, for example, will be, and ultimately this agreement will work in relation to all those things, that will function out of that process. All of those groups are involved in providing information and also seeking additional information. The process is unfolding exactly as it should and as it ought to do because that’s the appropriate forum for considering all of the environmental impacts that my friends have referred to this morning, including the impacts on aboriginal culture and their land usage, et cetera, arising from the Lower Churchill Project.

Now Mr. Schulze, supported by Mr. Carot, had raised the question of Section 68 of the Environmental Protection Act, and that kind of takes us to, well, what’s the interrelationship of what this Board is doing and what that Joint Review Panel is doing, and...
the basic principle of statutory interpretation is clear. Mr. Simmons, I think, has done a very good job in his brief laying it all out for the Board. Statutes are to be interpreted to avoid conflict wherever possible. They’re to be given an interpretation which best facilitates the achievement of the objectives of the statutes, and that’s the objectives of both statutes, both the Environmental Assessment Act, and in this case, the Electrical Power Control Act. The EPCA is very clear, it requires, if you look at Section 5.4, that if there is a proposed development, then you need a Water Management Agreement. The suppliers are told you don’t wait until it’s all done and in place, when it’s simply a proposal, not when it’s released from EA and you got a construction project, when it’s a proposal, you get your Water Management Agreement in place. It’s at the proposal stage. Then you have an Environmental Assessment Act, and in particular the whole process that operates under it, and you cannot have a licensed permit approval or other document of authorization. Now as we’ve laid out in the briefing, the case law is when you’ve got words like permit, approval — licence, permit, or approval, you’ve got to read it all together to see what the Legislature is really meaning, and it’s licence, permit, approval, or other. You don’t forget the word "other". It’s other document of authorization. So it’s a licence, permit, or approval, which is going to amount to some form of authorization. This Board doesn’t do anything that authorizes the Lower Churchill Project. You are simply establishing the terms of the Water Management Agreement, which in turn is going to be of utility, as I’ll come to in a moment, in that environmental assessment process, but there’s no conflict between the Acts. In fact, the Acts are set up to work perfectly logically together because the EPCA says at the proposal stage, you establish the Water Management Agreement, that’s going to feed into the environmental assessment process and then are you issuing a licence, permit, approval, or other document of authorization; no. So there’s no conflict, the two statutes work well together, they’re designed to work well together, and that’s the logical interpretation that makes sure you fulfil both of the objectives. Just stop and think about it. Let’s say you take my friend’s position that, well, we shouldn’t get the terms of the Water Management Agreement worked out, we should have an environmental assessment process first. Well, the problem with that is then the environmental assessment panel, as it’s considering the operating parameters, does not have before it one of the documents which is what’s the Water Management Agreement going to look like, and because it’s a neutral document, it makes logical sense you get that established first and then the parameters can be determined so the panel can have before it exactly how that’s going to work.

So the point that comes out of that is the environmental effects of the project can best be assessed if the panel has before it not only the technical information as to the project, but also the terms of the Water Management Agreement itself. Now with that as the background, just have a look at...
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Agreement does not in any sense allow or establish the terms of the Water Management Agreement, and that’s how the whole thing goes together, why it makes logical sense.

So, Mr. Chairman, on a proper interpretation of the EPCA and the EPA, there’s no conflict between the statutory provisions, there’s a logical sequence of what is required. The statutory provisions reflect that the Water Management Agreement gets established early while the project is still only a proposal because it’s an important input into that environmental assessment process. To further ensure that there’s a timely decision with respect to water management because these two processes are going on together, the Lieutenant Governor in Council has, in fact, enacted a regulation that requires the Board’s decision within 120 days, and that regulation is obviously intended to ensure that a timely decision is made because that becomes available then, the Water Management Agreement becomes available for the EA process. I think it goes without saying, frankly, that the Board is bound by the provisions of the Environmental Assessment Act -- sorry, by the provisions of the Electrical Power Control Act, and the provisions of the Water Management Agreement, or the Water Management Regulations, rather.

Mr. Chairman, I just want to say when you look at this agreement, it is a good agreement because look what it does. First of all, it fulfils the statutory purposes of ensuring efficiency and the water management objectives under the regulations. It works administratively between Nalcor and CF(L)Co, it works with the prior power contracts, most significantly the Hydro Quebec power contract which is important, and it doesn’t adversely affect any aboriginal interests. In establishing the terms of the Water Management Agreement doesn’t involve any exploitation of the resources by the Crown, whether the Crown is the Government or Nalcor, because establishing the terms of the Water Management Agreement does not in any sense allow or permit this project to proceed. So there is no dishonour in the Crown in having established - in the Board having established the terms of the Water Management Agreement, which are then going to funnel into a rather comprehensive process of consultation, environmental assessment, and permitting. My friend, Mr. Carrot, I believe, put up on the screen this morning all of the permits and approvals that will be required for this project, so that that can be assessed then in the environmental assessment process.

Mr. Chairman, there’s no basis for the Board to suspend Nalcor’s Application or to reject it or to suspend your decision. Frankly, nor is there any jurisdictional basis for the Board to do so. The Board has been entrusted with an important function by the Legislature of the Province of Newfoundland and Labrador, and that’s to establish the terms of the Water Management Agreement, and nobody has put forward any basis to suggest, let alone provided proof, that there are any terms of the Water Management Agreement, as both Nalcor and CF(L)Co have proposed, which are not appropriate. So the Board should continue to fulfil its Legislative mandate and the suspension Application should be dismissed. In whole, Nalcor submits that the Board should approve the Water Management Agreement as proposed by Nalcor and CF(L)Co. It achieves all of the objectives of the Act and the Regulations, it respects the existing prior power contracts, and it has no adverse impact on aboriginal interests. There is a consultation, environmental assessment, permitting process still to be followed, but that does not -- the establishment of the terms of the agreement facilitates those processes without in any sense having any adverse impact on aboriginal interests. Mr. Chairman, those are my submissions.

12:30 p.m.

Q. Okay. I think then next we’ve got Mr. Smith from the Churchill Falls (Labrador) Corporation.

SMITH, Q.C.:

Q. Thank you, Mr. Chairman, and Commissioners. Mr. Chairman, I intend to be
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Q. Well first I should clear one thing up, I do--

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It follows, of course, Mr. Chairman, that there is no duty to consult on CF(L)Co.

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Q. I think Mr. Schulze you have the right to some closing remarks.

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Q. Well first I should clear one thing up, I do--

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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

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 rarely arise under the Public Utilities Act because it would rarely--it would rarely be decision making with this kind of

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.

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panel, raised issues which resulted in studies, had approval on the mandate of the scientific advisor. That’s light years from what’s going on currently before the Joint Review Panel. My client got a very small amount intervenor funding and is a party and that is otherwise a party, like any citizen of Happy Valley-Goose Bay who might want to turn up. We’re not part of the environmental assessment like Taku River First Nation was with respect to that mine.

I want to now just--I want to get to the heart of my, if you will my challenge or my dilemma here. Mr. Kelly says well there’s nothing in the Water Management Agreement that the intervenors can point to that affect them. And I think we did try to take this up in our answer, in our information responses. Nalcor says yes, water flow will be different with the Water Management Agreement than without and then when they’re asked for sort of more--sorry, I need to just go to our submissions on this, but they say it’s very hard to predict what that would be. Well, with all due respect, Nalcor has significantly more resources than my client and has significantly more time to think about this agreement and water flows on the Lower Churchill than my client has. So how can Nalcor come and say we’re going to do a Water Management Agreement, the flow will be different before and after the Water Management Agreement, we can’t tell you exactly how and then say, but neither can Ekuanitshit, so there must not be any adverse effect. But I can’t--I can’t on, as I said, I can’t on three week’s notice with Nalcor saying we can’t predict it, I can’t provide the Board with a prediction that will say this will happen and it will be bad for the fish for this species or this island. I can do, I think, we can do what we did do which was we said Nalcor said water flow and water levels will be different before than they are after. Water flow difference variations not just seasonably but even daily make a difference. Our concerns are about the resources, the natural features and the literature says daily flows make a difference to that. To ask me to do more than that, I think sets the bar incredibly high. I also want to take the Board to that same document that Mr. Kelly just referred to. If we go back to the letter from the Joint Review Panel? Yes, thank you, that’s excellent, and if you go to page 9 and this become really, now we’re getting to the heart of my problem, the same one I tried to identify this morning. Nalcor says here, well, the operating parameters will be set in the environment assessment and the environmental assessment will, is a preliminary to permitting by the Minister of National Resources and also by Fisheries & Oceans Canada.

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Q. Pardon me? Page 7. Yes, page 7 at the bottom, page 9 of 34 which is paginated 7 at the bottom. There’s an expression in French, you know, when something gets missed, they say it falls between two chairs. I have a feeling like the actual concrete effect of this Water Management Agreement is falling between your chairs and those of the Joint Review Panel because if you go to the information or request of the Joint Review Panel, what do we see? The proponent is asked to provide the following: an assessment of the role of the pending Water Management Agreement with respect to risks, to project viability and environmental implications. Somehow it seems to me that something’s going missing if the Nalcor’s answer to that to the Joint Review Panel will be none and to you it will be none, and yet they’ve told us that flows will be different before or after. Everything to do with flow will happen in the Joint Review Panel and the permitting that the Federal and Provincial Governments will do once they get that report because incidentally don’t forget environmental assessment doesn’t make decisions, it makes recommendations. The ultimate decision will be Fisheries and Oceans will say that this flow is good or bad for fish; the Minister, the Provincial Minister of Natural Resources will say I’ll put these or those conditions on your water lease or I won’t. But in any case, either Nalcor is saying that’s where all the action is and this is just, this is just a technical mechanism or
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 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 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 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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The terms of proposed Water Management Agreement, sure, they’re just words on paper, but their effect are really real. We’re talking about management of water, and the management of water will be predicated on the terms of the Water Management Agreement, and that’ll be left up to an independent coordinator, using reasonable judgment and so forth, but that is quite big. What is true is that flows will be affected on an hourly basis, which has been acknowledged by Nalcor, and there’s no way around it. In that sense, the Water Management Agreement is not a neutral document, and those are the terms of my comment.

I just want to talk briefly about operating parameters. Counsel for Nalcor repeatedly says that Water Management Agreement will work within operating parameters that will be set in consultation, at least with respect to the Lower Churchill, in consultation with aboriginal groups. I don’t disagree if consultation occurs in that respect, but operating parameters establish minimums and maximums, but what about -- and again I might be repeating myself, but again this is the crux, what happens to daily fluctuations within those operating parameters. Even the Joint Review Panel is wondering about that, and my colleague, David Schulze, referred to at page seven that concern from the Joint Panel. The operating parameters for the Upper Churchill Project, those operating parameters, and again I’ve said this several times today, they’ve never been subject to environmental assessment, they never been subject to consultation with my client. So in those circumstances, the Board today is faced with the responsibility and the obligation to ensure that water management, either in the form of an agreement or the implementation of an agreement, will not adversely impact the aboriginal title, rights, and treat rights of our clients. We’ve established real impacts on traditional activities, on resource uses, and just generally over the control of our traditional lands. These are not generalities, these are very real. In those circumstances, the Board has no choice but to either refuse or suspend the establishment of the terms pending meaningful consultation, to order, and again to order consultation, or in the alternative, to provide terms in the Water Management Agreement which will provide for such consultation. Again those are my orders sought.

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Q. Our Vice-Chairman has spoken. Okay, thank you all very much, and the Board will not dally in making a decision, but I can give you no timeframes.

MR. SCHULZE:

Q. May I ask the Board a question, Mr. Chairman?

CHAIRMAN:

Q. Yes, sir.

MR. SCHULZE:

Q. I’ll just -- it’s not so much -- it’s a question with respect to costs, will the Board seek further submissions or take that under advisement now?

CHAIRMAN:

Q. Oh, I think we’ll be taking that under advisement, sir. We can’t give you any conclusive position on that.

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Mr. Chairman, is it the Board’s practice is to seek further submissions in the future about how to deal with costs arising out of the Application. Mr. Schulze, is that your question?

MR. SCHULZE:

Q. Very well stated.

COMMISSIONER WHALEN:

Q. It’s the Board’s practice is to seek further submission on costs in particular.

CHAIRMAN:

Q. Our Vice-Chairman has spoken. Okay, thank you all very much.

(Upon Concluding at 12:55 P.M.)
CERTIFICATE

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

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

Judy Moss
February 25, 2010

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