

MANITOBA CLEAN ENVIRONMENT COMMISSION

KEYYASK GENERATION PROJECT

PUBLIC HEARING

Motions hearing

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Transcript of Proceedings  
Held at Winnipeg Convention Centre  
Winnipeg, Manitoba

THURSDAY, OCTOBER 17, 2013

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## APPEARANCES

## CLEAN ENVIRONMENT COMMISSION

Terry Sargeant - Chairman  
Edwin Yee - Member  
Judy Bradley - Member  
Jim Shaw - Member  
Reg Nepinak - Member  
Michael Green - Counsel to the Board  
Cathy Johnson - Commission Secretary

## KEEYASK HYDROPOWER PARTNERSHIP

Sheryl Rosenberg - Counsel  
Doug Bedford - Counsel  
Robert Adkins - Counsel  
Jack London - Counsel

## MANITOBA WILDLANDS

Gaile Whelan Enns

## PEGUIS FIRST NATION

Lorraine Land - Counsel  
Mike Sutherland

## FOX LAKE GRASSROOTS CITIZENS ORGANIZATION

Peter Kulchyski

## PIMICIKAMAK

Kate Kempton - Counsel  
David Muswaggon  
Chief Cathy Merrick

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1 THURSDAY, OCTOBER 17, 2013

2 UPON COMMENCING AT 9:00 A.M.

3 THE CHAIRMAN: Good morning, I would  
4 like to call the proceedings to order.

5 We are here today to deal with three  
6 motions that have been submitted by three of the  
7 participant groups to these proceedings. The  
8 order will be, first up will be the Peguis First  
9 Nation, followed by Pimicikamak, and followed by  
10 the Concerned Fox Lake Grassroots citizens.

11 Each party, the appellant, the mover  
12 of the motion will be allowed up to 30 minutes to  
13 present their argument. That will be followed or  
14 may be followed by some questions by the panel or  
15 from panel members. That will be followed by a 30  
16 minute response from the proponent, again, which  
17 may be followed by questions from panelists. And  
18 following that, the mover of the motion will have  
19 ten minutes in rebuttal.

20 We will try to get through Peguis and  
21 Pimicikamak this morning, we may delay lunch if  
22 necessary, and then deal with the third one this  
23 afternoon. We will play it by ear as the schedule  
24 unfolds.

25 So I would now like to call Peguis to

1 come up to the front table and make their  
2 presentation, please?

3 MR. SUTHERLAND: Good morning.

4 THE CHAIRMAN: Good morning. Please  
5 introduce yourselves for the record and then you  
6 may proceed.

7 MR. SUTHERLAND: Good morning,  
8 Mr. Chair, nice to see you again. My name is Mike  
9 Sutherland, I'm one of the elected officials,  
10 councillor of Peguis First Nation. I hold the  
11 portfolio of lands and resource management, as  
12 well as consultation.

13 MS. LAND: And I'm Lorraine Land, I'm  
14 legal counsel for Peguis. Good morning.

15 MR. SUTHERLAND: I would like to thank  
16 you for the opportunity of being able to present  
17 our argument here today, you know, and I hope that  
18 what we say is fully understood and taken to heart  
19 and then adhered to, because I'm speaking not only  
20 on behalf of stats and so on, but personal  
21 effects, what we have seen and what we have felt  
22 over the years.

23 We are here to request a delay or a  
24 stoppage in the project until the proper  
25 independent cumulative effects assessment has been

1 done, especially on a larger scale.

2 I know that people are wondering why  
3 Peguis First Nation is here because we are  
4 situated in the southern part of the province.  
5 But in working with Manitoba Conservation,  
6 understanding, you know, a little bit about how  
7 things work, you know, I have been advised and  
8 educated through friends and through research,  
9 also studies, that any impediment, any impeding of  
10 water, movement of water affects us. We have  
11 flooded greatly over the years and it is due to  
12 compound -- it is compounded due to the levels of  
13 Lake Winnipeg.

14 In 2010 we flooded five times. Where  
15 we sit and are situated, there is a narrows there,  
16 so any movement of water fills our basin, stopping  
17 the movement of water through our community. And  
18 Peguis is in a basin. And one of the things that  
19 we have always looked at over the years and heard  
20 many argument is about the 711 and 716 levels of  
21 the lake and the way that Manitoba Hydro contains  
22 those levels. However, where we are, through  
23 numerous studies, I think about 18 over the last  
24 20 years, it always showed that the level of the  
25 lake in Peguis at the mouth of the river, the

1 Fisher River, is 713. So at any given time when  
2 the water moves from the north or the south, the  
3 basin is full, Fisher Bay. If we get any heavy  
4 rain storms, the water can't move anywhere, it  
5 sits in our community. And this is all due to the  
6 structures in the north, the dams, and one of them  
7 being Keeyask.

8                   And I really feel that there is not  
9 enough study or not enough research done to see  
10 that. Because in talking to Hydro and other  
11 government officials, Water Stewardship, they  
12 really feel that First Nations aren't affected  
13 that live around the lake, and only ones in the  
14 immediate area. And to us that's not true. We  
15 have felt the effects, we have seen the effects.

16                   We have interviewed the elders, and  
17 many of them will talk and tell you that since the  
18 dams in the north have been erected, more flooding  
19 has occurred in our community over the last 25  
20 years.

21                   You know, and I'm just in a process of  
22 doing a study for the Eastern Lake Conservation  
23 District of the Fisher Basin in the last two  
24 years, and I have become very, very educated in  
25 this process. So now I started doing my own

1 research. And one of the things that I see is  
2 that we have to look above and beyond just what is  
3 there in the immediate area. You know, you take a  
4 look at 1997, the flood of the century, the Red  
5 River, 2011, the flood of the century, the  
6 Assiniboine River, and all of these masses of  
7 water coming to one lake, Lake Winnipeg. And when  
8 it gets to the lake, with all of the dams and the  
9 structures in the north, it impedes the movement  
10 of water, therefore, affecting us in Peguis as  
11 well.

12                   But there is even a bigger picture.  
13 Not only is there a mass of water, but the quality  
14 of water. I just spent some time on the Namao  
15 understanding the research and the work that they  
16 have been doing. And one of the things that I  
17 find is that they are vastly underfunded and don't  
18 have the ability to do the adequate research that  
19 they need to do to determine the quality of the  
20 lake. Right now there is a lot of propaganda  
21 about the lake dying, and I really believe that.

22                   I just spent a couple of days up in  
23 Saskatchewan, in the Assiniboine watershed, a  
24 huge, huge watershed holding masses of water. But  
25 another issue that was very important to me was

1 that all of the potash mining that's going on  
2 there, and no one has yet been able to explain to  
3 us whether or not that industry is detrimental to  
4 the quality of water that flows to Lake Winnipeg.

5           Southern Saskatchewan and the Souris  
6 River Basin, the same thing, oil and gas fracking  
7 going on down there in the United States and  
8 southwestern Manitoba. Again, no one wants to  
9 speak to the quality of water that flows back up  
10 to Lake Winnipeg.

11           So, with that alone, that leaves me  
12 with a great concern of the impeding structures in  
13 the north. You know, you see already the effects  
14 of the movement of water, the slow movement of  
15 water with huge algae blooms within Lake Winnipeg.  
16 But yet we don't know what the effects are with  
17 the industries in our neighboring province, with  
18 the oil and gas, the potash mining. And I think  
19 that in order for us to really look at the big  
20 picture that we have to hold off on this project  
21 until, you know, a further assessment is done at a  
22 bigger scale, because it does affect us directly,  
23 whether it be Peguis or whether it be up near the  
24 structure itself.

25           With that I thank you, and I will turn

1 it over to Lorraine.

2 MS. LAND: Good morning. Thank you,  
3 Chair, and thank you, panel, for the opportunity  
4 to speak to you this morning and to argue this  
5 motion before you.

6 This is not the beginning of a  
7 process, this is the middle, as you know. We come  
8 before you today at the start of a new process,  
9 the hearings into the Keeyask Generation Project,  
10 but this is also very much the middle of a very,  
11 very long process. Keeyask doesn't stand alone,  
12 it stands on the shoulders of a massive  
13 interconnected hydro system to which it will be  
14 integrated, if it proceeds.

15 So Keeyask is not mythically isolated  
16 from the rest of the Hydro projects that have been  
17 approved already or will be approved. It is only  
18 viable on the basis of what has happened before.  
19 Keeyask is really the next step in a bigger  
20 process.

21 The proponent is telling you this is  
22 an empty glass of environmental effects that you  
23 will be looking at in the Keeyask hearings. We  
24 are going to look in the Keeyask hearings at what  
25 happens in this empty glass of effects. But what

1 we are saying is, and I believe that the CEC  
2 understands this based on the reports that you  
3 have done in previous hearings, this glass already  
4 has 50 years of impacts of hydro projects. So  
5 your starting point for looking at effects is not  
6 here to see what will fill that glass. Your  
7 starting point is here. And that's what we are  
8 arguing is, this is critical and relevant evidence  
9 to understand what is the basis, what is the real  
10 baseline environmental information that is needed  
11 to understand what the impacts of Keeyask will  
12 really be?

13 As you know, a regional cumulative  
14 effects assessment has never been done, even  
15 though your panel recommended it in Wuskwatim,  
16 even though there were recommendations in  
17 documents like the COSDI report, even though you  
18 recommended it again as a need in Bipole III in  
19 your report, and even though the Minister has said  
20 that he accepted your non-licensing  
21 recommendations in Bipole III, including your  
22 recommendation that a regional cumulative effects  
23 assessment should happen prior to the approval of  
24 any new projects.

25 So that's what this motion is about.

1 After 50 years of hydro projects in Northern  
2 Manitoba, and after ten years of your Commission  
3 saying that a proper review of environmental  
4 impacts for new hydro projects should include a  
5 regional cumulative effects assessment, and after  
6 the government said this August, Clean Environment  
7 Commission, you are right, we accept your  
8 non-licensing recommendation that a regional  
9 cumulative effects assessment is needed prior to  
10 any more approvals, and so we are going to get on  
11 that, we are going to start talking to Manitoba  
12 Hydro about that.

13 And after all of that, Peguis is  
14 saying there is no longer any doubt that a  
15 regional cumulative effects assessment is needed  
16 to understand the baseline conditions before  
17 approving new hydro projects. You said it  
18 multiple times, the government has confirmed it,  
19 it needs to be part of the evidentiary basis.

20 So when does it happen? The proponent  
21 in their response to our motion is saying, CEC,  
22 nothing has changed, your marching orders haven't  
23 changed, you received your terms of reference, you  
24 should just continue to do things the way that  
25 they have always been done, the way that we,

1 Manitoba Hydro, have always done them.

2 Well, there are some important recent  
3 changes since the release of your original terms  
4 of reference. Now your terms of reference given  
5 to you by the Minister last November definitely  
6 provide you with the authority to consider  
7 cumulative effects in the review of your project.  
8 But in addition to that, authority that's already  
9 there under your terms of reference, and I will  
10 talk about that in a minute, there have been  
11 developments since those terms of reference that  
12 strengthen the argument that now is the time for a  
13 proper regional cumulative effects assessment.  
14 And this is the hearing in to which that evidence  
15 should be integrated.

16 So what has changed in between? Your  
17 Bipole III review and the Minister's response.  
18 I'm going to take you to a couple of documents, a  
19 few documents in our materials, starting with the  
20 Bipole III report. That's tab F of our materials.  
21 So I will read into the record anything that I'm  
22 quoting here. So for those who don't have the  
23 motion record before you, that will assist.

24 So tab F is a copy of the Bipole III  
25 report which, of course, you are all very familiar

1 with. And I'm going to look at page 123. And  
2 this is a chapter in which your Commission looked  
3 at the issue of improving environmental assessment  
4 in Manitoba. Because, as you know, part of your  
5 mandate is to conduct hearings into these  
6 projects, and part of your mandate is also to  
7 advise the Minister on assessment processes, as  
8 part of your recommendations to strengthen these  
9 processes going forward.

10 So in the second column, the second  
11 full paragraph, you say:

12 "The Commission is of the view that  
13 such poor environmental  
14 assessment...",

15 that was the assessment in Bipole III,

16 "...should not be allowed to continue  
17 into the future. To allow this would  
18 pose additional unneeded threats to  
19 our environment."

20 And then your report went on to detail the  
21 problems that you encountered in the environmental  
22 assessment process in Bipole III, including the  
23 very poor initial Environmental Impact Statement,  
24 that you were able to address through the hearings  
25 by asking for additional evidence through

1 participants and through some of your own  
2 inquiries. And in the end you made the following  
3 recommendation, which is the recommendation on  
4 page 126, about the need for a regional cumulative  
5 assessment:

6 "During the Bipole III hearings it  
7 became apparent that past  
8 hydroelectric developments in Northern  
9 Manitoba have had a profound impact on  
10 communities in the areas of these  
11 projects, as well as on the  
12 environment upstream and downstream.  
13 Bipole III and projects proposed for  
14 the near future will add to these  
15 impacts."

16 And then in the next paragraph you go on to say in  
17 the second sentence:

18 "A regional cumulative effects  
19 assessment is needed for all Manitoba  
20 Hydro projects and associated  
21 infrastructure in the Nelson River sub  
22 watershed."

23 And that lead to your recommendation 13.2, which  
24 you see in the next column:

25 "The Commission recommends that

1 Manitoba Hydro, in cooperation with  
2 the Manitoba Government, conduct a  
3 regional cumulative effects assessment  
4 for all Manitoba Hydro projects and  
5 associated infrastructure in the  
6 Nelson River sub watershed, and that  
7 this be undertaken prior to the  
8 licensing of any additional projects  
9 in the Nelson River sub watershed  
10 after the Bipole III project."

11 And then, as you know, the Minister  
12 responded, in tab J of our materials we have a  
13 copy of the Minister's response letter, which I'm  
14 sure as well, because it was fairly recent, you  
15 are familiar with. So in tab -- behind tab J is a  
16 copy of the Minister's letter, and I'm going to  
17 quote from the first page of his letter, second  
18 paragraph. So the Minister responded to your  
19 recommendations and he said:

20 "In addition to the enclosed licence  
21 requirements, please be advised that  
22 it is my intent to ensure that all of  
23 the non-licensing recommendations in  
24 the Clean Environment Commission  
25 report be implemented. Technical

1 staff in my department will contact  
2 you in the near future to discuss  
3 implementation of the recommendation  
4 to cooperatively conduct a regional  
5 cumulative effects assessment for all  
6 Manitoba Hydro projects and associated  
7 infrastructure in the Nelson River sub  
8 watershed."

9 That was welcome news to many, many  
10 people, including my clients, Peguis First Nation.  
11 Because, as you know, communities have been asking  
12 for this for a long time. I know personally I was  
13 involved many years ago in the late 1990s, as a  
14 witness in the inquiry into the flooding in  
15 Northern Manitoba that was conducted. And at that  
16 time it was being brought up as an issue. This is  
17 many, many years coming.

18 And 14 years ago you had the report of  
19 the consultation on sustainable development in  
20 1999, that said Manitoba needs an integrated  
21 sustainable development planning process that's  
22 based on large watershed analysis.

23 And then 13 years ago, the Minister  
24 accepted the recommendations of that report and  
25 said, we know we can no longer afford to wait to

1 put sustainable development into action, to do so  
2 would subject future generations to the risk of  
3 losing the benefits of clean water, air and soil.

4 Then nine years ago in the Wuskwatim  
5 report, your Commission called again for a high  
6 quality cumulative effects assessment over a  
7 larger regional area, and said that you expected  
8 broader cumulative effects studies in the future.  
9 And it didn't happen.

10 Four years ago the Southern Chiefs  
11 Organization met to discuss the continued problems  
12 that the First Nations communities were facing  
13 with flooding in their communities, and they  
14 passed a resolution. They noted the devastating  
15 impacts of the flooding on their communities, and  
16 they passed a resolution. We include a copy of  
17 that in our materials at tab A2. And the  
18 resolution called on the government to conduct a  
19 full environmental audit of hydro projects because  
20 of the impacts being felt by the communities, the  
21 First Nations communities in Southern Manitoba.

22 And this year, as you know, you  
23 released your Bipole III report, and you  
24 recommended that a regional cumulative effects  
25 assessment should happen prior to any more

1     approvals.

2                     So the question now is, who takes that  
3     next step and when, on that path to ensuring that  
4     it happens?

5                     The proponent is telling you, Clean  
6     Environment Commission, you don't have the  
7     authority to adjourn these proceedings to get  
8     evidence about regional cumulative effects. The  
9     proponent is saying in their materials, if you  
10    look at what they are saying in response to  
11    Peguis' motion, they are saying, Clean Environment  
12    Commission, your only role is to hold public  
13    hearings to gather public input. They ignore that  
14    part of your explicit mandate, and a key role that  
15    you play, which is ensuring that the environmental  
16    impact record is complete for projects.

17                    And thank goodness you do, because  
18    look at what happened in the Bipole III process  
19    where you had to undertake a considerable amount  
20    of work to ensure that the evidence record was  
21    full so that you could make proper recommendations  
22    to the Minister based on all of the relevant  
23    evidence, which you initially did not have before  
24    you.

25                    The proponent intimates in their

1 submissions that your role as a Clean Environment  
2 Commission is to be the place where the public  
3 basically blows off steam while others make the  
4 real decisions. They are saying, CEC, you don't  
5 make the decisions, the Minister does based on  
6 many inputs. That's a seriously flawed  
7 understanding of the important role an  
8 environmental assessment tribunal like yours  
9 plays.

10 Yes, definitely the Minister is the  
11 final authority on the licence and makes the  
12 decision. And the government is the final  
13 authority on policy matters. And, yes, the  
14 Minister receives input from a number of sources,  
15 including you. But you, as a Clean Environment  
16 Commission, play a critical role. You are the  
17 Minister's experts, you are the Minister's expert  
18 tribunal on whether an environmental assessment  
19 process is complete, and what the conditions may  
20 need to be for appropriate development when the  
21 Minister approves a process.

22 Peguis' position is that you, the  
23 Clean Environment Commission, do have the  
24 authority to integrate evidence from a proper  
25 regional cumulative effects assessment into this

1 project assessment. Deciding to integrate that  
2 evidence establishes -- that will be part of the  
3 important basis on which you will make your  
4 recommendations to the Minister. It will be  
5 consistent with your overall mandate and your  
6 expertise.

7           As you know, the Environment Act  
8 establishes your Commission as the body to provide  
9 advice to the Minister and conduct public hearings  
10 under the Environment Act. I'm just going to take  
11 you through -- I know that you are very familiar  
12 with this, but I think it helps all of us just to  
13 remind ourselves about what your explicit  
14 statutory and other mandates are.

15           Behind tab B is the copy of the  
16 Environment Act. So tab B of our motion materials  
17 is a copy of the Environment Act. And I'm looking  
18 at Sections 6(1) and 6(5), so that's on page 4 and  
19 5. And the statute says:

20           "There shall be a Clean Environment  
21 Commission...",

22 and then it goes on to say,

23           "...for the purposes of, A, providing  
24 advice and recommendations to the  
25 Minister; B, developing and

1                   maintaining public participation in  
2                   environmental matters; and C, carrying  
3                   out the other functions under the  
4                   contaminated sites Remediation Act and  
5                   the Drinking Water Safety Act."

6       So I point out to you that that is an explanation  
7       that your purpose is not just to conduct hearings,  
8       but also to provide advice and recommendations to  
9       the Minister. You are the Minister's expert  
10      advisors, your tribunal, on issues of  
11      environmental review and the public interest, and  
12      you have developed significant expertise in this  
13      area which has lead you to make both licensing and  
14      non-licensing recommendations, about not just  
15      specific processes, but how to continue to improve  
16      the environmental assessment in Manitoba.

17                   A decision by you to integrate  
18      relevant evidence on regional cumulative effects  
19      into this hearing is also consistent with your  
20      terms of reference for this particular hearing.  
21      And here I refer to your terms of reference which  
22      we put in our materials at tab L. And tab L is  
23      the Minister's covering letter and then the  
24      specific terms of reference.

25                   And I would take you to the second

1 page of the terms of reference entitled Mandate  
2 for the Hearings, of the hearings, where it  
3 says -- I'm going to go to the fourth paragraph  
4 down:

5 "The Commission shall, within the  
6 mandate of the hearing and the terms  
7 of reference provided by the Minister  
8 as noted above, provide a report  
9 recommending whether an Environment  
10 Act licence should be issued to  
11 Keeyask Hydropower Limited Partnership  
12 for the Keeyask project. Should the  
13 Commission recommend issuance of a  
14 licence, any conditions should be  
15 included in the recommendation.  
16 Obviously, those would be conditions  
17 about mitigation based on relevant  
18 evidence, about what the environmental  
19 impacts are. The Commission's  
20 recommendation shall incorporate,  
21 where appropriate, the principles of  
22 sustainable development and the  
23 guidelines for sustainable development  
24 as contained in the sustainable  
25 development strategy for Manitoba."

1                   As you know, those principles and  
2 guidelines for sustainable development which are  
3 part of your explicit terms of reference are  
4 Manitoba law. They are appendices or schedules to  
5 the Sustainable Development Act.

6                   And what are some of those principles?  
7 I won't go through the specifics under the Act,  
8 but I will just list them here quickly for the  
9 sake of time. Some of those principles are  
10 properly looking at all effects of environmental  
11 decisions and economic decisions, balancing  
12 economic with environmental health and social  
13 effects, seeing Manitobans as caretakers today  
14 taking care of the environment, not just for the  
15 present, but for the future generations.  
16 Balancing today's decisions with tomorrow's  
17 effects.

18                   Then the guidelines portion, which is  
19 schedule B to the Act, is a bit more process  
20 oriented, and it talks about providing due process  
21 for those affected by decisions. And that's part  
22 of what we are saying this is about today, is  
23 about due process. And importantly, encouraging  
24 and facilitating the improvement and refinement of  
25 information about environmental, social and human

1 health.

2                   So that's one of the guidelines that  
3 is part of your mandate, to encourage and  
4 facilitate the improvement and refinement of  
5 information about environmental, social and human  
6 health.

7                   You, the Commission, have the  
8 authority to ensure that proper information and  
9 evidence is before you in order to complete your  
10 mandate under the terms of reference, and your  
11 statutory role.

12                   Now, what Peguis is saying in its  
13 motion is that you actually have a procedural  
14 obligation under the rules of natural justice, the  
15 common law rules of natural justice that apply to  
16 the proceedings of tribunal's such as yours. I  
17 know you are familiar with the Prasad case, you  
18 quoted it yourself in your decisions in Bipole III  
19 when you allowed adjournments to proceed. You are  
20 the experts within the framework of the authority  
21 that is provided to you under the act and under  
22 your terms of reference.

23                   The question is, how do you exercise  
24 the authority that has been given to you in a way  
25 that's procedurally fair? And Peguis is saying

1 that what is procedurally fair is to ensure that  
2 you have all of the relevant evidence before you  
3 to make the report and recommendations that you  
4 need to make on Keeyask. And the adjournment that  
5 we are seeking is for the purpose of ensuring that  
6 you have the full and proper record, so that the  
7 public can really understand what the impacts of  
8 the Keeyask will be as it relates and is  
9 interconnected to the overall picture of  
10 cumulative effects.

11 As you know, you have the authority to  
12 adjourn a proceeding. I won't take you through  
13 the specifics of your process guidelines, but you  
14 have used that authority before. And in Bipole  
15 III, you decided an adjournment was required so  
16 that you could complete an addendum to the EIS.  
17 You adjourned the hearings from November to March  
18 in order to ensure that full and complete  
19 information was on the record before the panel and  
20 was able to be engaged with and reviewed by the  
21 participants.

22 Here we are asking you for the same  
23 thing essentially. Structure the hearing schedule  
24 so that you can make sure that all of the relevant  
25 and pertinent information is before your panel and

1 subject to the scrutiny of participants in order  
2 for you to make good and thorough and proper  
3 recommendations to the Minister about what is  
4 appropriate for conditions for the project.

5           We put before you in our materials two  
6 legal cases that stand for the principle that  
7 administrative tribunals like yours have an  
8 obligation, as part of the common law principles  
9 of natural justice, to grant an adjournment where  
10 it is necessary for a full and proper inquiry to  
11 receive appropriate evidence. Now, one is the  
12 Prasad case, I know you have relied on it before  
13 because it stands for the principle that tribunals  
14 are masters of their own house in terms of their  
15 own procedures, and you relied on that in making  
16 your determination that you had the authority to  
17 grant an adjournment in Bipole III. But it is  
18 important to remember that that Supreme Court case  
19 in Prasad was also about specifically an  
20 adjournment request.

21           And I'm going to just quote to you  
22 from the Prasad case. The Prasad case is tab D of  
23 our materials, and I'm going to be looking at page  
24 569 to 570, just quoting a couple of paragraphs.  
25 So these are not the paragraphs that you quoted in

1 your Bipole III decision, these are more  
2 specifically about adjournment as a natural  
3 justice remedy. So on page 569 in the first  
4 column, the bottom of the first column, the last  
5 paragraph says:

6 "The power of an adjudicator to  
7 adjourn the proceedings is  
8 specifically addressed in section 35.1  
9 of the regulations and more generally  
10 in 113(e) of the Act."

11 So that was with respect to the immigration case  
12 they were hearing.

13 "The effect of these provisions is to  
14 confirm a discretion in the  
15 adjudicator, the exercise of which is  
16 guided by the general principle that a  
17 full and proper inquiry be held."

18 I agree with the statement made by Ludwinski in  
19 Canadian immigration law, and then the Supreme  
20 Court quotes and confirms the statements in this  
21 quote.

22 "The adjudicator is given discretion  
23 to determine whether an adjournment  
24 shall be granted, but of course this  
25 discretion is guided by the notion of

1 a full and proper inquiry. In other  
2 words, the discretion must be  
3 exercised in accordance with  
4 principles of fairness and natural  
5 justice."

6 And that's what the Saskatchewan teachers case is  
7 about as well, that was the following tab, tab E  
8 in our materials. And that was a case about a  
9 disciplinary proceeding for a teacher in  
10 Saskatchewan. And in that case the professional  
11 competence committee, the tribunal, had refused to  
12 allow an adjournment for the party to get more  
13 evidence, which was in that case a witness with  
14 relevant evidence. And the court overturned that  
15 decision and said that that was procedurally  
16 unfair and violated the principles of natural  
17 justice.

18 So I'm looking at paragraphs 5 and 6  
19 of that decision which are on page 3, so that's  
20 again tab E of our materials. So paragraph 5:

21 "Pursuant to Section 44 of the  
22 Teachers Federation Act, Ms. Demoisac  
23 has appealed to this court. While the  
24 notice of appeal has several grounds  
25 of appeal, there is only one with

1           which I need be concerned, namely that  
2           the committee in its inquiry acted  
3           contrary to the principles of justice  
4           in refusing to grant an adjournment  
5           for the purpose of procuring the  
6           attendance of a witness whose evidence  
7           was material, relevant and necessary  
8           for a just disposition of the  
9           complaint."

10       And then paragraph 6, I will skip to the second  
11       sentence:

12                 "In my opinion the professional  
13                 competency committee erred in refusing  
14                 to grant the adjournment to enable the  
15                 witness to be called as requested by  
16                 the appellant. Such refusal resulted  
17                 in an injustice to the appellant and  
18                 consequently the decision of the  
19                 executive should not stand."

20       Peguis says, similarly in this situation you have  
21       a request before you for an adjournment that would  
22       allow relevant evidence to be part of the record  
23       for this hearing and part of your assessment of  
24       the impacts of Keeyask and what recommended  
25       conditions should be part of the approval. You

1 need that evidence in order to properly complete  
2 the role that's outlined in your terms of  
3 reference and your statutory role, including your  
4 obligation to apply the principles and guidelines  
5 of sustainable development.

6           You have two choices, we suggest,  
7 procedurally. You can adjourn the commencement of  
8 the hearing or you can adjourn a later part of the  
9 hearing, for instance, at the end of the currently  
10 scheduled hearings, to allow the relevant evidence  
11 to be put into the record. You can decide now to  
12 include in the schedule a later adjournment that  
13 will allow the regional cumulative effects  
14 assessment to proceed, so that that evidence  
15 becomes part of the baseline information and  
16 evidence upon which you will make your  
17 recommendations for Keeyask.

18           The question is, when does it happen?  
19 No one can dispute now, after ten years of calls  
20 for regional cumulative effects assessment and  
21 finally the Minister saying it will be happen,  
22 that it has to happen. The question is when?

23           As you recommended in Bipole III, it  
24 should happen prior to any more approvals  
25 occurring for any more hydro projects. Peguis

1 says the time is now, and this is the hearing  
2 where that evidence should be integrated as  
3 relevant evidence, not after another one or two or  
4 three more hydro projects are approved and  
5 developed, not after another 10 years of calls for  
6 comprehensive assessment. The time is now and the  
7 door is open to you, and we say that you have the  
8 authority to take this next step, and to do so  
9 would be consistent with your expertise and with  
10 your mandate for this hearing, and with your  
11 statutory obligations under the Environment Act  
12 and the Sustainable Development Act. Thank you.

13 THE CHAIRMAN: Thank you, Ms. Land. I  
14 have a couple of questions.

15 You noted that our mandate says that  
16 we can attach conditions to the licence. Would  
17 you agree that a requirement or a call for a  
18 regional cumulative effects assessment as a  
19 condition to the licence would be within our  
20 mandate?

21 MS. LAND: Well, yes, in fact you have  
22 already done that, as you know.

23 THE CHAIRMAN: Yes, but that was a  
24 non-licensing recommendation, we clearly made it  
25 as that. If we were to make that as a licensing,

1 do you agree that could be within our mandate?

2 MS. LAND: If it is relevant to the  
3 evidence, if it is relevant to understanding what  
4 your mandate is, which is to ensure that there is  
5 a full public review of the environmental impacts  
6 of the project, so that full information is in the  
7 public record and scrutinized by the public, in  
8 order to understand what are appropriate  
9 mitigation measures, or perhaps modifications to  
10 the project, then, yes, I would say that would be  
11 within your mandate.

12 THE CHAIRMAN: Thank you. The second  
13 question, you've noted the adjournment as a result  
14 of a motion in the Bipole III process. That  
15 adjournment was made when we were well into the  
16 hearing process. In fact, the hearings had  
17 probably, you know, were three quarters complete  
18 by the time that issue came up, and we were  
19 already in an adjournment because of another  
20 issue. Would you agree that we could, if we  
21 proceeded with the hearings commencing Monday  
22 morning, and at some point in the proceedings we  
23 did determine that there was definitely a need  
24 for -- or this decision could be made at a later  
25 time in the hearing process?

1 MS. LAND: Well, as you noted yourself  
2 before in Bipole III, relying on Prasad, you are  
3 the masters of your own house in terms of your  
4 procedure to get before you what you need to  
5 fulfill your role. The key issue here is, how  
6 does this relevant evidence get integrated into  
7 this hearing? So we are saying, if you proceed  
8 with the hearings on Monday, obviously you are in  
9 the situation of fulfilling procedural obligations  
10 as well, to ensure that there is a fair process in  
11 terms of not allowing there to be undue delays.  
12 We are saying there won't be an undue delay to do  
13 this.

14 Manitoba, the government has already  
15 said that it will happen. Manitoba Hydro has  
16 already said in its response, well, we have  
17 already begun to engage, there is already,  
18 according to what Manitoba Hydro or the proponent  
19 is saying, there is already a ball rolling out  
20 there. So we are saying, ensure that that process  
21 that has been committed to produces the  
22 information that is relevant to you for this  
23 proceeding.

24 Is that needed up front? You know, I  
25 would say what we know is it is not there in the

1 record. It is definitely not there in the record  
2 now. One way or the other it has got to be there.  
3 If you make a decision now to adjourn, either  
4 upfront or to say, okay, we are going to start  
5 with the beginning of the hearings and either  
6 reschedule some of the cumulative effects  
7 assessment evidence, or come back to it, that that  
8 would be appropriate to say, you know, at a  
9 certain point before you conclude your hearings,  
10 before you close the door on the evidence, to get  
11 this evidence in so it can be integrated into your  
12 decision making.

13 THE CHAIRMAN: Thank you. Panelists,  
14 any questions? Thank you very much.

15 Just before we -- well, as you are  
16 coming to the table, I just noted, I think my  
17 caffeine hadn't kicked in when I commenced the  
18 morning process, I failed to introduce the panel.  
19 And although I think most, if not all, of you in  
20 the room have been in other meetings with this  
21 panel, I should do that for the record.

22 My name is Terry Sargeant, I'm the  
23 chair of the Clean Environment Commission, as well  
24 as the chair of this panel. Serving with me on  
25 this panel are Jim Shaw, Judy Bradley, Reg Nepinak

1 and Edwin Yee.

2 Having done that, I will now turn the  
3 mic over to the partnership, the proponent.

4 Sheryl Rosenberg is going to speak for them.

5 MS. ROSENBERG: Thank you, Mr.  
6 Sargeant. For the record my name is -- are we  
7 good now?

8 THE CHAIRMAN: You are good now.

9 MS. ROSENBERG: Well, I do need a  
10 minute just to get my materials organized, forgive  
11 me. I find that I'm too short for the table, is  
12 it okay if I stand?

13 THE CHAIRMAN: Do whatever you like.  
14 No problem at all.

15 MS. ROSENBERG: Good morning. My name  
16 is Rosenberg, for the record, and I'm here this  
17 morning as counsel to the Keeyask Hydropower  
18 Limited Partnership, which as you know is  
19 comprised not only of Manitoba Hydro, but of four  
20 First Nations, Tataskweyak Cree Nation, War Lake  
21 First Nation, acting together as the Cree Nation  
22 partners, York Factory First Nation and Fox Lake  
23 Cree Nation. That is the proponent that is before  
24 you this morning.

25 My friend started with a glass in her

1 hand, and she said to you that the proponent of  
2 this project sees the effects of Keeyask as -- the  
3 glass is not empty, because I put water in it, but  
4 as an empty glass.

5           The first thing I want to say to you,  
6 Commissioners, is nothing could be further from  
7 the truth. The partnership has conducted a  
8 cumulative effects assessment of this project, and  
9 it has done so in accordance with the terms of  
10 reference for the assessment that were given to  
11 it. It has done so keeping in mind the  
12 recommendations that you made as a result of the  
13 Wuskwatim hearings. And the proponent fully  
14 expects you to test that evidence, to listen to it  
15 carefully, and to make your own decision as to  
16 whether that evidence satisfies you in terms of  
17 the cumulative effects of this proposed project.

18           Now, a good deal has been said about  
19 the fairness of this process, and I want to make  
20 some comments to you about the fairness of this  
21 process and what is required for the conduct of a  
22 fair administrative hearing by a body of this  
23 nature, which I'm sure is not news to you that my  
24 view is that this body is not the same sort of  
25 body that was making a decision on removal of a

1 person from this country as was in the Prasad  
2 case, or the taking away of a person's licence to  
3 practice their profession, as was the case in the  
4 other case that my friend put before you. You do  
5 have a very important role, but it is a different  
6 sort of role.

7                   This Commission has set a reasonable  
8 and fair process that provides for a timely  
9 hearing concerning the proposed project. That  
10 process has been in accordance with your past  
11 practice for major projects. Everyone who is a  
12 participant in this hearing has had lots of time  
13 to prepare. It has been one and a half years  
14 since the EIS for Keeyask was filed. It has been  
15 almost a year since the Minister issued the terms  
16 of reference calling for this hearing.  
17 Participants have had the opportunity to apply for  
18 and receive funding, to retain experts, to retain  
19 counsel, to set aside time out of their busy  
20 schedules to come to this hearing and speak to you  
21 about what is on their mind about this proposed  
22 project.

23                   You've provided for two rounds of  
24 information requests. And you set the date for  
25 this hearing back in April, so people have had

1 four months to prepare.

2 Fairness, in the proponent's  
3 submission, means timeliness as well. And you  
4 have set out a process that provides for ample  
5 time, but a timeliness schedule which is fair to  
6 the proponent and to everyone else who is prepared  
7 to attend this hearing, not just the ones with  
8 lawyers, and not just the ones with experts, but  
9 everyone who is prepared to come and speak to you.

10 I want to reflect again on what my  
11 friend said about the nature of the role and  
12 having people blow off steam. I think that is a  
13 cavalier way of expressing a very, very important  
14 function that the Manitoba Legislature has  
15 provided for. When the Clean Environment  
16 Commission is asked to hold a public hearing, it  
17 is a very important process in participatory  
18 democracy. When you reflect on what happens in  
19 many parts of the world, there are not many places  
20 where ordinary citizens without counsel and  
21 without experts behind them, and without money,  
22 can come and speak their mind on matters of  
23 environmental public importance, and have an  
24 impartial body listen to their thoughts and  
25 feelings, and consider what they have to say, and

1 then provide recommendations to a decision maker  
2 that reflects that contribution that people have  
3 had the opportunity to make. It is an important  
4 role, and it is provided for in the  
5 interpretations and intent and purposes section of  
6 the Environment Act.

7 My friend took you to section 6 and  
8 that was proper, but she didn't take you to  
9 section 1(1)(d), which explains that one of the  
10 purposes of our Act is to provide for public  
11 consultation in environmental decision making,  
12 while recognizing the responsibility of elected  
13 government as decision makers. Both things, we  
14 understand that the government is the decision  
15 maker, but we do intend for people to have a fair,  
16 impartial way to state their feelings about major  
17 projects. And you are it. That is a very serious  
18 and important role.

19 So what is my friend asking you to do?  
20 She is asking you in reality to adjourn for an  
21 indefinite period of time to await the outcome of  
22 a study which is, in fact, outside the scope of  
23 the materials which were designated as the subject  
24 matter of this hearing. And where do we find that  
25 scope? We don't have to look far. We find it

1 directly within the Minister's terms of reference  
2 which I know you are familiar with. But if you  
3 will bear with me, I will take you to just a few  
4 different sections of the terms of reference.

5 I'm looking at page 1, on the first  
6 paragraph the Minister recites for you the steps  
7 that had been taken already prior to you holding  
8 this hearing. Firstly, the partnership filed an  
9 Environment Act proposal. And secondly, it filed  
10 a draft scoping document, and that scoping  
11 document outlined the proposed scope for the  
12 Environmental Impact Statement. That scoping  
13 document was subject to a technical advisory  
14 committee review and a public review period.

15 Some of you are more familiar than  
16 others with the role of the technical advisory  
17 committee, but that's also an important function  
18 in our government. The administration has experts  
19 within it who are charged with different roles,  
20 and one of their roles is technical review of the  
21 materials that come in, and technical  
22 recommendations on what should be the components  
23 of the EIS.

24 And in this case, the TAC was  
25 comprised of both Provincial and Federal

1 regulatory members, because this assessment had to  
2 be conducted cooperatively with the Federal  
3 Government, under our process and the agreements  
4 that the two governments have made. All of that  
5 is set out in your terms of reference.

6 As well, the first bullet under the  
7 exact terms of reference are that you are to  
8 review the EIS, including the proponent's public  
9 consultation summary, and you are cautioned that a  
10 detailed technical review will be done by the  
11 Provincial and Federal specialist agencies who are  
12 members of the TAC. In fact, that review now has  
13 been done and we have passed that stage in the  
14 process. You are asked to consider the documents  
15 that flowed out of that review in this hearing.

16 Now, what does that say? The role of  
17 this Commission could have included a public  
18 consultation process on the terms of reference for  
19 the EIS.

20 Mr. Sargeant, you may remember that  
21 that happened in the Wuskwatim process. I don't  
22 remember whether you joined the Commission after  
23 that had happened already --

24 THE CHAIRMAN: After.

25 MS. ROSENBERG: After -- but

1 nevertheless you understand that that's a process  
2 that can be provided for, but it wasn't in this  
3 case.

4           The terms of the EIS included, as I  
5 know you know, a project specific cumulative  
6 effects assessment of the proposed project. That  
7 is wholly within your mandate to review. You must  
8 considered that evidence. You must decide for  
9 yourselves whether you are satisfied that it fully  
10 reflects the effects of the Keeyask project, and  
11 you must decide whether people in the public have  
12 had a chance to comment on that in a fair way.  
13 That is your role and that is your mandate.

14           So my friend is asking you to adjourn  
15 for an indefinite period of time to await the  
16 results of a study which are outside the scope of  
17 this hearing. You would be thinking about that  
18 after you've completed the hearing. If,  
19 Mr. Sargeant, you follow through with the question  
20 that you asked, can you do it at any time? You  
21 would be thinking of it later.

22           But whose job is that? And I think  
23 you know that it is the position of the  
24 partnership that is the Minister's job. It is the  
25 Minister who decides. It is the Minister who

1 accepts all of the impacts from the various  
2 streams of information and then makes a decision.  
3 And any expansion of the scope of assessment that  
4 is to be done by the proponent of this project is  
5 outside the power of the CEC to order. And what  
6 you are being asked to do, make no mistake, is to  
7 order a change in the terms of reference for the  
8 EIS.

9           So what does fairness require? The  
10 date for this hearing has been known for four  
11 months. My friend and her client have had an  
12 opportunity, the same opportunity as everyone  
13 else, to prepare. Everyone has used it, everyone  
14 has prepared, the process has not been easy or  
15 inexpensive for anyone. Fairness demands that the  
16 CEC's procedures be followed and the hearing  
17 proceed as planned.

18           Now, much has been said about the  
19 intention of the CEC reflected in the Bipole III  
20 report. I want to make a few comments to you  
21 about that. You set the Keeyask date in April.  
22 You issued the Bipole III report in June. The  
23 report did not suggest that any hearings that were  
24 currently scheduled and already to be heard before  
25 you be delayed.

1                   Secondly, your recommendation for  
2 regional cumulative effects assessment was  
3 acknowledged to be a non-licensing recommendation.  
4 In my submission that means you understood very  
5 well what the difference was between a licensing  
6 recommendation and a non-licensing recommendation.

7                   Nor at that time, Mr. Sargeant, did  
8 you ask the Minister to clarify or amend the terms  
9 of reference, although I know you all understand  
10 that the terms of reference invite you to do that  
11 at any time that you are in doubt, you didn't do  
12 it.

13                   Now, what about the Minister's  
14 intention when he issued the Bipole III licence?  
15 The Minister also said nothing to you about  
16 delaying the Keeyask hearing. If he had wanted  
17 you to do that, all he had to do was write to you  
18 and say so. That was not his intention. And if  
19 you read some of the material that's been filed in  
20 support of basically the same motion by both  
21 Peguis and Pimicikamak, you will see that the  
22 study that they have in mind is not a study that  
23 will take months to complete, it is a study that  
24 would take years to complete. It would take  
25 careful scoping, review of historical information,

1 consultation with many communities along the route  
2 of the Churchill River Diversion and the Lake  
3 Winnipeg Regulation. It will encompass massive  
4 numbers of projects, and much, much time over a  
5 long past, and perhaps field studies as well. We  
6 are not talking about minutes or hours or days or  
7 weeks, we are talking about years.

8                   Granting this request would mean  
9 effectively the termination of this hearing  
10 process without hearing from members of the public  
11 who wish to participate, who are entitled to  
12 participate to come and speak their mind, without  
13 counsel, without technical advisors, but to say  
14 what is on their mind. I submit that what my  
15 friend is asking you to do is the very opposite of  
16 what the Act and the Minister's terms of reference  
17 intend.

18                   And before I stand down I want to say  
19 a word or two about the content of the material  
20 that my friends have offered in support of this  
21 motion. And I submit to you that it falls into  
22 three categories. One is the very sort of  
23 submission that should be made at this hearing  
24 itself. I understand the feelings that were  
25 expressed by the representative of Peguis First

1 Nation. They are heartfelt and they should be  
2 stated at the hearing itself.

3           Secondly, the allegations about past  
4 impacts from past projects that are owned mostly  
5 by Manitoba Hydro. Aside from impacts of Keeyask  
6 and whatever Keeyask might do, there has been a  
7 good deal of material filed about the impacts of  
8 existing and past projects. Those allegations,  
9 with respect, are entirely outside of your  
10 jurisdiction.

11           The excerpt from the standing  
12 committee testimony of Mr. Sutherland points out  
13 that a claim has been made in court in relation to  
14 some of those allegations, and that is where those  
15 issues will have to be tested.

16           Thirdly, impacts on the exercise of  
17 Aboriginal rights and title and Treaty rights,  
18 both the moving parties before you today have  
19 access to a Crown consultation process which they  
20 can use to discuss those types of concerns. That  
21 is their prerogative and that is the forum that is  
22 proper for those allegations. The second last  
23 paragraph of the Minister's mandate addresses that  
24 directly. I invite you to take a look at it.

25           In conclusion, the CEC's advice to the

1 Minister will be considered along with advice from  
2 a number of other sources; the Crown consultation,  
3 of which I just spoke, the technical advisory  
4 committee, including technical experts from both  
5 levels of government; the government's policy, and  
6 views about what is in the best interests of the  
7 people of Manitoba, and any other source that the  
8 Minister considers appropriate. If he thinks it  
9 is appropriate to wait for the regional cumulative  
10 effects assessment, he certainly may do so. He  
11 certainly may consider the result of the need for  
12 and alternatives to assessment, which he has asked  
13 another body to hold. The point is,  
14 Commissioners, that the Minister decides.

15 Subject to any questions that you may  
16 have, those are my comments.

17 THE CHAIRMAN: Thank you,  
18 Ms. Rosenberg. I have a couple of questions. You  
19 referred to the terms of reference, and you read  
20 on to the record that a detailed technical review  
21 will be done, et cetera, by the TAC members, and  
22 that such documents should be considered by the  
23 Commission. Are you indicating that it is not  
24 open to the Commission to engage in detailed  
25 technical reviews of the EIS?

1                   MS. ROSENBERG: Mr. Sargeant, I think  
2 you have a specialized function, and that is to  
3 take the information that's been prepared in the  
4 context of the EIS, to consider it carefully. You  
5 certainly may, and you have done, you have  
6 retained advice of your own to help explain that.  
7 The nature of your body is a citizen's body,  
8 right? Some of you have legal expertise, you  
9 happen to have one member right now who does have  
10 some technical expertise and background. And  
11 that's fair and appropriate, and it is fair and  
12 appropriate for you to retain advisors of your  
13 own.

14                   What is not fair and appropriate is to  
15 reset the terms of the assessment, to extend the  
16 terms of the assessment, which would require more  
17 work, more field work to be done, and then to set  
18 that as a requirement. That is not your  
19 prerogative. Does that help?

20                   THE CHAIRMAN: Yes.

21                   MS. ROSENBERG: May I just add a  
22 comment? In terms of the review and understanding  
23 of the documents that have been prepared, with the  
24 help of technical advisors, my answer to you is  
25 yes. Yes, you are entitled and encouraged and

1 required to do that.

2 THE CHAIRMAN: And it has been our  
3 practice from time to time, often before the  
4 hearing process, to send the proponent away to do  
5 further analytical work. Do you think that's  
6 within our jurisdiction?

7 MS. ROSENBERG: I think it is within  
8 your jurisdiction provided that it stays within  
9 the terms of reference that were set for this  
10 assessment.

11 THE CHAIRMAN: Thank you. So you are  
12 suggesting that if we were to ask for the  
13 proponent to go away and do a regional cumulative  
14 effects assessment now, that would exceed our  
15 jurisdiction?

16 MS. ROSENBERG: Indeed, that's my  
17 submission.

18 THE CHAIRMAN: Thank you. You've also  
19 suggested that it would take years to conduct and  
20 complete a regional cumulative effects assessment.  
21 Manitoba Hydro, which is the principal partner in  
22 the proponent's partnership, surely has an  
23 exhaustive amount of information in their database  
24 already. I mean, just going back to Wuskwatim,  
25 they did do an environmental assessment on

1 Conawapa back in the late '80s, early '90s,  
2 leading up to that review process, which died on  
3 the vine for other reasons. And much  
4 environmental review has been done throughout a  
5 good bit of the region in the last two decades.  
6 Why would they need to go out and do a lot of new  
7 field work and seeking new information? Couldn't  
8 a good consultant do a pretty good cumulative,  
9 regional cumulative effects assessment using the  
10 in-house information?

11 MS. ROSENBERG: Mr. Sargeant, I  
12 think --

13 THE CHAIRMAN: Go ahead.

14 MS. ROSENBERG: Mr. Sargeant, I think  
15 that the hearing itself is going to be a proper  
16 forum to discuss the vast array of information  
17 which, as you pointed out, has been available to  
18 the proponents in the preparation of the EIS and  
19 in the material that they have prepared to come  
20 before you.

21 The nature of the cumulative effects  
22 assessment that has been done is a proper subject  
23 for the hearing. And I think that when we get to  
24 the meat of this subject matter, and you hear the  
25 extent of the information that the proponent has

1    been relying on in terms of the more than 40-year  
2    record, the very many studies that have been done,  
3    and the way that material has been used in the  
4    context of this proponent's assessment of this  
5    project, I dare say you will be pleased with that  
6    product.  And the time to assess that is after  
7    you've had an opportunity to hear the proponent  
8    explain it and ask the questions about it.

9                   I agree with you that there is a vast  
10   array of material, and I think that you will find  
11   that much of it has been used in the preparation  
12   of this assessment.

13                   THE CHAIRMAN:  I wasn't referring to  
14   this assessment, or the Keeyask environmental  
15   assessment alone.  I was thinking of the regional  
16   cumulative effects assessment, that Hydro has  
17   information covering most of the Nelson River sub  
18   watershed that we referred to in our Bipole III  
19   recommendation.

20                   MS. ROSENBERG:  I agree with you, and  
21   I think you will hear that discussed at the  
22   hearing.

23                   THE CHAIRMAN:  Okay.  I think that's  
24   all I have.  Other panelists?

25                   MS. ROSENBERG:  If I may, I will

1 answer directly the question that you put to my  
2 friend about whether you could include that as a  
3 non-licensing -- as a licensing recommendation.

4 THE CHAIRMAN: Go ahead.

5 MS. ROSENBERG: Okay. I think that in  
6 your licensing recommendations you can put in the  
7 list anything that you think that the Minister  
8 could write fairly into the terms of the licence.  
9 And I think many of the licences that have been  
10 issued over the past and will be issued in the  
11 future can contain requirements for a proponent to  
12 collect additional information, provided that the  
13 decision maker is of the view that it is relevant  
14 to the ongoing environmental management of that  
15 project. So anything that's within the scope of  
16 the management of that project, or could affect  
17 the mitigation measures for that project, or the  
18 future impacts of that project, is a proper term  
19 to be included in the licence. And you may make a  
20 recommendation for the collection of any  
21 information which you feel, at the end of the day,  
22 is material to that licence.

23 THE CHAIRMAN: Now, would you agree  
24 that it would be open to us again to make a  
25 non-licensing recommendation, reminding the

1 Minister of our Bipole III recommendation and his  
2 acceptance of it?

3 MS. ROSENBERG: You are free to do  
4 that, sir. And as well my friend didn't take you  
5 to the other parts of section 6, which refer to  
6 the very many duties that the Commission can take  
7 on of its own motion. You are not limited in your  
8 scope of hearings to the very specific terms of  
9 reference that are given to you for specific  
10 projects.

11 I think, Mr. Sargeant, you know that  
12 you can call a hearing on your own motion if you  
13 are of the view that you want to re-examine  
14 whether the COSDI report could be or should be  
15 implemented, or how sustainable development should  
16 work in this province, or how the environmental  
17 impact assessment process should be looked at as a  
18 matter of policy by the government in the future,  
19 you are so free to do that.

20 THE CHAIRMAN: Thank you. When we  
21 have a bit of spare time between all of these  
22 Hydro projects and partnership projects, I may  
23 well do that. Thank you, Ms. Rosenberg.

24 MS. ROSENBERG: Thank you. Do your  
25 colleagues have any questions?

1 THE CHAIRMAN: No.

2 MS. ROSENBERG: Thank you.

3 THE CHAIRMAN: Ms. Land, rebuttal?

4 MS. LAND: Thank you. Panel members,  
5 I have just a few rebuttal points to pick up on  
6 and to respond to what was just argued before you.

7 So, counsel for the partnership has  
8 argued before you on their response that the  
9 cumulative effects assessment has already  
10 happened, it is in this report, no need to go any  
11 further. And I would say to that, it is important  
12 to remember that we are really talking about  
13 different cumulative effects assessment. I know  
14 that you get this because you have made  
15 recommendations about the need for a regional  
16 cumulative effects assessment. But what we are  
17 saying is to properly understand the cumulative  
18 effects assessment that was done in this report,  
19 there needs to be integrated the relevant evidence  
20 of the regional, i.e., watershed based cumulative  
21 effects assessment.

22 My friend has argued that everybody  
23 has had lots of time to prepare, there is no need  
24 to delay now, that there are -- the procedural  
25 fairness says that you set a schedule, everybody

1 has been working to that schedule, which is true.  
2 But I would say what has changed is the Bipole III  
3 report in between, and the Minister accepting  
4 that. The affirmation from the government that it  
5 is their intention to ensure that regional  
6 cumulative effects assessment occurs prior, as is  
7 its principle, it should happen prior to any  
8 further approvals on Hydro projects. That's what  
9 you recommended as your non-licensing  
10 recommendation, it should happen prior to any more  
11 approvals. That's what the Minister said he was  
12 accepting. And then he started to roll the ball  
13 out on that with discussions with the proponent,  
14 particularly with Manitoba Hydro.

15 My friend is telling you that we are  
16 asking for an indefinite delay to await some study  
17 that will take years to prepare. As I noted in my  
18 submissions, we understand that you are trying to  
19 balance different procedural fairness issues here.  
20 One is the need to ensure that there is timeliness  
21 and that there is not undue delay. That's why we  
22 are saying an adjournment is an option that has  
23 several different possibilities. You may adjourn  
24 up front, we understand that you may have some  
25 constraints because you already set the schedule

1 for the hearings, everybody is ready to start  
2 rolling on Monday. So that's why we suggested --  
3 really what we are talking about here is because  
4 it is about ensuring that you have the relevant  
5 evidence before you, don't close the end of the  
6 evidence submissions.

7                   So you are going to start into this  
8 process, we already know we are scheduled to go  
9 until at least December. That surely, if indeed  
10 Manitoba has started to communicate with the  
11 proponent about doing a regional cumulative  
12 effects assessment, that is an opportunity, if  
13 that ball is already rolling, for that process to  
14 start seriously to occur now. As you say, this is  
15 a proponent that has a long history of doing large  
16 projects with a significant amount of evidence  
17 that they should already have at their disposal,  
18 in theory, if they had been diligent about  
19 recording baseline information and so on. So we  
20 are not talking about an undue delay, we are  
21 saying, get the process going now so it can be  
22 integrated into this hearing, and that's an  
23 imminently reasonable thing to do, given how  
24 critical that evidence is.

25                   I would also point out that with

1 respect to the scoping document, that of course  
2 this is the first class three proposal under the  
3 Environment Act that has been subject to the  
4 scoping document process. And the roots of the  
5 scoping document are, of course, in the scoping  
6 that was required under the Canadian Environmental  
7 Assessment Act. And the principles of the  
8 Canadian Environmental Assessment Act are clear on  
9 what types of cumulative effects assessment is  
10 appropriate, i.e. broad cumulative effects  
11 assessment that's not bounded by space or time, to  
12 truly understand what the true scope of impacts  
13 are. So I would just encourage you to go back and  
14 look at the Canadian Environmental Assessment  
15 principles for proper cumulative effects  
16 assessment, because that was integrated into the  
17 scoping. Manitoba, essentially from what I could  
18 tell, adopted what are the requirements under CEA.

19           There are references made to the types  
20 of materials that were put before you, that one  
21 set of materials was submissions that should be  
22 made at the hearings. There is no doubt that my  
23 clients are going to be making submissions at the  
24 hearings about cumulative effects assessment. But  
25 what they are saying is that the evidence that

1 they want to be able to scrutinize needs to be, in  
2 order for them to properly respond, needs to be  
3 more widely based. They need to understand better  
4 baseline data on what the cumulative effects are  
5 on watershed bases in order to properly respond.  
6 There was a reference to whether or not Peguis was  
7 asking for some sort of compensation for loss, or  
8 that that needs to be a different process. I just  
9 want to be very clear. That's not what we are  
10 asking for here, we are not asking you to be an  
11 adjudicator whether there should be compensation  
12 for past losses, that's a different process. What  
13 we are saying is we need to have the proper  
14 environmental baseline data. That's a different  
15 issue.

16 So the other type of information that  
17 my friend mentioned, the third basket of  
18 information she mentioned was the Crown  
19 consultation. The Peguis First Nation is engaged  
20 in a Crown consultation process. These are  
21 parallel processes. I would say there are some  
22 clunkiness and some problems with the parallel  
23 Crown consultation processes side by side with  
24 environmental assessment. This is part of what we  
25 are learning to do as a result of how the law is

1 unfolding and the practice is unfolding in terms  
2 of Aboriginal consultation. But just because  
3 there is a Crown consultation process going on in  
4 addition doesn't somehow mythically strip out the  
5 fact that there is evidence of impacts on  
6 Aboriginal peoples, on hunting, on harvesting  
7 rights, on land rights and so on. That is still  
8 relevant evidence. It doesn't somehow allow you  
9 to strip that away in terms of saying that's part  
10 of the evidentiary basis that you look at in terms  
11 of impacts. It is just saying that for the  
12 purpose of ensuring that the Crown is able to say,  
13 yes, we have met our constitutional obligation to  
14 consult First Nations, there is this other process  
15 going on. Fine, that doesn't take away the  
16 relevance of Treaty rights and Aboriginal rights  
17 to the evidence that you are going to be looking  
18 at in this proceeding.

19                   Finally, I would just say, the bottom  
20 line of what I'm hearing the proponent say is,  
21 Clean Environment Commission, it is still not time  
22 to do this, put it off again, you can ask the  
23 Minister to address it later on, you can put it  
24 into some recommendations yet again like you did  
25 in Wuskwatim ten years ago, and in Bipole this

1 year. But we are saying no, you have the ability  
2 now, it is on the record, the Minister has said  
3 yes, he has accepted this is a recommendation.

4 I would say as a fallback position,  
5 you know, you do have the authority under the  
6 terms of reference to go back to the Minister and  
7 ask for clarification about the terms of  
8 reference. That's -- I will just read from you  
9 your terms of reference, which I know you are very  
10 familiar with, but just to remind myself again.  
11 The last page, the mandate of the hearings, second  
12 paragraph, again that was behind tab L of our  
13 materials:

14 "The Commission may at any time  
15 request that the Minister of  
16 Conservation and Water Stewardship  
17 review or clarify these terms of  
18 reference."

19 So that's also available to you as an option. But  
20 we are saying, you definitely have the authority  
21 now to adjourn the proceedings to make sure that  
22 you have the relevant evidence that you need to  
23 make your determinations in this particular  
24 hearing.

25 THE CHAIRMAN: Thank you, Ms. Land.

1 We will take a short break and come back at 10:30.

2 Are you are looking for an opportunity to rebut  
3 the rebuttal?

4 MS. ROSENBERG: Just the break.

5 THE CHAIRMAN: Okay. We will come  
6 back at 10:30.

7 (Recessed at 10:15 a.m. and reconvened  
8 10:30 a.m.)

9 THE CHAIRMAN: Could we reconvene,  
10 please? The notice of motion before us is brought  
11 by Pimicikamak. Ms. Kempton?

12 MS. KEMPTON: Is my mic on? I guess I  
13 wasn't hitting it proper. I'm Kate Kempton, legal  
14 counsel for Pimicikamak. The way we have  
15 structured this is David Lee Roy Muswaggon  
16 executive council member responsible for lands,  
17 natural resources and the Northern Flood Agreement  
18 will speak first. I will speak second in our  
19 opening submissions, and the Chief of the Nation,  
20 Cathy Merrick, will speak last. These are just in  
21 our opening submissions. I will reserve any  
22 comments on Manitoba Hydro's responses to the end,  
23 to our reply. We had originally had this divided  
24 into two motions and, therefore, I thought we had  
25 a bit more time. So we have been compressed. So

1 that's the way, if it is all right with Mr. Chair  
2 and the panel, that's the way we intend to do  
3 that.

4 THE CHAIRMAN: Fine.

5 MS. KEMPTON: David, you are on.

6 MR. MUSWAGGON: Good morning, ladies  
7 and gentlemen. My name is David Muswaggon. I'm  
8 the executive council member responsible for  
9 lands, natural resources, the Northern Flood  
10 Agreement and all consultation processes on behalf  
11 of Pimicikamak.

12 Pimicikamak is a Cree tribe with a  
13 particular territory they call home. With great  
14 courage and strength, and against odds and many  
15 obstacles that we have faced in 40 years or so, we  
16 have been telling the truth about the devastating  
17 environmental, social, cultural and economic  
18 impacts of Manitoba Hydro projects. It has always  
19 been our mandate to look at things holistically,  
20 because we are a holistic people, much like our  
21 land is holistic, you cannot separate the truth  
22 about the adverse effects from the Hydro projects.

23 We live in the middle of these impacts  
24 and are crushed by them every day. I have seen my  
25 people die and get hurt as a result of these

1 projects. Yet for years many people have refused  
2 to hear the truth. They prefer to believe Hydro,  
3 when it pitched the project as clean, green and  
4 renewable. But it is nothing but far from the  
5 truth. (Speaking Cree.)

6           When they pitched it as the greatest  
7 thing since sliced bread for Manitoba and for  
8 export markets, Pimicikamak would not back down in  
9 telling that truth. Even after Hydro sued us and  
10 shut down our Pimicikamak trust fund, the fund  
11 that allowed us to carry out our campaigns of  
12 truth, our people continue to suffer in silence  
13 today.

14           Now, here we are today, again wanting  
15 to know the truth, nothing but the truth. With  
16 the same truth, with the same plea, my people that  
17 I represent, the voices of the many that have  
18 suffered from Hydro development, we are saying  
19 please do not keep devastating our lands, our  
20 waters, our fish, our birds, our animals and my  
21 people. (Speaking Cree.)

22           We ask that people do not continue to  
23 blindly steam roll ahead with more big Hydro  
24 before the truth is discovered and shared for  
25 everyone to see. All Canadians, Manitobans

1    deserve that truth.  We cannot separate the facts,  
2    just like the land is with the water, the water  
3    with other natural resources.  It is what it is.  
4    We can discover and share that truth about all the  
5    ongoing cumulating impacts through a regional  
6    cumulative effects assessment if it is done right,  
7    not only within your limited scope, but it is also  
8    a responsibility under that Northern Flood  
9    Agreement.

10                    They said before they even talk about  
11    building other projects they would review and  
12    assess the damage to our land, to our environment.  
13    It seems to Pimicikamak that now we have a chance  
14    for our plea to be answered.  It seems that the  
15    tide is turning, but we keep our hopes low because  
16    they have been bashed in the past.  We hope that  
17    people in Manitoba are no longer willing to  
18    blindly accept bald assertions that this Hydro  
19    project is clean, green and renewable.

20                    It seems people really want to know  
21    and need to know just how massive hydro projects  
22    continue to affect us all.  We are all in it  
23    together.  We cannot approve one thing on one hand  
24    and not on the other.  It is one body or system  
25    that we are looking at.

1 Pimicikamak has always been where we  
2 are in our homeland. My elders used to say,  
3 (Speaking Cree), this is the place that sustained  
4 our way of life, our livelihood. But it has been  
5 turned upside down. My people are sick and dying  
6 because of ignorance. We welcome others into our  
7 homeland. It is time that those we welcome stop  
8 pillaging and looting and start respecting and  
9 carry on the responsibilities they have that was  
10 consented to by our elders under duress. And I  
11 want to say this in Cree. (Speaking Cree).

12 History is repeating, the same  
13 practices have not changed, regardless of how the  
14 environment is being impacted, build first,  
15 negotiate later. This is not acceptable, and it  
16 is not consistent even in Canada's own laws.

17 As a sovereign indigenous nation, we  
18 have our own. Manitoba knows that they hold this  
19 land in trust. They know so because they still  
20 have to come to my people to talk about such  
21 undertakings. (Speaking Cree.)

22 I thank you for listening to my  
23 opening statement, and this is just the tip of the  
24 iceberg of that truth. I will turn over the floor  
25 to our legal counsel. Thank you for listening.

1 MS. KEMPTON: Thank you, Mr. Chair,  
2 panel. The basic question that Pimicikamak has  
3 for the Clean Environment Commission today is will  
4 you stop this runaway train that has become hydro  
5 development in the north, without really any of  
6 us, including Hydro, really understanding what it  
7 is doing to the waters, the lands, the people, the  
8 animals. That's the question we bring to you  
9 today.

10 You know, there have been incremental  
11 decisions and movements toward understanding what  
12 is happening fully and completely once and for  
13 all, so that informed decisions, once and for all,  
14 can be made. As was pointed out by Ms. Land in  
15 her submissions for Peguis, there was the  
16 recommendation of this panel, or the Clean  
17 Environment Commission in the Wuskwatim hearings,  
18 there was the COSDI sustainable development  
19 committee recommendation about large watershed  
20 area assessments and planning, there was the CEC  
21 recommendations in Bipole III and finally the  
22 Minister's acceptance of that.

23 Those are incrementally getting us  
24 toward where we should have been, frankly, all  
25 along. In an informed world, a baseline full

1 scale assessment of what this entire integrated 35  
2 component and rising Hydro system was likely to do  
3 should have been done from the get go. Wasn't.  
4 We have incrementally been recognizing that and  
5 moving toward it. But in the meantime, every day  
6 big chunks of Manitoba's northern river system and  
7 the people who rely on it as their home forever,  
8 has been and forever will be their home, is  
9 washing away, is being lost. Can we afford more  
10 small incremental changes to get to where we all  
11 know, I think, that we need to be and should have  
12 been all along? We think not. And we say that  
13 the Commission not only can do what we are asking,  
14 not only should do what we are asking, as a moral  
15 imperative, but that you must do this under law.  
16 And I will get to that in my submissions.

17 Let's start with some fundamental  
18 premises first, as we submit them. One, the  
19 Manitoba Hydro project is not clean, green and  
20 renewable from Pimicikamak's and many other  
21 people's experience. This is a sales pitch, and  
22 one that has unfortunately been accepted or bought  
23 by many people for many decades. The reality of  
24 the devastation remained for decades hidden up  
25 north except to those like Pimicikamak, who live

1 and experience it every day.

2                   Two; Manitoba Hydro and the province  
3 have had for decades one single-minded focus,  
4 build more and more big hydro. It is almost like  
5 an obsession. But like all obsessions, it is  
6 based more on habit than reason. It is just let's  
7 plow on ahead.

8                   Three; for decades Manitoba Hydro, in  
9 Pimicikamak's view, held a special status in this  
10 province. It was, I would suggest, almost  
11 revered. It had a lot of control. It often  
12 wasn't questioned too hard and it often got a lot  
13 of what it wanted. But we see that changing, and  
14 changing a lot through this Commission.

15                   Four; by Manitoba Hydro's own  
16 admission, Manitoba does not need Keeyask for  
17 domestic supply for years to come, and Pimicikamak  
18 says maybe not at all. If we are to focus on  
19 demand side management and conservation and  
20 efficiency measures, maybe not at all. There is  
21 thus no need to hurry Keeyask along at this time.

22                   The CEC recognized a good chunk of  
23 this in the Bipole III hearings. I won't repeat  
24 what Ms. Land quoted from you in your Bipole III  
25 report, but just the fact that you recognized that

1 the large scale integrated Hydro project indeed  
2 had had profound impact, and was having a profound  
3 impact, and that as a result of this, we need to  
4 fully understand what is going on. We should do  
5 that before more is added to it, more is added to  
6 it and alters what is already going on.

7           The comments from Manitoba Hydro legal  
8 counsel in the Peguis motion are quite telling and  
9 I think this is the nub of it for Hydro. She said  
10 the allegations about past impacts are in the past  
11 and are not properly before this Commission. And  
12 as a result of that position that Hydro takes, it  
13 has therefore limited its cumulative effects  
14 assessment to very narrow focus. It ignores what  
15 in fact are not past impacts, but ongoing existing  
16 impacts. They started in the past from projects  
17 that were built in the past, but those projects  
18 stand there today causing impacts today, every  
19 day, to Pimicikamak and to all of us. The fact  
20 that Hydro views them as it has happened already,  
21 it is in the past, let's forget about it, we don't  
22 need to look at that, means that Hydro is not  
23 looking at that in its cumulative effects  
24 assessment. And we need to look at that across  
25 the entire breadth of what the Hydro project has

1 and continues to impact every day. That's the  
2 call for the regional cumulative effects  
3 assessment.

4 This is what you recognized in Bipole  
5 III and called for. The Minister of Conservation  
6 accepted this recommendation. This is crucial. I  
7 just about fell off my chair when I got emailed  
8 the letter that the Minister sent on August 14th  
9 to Hydro, acknowledging the acceptance of the  
10 government, through him, of that recommendation  
11 and that it would be implemented.

12 The CEC recommended no new licensing  
13 of any further hydro projects in the north, in the  
14 Nelson, until a regional cumulative effects  
15 assessment was done. And the Government of  
16 Manitoba, through the Minister, agreed. So too,  
17 by the way, does one of the project proponents.  
18 Fox Lake Cree Nation, in its environmental  
19 evaluation report submitted for Keeyask, at page V  
20 for five, there is a couple of page Vs, but it is  
21 the second one I think, says, and I won't turn you  
22 to it, I will just read from it.

23 "Fox Lake Cree Nation and Manitoba  
24 Hydro hold different theories of being  
25 that can give rise to different

1 theories of knowledge, values and  
2 value judgments, and ultimately truths  
3 about the natural environment. Our  
4 people define baseline as the  
5 condition of the land, waters and  
6 people prior to hydroelectric  
7 development which began in the early  
8 1960's. This is in contrast to  
9 Manitoba Hydro's baseline defined as  
10 the existing condition of the  
11 environment. Accepting the baseline  
12 as the conditions prior to any Hydro  
13 development is Fox Lake Cree Nation's  
14 view of how best to understand and  
15 assess how our people and our land and  
16 waters will be further impacted by the  
17 proposed Keeyask project. Fox Lake  
18 Cree Nation believes that it is the  
19 most appropriate and accurate way to  
20 understand and determine measures  
21 required for our community to reduce  
22 adverse impacts of Keeyask ...",  
23 et cetera.

24 This baseline analysis of what the  
25 environment was like before Hydro is what a

1 regional cumulative effects assessment would  
2 undertake, because that is the only way that one  
3 can understand what all of the cumulative impacts  
4 from this large integrated project have been and  
5 continue to be. So, in effect, Fox Lake was  
6 calling for a regional cumulative effects  
7 assessment. It pointed out that what Hydro has  
8 done in the Keeyask EIS, which it has done for  
9 other EAs of other Hydro projects, is to not use  
10 this baseline and not undertake this cumulative  
11 effects assessment, making its analysis thin,  
12 inappropriate and inadequate.

13                   The Winnipeg Free Press agrees too.  
14 In its editorial of September 16th this year, it  
15 is saying what Pimicikamak believes Manitobans  
16 have finally come to accept. He got some facts  
17 wrong about Pimicikamak's viewpoints on who would  
18 do the assessment, but nonetheless, it revealed a  
19 strong sentiment and need. The Free Press stated:

20                   "Manitoba Hydro has been rearranging  
21 the environment in Northern Manitoba  
22 for 50 years, diverting a major river,  
23 polluting lakes, building dams,  
24 flooding land, relocating Aboriginal  
25 communities, regulating Lake Winnipeg,

1                   destroying old ways of life and  
2                   disrupting wildlife. The cumulative  
3                   effects of developing hydro power have  
4                   had an enormous impact, yet it has  
5                   never been assessed as a whole.  
6                   Instead, Manitoba Hydro has conducted  
7                   piecemeal research into individual  
8                   projects, but they haven't even done  
9                   that very well, according to the Clean  
10                  Environment Commission. The  
11                  Commission has complained about the  
12                  province's poor work in assessing the  
13                  cumulative impacts of several projects  
14                  over the years, including the  
15                  Wuskwatim generation and transmission  
16                  projects, the Red River Floodway  
17                  expansion project, and the Bipole III  
18                  transmission project. But even if  
19                  Manitoba Hydro had done a credible job  
20                  on each of the 35 projects it has  
21                  undertaken in Northern Manitoba over  
22                  the decades, it would not add up to a  
23                  global study of the cumulative impact  
24                  of all of the disruptions and the  
25                  development."

1                   So where does that leave us today?

2    Yes, the Commission has, in the words of the Free  
3    Press, been complaining for years. It is now time  
4    for the Commission to act. You have the  
5    authority, the mandate, and we say the requirement  
6    under law.

7                   Clearly, in order for the entire  
8    environmental assessment approvals process for  
9    hydro projects and for Manitoba as a whole, to not  
10   look like a complete empty shell devoid of any  
11   substance or meaning, then the CEC should put the  
12   Keeyask hearings on hold now or later, to ensure  
13   that Keeyask isn't licensed until a regional  
14   cumulative effects assessment is done, to ensure  
15   that the information from such an assessment  
16   informs the EA for Keeyask and enables much better  
17   understanding, analysis and decision making as to  
18   whether Keeyask should be approved or not, and if  
19   so, under what conditions.

20                  You already know this, that's what you  
21   said in your Bipole III report. Otherwise, the  
22   Government of Manitoba's acceptance of your  
23   recommendation from Bipole III to have such an  
24   assessment before further licensing means nothing.  
25   It would end up being a cheap political promise,

1    which like so many others, ends up being broken  
2    due to expediency, laziness, lack of courage or  
3    all of the above.

4                    We don't believe this was the  
5    Minister's intent.  Don't let it be the effect,  
6    which would happen if Keeyask proceeds blindly  
7    along without the regional cumulative effects  
8    assessment happening before this EA is over.  The  
9    people of Manitoba deserve that.

10                   So the CEC can do this.  You have the  
11   authority to adjourn your proceedings for good  
12   reason.  The CEC should do this, you have  
13   recognized this yourself and stated this yourself  
14   in Bipole III.  You are not alone.  There are a  
15   number of examples of regional cumulative effects  
16   assessments in Canada.  And Manitoba's own  
17   sustainable development committee recommended this  
18   approach for the province.

19                   But finally we say, not only can you  
20   and should you do this, but you must do this under  
21   law.  Three laws that apply here:  The Environment  
22   Act, the rules of procedural fairness, and the  
23   rule of law.

24                   First, in accordance with the  
25   Environment Act, the Commission has to act to

1 effect its purpose. All of what you do must be  
2 carried out in accordance with and to effect the  
3 purpose of the Act. Section 1(1) of the Act says  
4 in part:

5 "The intent of this Act is to develop  
6 and maintain an environmental  
7 protection and management system in  
8 Manitoba which will ensure that the  
9 environment is protected and  
10 maintained...",  
11 et cetera.

12 Section 12(7) of the Act says:  
13 "A licence can only be issued if it  
14 contains conditions sufficient to  
15 ensure effective environmental  
16 management, otherwise it is to be  
17 rejected."

18 Thus the Commission, when conducting an  
19 environmental review, must be sure that it has  
20 evidence before it sufficient that the findings in  
21 its report and the decision of the Minister who  
22 will rely on this report will indeed be able to  
23 ensure that the environment is protected and  
24 managed in accordance with effective environmental  
25 management. That's the purpose of the Act.

1           The CEC doesn't hear evidence about  
2 just anything. You are not here hearing about  
3 polka-dot bikinis and hula hoops. You have to  
4 hear evidence sufficient for you to meet the  
5 purpose of the Act and to enable the Minister to  
6 do as well. Again, that is to ensure that the  
7 environment is protected and maintained in  
8 accordance with effective environmental  
9 management.

10           You found this to be the case in the  
11 Bipole III hearings when you said, and I quote:

12           "It is the task of the Government of  
13 Manitoba to do whatever is necessary  
14 to ensure that potential environmental  
15 impacts posed by development are  
16 avoided where possible and minimized  
17 and mitigated where not possible. To  
18 be able to do this requires that  
19 impact assessment be thorough, that  
20 analysis be comprehensive, and that  
21 conclusions be soundly based."

22           Therefore, there is no discretion that  
23 there must be this sufficient evidence and  
24 analysis, sufficient to meet the purpose of the  
25 Act. There is discretion on what constitutes this

1 sufficient evidence, but in this case that  
2 determination has already been made. You already  
3 found that such evidence needs to include that  
4 which would be gathered through a regional  
5 cumulative effects assessment. And the Minister  
6 has agreed.

7           This would provide information and  
8 enable analysis about what the impacts of Keeyask  
9 are likely to be, cumulative to those that are  
10 already going on across the area that the Hydro  
11 project, to which Keeyask would be added and  
12 integrated, are already occurring. This is  
13 necessary and relevant evidence and information,  
14 and the EA on Keeyask cannot proceed without it.  
15 For the CEC to complete the Keeyask environmental  
16 assessment without this evidence and analysis  
17 would be an error of law and jurisdiction.

18           Second, the law on procedural fairness  
19 in this case requires the same thing, that the  
20 necessary and relevant information be before the  
21 Commission in this EA for Keeyask. Conduct of  
22 proceedings that fail to allow parties to procure  
23 or access relevant and necessary information and  
24 evidence can be found to be a breach of procedural  
25 fairness. And that's stated in the Saskatchewan

1 Teachers Federation case that we provided.

2 Participants and the public need the  
3 opportunity to obtain and assess good evidence on  
4 the real and actual ongoing cumulative effects in  
5 order to know effectively the case to meet at  
6 these hearings about Keeyask, and what it will add  
7 to and alter. Without that full information, the  
8 participants and public, including Pimicikamak,  
9 will be denied the opportunity to comment in the  
10 hearings on the true cumulative impacts of  
11 Keeyask.

12 Further, the Commission has been  
13 mandated to incorporate the principles and  
14 guidelines of sustainable development in this  
15 review of Keeyask. These require, among many  
16 other things which Ms. Land hit on somewhat, that  
17 all Manitobans have access to adequate  
18 environmental information.

19 Third, the rule of law applies. This  
20 means that all subjects of the applicable law,  
21 including this administrative tribunal and the  
22 Minister, must abide by that law. Failure to do  
23 so calls into question the actual administration  
24 of justice and democracy itself.

25 The Environment Act and the law of

1 procedural fairness are the applicable laws here.  
2 In our submission, the CEC has no choice. Those  
3 laws mandate that necessary and relevant  
4 information about cumulative impacts that Keeyask  
5 would add to and alter must be before this  
6 Commission before a decision, a report is rendered  
7 and recommendations are rendered, and before a  
8 decision is made by the Minister.

9 In terms of the land use and occupancy  
10 study, the same issues and positions hold true  
11 with that. This is necessary and relevant  
12 information in respect of just exactly what  
13 Pimicikamak's connections to, values in, and uses  
14 in occupancy of its large traditional territory,  
15 which goes up into the study area of Keeyask are,  
16 and just how Keeyask cumulative, with the existing  
17 impacts from the existing Hydro projects, will  
18 affect that. We can not understand the impacts of  
19 Keeyask without knowing this critical information.

20 The fact that this happened to arise  
21 under the process of article 9 of the NFA is  
22 irrelevant, it could have arisen on the street  
23 corner, or under section 35, or here. It doesn't  
24 matter where the discussion about this arose.  
25 What matters is it is necessary and relevant

1 information for this EA, for Keeyask, and it needs  
2 to happen as well before any report and decision  
3 is rendered on Keeyask.

4 The Chief will now make some  
5 concluding remarks.

6 CHIEF MERRICK: Good day to the  
7 Commission, I'm Chief Cathy Merrick of  
8 Pimicikamak. I am very happy to be here to be  
9 able to relay a message to you from my people and  
10 from my territory.

11 The court found that the  
12 reconciliation of Aboriginal peoples with the  
13 interest of Aboriginal peoples was at the core of  
14 the dispute, and that this reconciliation was also  
15 a part of the rule of law. I will speak to what  
16 the court said in my own words.

17 Pimicikamak is an Aboriginal people.  
18 We have always been here. We were here when  
19 people arrived from other parts of the world and  
20 asked us if they could share our land and our  
21 resources. This is the very same land and  
22 resources that have been used, abused, taken and  
23 devastated by the hydro project.

24 The Pimicikamak offered to share the  
25 land, we offered to do this in good faith. We

1 trusted those who told us that they would not harm  
2 us and our lands.

3           When Manitoba Hydro first came to us  
4 and told us about their idea to build a hydro  
5 project, they said that things would not change  
6 much. They held up a pencil and said, your waters  
7 and your lives will not change more than the  
8 length of this pencil. We believed them. Our  
9 elders at that time believed them.

10           Our trust has been abused, our belief  
11 has been betrayed. The Hydro project has had and  
12 continues to have every day enormous impacts on  
13 us, our lands, our waters, our society, our  
14 cultural and our lives, the lives of our children  
15 and our grandchildren.

16           But it is important for you to stop  
17 thinking about us as separate from you. In this  
18 regard the Manitoba Hydro project has affected all  
19 of us and continues to do so. While we live in  
20 the middle of it, you too are deeply affected.

21           The environment does not respect  
22 artificial boundaries and categories. So what I  
23 hear the court saying is this: Please listen to  
24 us, we know. Please respect us, we deserve it.  
25 You are here because of us. And please do the

1 right thing for us and for you. In this case the  
2 right thing is clear, please just do it. That is  
3 the message I'm delivering from my people of  
4 Pimicikamak. Thank you.

5 THE CHAIRMAN: Thank you, Chief  
6 Merrick. I don't have any questions at this time.  
7 You did say you would have more submissions in  
8 your rebuttal so we may have some questions after  
9 that. Any of the panel have questions now? Thank  
10 you very much.

11 MS. ROSENBERG: Mr. Sargeant, my  
12 partner Bob Atkins is going to join me in this  
13 argument. Do you need another appearance or are  
14 you okay?

15 THE CHAIRMAN: I'm fine with that.  
16 State your names for the record and carry on.

17 MR. ADKINS: Bob Adkins, A-D-K-I-N-S.

18 THE CHAIRMAN: Go ahead, whoever is  
19 going to go first.

20 MS. ROSENBERG: All right.  
21 Mr. Sargeant, you have heard a good deal from me  
22 already. I would just want to make one comment in  
23 relation to the things you have heard from my  
24 friend. I want to point out to you and to the  
25 other Commissioners where Ms. Kempton found the

1 Fox Lake Environmental Impact Assessment report.  
2 And where she found it was inside the EIS that has  
3 been filed by the proponent of this project, which  
4 is not Manitoba Hydro, it is the partnership which  
5 includes Fox Lake Cree Nation.

6 The proponent wants you to read that  
7 report and wants you to consider everything in it  
8 and in the reports of the other First Nations who  
9 are members of this partnership. The proponent is  
10 Manitoba Hydro and the four First Nations. All of  
11 their points of view on cumulative effects  
12 assessment are reflected in the EIS, including the  
13 reports of each of those First Nations.

14 We invite you to read it, to consider  
15 it, to ask questions about it, and to put what you  
16 find in it in your reflections on this project.

17 That being said, I'm going to turn  
18 over the argument to my partner, Mr. Adkins, who  
19 will speak to you about the NFA and the role of  
20 Pimicikamak in relation to that.

21 MR. ADKINS: I have been involved on  
22 behalf of Manitoba Hydro for in excess of 30 years  
23 now, working in Northern Manitoba with First  
24 Nations, including the Cross Lake First Nation,  
25 Pimicikamak, who was here today just a short while

1 ago, and also the First Nations who form part of  
2 the partnership that, in fact, is now looking at  
3 doing the Keeyask project. It has been a large  
4 part of my life. It has been a very rewarding  
5 part of my life. I have learned a lot. And I  
6 certainly do respect the Cree positions that they  
7 advance, and I'm very interested in trying to  
8 fully understand what they are saying and how we  
9 properly institutionalize or implement that.

10           It was in part for that reason that I  
11 was extremely pleased to be involved in some of  
12 the agreements and principles that lead to the  
13 partnerships that we are now having bring forward  
14 these ideas for hydro development. And the  
15 information that comes forward from the partners  
16 is something that is going to be quite unique in  
17 terms of the materials that will be brought before  
18 this Commission, in terms of what are the effects  
19 of hydro development, how is it seen and perceived  
20 by the local people, how does it impact them? And  
21 it is part of the EIS that has been filed, it has  
22 been part of the environmental assessment that's  
23 been undertaken. And I think that is going to add  
24 a lot to the background, the information, the  
25 material that will be before this Commission in

1 considering this particular project.

2 Now, I am not a particular expert in  
3 terms of the Environment Act. I have read it, I  
4 have involved myself in it from time to time, but  
5 my learned friend, Ms. Rosenberg, is and she will  
6 speak to any of those issues far more eloquently  
7 than I can. I am, however, relatively familiar  
8 with the terms of the Northern Flood Agreement,  
9 and I am familiar with the particular study that  
10 my learned friend, Ms. Kempton, referred to that  
11 arose out of the article 9 processes under that  
12 agreement. And I would like to not repeat what  
13 my -- what Ms. Rosenberg has indicated, but rather  
14 to put most of my thoughts in terms of that  
15 particular aspect of this.

16 The article 9 process does fall under  
17 an agreement, an agreement that was entered into  
18 between Canada, Manitoba, Manitoba Hydro and the  
19 Northern Flood Committee. The Northern Flood  
20 Committee was a committee established by five  
21 First Nations, and represented the five First  
22 Nations during the negotiation and implementation  
23 in the earlier stages of the Northern Flood  
24 Agreement.

25 The Cross Lake band of Indians, as it

1 was then known, I think it is now properly called  
2 the Cross Lake First Nation, is a party to that  
3 agreement through the agency, through its  
4 representative of the Northern Flood  
5 Implementation Committee.

6 We, in dealing with this matter,  
7 because under that agreement there is an  
8 undertaking by Manitoba Hydro, it is not an  
9 undertaking by Canada or Manitoba, it is an  
10 undertaking by Manitoba Hydro that it will  
11 undertake bona fide consultation with bands that  
12 are part of that agreement before it proceeds  
13 with -- makes a decision to proceed with any  
14 future development.

15 Manitoba Hydro triggered that in 2001,  
16 as it relates to the Keeyask project that we are  
17 here today, it triggered it with the Cross Lake  
18 First Nation. It did not trigger it per se with  
19 other First Nations because there was a far  
20 different series of arrangements put in place  
21 under implementation agreements with the other  
22 First Nations that effectively sets out  
23 specifically how you deal with that consultation.  
24 But with the Cross Lake First Nation, it was  
25 triggered and notice was given to Canada and to

1 the Cross Lake First Nation of the intention to  
2 start planning towards doing a Keeyask project.

3           It started with a description of what  
4 the Keeyask project was going to be. And then the  
5 Wuskwatim project was also part of that notice,  
6 time was spent more on the Wuskwatim project than  
7 on Keeyask. In 2005, Manitoba Hydro endeavored to  
8 have the Cross Lake First Nation Pimicikamak come  
9 back to the table and work with Manitoba Hydro in  
10 looking at the Keeyask project in more detail.  
11 That was initially resisted by Pimicikamak, Cross  
12 Lake First Nation.

13           And I'm going to start using  
14 Pimicikamak at this point in time as opposed to  
15 combining the two together, because what has  
16 transpired, and being respectful of the people of  
17 Pimicikamak, they have looked at a self-government  
18 approach, their normal government, they have look  
19 looked at Pimicikamak as being their continuing  
20 Okimawin, their form of government that they would  
21 have. And the band which they still say exists,  
22 it does exist, is mostly an Indian Act creature  
23 and it deals with things on reserve and reserve  
24 lands, it deals with Canada it is the one that's  
25 funded by Canada. But the overriding government,

1 if you want, of those people would be Pimicikamak.  
2 And that has been confirmed by Pimicikamak  
3 representatives and it has also been confirmed by  
4 council resolutions from the Cross Lake First  
5 Nation or Cross Lake band.

6 So we began at one point with  
7 Pimicikamak representing the First Nation, and  
8 then subsequently that Pimicikamak was speaking on  
9 behalf of the First Nation. So the process,  
10 although we are now dealing with Pimicikamak,  
11 which name you will not find associated with the  
12 Northern Flood Agreement, is nonetheless part of  
13 the Northern Flood Agreement process.

14 Now, the other thing that you will  
15 note is that it is Manitoba Hydro that has that  
16 obligation. It is not the partnership, it is not  
17 the proponent that is here on the Keeyask project.  
18 It is Manitoba Hydro that had the obligation to  
19 talk about these types of future development. And  
20 although it wasn't the proponent, it is a major  
21 part of that proponent, and it did undertake that  
22 process with Pimicikamak in order to fulfill that  
23 obligation. It didn't try to pretend, oh gee, we  
24 are not doing that. It is part of that project  
25 and the start of that process.

1                   We have filed material, and I can go  
2 through it in more detail with you, we have  
3 actually put in material which we've identified  
4 that is already filed as part of the EIS, which  
5 shows the processes have been undertaken with  
6 Manitoba Hydro and Pimicikamak in terms of this  
7 particular project, the Keeyask project.

8                   This is over and above the public  
9 involvement processes, this is over and above the  
10 environmental assessment processes, this is  
11 actual -- these are arrangements that fall under  
12 the Northern Flood Agreement.

13                   When we began back in 2000, after  
14 Pimicikamak said, yes, they would come back to the  
15 table, we began looking at the effects of the  
16 project, Keeyask project, if it were to proceed,  
17 and efforts were made to find out from Pimicikamak  
18 people, what are the concerns that you have? What  
19 are the effects that you are concerned about? Do  
20 you have resource harvesters who harvest in these  
21 areas? Can we meet with resource harvesters? Can  
22 we meet with the community?

23                   Those were all effectively not  
24 responded to and we were not given permission to  
25 come into the community to have those discussions.

1 The position was we will take it back, the  
2 representatives that we were meeting with from  
3 Pimicikamak, we will advise our people about what  
4 you are doing. And if we are ready at some point  
5 in time, we may have you in to the community to  
6 speak, but not until then.

7                   When we first began the process there  
8 was no interest in looking at studies. We offered  
9 to bring studies forward and have the people that  
10 we were meeting with review those studies, to  
11 bring people who were involved in those studies.  
12 And the response we got from the community and  
13 there then legal counsel, it was not Ms. Kempton  
14 at that point in time, was, no, we are more  
15 interested in what system effects there may be.  
16 Because we are here just downstream of Jenpeg, and  
17 we are interested in what the system effects will  
18 be, as opposed to what is much further downstream  
19 in the Keeyask area where there are effects from  
20 Keeyask.

21                   So the efforts focused on that, and  
22 they also focused -- and the material is there --  
23 they focused on some of the past effects that had  
24 been felt by the Cross Lake people. And I'm not  
25 trying to diminish in any way those effects. The

1 idea that they have been ignored I think is wrong.  
2 I think that effectively there has been numbers of  
3 statements about the effects. There is a fairly  
4 significant amount of literature about the effects  
5 of past developments on the people at Cross Lake.  
6 And there has been many efforts and ongoing  
7 efforts to address those and to mitigate those,  
8 and they are done under the Northern Flood  
9 Agreement, and they are done with the four parties  
10 to the Northern Flood Agreement, the three Crown  
11 parties and the First Nations.

12 So there was no interest in looking at  
13 the actual effects of the Keeyask project, the  
14 direct effects. There was expressions that that's  
15 not an area that's particularly utilized by our  
16 people. We utilize the Cross Lake area, we  
17 utilize the Sipiwesk area, we don't utilize that  
18 area particularly.

19 When legal counsel changed for  
20 Pimicikamak at the beginning of 2010, there was  
21 some changes that occurred. We had just actually  
22 made a response to the Pimicikamak people, because  
23 they had said, we've told you our concerns. And  
24 so we actually went through all of our records of  
25 meetings we had and prepared a document where we

1 set out what we had understood or heard from them  
2 what their concerns were. And that's in the  
3 material that has been filed with you as part of  
4 our reply. And you can go through those and look  
5 at the types of things that their concerns are,  
6 and they relate to what's happening at Cross Lake,  
7 what's happening in their community in the areas  
8 that they had traditionally pursued their resource  
9 activities. There was, again, no indication at  
10 that time that there was interest in the Keeyask  
11 area.

12           Subsequent to that a new expert was  
13 brought in by Pimicikamak, Dr. Annette Luttermann  
14 and Dr. Luttermann was far more interested in the  
15 environmental assessment and what was transpiring  
16 with respect to the environmental assessment. So  
17 at that point in time, again being very respectful  
18 of Pimicikamak and what they wanted to look at and  
19 consider, Manitoba Hydro arranged with the  
20 partnership -- it is obviously major, it still has  
21 to work with its partners, that there could be  
22 representatives to come to the table to meet with  
23 Pimicikamak representatives, including Dr.  
24 Luttermann, and go through what the environmental  
25 assessment was doing, what sort of things had been

1 discovered, what was being looked at, the  
2 cumulative effects aspects, all sorts of aspects.

3 Documents were provided, some of them  
4 in draft. The VECs that were identified and the  
5 reason for those VECs were brought forward. There  
6 were experts in the various areas that came and  
7 spoke to the various groups of people that were  
8 there.

9 During the course of these  
10 discussions, we were interested, Manitoba Hydro  
11 was interested, in fact, we had been interested  
12 the whole time, what level of resource use is  
13 there, if any, in this area of direct Keeyask  
14 impacts that exist? And there was a discussion  
15 about having a study to look at that. And  
16 Manitoba Hydro then made a proposal, let's take a  
17 look at that as an area where we could do a study,  
18 and just confirm what had already been identified  
19 in a whole bunch of reports, again, which have  
20 been filed and listed for you, and confirmed by  
21 the partner First Nations, which this area is  
22 within their traditional area and where they are  
23 clearly resource harvesting, in terms of the  
24 amount of use by others. But it would be good to  
25 have that confirmation, absolutely, if we could

1 get that, that would be good. And a proposal was  
2 put forward by Manitoba Hydro, it was not prepared  
3 by Manitoba Hydro, it was prepared by consultants  
4 for Manitoba Hydro that put forward that approach.

5 That approach was presented and the  
6 Pimicikamak people said, no, we are not prepared  
7 to do that. We will not participate in that type  
8 of approach, it is too small, it doesn't deal with  
9 the larger issues that we want to deal with. We  
10 would rather look at our whole area and do it on a  
11 much broader scale.

12 Again, Manitoba Hydro being respectful  
13 of this issue said, all right, who would you want  
14 to do that? Because Pimicikamak was clear they  
15 would want to choose the consultant that would do  
16 the work, subject to Hydro's ultimate saying, you  
17 know, that's all right with us but they would be  
18 the ones choosing. They looked and proposed  
19 Tobias & Associates, which were people that  
20 Manitoba Hydro was aware of their reputation.  
21 Manitoba Hydro said they seem like reasonable  
22 consultants, let's have them in and let's talk  
23 about what has to be done and what they propose.  
24 That occurred.

25 There was then, Manitoba Hydro said,

1 we need to have a better understanding of exactly  
2 what is being proposed and the time parameters in  
3 which this can be done. And that was going to  
4 cost 15,000, actually \$200, I think the material  
5 says 15,000 but it is actually \$15,200 that was  
6 required for that. Manitoba Hydro had to look at  
7 this because what was being proposed verbally was  
8 a broader thing than related to Keeyask, so it has  
9 to involve more than just the Keeyask partners, it  
10 has to involve transmission people, it has to  
11 involve ARD, Aboriginal relations division. If  
12 you are looking at a broader scope to this, then  
13 who is taking responsibility? Who is going to  
14 provide money to fund it?

15 In the end result, Manitoba Hydro said  
16 we are interested in looking to see what that  
17 would look like, and they prepared and did provide  
18 funding for Tobias to proceed, but ultimately  
19 Tobias were not prepared to proceed, and  
20 subsequently Manitoba Hydro was requested to put  
21 in what information it did have in relation to  
22 this particular area, and in relation to where  
23 people of Cross Lake, the Pimicikamak people, did  
24 carry on their harvesting. And there was a very  
25 significant list of information that was brought

1 forward and is set out in our reply about studies  
2 that have been undertaken in terms of the areas  
3 where harvesting is done by Pimicikamak people.

4           It was shared with Pimicikamak, and  
5 Pimicikamak came back and had some suggested  
6 changes, some of which were incorporated. They  
7 also suggested additional studies, a couple of  
8 additional studies, one of which was I think  
9 incorporated as well, or referenced and looked at  
10 in terms of that material. That has all been  
11 filed as part of the material that will be before  
12 this Commission.

13           When it became clear that Tobias &  
14 Associates couldn't do it, there was another SVS,  
15 I think is the acronym for it, a group that would  
16 be able to do this. It wasn't as well known by  
17 Manitoba Hydro. But again Manitoba Hydro said,  
18 well, we can't make a decision on this unless we  
19 know in detail what is going to be done, and we  
20 need to know what it is going to cost. And  
21 Manitoba Hydro provided funding, \$17,000, plus  
22 taxes in this case, so that they could actually  
23 prepare a detailed work plan and budget of what  
24 would be done, which effectively is included in  
25 the materials that Pimicikamak filed.

1                   It is again much broader than what  
2    would have been involved in terms of looking at  
3    people carrying on activities within where the  
4    Keeyask project is going to have direct effects.  
5    It is very, very broadly based, and it actually  
6    involves traditional territory, which suggests it  
7    is quite a significant amount of land. I do not  
8    believe that the evidence that will ultimately  
9    come before us will support that that is current  
10   traditional use area, in other words, where people  
11   are currently from Pimicikamak carrying on their  
12   activities, but rather at the time of signing of  
13   the Treaties, these are areas that may have been  
14   represented by the head men of Pimicikamak. It  
15   goes right from Saskatchewan into Ontario, and it  
16   goes south into Norway House area, it goes north,  
17   it represents a fairly significant territory. And  
18   I -- nothing that we have seen other than this  
19   would suggest that that's been significantly  
20   harvested continually by Pimicikamak today. If  
21   you look back ten years, 15 years, it is much  
22   broader. But that was the area that they wanted  
23   to look at.

24                   Manitoba Hydro has not responded yet  
25    whether we -- whether it is prepared to fund that.

1 It has, however, undertaken a technical review of  
2 that, and it is providing or has provided, I'm not  
3 sure where it stands right now, a response to that  
4 particular document, which it has not rejected it,  
5 it has raised some concerns or issues, one of  
6 which is the role Hydro would play in how this  
7 develops, which was always a concern from Hydro's  
8 perspective. Is it just going to be done away  
9 from Hydro? But it is for the same reasons that  
10 have been expressed by my learned friend,  
11 Ms. Rosenberg, something additional to what is  
12 looked at in this particular Commission. It is  
13 something that is under another agreement. It is  
14 an agreement with the three Crown parties and the  
15 First Nations.

16 That Northern Flood Agreement has its  
17 own remedy, remedies available to it. The issue  
18 as to whether or not that study is required for  
19 purposes of article 9 of the Northern Flood  
20 Agreement, whether the study is too broad or not  
21 too broad, or too expensive or not too expensive,  
22 or timely or not timely, those are all questions  
23 that effectively can be determined under that  
24 Northern Flood Agreement through an arbitration  
25 process that is spelled out. And that arbitration

1 process has an appeal from that process to the  
2 Court of Appeal on stated case.

3 So there really are three different  
4 avenues in which any of these projects today are  
5 getting looked at. There is the Crown  
6 consultation process. It is a newer form of  
7 process, it has different tests. It is looking at  
8 different issues than what the CEC is looking at.

9 There is the environmental assessment,  
10 which is the backbone, quite frankly, and this is  
11 where the majority of the information about  
12 effects of these projects, not just on Aboriginal  
13 people but on everybody, on our society as a  
14 whole, this is what is coming here. And then we  
15 have in that particular circumstance a separate  
16 Manitoba Hydro commitment to Pimicikamak under the  
17 Northern Flood Agreement to carry on this  
18 consultation process.

19 And it, Manitoba Hydro would submit,  
20 if this were the arbitration process, that we are  
21 fulfilling that, we are still going to be  
22 continuing it, we have done a lot to fulfill that  
23 obligation to date and we will continue to fulfill  
24 that obligation as we go forward.

25 So the study itself does talk about

1 taking a year. It is something that effectively  
2 wasn't contemplated in the materials that the CEC  
3 was going to be looking at. It does have another  
4 whole process where it can be addressed and would  
5 have to be dealt with under that process,  
6 including ultimately through the Court of Appeal.  
7 So to have this application delayed while that  
8 gets completed seems to be not the correct thing  
9 to do, to me.

10           It seems to me that we have a process  
11 here which can hear evidence. It seems to me that  
12 we have a process where there is huge amounts of  
13 materials have been filed and where people must be  
14 anxious to get into it and find out what is there  
15 and try to test what is there. There is people  
16 waiting to have their say about what is going on,  
17 and should this be done or that be done. To delay  
18 this so that some other piece of work can be done,  
19 that at this point in time there is no indication,  
20 no one can tell you whether that's going to add  
21 one iota of new information relevant to your  
22 determination, because the study has not been  
23 done. It will just -- it may confirm what people  
24 already believe, it may add something, we don't  
25 know, but it has not been done and it is going to

1 delay a process which, quite frankly, is a really  
2 good process and one that does get a lot of kudos  
3 and should get a lot of kudos. And it is a  
4 process that involves the public and the public  
5 has an opportunity to say things.

6           And the public includes people who are  
7 partners in this process with Manitoba Hydro, part  
8 of the Keeyask Hydropower Limited Partnership.  
9 There will be people coming forward and speaking  
10 about that. I think you just came back from the  
11 north, you probably heard people speak. I didn't  
12 have the opportunity, unfortunately, to be with  
13 you when you went to Cross Lake. I would love to  
14 have heard what was going on there. I have worked  
15 with Cross Lake people for many years now, and I  
16 enjoy the people of Cross Lake. They are quite  
17 capable people, and I enjoy working with them, and  
18 I'm hoping to continue to have that relationship  
19 as we go forward, obviously representing Manitoba  
20 Hydro, and therefore not necessarily always in  
21 accord with their positions, but nonetheless we  
22 have good exchanges. I end up usually feeling a  
23 little bit exhausted when I finish them, because  
24 they stretch your mind quite a bit when you are  
25 with them.

1                   But to me the issue here is, why would  
2 you adjourn what everyone is waiting to have  
3 happen at this stage? Like, I know I can't  
4 foresee the future, I don't know what evidence you  
5 are going to hear. I don't know what people are  
6 going to say about the evidence. I don't know  
7 what your thoughts will be after you have heard  
8 the evidence. I do know if you adjourn it today  
9 and it is adjourned for a year, which is the  
10 minimum I think they are saying for this study, or  
11 longer if that's what is required on the other  
12 side, that that won't be heard until that  
13 adjournment is passed. And to me that just  
14 doesn't make any sense. It seems to me, let's get  
15 on with it, hear what is being said, find out what  
16 the evidence is. Maybe the cumulative effects  
17 work that has been done, because there is a lot of  
18 material that is available, and the partners  
19 certainly are able to testify to the effects of  
20 past projects, they have been in the midst of them  
21 for a long time. So that information I think will  
22 be coming out.

23                   I do not think that the Minister's  
24 statement is -- I think Ms. Kempton said it is  
25 just a political -- I should get the word right --

1 a cheap political promise. And the statement is  
2 that I think what was recommended is no licensing  
3 until there be this type of study. Now, I'm not  
4 an expert on that type study. I don't know what  
5 that entails, and I suspect probably there will be  
6 some real effort done to what actually should be  
7 included in such a study and how would that be  
8 done.

9           The Minister didn't say don't proceed  
10 with any hearings. The Minister basically said, I  
11 accept that the licensing part -- which is the  
12 ultimately the government's decision to be made.  
13 And how they plan to do that and what the actual  
14 scope of that will be and how they will be  
15 implemented, I don't know. I can't foresee the  
16 future. But I certainly don't think that it is  
17 just a cheap political promise.

18           I don't think that anyone, the issues  
19 that are -- that my learned friend, Ms. Kempton,  
20 said, it is not an issue I think that you are  
21 needing to decide that these statements, that it  
22 is clean, green and renewable, I don't know if  
23 that's really what is before this Commission. I  
24 think you are being asked to look at a particular  
25 project, what the effects of that project will be,

1 and there will be effects of that project. My own  
2 sense is with the Cree partners that we have  
3 involved in it, that effectively those effects  
4 will be minimized significantly as a consequence  
5 of their input and involvement in the planning  
6 stages of this process.

7 My learned friend, Ms. Kempton, talks  
8 about there being an obsession. I don't know  
9 whether it is really fair to say our province is  
10 obsessed with Hydro power -- excuse me, I have a  
11 cold -- but it is an important industry within our  
12 province and it is an important generator of power  
13 and wealth for our province, and for people and  
14 for our society. It is not -- I mean, it is a  
15 Crown corporation and in the end result it is  
16 benefiting the Province of Manitoba, including the  
17 people of Pimicikamak, including the people up  
18 north.

19 There was a suggestion that Manitoba  
20 Hydro was not questioned. Well, if that ever was  
21 the case, it doesn't seem to be the case today.  
22 The numbers of questions that are given to  
23 Manitoba Hydro to respond to or answer, and the  
24 process that is here, quite frankly, again, gives  
25 rise to the ability for people to ask these

1 questions, and then for Hydro to have to make  
2 responses to them. It is a very credible process,  
3 and to make that on a public basis.

4           And the issue of whether or not it is  
5 for domestic or export purposes, I don't think  
6 that I do know the answer to that question, I  
7 don't know if my learned friend does or not. It  
8 seems to me that that really is an issue to the  
9 extent, in terms of the NFAT, would be something  
10 that they would look at, and obviously the  
11 government would look at as to whether or not it  
12 feels an appropriate thing to be doing.

13           So I don't know how that fits within  
14 the terms of that submission, but I do know this,  
15 the thing that I do want say is that the land use  
16 and occupancy study that is there, it has not been  
17 approved by Manitoba Hydro, it has not been  
18 rejected by Manitoba Hydro. It has been reviewed  
19 since we got it in early September. There has  
20 been a response, or is being a response provided  
21 back to Pimicikamak. We will be meeting with  
22 representatives of Pimicikamak about that. We  
23 have other meetings set up. The fact that this  
24 proceeds or doesn't proceed, whatever the  
25 Commission's decision is, will not impact on

1 whether or not we continue to deal with  
2 Pimicikamak under article 9. And there are  
3 separate remedies related to what we have to do  
4 under article 9. They are not something that's  
5 referred to this Commission, they are referred to  
6 an arbitrator and then to the Court of Appeal.

7 So that would be my submission on  
8 those matters, thank you.

9 Did you have anything you wanted to  
10 add?

11 MS. ROSENBERG: My apologies. Thank  
12 you, Mr. Sargeant, subject to any questions from  
13 the Commission, those are the submissions of the  
14 proponent.

15 THE CHAIRMAN: Thank you both.

16 Mr. Adkins, I can tell you we had a  
17 very good afternoon in Cross Lake. If you really  
18 want to know what the people said, the transcripts  
19 are on our website, I'm sure by now.

20 I do have a question that actually  
21 doesn't relate to either of your presentations, or  
22 what has been spoken so far. But in the materials  
23 that were provided by both parties to this motion,  
24 Pimicikamak refers to and relies on the CEA EIS  
25 guidelines, in particular clauses 9.1.3 and 9.4.

1 I would just like the partnership's view on  
2 whether CEA guidelines bind us or are applicable  
3 to us, given that those are Federal guidelines?

4 MS. ROSENBERG: What an excellent  
5 question.

6 THE CHAIRMAN: Thank you.

7 MS. ROSENBERG: I think, Mr. Sargeant,  
8 you are familiar with the cooperation agreement  
9 between Manitoba and Canada with respect to  
10 environmental assessment. I'm not quoting the  
11 name of it exactly, but I think you are familiar  
12 with the terms of -- the agreement between the  
13 jurisdictions is that they will take a look, each  
14 one will take a look at any proposal that comes  
15 in, and that they will discuss the terms of the  
16 assessment and set out a cooperatively agreed on  
17 process, so that each proponent really has to do  
18 one EIS. That discussion is subject to the  
19 technical advisory committee and the group that's  
20 formed between the two jurisdictions, and they did  
21 that work, and I think that's actually reflected  
22 in your terms of reference, I believe I read you  
23 some of that this morning.

24 A lot of changes happened during the  
25 time when this project was being managed, changes

1 in the government at the Federal level, changes in  
2 the approach to how that process was managed. The  
3 formal agreement between Canada and Manitoba was  
4 still in effect when this project commenced, and  
5 so this project was subject to that. And it is  
6 subject to CEA as it was, not CEA 2012.

7 So the guidelines that were  
8 subsequently issued by the agency, I believe, with  
9 respect to the Federal assessment bind the Federal  
10 process, but they also played a part in the  
11 determination of what the proponent took as the  
12 terms of reference for the EIS.

13 So while they do not bind  
14 specifically, the Provincial Government and the  
15 Provincial decision making process, both parties  
16 agreed that the input developed through terms of  
17 reference prepared in that joint process would  
18 become material for -- would become input for both  
19 parties to make decisions.

20 You will appreciate, I'm sure, that  
21 the Federal government has decision making  
22 responsibilities over the issues of Fisheries and  
23 Navigable Waters, which are within Federal  
24 jurisdiction, and they will look specifically at  
25 those sections. They won't look at the entirety

1 of the EIS, they will focus on the sections that  
2 are subject to specific Federal jurisdiction.

3 But on the other hand, Manitoba, under  
4 our constitutional division of powers, has full  
5 authority over anything to do with environmental  
6 impacts and with property and civil rights in the  
7 province, which includes everything in relation to  
8 the project. So all of the material developed in  
9 the EIS, in response to both the terms of  
10 reference that were submitted, the draft and draft  
11 and review by the committees, submitted up through  
12 the proponent, and the ones prepared in detail by  
13 the agency, all of that material is proper subject  
14 matter for consideration by Manitoba.

15 THE CHAIRMAN: Thank you.

16 MS. ROSENBERG: I don't know if that  
17 answered your question directly.

18 THE CHAIRMAN: Yes, it does. Thank  
19 you very much. Any questions?

20 Thank you both. I think that's the  
21 extent of our questions at this time.

22 MS. ROSENBERG: Thank you,  
23 Commissioners.

24 MS. KEMPTON: I might jump around a  
25 bit, there is a bunch of topics here. I just want

1 to correct something that Ms. Rosenberg just  
2 stated. My experience in working EAs is not  
3 correct at all. What triggers a Federal EA, of  
4 course, is Federal jurisdiction, among other  
5 things, Fisheries and Navigable Waters, but they  
6 will look at the whole EIS. That is their job.  
7 In fact, they have sent back questions and  
8 clarifications to Manitoba Hydro seeking  
9 information, for instance, about the impacts on  
10 Pimicikamak.

11 I would like, therefore, to start with  
12 a reply in respect of the impacts on Pimicikamak  
13 that need to be assessed and entered into this EA,  
14 i.e., through the land use occupancy study and  
15 impacts assessment.

16 Paragraph 35 of our Notice of Motion  
17 indicates what this EA requires. The fact that it  
18 might also be required under article 9 or  
19 somewhere else is not relevant here today. What  
20 is relevant is what is required under the EA for  
21 this Keeyask project, and what the CEC must deal  
22 with, and ensure that it has the relevant and  
23 necessary information on.

24 The guidelines, in my view, was a very  
25 appropriate and telling question, Mr. Chair, and I

1 agree with Ms. Rosenberg on this point that  
2 indirectly, effectively, the guidelines bind, if  
3 you will, the CEC in my view, because of this  
4 cooperation agreement and the fact that the  
5 parties have proceeded under the Federal  
6 guidelines. They could be expanded, but in my  
7 view they can't be -- you can't cherry pick from  
8 them and just say that Hydro has met its duty by  
9 only, you know, addressing some of the things out  
10 of the guidelines. If the two Crown parties, who  
11 will or will not licence this project, have agreed  
12 that at the minimum the EIS must address what is  
13 in the Federal guidelines, then it is incumbent in  
14 my view on the CEC to ensure that the EIS does do  
15 that, at a minimum. It is not to say that there  
16 couldn't be requirements beyond.

17           The EIS guidelines in paragraph 35  
18 sets out what Hydro is required to provide by way  
19 of information and evidence. And I won't read  
20 them all here, but they have to do with impacts on  
21 Pimicikamak.

22           So that the nub of the issue here, and  
23 I think it is quite telling what Mr. Adkins  
24 earlier said, that the nub of the whole thing here  
25 is the very big disconnect between Hydro's views,

1 and Pimicikamak's, and others' views about  
2 impacts.

3           Hydro, you know, Mr. Adkins referred  
4 to the Keeyask area. And that this term was  
5 raised in article 9 consultations, and certainly  
6 it has been raised here. Hydro set this line  
7 around, a fairly narrow geographic scope around  
8 the Keeyask site and said this is the area of  
9 impact. And Pimicikamak says, no, no, no. I  
10 mean, maybe a chunk of the impacts will happen  
11 there, but you are going to impact an entire  
12 entire series of river systems and watersheds.  
13 You already are, and you are going to add a new  
14 element into what is already cumulatively a series  
15 of serious ongoing impacts, and that addition will  
16 alter those impacts. We need to understand this.  
17 Those impacts carry right through into our large  
18 traditional territory. They said that from the  
19 very beginning, before I was legal counsel in that  
20 process.

21           This document that Mr. Adkins was  
22 referring to, trying to suggest there was some  
23 shift in Pimicikamak's position under article 9,  
24 speaks to that. Before I became involved  
25 Pimicikamak made it clear, it is in their

1 submissions tab -- you don't need to turn to it  
2 now -- but at tab D, it is an exhibit to a  
3 statement of Mark Sweeny, and it is tab D2, and it  
4 is a draft, it has not been approved by  
5 Pimicikamak, on what Hydro says they heard three,  
6 four years ago were Pimicikamak's concerns at that  
7 point in time.

8           You look at number one and it talks  
9 about the relationship between Hydro and  
10 Pimicikamak. It talks about the holistic effects  
11 of such developments, being hydro developments.  
12 It talks about addressing the impacts of past  
13 development. This speaks to, there is a massive  
14 big hydro project out there affecting us every  
15 day. It has been built in the past but it is  
16 affecting us now. We need to holistically look at  
17 that and understand that and address what is going  
18 on, before we add to it and alter that, blindly,  
19 because we don't know what we are doing now.

20           This is what Pimicikamak's position  
21 has been from the get go and still is today. So  
22 contrary to what Mr. Adkins said, that's what they  
23 have been saying. Pimicikamak does not hold to  
24 this view that there is some narrow little  
25 geographic area in a vacuum that Keeyask will

1 impact. What Pimicikamak says is there is already  
2 a massive area, huge series of river watersheds  
3 and beyond that are being impacted by Hydro that  
4 Keeyask will alter. And a big chunk of that is  
5 Pimicikamak's traditional territory, and that's  
6 what we need to be looking at. So let's correct  
7 the record on that. That's where the disconnect  
8 arises and that's what lead to a lot of the  
9 disputes here and elsewhere.

10 The EIS guidelines require the  
11 information about impacts to Pimicikamak. The  
12 disconnect between Hydro's position and  
13 Pimicikamak's lead to originally Hydro essentially  
14 ignoring the impacts to Pimicikamak and just  
15 focusing on the impacts to Aboriginal peoples  
16 closer to the site of Keeyask, who have become by  
17 and large the partners in Keeyask. Because they  
18 looked at it so narrowly, they just said we really  
19 only need to look at the impacts on those  
20 communities, Aboriginal communities, near the site  
21 where Keeyask will be built, and we don't really  
22 need to look at the impacts on Pimicikamak.  
23 Wrong. And the EIS guidelines said that was  
24 wrong. And the EIS guidelines have not been met  
25 in that regard.

1                   So, as Mr. Adkins knows, as a result  
2 of that, we proposed some studies that would look  
3 at the impacts of Keeyask cumulatively with the  
4 existing Hydro project impacts, which is the  
5 correct and only way to do it on Pimicikamak.  
6 That requires first identifying what all of the  
7 connections and values and uses of the land are to  
8 Pimicikamak, and then determining how Keeyask is  
9 likely to affect those. That's what we are going  
10 for here. That's what the EIS itself requires.  
11 Whether, as I said, it might be required elsewhere  
12 is not relevant here. What is relevant is the EIS  
13 requires this information. The CEC requires this  
14 information. It has not been done. And that's  
15 why we are saying these studies therefore need to  
16 be done to meet the requirements of this process  
17 for Keeyask. That's what that is about.

18                   You know, the Hydro's submissions on  
19 saying there is really no need for these studies  
20 because Pimicikamak didn't provide any evidence or  
21 information about impacts from Keeyask on it is  
22 wholly and completely factually wrong.  
23 Pimicikamak has repeatedly provided information  
24 about its concerns about impacts on sturgeon, on  
25 migratory birds, on burial grounds and other

1 sacred sites, on other uses and values and  
2 connections to the land.

3           The problem is, as a person who  
4 practices Aboriginal law for clients across  
5 Canada, I can say this with assurance, there has  
6 been a loss of critical information in many,  
7 perhaps most Aboriginal communities, as a result  
8 of dispossession of their language through  
9 residential schools and other causes, and  
10 impositions of the white man's way of life and  
11 laws. So what had been a pretty continuous  
12 passing on of oral history and information that  
13 would have been quite detailed about where burial  
14 grounds and sacred and ceremonial sites are, et  
15 cetera, and where each family goes to harvest on a  
16 seasonal basis, a rift was caused in the passing  
17 on of that information and it is now incomplete as  
18 a result of those impositions and dispossessions.  
19 And therefore we need formalistic studies to --  
20 the information is there to some degree, maybe to  
21 a great degree, but it is there in people's heads,  
22 and it is not shared the way it used to be because  
23 of that, because of those issues. So it needs to  
24 be systematically and methodologically soundly  
25 gathered and analyzed and put together, and that's

1 what these studies, which are known to be valid if  
2 done correctly, that's what they do, and that's  
3 why we need them. We need to understand what  
4 Pimicikamak is, and it is doing, and what its  
5 connections to the land are, and then what Keeyask  
6 is going to do to those cumulatively with the  
7 existing impacts from hydro projects out there.  
8 That's what we are looking for and the EIS  
9 requires. So full stop, it is not more  
10 complicated than that.

11 I would like to speak to a few points  
12 that Hydro raised, other points that it raised in  
13 its responses, very briefly because I don't think  
14 frankly a lot of them warrant much comment. I  
15 think a lot of them are diversions.

16 First, they say that the CEC can't  
17 adjudicate or hear allegations about damage caused  
18 by past and existing projects. We are not asking  
19 for that. This isn't a lawsuit for compensation.  
20 We are saying, as I mentioned before, that these  
21 projects were built in the past, the impacts exist  
22 today and are ongoing and are part of the parcel  
23 of necessary and relevant information about what  
24 Keeyask would add to and alter to really  
25 understand cumulative impacts.

1                   Second, they say, Hydro says the CEC  
2    can't adjudicate or consider Manitoba Hydro's  
3    compliance with the NFA.  Again, we are not  
4    asking -- this is a diversion, we are not asking  
5    the CEC to do that.  The fact that the discussions  
6    about the need for land use and occupancy and  
7    impacts assessment on Pimicikamak arose in article  
8    9 of the NFA is irrelevant.  It doesn't matter  
9    where it arose.  It is required by the EIS.  And  
10   as Mr. Adkins knows, the original discussions  
11   about this were that this information would feed  
12   into the EIS directly.  Because there were delays  
13   outside of Pimicikamak's control, that did not  
14   become possible on the timeline that Hydro was on  
15   in terms of submitting its EIS.  So Hydro, under  
16   direction of the CEA agency, went off and gathered  
17   what very incomplete information is out there, and  
18   tried to reach conclusions about impacts to  
19   Pimicikamak based on such very incomplete  
20   information.

21                   By the way, on that, Hydro's  
22    conclusion was that, well, that incomplete  
23    information doesn't reveal many impacts or any  
24    impacts from Keeyask, so there aren't any.  That's  
25    kind of a circular and flawed argument and

1 reasoning. It is like me going to the doctor  
2 saying, I don't feel well, I feel sick. And the  
3 doctor saying, I'm going to deny you the medical  
4 MRIs and other studies to determine what is really  
5 going on with you, and I don't have, therefore,  
6 that information to really understand it. And the  
7 doctor, therefore concluding, because the  
8 information is wholly incomplete, there is nothing  
9 wrong with me. That's that same flawed logic.

10 Third, Hydro says the CEC can't  
11 adjudicate whether the Crown met the duty to  
12 consult and the CEC has no responsibility for  
13 consultations. Again, that's a diversion, we are  
14 not asking for that at all.

15 Fourth, Hydro says the CEC can't hear  
16 evidence and argument on government policy, or  
17 consider possible legislative changes. Again, we  
18 are not asking for that. We are asking the CEC  
19 merely to apply the law and policy as it exists.  
20 The Environment Act, procedural fairness, the rule  
21 of law and the terms of reference, which are law  
22 and which require you to ensure you have got  
23 sufficient, necessary and relevant information and  
24 evidence before you, and which require you to  
25 apply the sustainability development guidelines

1 and principles.

2 Fifth, Hydro says the CEC can't  
3 determine or expand the scope of the EA or the  
4 terms of reference. Again, ad nauseam, we are not  
5 asking you to do that. We say it is well within  
6 the terms of reference and it is mandated by law  
7 that you ensure you have all necessary and  
8 relevant information before you to make informed  
9 findings and to enable the Minister to make an  
10 informed decision. That is a regional cumulative  
11 effects assessment, and the impacts on  
12 Pimicikamak, it is that evidence and information  
13 that you don't have that is required.

14 Six, Hydro says that the  
15 recommendations from this Commission and Bipole  
16 III, and the decision of the Minister don't apply  
17 to Keeyask, that we should yet again basically say  
18 what we should do, but then don't do it. Let's  
19 just put it off again.

20 On its face, the CEC's recommendation  
21 from Bipole III is clear. It says no further  
22 licensing, that this should -- this regional  
23 cumulative effects assessment should be done  
24 before further licensing, the EA informs that  
25 licensing.

1                   To suggest that we can have this  
2 process before the CEC, and ignore the necessary  
3 and relevant evidence from a regional cumulative  
4 effects assessment, and then just sort of push it  
5 off to the Minister is comical and ludicrous. The  
6 decision of the Minister is to be informed by what  
7 happens here. To suggest otherwise, to suggest  
8 that you can essentially do whatever you want,  
9 gather wholly incomplete evidence, make therefore  
10 uninformed recommendations, and give them to the  
11 minister who will, it is expected he or she will  
12 rely on them, would therefore be making a wholly  
13 uninformed decision. That is not the way this  
14 system was set up.

15                   And finally, just to address your  
16 question, Mr. Chair, to my colleague in the Peguis  
17 motion, whether this Commission has the authority  
18 to attach conditions to a licence for Keeyask,  
19 that the regional cumulative effects assessment  
20 must be done beforehand, yes, in my view you have  
21 that authority. But Pimicikamak's position is  
22 that would be a wholly, a second poor sort of  
23 choice based -- compared to what we are seeking  
24 here and what we say the law requires, for several  
25 reasons. First the Minister can ignore it, it is

1 a recommended condition and the Minister could  
2 ignore it, so that might not get us anywhere.  
3 Secondly, the results of a regional cumulative  
4 effects assessment, and overall, all of the  
5 information that we gather about cumulative  
6 impacts of Keeyask with the existing impacts of  
7 Hydro, might indicate the best recommendation is  
8 that Keeyask should not proceed at all. We can't  
9 pre-determine that, we can't know that. The only  
10 way any of us will know that is through being  
11 fully informed about such cumulative impacts. And  
12 that means a regional cumulative effects  
13 assessment be done before any recommendations or  
14 findings are made.

15 So while you can do this, we don't  
16 think that is the right solution. We don't think  
17 that it will get us where we need to be and where  
18 we say that the law requires that we are. Thank  
19 you.

20 THE CHAIRMAN: Thank you, Ms. Kempton.  
21 I have one question.

22 In the CEA guidelines, the same 9.1.3  
23 that I posed to Ms. Rosenberg earlier, it refers  
24 to Aboriginal groups. In your Notice of Motion  
25 you have changed the word Aboriginal groups to

1 Pimicikamak. Am I splitting hairs or is there a  
2 nuance difference there? Why -- why and what does  
3 it mean that you've changed those words  
4 specifically to Pimicikamak?

5 MS. KEMPTON: Pimicikamak is an  
6 Aboriginal people, which without trying to be too  
7 semantical, we take to also be an Aboriginal  
8 group, and so we are just personalizing it. It is  
9 abundantly clear to Pimicikamak, and we hope it is  
10 clear to everybody else, that they are profoundly  
11 affected by the existing cumulative impacts of the  
12 Hydro project, which Keeyask will add to and  
13 alter, and therefore will be affected by Keeyask.  
14 So all we did is personalize what was a  
15 generalized statement, because we think it is  
16 obvious that it has to include Pimicikamak.

17 THE CHAIRMAN: Okay. Thank you. Any  
18 other questions? No further questions. Thank you  
19 very much.

20 Okay. Go ahead.

21 MS. JOHNSON: Mr. Chairman, I would  
22 like to enter these documents on to the record  
23 that we are referring to today. Peguis First  
24 Nation Notice of Motion and their supporting  
25 information will be MPFN number 01. Pimicikamak's

1 Notice of Motion and supporting information will  
2 be MPCN 01. We also have the reply from the  
3 Hydropower, Keeyask Hydropower Limited  
4 Partnership. Their response will be MKHLP 01. We  
5 also have letters of support to the Pimicikamak  
6 and Peguis First Nation from the Concerned Fox  
7 Lake Grassroots Citizens Organization, and that  
8 will be MCFLGC. And also a letter of support from  
9 Manitoba Wildlands for both of these motions. The  
10 one for Peguis is MWL 01, and for Pimicikamak is  
11 MWL 02.

12 (EXHIBIT MPFN 01: Peguis First Nation  
13 Notice of Motion and supporting  
14 information)

15 (EXHIBIT MKHLP 01: Reply from KHLP)

16 (EXHIBIT MCFLGC 01: Letter of support  
17 to the Pimicikamak and Peguis First  
18 Nation from the Concerned Fox Lake  
19 Grassroots Citizens Organization)

20 (EXHIBIT MWL 01: Letter of support  
21 from Manitoba Wildlands for Peguis  
22 motion)

23 (EXHIBIT MWL 02: Letter of support  
24 from Manitoba Wildlands)

25 THE CHAIRMAN: Thank you. We will

1 take a lunch break now. I would like to come back  
2 at 1:30, at which time we will deal with the Fox  
3 Lake motion.

4 (Adjourned at 12:04 p.m. and  
5 reconvened at 1:30 p.m.)

6 THE CHAIRMAN: Okay. Can we come back  
7 to order, please? We have one more motion to  
8 attend to this afternoon, and that's one filed by  
9 the concerned Fox Lake Grassroots Citizens,  
10 whoever is making the presentation.

11 Dr. Kulchyski, identify yourself for  
12 the record and then proceed. You have half an  
13 hour for your presentation.

14 DR. KULCHYSKI: For the record, my  
15 name is Dr. Peter Kulchyski, don't put a N in  
16 there, they always say "Kulchynski," but it is  
17 not. I think I will probably be less than half an  
18 hour, we have a fairly narrow issue, not as broad  
19 as what you were faced with this morning. In the  
20 interest of all of our time, I will be brief.

21 I want to tell you basically, I'm  
22 going to confine myself in terms of referring to  
23 documents to our original motion, very briefly,  
24 and to the response from Manitoba Hydro. So I'm  
25 not going to pull out a lot of paper. I'm just

1 going to tell you a little story and turn to these  
2 documents.

3           In the course of our doing research  
4 for our presentation, later on, we discovered  
5 there had been a report that we understood was  
6 about social impacts. And there was a lot of kind  
7 of rumours about it, but effectively we were sort  
8 of told, well, the report has been squashed. And  
9 so we asked around and asked around and,  
10 eventually Dr. Rachel Eni's name came to be  
11 associated with this report. So she is a  
12 colleague at the University of Manitoba, so I  
13 contacted her. She said she is under a very  
14 strict confidentiality agreement. She couldn't  
15 even really confirm the existence of the report or  
16 deny it. But we had kind of a hypothetical  
17 conversation, and that lead us at least to be  
18 interested enough to ask for the report, not  
19 really sure even if it existed, not knowing its  
20 name, not knowing who commissioned it, but we  
21 asked for it in the first round of information  
22 requests.

23           We got a response that confirms that  
24 the report existed and that they didn't want to  
25 release it to us, so we wrote our appeal and

1 brought it forward here. That's where we stand.

2 We still don't know what the report is  
3 called. We don't know how long it is. It is now  
4 called a draft document.

5 We filed the motion. The response for  
6 the motion, you know, the first thing they say is  
7 the motion should be denied or withdrawn. Well,  
8 the response actually makes us, rather than  
9 withdraw the motion, more determined than ever to  
10 try and see the report. Because it seems like  
11 from the information that they do give us, the  
12 report is quite relevant to the matters that we  
13 are considering.

14 And I will say we are not -- we have  
15 consulted here and there with lawyers, but we are  
16 a community group. I'm an expert witness, I'm not  
17 a lawyer myself. So here and there we have made a  
18 few errors of facts, but I think they don't affect  
19 the heart of the matter.

20 Two of the points made in the  
21 response, points number 4 and 5 related to the  
22 fact that we said that we -- and our point 3(e),  
23 we represent the interests of Makeso Sakahican.  
24 You know, we recognize fully that the Fox Lake  
25 Cree Nation is their legal representative, that

1 they have been duly empowered, they have been  
2 elected, they have held referendums. So we don't  
3 make any claims in that regard. But I will state  
4 that the elders that we are working with and the  
5 traditional land users are not only asking us to  
6 speak on their behalf, they do have the interests  
7 of their own people at heart, and there are elders  
8 working with us. And it is not about them, they  
9 see very passionately what they are trying to do  
10 is create a better future for their children and  
11 for their people as a whole. So in as much as we  
12 said that we represent the interests of Makeso  
13 Sakahican, that's to the extent that they are  
14 concerned about their people, even though they are  
15 not the majority group perhaps, and they are  
16 certainly not elected leaders. And I think that  
17 that's fair enough for us to say, without denying  
18 the legitimacy of the existing authorities. All  
19 of that is a side issue, so I don't want to say  
20 any more about that.

21 In the response the proponents have  
22 included a statement of facts by Vicky Cole. And  
23 in their statement of facts, fact number 3 tells  
24 us little bit about the study, more than we knew.  
25 And they say the contract required Dr. Eni to

1 provide advisory and consulting services related  
2 to the social, cultural, health impacts program  
3 for Fox Lake Cree Nation, Bird, Manitoba.

4           So this is the first confirmation that  
5 we have that this study involves the social  
6 impacts.

7           In their point number 8, they refer to  
8 the fact that Manitoba Hydro received a draft copy  
9 of the report as part of its reimbursement  
10 programs. So parsing this together, it's the Fox  
11 Lake negotiations office that appears to have been  
12 responsible for the report, and Manitoba Hydro  
13 that appears to have funded the report. So we  
14 have a situation where -- to me this seems to be  
15 clearly work that was done in conjunction with  
16 preparing the EIS. And it seems to me what is  
17 likely happened here is they got information they  
18 didn't like and then squelched it. And so we  
19 would like to see that information and see if it  
20 is relevant to our deliberations. And it may well  
21 be in terms of all of these issues, the social,  
22 cultural and health impacts.

23           Basically, they tell us in their  
24 response that they can't produce the report  
25 because they don't have it, but they also admit

1 that they have a copy of the draft report. So  
2 they sort of have it and they sort of don't have  
3 it. They tell us they don't have the authority to  
4 release it, the Fox Lake Cree Nation has it. The  
5 Fox Lake Cree Nation is one of the proponents. So  
6 when they say they can't release it to us, in  
7 terms of who has the authority to do that, they  
8 are just kicking the can around amongst  
9 themselves. Someone could release it, or they  
10 could write an order allowing Dr. Eni to release  
11 it, but certainly somewhere on their side they  
12 have the authority to release this report.

13 I appreciate -- and I'm a researcher,  
14 I work in northern communities, and the trust  
15 relationship that you build as a researcher and in  
16 terms of conducting any research is very  
17 important. So if there are names in the report, I  
18 would be happier if the names were redacted. It  
19 would be an hour's work at the most, probably, I  
20 don't know how long the report is, the draft  
21 report or whatever we want to call it, but the  
22 names could be redacted. I don't want to know  
23 anybody's name behind the information they are  
24 telling. So the issue of confidentiality I think  
25 can be handled respectfully.

1                   So I can't see any other reason --  
2    they have the authority to release the report,  
3    they could release it in a manner that doesn't  
4    breach anyone's confidentiality, if any names are  
5    mentioned in the report, and I think substantively  
6    it can be very useful.

7                   In point number 9 they say the  
8    Commission cannot and should not be privy to the  
9    dispute that is prevalent between Dr. Eni and Fox  
10   Lake Cree Nation, but no reason why.  If Dr. Eni's  
11   report indicates serious social issues that  
12   occurred as a result of past Hydro development,  
13   then that might be a dispute that would be of  
14   interest to the Commission actually.  So I don't  
15   know if we can take the proponent's statement on  
16   the surface until we have more information.

17                   So, I guess I would say, you know,  
18    here what would satisfy us is we would be happy to  
19    see a report with names redacted.  I would be  
20    happy to have that released by Dr. Eni herself, or  
21    by the Fox Lake Cree Nation, or by Manitoba Hydro,  
22    any of the parties who has a copy of it, however  
23    we get it, it doesn't matter.

24                   I'm concerned that in preparing the  
25    EIS report, if proponents conduct studies and

1 those studies aren't favorable or aren't saying  
2 the kinds of things they want to be presented,  
3 that they repress them. That also may not help  
4 the process very well. So I would say that, to  
5 me, technically should be included within the  
6 terms of what the Commission is allowed to look  
7 at. It is a study funded by Hydro, prepared by  
8 the negotiations office, and obviously was at some  
9 point probably intended to be part of the EIS, but  
10 didn't, it seems to me, probably present the kind  
11 of information they wanted.

12           So without belabouring anything, that  
13 was fairly brief and I will leave it at that. I  
14 may have some additional points to make in  
15 response to my friends. I would be happy to  
16 answer questions.

17           THE CHAIRMAN: Would you explain a  
18 little bit, I mean you have a general sense of  
19 what this report is about, why is it relevant to  
20 your review?

21           DR. KULCHYSKI: We will be talking  
22 about, quite extensively, to the extent that we  
23 have been able to find out information about the  
24 social impact of Hydro on the community, I think  
25 in two ways, both to really understand the

1 dimensions of what's happened in the past and how  
2 the community has been traumatized by that, and  
3 then also to try and learn particular lessons  
4 about what can be done in the future.

5           So without knowing what the report is,  
6 it is hard for me to be more detailed than that.  
7 But my sense is that it probably conveys a lot of  
8 information about how negative the past impacts of  
9 Hydro have been, and it may give some details on  
10 how some of those negative impacts occurred.

11           We have been gathering information  
12 from local people to that effect and will be  
13 presenting some information, but if we correlate  
14 it with the broader study that was done, I think  
15 that would be useful, and there may be other  
16 information in there that we haven't come across  
17 that would be important. And then all of these  
18 things allow us to think of a better way of doing  
19 things in the future.

20           I mean, I should note, you know, I  
21 heard a lot this morning about how Hydro will be  
22 doing and the proponents will be doing  
23 presentations, and they have some information that  
24 has been cumulative, and they have a lot of stuff  
25 to bring forward. So on the one hand that's what

1 they were saying this morning. And then this  
2 afternoon they are going to be telling us that  
3 they don't want this piece to come forward. It  
4 just seems to me that it is a relevant piece of  
5 research that's absolutely on topic. Without  
6 having seen it, without knowing what it says, it  
7 seems to me it could potentially be very, very  
8 useful. That's as much as I can say without being  
9 able to look at it.

10 I may look at it and find out there is  
11 nothing of value there from our perspective, and  
12 maybe there are issues with it that it was  
13 conducted as poor research, although Dr. Eni is a  
14 credible researcher in the field, so I have some  
15 doubts about that. But I don't know. Until we  
16 see it, we can't really tell.

17 But certainly it disturbs me that the  
18 work of a good credible researcher around social  
19 impacts appears to be just being squashed as part  
20 of this process, and it should be something that  
21 we are all looking at. If it says some  
22 controversial things, if that's the issue, then we  
23 should face up to those things. Certainly, if it  
24 uses people's names, I don't need to see them, or  
25 even if there is information there that can tell

1 us who the person was who says something, I don't  
2 need to see that.

3           Since they refer to data, I assume  
4 that it is quantitative research as well as  
5 qualitative research, which is the kind of  
6 research that I do. In that case it is very easy  
7 to keep the names of individuals away from the  
8 information that is being conveyed.

9           THE CHAIRMAN: Is reference made to  
10 this information in the EIS or in some of the  
11 technical documents?

12           DR. KULCHYSKI: Not as far as I can  
13 see.

14           THE CHAIRMAN: How did you become  
15 aware of it?

16           DR. KULCHYSKI: We became aware of it  
17 just when we were in Fox Lake, we were talking to  
18 people, we did interviews with people. And some  
19 of the people had previously worked with the  
20 Nation. But several people said that, you know,  
21 there was a study conducted around social issues.  
22 And so then I started asking about it  
23 deliberately, and gathered that Dr. Eni was  
24 involved in it. So that was enough for me to then  
25 say, she is at the University of Manitoba, I can

1 contact her. And I contacted her and she said, in  
2 fact, that she was under a confidentiality  
3 agreement. That sort of lead me to suspect that  
4 there was indeed a study, but she wouldn't  
5 technically confirm or deny for me. And we  
6 proceeded from there.

7 THE CHAIRMAN: Thank you. Any other  
8 questions?

9 MR. SHAW: Doctor, is Dr. Eni aware  
10 that you brought this motion today?

11 DR. KULCHYSKI: Not that we brought it  
12 forward. I didn't really want her personally to  
13 be under pressure to violate her confidentiality  
14 agreement. So after our first conversation I  
15 stayed out of contact with her because I would be  
16 just too curious, I would be trying to press her  
17 on issues. So she is, as far as I know, not aware  
18 that we are bringing this forward.

19 MR. SHAW: Thank you.

20 THE CHAIRMAN: Thank you.  
21 Mr. Bedford, Mr. London?

22 MR. BEDFORD: Good afternoon. My name  
23 is Doug Bedford. I'm joined this afternoon by  
24 Mr. Jack London. My mandate at this hearing is to  
25 represent the Keeyask Hydropower Limited

1 Partnership, which is the proponent of the project  
2 that you have been asked to review.

3 Mr. London, for over a decade now, has  
4 been legal counsel to Fox Lake Cree Nation. Since  
5 the end of May, 2009, when Mr. London's client and  
6 Manitoba Hydro, which is also a client of mine,  
7 signed the Joint Keeyask Development Agreement,  
8 Mr. London has also been providing legal counsel  
9 from time to time to the Keeyask Hydropower  
10 Limited Partnership. And particularly since this  
11 hearing was scheduled and the partnership began  
12 preparing for it, Mr. London, along with myself  
13 and other counsel, have been regularly attending  
14 meetings and providing advice as required to our  
15 joint client.

16 The Keeyask Hydropower Limited  
17 Partnership does not have and has never had in its  
18 possession any reports, draft or otherwise, any  
19 data, or any other documentation prepared by  
20 Dr. Rachel Eni.

21 And accordingly, and with all due  
22 respect to Dr. Kulchyski and the folks that he is  
23 assisting, I did write in the written brief that  
24 was filed that the motion that has been brought by  
25 them was ill-advised. And the thinking behind

1 that, of course, was that the proponent, whom you  
2 are asked to order have this information produced,  
3 is not in possession of any of the information.  
4 And accordingly there is, I suggest to you, no  
5 logic or any purpose to you considering as  
6 Commissioners whether to order the proponent, the  
7 partnership to produce what it does not have.

8           Now, we have also volunteered some  
9 facts before you to assist you in understanding  
10 who Dr. Eni is, and what connection, if any, she  
11 has to the Keeyask project and the Fox Lake Cree  
12 Nation. So in summary, some of the simple facts  
13 that we thought would be helpful to you in  
14 understanding what has occurred are as follows:

15 As Dr. Kulchyski has told you, we agree,  
16 Dr. Rachel Eni teaches at the University of  
17 Manitoba. At one time, not presently, but at one  
18 time Dr. Rachel Eni was under contract through her  
19 holding corporation to the Fox Lake Cree Nation.  
20 She has never been under contract nor employed by  
21 the partnership. She has never been under  
22 contract nor employed by Manitoba Hydro.

23           Dr. Eni, in the period approximately  
24 beginning late 2006 to earlier this year, was  
25 working on what I can fairly describe was a

1 socio-economic study for Fox Lake Cree Nation.  
2 There is, as we have volunteered in our facts, a  
3 draft report. The report is not signed. Manitoba  
4 Hydro has a copy of the report that was given to  
5 it by Fox Lake Cree Nation, not by Dr. Eni, and it  
6 was given in confidence to Manitoba Hydro to  
7 support a claim by Fox Lake Cree Nation for an  
8 advance of money, yes, to pay for expenses  
9 incurred by Fox Lake Cree Nation in connection  
10 with Dr. Eni's work.

11 Dr. Eni has never completed the work  
12 that she undertook. Dr. Eni's work was not used  
13 in the Environmental Impact Statement that is  
14 before you. Initially, some six years ago there  
15 was a hope and an intention that Dr. Eni's work  
16 would be used by Fox Lake Cree Nation to inform  
17 its participation in the Keeyask project. But now  
18 in October, 2013, we find that did not come to  
19 pass. To repeat, Dr. Eni's work was not used in  
20 the Environmental Impact Statement.

21 Further simple facts are that Fox Lake  
22 Cree Nation does not want the draft report used.  
23 Fox Lake Cree Nation, I'm told, and Mr. London can  
24 speak for the First Nation when I conclude my  
25 comments, but I am told that Fox Lake Cree Nation

1 is not satisfied with the methodology that Dr. Eni  
2 was employing.

3 I'm told that the most serious concern  
4 that Fox Lake Cree Nation has is that the  
5 substance of Dr. Eni's work was to conduct  
6 interviews of members of Fox Lake Cree Nation.  
7 And while I have not personally seen the  
8 interviews, I'm told that the interviews covered  
9 topics such as the interviewee's health, emotional  
10 and historical experiences, sexual background and  
11 so forth. In other words, quite obviously  
12 intimate and very personal life history details of  
13 persons being interviewed. Each person who was  
14 interviewed, I'm told, was promised, for common  
15 sense reasons, of course, confidentiality. Fox  
16 Lake Cree Nation is not a large First Nation. It  
17 would be easy, I'm told, even though names don't  
18 appear attached to particular anecdotes or  
19 personal histories, for those in a small community  
20 to easily recognize who it is who was giving the  
21 interview.

22 The actual interview notes, we could  
23 call them data, were never delivered to Manitoba  
24 Hydro. And to repeat, they are not in the  
25 possession and never have been of the proponent to

1 this hearing. I'm also informed that currently  
2 Fox Lake Cree Nation does not have physical  
3 possession, if they still exist, of the detailed  
4 interview notes.

5 I wish to suggest to you that no  
6 useful purpose can be served by any of us, you  
7 five Commissioners, my client, the Keeyask  
8 Hydropower Limited Partnership, and with the  
9 greatest of respect, Dr. Kulchyski and his  
10 colleagues, reading a draft report of a study that  
11 was never completed, was never used to inform  
12 conclusions or factual statements in the  
13 Environmental Impact Statement, and over and above  
14 all of those, the owner of that draft report and  
15 of that work, which is the Fox Lake Cree Nation,  
16 objects to its release.

17 Now, I did find of interest the  
18 materials that Dr. Kulchyski and his colleagues  
19 have filed. And I noted in passing the reference  
20 to article 29, for example, the draft declaration  
21 on the rights of indigenous peoples. And I quote:

22 "Indigenous peoples are entitled to  
23 the recognition of the full ownership,  
24 control and protection of their  
25 cultural and intellectual property.

1           They have the right to special  
2           measures to control, develop and  
3           protect their sciences, technologies  
4           and cultural manifestations including  
5           human and other genetic resources."

6           And I suggest to you that based on the  
7   very simple facts that are before you, Fox Lake  
8   Cree Nation has very vigilantly applied those very  
9   principles. It protected itself through a  
10  contract with Dr. Eni, and you've heard correctly  
11  that Dr. Eni is under strict confidential  
12  requirements in that contract. Fox Lake Cree  
13  Nation, through the contract, was careful to  
14  ensure that it has full ownership of these  
15  interview notes that record intimate personal  
16  details of the lives of its members. It has full  
17  control today of what use, if any, can be made of  
18  that data. And it has quite appropriately taken  
19  good steps to protect the cultural and  
20  intellectual property of its citizens.

21           Now, in listening to Dr. Kulchyski, I  
22  detected the obvious, what has motivated this  
23  motion to come forward, and I quote I think  
24  accurately, Dr. Kulchyski's concerned,

25           "They have the information, they did

1 not like it and have been squelching  
2 it."

3 Well, there is, I concede, a natural  
4 human inclination when you have a situation like  
5 this to speculate and conclude that there must be  
6 something dramatic, yet embarrassing, in this work  
7 that the proponent, having indirect knowledge of  
8 it, hastened to, as Dr. Kulchyski expressed it,  
9 squelched it, cover it up, hide it.

10 Now, sometimes in life those  
11 speculations prove to be correct. They are the  
12 answer to the apparent mystery of refusal to  
13 disclose. But sometimes in life there is an  
14 alternative, clearly appropriate and persuasive  
15 explanation that has nothing to do with a  
16 conspiracy to squelch or cover up. And all five  
17 of you probably have grasped what the true  
18 explanation of the problem is here. The ownership  
19 of the information is Fox Lake Cree Nation. Fox  
20 Lake Cree Nation didn't like the approach and  
21 methodology Dr. Eni was pursuing. They didn't  
22 even have her complete the work, ultimately, and  
23 it hasn't been completed. Fox Lake Cree Nation is  
24 concerned about the privacy of the life history of  
25 individual members. It is not motivated to

1    squelched or hide its views on the impacts on its  
2    people over 50 years of the development of Hydro  
3    projects on the Nelson River.

4                   Obviously, you have only to read its  
5    evaluation report that we have filed to know that  
6    no one has tried to squelched that, or to hide it,  
7    or to keep it from you in this hearing.

8                   So accordingly, while I understand on  
9    a very human level what has motivated  
10   Dr. Kulchyski and his colleagues to bring forward  
11   a motion that I ruthlessly said ought to be  
12   withdrawn or dismissed, I suggest to you that the  
13   motion does have to be dismissed, but for good  
14   reasons.  And I turn the microphone over to  
15   Mr. London.

16                   MR. LONDON:  Members of the  
17   Commission, as a young lawyer I learned never try  
18   to improve on an argument that's already been made  
19   so effectively that it doesn't need a follow-up.  
20   But there are a couple of things that I think I  
21   should say because Mr. Bedford can speak for the  
22   proponent, I can speak for Fox Lake.

23                   And let me start by saying that I  
24   confirm everything that he just said in every  
25   respect.  There were no errors.

1 Fox Lake doesn't think that curiosity  
2 is a good reason for this Commission to compel  
3 production of a report, assuming it could be, it  
4 could be compelled, or particularly the data on  
5 which it is based. It is, as Mr. Bedford said,  
6 the document, the data, were never used in  
7 anything to do with the preparation for the  
8 Keeyask project. It wasn't used in the EIS itself  
9 and it was not used in the Fox Lake environment  
10 evaluation report, which is Fox Lake's  
11 identification of all of its circumstances and all  
12 of the issues that it thinks relevant for this  
13 Commission to take a look at in determining its  
14 recommendations to the Government of Manitoba.

15 I want to emphasize that it is  
16 absolutely not true that the document or the data  
17 were squelched because Fox Lake discovered  
18 something in it that they didn't like or they  
19 didn't think ought to be made public. It was  
20 squelched, and I shouldn't even use that term,  
21 because I think it was said at some point by  
22 Dr. Kulchyski that they didn't have -- sorry, it  
23 was by Mr. Bedford, they didn't have her complete  
24 report. Actually, it would be equally correct to  
25 say that she didn't complete the report. It was

1 inadequate, it was untrustworthy, the methodology  
2 was suspect, and because it had not been  
3 completed, Fox Lake did not feel confident that it  
4 should go forward in their participation in the  
5 Keyask project and in the development of the Fox  
6 Lake environment evaluation report.

7           In fact, as Mr. Bedford said, there is  
8 a problem in a small community that even without  
9 the data, which obviously was collected on a  
10 confidential basis from the citizens of Fox Lake,  
11 they believed that their data was never going to  
12 be released in any way, when you take that into  
13 the draft report, even if you redacted the names,  
14 if there are any names in it, as Mr. Bedford says,  
15 some of the conclusions would lead almost  
16 immediately to identification of an individual or  
17 individuals within the community, which would be  
18 inappropriate.

19           But let's assume that it isn't even  
20 relevant for an individual in the community, or a  
21 couple of individuals in the community, let's say  
22 it is broader than that, it would be like asking  
23 for the medical records of all of the citizens of  
24 Fox Lake, or the income data related to the  
25 citizens of Fox Lake, or the incarceration rates

1 of people at Fox Lake.

2                   If data like that was to be part of  
3 this report and produced, what would happen?  
4 There would be a conclusion that is drawn, or an  
5 observation that would be drawn in the report  
6 which would say X, Y and Z about the people of Fox  
7 Lake. That innuendo now is labeled on every  
8 person in Fox Lake because those individuals are  
9 not identified. So everybody, let's take the  
10 example of a subject, it is an unfortunate part of  
11 the history of Fox Lake, but with the influx of  
12 workers on past Hydro projects, there was several  
13 instances of rape by the workers who came into  
14 Gillam to participate on the project. So let's  
15 say there was a comment in the report which says  
16 there were 17 rapes over a period of three years.  
17 Every woman in that community now has to be either  
18 angry or embarrassed at the fact that she may be  
19 one of the people who was thought to have been  
20 involved in one of those incidents, and maybe  
21 didn't come forward for whatever reasons. That's  
22 totally inappropriate, it is totally inappropriate  
23 information to come before the Commission. It  
24 might have been relevant in some circumstance in  
25 some place, but not when it was not used at all in

1 the preparation of Fox Lake for the Keeyask  
2 project.

3                   So, I must say on behalf of Fox Lake,  
4 I'm instructed to say that Chief and Council will  
5 not let that happen. They will protect their  
6 people and they will protect the information  
7 surrounding their people, whatever it may be. The  
8 Chief and Council do not feel that participating  
9 in a process which would allow for that kind of  
10 revelation is worth the price of whatever economic  
11 development it will experience and benefit from in  
12 the future on a project of this kind. It must  
13 maintain its privacy, and as a sovereign nation,  
14 it will.

15                   THE CHAIRMAN: Thank you, gentlemen.

16                   Mr. Bedford, I will direct this to you  
17 because of your extensive experience before this  
18 Commission. As you know, we are very open in our  
19 review process of EISs and anything that comes in  
20 to us, and we sometimes warn people when they are  
21 making written submissions, anything that comes  
22 into us does go on the public record. So what, in  
23 your view, should and should not be on the public  
24 record in any of these hearing processes?

25                   MR. BEDFORD: I don't think that you

1 should put on the public record names of  
2 individuals, and I saw this happen in this hearing  
3 when we had a session in Thompson, the name of a  
4 manager working for an employer. Frankly, and I  
5 know it is not my other client, Manitoba Hydro,  
6 but nonetheless, you took the appropriate step to  
7 delete from the record an individual's name who  
8 was accused in a presentation of bad behaviour.  
9 And I thought it was appropriate for you to delete  
10 the name, because it is unfair to the individual  
11 who was named, he wasn't there, you didn't hear  
12 his side of the story, so that ought to be  
13 deleted.

14                   As Mr. London says, and I'm not  
15 foreseeing it is going to happen and I haven't  
16 seen it happen at hearings, but personal details  
17 of people's health and sexual past ought never to  
18 be on a public record. I know some say, what if  
19 the individual concerned says, I want it on the  
20 public record, please name me, I'm a victim of a  
21 violent assault, while I am entitled to have my  
22 name kept private, I boldly and aggressively tell  
23 you I want my name made public, I want the facts  
24 of my personal history, as unpleasant and tragic  
25 as they are, made public. Well, I leave that to

1 your discretion. I think if I were sitting where  
2 you were sitting, I would be reluctant, even with  
3 the kind of encouragement from someone who has  
4 been victimized, to put their name on the record.  
5 They speak from emotion in the moment, and I would  
6 be concerned that on a subsequent day they would  
7 regret having invited you to make their history  
8 public by associating them with their name.  
9 That's some examples of where we go.

10 I know there is a parallel tribunal in  
11 this province called the Public Utilities Board.  
12 It works a little differently than yours does. It  
13 has the same general concern, though, that you are  
14 a public body and the evidence that comes before  
15 you ought to be transparent, meaning there should  
16 be nothing received in confidence, nothing held in  
17 confidence, whatever you read and see should be  
18 available for all the public to see.

19 And I think all of us who live in a  
20 democracy say that's a wise and appropriate thing  
21 to do. That is an aspect of rule of law that we  
22 didn't hear about this morning, but we heard the  
23 expression rule of law, that would be a firm  
24 example of the application of rule of law.

25 MR. LONDON: Mr. Chairman, I know you

1 put the question to Mr. Bedford --

2 THE CHAIRMAN: That's fine.

3 MR. LONDON: -- and I have no  
4 experience before this Commission, and he does, so  
5 I won't -- I second everything that he just said.  
6 I would guess that the threshold answer to that  
7 question is that nothing that's not relevant  
8 should be put before the Commission. And if there  
9 is obviously no relevance to the data and there is  
10 an objection to it, it seems to me that the  
11 Commission is bound by principles of  
12 administrative law not to allow it into evidence.

13 THE CHAIRMAN: Can I put a supposition  
14 then? Let's say that this report had been  
15 completed, that it was general in nature, and it  
16 did form significant background for a chapter in  
17 the EIS on socio-economic effects in the  
18 community, would that type of a document be --  
19 should that type of a document be released?

20 MR. BEDFORD: Not if the owner says  
21 no, I own that information and I protest and  
22 object to it being made public. And in this case  
23 I'm on the same side as Dr. Kulchyski when I look  
24 at the materials he filed in support of his  
25 argument. This just isn't any citizen, this is

1 not my other client, Manitoba Hydro, a Crown  
2 corporation, this is a First Nation. And when the  
3 substance of the information is cultural and  
4 personal information owned by the First Nation.  
5 We now live, and happily I would suggest to us  
6 all, in a world where we show great deference and  
7 respect to Aboriginal traditional knowledge and  
8 how it is held and owned. And part of the reason  
9 for that, of course, is in our society we have not  
10 always done that.

11 THE CHAIRMAN: I made a mistake. I  
12 meant to add that if the partnership had  
13 contracted for this report -- maybe I can -- if  
14 the partnership had contracted for a report to be  
15 done that did inform the Environmental Impact  
16 Statement, but that did contain sensitive  
17 information, personally sensitive, although not  
18 identifiable information, should that type of a  
19 report be released, or put on the record?

20 MR. BEDFORD: Now you are beginning to  
21 persuade me that there would be merit if those  
22 facts existed. They don't, because important  
23 elements of what you said are it is actually owned  
24 by the proponent before a hearing. And secondly,  
25 it was actually used, Mr. Bedford, in my assumed

1 facts, it was actually used by the proponent to  
2 inform the studies. Now you are squarely falling  
3 into the category of, if it does indeed have  
4 relevance to the work we have to do, now we really  
5 want to drill down to why are you refusing in your  
6 supposed hypothetical fact situation, why are you  
7 protesting and refusing to release it? Because if  
8 it involves disclosure of private personal  
9 information, we have simple ways of dealing with  
10 that, we cover up names and documents and reports,  
11 since Dr. Kulchyski said no objection to doing  
12 that. If you receive the report in confidence and  
13 it wasn't intended to be made public, now I'm  
14 creating a new fact that you did not, we would  
15 have to drill down to that. But you are certainly  
16 in your assumed facts now creating a fact  
17 situation where, to repeat, you would be  
18 persuading me that that ought to be brought  
19 forward.

20 THE CHAIRMAN: Thank you. I would  
21 note that in our process guidelines we do allow  
22 for rare situations where documentation may be  
23 held in confidence. We have yet to experience it,  
24 and hopefully we may never do that. But any other  
25 questions from the panel members? Okay. Thank

1 you both.

2 Mr. Kulchyski, Dr. Kulchyski,  
3 rebuttal?

4 DR. KULCHYSKI: I like using the  
5 doctor here, it makes me feel like with all of  
6 these learned colleagues that I can stand on  
7 almost relatively level ground.

8 THE CHAIRMAN: I think in certain  
9 areas you would rank above them, and in other  
10 areas --

11 DR. KULCHYSKI: Many I would rank far  
12 below. I want to thank Mr. Bedford for  
13 acknowledging at least, and have some  
14 understanding of why we are curious about this  
15 document. And it is not an idle curiosity, I take  
16 it very seriously. I also appreciate what  
17 Mr. London said about the seriousness with which  
18 Fox Lake Cree Nation holds on to this information,  
19 and the damage that it could potentially do.

20 So much of what I heard them say is  
21 that this was not used as a part of EIS. And in  
22 effect, the nub of what I want say is, you know,  
23 our question is, should it have been used? Maybe  
24 it should have been used as part of the EIS  
25 because it conveyed a lot of information that

1 would be useful. The example that I think  
2 Mr. London presented, I think is instructive. He  
3 says what if the document says 17 women were  
4 raped, right? And it doesn't have any names. And  
5 so that potentially casts a pall over all of the  
6 females in the community. Maybe so. But if 17  
7 women were raped as part of a hydro project, are  
8 we just going ignore that, not think about it,  
9 shove it under the table and say, let's let the  
10 next Hydro project go on and let's not worry about  
11 what will happen to the next 17 women? I think,  
12 as painful as it is, we to look at that, if that  
13 is a hard fact. We have to know it, we have to  
14 say something about it, and at least we have to  
15 try and think of better ways to mitigate it.

16 To be honest, we have had people that  
17 we interviewed from the nation who have wanted  
18 their names to be used, some women who have said  
19 they were sexually assaulted, and this will come  
20 forward in our presentation, and they are very  
21 concerned about what is going to happen to the  
22 next generation of women when the camp is there.  
23 If there is more information pertaining to that,  
24 and it doesn't deal with individuals, but it give  
25 us some numbers or some information of that sort,

1 yes, it is painful information and, yes, it may,  
2 you know, reflect badly to the community, but we  
3 have to face up to that and we have to find, for  
4 God's sakes, some way of doing something about it.  
5 We have to try and make sure it doesn't happen  
6 again.

7                   So using the same example, I come to  
8 the exact opposite conclusion; we can't sweep this  
9 under the table, we have to confront it and then  
10 we have to try to find ways to mitigate it.  
11 That's part of our job. But we certainly have to  
12 look it square in the eye, if that's part of the  
13 reality, and deal with it.

14                   I guess the only other thing that I  
15 can say is, you know, we are kind of at an impasse  
16 to a certain extent. They are saying the  
17 information isn't relevant. I'm saying it looks  
18 like it could be relevant. So one possible  
19 solution is to have some kind of an independent  
20 assessment, have yourself or some member of the  
21 Commission take a look at the document and  
22 determine whether personal information can be  
23 redacted and whether it is relevant to these  
24 proceedings or not. And if it is, you know,  
25 release it to us or release it to who it can be

1 released. Then at least I would feel more  
2 comfortable if a third party somehow independently  
3 of, you know, they have an interest and we have an  
4 interest, so if someone comes forward and looks at  
5 it and says, no, this really isn't going to help  
6 the process at all, or yes, we think it will help  
7 the process in spite of what the Cree Nation  
8 thinks, and maybe it should come forward, that  
9 would be acceptable and make sense to me.

10 I understand under the Environment  
11 Act, I think it is section 6.3, you have the power  
12 to do your own investigation into whether  
13 information is relevant or not. So, certainly I  
14 would still like to see the document with the  
15 names redacted myself to see what we can glean  
16 from it. But I would trust someone independent to  
17 look at it and tell us whether it is or is not.

18 And I would suggest to you that if it  
19 provides some compelling, strong information that  
20 doesn't name names, but that tells us, gives us a  
21 deeper insight into the nature of some of the  
22 impacts of past projects, then to me that is very  
23 relevant and it is something that I think we would  
24 be very remiss to ignore, I guess is what I would  
25 say.

1                   So that's -- that's the best I can do  
2 as a professor for rebuttal to learned counsel  
3 there, and I'm happy to entertain any other  
4 questions you have.

5                   THE CHAIRMAN: Thank you,  
6 Mr. Kulchyski.

7                   MR. LONDON: Mr. Chairman, I know your  
8 process is informal, but I would like the  
9 opportunity to just make one comment.

10                  THE CHAIRMAN: Come to the mic, you  
11 need to be on the record.

12                  MR. LONDON: I appreciate it. I just  
13 wanted to say, I indicated that relevance was one  
14 of the tests, but I don't want the Commission to  
15 be, to make a silk purse out a sow's ear out of  
16 what they just heard. I also said the report has  
17 to be completed, it has to be methodologically  
18 sound, it has to be something on which we can  
19 rely, and then we get to relevance.

20                  THE CHAIRMAN: Thank you, Mr. London.  
21 Mr. Kulchyski, any final comment?

22                  DR. KULCHYSKI: As I understand,  
23 Dr. Eni is quite a respected researcher in the  
24 field. I think the draft report that she  
25 prepared -- I should also say it was presented to

1 the community at some point, which is why it was  
2 so widely known about, apart from the fact that  
3 she interviewed people. So it was an in-house or  
4 a community based public process around this  
5 report. And you know, I think the major part of  
6 her research was done, and I understand her to be  
7 a credible researcher. And I believe, if given  
8 the opportunity, she would certainly say it was  
9 methodologically sound. She wouldn't conduct  
10 research that she didn't feel was methodologically  
11 sound, and she is one of the experts in the field.  
12 So I think the draft nature of the report was  
13 simply trying to get the First Nation to sign on,  
14 although I don't know. And again, not seeing the  
15 report, I can't tell, so...

16 THE CHAIRMAN: Thank you. Any  
17 questions from panelists? Thank you very much,  
18 Dr. Kulchyski.

19 That brings the formalities of today's  
20 proceedings to an end. Before you rush off, just  
21 let me tell you what I hope will unfold from here.  
22 The panel will meet immediately following the  
23 adjournment of this to discuss the issues. We may  
24 or may not resolve them today, I suspect we will.  
25 I will inform all parties tomorrow by email as to

1 the basic decision in respect of each of the  
2 motions, that is whether they have been dismissed  
3 or accepted.

4           If they are dismissed and we commence  
5 the hearings on Monday morning, I will give  
6 relatively brief oral reasons on Monday morning,  
7 and written reasons will follow later next week.  
8 If we allow one or more of the motions and we  
9 don't meet Monday morning, then I will have more  
10 time to write the decisions and they will come out  
11 earlier sometime next week. So you should know by  
12 noon'ish, mid afternoon tomorrow as to the  
13 decision, the basic decision that we've -- whether  
14 they are allowed or dismissed.

15           Any questions?

16           Thank you all very much and thank you  
17 to all of the participants. Your presentations  
18 were very well done, and thank you for your --  
19 again, I want to thank all of the participants for  
20 their participation today and the good work that  
21 was done. Now we have to make the decisions based  
22 on all these excellent presentations.

23           Madam secretary?

24           MS. JOHNSON: Just a couple more  
25 documents to be put on the record. The Concerned

1 Fox Lake Citizens Organization motion will be  
2 MCFLGC, and KHLP's response will be MKHLP 02.

3 (EXHIBIT MCFLGC: Concerned Fox Lake  
4 Citizens Organization motion)

5 (EXHIBIT MKHLP 02: KHLP's response)

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7 (Concluded at 2:19 p.m.)

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REPORTER'S CERTIFICATE

I, CECELIA J. REID, a duly appointed Official  
Examiner in the Province of Manitoba, do hereby  
certify the foregoing pages are a true and correct  
transcript of my Stenotype notes as taken by me at  
the time and place hereinbefore stated.

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Cecelia J. Reid  
Official Examiner, Q.B.

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