

MANITOBA CLEAN ENVIRONMENT COMMISSION

BIPOLE III TRANSMISSION PROJECT

PUBLIC HEARING

MOTIONS HEARING

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Transcript of Proceedings
Held at Winnipeg Convention Centre

THURSDAY, AUGUST 16, 2012

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APPEARANCES

CLEAN ENVIRONMENT COMMISSION

Terry Sargeant - Chairman
Pat MacKay - Member
Brian Kaplan - Member
Ken Gibbons - Member
Wayne Motheral - Member
Kelly Dixon - Counsel to the Board
Cathy Johnson - Commission Secretary

MANITOBA HYDRO

Douglas Bedford - Counsel
Janet Mayor

BIPOLE III COALITION

Brian Meronek - Counsel
Ivan Holloway - Counsel
Garland Laliberte

CONSUMERS ASSOCIATION OF CANADA

Byron Williams - Counsel
Gloria Desorcey

GREEN PARTY OF MANITOBA

James Beddome

PEGUIS FIRST NATION

Robert Dawson - Counsel

INDEX OF PROCEEDINGS

Submissions by Mr. Meronek	6
Submissions by Mr. Holloway	21
Submissions by Mr. Bedford	26
Submissions by Mr. Beddome	35
Rebuttal by Mr. Meronek	44
Rebuttal by Mr. Holloway	49
Submissions by Mr. Williams	52
Submissions by Mr. Bedford	77
Submissions by Mr. Beddome	86
Rebuttal by Mr. Williams	95
Submissions by Mr. Dawson	102
Submissions by Mr. Hannon	126
Submissions by Ms. Mayor	138
Submissions by Mr. Hannon	142
Submissions by Mr. Williams	143
Rebuttal by Mr. Dawson	146
Discussion on timelines	153

1 THURSDAY, AUGUST 16 2012

2 UPON COMMENCING AT 10:00 a.m.

3

4 THE CHAIRMAN: I would like to call
5 the meeting to order, please. For those of you
6 who haven't sat through sessions that I have
7 chaired in the past, you should know that I am
8 punctual to the point of being a pain in the butt.
9 So I would like to get going. We have a
10 potentially long day ahead of us.

11 I think you have all seen the agenda
12 which is in front of you. We have allotted two
13 hours for each of three motions hearings, one this
14 morning, the first one will be Bipole III
15 Coalition. This afternoon, the first will be the
16 Consumer Association of Canada, followed by Peguis
17 First Nation.

18 We have also a note at the bottom of
19 the agenda which gives some time lines. The
20 moving party will be allowed 30 minutes to make an
21 oral presentation. The proponent will be allowed
22 30 minutes to respond, followed by some questions,
23 or perhaps questions from panel members, and then
24 an opportunity for the moving party to make a
25 rebuttal. Other than that, our process guidelines

1 will generally govern the proceedings today.

2 One very important thing, turn off
3 your cell phones. We have a rule that if any cell
4 phones go off during any of our hearings, you have
5 one of two choices, either leave permanently or
6 give up your cell phone permanently. We will
7 destroy it on the spot. So put it on vibrate or
8 silent, I don't want any -- and if a call does
9 come in and you need to take it, leave the room.
10 If you take it while you are in the room, it will
11 upset my humour.

12 I don't think that we have anything
13 else to deal with. Mr. Meronek, are you ready to
14 proceed?

15 MR. MERONEK: I am, sir. Point me
16 where I should go?

17 THE CHAIRMAN: Yes. The presenters
18 will sit up at that table where the mics are.

19 Just by way of general comment, we
20 should note that we have all read the materials
21 that were presented, they will form very much a
22 part of the record. We don't need you to go
23 through all of stuff in detail this morning or
24 afternoon, but to highlight the points that you
25 want us to take particular note of.

1 MS. JOHNSON: Mr. Chairman, could I
2 just ask that they introduce themselves for the
3 benefit of the transcriber?

4 THE CHAIRMAN: Yes. Anybody speaking
5 into the mic, please state your name for the
6 transcription. You don't have to do it every time
7 you open your mouth, but certainly at the opening
8 of your presentation.

9 MR. MERONEK: That would certainly cut
10 into my 30 minutes.

11 THE CHAIRMAN: Go ahead, Mr. Meronek.

12 MR. MERONEK: Thank you, Mr. Chairman,
13 members of the Commission, parties. I'm
14 representing the Bipole III Transmission
15 Coalition. I have with me Ivan Holloway, and we
16 both propose to speak. My topic will be on the
17 other scope issue, and Mr. Holloway will speak to
18 the adjournment matter.

19 Just a couple of preliminary points
20 first. I have distributed a package called
21 supplementary documents. And before anyone gags,
22 really all it represents is, I had indicated in my
23 written submission that I wasn't about to provide
24 the whole EIS or the answers to information
25 requests. So what I have done is I have put the

1 pertinent ones in here. So that will be easy for
2 the Commission, at its leisure, to review them if
3 it deems it appropriate.

4 I have also included in the package
5 some excerpts out of the EIS which I will be
6 referring to in a summary fashion. I have put one
7 case in, which is not on point in terms of facts,
8 but it deals -- it is instructive of what the
9 Commission should take into account when it comes
10 to the issue of out of scope. And I have got
11 copies for anybody who wants them. I think I have
12 distributed them to certainly Hydro.

13 I have five preliminary points to
14 make. The first one is, unless there is any
15 inference that is being drawn about our position,
16 I want to put on the record that we are not
17 bringing an application to deal with the east
18 side, east side of Lake Winnipeg. That is off the
19 table, notwithstanding the fact that it has been
20 something that we've indicated that we would be
21 addressing. We see that there is an argument with
22 respect to the issue of scoping as it relates to
23 that. So we are going to disabuse ourselves of
24 that complication.

25 What we want to deal with today are

1 the information requests that we submitted in time
2 to the Commission, on July 19 and 20, and express
3 at the outset our extreme concern that not one of
4 those information requests were submitted by the
5 Commission to Manitoba Hydro. If you look at the
6 questions individually, there are 129 of them, and
7 the probability that not one of them is in scope
8 or relevant is nil.

9 It leaves us to ponder whether or not
10 they were actually vetted or whether they were --
11 there was an understanding as to their relevance
12 or whether they were disregarded out of hand.
13 Hopefully that wasn't the case. And I have said
14 this in my written argument, there is something
15 seriously flawed when there is a preemptive
16 dismissal of relevant potential evidence, without
17 the protagonist even duking it out first and
18 having an arbitrator determine what is relevant.
19 We will never know what questions Manitoba Hydro
20 would have objected to, had they been submitted.

21 Having said that, we are here today
22 hopefully to convince the Commission that these
23 questions are not out of scope. They are relevant
24 for many, many reasons, and I will just articulate
25 some of them.

1 One, they deal essentially with
2 reliability, which is a focal part of this
3 hearing. They ask questions dealing with what
4 demand is actually required to be secured in terms
5 of reliability. They ask questions dealing with
6 the quintessential figure in chapter 2, which is a
7 graph 2.2.6, which talks about the loss of power
8 during an outage. They talk about planning
9 criteria required, which was used for low
10 probability, high risk outcome. That is, is there
11 an overkill here with respect to Bipole III? Were
12 the alternatives chosen by Bipole III, the
13 options, even realistic comparisons? Was the best
14 and least cost alternative omitted, deliberately
15 or otherwise? Are the total real costs included
16 for comparison purposes? Are all of the costs
17 included? Has Manitoba Hydro studied other
18 feasible alternatives which it has not advanced to
19 this Commission? And there are safety concerns
20 which we have addressed as well.

21 And in our respectful submission, if
22 we don't get answers to those questions, then to
23 quote the U.S. vernacular, due process will not be
24 accomplished, the Canadian counterpart is natural
25 justice will not be served. And the Commission,

1 in our respectful submission, will not be
2 fulfilling its obligation, and the Minister will
3 not receive a complete, accurate and instructive
4 assessment in terms of this hearing.

5 Now, Manitoba Hydro, as it relates to
6 the Bipole III Coalition says, and I say
7 respectfully, glibly, all of the questions are out
8 of scope. They put their corporate feet up on the
9 table, lean back and say, hey, none of this is
10 relevant. You can't look at information that
11 relates to whether there is a better way, and you
12 can't look at issues relating to whether there is
13 a less costly way. All that you can look at is,
14 is Bipole III needed, and that's it.

15 We say that the terms of reference are
16 clear and complete. We say that there is no other
17 reasonable interpretation that can be deduced from
18 the terms of reference that exclude the evidence
19 that we are trying to adduce and the information
20 that we are trying to garner with respect to
21 alternatives. The terms of reference didn't say
22 let's look at the EIS, but not chapter 1 or
23 chapter 2 or even chapter 7. Let's ignore costs,
24 let's ignore other alternatives, let's only
25 concentrate on Bipole III with the proposed

1 routing as is in the manner or means that is
2 proposed. Don't look at any other means or
3 alternatives, even if they are better or less
4 costly, or have lesser adverse environmental
5 impacts. None of that is in the terms of
6 reference.

7 I ask the rhetorical question, what if
8 this Commission in its wisdom rejects the Bipole
9 as proposed? Does that mean it gets shut down?
10 Shouldn't the Commission have in its arsenal
11 options that it can promote or recommend to the
12 Minister?

13 We might as well go home if all we are
14 dealing with is whether improved reliability is
15 required, I think we can all agree that it is, and
16 if only we have to look at whether Bipole III will
17 do the trick.

18 Manitoba Hydro had asked the
19 Commission, if there is any doubt go back to the
20 Minister, there is an open invitation. We say you
21 don't have to go back to the Minister. You would
22 only have to go back to the Minister if there is
23 an ambiguity. There is no ambiguity. It is clear
24 on the record. If the Minister had deemed it
25 appropriate to confine, restrict or otherwise

1 limit the scope of this hearing, he had the option
2 and he would have done so. The only question
3 about scope dealt with the east side, it was put
4 in the EIS, and that was the only restriction that
5 was imposed.

6 Now, I just want to reference in your
7 book a case out of the Ontario Court of Appeal,
8 which is tab A. It is Ontario Provincial Police
9 dealing with the Commissioner of the Cornwall
10 Public Inquiry. The facts aren't really
11 important. I have highlighted some of the facts
12 and some of the pertinent quotes. That particular
13 case was a commission of inquiry, much like this
14 is, where the Commissioners were asked by an
15 Order-in-Council to make recommendations as a
16 result of systemic child abuse in the Cornwall
17 area over a period of time at the hands of certain
18 authorities. The issue in that particular case
19 was whether examples of sexual abuse, that weren't
20 at the hands of government authorities, but which
21 were dealt with shabbily by the police, could be
22 incorporated as evidence. And the Court of Appeal
23 indicated at -- went through a treatise at page 8
24 and 9 of the decision and essentially said, the
25 issue of terms of reference in a commission of

1 inquiry is a jurisdictional issue. If the
2 Commission interprets the terms of reference too
3 narrowly, that's an excess of jurisdiction. If
4 the Commission interprets the terms of reference
5 too broadly, that's an issue of jurisdiction as
6 well. And the court went on to talk about what is
7 in scope, essentially, or out of scope as it
8 relates to evidence.

9 And at page 9 the court says:

10 "In my opinion any evidence should be
11 admissible before the Commission which
12 is reasonably relevant to the subject
13 matter of the inquiry, and the only
14 exclusionary rule which should be
15 applicable is that respecting
16 privilege as required by s. 11 of the
17 Public Inquiries Act."

18 It goes on to say in the middle of
19 page 9:

20 "Having determined that the test of
21 reasonable relevance should be
22 applied, it is necessary to consider
23 the meaning of the words "reasonably
24 relevant".

25 And later on in the quote, two-thirds down the

1 page, the court says, or adopts with approval the
2 following quote:

3 "In concluding what evidence is
4 admissible as being reasonably
5 relevant to the commission of Inquiry,
6 I would adopt the statement of
7 McCormick on evidence, 'relevant
8 evidence then is evidence that in some
9 degree advances the inquiry and thus
10 has probative value...'"

11 And we submit, with respect, that everything that
12 we are asking for is relevant and probative.

13 Now, the quintessential document
14 obviously is the terms of reference. And it is
15 recited in Manitoba Hydro at tab A, it is to
16 review and evaluate and make recommendations as to
17 whether the licence should be issued. And that's
18 pursuant to section 6, sub 5.1 of the Act, which
19 gives the Minister authority to specify those
20 terms. Those are the terms specified, nothing
21 more, nothing less.

22 Now, the Environmental Impact Study --
23 and if you look at tab B, I have identified a
24 summary of attached excerpts from the
25 Environmental Impact Study, which you can read at

1 your leisure, with the documents behind it at tabs
2 1 to 13, that identify what this Environmental
3 Impact Study is all about.

4 In my view, in the Coalition's view,
5 the following questions are quintessential.

- 6 1. Is there a need for improved
7 reliability on Manitoba Hydro's power
8 system?
- 9 2. If yes, is there a need for Bipole
10 III, or another way of phrasing it, is
11 Bipole III warranted to fill that
12 need?
- 13 3. If no, are there cheaper, better
14 alternatives to Bipole III?
- 15 4. Implicit in all of those questions
16 is at what cost to the environment?
17 In other words, are there adverse
18 environmental impacts which outweigh
19 the need or benefit of any project,
20 and if so, can there be conditions
21 imposed on any approval of the project
22 to mitigate against these adverse
23 environmental impacts?

24 To me, that's what the Commission should be
25 focusing on, and I have recited it in the summary.

1 Now, when you look down the page, some
2 of the comments just leap out. For example, just
3 above item number 3, Manitoba Hydro's mandate
4 includes to supply power adequate for the needs of
5 Manitoba and to promote economy and efficiency in
6 the transmission of power. Over on the next page,
7 two-thirds of the way down under needs and
8 alternatives, the need for Bipole III will be
9 detailed along with technically and economically
10 feasible alternatives. That's just above source
11 number 6.

12 The chapter which puts it all into
13 focus is chapter 2. And in chapter 2, I set out
14 the questions that Manitoba Hydro asked. For
15 example, why is the project needed? What are the
16 load requirements to be met? What options are
17 there aside from a new north/south transmission
18 line?

19 What Hydro did is they reviewed
20 certain alternatives to the north/south
21 transmission, including gas turbines and import
22 ties to the United States. They also considered
23 other alternatives which they rejected out of
24 hand, didn't tell us what they were exactly,
25 except for strengthening existing HVDC

1 transmission lines and converter stations, and
2 staging Bipole III. Manitoba Hydro did not
3 identify all the alternatives considered, but
4 chose to disclose a few which did not require
5 Bipole, by the way.

6 So, what we can take away from that is
7 Manitoba Hydro didn't eliminate from
8 considerations alternatives which did not involve
9 building Bipole III. They chose, Manitoba Hydro
10 chose alternatives which were not all inclusive of
11 feasible choices which we say we can demonstrate
12 or will demonstrate, only those which are patently
13 unattractive. In other words, they didn't include
14 reasonable viable alternatives, which we will say
15 have been considered by Manitoba Hydro.

16 To go over to the next page, just
17 above source number 9, when looking at the
18 alternatives, Manitoba Hydro states the main
19 evaluation criteria for project alternatives is
20 project cost. And then it goes down further and
21 says, Manitoba Hydro recommends means which it
22 states are by far the least cost alternative, they
23 are technically feasible, and they provide
24 excellent reliability. And then the rationale
25 just above number 13 is, Bipole III is the most

1 cost effective alternative that meets the entire
2 supply shortfall in the event of an extended HVDC
3 outage with a minimal risk.

4 So, with that in mind, how can it
5 possibly be said that our questions are out of
6 scope? It is not cogent, it is gossamer to
7 suggest that.

8 Now, Mr. Williams will talk later on
9 about sustainability assessment. I have gone
10 through the papers that he cited from Professor
11 Gibson, and I just want to make one comment -- or
12 two comments. In the paper that Professor Gibson
13 prepared, which is in CAC tab F, at page 37 of
14 that, page 24 and 37 of that document, he talks
15 about timing, skill, pacing components of a
16 project. In other words, you don't have to do it
17 all at once, you don't have to -- you can do
18 components of a project. In other words, these
19 are things that all have to be examined. More
20 importantly, in CAC tab H, page 6, he talks in
21 terms of the various approaches that are --

22 THE CHAIRMAN: Where is that?

23 MR. MERONEK: That's in Mr. Byron's --
24 CAC tab H, page 6. He talks in terms of
25 approaches that a proponent can take. One of the

1 approaches is judging a single proposal based on a
2 set of standards. That's not what was chosen here
3 by Manitoba Hydro.

4 The second approach is to do an
5 assessment of processes which involve comparative
6 evaluation of reasonable alternatives. That's
7 ostensibly what Manitoba Hydro purports to do.
8 Unfortunately, in our view, Manitoba Hydro did not
9 adopt that approach in its entirety. Because what
10 it did was set up straw men, in our view. It took
11 two alternatives which were bound to be
12 unattractive. And it is like saying, well, why
13 don't we compare it to an alternative of taking
14 coal all the way from Alberta and building a
15 generating station based on coal? You have to
16 look at reasonable alternatives.

17 Now, in our case I have gone
18 through -- because we have just learned lately
19 that it is really out of scope, concern that is
20 the issue. I have prepared in tab C a summary of
21 all of the information requests that have not been
22 answered, under a topic of what they address
23 essentially, and a note as to whether they are in
24 scope or not. I say that every one of these
25 matters is in scope and there are -- you can read

1 them at your leisure, but there are two aspects
2 that I would like to address.

3 One is many of these information
4 requests relate to topics that have been asked by
5 the CEC. So how can it be said that questions
6 relating to those topics are out of scope? How
7 can you have questions in scope on one topic, but
8 similar questions on the same topic are out of
9 scope? That's the first thing.

10 The second point I want to make is in
11 question number 9(i), and 12(j), Manitoba Hydro
12 has a report that we have asked for, that it will
13 not submit. It is a recent report. It deals with
14 the relocation of -- it should be of Bipole II,
15 not Bipole III -- as a viable and attractive
16 option in reducing risk of Dorsey outage, which
17 has a 50 per cent reduction in the risk with
18 substantial financial savings. Why is that
19 document not before this Commission for its
20 review?

21 THE CHAIRMAN: What question was that
22 again, Mr. Meronek?

23 MR. MERONEK: It is under our summary
24 and it is question 9(i).

25 THE CHAIRMAN: Okay. Thank you.

1 MR. MERONEK: And that's for the
2 report under 12(j).

3 Questions 11(o) and (r) deal with,
4 under the proposition and the premise that this
5 alternative has to be looked at, we have to do
6 cost comparisons, and that's what we are trying to
7 get information on in order to indicate to this
8 Commission that Bipole III is not the best
9 solution. And we have also asked for reports,
10 some of which have been given, some of which have
11 not been given, but they all relate to relevant
12 material.

13 With that, hopefully I can turn it
14 over to Mr. Holloway for a few minutes to talk
15 about adjournments.

16 THE CHAIRMAN: About six or seven
17 minutes.

18 MR. HOLLOWAY: Thank you, Mr. Chair.
19 Good morning members of the Commission. My name
20 is Ivan Holloway, I'm counsel to Bipole III
21 Coalition. The Coalition is seeking an
22 adjournment and a revised schedule of this matter
23 as has been set out in the materials. Here is the
24 reasons why. The project that is before the
25 Commission is a project of scope and size that is

1 rare in this province. We are talking about a
2 project that is \$3.3 billion. We are talking
3 about a project that is -- that runs two-thirds of
4 the length of the Province of Manitoba. The
5 Environmental Impact Statement is a document that
6 is 2,000 pages long. The technical reports
7 related to the EIS are 4,000 pages. The total of
8 the first round IR responses is close to 1,000
9 pages.

10 The participants in this matter
11 received notice of their funding on May 14 of this
12 year. From May 14, which is really the starting
13 point from which they can start preparing, they
14 have four and a half months to go through these
15 materials, to hire experts, to prepare IRs, to
16 receive responses to IRs, to formulate further
17 second round IRs, to use the responses to those
18 IRs to have their experts prepare reports that are
19 meaningful, thoughtful, and that provide some
20 substance to the proceeding. Then there is a
21 process required to prepare, separate and apart
22 from all of the preliminary process, to prepare
23 for this hearing.

24 On July 19 we received, the
25 participants received six further technical

1 reports, which is basically primary EIS material,
2 totaling 1,064 pages. This is less than two and a
3 half months before the hearing is set to commence.

4 July 31, Hydro notifies the CEC that
5 it will be providing supplementary EIS documents,
6 and it provides further supplementary EIS
7 documents in the total amount of 93 pages.

8 August 8 of this year, Hydro notifies
9 CEC that it will be providing a supplementary
10 caribou technical report, 153 pages.

11 August 15, yesterday, Hydro provides
12 answers to 124 first round IRs totaling 300 pages.
13 By letter of that same date, August 15, Hydro
14 advises that there are more answers to first round
15 IRs to be filed "in the near future". The current
16 deadline for second round IRs, which as we know is
17 based upon the answers received to the first round
18 IRs, is August 17, which is tomorrow.

19 We are currently less than one and a
20 half months away from the beginning of this
21 hearing and we are still receiving EIS basic
22 material at this point in time. Our experts need
23 to take this material, they need to consider it,
24 they need to discuss it, they need to look at
25 background supporting documentation, the

1 references, the studies which are voluminous,
2 contained in these materials. They need to
3 prepare a report, consult with counsel, consult
4 with participants, and all of those individuals
5 combined need to prepare for a hearing starting on
6 October 1, for a project that is one of the most
7 important and large projects in Manitoba right
8 now, if not in the history of Manitoba.

9 Given the volume of material, which is
10 technical, which is something that you simply
11 can't read on the bus ride home, given the
12 importance of this matter, it is simply absolutely
13 and completely impossible for participants to be
14 able to meaningfully provide a position and
15 provide evidence based upon this timeline. It is
16 absolutely impossible.

17 And the argument that I'm making there
18 is -- that's the argument, notwithstanding my
19 colleague's argument on the scope of the
20 proceeding and whether questions, IRs that have
21 been submitted for his purposes are to be allowed,
22 or whether IRs that Mr. Williams has submitted are
23 to be allowed, that's not even including the
24 circumstances in which those are going to be
25 allowed, which would obviously extend, exacerbate

1 and compound the issues beyond reason.

2 I can't see, based on all of these
3 circumstances, based on the fact there has been
4 already two rescheduling of the -- one
5 rescheduling of the IRs -- the onus has really got
6 to shift to Hydro to say, why, what is it about
7 this project that needs to have a process that is
8 so -- that is being pushed forward with such speed
9 and in the absence of what is quite frankly due
10 process? The onus has got to turn to them to tell
11 us where is the prejudice. There is nothing,
12 absolutely nothing in their materials that they
13 have filed in response to this motion that tells
14 us where the prejudice is to have this matter
15 adjourned and a new litigation schedule set for at
16 least two months, and maybe as Mr. Williams put
17 forward, four months.

18 THE CHAIRMAN: Please wrap up,
19 Mr. Holloway.

20 MR. HOLLOWAY: Yes. We all know that
21 the amount of wilderness in the world is limited.
22 We are privileged to have in this province and
23 this country some of the most pristine large
24 tracts of wilderness anywhere. The proposal being
25 put forward for Bipole III cuts a swath right

1 through some of that pristine wilderness.

2 This is important. The Environment
3 Act talks about looking out for the current
4 generation, for future generations. And there are
5 few projects that are more important, that are
6 larger in scale than this one. And as it stands
7 right now, given the schedule, it is hard not to
8 view this as a foregone conclusion. I'm not
9 saying that it is a foregone conclusion, but the
10 appearances on a schedule like this is that it is
11 a foregone conclusion. This is important. This
12 needs to be dealt with properly. And an
13 adjournment is absolutely essential. Without it
14 there is not going to be an opportunity for the
15 participants to participate meaningfully and,
16 therefore, this process will not be procedurally
17 fair and will not be in accordance with natural
18 justice. Those are my submissions.

19 THE CHAIRMAN: Thank you. Before you
20 leave -- do any of the panelists have questions of
21 clarification? No. Thank you.

22 Manitoba Hydro?

23 MR. BEDFORD: My name is Doug Bedford.
24 I appear today as counsel to Manitoba Hydro, the
25 proponent of the Bipole III project.

1 Commissioners, your terms of reference
2 do not ask you to investigate and to recommend to
3 the Minister of Conservation whether there is a
4 less costly way for Manitoba Hydro to meet its
5 need to improve the reliability of its
6 transmission system. Your terms of reference do
7 not ask you to investigate and recommend whether
8 the Bipole III project is needed at this time. I
9 would respectfully suggest to you that if the
10 answers to those questions were critical to the
11 Minister of Conservation, he would have said so
12 explicitly in his terms of reference, and no
13 doubt, with the greatest of respect to the five of
14 you, he would have referred such questions to a
15 panel of electrical and civil engineers.

16 Mr. Meronek is entirely correct when
17 he suggests to you that what you have to weigh
18 with respect to his client's motion is whether or
19 not the questions to which his client seeks
20 answers are relevant to your terms of reference
21 and to this inquiry. I would suggest to you that,
22 at best, the questions that you have before you
23 from the Bipole III Coalition relate to issues
24 that are collateral and minor to an environmental
25 hearing.

1 Now, Mr. Meronek and Mr. Holloway, in
2 order to advance the motion that their client has
3 instructed them to bring, have had to argue that
4 the issues they want canvassed at this hearing are
5 relevant to your mandate, and they have to rely in
6 so arguing entirely on the use of the word
7 "review" that is in the terms of reference. And
8 further, they will have to convince you, when you
9 deliberate on their motion, that there was an
10 implied intent on the part of the Minister of
11 Conservation when he used the word "review" in the
12 terms of reference, that his use of that word was
13 his way of directing the five of you to determine
14 if the Bipole III project is needed at this time,
15 and further to determine whether or not it is the
16 least costly way for Manitoba Hydro to meet its
17 reliability needs.

18 I would suggest to you, presumably, if
19 you are persuaded that you are to inquire into
20 those issues, that you will have to do so at the
21 expense of spending less time at the upcoming
22 hearing on environmental issues which, of course,
23 are your known area of expertise, why each of you
24 accepted appointments to the Clean Environment
25 Commission of the Province of Manitoba.

1 I suggest to you that trying to put
2 all of that weight on the word "review" in your
3 mandate is not a sustainable nor persuasive
4 argument at the end of the day. I will
5 acknowledge it is a clever argument, and I will
6 acknowledge that it is not a frivolous argument
7 that Mr. Meronek is advancing before you. But at
8 the end of the day, although the questions that he
9 seeks answers to may well be relevant to the
10 issues he wants canvassed, the issues he wants
11 canvassed, I submit, are out of scope to the
12 mandate.

13 The reason that we put into our brief
14 a reminder to you that there is an invitation in
15 your terms of reference to seek clarification from
16 the Minister was put there solely because, if you
17 are inclined to put all of that weight on the word
18 review and that that word implies that you are to
19 investigate and explore whether the Bipole III
20 project is needed, whether it is the least costly
21 method of proceeding, that those sorts of issues
22 ought to have been made explicit in the terms of
23 reference, not compelling Commissioners to read
24 into the word review, that they have to do that.

25 And finally with respect to

1 Mr. Holloway's observations that it is completely
2 impossible for this schedule to be maintained,
3 with the greatest of respect to Mr. Holloway and
4 to all of you, I am reminded that this Commission
5 had a hearing some years ago which you had to
6 consider not one project at the same time, but
7 two. I'm thinking of the Wuskwatim Generation
8 Project and the Wuskwatim Transmission Project,
9 EIS's for which ran to thousands of pages, the IRs
10 that were presented and answered exceeded 3,000,
11 with the corresponding number of pages. You also
12 were given an explicit mandate for that hearing to
13 canvass the need for and alternative issues. The
14 EIS of my then client was filed, and 11 months
15 later you started the hearing. So to Mr. Holloway
16 who thinks it is completely impossible for this
17 Commission to do that in this case, where at the
18 start of the hearing ten months will have elapsed
19 from the date that we filed our EIS, I say it is
20 not completely impossible, it is indeed possible.
21 I know so because I have done it. The pace, I
22 acknowledge, is intense. It is not leisurely, but
23 it can be done because I myself have done it. And
24 if I can do it, I would suggest most respectfully
25 that anyone in this room can do it. Because from

1 my personal observation, each person in this room
2 possesses to one degree or another more expertise
3 and more ability than I possess. So it can be
4 done.

5 Subject to any questions you may have
6 for me, that is all I wish to tell you today with
7 respect to the Bipole III Coalition motion.

8 THE CHAIRMAN: Thank you, Mr. Bedford.
9 I do have a couple of questions and they relate to
10 your interpretation of our terms of reference. I
11 don't fully understand them because is it not, at
12 least in my experience, which is about eight years
13 now with the Clean Environment Commission, eight
14 and a half years, in my experience environmental
15 impact assessment does include a need for and
16 alternative to step. This is contained in the
17 Canadian Environmental Assessment Act, which
18 granted is not -- does not govern Manitoba
19 proceedings, it is a Federal statute, it doesn't
20 govern what we do, but it is -- the Act and also
21 the guidelines that come out of CEAA tend to be
22 followed in all environmental impact assessments.

23 The second part of this is that the
24 Minister asked us to review the EIS filed by
25 Manitoba Hydro. And there is a chapter in there

1 called needs for and alternatives to. So if we
2 are going to fulfill our mandate as given to us by
3 the Minister, which is to review the EIS, are we
4 to skip that one chapter?

5 MR. BEDFORD: No. The CEAA is Federal
6 legislation. I concur with your interpretation of
7 it. My response to that is it does not apply to
8 your mandate or to this hearing. We have to
9 follow Provincial law. I said earlier that issues
10 for need for and alternatives are collateral to
11 the main purpose of this hearing. I'm not
12 suggesting to you that you would ignore recording
13 and reading chapter 2, and hearing evidence
14 generally with respect to chapter 2.

15 But to understand the company's
16 explanation of why it needs this project, to
17 understand whether or not the company gave any
18 consideration whatsoever to alternatives in trying
19 to meet its needs, does not require you to engage
20 in a more expansive, in a more detailed
21 investigation into whether or not there are less
22 costly ways to meet the alternative need, and then
23 arguably to recommend that a less costly -- if
24 Mr. Meronek's client were to be allowed to do this
25 and were to convince you that there is a less

1 costly way to do it, or alternatively that it is
2 not needed at this time. I think the real concern
3 is how much time do you want to invite people to
4 spend at a hearing and transform what is intended
5 to be, I suggest to you, an environmental hearing,
6 drawing upon the expertise of Commissioners of the
7 Clean Environment Commission into areas that take
8 you far beyond not only your area of expertise,
9 but, yes, as I have submitted, beyond what I
10 believe was intended in the mandate given to you.
11 If we were to go there, I suggest it would have
12 been made explicit, not as Mr. Meronek is
13 compelled to argue and as you have outlined for
14 me, Mr. Sargeant, implicit in the word "review".

15 THE CHAIRMAN: We are also in our
16 terms of reference asked to incorporate the
17 principles and guidelines for sustainable
18 development in Manitoba, one of which does refer
19 to efficient use of resources, and calls for
20 proper resource pricing, demand management, full
21 cost accounting. How would that play into this?

22 MR. BEDFORD: Well, I'm anticipating,
23 and have been for over a year, that you will ask
24 some questions of my client. Because I'm
25 anticipating that you would do that, I'm expecting

1 that I'm going to do that, to ask them generally
2 about the cost, about alternatives that they
3 looked at. You have read the gist of that of
4 course in chapter 2. And whether or not the
5 sustainability principles are being observed and
6 respected, and how my client's employees think
7 that they are. So I'm certainly not suggesting to
8 you that that's an area of inquiry to which I, as
9 counsel to Manitoba Hydro, would object. I think
10 it is a relevant area of inquiry.

11 But once again, your mandate is to
12 conduct an environmental hearing, we all know
13 that. You are very much an organization which is
14 directed to embrace public participation,
15 encourage the public to come forward and comment
16 on projects that are being proposed, particularly
17 class 3 developments such as this. And then you
18 record not only what you have heard, but you bring
19 to bear your own expertise when you draft your
20 recommendations to the Minister of Conservation.
21 But, again, this is primarily to be an
22 environmental hearing, not a cost accounting
23 hearing.

24 THE CHAIRMAN: Thank you, Mr. Bedford.
25 Commissioners, any questions? Thank you.

1 Thank you, Mr. Bedford.

2 I will entertain a very short brief
3 from other participants if they wish to have a
4 five minute say. If you are just going to say "me
5 too", then there is not much point in doing it,
6 but if you have other comments on this particular
7 motion, I will hear them. Five minutes only.

8 Mr. Beddome?

9 MR. BEDDOME: I'm willing to take the
10 five minutes, but I believe the schedule sent out
11 indicated ten minutes. I'm wondering why --

12 THE CHAIRMAN: Well, actually the
13 schedule indicated no time at all for other
14 participants.

15 MR. BEDDOME: Okay. I will gladly
16 take your five minutes. That means I'm going to
17 have to move considerably quicker on this.

18 THE CHAIRMAN: Please identify
19 yourself for the record.

20 MR. BEDDOME: Yes, I will. Just one
21 second, if I may get myself set up, if you are
22 okay with that, given the tight time frames that
23 we have to work under.

24 Okay. My name is James Beddome. I am
25 the leader of the Green Party of Manitoba, and we

1 are participants here in the Clean Environment
2 Commission hearings.

3 Basically, we want to firstly put our
4 support for an adjournment. I'm not going to
5 spend a lot of time, given my time constraints, to
6 discuss this, but what I will say is I think there
7 needs to be an adjournment. We have had many --
8 the briefs put forward in terms of the
9 deficiencies, and I think perhaps the best example
10 is the caribou report, finished less than a week
11 ago. That is assuming that people have experts on
12 the ready, ready to review it, to put questions in
13 by the 17th. This schedules seems ridiculous.

14 I am hoping I might get five minutes
15 to the Consumer's Association presentation, so I
16 am going to leave any further comments to that
17 extent for that.

18 In terms of needs for and alternatives
19 to and relevancy, this is something that really
20 concerns the Green Party of Manitoba. I was quite
21 shocked when I got my response back as to our
22 evaluation for funding, which indicated,
23 apparently in the opinion of the Commission that
24 reviewed it, that demand side management is
25 completely outside of the scope of this hearing.

1 I have made comments -- and I would cite them, but
2 given five minutes, I am going to avoid that -- in
3 both the May 10th pre-hearing meeting and the July
4 19th meeting, asking for clarifications on what
5 the Commission considers to be germane. And also
6 indicating that I think you have to look at this
7 project in totality, in terms of looking broadly
8 at it.

9 What I will say in terms of the
10 response to Manitoba Hydro about relevancy is that
11 actually the Commission has much more -- in the
12 past there has been examples of the Commission
13 reading in economic concerns. So the Green Party
14 of Manitoba put in a submission on the
15 investigation regarding Louisiana Pacific, and I
16 sent that in my response to the motion, links to
17 that for you.

18 We made the argument, similar to the
19 argument being made by Mr. Bedford. In those
20 cases, in fact the terms of reference were more
21 explicit to deal with health and environmental
22 impacts. We argued you are supposed to look at
23 health and environmental impacts, not economic
24 arguments. The Commission came back in its
25 decision and said, no, we can read in the

1 principles of sustainable development, which talks
2 about the integration of environmental and
3 economic decision making. So they read it in and
4 looked at the consideration of jobs, of what that
5 meant for the mill, even though the terms of
6 reference were quite explicit to environmental and
7 health concerns.

8 Now, in this case there is an explicit
9 reference to the two -- the principles of
10 sustainable development. And I would also argue
11 that not only does it talk about integration of
12 environmental and economic decision making, it
13 also talks about the need for meaningful public
14 input and consultation.

15 I would suggest, as Mr. Bedford said,
16 you know, it maybe a grueling process. Well, for
17 unfunded participants and people in the public
18 that want to participate in a process that is
19 going to cost, you know, ultimately it is going to
20 put more debt obligations on behalf of Manitobans,
21 then we need to have an ability to participate.

22 I also, in my submission, I had
23 highlighted the case of Alberta Wilderness
24 Association and Cardinal River Coals. Now in that
25 case it looked at needs for and alternatives to --

1 now, granted, I will admit under CEAA -- because I
2 gave you a CanLII link, I don't have a paragraph
3 number, but if you go about two-thirds of the way
4 down, just above section 6, the joint view of
5 review panel breach, about three paragraphs up:

6 "While the alternative means of
7 underground mining is generally
8 considered a Joint Review Panel's
9 report, the effects of this
10 alternative means, as compared to the
11 effects of open pit mining, are not
12 considered in any meaningful way. I
13 agree with the applicants' argument
14 that simply identifying potential
15 alternative means without discussing
16 their comparative environmental
17 effects fails to provide any useful
18 information to decision makers, and
19 fails to meet the requirements of
20 paragraph 16(2) of CEAA."

21 So what I'm trying to get at there is that if we
22 don't look at this broadly, and we can't just
23 simply say the needs for an alternative as
24 proposed by Hydro, but rather there has to be an
25 attempt for participants to test and to push these

1 things out.

2 I owe a great debt to the Bipole III
3 Coalition. Although the Green Party of Manitoba
4 certainly doesn't agree with all of their
5 positions, we owe a great debt in terms of some of
6 the great questions about the LaVerendrye
7 substation. I think they figured out what I had
8 asked in terms of my March 16th comments about
9 isn't there a way that we can twin this with Riel,
10 in terms of licensing Riel separately, rather than
11 looking at this as a total project, we can't look
12 at alternative locations for Riel to cut off
13 length of the line. So if you keep slicing this
14 up into little chunks, you can't ever analyze it
15 properly.

16 And then we have a sham review. And I
17 would like to hope that we don't have a sham
18 review, but if we don't analyze it in the context
19 of the totality, that's what we are going to have.

20 I also want to highlight the scoping
21 document, because the scoping document also
22 explicitly deals with needs for and alternatives
23 to. I highlight page 9 of 26, and you go under
24 section 4, needs and alternatives:

25 "The purpose of the project will be

1 addressed in the EIS in relation to
2 the need to improve the reliability of
3 Manitoba's power system by creating a
4 second major transmission corridor and
5 third Bipole line, and the requirement
6 for additional transmission capacity
7 for ..."

8 emphasis added,

9 "...future generating stations in
10 Northern Manitoba. The transmission
11 line routing process for the project
12 will not address the east side of Lake
13 Winnipeg as an alternate route to a
14 decision reached in 2007 by Manitoba
15 Government and Manitoba Hydro-electric
16 Board. The requirement for a physical
17 separation from existing...

18 I will leave it there. But basically what I'm
19 saying is, it already ties in the need for and
20 alternatives to has to look at northern
21 generation. So contrary to the arguments that we
22 are hearing from Manitoba Hydro, we have to
23 consider this in totality.

24 There is lots of comments in the
25 responses, in the EIS where, you know, why are we

1 siting the northern convertor station right where
2 Conawapa is? I think it is quite obvious to most
3 people, it is part of a long term development
4 plan.

5 What I want to close and highlight
6 with is I think the great words of Peter Miller
7 from the Green Action Centre, he sent you a
8 letter, Mr. Chairperson, suggesting that you look
9 at a broader review. I can't go through
10 everything, but page 2 of 12, which I circulated
11 around, recommendation 4, in the Wuskwatim hearing
12 the Consumers Association of Canada, MSOS -- I'm
13 not sure what that is referring to -- and Resource
14 Conservation Manitoba, now Green Action Centre,
15 and Time to Respect Earth's Eco-system recommended
16 that a proper NFAAT should be a comparison between
17 alternative suites or portfolios of alteratives
18 rather than separate projects by themselves. This
19 is because generation, transmission and demand
20 side management options complement one another in
21 systematic ways, and choices are ultimately
22 between complementary sets of alternatives to meet
23 Manitoba's energy needs. Recommendation 6.4 of
24 the CEC report on Wuskwatim endorsed this
25 recommendation.

1 So I think I'm probably at my five
2 minutes, so I think I have made my point quite
3 clear, which is that we have to look broadly at
4 this. And you do, within your existing terms and
5 within the experience and history of this
6 Commission, you can look more broadly at this. In
7 fact, I would say you need to look more broadly at
8 this. This is why they call Clean Environment
9 Commission hearings, so the public can be
10 involved.

11 Just as a final note, page 27 of 80 in
12 the Bipole III Coalition submission, there is some
13 questions that the Green -- that they reference,
14 ideas the Green Party of Manitoba put forward that
15 they have withdrawn, I would just like to make it
16 clear, we would actually like to not have that
17 withdrawn. If we need to remove it as an
18 information request by tomorrow, we will do that.
19 But I would also just like some time on those
20 information requests, given we have a motion today
21 and the timeline. Thank you.

22 THE CHAIRMAN: What was that Alberta
23 case you referenced?

24 MR. BEDDOME: I sent it around to the
25 Commission with the CanLII link, but it is Alberta

1 Wilderness Association versus Cardinal River Coals
2 Limited, that's a 1999 Federal Court -- it is a
3 Federal Court of Appeal case is the one that I
4 cited. It was turned over in appeal.

5 THE CHAIRMAN: Cardinal River?

6 MR. BEDDOME: Alberta Wilderness
7 Association v Cardinal River Coals. If you see my
8 response that I circulated to the CEC, it is
9 provided there in the links, the CanLII citation.

10 THE CHAIRMAN: Thank you, Mr. Beddome.

11 Mr. Meronek, rebuttal?

12 MR. MERONEK: I just have four or five
13 points.

14 THE CHAIRMAN: I just want to note,
15 Mr. Beddome, the reason I ask you to keep it down
16 a bit is that the recorder might suffer hearing
17 loss if we keep it too loud.

18 MR. BEDDOME: I fully admit I have a
19 booming voice.

20 THE CHAIRMAN: Thank you.

21 Mr. Meronek.

22 MR. MERONEK: First point I would like
23 to make is, Mr. Bedford suggests that these
24 questions are collateral to the main issues. With
25 all due respect, if you read the information

1 requests, all but three or four that relate to
2 relocation target main issues in terms of
3 reliability, risk, and matters of that nature, and
4 they are not collateral to. But in any event,
5 this is not the forum or the time to deal with
6 matters of collateral nature. They are either
7 admissible or they are not.

8 At the hearing, it is at that point in
9 time that the Commission can then determine what
10 weight to put on this evidence. This is not the
11 time. If they are in scope, they are in scope and
12 they should be allowed to proceed.

13 The second point that Mr. Bedford
14 makes is that, well, review of the EIS's is all
15 that you are supposed to do, and it is nebulous as
16 to what that really means. What he didn't include
17 is the phrase, it is review and evaluate. That
18 makes it more comprehensive.

19 And the EIS contains chapter 2, as
20 you've pointed out. Now, chapter 2 isn't just
21 incidental, it is the whole raison d'etre for
22 Bipole III. What the Commission appreciates, and
23 what everyone should appreciate, is that the whole
24 thrust behind Bipole III supposedly, within the
25 four corners of this hearing, is reliability. And

1 you have to examine that question in order to
2 determine whether Bipole III is necessary. And
3 these questions relate to that.

4 And it is fallacious to suggest that
5 costs are not integral. Manitoba Hydro itself, in
6 dealing with alternatives, says that's the primary
7 factor in selecting alternatives is costs. And
8 why not?

9 The fourth point is, he suggests that,
10 well, you will need engineering experts to come in
11 who have more expertise or they should be on the
12 panel. That's what panel's are all about. You
13 will hear from the experts, you will hear from
14 engineering experts. You will be able to make an
15 assessment as to their credibility and the cogency
16 of their evidence and what they are saying.

17 You are not an accountant, you are not
18 an economist, but you have a role here that goes
19 beyond just the narrow environmental touchy feely
20 subject matter.

21 The one thing that I want to emphasize
22 is, to the extent that this is an environmental
23 assessment, the feasibility, the relocation that
24 we are talking about and are going to promote will
25 eradicate, or eliminate, or severely reduce at

1 least the environmental impacts that we are all
2 concerned about, the thousands of pages. You
3 won't need a transmission line that runs
4 two-thirds of the province. It is going to
5 ameliorate a lot of the problems. To suggest
6 that's not relevant, I think is absolutely not
7 sustainable.

8 And so just on that score, we urge
9 that these information requests be asked.
10 Obviously, there is going to have to be a time
11 line associated with the answer to those questions
12 and the process dealing with second round
13 information requests. That's my response, Mr. --
14 I was going to call you My Lord, but I will call
15 you Mr. Chairman.

16 THE CHAIRMAN: Thank you, Mr. Meronek.
17 A couple of questions, Mr. Meronek. In your
18 initial submission on the very last page, point
19 19, you write that the coalition will argue that
20 any reason for not delaying the hearing presumes
21 that the CEC will recommend the project to the
22 Minister without change. In his closing comments
23 earlier, Mr. Holloway also suggested that if we
24 didn't accept your motion that we were showing
25 bias. You didn't use those words, but the

1 suggestion to me is, from both of these
2 statements, is that you are thinking that we may
3 be biased?

4 MR. MERONEK: No, no. What I'm saying
5 there is, for Manitoba Hydro to argue -- the
6 presumption has to be that there will be no
7 change, that it will be approved as is, without
8 regard to whether there are alternatives. It
9 wasn't in the sense of bias, it was in the sense
10 of, it is not just shutting the project down, are
11 there other ways to do it?

12 THE CHAIRMAN: You might consider
13 better writing in future, better wording for that
14 statement. The way you explained it now is less
15 offensive to the panel than what is written here.

16 MR. MERONEK: Well, I didn't mean to
17 offend the panel and it certainly was not in that
18 context.

19 THE CHAIRMAN: Thank you. Any other
20 comments or questions from the panel? Thank you
21 very much.

22 Well, amazingly, we are well ahead of
23 schedule.

24 MR. HOLLOWAY: Sorry, Mr. Chair?

25 THE CHAIRMAN: Sorry, Mr. Holloway,

1 you haven't used your ten minutes.

2 MR. HOLLOWAY: I will be brief.

3 THE CHAIRMAN: That's fine, you have
4 about five, six, seven minutes.

5 MR. HOLLOWAY: Then I will be longer.

6 THE CHAIRMAN: You are a lawyer after
7 all.

8 MR. HOLLOWAY: Mr. Bedford made really
9 one point with respect to the issue of whether
10 this matter should be adjourned and a new
11 litigation schedule put forward, and that is he
12 pointed to the Wuskwatim project and pointed out
13 that it was a project that was of similar scope,
14 similar large volume of materials, and that
15 participants were able to -- and the CEC was able
16 to proceed on that matter in a pace that is
17 similar to this pace.

18 Mr. Bedford commented that that
19 proceeding was 11 months. I will take his word
20 for that, I wasn't part of that proceeding. I
21 would like to point out that we are looking at
22 four and a half months.

23 Mr. Bedford commented that if it was
24 possible to do that proceeding, and I'm quoting
25 here, he is saying it is not completely impossible

1 to do this proceeding under similar circumstances.
2 I completely agree with Mr. Bedford on that
3 comment. It is not completely impossible to do
4 this proceeding under this time line, it is
5 completely impossible to do this proceeding
6 properly on this time line. Those are my
7 submissions.

8 THE CHAIRMAN: Thank you.

9 MR. MERONEK: Mr. Chairman, it bothers
10 me, your last comments, and you caught me off
11 guard. And I don't have my last submission in
12 front of me. Really what I was trying to say was,
13 in terms of adjournment, the presumption is that
14 you can't, if you are going to adjourn it, it is
15 going to take a long time and the project will be
16 delayed. That presumes that the Commission will
17 come down with a recommendation that it is as is.
18 If the Commission comes down with other
19 alternatives, that may delay it too. That's
20 really the context. So I will still take your
21 words to heart about better penmanship, but
22 clearly that was the thrust.

23 THE CHAIRMAN: Thank you, Mr. Meronek.
24 I didn't really think you were suggesting that we
25 were biased, but on paper it does say presumes

1 that the CEC will recommend, et cetera.

2 MR. MERONEK: That's right. The
3 adjournment, the issue of adjournment has to
4 presume that there won't -- if there is no
5 adjournment, it presumes that the thing will go
6 along as scheduled.

7 THE CHAIRMAN: But recommend the
8 project to the Minister without change?

9 MR. MERONEK: Right. But if you
10 recommend changes, that may delay the project.

11 THE CHAIRMAN: Well, then it is beyond
12 our --

13 MR. MERONEK: I understand that, but
14 that's the test.

15 THE CHAIRMAN: Thank you. Thank you
16 both.

17 While we are still somewhat ahead of
18 schedule, which is very nice, we will break now
19 until 1:00 p.m. when we will hear the Consumers
20 Association of Canada -- or are they prepared to
21 start now and have a -- it is 11:15. Are you
22 going to use the full two hours, do you think, or
23 hour and a half that's actually on the agenda?
24 Perhaps we should wait until 1:00 o'clock. I am
25 easy with that.

1 Okay. We will resume at 1:00 o'clock.

2 And as I noted earlier, that means 1:00 o'clock
3 sharp. Thank you all. We are adjourned for a
4 couple of hours.

5 (Lunch recess taken)

6 THE CHAIRMAN: Okay. Could we
7 reconvene, please? This afternoon first up we
8 have the Consumers Association of Canada,
9 Mr. Williams, are you ready to proceed?

10 MR. WILLIAMS: Yes, I am. And good
11 afternoon, Mr. Chair, members of the Commission
12 from Winnipeg, and member of the Commission from
13 Morden as well.

14 My name is Byron Williams. I'm
15 appearing on behalf of the Consumers Association
16 of Canada, the Manitoba branch.

17 You have been provided some materials
18 by my client, and I thought just for a couple of
19 moments it might be helpful to the panel to
20 highlight in the voluminous -- in the thicker
21 volume with the multiple tabs, there is a few
22 passages which I would like to highlight for the
23 panel's attention which may not -- with time, I
24 may not be able to get to later, so I do wish to
25 start with them now.

1 And the thick volume like this should
2 be numbered in the top right-hand corner,
3 handwritten, with some numbering. And I am
4 wondering if I might ask the Commission to turn to
5 page 163 in the top right? That's right near the
6 very back of the document, perhaps the last four
7 pages. And there will be a heading on the lower
8 left-hand side of that page, or there should be,
9 saying discussion. I see a head nodding.

10 And we are going to talk a little bit
11 about Mr. Gibson's work, and I do want to make it
12 clear to the panel that while Mr. Gibson speaks
13 about his work on the MacKenzie Valley Pipeline,
14 his analysis he asserts -- and he is one of the
15 foremost writers on this in Canada -- is
16 applicable for sustainability assessment across
17 Canada.

18 Under discussion at the bottom
19 left-hand side he makes this point, that the
20 analytical work of the MacKenzie panel stands in
21 Canada at least as a standard for sustainability
22 based environmental assessment. So that is
23 certainly the Canadian standard that we are
24 drawing to your attention.

25 If you go down two bullets on the

1 right-hand side you will see identified, what
2 Professor Gibson identifies as one of the key
3 elements of modern best practice environmental
4 assessment in Canada. The comparative evaluation
5 of options with explicit emphasis on cumulative
6 effects and implications for building desirable
7 and resilient futures. Those seven bullets are
8 really what Professor Gibson characterizes as the
9 seven essential ingredients of modern
10 environmental assessment. Again, at the bottom of
11 those bullets he again asserts that this is a
12 standard that's not strictly or limited to the
13 CEAA, the Canadian Environmental Assessment Act,
14 but is applicable across Canada. So those are
15 important standards, not only for today, but as
16 the hearing proceeds.

17 I do wish to ask the panel as well
18 just to flip back a couple of pages, really to
19 page 158 in the top right-hand corner. Page 158
20 in the top right-hand corner, there should be a
21 little box at the bottom on the left-hand side
22 saying box 2. Hopefully, I see heads nodding.
23 There is two passages on this page that our
24 client's wish to draw to the Commission's
25 attention. First of all, on the left-hand side

1 there should be a marking beside it in pen, the
2 second full paragraph. Here you have Professor
3 Gibson talking about the MacKenzie Valley
4 Pipeline. And at the end of the day the critical
5 question was cumulative effects assessment. And
6 he has a description of cumulative effects
7 assessment as well in that paragraph, and I will
8 not read it to you, but it is about the ability of
9 authorities and communities to capture benefits
10 and manage threats. And that's certainly, in our
11 client's submission, what modern environmental
12 assessment is about. It is not the dated impact
13 assessment, it is much more modern than that,
14 about capturing benefits as well as managing
15 impacts.

16 Again, I believe at the bottom of that
17 page on the left-hand side you will see the actual
18 passage that my friend, Mr. Meronek, was seeking
19 to direct to your attention. Because Professor
20 Gibson says, really, one of two great achievements
21 of the MacKenzie Valley Assessment set in the
22 Canadian standard was this analysis of options
23 using modern cumulative effects assessment. So
24 again, that's really the heart of a lot of the
25 importance that our clients put on this hearing,

1 and that they put on their articulation of a
2 concern with the adequacy of the record.

3 I won't belabour Professor Gibson any
4 more, but I would ask the panel to flip back one
5 more tab, and to page 143 in the top right-hand
6 corner. And there should be a lovely supply curve
7 or some sort of curve on there. I'm not directing
8 your attention to that, but I am directing your
9 attention, again, there should be some faint pen
10 marks on the left-hand side at the bottom, and
11 then on the right-hand side, about what Professor
12 Bond, one of the foremost international experts on
13 sustainability assessment is saying, and basically
14 making the point again at the bottom left
15 hand-side, that environmental, social and health
16 impact assessments -- and again noting that some
17 financial institutions are doing this -- are very
18 compatible with the concept of sustainability
19 assessment.

20 So you will hear some discussion later
21 on from our clients about the importance of a
22 proper human health risk assessment, about the
23 importance of a community health assessment. It
24 is not just pie in the sky. It is practical, it
25 is necessary, especially if one wants to seize,

1 not just manage the negative impacts but seize the
2 positive opportunities.

3 Those really in terms of this
4 document, we will certainly come back to it, but
5 those are some of the highlights that we wish to
6 share with the panel.

7 The other coloured sheet that the
8 panel will have in front of it, it is titled best
9 practice analysis draft. And it occurred to our
10 clients, as they reflected on the debate between
11 them, CAC Manitoba, in terms of what they think
12 the Commission should have to make a proper
13 determination, and with Manitoba Hydro telling
14 them what they won't provide, really came down to
15 a difference in interpretation of what is best
16 practice, and indeed what the legislative scheme
17 tells us about best practice. And we will come
18 back to this document in some detail later, but at
19 a high level, just so the panel understands what
20 is before them -- and this is draft -- in the blue
21 is our interpretation of what we think Manitoba
22 Hydro's approach has been in terms of this
23 proceeding, the purpose of best practice
24 assessment, which we see as the more traditional
25 from the '70s, '80s '90s kind of impact

1 assessment, although we note an interesting
2 discussion in chapter 10. And then how they have
3 approached the needs for an alternatives analysis.
4 So that's our interpretation of what Hydro has
5 done.

6 The purple in the middle is our
7 interpretation of the literature that we provided,
8 and some of which I have cited to you, leading
9 practitioners in Canada and otherwise in terms of
10 both the purpose of environmental assessment and
11 how needs for an alternatives fits within that
12 analysis. And there are pages cited, and those
13 are the pages, the handwritten pages from the
14 text.

15 And on the right-hand side in the
16 green is our client's interpretation of how the
17 reading of the Environment Act and the Sustainable
18 Development Act should influence the board's --
19 the Commission's determination of best practice.

20 And certainly my client was quite
21 struck by the conversation between my friend,
22 Mr. Bedford, and the chairperson this morning
23 about what role the Sustainable Development Act
24 should play. And what we've highlighted here is,
25 if you look at the legislative scheme, reading the

1 Environment Act together with the Sustainable
2 Development Act, what is the purpose of
3 assessment? Certainly the precautionary principle
4 is there, to prevent, to conserve, but it is also
5 to enhance and to protect the quality of our
6 environment. So it is not just -- certainly we
7 would suggest reading the two acts together, not
8 just inviting an old fashioned impact assessment,
9 but a modern sustainability assessment.

10 And again the vibrant language of the
11 Sustainable Development Act and Guidelines and
12 principles speak to how that applies to NFAAT per
13 se. And again, that conversation was with the
14 Chair. So we provide that to the panel for its
15 guidance. We hope that it is of some assistance.
16 The citations on the green side are either from
17 the Act, the principles, or the guidelines. We
18 tried to put the source, given the limitations of
19 one page.

20 From the client's perspective, the
21 resolution of their motion turns on three
22 threshold questions. Again, this is a motion to
23 adjourn. One -- question number one is, is it
24 fair to funded participants to proceed with the
25 hearing start date of October 1st, 2012? Is it

1 fair for funded participants to proceed with the
2 hearing start date of October 1st, 2012? Number
3 2, if the hearing begins October 1st, 2012, will
4 the Commission have before it the information it
5 requires to do the job the Minister has assessed
6 it -- has asked it to do? Will it have the
7 information it requires to do the job? If the
8 answer to question one or question two is no, then
9 the third -- from the Commission's perspective,
10 then the third question begged by a no answer to
11 one or two is, what is the Commission to do? What
12 would be the response that best balances the needs
13 of the applicant, the needs of the participants,
14 the needs of the process, and the interests of the
15 public?

16 And certainly my client, hoping for a
17 ten minute warning when there is ten minutes to
18 go, will provide a more thoughtful analysis in the
19 time to come. But they certainly, in terms of
20 question number one, have a really easy answer.
21 The simple fact that over 300 pages of responses
22 were filed yesterday, that we are awaiting more
23 today, responses from the first round which still
24 require second round of information requests
25 simply underscores, from our client's perspective,

1 in the starkest, clearest way possible, the
2 reality that it is not possible for funded
3 participants to do their job and maintain the
4 current hearing schedule.

5 In terms of question two, at the
6 simplest, most easy, our clients invite this
7 Commission to take a look at Manitoba Hydro's
8 cumulative effects analysis found in chapter 9,
9 and Hydro's rather cheeky response to CEC III-104
10 and based upon this panel's experience ask
11 yourselves, is this what a best practice
12 cumulative effects analysis looks like? Has Hydro
13 properly presented a baseline case, a quantifiably
14 supported application case, and a quantifiably
15 supported plan development case? Can you safely
16 or reasonably draw the conclusion that they draw
17 based upon the analysis they provide? Is this the
18 type of analysis you would confidently rely upon
19 to give licensing advice and to make
20 recommendations to the Minister? If not, then we
21 have a problem.

22 So that's the quick and easy answer to
23 the question. I'm not being invited to sit down,
24 so I'm assuming I should proceed.

25 We have provided to the panel

1 additional reference materials, included in which
2 at tab 1, so it is a thinner document at tab 1, it
3 should be the terms of reference. And our
4 clients, certainly directing your attention to the
5 first page of the terms of reference, were stuck
6 between the debate between our friends,
7 Mr. Meronek and Mr. Bedford, about is it just to
8 review the EIS or is to review and evaluate?
9 Under the heading of the terms of reference,
10 within the terms of reference, our clients do
11 direct the panel's attention to -- that the
12 purpose is to review and evaluate the EIS, not
13 just to review, but to critically evaluate it,
14 along with the proponent's public consultation
15 summary with a view to a licensing decision, yes
16 or no, along with recommendations.

17 And our clients wish to point out, and
18 certainly the panel is familiar with Hydro's
19 response of August 12th to our motion. Our
20 clients would invite the Commission to read that
21 response carefully. And Hydro says a lot about
22 what they are not going to give, what they think
23 that either CAC Manitoba or the Commission does
24 not need. But they never really get around, in
25 our client's respectful view, to the central

1 question which is, is the record adequate for this
2 august tribunal to do what the Minister has asked
3 it to do? You have been asked, you have been
4 delegated to do an important task. While Hydro
5 may glibly dismiss the concerns about insufficient
6 or deficient filings, if critical information is
7 missing, then the Commission may have challenges
8 discharging its mandate.

9 The other point that our clients wish
10 to draw to the panel's attention is on the second
11 page of the terms of reference, and we certainly
12 agree with Mr. Beddome that it is different from
13 Louisiana Pacific, the last hearing that I
14 participated before this tribunal, because the
15 terms of reference expressly incorporate the
16 principles of sustainable development and the
17 guidelines for sustainable development, as
18 contained in the sustainable development strategy
19 and the Act, of course. Certainly, again, we
20 would invite the Commission to go back through
21 Manitoba Hydro's response of August 12th, and we
22 tried to, and see if you can identify a reference
23 to the Sustainable Development Act. And perhaps
24 you will. We certainly didn't.

25 From our client's perspective, that is

1 a telling lack of emphasis. And that omission is
2 instructive. Because in their submission, many of
3 the analytic challenges Hydro is experiencing,
4 much of what it is telling you that you don't need
5 to have would appear, in our client's respectful
6 view, to flow from its lack of emphasis on the
7 Sustainable Development Act, read with the
8 Environment Act. Certainly our clients are of the
9 view that those responses of Hydro might be
10 materially different.

11 They do reference the Sustainable
12 Development Act at length in chapter 10 of their
13 application, but we wonder if they put the pieces
14 together.

15 Just again by way of overview
16 comments, Mr. Chairman, our client, CAC Manitoba,
17 is a funded participant. They have been asked to
18 provide recommendations under their agreement in
19 terms of relating to consistency with best
20 practice. They have been asked to comment on the
21 application of adaptive environment management
22 principles, and to address reliability
23 expectations and alternatives as they apply
24 directly to the project as presented.

25 Certainly I can tell this Commission

1 today that if our client, looking at the record as
2 it is today, and after plowing through hundreds of
3 pages filed yesterday, expecting even more today,
4 we have no doubt that if we were given four or
5 five weeks to proffer a final opinion, our experts
6 could come up with opinions that the adaptive
7 management approach offered by Hydro is not
8 consistent with best practices, that the
9 cumulative effects analysis is glaringly
10 deficient, that the human health risk assessment
11 is inadequate, that Hydro has missed an
12 opportunity to make a contribution to
13 sustainability analysis through a community health
14 assessment, and that the need for an alternative
15 analysis was not conducted in a manner consistent
16 with best practices. Our client could say that.
17 But to what point?

18 From our client's perspective, the
19 role of the funded participant is about more than
20 saying no. It is about more than saying Hydro
21 hasn't made their case.

22 Our client's understanding of their
23 role is to assist the Commission to make the best
24 possible recommendations based upon an adequate
25 and indeed the best possible record, consistent

1 with the legislation and evolving best practice.
2 And it is very possible that a licensing decision
3 will flow from this decision. That's a very
4 possible outcome that BP-III will be licensed. If
5 so, our clients believe it is incumbent upon all
6 parties to get the record -- it is never going to
7 be right -- but to get the record to as close a
8 state as it should be, to assist this panel and to
9 assist the government in making the right decision
10 and the right recommendations.

11 So the central submission of our
12 client is the record, as it currently stands, is
13 not there for you to do your job, or for our
14 clients to do their job.

15 While Hydro may be telling you what
16 you don't need to have, the mandate given by the
17 Minister, when considered in light of the
18 legislative framework and sustainability based
19 assessment, is telling a different story.

20 I'm going to spend a bit less time on
21 the first threshold question, which is whether it
22 is fair to funded participants to proceed with the
23 hearing start date of October 1st, 2012. I will
24 be quick on this point. We certainly recommend to
25 the Commission the written submissions of the MMF

1 filed on August 13th, and certainly endorse in
2 main thrust the comments of my friend,
3 Mr. Holloway, from this morning.

4 We do want to step back and just
5 highlight where we are. Back in June the
6 Commission said, we have got a problem with this
7 hearing, there is significant deficiencies. And
8 in a certain way, Hydro's response makes light of
9 our concerns about deficiencies. They say, you
10 know, the Minister hasn't asked the Commission to
11 comment about minimally acceptable practices,
12 Hydro is not here to rewrite the EIS to the
13 satisfaction of CAC Manitoba. Hydro is right
14 about that. But the key point that they miss is
15 that the significant deficiencies identified by
16 the CEC in June haunt us still. Time that could
17 have been spent presenting preliminary case
18 theory, to testing the models and quantifiable
19 analysis of Hydro, has been spent trying to dig up
20 this stuff. This process has been behind the
21 eight ball from day one, trying to play catch up.

22 So when experts get information
23 responses on August 15th that they would have
24 expected well before that date, it is not just a
25 loss of a couple of weeks, it is a loss of a

1 couple of weeks compounding the loss of a far
2 longer period of analysis. So certainly the
3 clients believe it is open to the Commission to
4 take the advice of the MMF, or the advice of the
5 Bipole III Coalition, and recognizing that funded
6 participants, given the state of the record, it is
7 not fair to ask them to be ready for a hearing
8 start of October 1st, to adjourn the hearing by a
9 couple of months. And that's certainly open to
10 the Commission.

11 We want to turn to that second
12 question which is, is this more than a question of
13 fairness? Do you have enough information before
14 you to get the proper determination and advice to
15 the government? And again one of the thrusts of
16 Hydro's response certainly seems to be, from our
17 client's perspective, what are you going to do
18 with an adjournment? You can't compel Manitoba
19 Hydro to rewrite its EIS. And in a technical
20 sense, my clients don't disagree. Probably that
21 authority resides with the Minister, but our
22 clients are mindful of the experience of this
23 Commission in Louisiana Pacific, where the
24 Commission, in its wisdom, determined that the air
25 dispersion modeling needed some work. It

1 determined in its wisdom that the human health
2 risk assessment didn't quite do the trick. It
3 invited -- it articulated its concerns and it
4 invited the respondent, Louisiana Pacific, to
5 perfect the record. And certainly that type of
6 remedy is open to the Commission here, in our
7 client's perspective.

8 Certainly it is open from our client's
9 perspective for this Commission to make a
10 determination that the proceeding can't go ahead
11 on October 1st, 2012, given a materially deficient
12 record, to provide Manitoba Hydro with the
13 opportunity to rethink its refusal to provide
14 necessary information, if the Commission actually
15 believes that it is refusing to provide that
16 information. And in the event that Hydro declines
17 that opportunity, to seek direction from the
18 Minister and to ask the Minister, if the
19 Commission is of this view that information is not
20 adequate, give us guidance, do you want us to go
21 ahead on a record that we think is not quite
22 there, or is materially not there?

23 Mr. Chairman and members of the
24 Commission, I want to focus for the remainder of
25 our discussion on cumulative effects analysis.

1 Because certainly from our client's perspective,
2 that's one of the most troubling aspects of
3 Hydro's EIS. And I have already directed you to
4 the comments of Professor Gibson. So why do we
5 say that Hydro's cumulative effects assessment
6 does not meet minimally acceptable standards, let
7 alone best practice? Let's remind ourselves that
8 we are dealing with a project traversing major
9 portions of the province, including ecologically
10 sensitive areas where certain wildlife species,
11 including Woodland caribou and moose are already
12 under significant pressure, and in some cases
13 declining. And we are engaged in a business of
14 predicting outcomes for which there was a
15 significant inherent uncertainty attached. Given
16 this, our clients would have expected a minimally
17 acceptable cumulative effects assessment to
18 involve a baseline case, a quantifiably supported
19 application case, and a quantifiably supported
20 plan development case. They would have expected
21 Manitoba Hydro, just like applicants are expected
22 in Alberta or in Ontario, to provide, to show the
23 demonstrated use of appropriate predictive tools
24 and methods, to enable quantitative estimates of
25 future conditions with the highest possible degree

1 of certainty. They would have expected a
2 sensitivity analysis demonstrating which
3 parameters have the largest influence on model
4 output, and a discussion of the errors to which
5 the models are most sensitive. That's at the bare
6 minimum what our clients would have expected. And
7 certainly you have our views that the cumulative
8 effects analysis in chapter 9 is simply vague,
9 generic and qualitative, and its conclusions are
10 not defensible based on assessment.

11 From our client's perspective, Mr.
12 Chairman and members of the Commission, it doesn't
13 mean that Hydro is wrong. It means that certainly
14 from their perspective, they can't do the analysis
15 to make the right recommendations to the
16 Commission. Manitoba Hydro is quite dismissive of
17 our client's focus on human health risk assessment
18 and community health assessment, advising the
19 Commission, I am sure to everyone's surprise, that
20 they are not the Department of Health. Our
21 clients readily concede that point. But such a
22 statement does not do honour to Manitoba Hydro's
23 assertion that their assessment is best practice.

24 You can look at the Bond reference
25 that we provided to this Commission. You can look

1 at what is required in Alberta, or what good
2 corporate citizens like Shell Canada do in their
3 environmental assessments. To a certain point it
4 comes down to a philosophical question. As noted
5 by Gibson, and it is on the sheet here in the
6 middle, what good sustainability assessment should
7 be about is a contribution to sustainability
8 through assessment process, as well as through the
9 better decisions. Manitoba Hydro missed a
10 terrible -- a real opportunity here on human
11 health impacts, and that certainly our clients
12 regret.

13 Mr. Chairman, our clients have a lot
14 to say on NFAAT. Time does not permit it. This
15 table certainly, in our perspective, makes the
16 point, A, that Hydro on the blue side has already
17 put NFAAT into issue. We put their comments
18 there. The purple in the middle is what modern
19 environmental assessment practice says should be
20 done, which is options analysis within an explicit
21 sustainability based framework, and certainly
22 Hydro has not done that here. The analysis on the
23 green side gives the authority, highlights the
24 authority in the Act, both the Environment Act and
25 Sustainable Development Act, to do that type of

1 analysis.

2 The last comment our clients have is
3 on load forecast. That's canvassed in detail in
4 our commentary, certainly running from pages 11
5 through 14 of attachment A. If the panel will
6 direct its mind to the comments of the vice
7 president of transmission -- so that's in the big
8 thick book, page 11, right near the front -- if
9 the panel will direct its mind to the commentary
10 of the vice president of Manitoba Hydro,
11 Mr. Tymofichuk, back in July -- because our
12 clients asked what is the urgency, Manitoba Hydro
13 has said it has got this 2017 tipping point, a
14 1500-megawatt deficit at peak capacity. And
15 certainly Mr. Tymofichuk spoke to that and talked
16 about the urgency growing with the load.

17 So our clients took Mr. Tymofichuk at
18 his word. We analyzed Manitoba Hydro's load
19 forecast that they supplied in support of this
20 application, the 2011 load forecast, and compared
21 it to what they said in 2012. And those comments
22 are set out by our client at page 12 of their
23 outline. Hydro has identified in their own data a
24 significant drop of two years of peak growth. So
25 if 1500 megawatts was truly the peak, then that

1 peak is not before Manitoba Hydro in 2017. Not to
2 say that reliability is not a big issue, but if
3 that's the urgency behind 2017, that's not borne
4 out by Manitoba Hydro's current load forecast.

5 And we think that Hydro's response is
6 quite telling because they say, we are not going
7 to debate the finer points of load forecasting.
8 And my clients understand perfectly why -- because
9 they don't support Hydro's position in terms of
10 the urgency alluded to by the vice president.

11 Mr. Chairman, there is lots more to
12 say, I will have to save it for another day. I
13 thank the panel for its patience, and subject to
14 any questions of clarification, those conclude my
15 submissions but for the right of brief response.

16 THE CHAIRMAN: Thank you,
17 Mr. Williams. Don't run away. I have a couple of
18 questions. You talk about sustainability
19 assessment and Professor Gibson, and you have this
20 purple section on your sheet. I'm slightly
21 familiar with Professor Gibson and his approach.
22 But how does sustainability assessment differ from
23 an Environmental Impact Assessment?

24 MR. WILLIAMS: I think Environmental
25 Impact Assessments are typically seen as the third

1 generation of assessment -- excuse me, the first
2 generation, as opposed to sustainability
3 assessment, which is another type of impact
4 assessment, but more modern. If you look at, on
5 the blue side, in terms of -- and again, I'm
6 trying to paraphrase what we understand to be
7 Hydro's position. Certainly from an information
8 response, they said the main purpose of
9 environmental assessment is to reduce or avoid
10 environmental effect. And that's certainly a very
11 critical point of environmental assessment.

12 A sustainability development asks a
13 different question, and that is captured in the
14 purple in the middle, Mr. Chairman. Would the
15 project deliver valuable benefit and avoid
16 significant adverse environmental impact? As I
17 understand sustainability development, it is based
18 on kind of a retro, looking back in time, at the
19 limitations of environmental impact assessment and
20 its failure. And it is saying that we need to do
21 more. And it also says that when we are doing
22 more, it is not just about mitigating impacts, but
23 it is capturing opportunities. And that certainly
24 is a material point of difference.

25 Did I duck your question?

1 THE CHAIRMAN: No, no, no, that was
2 fine actually. I want to sort of pursue it a
3 little further, a little differently.

4 The proponent, Manitoba Hydro, has
5 done this EIS in what you call the first
6 generation EIA model. Is it fair or even possible
7 to now review that under a sustainability
8 assessment model? Shouldn't -- to go on a step
9 further, shouldn't that be part of the initial
10 directions to the proponent?

11 MR. WILLIAMS: Well, presumably
12 Manitoba Hydro, certainly in our review, they
13 asserted to the department and to the Minister
14 that they did this consistent with best practices.
15 So certainly at a bare starting point, it is open
16 to ask whether you have done it at best practices.
17 As I understand environmental assessment in
18 Professor Gibson's work, you know, MacKenzie
19 Valley Pipeline wasn't perfect at the start
20 either, and he identified limitations in terms of
21 the evidence that the Commission was able to
22 garner, because they had been presented with a
23 very traditional impact assessment. And so they
24 had challenges taking through some of the options
25 to a sustainability analysis. So it was done in

1 that hearing. I think it has been done in five
2 hearings where I think the Commission has been
3 presented with a more traditional analysis. So
4 from our client's perspective, it is certainly not
5 unfair to Hydro. Manitoba Hydro should be aware
6 of the Act, and the Sustainable Development Act
7 and principles and guidelines speak very
8 powerfully to this. So that's certainly from our
9 client's perspective. The process evolves, no one
10 expects it to be perfect, but it would be a lot
11 better to walk part way down that path than what
12 we have here.

13 THE CHAIRMAN: Anyone else? Thank you
14 Mr. Williams, you will have an opportunity to
15 rebut later on.

16 Mr. Bedford?

17 MR. BEDFORD: Doug Bedford, counsel
18 for Manitoba Hydro, the proponent of the Bipole
19 III project.

20 My learned friend, Mr. Williams'
21 client has put a motion before you asking that you
22 delay the commencement of the hearing presently
23 scheduled for October 1. I respectfully suggest
24 to you that there is no logic to delaying the
25 start of the hearing as of October 1. If the

1 purpose in doing that is to give my client,
2 Manitoba Hydro, more time to do more studies or
3 more reports, which we have said to you we are not
4 planning to do -- if you will forgive me for a
5 moment?

6 In this province it is the Department
7 of Conservation and Water Resources which has the
8 authority to tell a proponent, in this case
9 Manitoba Hydro, that its environmental impact
10 statement does not meet the requirements of the
11 Environment Act and the applicable regulations
12 under that Act.

13 If one asks what in Manitoba at law
14 are the minimally acceptable standards for an
15 Environmental Impact Statement, I would answer
16 that question for you by saying one has to look to
17 the legislation and to the regulations passed
18 pursuant to that legislation. And as of today,
19 the Department of Conservation and Water
20 Stewardship has not said to Manitoba Hydro that
21 your environmental impact statement does not meet
22 the requirements of the Act and the regulations.

23 The Minister of Conservation of the
24 Province of Manitoba does have the authority under
25 the Act to tell a proponent, in this case Manitoba

1 Hydro, that further studies or reports must be
2 required to make the record, as Mr. Williams puts
3 it, satisfactory. In the case of a class 3
4 development, which is of course what the Bipole
5 III project is, I look to section 12, subsection 5
6 of the Act, and I read that it is the Minister, in
7 this case to repeat, the Minister of Conservation
8 who can require from a proponent additional
9 relevant information. It is the Minister of
10 Conservation, under that section, who can require
11 a proponent to include such studies, research,
12 data gathering and analysis or monitoring in
13 addition to what has been filed, as the Minister
14 deems necessary.

15 The Minister of Conservation has not
16 to this date told my client, Manitoba Hydro, that
17 it should conduct further studies, prepare the
18 further reports that Mr. Williams suggests ought
19 to be done. And if they ought to be done, his
20 client says the hearing obviously cannot commence
21 on October 1.

22 I would respectfully suggest to you
23 that no tribunal in this country, including the
24 Clean Environment Commission of the Province of
25 Manitoba, and indeed no judge of the Court of

1 Queen's Bench of the Province of Manitoba has the
2 power to order a proponent, or in the case of a
3 Queen's Bench judge, a party before the court, to
4 go out and create new evidence to be filed for an
5 upcoming hearing. As I have just cited, there is
6 legal authority for that in this province for
7 hearings of this sort that the authority rests
8 with the Minister of Conservation.

9 I say with respect to my learned
10 friend, Mr. Williams, having had to read through
11 the copious material that he has provided us all
12 to read, that in this business every advocate has
13 to work with what evidence is at hand, meaning
14 what evidence has been filed, and one has to
15 prepare his or her case accordingly. We work with
16 what we have. We don't work with what we wish we
17 had.

18 You may well find in considering what
19 to do with Mr. Williams' motion that you disagree
20 with my submission, and that you find attractive
21 some of the things he said. If so, and you think
22 that the record is inadequate, if you are
23 persuaded by him that you think you can not do
24 your job with what has been filed, and I
25 acknowledge there is still some information

1 requests to be answered, we haven't missed any
2 deadlines, but there are some that we received
3 August 1, that I know that you have not yet
4 received the answers to. We anticipate we will be
5 answering them midweek next week, so there is
6 still some of that to come. But to repeat, if you
7 are persuaded that this record is inadequate, that
8 you can't do your jobs unless my client, Manitoba
9 Hydro, prepares more studies, prepares more
10 reports, arguably rewrites all or a portion of the
11 Environmental Impact Statement that has been
12 filed, then I do ask of you, please, tell us which
13 academic paper, which report from which project
14 and which other province in this country, which
15 legislation from which other province in this
16 country does my client, as a proponent, have to
17 mirror in filing and preparing its studies and
18 reports so that there can be a hearing for my
19 client's project before the Clean Environment
20 Commission of the Province of Manitoba. Thank
21 you.

22 THE CHAIRMAN: Mr. Bedford, I hear
23 your argument that the Minister has the sole
24 authority to say whether or not the EIS is
25 sufficient to go forward to hearings. Once we get

1 into the hearings, is it within -- in your view is
2 it within the authority of the Commission to send
3 Manitoba Hydro away to provide more information?

4 MR. BEDFORD: Legally, with respect, I
5 don't think you have that power. As Mr. Williams
6 outlined, I think certainly in the context of the
7 kind of hearings that I know you conduct, and your
8 general mandate, you can certainly invite
9 proponents to do that. I certainly wasn't at the
10 Louisiana Pacific hearing, but from what I heard
11 described of it by Mr. Williams, that seems to me
12 common sense and completely within the role that a
13 Clean Environment Commission might make. We heard
14 some evidence to date about this project. We
15 politely suggest or invite the proponent to give
16 some serious thought to this aspect or the other
17 of the information it has put before us. That
18 obviously is logically quite different from saying
19 to a proponent, we hereby order you to go out and
20 do this particular study, or that particular
21 study, or in a more frustrating fashion, we simply
22 refuse to continue this hearing because we don't
23 think you have met minimally best accepted
24 standards. I think in the latter situation,
25 proponents would be entitled to say in

1 frustration, we have complied with the law, we
2 believe that we have complied with what the
3 statute provides. Indeed the Department of
4 Conservation and Water Stewardship, whose role it
5 would have been to tell us that our document was
6 deficient, has not done that. We believe that we
7 are entitled at law to have a hearing.

8 You may well find, given your
9 expertise in the role that you play, that when
10 this hearing is done you may have some
11 observations and comments, drawing upon what you
12 have heard, what you have seen, your own
13 experience, your own reading, your own
14 backgrounds, that perhaps standards should be
15 improved in Manitoba. And I'm reminded, although
16 I was not here on July 19, that this was touched
17 upon, and someone reminded the Commission that
18 when the Wuskwatim hearing was done, you made some
19 recommendations regarding sharpening up and
20 improving the law, the legislation, the
21 regulations regarding what proponents ought to be
22 required to study and put in their environmental
23 impact statements.

24 And I suppose we all have to respect
25 the fact that sometimes recommendations aren't

1 followed through in any kind of timely fashion.
2 And we all know, because we live in a democracy,
3 that the role to change the law in this case lies
4 with the legislature of the Province of Manitoba,
5 and it and the governing party and the opposition
6 can all speak for themselves, they usually do so
7 quite well on topics such as this.

8 THE CHAIRMAN: Now, assuming that you
9 are correct and that we accept your premise, just
10 in response to my question, that you don't think
11 we really have the legal authority to ask you to
12 provide more information, there is the other side,
13 or another side to it, that if you didn't do that,
14 then we, the panel, may not have sufficient
15 information at the end of the day upon which to
16 make recommendations to the Minister.

17 MR. BEDFORD: An observer would
18 immediately comment that presumably that's a risk
19 that Mr. Bedford's client knowingly and willingly
20 understands and proceeds with.

21 THE CHAIRMAN: Thank you. Any other
22 questions? I think that's it, Mr. Bedford, thank
23 you. I am sorry, I do have one more, because I
24 don't think, you know, you won't be back on the
25 stand in this hearing.

1 This morning Mr. Meronek and this
2 afternoon Mr. Williams both asked about the
3 sanctity of the October 1st date and why that date
4 is critical to Manitoba Hydro. Can you comment
5 on, or would you care to comment on why it is --
6 why that might pose a problem for your client?

7 MR. BEDFORD: I have discussed it with
8 my client. My instructions are that we would like
9 to adhere to the October 1st date. It is a
10 challenge to explain to any audience the costs and
11 the ramifications of this hearing being delayed,
12 particularly delayed for any significant period of
13 time. In fairness to my client, I certainly know
14 that delay brings with it costs in terms of
15 planning, construction, scheduling. It is
16 complex. At Manitoba Hydro this project interacts
17 with other projects. The employees who work on
18 this project, or aspects of it, work on other
19 projects and other aspects. I'm not armed today
20 to give you an estimate of the cost of delay to
21 Manitoba Hydro. I'm not sure how terribly
22 relevant that would be to your considerations in
23 any event. But I've told you what I have told you
24 because in fairness to my client, we are not being
25 cheeky or glib when we say to the world that delay

1 brings with it ramifications and costs to Manitoba
2 Hydro.

3 THE CHAIRMAN: Thank you.

4 Mr. Beddome, if you promise to speak more slowly,
5 I will give you seven minutes.

6 MR. BEDDOME: One second. James
7 Beddome, leader of the Green Party of Manitoba,
8 presenting here for the Green Party of Manitoba.

9 We are generally supportive of the
10 position put forth by the CAC of Canada, and we
11 actually prefer their time line than that one
12 proposed by the Bipole III Coalition. Simply put,
13 early December won't be a good time for us, so
14 early December start would be particularly not
15 appreciated for us. Could be amenable to
16 something else, but that would be a request that
17 we would like to put on the record.

18 I would also just like to indicate, as
19 I indicated earlier, we are an unfunded
20 participant. And I think that's significant,
21 because Mr. Bedford commented, we work with what
22 we have, not what we wish we have. Fair enough.
23 I wish we had had all of the responses by July 31,
24 as the Clean Environment Commission indicated
25 should be the outcome for submissions by

1 information requests by July 20th. And yet here
2 we are in August 15th and we are receiving
3 responses.

4 Now, let's be fair to Manitoba Hydro.
5 It took a week to get the responses forwarded to
6 them, there was a high volume of requests. I
7 would prefer to take a much more balanced approach
8 than saying, we work with what we have. But if I
9 can use Mr. Bedford's words against him, then why
10 didn't he work with what he had and make sure he
11 met July 27th, you could have met the 31st
12 deadline, we are 24 hours into it. That's
13 unreasonable, and it is not fair to unfunded
14 participants, and it doesn't work with the
15 principles of sustainable development of engaging
16 the public. So I don't appreciate that, because
17 there has been a week, as I have noted, to review
18 roughly, to review the caribou report, a day and a
19 half for second questions of some of the IRs. I
20 have taken a chance to review some of them, I
21 think we may be able to put forward some
22 questions, but quite frankly, you know, we are
23 trying to prepare for a motion here. I'm going to
24 be going until 2:00 in the morning, and I will
25 probably send you something with typos late at

1 night, because that's the time lines we are being
2 put underneath. You know, fair enough, but that's
3 the result of it. So I think that's the biggest
4 reason why we need an adjournment. I made that
5 clear when we first started moving back some of
6 the information request deadlines, saying if we
7 are going to move back these deadlines, do we need
8 to move back other deadlines?

9 I also just want to note that Manitoba
10 Conservation and Water Stewardship did send a
11 series of requests after the filing of the EIS.
12 And so they are claiming that -- Manitoba Hydro is
13 claiming, if I understand it, that the Minister
14 has said that everything is fine and there wasn't
15 any deficiencies in it. I think some of those
16 questions speak to the fact that there may be some
17 deficiencies, but obviously that would have to be
18 something you would have to hear from the director
19 of Environmental Licensing. Also it is a little
20 bit difficult because hearings were called so
21 early for this Environmental Licensing, they feel
22 that these issues are best brought forward through
23 the public hearing process. Once again, I don't
24 want to speak for them, I'm just offering
25 potentials that may be what the position is.

1 What I would say in terms of is there
2 any -- is it not somehow meeting the legal
3 standards outline? Well, there is a couple of
4 places that I can highlight where they are in fact
5 missing some of the standards. So if you take a
6 look at CEC MH-6, 260-A, that's at page 171 of the
7 response sent yesterday, you will just have to --
8 I'm using my computer so you will just have to
9 wait with me momentarily as I try and get up that
10 page. And in that case there is a question about
11 converter stations. And essentially their point
12 is they have no standards for converter station
13 decommissioning and shutdown. And they have said
14 that in other information requests.

15 Then I would draw your attention to
16 the scoping document, and I would draw your
17 attention to, I believe it is page 11 of the
18 scoping document. And once again, sorry, I'm
19 scrolling through on my screen here for you. But
20 if we go to 7.35, decommissioning:

21 "The EIS will provide a description of
22 plans for decommissioning any
23 temporary infrastructures or
24 facilities related to the construction
25 of the project. It will also provide

1 a general concept plan for
2 decommissioning the transmission lines
3 and other project components at the
4 end of their operation life, including
5 site restoration and remediation."

6 Decommissioning is not being dealt with. It seems
7 to be required under the scoping document.

8 Separate point that I would point out
9 would be, it is CEC MH-6, 274. Once again, if you
10 can just bear with me as I shift around my PDFs on
11 my screen.

12 In that case it is dealing with some
13 of the supplemental information, some of the
14 socio-economic information, some of the caribou
15 data, and they reference the EIS 5.1, which --
16 once again I have to get it up to the right -- it
17 is page 2 of 3 for you, 2 of 5 if you are on PDF,
18 just for the record. EIS 5.1, where they talk
19 about there will be opportunities at various
20 stages for public consultation. But in this case
21 they respond in terms of, well, then for
22 supplemental information, will there be more
23 public consultation? They say, outside of the CEC
24 process, Manitoba Hydro is not planning to solicit
25 any further public input on supplemental materials

1 provided.

2 So to that extent I would note that
3 your terms of reference actually explicitly deal
4 with stakeholder and public input in reviewing the
5 consultation record. So once again there is a
6 deficiency in there.

7 Mr. Bedford also comments that there
8 is no authority in the Environment Act for you to
9 require additional information. Well -- if I can
10 back up. In terms of authority in the Environment
11 Act, first on public consultation, if you go to
12 6.1 section B of the Environment Act, you can see
13 that the Commission actually has the charge of
14 developing and maintaining public participation in
15 environmental matters.

16 Now, if we move down through the Act
17 in to 6.3, we can see that the Commission may, on
18 its own volition, conduct an investigation into
19 any environmental matter except a matter involving
20 the gathering of evidence to determine whether or
21 not a specific proponent is complying with
22 provisions of this Act and the regulations, and
23 advise and make recommendations thereon to the
24 Minister.

25 Furthermore, if we move down to

1 6.5(c), so 6.5 starts:

2 "When requested by the Minister, the
3 Commission must do one or more of the
4 following in accordance with any terms
5 of reference specified by the
6 Minister: (c) Conduct investigations
7 into specific environmental concerns
8 and report back to the Minister."

9 So I would argue that that gives you the ability
10 to do it. And additionally section (d) says you
11 can act as a mediator. And that's what you are
12 here today to do in terms of this motion.

13 And I think there is significant
14 deficiencies in this EIS. I spoke earlier about
15 arguing that you should incorporate the principles
16 of sustainable development into it, particularly
17 economic decision making. What I will say is, the
18 position of Manitoba Hydro is that this is solely
19 a reliability project. While I don't deny that
20 reliability is a substantial and a real issue, it
21 is also tied and connected to northern generation.
22 If this is solely about reliability, then I guess
23 I would ask of the proponent, can they give us an
24 indication of how many cents per kilowatt this
25 means to Manitoba consumers if we just build

1 Bipole III and no future northern generation
2 projects? The Public Utilities Board has
3 estimated it at 3 cents a kilowatt. I have put
4 that in my submission to the Environmental
5 Approvals Branch, but we don't have a response on
6 that. So if we want to integrate economic and
7 environmental decision making, we need to
8 understand that.

9 And I will agree with Mr. Williams
10 that it is very much a philosophical issue -- I
11 will wrap up shortly, Mr. Chairperson, just one
12 more moment -- it is very much a philosophical
13 issue. Everything we do in life has an
14 environmental impact. It is about balance, it is
15 about weighing the multiple options, it is about
16 weighing the economic and the environmental
17 options, and trying to find the most
18 environmentally benign way of achieving it.

19 And it also means -- Mr. Williams
20 mentioned the precautionary principle, which means
21 we have to consider doing nothing as well. It
22 doesn't mean that we have to do it, but it has to
23 analytically be considered. So I think there is a
24 pile of deficiencies, and there is no reasonable
25 way to assume that, you know, people should have

1 to go through 300 pages in a day and a half to
2 file a second round of information requests to say
3 nothing else of the various deficiencies that
4 other participants have put forward. Thank you.

5 THE CHAIRMAN: Thank you, Mr. Beddome.

6 Mr. Bedford, I do have one more
7 question of you, if you would take the stand
8 please? It is not a difficult one.

9 In your written response and in your
10 comments today you referred to minimally
11 acceptable standards. What is the origin of that
12 test?

13 MR. BEDFORD: The origin of the test?
14 I was quoting Mr. Williams. Maybe -- it may be a
15 question --

16 THE CHAIRMAN: Even in your written
17 thing, was it quoting Mr. Williams?

18 MR. BEDFORD: Yes, I was quoting
19 Mr. Williams. But I suppose the correct answer to
20 your question is, I would suggest to you legally,
21 it is what is in the legislation. Particularly a
22 regulation that applies to what proponents are
23 supposed to put in proposals, I think that's
24 regulation 163/88 under the Environment Act.

25 THE CHAIRMAN: But surely we would

1 want to have something, an environmental
2 assessment that exceeded minimally acceptable
3 standards?

4 MR. BEDFORD: That should be a
5 desirable target but --

6 THE CHAIRMAN: Thank you.
7 Mr. Williams?

8 MR. WILLIAMS: Just two quick
9 comments, Mr. Chairman. And we do thank both
10 Manitoba Hydro and the Green Party for their
11 commentary.

12 In response to Manitoba Hydro
13 responding to your question, the consequences of
14 delay, our clients acknowledge that there may be
15 some cost consequences to Manitoba Hydro of delay,
16 that their motion for delay or for an adjournment
17 was not made lightly. Indeed they deferred in
18 July out of wanting to get a better sense of the
19 record. But there are also costs for Manitobans,
20 both today, tomorrow, and well into the future,
21 from environmental decision making made without
22 the evidence that we need to make environmental
23 decision making. So our clients certainly have
24 made the judgment call, comparing the short-term
25 consequences of a potential delay versus the

1 potential long term benefit of doing environmental
2 assessment right, that that's a worthy
3 recommendation to make.

4 Mr. Chairman, with your permission,
5 you asked me a question at the end of my
6 submission which I think I wasn't fully assisting
7 the panel on, so I have one very brief comment.
8 You asked, you know, about the difference between
9 a third generation assessment, sustainable
10 development assessment, and what Hydro has done.
11 And what I neglected to point out to you is that
12 certainly from our client's perspective, whatever
13 generation of assessment has been undertaken, the
14 cumulative effects analysis found in chapter 9
15 doesn't meet what one would expect to find,
16 whether it is the old fashioned way or the more
17 current way. And certainly from our client's
18 perspective, we have spent a lot of time on
19 cumulative effects analysis, we think it is
20 fundamental, both as a matter of process and for
21 good decision making. So whatever debate we have
22 about what is the appropriate standard and what is
23 fair for Hydro on that specific issue, in our
24 client's view, it doesn't meet the test of either
25 the older approach or the more modern approach.

1 Subject to any questions, thank you.

2 THE CHAIRMAN: Actually, I do have
3 one, at least one, so don't run away.

4 MR. WILLIAMS: I was trying to get
5 away as quickly as I could.

6 THE CHAIRMAN: I'm used to you now
7 from various other hearings.

8 Would you care to comment on
9 Mr. Bedford's argument that we don't have the
10 authority to rule on the sufficiency of the EIS,
11 at least prior to getting into hearings?

12 MR. WILLIAMS: Certainly -- well, from
13 our client's perspective, you certainly have the
14 authority to make judgment in terms of whether the
15 EIS is -- a judgment in terms of whether the EIS
16 is sufficient for you to proceed. What you do
17 with it after that is where I'm struggling. You
18 have a right to control your own process. You
19 also have a duty under your terms of reference to
20 ask yourself, have you got the information to do
21 your job? The question is, if you come to the
22 conclusion that you don't have the information to
23 do your job, which our clients would say
24 absolutely, not only do you have the authority,
25 you have the responsibility to make that decision.

1 THE CHAIRMAN: But at what point?
2 Mr. Bedford is suggesting that the decision in
3 respect of the sufficiency of the EIS, at least
4 before the start of the hearing, is with the
5 department. And that then once we have heard
6 evidence in the hearings, then we can comment on
7 the sufficiency of the EIS.

8 MR. WILLIAMS: I'm not sure I
9 understand this.

10 THE CHAIRMAN: If I'm not
11 construing --

12 MR. WILLIAMS: I am not sure I
13 understood Mr. Bedford to say that.

14 THE CHAIRMAN: He may not have
15 completely, but in my question to him I asked
16 that, whether we would have the authority to --
17 well, actually it was the authority to send him
18 out to create more information.

19 MR. WILLIAMS: Mr. Chairman -- well, I
20 am going to -- I think you are asking two
21 different questions now. So to address the
22 question, first of all, is there something magic
23 about starting the hearing and asking for more
24 information versus making a determination that you
25 need more information today, our clients would say

1 absolutely not. We are engaged in a process, if
2 this Commission is of the view that it doesn't
3 have the tools to do its job, it should make that
4 call when it feels that Hydro has had a chance, a
5 full chance to put the information before it.

6 And then I missed your second, I think
7 you were moving to a second question?

8 THE CHAIRMAN: It wasn't so much a
9 second question, it was sort of, you have said in
10 one of your three points that the CEC needs to
11 have the information, sufficient information upon
12 which to make, give advice and make
13 recommendations to the Minister. So the question
14 from both your comments and Mr. Bedford's comments
15 is, at what point do we need to have that
16 information, the day before we start hearings on
17 September 30th, or the end of the hearings which
18 may be November 30th, or January 30th, or
19 whatever, whatever the end of the hearings are?

20 MR. WILLIAMS: Mr. Chairman, to a
21 certain degree it depends on the type of
22 information that is missing. And I hate to start
23 an answer with "it depends." But certainly from
24 our client's perspective, if you look at something
25 as fundamental as a cumulative effects analysis,

1 or in your wisdom you think that a human health
2 risk assessment is required, I'm not sure how, in
3 fairness to the parties or to the process, you
4 make that call near the end of the hearing.

5 Certainly, you have got Hydro's
6 cumulative effects analysis. If it works for you,
7 great. If not, that's a problem.

8 If it is something more modest, then
9 certainly there are -- I have certainly seen in my
10 experience tribunals make a call part way through
11 that we need a bit more, and they provide an
12 alternative mechanism for a fair process to -- for
13 parties to participate. They might ask, let's say
14 it is in a PUB hearing, they might require some
15 financial information, let's get it and we will
16 give a written opportunity to respond.

17 So I think to a certain degree, the
18 significance of the issue -- like if a
19 determination was made that a cumulative effects
20 analysis was deficient, it is pretty hard for
21 funded participants or other participants to
22 meaningfully participate. Again, if it is
23 something smaller, you can conceive of alternative
24 mechanisms to test that information, for what it
25 is worth.

1 THE CHAIRMAN: Thank you. Anybody
2 else? Thank you Mr. Williams.

3 MR. WILLIAMS: Thank you very much.

4 THE CHAIRMAN: I am very impressed
5 with how all of you are sticking to -- not only
6 sticking to time lines but ahead of time lines.
7 We are finished early again.

8 Mr. Dawson, are you prepared to start
9 before 3:00 o'clock?

10 MR. DAWSON: At your call,
11 Mr. Chairman.

12 THE CHAIRMAN: Okay. Mr. Hannon, you
13 are present. Mr. Bedford, are you prepared to
14 move, not immediately but in five or ten minutes
15 on the next motion?

16 MR. BEDFORD: Certainly.

17 THE CHAIRMAN: Okay. Let's take a ten
18 minute break, we will reconvene at 20 after, and
19 we will start with the final motion of the day.

20 (Recess taken)

21 THE CHAIRMAN: Call the hearing back
22 to order. Mr. Dawson was here, but he seemed to
23 disappear. He didn't get this morning about the
24 punctuality. We will give you a moment or two
25 until he returns.

1 Given the nature of this particular
2 motion, there will be a slightly different
3 procedure. The Province of Manitoba, because this
4 motion involves the Crown, the Province of
5 Manitoba requested, and we readily granted
6 permission for them to make a presentation this
7 afternoon. So, we will first hear from Mr. Dawson
8 on behalf of Peguis First Nation, and then
9 Mr. Gord Hannon from Civil Legal Services of
10 Manitoba will speak on behalf of the Crown,
11 followed by Ms. Mayor from Manitoba Hydro. Mr.
12 Dawson, 30 minutes.

13 MR. DAWSON: Thank you, Mr. Chairman.
14 I noticed in the last month's New Yorker there was
15 a challenge to the readers to caption a cartoon.
16 The cartoon paid homage to a classic episode from
17 the Seinfeld T.V. show in which a pig goes up to
18 the complaints department at a department store.
19 And of course the humour arises from the fact that
20 there is very little that a complaints desk at a
21 department store can possibly do, one would
22 expect, for a barnyard animal. I'm anticipating
23 the argument that my learned friends will put
24 forward, but I very much think that the same thing
25 is being said here. This panel, apparently they

1 will say, can do very little for Peguis First
2 Nation and any other body that would come before
3 it and say this body, this panel, has a role to
4 play when it comes to the duty to consult
5 Aboriginal groups.

6 Before I turn to that substantive
7 matter, the appellate lawyer in me compels me to
8 put forward a couple of procedural objections. I
9 am concerned that this panel has agreed to hear
10 from the Crown. The Crown, of course, is not a
11 participant before these hearings. The proponent
12 is, of course, a participant, and could itself
13 have put forward these arguments that the Crown
14 will soon put forward to this panel.

15 I draw the Board's attention to
16 section 7(2) of the Environment Act, which talks
17 about deadlines, and it says that any person, and
18 that certainly would include the Crown, who wishes
19 to make representation to the Commission at a
20 hearing, and I would submit this is part of the
21 hearing process, shall, not may, not might, not if
22 it feels like, shall not later than the date set
23 out on the notice in writing so notify the
24 Commission. And, of course, we know that the
25 Crown in this particular case is not only well

1 past the date on the notice to notify the
2 Commission, it missed the Commission's own
3 deadline for filing a response to the motion that
4 my client brought last week. Instead of filing it
5 on time like everybody else was apparently
6 required to do so, the Crown waddled in almost
7 more than 24 hours after the fact, sending off a
8 response by email, at least to me.

9 Now when I sit on a tribunal my first
10 response is so what, where is the prejudice?
11 First my problem in this case I submit for this
12 panel is that we have a "shall" to get around,
13 there is no discretion, there is no alternative
14 for this tribunal, it can not hear the Crown at
15 all.

16 Secondly, even if it could, actual
17 prejudice has arisen. Many of the people in this
18 room, although probably not the Crown, know that I
19 personally was away and that I took this matter
20 nonetheless to my client right away. I have not
21 yet had the opportunity to discuss this matter
22 with my client in person, which we had made plans
23 to do with respect to the Hydro matter, which we
24 received well in advance of that particular
25 deadline. It also has precluded any specific

1 response that the client might have brought to me
2 today. In fact, the panel will note that the
3 seats for Peguis First Nation are currently empty
4 because they are expecting that we are going to
5 start at 3:00 o'clock, as the agenda says. I
6 waive that particular point, I understand that
7 schedules change, that's fine, but the problem is
8 that I haven't had a chance to talk to my client
9 about the Crown's response.

10 Other particular problems arise. 30
11 minutes the chair declared as I opened my mouth.
12 Of course I have two motions to respond to, while
13 everybody else got 30 minutes to respond to only
14 one. Your reply, well, you probably wasted enough
15 time talking about cartoons.

16 So I mention these particular points,
17 if the tribunal wishes to pause at this point and
18 consider the procedural unfairness that I'm
19 underlining, and that I would later in a different
20 forum certainly underline with different effect.
21 I'm prepared to wait, failing which I will return
22 to my substantive points.

23 THE CHAIRMAN: Just to respond to your
24 comments about the Crown and their late filing, I
25 would note that while the Crown did ask for this

1 opportunity, it was after we had sent your motion
2 to them and asked them, and sought information
3 from them in respect of the process in Manitoba
4 for fulfilling the duty to consult. I don't see
5 it as a violation of the timelines that are in
6 place or that it really has any effect on whether
7 it shall or may, so I would say proceed, Mr.
8 Dawson.

9 MR. DAWSON: Very well, Mr. Chair, I
10 have the panel's position.

11 A lot of the materials that I filed
12 then, of course, relate to the historical basis of
13 the duty to consult, but I'm happy to say that
14 much of that discussion we can set aside simply.
15 Both the Crown and Hydro have in their filings
16 conceded that there is a duty to consult and
17 accommodate owed by the Crown to Peguis First
18 Nation and others. And at least if one reads
19 these further, it suggests that they recognize an
20 adverse effect could possibly arise as a result of
21 the Bipole III project. So there is no real need
22 for me to go into great detail to convince this
23 panel that there is a duty to consult, and that it
24 is properly owing to my client.

25 I will just summarize, because I note

1 that of course the panel does not consist entirely
2 of lawyers, very, very briefly the background to
3 this. This is not just some invention that Dawson
4 has thought up. In fact, the duty to consult
5 arises from the Canadian constitution. Section 35
6 of the Constitution Act places a certain
7 obligation upon the government, whether the
8 Federal government or the Provincial Government,
9 to recognize and protect Aboriginal groups and the
10 rights relating to them. This sometimes will
11 arise from treaties, this can also arise without
12 respect to treaties. In any event, the duty to
13 consult and accommodate is well established in
14 Canadian law.

15 The duty to consult in this particular
16 context arises simply from the fact that Peguis
17 First Nation asserts its traditional rights and
18 the treaty rights being constitutional rights
19 relating to a significant portion of the land over
20 which or through which or on which the Bipole III
21 transmission project would pass. It further
22 asserts, and I won't go into the detail, that
23 Bipole III could have a serious adverse impact
24 upon those rights. And of course, therefore
25 correctly, all of the parties here concede that

1 that duty to consult exists between the Crown and
2 the First Nation.

3 I should also put two footnotes for
4 your amusement. There is actually no obligation
5 that as a result of the consultation there should
6 be any agreement between the Crown and the First
7 Nation that's being consulted, there needs only to
8 be an appropriate consultation process. And the
9 First Nation itself cannot thumb its nose and say,
10 we don't want any part of this, there is an
11 obligation by law upon First Nations to
12 participate in the consultative process once it
13 has been appropriately put forward. And that in
14 part is why Peguis First Nation is here today,
15 because we recognize, at least it is our
16 submission, that the law requires it to appear
17 before this particular body to participate in the
18 consultative process that I'm about to suggest
19 this panel has an obligation to engage in.

20 It certainly is the position of Peguis
21 First Nation that the Crown is not discharging its
22 duty to consult. And indeed when I read the
23 submission of the Crown that's been put before
24 you, there is a suggestion that discussions began
25 some two years ago. But this is like planning a

1 party or a wedding. These were people who were
2 having a chat, talking about what colour the
3 chairs would be, what rooms would be held, who
4 would talk when, what the area of discussions
5 would be, but there has been no actual
6 consultations done, says my client, with respect
7 to Bipole III. Indeed it is further stated in the
8 Crown's submission that the money that would
9 properly be paying to Peguis First Nation so that
10 it can conduct its own due diligence, respecting
11 these very technical documents, as well as the
12 geographic extent of the project, the money to do
13 all of that was paid only a couple of weeks ago,
14 the beginning of this month. So in terms of
15 discharging its obligation to Peguis First Nation,
16 the Crown might have always had intentions, the
17 Crown might be moving forward, but to say as I
18 think is the position about Hydro, as well as the
19 Crown, that these discussions are well underway,
20 is my client would suggest a dramatic
21 overstatement of the fact.

22 It is important, says the law, that
23 this duty should have arisen from the very
24 beginning, as soon as the idea of this project
25 arose. We are now almost at the tail end. I

1 remember at the pre-hearing conference when Mr.
2 Tymofichuk, the vice president from Manitoba
3 Hydro, told us the importance of moving this
4 project forward so that at the beginning of 2013
5 work could begin. This very much is late in the
6 game when it comes to the duty to consult. Not
7 only must that duty to consult arise from the very
8 beginning and continue in an ongoing way without
9 making it seem like a hasty last minute thought,
10 that consultation must be meaningful. What that
11 means, of course, is that if one is presented with
12 this very technical information, it certainly
13 follows that the party being consulted has to have
14 the means to understand it. For one to assess the
15 impact, for one to make proper decisions, one must
16 understand what the project actually is.

17 I'm sure that I'm not the only one in
18 this room that confesses that the vast majority of
19 the EIS is gobbledegook, not for the reasons that
20 earlier movers of motions have put forward, but
21 rather because I am not an engineer, and I have no
22 technical training in these areas, I have to rely
23 on people who do. So too would any First Nation
24 that is being consulted.

25 And in order for this due diligence to

1 engage in this, it is not only required by law but
2 expected, as one would think, that the Crown would
3 help discharge the costs of that by providing
4 appropriate funding. And that, of course, until
5 the beginning of this month hadn't even hit the
6 table.

7 Not only must the consultation be
8 meaningful, but the process itself must be
9 adequate. What adequacy is depends upon a number
10 of factors, but it is important to note in this
11 circumstance that many First Nations, including
12 Peguis First Nation, have established their own
13 consultative documents, processes that outline in
14 detail how these consultations should unfold. And
15 as far as I can tell there has been no reference
16 at all in any of the material by Hydro or the
17 Crown to a recognition of that particular process,
18 even though that process has been adopted and
19 used, my client says, in earlier projects
20 involving both the Federal and Provincial
21 governments.

22 So the consultation is neither
23 meaningful so far nor adequate so far, says Peguis
24 First Nation.

25 Hydro politely sitting there and

1 thinking frankly, so what? This duty is upon the
2 Crown. How does this affect the Commission?
3 Well, it certainly is correct to say that the duty
4 to consult is not something that is imposed upon
5 this Commission. But that doesn't mean that
6 effectively I'm at the wrong complaint desk filing
7 the wrong complaint, to go back to my opening
8 version when it came to that cartoon from the New
9 Yorker. I submit that first this panel, the
10 Commission, has an obligation to consider whether
11 any consultation has taken place, and whether that
12 consultation has been meaningful and adequate.

13 You don't have to turn to it, but you
14 may want to make a note of it for consideration at
15 a later time, at tab R of our submission -- sorry,
16 S -- no, I'm going to go through them one by one
17 letter at a time here. U, for undulating
18 mistakes; tab U sets out a transcript excerpt from
19 the hearing, the pre-hearing conference in which I
20 asked a question of the chair who gave the answer
21 that I expected. I asked the question of will the
22 Commission take into account whether it gives
23 advice and recommendations to the Minister,
24 whether or not the participants have had their
25 duty to be consulted and accommodated discharged?

1 And the chairman answers, I think correctly, I
2 think that the answer will be yes. And he goes on
3 to answer similarly when Mr. Madden asks him the
4 same question later in that hearing. I submit the
5 chair was not in error. He simply said exactly
6 that; it is an obligation of this Commission to
7 ask two questions, one, have there been
8 consultations and, secondly, have they been
9 meaningful and adequate.

10 Now implicit in that answer that the
11 Chair himself gave, was two things. First, the
12 quality of the recommendations that this
13 particular body will make to the Minister depends
14 indeed upon the fact of whether or not
15 consultations have occurred. If they have not
16 occurred, this can undermine the entire project,
17 and undoubtedly would have to be reflected in the
18 recommendations of this panel.

19 Secondly, is the timing of these
20 consultations. For this body to discharge the
21 function that the chairman answered it has,
22 clearly those consultations must at least be
23 underway, if not relatively close to conclusion,
24 by the time this body makes those recommendations.
25 We come then before this panel in this first round

1 to suggest that there should be an adjournment in
2 order to give the Crown the time that it will
3 need, coming late in the game as it has, to move
4 forward with these consultations and in short
5 allow this Commission to have the assurance that
6 we submit it requires, as well as I think the
7 chair has indicated it requires in answering that
8 question.

9 There is definitely a need or a time
10 needed in order for both the Crown, as well as the
11 First Nations, to catch up with the process.
12 Funding has become available only at the beginning
13 of this month. It is unrealistic to say,
14 therefore, that consultations that are meaningful
15 and adequate are indeed in place.

16 Now, having said all of that, now I
17 anticipate what Hydro as well as the Crown will
18 tell us, they will say, well, that's a nice idea,
19 but there is no basis in law for what I'm saying.
20 I submit there is. I submit there is plenty, in
21 fact. First, we know that the Crown will rely
22 upon the Clean Environment Commission's hearing
23 process. We've heard the impact, the effect that
24 this panel's recommendations will have. Again at
25 the last pre-hearing conference the chair in

1 answer to a question that was posed by someone,
2 told us that in all of the years that this
3 Commission has ever made recommendations to the
4 Minister, all but two or so have been accepted.
5 In short, the words that dropped from the mouths
6 of this Commission are listened to closely by the
7 Minister. This is not merely a gossip gathering
8 collection of people. You are a tribunal of
9 significant and important powers, and a vital part
10 of the environmental assessment process. The
11 Crown will undoubtedly rely upon the CEC's hearing
12 process as part of its consultative process.

13 Let's turn to some of the statutes to
14 find where we see that. You don't have to
15 actually turn the page, you can if you want,
16 talking about your own Act, the Environment Act,
17 and I will give quickly some of the references in
18 section 6(1)(a). It makes reference to the fact
19 that this Board will, of course, give advice and
20 recommendations to the Minister. Now that doesn't
21 say, let's be clear, that this panel, this
22 Commission has a duty to consult. This is a whole
23 separate thing. What I'm saying is this
24 Commission is part of the process. It is part of
25 the process by which the Crown ultimately

1 discharges its duty to consult. There is no
2 legislative basis, just to be clear, for this
3 board to engage itself in the duty to consult.
4 Indeed, if it tried to accommodate I don't know
5 where it would get the power to order anything
6 because it is an advisory board only. But the
7 legislative basis is broad. It constantly makes
8 reference to what I will simply term public
9 consultations.

10 We find the reference to public
11 consultation as part of the very purpose of the
12 Environment Act at section 1(1)(d). In talking
13 about the mandate of this Commission there is a
14 reference to developing and maintaining public
15 participation in environmental matters. When it
16 comes to hearings, section 6(5) talks about the
17 need to conduct public hearings or hearings that
18 provide advice and recommendation to the Minister.
19 And note the reference to public doesn't say
20 public, but not Aboriginal, they have got a
21 separate process. Because if we are going to talk
22 about that, then we should start by excluding most
23 of the participants who are here. The Consumers
24 Association, well they don't actually own land,
25 they are not part of the group, they have their

1 own process, they use the media, they use a public
2 process, they can fight it out there. And the
3 Bipole Coalition, well, you know, these people,
4 that's mostly a political attack, they can bring
5 their attack separately. We in the Clean
6 Environment Commission focus only on environmental
7 issues brought by the public. Well very rapidly
8 if we adopt that approach, this room would empty.
9 So clearly, public is a broad inclusive term that
10 certainly captures Aboriginal groups such as the
11 Peguis First Nation.

12 I don't want to bore the non-lawyers
13 on this board, but I will tell you that there is a
14 piece of law in Manitoba that tells us how to read
15 and interpret legislation. And what it says is
16 two things. First, when it comes to this kind of
17 a board you can only do what you are authorized to
18 do. But secondly it also says when it comes time
19 to defining what you can do, when it gives rights
20 to the public, then this should be as permissively
21 interpreted as possible.

22 There is a remedial underlying
23 legislation, the Interpretation Act, that simply
24 says all legislation is intended to be remedial,
25 meaning that when it gives rights to parties,

1 those rights are broad and inclusive, and I'm
2 suggesting both from a common reading of this
3 legislation as well as an application of those
4 interpretive approaches, public clearly means we
5 should include First Nations. We should not be
6 saying at any moment, why are you here? You are
7 at the wrong complaint desk. Barnyard animals
8 complain down the road, to go back to my cartoon
9 at the beginning. In fact, it is a process here
10 before this panel that is all inclusive. It is
11 intended to grab everyone.

12 If that weren't enough, I could turn
13 to the terms of reference where I note that it not
14 only makes reference to the public, but it also
15 says stakeholders, as if a First Nation that is
16 asserting treaty rights over land that it may
17 suffer a severe or serious adverse impact over is
18 not a stakeholder.

19 There is undoubtedly no question, in
20 my submission, that the terms of reference as well
21 as the legislation completely reject the position
22 that Hydro and the Crown would put forward, namely
23 we are at the wrong complaint desk. This is the
24 right forum in which to be part of the duty to
25 consult process.

1 And I'm not suggesting anything that's
2 terribly novel here. At tab Y of my materials, no
3 need to turn, just make a note for your later
4 reading pleasure, there is a case from the Federal
5 Court of Canada, it is a 2009 decision called
6 Brokenhead. And in that particular case, among
7 other things, the question arose as to what the
8 role of a Federal environmental assessment body as
9 part of a duty to consult. Let's pause right
10 there and say they have very different legislation
11 than you. But irrespective of that different
12 legislation is the part you want to write down,
13 paragraphs 18 and 19 of the Brokenhead case, and I
14 am not going to quote it, I will just summarize it
15 for you. It is at tab Y if you are flipping,
16 Mr. Chair. The Crown may fairly consider the
17 opportunities for Aboriginal consultation that are
18 available within the existing processes for
19 regulatory or environmental review.

20 THE CHAIRMAN: Can I interrupt, Mr.
21 Dawson? You said tab Y?

22 MR. DAWSON: I say tab Y paragraph 18,
23 Brokenhead.

24 THE CHAIRMAN: We have paragraphs one
25 two and three and then it skips to 24. Page 18

1 and 19 --

2 MR. DAWSON: I think this is a ploy
3 from the Commission to keep me talking.

4 THE CHAIRMAN: I will give you injury
5 time.

6 MR. DAWSON: You see I wisely, I
7 thought, broken everything into -- Mr. Chair you
8 are absolutely correct. Paragraph 25, pages 18,
9 19.

10 THE CHAIRMAN: Thank you.

11 MR. DAWSON: Thank you for being my
12 secretarial eye dog there. I won't even take the
13 extra time, I'm almost done. I feel like that
14 Simpson lawyer's character who says I'm so
15 confident of victory -- although I'm not -- I am
16 so confident of victory that I can afford to waste
17 the court's time rating the super hawks. In my
18 case I simply talk about cartoons.

19 So I'm just saying that the Brokenhead
20 decision, quite irrespective of the different
21 legislation in play, makes it established that
22 boards such as this can be part of the process.
23 And when I point to the fact that the terms of
24 reference include a reference to stakeholders,
25 when I point to the fact that the enabling

1 legislation of this board points to the fact that
2 the public is involved and the public does not
3 mean not Aboriginal bodies, it means the public,
4 anyone out there, then I suggest that this board
5 undoubtedly has the authority to deal with this.

6 So, so far our complaint, and this is
7 leading up to why an adjournment is necessary with
8 this particular process, has been simply there has
9 not been adequate or any funding to engage in due
10 diligence. That may be changing but it certainly
11 is not there yet. Other parties have already
12 argued about the inadequacy and incompleteness of
13 the Environmental Impact Study, and I will leave
14 that argument to them except to say that I join
15 them in that concern. Other parties have also
16 raised the inadequacy of the information round
17 replies that Hydro has raised; I would join that
18 as well but leave it to them to argue.

19 And lastly there has been no
20 consultation, pardon the pun, but there has been
21 no discussion relating to the consultative process
22 that has been adopted by Peguis and accepted by
23 many levels of government. If we were given time
24 and we are not asking for a lot of time, we are
25 not asking for an open ended amount of time, in

1 fact the 120 days that I selected reflects the
2 usual injunction that courts, especially in
3 Ontario last year, seemed to have granted when
4 these kinds of complaints have gone before panels
5 like this, and then made their way on to the
6 courts. 120 days does not seem like a lot of
7 time, but my client and I are confident that that
8 seems to be an adequate amount of time for us to
9 address most of these concerns.

10 So I submit in conclusion then that
11 this panel undoubtedly has the power to deal with
12 this. Does it have the power to grant an
13 adjournment in light of that obligation?
14 Undoubtedly I suggest that flows. We know from
15 Carrier Sekani, not a case on which I wish to rely
16 except for this one particular point -- you are
17 laughing because you have had this discussion with
18 Mr. Madden and I, and it seems, Mr. Chair, that
19 you and I have the same views on that. But in any
20 event, the only purpose of Carrier Sekani in my
21 view is the throw away line that a board may
22 provide whatever relief appropriate in the
23 circumstances, mindful of its overriding goal.

24 What is that goal in this context?
25 Well, the goal ultimately is rather lofty. On the

1 one hand we want to balance Canadian
2 constitutional principles that promote
3 reconciliation, not court battles, not aggressive
4 disputes, not me running to the Court of Queen's
5 Bench asking for an injunction, we are seeking a
6 reconciliatory approach of Aboriginal and treaty
7 rights in balance with the sovereignty of the
8 Crown. And I submit that an adjournment in these
9 circumstances, given the duty, obligation and
10 certainly the power of this panel is the
11 appropriate disposition. Failing any questions at
12 this point, that concludes my submission.

13 THE CHAIRMAN: Thank you, Mr. Dawson.
14 The reason that I smiled when you mentioned
15 Carrier Sekani, that you were only going to rely
16 on one small part of it, is because I think the
17 Carrier Sekani may not support your basic premise
18 today. Carrier Sekani, if I'm not mistaken, says
19 that tribunals don't necessarily have to engage in
20 consultation, they don't necessarily represent the
21 Crown. And I'm not sure if it is Carrier Sekani
22 or another case before it, Haida, that says that
23 unless the tribunal is given the authority to
24 make, or to determine questions of law, and it
25 doesn't have that authority, and it is pretty

1 arguable that we have the authority to cite
2 questions of law.

3 MR. DAWSON: I don't think that this
4 panel has the authority to decide much. This
5 panel is an advisory body. Here is where I differ
6 from what you said, Mr. Chairman, with respect.
7 What you have read in the cases relates to the
8 duty to consult and who has it. In Carrier
9 Sekani, it was based on British Columbia
10 legislation dealing with essentially its version
11 of the Environment Act. If I vaguely remember, it
12 was section 42, 45 of that Act specifically
13 pointed to its version of the Clean Environment
14 Commission, and gave it a whole pile of
15 obligations. Section 6 of this, our Manitoba Act,
16 limits what this board can do. It holds hearings,
17 it holds meetings it makes recommendations and it
18 gives advice. Undoubtedly it controls its process
19 as part of that, but that's about it. To the
20 extent of comparing our legislation with the
21 legislation of Ontario, British Columbia, many
22 other jurisdictions, even many Federal bodies, it
23 is a waste of time and that's why I said I'm not
24 relying on Sekani. Sekani is not helpful in this
25 particular context. Sekani talks about who has

1 the duty to consult.

2 Does this board have the duty to
3 consult? I don't see how. At most I have said
4 this board is part of the consultative process.
5 This board will make recommendations as to whether
6 that consultation took place, whether that
7 consultation was adequate, whether that
8 consultation was meaningful. This board will put
9 forward a record on which the government itself
10 may rely. To some extent because of the nature of
11 the obligation, meaning the public consultations
12 and the terms of reference which specifically make
13 reference to stakeholders, this Board is certainly
14 open to any First Nations that come before it.
15 Are they allowed to participate here? Yes. Can
16 they make questions or can they test the evidence
17 here? Yes. Does that somehow discharge the
18 Crown's duty to consult? No. Nor should it.

19 At most we are saying this body is
20 part of the consultative process. It is not the
21 consultative process, this body is not responsible
22 of discharging that process. If we can put it in
23 a blunter way, this panel has gotten mixed up into
24 a bigger issue, and the problem is that we are all
25 stuck. We now come before you pointing to

1 problems that largely have nothing to do with what
2 this Commission has done wrong. Instead we come
3 before you saying here is some things that this
4 Commission can do that are right, that will work
5 toward the constitutional outcome. Thank you.

6 THE CHAIRMAN: Thank you. Mr. Hannon.

7 MR. HANNON: Thank you, Mr. Chair. My
8 name is Gord Hannon. I'm a lawyer with Manitoba
9 Justice Civil Legal Services. I'm general counsel
10 in Manitoba justice and serve as the team leader
11 of the Aboriginal and Natural Resources law team
12 of lawyers in Civil Legal Services. And I've
13 asked and I thank the Commission for giving us --
14 giving me a brief opportunity to make comment.

15 THE CHAIRMAN: Excuse me, could we not
16 have any conversations in the audience?
17 Mr. Hannon, go ahead.

18 MR. HANNON: I thank you again,
19 Mr. Chair, for the opportunity to make a brief
20 submission on the issue of Crown Aboriginal
21 consultation relating to the Bipole III project.
22 I do express my regret for not filing our material
23 somewhat sooner. Nonetheless, it was really only
24 brought to my attention a week ago on I believe
25 Thursday, August 9th. I sought and received

1 instructions to ask the Commission for the
2 opportunity to make a brief presentation. And the
3 Crown is not taking positions in these hearings,
4 but rather simply wishing to advise the Commission
5 of the circumstances relating to how the Crown is
6 approaching consultation on the Bipole III
7 project.

8 Presently the Crown in Right of
9 Manitoba, which is lead by the Department of
10 Conservation and Water Stewardship, but not the
11 Environmental Approvals Branch of Conservation and
12 Water Stewardship, is involved in consultations
13 relating to the project with a wide variety of
14 First Nations, Metis communities and other
15 Aboriginal communities, including Peguis First
16 Nation, including the Manitoba Metis Federation,
17 in respect to communities that it asserts that it
18 represents, and I think up to as many as 40 total
19 communities relating -- which may be affected by
20 the Bipole III route, as it is presented and
21 identified in the Environmental Impact Statement.

22 These communities have been identified
23 by the Crown as those that may potentially be
24 affected by the project, and the consultations are
25 intended to provide an opportunity for those First

1 Nations and communities to advise the Crown of any
2 concerns about how the project may affect the
3 exercise of Aboriginal or treaty rights of members
4 of the First Nation or communities, and those
5 concerns will be considered by the Crown in that
6 process and ultimately considered by the Crown in
7 making any decisions relating to the project.

8 This process, this Commission process
9 is, as Mr. Dawson notes, a public process. And
10 certainly First Nations and Aboriginal communities
11 are more than welcome to participate in that
12 process, and several of them have availed
13 themselves of that opportunity and are
14 participating. Nonetheless, the government in
15 considering the Crown's duty of consultation, the
16 case law relating to section 35 of the
17 Constitution Act, 1982, and the objectives of
18 consultation, including the principles of
19 reconciliation, has developed an approach to
20 consultation that does not utilize the Clean
21 Environment Commission or any other public process
22 tribunal as a vehicle for the procedural aspects
23 of Crown/Aboriginal consultations. In part
24 because they are public in nature, open to all
25 stakeholders or all interested parties, we have

1 concluded, and we have concluded that we, when I
2 say we I mean the Government of Manitoba have
3 concluded, it would be better to establish
4 separate processes whereby the Crown goes and
5 works directly with communities and hears from
6 those communities directly rather than as part of
7 a broader public process.

8 The Manitoba government considers this
9 to be a more effective way of hearing and
10 understanding concerns that First Nations and
11 other Aboriginal communities may have about
12 potential effects of projects on the exercise of
13 Aboriginal rights or treaty rights. The First
14 Nations members and community members may raise
15 issues and concerns directly with Provincial
16 representatives, the information provided and the
17 concerns expressed will be considered in making
18 the decisions, there will be a opportunity for
19 communication and discussion and the information,
20 if it is provided in confidence, will be respected
21 by Crown representatives. Those are parts of the
22 reasons why the Crown has established a discrete
23 separate process, not this process, but in
24 addition, another process for Crown/Aboriginal
25 consultation.

1 The Crown has not delegated any
2 authority for Crown/Aboriginal consultations to
3 this Commission. There is nothing in the
4 Environment Act, I submit, or the terms of
5 reference to this Commission for this project to
6 provide direction to the Commission to conduct
7 consultations. And I understand that Mr. Dawson
8 acknowledges that. Nor do we submit any authority
9 to evaluate or consider the adequacy or
10 appropriateness of the consultation process
11 established by the Crown. There are remedies in
12 the event that the Crown does not conduct an
13 adequate process or does not properly evaluate the
14 effects of a project on the exercise of Aboriginal
15 or treaty rights. But those processes don't, I
16 submit, fall on this Commission.

17 We have provided, and they are readily
18 available, some background information on the
19 Manitoba Aboriginal and Northern Affairs website
20 relating to the Crown's approach to consultation.
21 And included in that is an interim Provincial
22 policy for Crown consultations with First Nations,
23 Metis communities and other Aboriginal
24 communities, which is accompanied by guidelines
25 for Crown consultations, that are guiding high

1 level documents to direct Manitoba government
2 departments and agencies on how they are to
3 conduct consultation. And a copy of those interim
4 Provincial policies and guidelines is available,
5 again, published on the government website. And I
6 have provided Mr. Dawson and the Commission with a
7 copy of the policy and guidelines.

8 A little bit more on the Bipole III
9 consultation process. Manitoba Conservation and
10 Water Stewardship, as I noted, is the lead
11 government department for conducting
12 consultations, and has been identified because it
13 has two main decision making roles, separate, but
14 both fall within the responsibility of that
15 department.

16 First, that department is the lead
17 department in considering issues of allocation or
18 grants of Manitoba Crown land associated with the
19 Bipole route, which in part at least is routed to
20 fall over areas of Manitoba Crown land, as well as
21 some private land. And secondly, there are issues
22 about the consideration of the application for a
23 licence for the proposed project under the
24 Environment Act, both of which fall within
25 Manitoba Conservation and Water Stewardship's

1 general responsibilities.

2 Under the policy and guidelines, it is
3 the practice of the government to determine what a
4 lead department would be and to task that
5 department with initiating consultation with
6 identified Aboriginal communities and First
7 Nations. And in doing that, the department will
8 conduct what has come to be called an initial
9 assessment, which is the early stage evaluation of
10 communities that may be affected by the project,
11 to determine which communities should be
12 consulted, where there may potentially be an
13 adverse effect on the exercise of Aboriginal or
14 Treaty rights, and then to develop with those
15 communities an appropriate consultation process
16 that provides, recognizing the objectives of the
17 Crown's duty of consultation, an opportunity for
18 the Crown to work with the community, to
19 understand community concerns about the project
20 and to consider potential measures, sometimes
21 called accommodation measures, to address those
22 impacts.

23 For this project, it is a large
24 project, there are many communities affected, I
25 believe over 40 that have been identified for

1 potential consultation, Manitoba Conservation and
2 Water Stewardship has retained a firm, a
3 consulting firm to provide assistance as a
4 consultation facilitator. The firm is called the
5 Kalian group. They operate out of Calgary but
6 they are spending a lot of time in Manitoba. They
7 are there to assist the Crown in working with
8 communities to understand issues and concerns.
9 And the practice is to determine whether
10 communities are interested, to develop work plans
11 for consultation, and to develop budgets which may
12 be funded through the process that the Crown has
13 established called the consultation, I believe it
14 is consultation participation support cost fund.
15 So there are funds available to assist First
16 Nations and communities to participate in a
17 consultation process, discretely and specifically
18 with Crown representatives.

19 And what happens then is that there
20 are consultation teams consisting of a
21 consultation facilitator to assist the process,
22 and representatives of the government with
23 Manitoba Conservation and Water Stewardship, who
24 will work with communities to hear and understand
25 their concerns, to document their concerns, and to

1 ultimately provide a consultation report to
2 government decision makers, in this case including
3 the Minister of Conservation and Water
4 Stewardship, and that report will be considered
5 before any decisions are made.

6 Peguis First Nation is one of the
7 communities that has been identified. As
8 Mr. Dawson notes, there has been correspondence
9 relating to the consultation process going back to
10 2010. More recently, while work has become more
11 intense in the process, in July of this year the
12 Manitoba Conservation Water Stewardship and Peguis
13 First Nation entered into an agreement that set
14 out the work plan and budget for the consultation
15 process, which targets a period to November of
16 this year, provides funding for that consultation
17 process. And it is the expectation, I believe, of
18 the Crown representatives that that consultation
19 process will continue. And we certainly hope and
20 expect that it will be effective to allow for
21 Peguis First Nation, as well as all of the other
22 communities, to express their concerns, and that
23 those concerns will be considered and evaluated
24 and be part of a decision making process for this
25 project.

1 One point I do want to make that I
2 think it is important for this Commission to
3 consider is that it is the Crown that has the
4 responsibility for establishing a reasonable
5 consultation process. This reflects the principle
6 of the honour of the Crown, which is described in
7 leading case law, including the Haida nation, the
8 Mikisew Cree First Nation, cases which are leading
9 cases on the issue of Crown/Aboriginal
10 consultation. And the Haida case, in addition,
11 identifies the kinds of remedies that are
12 potentially available to Aboriginal communities
13 and First Nations, to alleged failures to comply
14 with the duty of consultation.

15 So where a First Nation or Aboriginal
16 community alleges a failure of the Crown to
17 discharge its duty of consultation, the issue
18 would normally be considered under general
19 administrative law principles. Those principles
20 include a consideration of whether the decisions
21 that were made were made properly. And case law,
22 including the Haida Nation case, identifies two
23 separate questions that have different standards
24 of review.

25 The issue of the process itself, the

1 appropriateness of a particular process is
2 examined on a standard of reasonableness. This is
3 quoted right from the Haida Nation case at
4 paragraph 62, and it says:

5 "Perfect satisfaction is not required.
6 The question is whether the regulatory
7 scheme or government action viewed as
8 a whole accommodates the collective
9 right in question. What is required
10 is not perfection but reasonableness."

11 Moving on:

12 "So long as every reasonable effort is
13 made to inform and consult, such
14 efforts would suffice. The government
15 is required to make reasonable efforts
16 to inform and consult."

17 Accordingly the Crown, we submit, is
18 entitled to develop a reasonable process for Crown
19 consultation with First Nations and Aboriginal
20 peoples. And we submit that the approach that has
21 been taken under the interim provincial policy and
22 guidelines, the approach that's been applied in
23 the Bipole III case involving Manitoba
24 Conservation and Water Stewardship, the use of
25 facilitators, and development of work plans and

1 budgets in many cases for communities, that is
2 separate, that is essentially bilateral between
3 the Crown and the communities and not part of this
4 process, is a reasonable one, and that there is
5 nothing in the terms of reference nor in the
6 Environment Act that suggests that this Commission
7 needs to participate in or concern itself with the
8 adequacy of that process. And that in fact no
9 decisions have been made and decisions will not be
10 made until after that consultation process is
11 complete.

12 And if the Crown were to make errors,
13 whether in terms of process or in terms of
14 substantive assessment of impacts on Aboriginal or
15 Treaty rights, that that's a matter that may be
16 subject to judicial remedies. All of which is
17 premature right now, because the consultation
18 process, just as this Commission's process, are in
19 progress, maybe even early in process, and we
20 might be some time away from having them complete.
21 But it is certainly the Crown's objective to
22 continue to consult with communities, including
23 Peguis First Nation, and to give every reasonable
24 opportunity to hear and understand concerns about
25 the project in a manner that is in accordance with

1 a work plan and under a budget that's already been
2 developed by Manitoba Conservation and Water
3 Stewardship and Peguis First Nation.

4 So that's my submission, Mr. Chairman.

5 THE CHAIRMAN: Thank you, Mr. Hannon.

6 Any questions? Thank you very much for the
7 information provided today.

8 Ms. Mayor?

9 MS. MAYOR: Thank you, Mr. Chairman.

10 It is Janet Mayor on behalf of Manitoba Hydro, I
11 am neither as eloquent or entertaining as
12 Mr. Dawson is, nor as knowledgeable about the duty
13 to consult as Mr. Hannon, so I will keep my
14 comments very brief.

15 The key points from Manitoba Hydro's
16 perspective to cover are just a few and they have
17 been set out in our brief. The Crown, through the
18 Province, has a duty to consult where a project
19 may impact the rights of a First Nation such as
20 Peguis. And as Mr. Dawson indicated, that is not
21 in dispute.

22 The Crown, through the evidence
23 provided by Mr. Hannon today, has such an
24 organized process and it is proceeding. The duty
25 has not been delegated to Manitoba Hydro, nor to

1 the Commission, though Mr. Dawson has indicated
2 that it plays part of that process. With respect,
3 it hasn't been delegated a section 35 duty, nor
4 does it play a part in that duty to consult, as we
5 have heard from Mr. Hannon.

6 The Crown is carrying out its
7 consultation independent of this CEC hearing
8 process. It has determined that it should be
9 carried out not through a public process, but
10 rather through direct negotiations, and he has
11 provided all of the details of that process.

12 With respect, this Commission does not
13 have jurisdiction to review that Crown
14 consultation process, and in particular does not
15 have the duty to investigate whether that
16 consultation is meaningful and adequate. No such
17 duty exists in the Environment Act, which is the
18 empowering statute. And even a broad
19 interpretation of both that statute and the
20 Interpretation Act, as suggested, provides that
21 jurisdiction. If it did provide such a
22 jurisdiction, it would then be incumbent upon this
23 Commission to then review whether the consultation
24 taking place with all 45 or so First Nations and
25 groups have had meaningful and adequate

1 consultation. And I shudder to think that that's
2 where this Commission wishes to go, and nor has
3 that jurisdiction been provided to us.

4 Similarly, there is no direction which
5 has been provided to the Commission through the
6 Minister in its terms of reference.

7 I'm not going to belabour the point on
8 Carrier Sekani because I think you are very
9 familiar with that case. I do point out the one
10 paragraph in the submission by Peguis First
11 Nation, where it talks about the ability to grant
12 relief, that is qualified in paragraph 61 which
13 talks about a tribunal that has the power to
14 consider adequacy can then go on to grant relief.
15 And as we've indicated, we don't believe that this
16 tribunal has been given that power to consider
17 whether consultation has been meaningful and
18 adequate.

19 The request that has been made is for
20 an adjournment of four months or so. The Crown,
21 through Mr. Hannon, has not indicated that such an
22 adjournment of four months or any particular time
23 is required. Their consultation is continuing
24 through an established timeline. They hope to be
25 able to present the results of that consultation

1 to the decision maker, the Minister, with respect
2 to this project. And as such, there is no reason
3 for an adjournment on the basis of a need for
4 further consultation to be carried out.

5 The only other comment that I will
6 make with respect to Mr. Dawson's submission is
7 that he indicated and quoted from a reference to
8 the July 19th hearing, and he referenced where you
9 indicated that you thought the Commission would in
10 fact embark upon an examination of the meaningful
11 and adequate consultation.

12 With respect, you further clarified
13 your position in that regard at page 108 of the
14 transcript where you said you would simply be
15 making an inquiry as to whether or not
16 consultation is taking place. So I just wanted to
17 point out that there was further that had been
18 said by you at that meeting.

19 Those are my only comments, subject to
20 any questions you may have.

21 THE CHAIRMAN: Thank you, Ms. Mayor.
22 I don't have any questions. I did have one but
23 you answered it.

24 MS. MAYOR: Thank you.

25 THE CHAIRMAN: Mr. Hannon, could I ask

1 you to come back? I just have a question. It
2 occurred to me after you had left the stand and
3 then Ms. Mayor addressed it, about the time.
4 Mr. Dawson has asked that the hearings be
5 adjourned for 120 days so the Crown has time to
6 carry out its duty. What is the Crown's opinion
7 in that respect?

8 MR. HANNON: Well, the Crown is
9 working on the basis that it can continue its
10 consultations. It is working toward a November
11 time frame for concluding the consultations. The
12 work plan that's been developed with Peguis First
13 Nation contemplates, I believe, a November 15th
14 sort of target date. And so the -- it is
15 anticipated, it is acknowledged it can be a lot of
16 work, but it is anticipated that the Crown at
17 least, in terms of its consultation processes,
18 will move forward with dispatch. We have a number
19 of consultation teams engaged, agreements and work
20 plans, funding agreements and work plans are in
21 place with many communities, and we are
22 proceeding, as far as I'm aware, in accordance
23 with those work plans.

24 THE CHAIRMAN: Thank you. That's all.
25 Mr. Dawson -- sorry, Mr. Williams you have -- you

1 only have five for this round.

2 MR. WILLIAMS: Mr. Chair and members
3 of the Commission, I may use up part of my five
4 asking a couple of questions.

5 Our client, to their knowledge, they
6 certainly haven't reviewed the Crown filing in
7 terms of the motion of Peguis, and we are not sure
8 whether that's an oversight on our part, or
9 whether it just hasn't been provided. And so
10 that's -- our client certainly has an intent to
11 offer some commentary on this issue. They had
12 been anticipating waiting until Mr. Madden's
13 motion was presented as well. And I just wanted
14 to make sure, from the Commission's perspective,
15 will there be a opportunity to comment in terms at
16 a later date?

17 THE CHAIRMAN: Yes, there will.

18 MR. WILLIAMS: Our client won't offer
19 any opinion in terms of this to date, except I
20 think for what is common in this room, that this
21 Commission does not have a duty to consult.

22 The more interesting and important
23 question from our client's perspective, on which
24 their position is still being developed, is
25 whether under the Rio Tintin, or Rio Tinto cases

1 there was a duty to assess the meaningfulness and
2 adequacy of Crown consultation. And clearly, and
3 this is where our client is working their way
4 through the puzzle, under the -- in terms of
5 environmental licensing, this Commission has an
6 authority to make recommendations rather than to
7 make decisions. What our client is grappling with
8 is, it does appear to them that under the Act,
9 specifically section 6.1(c), the Commission has
10 had delegated to it the authority to carry out
11 functions as required under the Contaminated Sites
12 Remediation Act. And certainly when our clients
13 look at that Act, it appears to them that there is
14 some jurisdiction in terms of the determination of
15 questions of law.

16 So that is the question our clients
17 are kind of working their way through and they are
18 reserving their position on. Certainly their
19 review of the case law to date suggests there is
20 no case law that provides clarity between the
21 distinction between the deciding authority, as in
22 Rio Tinto, at a recommendatory body like the CEC.
23 The additional twists that our clients are adding
24 is that section 6.1(c). So their work is ongoing.
25 Not having had the opportunity to read the Crown's

1 submissions, they will read that with interest in
2 developing a final advice on the legal position
3 that they may take.

4 I think I made my five minutes.

5 THE CHAIRMAN: You did indeed. I was
6 just going to comment that I think your slip of
7 the tongue on Tinto and TinTin was probably due to
8 Mr. Dawson's cartoon allusions earlier.

9 MR. WILLIAMS: I misspent too much of
10 my youth on Tintin, I apologize for that.

11 THE CHAIRMAN: Mr. Dawson?

12 MR. DAWSON: I would like a moment
13 with my client. Do you mind if I take just a
14 second?

15 THE CHAIRMAN: How much would you
16 like?

17 MR. DAWSON: Literally a moment?

18 THE CHAIRMAN: Okay. That's fine. We
19 can give you a couple more if you wish.

20 (Brief recess)

21 THE CHAIRMAN: Order. Mr. Dawson?

22 MR. DAWSON: If I understand
23 correctly, there will be questions from the panel
24 now, is that how you would like to proceed,
25 Mr. Chair?

1 THE CHAIRMAN: No.

2 MR. DAWSON: You would just like me to
3 talk more?

4 THE CHAIRMAN: We had a question or so
5 at the end of your presentation. The agenda
6 wasn't entirely clear in that regard. If at the
7 end of your rebuttal, the panelists have any
8 further questions, we will ask them, we will
9 direct them at that time.

10 MR. DAWSON: Very good.

11 You know, I was listening to the
12 rebuttals or the comments of both the proponent
13 and the Crown, and it reminded me of a comment or
14 an exercise that I frequently go through.

15 Now, for those of you who are only
16 reading the transcript and not here in the room
17 right now, you may think that I'm somehow a
18 stunning Olympian, the reality is that I look more
19 like the Pillsbury dough boy, but nonetheless I
20 often think to myself, how can I make myself into
21 an Olympian? And I develop an intricate plan of
22 what I am going to eat and how I'm going to waddle
23 from point A to point B and sweat extensively.
24 And this is a great plan. And I look at it a long
25 time and I think that this is how I'm going to

1 implement it, but the reality is, as my obvious
2 massive form now proves, the pull of the M & M's
3 is stronger than the plan's implementation.

4 When I listen to what my client would
5 have me believe what is the thoughtful views of
6 Hydro, as well as the Crown, about a consultation
7 process, the reality is that there is a great plan
8 in place, but nothing is happening. So I don't
9 want this panel to walk away thinking that
10 consultations are well under way. I'm somewhat
11 distressed even by what I'm going to take as a
12 slip of the tongue that you, Mr. Chair, said as
13 Mr. Hannon left his microphone, saying, thanking
14 him for the information provided today. We should
15 not be here receiving evidence. If the function
16 of this motion is to accept what the Crown has
17 said as some representation of fact, then I want
18 to cross-examine the Crown, I want to call my own
19 evidence, and I don't think we should be doing
20 that.

21 This is a motion. The motion rules
22 clearly stated a short clear statement of fact is
23 all that this body wanted. We should not be here
24 fighting over whether or not the evidence points
25 in a certain direction or other. And the very

1 fact that the Crown has sat here, given evidence,
2 filed extensive attachments to its brief that
3 purport to be evidence that have been received by
4 the panel as information is problematic.

5 I have a solution, one that doesn't
6 involve me running to the Queen's Bench. I'm
7 going to suggest that this panel simply can't
8 consider that. Instead what we have to do is we
9 have to focus upon those facts that are in common.
10 Both the Crown, as well as my client, agree that
11 it was as late as July last month before some sort
12 of agreement was in place relating to
13 consultation. Both the Crown and my client agree
14 that it was only at the beginning of this month
15 that a cheque was cut so that my client could
16 begin the process of due diligence. To suggest
17 that this consultation process has gone on for two
18 years, even a year, even six months, is fantasy.
19 To label it information provided today, with
20 respect, is simply wrong. At most what we can say
21 is that the consultation process has been
22 discussed a lot, but it is only under way perhaps
23 even just as we speak.

24 This indeed should not be an
25 evidentiary fight. To the extent that I wished to

1 challenge whether or not consultations are under
2 way, that is something that should be done during
3 the course of the hearing, if at all. And I
4 suggest that that's the appropriate way to deal
5 with it.

6 I'm not sure also in listening to the
7 Crown whether it was some sort of what I would
8 ungenerously label as a threat to derail the
9 process here and simply say, listen, the usual
10 rules of administrative law apply. Now, another
11 way of saying that is, if you decide this the
12 wrong way, we are going down the street to the
13 Court of Queen's Bench and have a judge review
14 what you said.

15 Ms. Mayor pointed out, I believe it
16 was Ms. Mayor at least, in the course of her
17 submissions that it might be premature to do that
18 given that these hearings are unfolding. And in
19 fact I can say that, given the nature of these
20 hearings, that is that they are ongoing and a
21 substantive amount of work would be unfolding,
22 probably a court would entertain, without labeling
23 it a fancy word for the non-lawyers, as a
24 collateral attack, being a side run on the
25 process, probably the courts would allow that kind

1 of a process. To the extent that we are trying to
2 say that any party is going to disrupt these
3 proceedings unless the outcome is one that they
4 hope for, I suggest is a little problematic.

5 Let me turn to the substance of our
6 motion, and let me make sure that I have one thing
7 absolutely clear in your minds, because I think
8 that it was muddled both by the Crown as well as
9 Hydro. When we talk about the duty to consult,
10 this panel does not have that duty. No one has
11 delegated that duty to you. It is not your job.
12 The most that I am saying, and I suggest the most
13 that the case law will say, is that this panel has
14 a role to play as part of that process. To the
15 extent that Hydro and the Crown would put up their
16 hand and say, hey, stay out of our bailiwick, we
17 will deal with this on our own, we don't need you
18 sticking your nose into this, the reality is that
19 both the Environment Act's repeated references to
20 public meetings, public consultations, which would
21 include Aboriginal groups, the reality is that the
22 terms of reference make reference to stakeholders,
23 means that it is certainly open to any group to
24 participate.

25 Now, Ms. Mayor made reference to that

1 horror situation, if in fact she said if you
2 agreed with me that you must consider the adequacy
3 of all of the consultation processes, does that
4 mean that this Commission has to dig through, she
5 has labeled 45 Aboriginal first consultations?
6 Well, the reality is that sitting in this room
7 there is at most one First Nation that seems to be
8 actively participating. Brokenhead, that case
9 from the Federal Court, tells us unless you come
10 forward, Aboriginal groups, we are not going to go
11 out looking for you, the obligation is upon you to
12 participate. So with respect to that horror
13 scenario that 45 consultations have to be taken
14 into consideration, the reality is that unless
15 someone is knocking on this Commission's door
16 saying, we have a problem, well then at that point
17 it is not this panel's concern. So 45 is entirely
18 unnecessary.

19 The further -- I just want to ask one
20 quick question because I like to compare the
21 language. Am I correct that there is no French
22 version of the terms of reference, Mr. Chair?

23 THE CHAIRMAN: I don't know.

24 MR. DAWSON: Okay. I thought perhaps
25 it would be useful to see what the comparable

1 language was, but we will just assume it is not
2 available to the extent it exists.

3 So I think the take home point here is
4 that my client is trying to work in a conciliatory
5 way within this process. My client, at the same
6 time, correctly insists upon being treated fairly
7 and respectfully. My client points out that to
8 the extent that it is able to participate in this
9 process, to engage in part of the consultative
10 process that the Crown has a duty to participate
11 in, it needs time. And the amount of time that it
12 is seeking is such so that it can give effect to
13 these consultations that are beginning. What is
14 the point of having a consultative process,
15 separate and apart from, with no relation to these
16 proceedings, if a party comes before this body
17 trying to exercise its constitutional rights?

18 So failing any questions, that
19 concludes my submission.

20 THE CHAIRMAN: Thank you, Mr. Dawson.
21 Questions? No questions. Thank you very much,
22 sir.

23 Okay. Well, that brings us to the end
24 of today's proceedings, but don't rush off for a
25 minute or two. I have a couple of comments to

1 make.

2 We will make best efforts to have
3 decisions in respect of the first two motions
4 heard today some time next week. In respect of
5 this last motion, the Manitoba Metis Federation
6 was not able to be present today. Their counsel
7 and his co-counsel were not available. They asked
8 for permission to -- they want to bring a motion
9 that is similar, but they insist different enough
10 to this third motion this afternoon, they wish to
11 bring a motion in that regard. We agreed that we
12 would hear that motion on August 30th, which is
13 our next scheduled day for a motions hearing.

14 Mr. Madden, counsel for the MMF, also
15 asked that since an early decision on this Peguis
16 motion might prejudice his presentation, he asked
17 that we not issue our ruling on this third motion
18 until after August 30th. We agreed to that. I
19 don't think that was an unreasonable request.

20 So to sum up, the first two motions
21 decisions, hopefully by the end of next week, we
22 will certainly make best efforts to do that. The
23 third motion decision will come some time after
24 August 30th.

25 The filing date for the August 30th

1 motions date would be next Wednesday, so that will
2 be the 22nd.

3 Any other questions, Mr. Laliberte or
4 Mr. Meronek?

5 MR. MERONEK: Mr. Chairman, what about
6 the information requests that have just come in,
7 in terms of responding a second round? I don't
8 think that's contemplated.

9 THE CHAIRMAN: Could you elaborate a
10 little bit?

11 MR. MERONEK: The information requests
12 that came in --

13 THE CHAIRMAN: Yesterday, the
14 responses that came yesterday.

15 MR. MERONEK: First round.

16 THE CHAIRMAN: Yes.

17 MR. MERONEK: When are the information
18 requests, second round due on those?

19 THE CHAIRMAN: Tomorrow noon is what
20 we currently have scheduled.

21 MR. BEDDOME: Mr. Chairperson, I
22 respectfully request, I know you want to make a
23 determination on adjournment, but even just Monday
24 in terms of the information requests would make it
25 easier for people.

1 MR. MERONEK: I think you
2 misunderstand my question, Mr. Chairman. You had
3 indicated that the later that these information
4 requests came in, it might jeopardize the process.
5 So the information requests for July 31st came in,
6 and I realize the deadline is tomorrow, but we
7 just got 300 pages yesterday. It is just not
8 feasible to be able for us to ask more questions.

9 THE CHAIRMAN: What would you consider
10 to be a reasonable time line?

11 MR. MERONEK: I would say a week.

12 THE CHAIRMAN: Okay. Any other
13 comments? But then we would allow Hydro a similar
14 two-week period to respond.

15 MR. MERONEK: That's fair. But we
16 recognize there has been a slippage.

17 THE WITNESS: Okay. Mr. Williams?

18 MR. WILLIAMS: Certainly a week would
19 be the minimum that our clients would request. We
20 note Mr. Madden I think in his letter requested a
21 longer period of time, so the board may wish to
22 consider that.

23 Also there is a whole package, I don't
24 know if they have arrived today or not, but there
25 is the August 1st responses, we had not received

1 as of 9:00 o'clock -- or the August 1st questions
2 we had not received as of 9:00 o'clock last night
3 or this morning, so I don't know if they have been
4 filed, but there is those to keep in mind.

5 THE CHAIRMAN: Okay. Mr. Beddome?

6 MR. BEDDOME: Just to follow up on
7 that, I mean, certainly, a lot of them a week
8 would be reasonable, but given that the initial
9 deadline was July 31st, I will say the requests
10 were sent the 27th, I think about seven to eight
11 days seem reasonable in terms of putting us back
12 on schedule, in terms of the delay in getting all
13 of the responses in.

14 THE CHAIRMAN: Mr. Bedford?

15 MR. BEDFORD: I leave it to you, eight
16 days, a week, two weeks. All we ask is that if
17 you extend that deadline, we would want the same
18 courtesy that our deadline is extended by an equal
19 number of days. I'm always mindful of the fact
20 that we count from the day we actually get the
21 questions. As you know that they all first go to
22 the Clean Environment Commission and you perform
23 a --

24 THE CHAIRMAN: It is procedural stuff,
25 it really doesn't matter that we have an exact

1 transcript of this. I think we had originally set
2 the 17th and 31st, is that not correct?

3 MR. BEDFORD: Yes.

4 THE CHAIRMAN: Let me put it this way,
5 first of all, the second round questions are not
6 to be new questions that you missed the first time
7 around, they are to be seeking further information
8 on responses received in the first IR round.
9 That's understood?

10 Given that then, I think it is not
11 unreasonable that we will give you until noon next
12 Friday, which will be the 23rd -- 24th. We
13 will -- given that it is likely that the number of
14 questions that come in will be considerably less
15 than during the first round, we will accept them,
16 we will repackage them, we will send them to Hydro
17 immediately. We won't put them through our
18 consultants. We will let Hydro decide itself on
19 relevance and repetition, and we will give them
20 two weeks to respond to those second round
21 information requests.

22 Does that sound reasonable to all
23 parties? Mr. Beddome?

24 MR. BEDDOME: No, Mr. Chairperson, I
25 strongly object to the idea that Manitoba Hydro

1 determines the relevance or repetition, because
2 that would create a differential in terms of the
3 procedure in terms of how things have been done,
4 We vetted things thus far. It would only make
5 sense to have some consistency in the process.
6 And then to put that decision in the proponent's
7 hands, I would suggest is particularly
8 problematic. I understand that you guys need some
9 time to vet, if you are going to do it that way
10 and that may add more time, but I respectfully
11 submit that that may just be the cost of, you
12 know, the mathematical number of requests that
13 have been filed and the time needed to respond to
14 them.

15 THE CHAIRMAN: I was just trying to
16 speed up the process. If the Clean Environment
17 Commission is going to consult with our
18 consultants in vetting the round two questions,
19 then it will add some time to when you receive
20 responses back from Hydro. Mr. Williams?

21 MR. WILLIAMS: Just two comments. The
22 proposal in terms of, not put in through the
23 Commission, but Hydro responding, our clients --
24 that's a process that we are quite familiar with.
25 They always, of course, reserve the right to bring

1 a motion if they feel that relevant information
2 has been denied.

3 So just so I'm clear, Mr. Chairman,
4 the ordinary course dealing with companies, we put
5 questions to them, most they respond to, some they
6 claim are irrelevant or unnecessary, and the
7 Commission, being the master of its own procedure,
8 presumably would retain the jurisdiction to hear a
9 motion on that. So if that's the understanding,
10 certainly our clients won't want an objection to
11 an expedited process.

12 I do just wish to make one additional
13 point, that the second round information requests,
14 certainly, we don't -- I haven't looked at what we
15 received from our folks, but I do know that we
16 were provided, for example, with a lot from
17 Teshmont, and there will be some questions
18 naturally flowing from that. So I'm not sure you
19 are going to get a pile like this, but I would
20 expect that there will be more than two or three
21 questions posed.

22 THE CHAIRMAN: Okay, thank you.

23 Mr. Bedford?

24 MR. BEDFORD: On July 19 you
25 identified August 30 as the date of your motions.

1 THE CHAIRMAN: Yes.

2 MR. BEDFORD: And specifically you
3 identified that as the day to hear motions from
4 parties. The logic of what we are now discussing
5 is that we are extending the deadline out for
6 providing answers to round two. We should all be
7 mindful that it meets August 30 for that other
8 category of motions. We will be here, but it will
9 be -- (inaudible) presumably we will see it by
10 August 22nd, but we should all be clear that
11 that's likely the only motion that we are hearing
12 on this date.

13 THE CHAIRMAN: That's a good point.

14 Mr. Williams, it is within our
15 procedural guidelines that motions can be brought
16 at any time. We have directed by way of a
17 practice direction that show shopper motions, as
18 the term was coined at our last meeting, we would
19 not entertain after 15 days before the start of
20 the hearings. But motions in respect of
21 insufficient information can be brought pretty
22 well at any time.

23 I think Mr. Bedford is probably
24 correct that we might want to find another date
25 some time in September. We do have a pre-hearing

1 meeting scheduled I think for the 11th of
2 September. The staff is shuddering at this, but
3 unfortunately I think we have to deal with it. We
4 may extend that day and have that part prehearing
5 meeting and part motions hearing.

6 So any comments, Mr. Meronek?

7 MR. MERONEK: I subscribe to your
8 suggestion about forgetting about the vetting. It
9 certainly isn't the way that it is done at the
10 PUB, but it is more workable in this circumstance.
11 And secondly, does that mean that tomorrow noon is
12 still on the table?

13 THE CHAIRMAN: Tomorrow noon, no, it
14 is a week tomorrow noon.

15 MR. MERONEK: For all --

16 THE CHAIRMAN: Round two questions,
17 round two questions must be in -- and Manitoba
18 Hydro, we will send them out to Manitoba Hydro
19 next Friday afternoon, they will respond by noon
20 the following Friday. The reason, well --

21 MS. MAYOR: Two Fridays from next
22 Friday is when Manitoba Hydro must respond?

23 THE CHAIRMAN: Yes, sorry, two weeks.

24 MS. MAYOR: You lost me.

25 THE CHAIRMAN: We wouldn't want to do

1 that.

2 Why we have introduced this vetting
3 process, and this isn't the first hearings that we
4 have done this on the IRs, has a history with the
5 Clean Environment Commission. It is Wuskwatim
6 where some participants submitted thousands of
7 questions, many, many, many of which were totally
8 irrelevant. So in order to head that off, we
9 introduced this process. This isn't something
10 that we invented, it is not unique to us. The
11 MacKenzie Valley Environmental Impact Review Board
12 has a very similar process. Mind you, they
13 also -- that review board combines the roles of
14 both Manitoba Conservation Environmental
15 Assessment Branch and the Clean Environment
16 Commission, so they do have a bit of a different
17 role in that. But there is history with that.

18 We are always open, once these
19 hearings are concluded, to consider whether this
20 is the best way to do it and how we might do it in
21 the future differently. But at this point, we
22 will go with what we have. For this next round,
23 we won't vet them. You will have an opportunity,
24 if you don't like how Manitoba Hydro has
25 responded, on September 11th, to bring that to our

1 attention.

2 MR. MERONEK: I get your comments, and
3 maybe at some opportunity in a generic way we can
4 discuss it because --

5 THE CHAIRMAN: After the Wuskwatim
6 hearings, I did invite all participants and many
7 other parties to provide comments on our
8 procedures, and we did change our procedural
9 guidelines considerably after that. And we are
10 always open to do that. These documents aren't
11 cut in stone. If we can make the process better,
12 we are open to that. Mr. Bedford?

13 MR. BEDFORD: When the round two
14 questions come, I remind everybody in the room,
15 the round two questions of which there is a round
16 one question, this is a follow up.

17 THE CHAIRMAN: Okay. Did everybody
18 hear that? Any other matters to deal with this
19 afternoon?

20 Well, thank you very much. This was
21 actually a less stressful day than I thought it
22 might be, so thank you all for that. We have had
23 good day and we are adjourned.

24 (Adjourned at 3:49 p.m.)

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OFFICIAL EXAMINER'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.

Cecelia J. Reid
Official Examiner, Q.B.

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