

**BRITISH COLUMBIA UTILITIES COMMISSION**  
**IN THE MATTER OF THE UTILITIES COMMISSION ACT**  
**S.B.C. 1996, CHAPTER 473**

**and**

**British Columbia Hydro and Power Authority**  
**Call for Tenders for Capacity on Vancouver Island**  
**Review of Electricity Purchase Agreement**

**Vancouver, B.C.**  
January 26, 2005

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**PROCEEDINGS AT HEARING**

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**BEFORE:**

**R. Hobbs,                      Chairperson**

**L. Boychuk,                  Commissioner**

**VOLUME 13**

## APPEARANCES

G.A. FULTON  
P. MILLER

Commission Counsel

C.W. SANDERSON, Q.C.,  
H. CANE  
J.C. KLEEFELD

B. C. Hydro

L. KEOUGH

Duke Point Power Limited

C.B. LUSZTIG  
A. CARPENTER

British Columbia Transmission Corporation

D. PERTTULA

Terasen Gas (Vancouver Island) Inc.

G. STAPLE

Westcoast Energy Inc.

R. B. WALLACE

Joint Industry Electricity Steering Committee

C. BOIS

Norske Canada

D. NEWLANDS

Elk Valley Coal

F. J. WEISBERG

Green Island Energy

D. LEWIS

Village of Gold River

D. CRAIG

Commercial Energy Consumers

J. QUAIL.  
D. GATHERCOLE

BCOAPO  
(B.C. Old Age Pensioners' Organization, Council Of  
Senior Citizens Organizations Of B.C., End Legislated  
Poverty Society, Federated Anti-Poverty Groups Of B.C.  
Senior Citizens' Association Of B.C., And West End  
Seniors' Network)

W. J. ANDREWS  
T. HACKNEY

GSX Concerned Citizens Coalition  
B.C. Sustainable Energy Association  
Society Promoting Environmental Conservation

R. MCKECHNIE

Himself

R. YOUNG

Gabriola Ratepayers' Associations

K. STEEVES

Himself

**CAARS**

VANCOUVER, B.C.

January 26<sup>th</sup>, 2005

**(PROCEEDINGS RESUMED AT 8:30 A.M.)**

THE CHAIRPERSON: Please be seated.

I think the order of proceeding this morning will be as follows. I will make two comments. I think they're of a factual nature. I think it's necessary for me to do that first, in part so that Mr. Andrews has an opportunity to make his comments in the context of my comments. And then I think Mr. Andrews should have an opportunity to address his notice of motion, and then I think we will hear from those who are in support of Mr. Andrews' notice of motion, and then I think we will hear from those who do not support Mr. Andrews' notice of motion, and then I think Mr. Andrews should have an opportunity of reply.

Are there any objections to that process?

Before I make my comments, are there any other issues regarding the process for today that need to be spoken to?

**Proceeding Time 8:33 a.m. T2**

MR. FULTON: Mr. Chairman, I just would like to indicate for the record that there have been some letters received. Some were received before the time last night, some after the time. But if I just might

1 reference those with their exhibit numbers before we  
2 get started so people will be aware of them.

3 THE CHAIRPERSON: Please proceed.

4 MR. FULTON: And I'll do these in chronological order.  
5 The first is an e-mail from John Hill Monday, January  
6 the 24<sup>th</sup>, 2005, if that might be marked Exhibit C13-6.

7 THE HEARING OFFICER: Marked Exhibit C13-6,  
8 (E-MAIL FROM JOHN HILL, DATED JANUARY 24, 2005, MARKED  
9 AS EXHIBIT C13-6)

10 MR. FULTON: The second is an e-mail from Bob McKechnie  
11 Tuesday, January the 25<sup>th</sup>, 2005, Exhibit C22-8.

12 THE HEARING OFFICER: Exhibit C22-8.  
13 (E-MAIL FROM BOB McKECHNIE, DATED JANUARY 25, 2005,  
14 MARKED AS EXHIBIT C22-8)

15 MR. FULTON: The third is an e-mail from John Hague dated  
16 January 25<sup>th</sup>, 2005, C26-8.

17 THE HEARING OFFICER: Marked C26-8.  
18 (E-MAIL FROM JOHN HAGUE, DATED JANUARY 25, 2005,  
19 MARKED AS EXHIBIT C26-8)

20 MR. FULTON: The next is an e-mail from Mairi McLennan  
21 dated January 25<sup>th</sup>, 2005, C36-15.

22 THE HEARING OFFICER: C36-15.  
23 (E-MAIL FROM MAIRI McLENNAN, DATED JANUARY 25, 2005,  
24 MARKED AS EXHIBIT C36-15)

25 MR. FULTON: Next is an e-mail from Eric Anderson dated  
26 January 24<sup>th</sup>, 2005, C37-8.

1 THE HEARING OFFICER: Marked C37-8.

2 (E-MAIL FROM ERIC ANDERSON, DATED JANUARY 24, 2005,  
3 MARKED EXHIBIT C37-8)

4 MR. FULTON: Next is a letter from the Islands Trust  
5 dated January 25<sup>th</sup>, 2005, C38-2.

6 THE HEARING OFFICER: C38-2.

7 (LETTER FROM ISLANDS TRUST, DATED JANUARY 25, 2005,  
8 MARKED AS EXHIBIT C38-2)

9 MR. FULTON: And finally there is a series of form e-  
10 mails that were received last night, and if those  
11 might be marked Exhibit E-282.

12 THE HEARING OFFICER: Marked E-282.

13 (SERIES OF FORM E-MAILS RECEIVED JANUARY 25, 2004,  
14 MARKED AS EXHIBIT E-282)

15 MR. FULTON: Thank you.

16 THE CHAIRPERSON: Thank you.

17 As I said, I have essentially two comments.  
18 One of them relates to the discovery of the issue that  
19 was raised *In camera* and the timing of that by me, and  
20 independently, if you will, by Commissioner Boychuk.

21 **Proceeding Time 8:35 a.m. T03**

22 It wasn't until the morning of the *In*  
23 *camera* session that I identified the issue that was  
24 raised during the *In camera* session. The comments  
25 that are made by Mr. Andrews in Exhibit C20-35 with  
26 respect to when it -- when the Commission Panel

1 identified the issue; I might say, Mr. Andrews, that  
2 it was reasonable for you to expect that the  
3 Commission Panel would have identified the issue as  
4 early as that. And I do make that comment without  
5 commenting on the merits of your inference with  
6 respect to that. But I can tell you that it wasn't  
7 until the morning of the *In camera* session that I  
8 identified that issue.

9 Further, although *In camera* sessions were  
10 on the regulatory agenda, a decision as to whether or  
11 not there should be an *In camera* session was made by  
12 me, independently of Commissioner Boychuk, and it was  
13 made by me following the answer that I received from  
14 Ms. Hemmingsen on the transcript at page 1718.  
15 Commissioner Boychuk and I did not discuss that  
16 evidence prior to the *In camera* session, and  
17 Commissioner Boychuk was not aware of the issue until  
18 it was raised by me on the transcript at Volume 8,  
19 page 1718. And, Commissioner Boychuk did not know  
20 that I was going to request an *In camera* session until  
21 the *In camera* session.

22 In fact, although I haven't discussed this  
23 with Commissioner Boychuk, it may not have been until  
24 we were in the *In camera* session that the issue itself  
25 was -- became fully aware -- or Commissioner Boychuk  
26 became fully aware of the issue.

25           That response is explored in further detail  
26       later. I was concerned about that response because I

1 was concerned that I wouldn't be reviewing the  
2 evidence that Mr. Lewis wanted me to, and I felt it  
3 was important that I do that.

4 And so that evening I reviewed the tender  
5 sheets and the QEM model, and then spoke to that issue  
6 the following morning, Volume 10, page 2163, where I  
7 indicated

8 "I would like to begin this morning by --  
9 unless there are some filings you'd like to  
10 make, Mr. Sanderson -- but I'd like to begin  
11 by returning to Mr. Lewis's request."

12 And then over on page 2164, I say what I've  
13 just told you.

14 "...I returned to the tender sheets and the  
15 tender sheets -- on my read of the tender  
16 sheets, the levelized unit costs are not  
17 there, because you don't NPV the energy for  
18 -- because of the nature of the QEM model."

19 Somewhat inarticulate, but I think the point is made.

20 And then on line 14 I go on and say:

21 " So I think we were a little bit misleading  
22 yesterday with respect to that as well. And  
23 I think the numbers are in the evidence, but  
24 I think we also need to get there as well.  
25 So, and I'd like to give Mr. Lewis some  
26 assurance that in fact the Panel is looking



1 at what he wants us to look at, so."

2 So it was my intention to ensure that the  
3 Panel was looking at the evidence with respect to the  
4 issue that Mr. Lewis was raising, and the issue that  
5 Mr. Lewis was raising was a different issue than was  
6 raised *In camera*, arguably a broader issue and one  
7 that related to the principal issue in this  
8 proceeding.

9 I think those will be the extent of my  
10 comments.

11 Mr. Andrews, you may proceed.

12 **Proceeding Time 8:43 a.m. T05**

13 **SUBMISSIONS ON NOTICE OF MOTION:**

14 MR. ANDREWS: Mr. Chairman, Madam Commissioner. I am  
15 going to follow along through my written motion, which  
16 is Exhibit C20-35, and I will be making reference to  
17 Volume 8 of the transcript, the proceedings *In camera*  
18 as more fully released January 24, 2005, and  
19 occasionally I will refer to the proceedings *In camera*  
20 Volume 8, which are not qualified as having been more  
21 fully released. I may refer to them as the "redacted  
22 transcript" and the "unredacted transcript" for ease  
23 of reference. And just to also try to clarify in  
24 advance what I'm referring to, the *In camera* session,  
25 and I use the term "the panel," I will have in mind  
26 the Commission panel, unless I explicitly use the term

1 "witness panel". So, for the record, should I happen  
2 to merely say "panel" I would be intending to say  
3 "Commission Panel" at the time.

4 This is an application for an Order that  
5 the Commission disqualify itself on the grounds of a  
6 reasonable apprehension of bias and denial of  
7 procedural fairness and natural justice during the  
8 hearing. The leading statement of the test, and I  
9 will read it, because I believe it sets the framework  
10 for today's discussions, and I don't propose to go  
11 through the cases or the law any further than this,  
12 but the test is:

13 "The apprehension of bias must be a  
14 reasonable one, held by reasonable and  
15 right-minded persons, applying themselves to  
16 the question, and obtaining thereon the  
17 required information. The test is, what  
18 would an informed person viewing the matter  
19 realistically and practically, and having  
20 thought the matter through, conclude? Would  
21 he or she think that it is more likely than  
22 not that (the decision-maker), whether  
23 consciously or unconsciously, would not  
24 decide fairly?"

25 The test is an objective one. It's a  
26 matter of what an objective outside person would

1 reasonably conclude and, in my submission, this  
2 unfortunately is a case in which the test has been  
3 met. I will go through the points in my motion to  
4 identify them and elaborate to a certain extent with  
5 references to the transcript, and in the course of  
6 doing that, I will respond, I think, to the various  
7 additional information that has emerged since the time  
8 that I wrote the motion.

9 **Proceeding Time 8:47 a.m. T6**

10 The first point concerns the whole area of  
11 the Panel's decision to enter into an *In camera*  
12 session. And for those following on the record, the  
13 argument is that the Panel failed to implement the  
14 least restrictive procedural mechanism for handling  
15 confidential information without violating the rights  
16 of the parties of B.C. Hydro.

17 Now, the Chair this morning has provided  
18 further information regarding the unique or distinct  
19 roles of himself and Commissioner Boychuk in terms of  
20 a decision to have an *In camera* session. My  
21 submission is premised on the understanding that the  
22 entire Panel is responsible for the decisions of the  
23 Panel, and that to the extent that one member of the  
24 Panel has done something that contributes to a  
25 reasonable apprehension of bias, there is in the law  
26 some discussion about the extent to which that

1 apprehension of bias taints the rest of the Panel.  
2 And I don't have a citation, but the *Lee v. C.H.*  
3 *Trucking* case involving reasonable apprehension of  
4 bias arising out of the Labour Relations Board of B.C.  
5 discusses this issue and the concept applied there is  
6 the other panel members being tainted by the bias  
7 virus.

8 In my respectful submission, the decision-  
9 making process within the Panel is not something that  
10 outsiders are privy to, and is not essentially  
11 relevant to whether the Panel as a whole is in a  
12 position of perceived apprehension of bias.

13 I think in this case that argument is  
14 bolstered by the fact that in the circumstances, the  
15 Chair is also the CEO of the Commission. There is a  
16 position of authority that the Chair holds both as  
17 Chair of the Panel and as Chair of the Commission  
18 itself in relation to the other commissioner on this  
19 Panel, and in my submission the information about the  
20 role of Commissioner Boychuk does not deflect in any  
21 way the thrust of the argument that I'm making.

22 One of the, I guess, the premises of my  
23 first point here is that the purpose of an *In camera*  
24 *ex parte* meeting -- hearing ought to be to receive  
25 evidence in confidence. And I don't at all dispute  
26 that the Commission Panel does have the legal

1 authority to receive evidence in confidence in  
2 appropriate circumstances. However, in my submission,  
3 it's clear from the transcript Volume 8, and by that I  
4 mean both the redacted and unredacted versions, from  
5 the very first question asked by the Chair, that the  
6 focus of the Commission Panel's question of the  
7 witness panel was not specifically to adduce  
8 confidential information in the sense of numbers  
9 submitted by unsuccessful bidders, for example.

10 **Proceeding Time 8:51 a.m. T07**

11 And I'll go further into what I characterize the  
12 purpose as being. But given the broader purpose that  
13 the panel evidently had in holding this *ex parte In*  
14 *camera* session, in my submission, there are many other  
15 procedures that would have been far less intrusive on  
16 the rights of the other parties.

17 The Chair said this morning that it wasn't  
18 until the morning of the day of the *In camera* session  
19 that, if I understood it correctly, he was aware of  
20 the issue that was discussed in the *In camera* session,  
21 and I'll have to review the transcript for the precise  
22 wording, but my remarks are premised on the  
23 understanding that the issue being referred to is  
24 this: that it appears to be -- it now appears to be  
25 that the DPP project without duct firing was the  
26 winner of the Call For Tenders based on having the

1 lowest price, on an NPV value, but that there is some  
2 information in the CFT which quantitatively indicates  
3 that the DPP with duct firing is described as being  
4 "better value for the customer" and in -- also  
5 described as being more cost effective than DPP  
6 without duct firing.

7 So, coming back, my understanding is that  
8 the Chair is saying that it was not until the morning  
9 of the *In camera* session that he was aware of that  
10 issue. And why I'm not -- as I say, I'll have to  
11 review the transcript, but to those of us who were  
12 following the transcript on -- excuse me. I may not  
13 have the -- my copy of the reference here. Page 1718,  
14 I believe, is the page reference, where the Chair, in  
15 the public session, pointed to the two figures in the  
16 populated QEM model, identified them for Panel 4, and  
17 asked Ms. Hemmingsen to comment on them, and her  
18 comment was, in another reference in front of me, was  
19 to the effect that the significance of those two  
20 numbers is that you could get 28 megawatts of capacity  
21 for a very low price.

22 Well, right at that point, one knew that  
23 there were only two 28 megawatt capacity items under  
24 discussion. One was the duct firing added to the Duke  
25 Point project, the other was the duct firing added to  
26 the competitor, using VIGP assets, which has been

1 identified originally as 250 megawatts and then later  
2 corrected to 255 megawatts.

3 **Proceeding Time 8:55 a.m. T8**

4 Well, by the process of deduction,  
5 purchasing 28 megabytes -- megawatts of power from the  
6 competitor to DPP would hardly be inexpensive, given  
7 that you hadn't purchased the original 255 megawatts.  
8 So the only possible project being referred to under  
9 discussion would be duct firing at DPP.

10 Immediately after receiving that answer,  
11 the Chair on the transcript discusses the need to go  
12 into an *In camera* session. And at least I think it's  
13 certainly a reasonable supposition that at that point  
14 in time the issue was raised, and that the issue was  
15 then followed up by the very first question asked by  
16 the Chair in the *In camera* session, which in the  
17 unredacted version includes, and as Ms. Hemmingsen  
18 said:

19 "... and as Ms. Hemmingsen said, the Pristine  
20 with duct firing is better customer value  
21 than Pristine without duct firing. Is it  
22 also true that you're proposing the Pristine  
23 without duct firing because that's the  
24 lowest NPV?

25 MS. HEMMINGSEN: A: Right..."

26 So my submission is that there's a complete

1 continuity between the issue arising in the public  
2 session and a decision to go into the *In camera*  
3 session, and that the -- it's clear that the entire  
4 exercise *In camera* was not focused at getting specific  
5 confidential information from the B.C. Hydro  
6 witnesses, because that information was already in the  
7 possession of the Panel.

8 And I'll move now to my point number 2,  
9 which is a listing of what I say are the evident  
10 purposes of the *In camera* session, of which I discern  
11 four. The first is to obtain Hydro's confirmation of  
12 the Panel's conclusion that the EPA, meaning DPP  
13 without duct firing, is not the most cost effective  
14 option; and secondly, to obtain B.C. Hydro's  
15 concurrence or agreement with the Panel's conclusion  
16 that a specific other project is the most cost  
17 effective option.

18 Now I'll pause here. The time that I wrote  
19 this was before the redacted transcript had been  
20 unredacted, and there was not ironclad confirmation  
21 that it was in fact the duct firing at DPP that was  
22 under discussion, though that seemed to be the only  
23 obvious possibility. Now, of course, with the  
24 unredacted version, that has been confirmed.

25 And if I may foreshadow the argument that  
26 I'll be elaborating further later, there's two aspects



1 to the Panel's evident conclusion that DPP with duct  
2 firing is the most cost effective option. One is that  
3 the Panel appears to have concluded that it is more  
4 cost effective than DPP without duct firing; and  
5 second, that it is more cost effective than any other  
6 option that might be considered within the  
7 constellation of options that are before the Panel for  
8 valid consideration.

9 The third of the purposes evident from the  
10 transcript itself was to obtain Hydro's agreement with  
11 the Panel's expressed intention to achieve in some way  
12 an electricity purchase agreement for the other  
13 project. That is, not an electricity purchase  
14 agreement as it is filed and before the Commission for  
15 DPP without duct firing, but a EPA for some other --  
16 at that point some other project, but we now know to  
17 achieve an EPA for DPP with duct firing.

18 And then the fourth stated purpose in the  
19 transcript was to obtain B.C. Hydro's input regarding  
20 how, legally and jurisdictionally, the Commission  
21 could achieve its stated desired outcome of an EPA for  
22 DPP with duct firing, even though there is no such EPA  
23 in front of the Commission.

24 **Proceeding Time 9:00 a.m. T09**

25 Stepping back again, there are really two  
26 basic themes that run through the reasonable

1 apprehension of bias. One is the Panel having made up  
2 its mind, without having heard all of the evidence.  
3 And the second theme are various examples and ways in  
4 which the Panel has indicated that it favours B.C.  
5 Hydro. That it provides B.C. Hydro with special  
6 advantages not provided to the other parties, that it  
7 has expressed an intention to help B.C. Hydro, and so  
8 on. So these are the two basic themes that run  
9 through the -- my argument.

10 Coming, then, to the third itemized point  
11 in my motion itself, the Commission Panel clearly told  
12 B.C. Hydro during the *In camera ex parte* session that,  
13 based on confidential evidence not available to the  
14 other parties, the Commission Panel believes that the  
15 EPA that is the subject of this proceeding is not the  
16 most cost effective option for meeting the identified  
17 capacity need on Vancouver Island.

18 Now, that is extremely important  
19 information. The Panel's belief as to that issue is  
20 the heart of what the Panel has described as the  
21 principal issue in this hearing. And yet only B.C.  
22 Hydro was provided with that information. Now, I've  
23 also argued that it was improper for the Panel to have  
24 reached a conclusion on that issue in the first place,  
25 but having reached a conclusion, it was also and  
26 separately improper for the Panel to disclose that

1 conclusion to one party and not all the others.

2 In the *In camera* session, the Panel also  
3 clearly told B.C. Hydro that -- what I've described in  
4 point four as a project different than the one that  
5 won the CFT, but now we know is DPP with duct firing,  
6 is the most cost effective option. And these are two  
7 different issues. The one I was -- in point three is  
8 that the EPA is not the most cost effective option.  
9 The next point is that the Panel reached the  
10 conclusion, and disclosed this conclusion to Hydro,  
11 that DPP with duct firing is the most cost effective  
12 option. And with the agreement and concurrence of the  
13 Hydro witnesses, the Panel's decision was evidently  
14 confirmed, and there can be no doubt, I submit, to  
15 anybody reading the transcript in the full context,  
16 either out of context or in the full context, that the  
17 Panel had reached the conclusion that DPP with duct  
18 firing was the optimal project for the customer or, as  
19 it's phrased elsewhere, the most cost effective  
20 project.

21 My point number five is that the Commission  
22 Panel came to these two conclusions, which I emphasize  
23 are very distinct -- the first that the EPA itself is  
24 not the most cost effective option, and second that  
25 DPP with duct firing is the most cost-effective  
26 option, before having heard all of the evidence. And

1 further, without having heard the direct evidence and  
2 the cross-examination evidence of witnesses for  
3 Intervenors, whose positions are inconsistent with the  
4 outcome that was adopted by the Commission Panel,  
5 which I've just referred to.

6 **Proceeding Time 9:05 a.m. T10**

7 Now, my point number six has been  
8 superseded by the unredaction of the transcript. The  
9 point there was that only B.C. Hydro would know for  
10 sure what the parties were talking about, but now that  
11 the transcript has been unredacted, all the parties  
12 are indeed aware of that.

13 So having disclosed to B.C. Hydro, in the  
14 absence of the other parties, the Panel's, the  
15 Commission Panel's conclusions that (a) the EPA is not  
16 the most cost effective, and (b), DPP with duct firing  
17 is the most cost-effective option, the Panel then  
18 proposed one or more additional *ex parte In camera*  
19 exchanges of information between the Commission Panel  
20 and B.C. Hydro, orally or in writing, regarding the  
21 topic of how the Commission could achieve its desired  
22 outcome of the proceeding.

23 Now, at this point, I submit, we are way  
24 beyond the receipt of confidential information. At  
25 this point we have the Panel working with B.C. Hydro,  
26 the Applicant, to achieve a certain outcome, but none

1 of the other parties are aware -- has been chosen by  
2 the Panel, that ought not to have been chosen by the  
3 Panel at this early stage in the proceedings. And  
4 regarding which, and an issue that goes to the heart  
5 of the approval or disallowance of the EPA itself, is  
6 not a peripheral issue by any stretch of the  
7 imagination.

8 And in particular, even in the first *In*  
9 *camera* session, the Commission sought and obtained  
10 submissions from B.C. Hydro regarding the jurisdiction  
11 of the Panel to achieve the Panel's desired outcome.  
12 Now, this is clearly not a matter which is properly  
13 the subject of confidentiality. Jurisdictional  
14 submissions are not the confidential bidding  
15 information supplied by unsuccessful bidders. And not  
16 only did this accidentally slip out, this was the  
17 evident purpose of the *In camera* session, and further,  
18 the Panel, the Commission Panel proposed additional *In*  
19 *camera* sessions, to develop this dialogue between the  
20 Commission Panel and B.C. Hydro to the exclusion of  
21 the other parties.

22 At point nine, during the *In camera* session  
23 the language used by the Panel implies that, by that  
24 point, there was a common understanding between the  
25 Commission Panel and B.C. Hydro regarding what the  
26 desired outcome was, that is, DPP with duct firing;

1 the nature of the problem, so-called, being that that  
2 is not included in the EPA that's filed; and a sense  
3 of common purpose about the desirability of finding a  
4 way to achieve a different EPA than the one that's  
5 been filed. And this is something I've alluded to in  
6 the previous point, what followed from that is that  
7 the Commission Panel implied that additional *ex parte*  
8 *In camera* communications would be used to facilitate  
9 accomplishment of this joint objective between the  
10 Commission Panel and B.C. Hydro.

11 My point number ten is to the effect that,  
12 in retrospect, the question that can now be asked,  
13 whether the Commission Panel was aware as early as the  
14 setting of the schedule that the -- that DPP with duct  
15 firing was, at least in the opinion of B.C. Hydro and  
16 the Commission Panel, who were the only ones who have  
17 seen this, more cost effective than DPP without duct  
18 firing, that the Commission reached that conclusion as  
19 early as January 13<sup>th</sup> when the hearing schedule was  
20 created.

21 **Proceeding Time 9:10 a.m. T11**

22 The Chair has indicated on the record a  
23 different version of events, and I will have to review  
24 the transcript. Though I must say that I'm not  
25 convinced -- I have a hesitation in accepting that a  
26 reasonable person's understanding of the circumstances

1        regarding the *In camera* session can be informed by  
2        information received after the *In camera* session, and  
3        that is something of a legal issue.

4                There are a number of -- I'm not going to  
5        go line by line through the transcript, but another of  
6        the points that is deeply troubling and it goes to the  
7        head of argument related to favouritism to B.C. Hydro,  
8        which is that B.C. Hydro's witnesses have all taken  
9        the position, being variations on the theme, that the  
10       EPA is the most cost effective option available for  
11       Vancouver Island within the terms of the principal  
12       issue as defined by the Panel. And yet, during the *In*  
13       *camera* session, Ms. Hemmingsen totally contradicted  
14       that most fundamental of factual and legal positions  
15       by acknowledging readily that the EPA is not the most  
16       cost effective option for Vancouver Island.

17               Now, obviously there would be major  
18       implications for that going to final argument, but in  
19       this context, in the context of a reasonable  
20       apprehension of bias, what really stands out is that  
21       the Commission Panel did not express the least  
22       interest in pursuing with the witness panel the  
23       implications of having just heard a totally opposite  
24       explanation of the fundamental facts relating to the  
25       principal issue. The Panel merely accepted that  
26       everything that had been said about DPP without duct

1 firing being the most cost effective was simply  
2 incorrect, and moved on to jointly plan with B.C.  
3 Hydro as to how that little problem could be  
4 rectified.

5 As I say, I'm not going to go through the  
6 transcript in detail. You have my written  
7 submissions, and with the exception of point 6 I  
8 endorse them, and you have my further elaboration at  
9 this point. I look forward to the submissions from  
10 the other parties, and I do look forward to the  
11 opportunity of further reply, and if you have any  
12 questions at this point, of course I'd be quite happy  
13 to respond.

14 THE CHAIRPERSON: We have no questions.

15 MR. ANDREWS: Thank you.

16 THE CHAIRPERSON: I would now like to hear from anyone  
17 who supports Mr. Andrews' motion.

18 **Proceeding Time 9:15 a.m. T12**

19 MR. WALLACE: Mr. Chairman, there are a number of cases I  
20 would like to pass up, not that I am going to dwell on  
21 them because I don't think they're magic words in any  
22 of the cases that answer this matter, but that they  
23 should be available to the Commission and the parties  
24 to consider. I don't think it's necessary they be  
25 marked as exhibits.

26 Mr. Chairman, I have now circulated the



1 cases. I will reference them in due course in my  
2 argument.

3 **SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MR. WALLACE:**

4 MR. WALLACE: Mr. Chairman, the JIESC supports Mr.  
5 Andrews' motion on both the grounds of reasonable  
6 apprehension of bias and the denial of fairness and  
7 natural justice. The JIESC takes this position  
8 reluctantly, not because we believe that Mr. Andrews'  
9 motion is not well-founded, but rather because the  
10 necessity -- and the very necessity for this motion  
11 reflects, at least in part, a failure of the  
12 regulatory process that the JIESC and its predecessors  
13 have supported for 25 years and continue to support  
14 today.

15 Unfortunately, in spite of this general  
16 support for the regulation by the BCUC, the JIESC has  
17 come to the conclusion that, in this instance, the  
18 Commission Panel and the processes that it has put in  
19 place for this proceeding have failed to ensure that  
20 the public receives a full and fair hearing for the  
21 issues in this proceeding that it has every right to  
22 expect.

23 Mr. Andrews' application, with what I  
24 believe is the wide support that it has from all of  
25 B.C. Hydro's customer groups, in our submission, does  
26 not arise from a single incident or a single

1       unfortunate or inappropriate statement. Rather, it  
2       rises out of a situation where a number of parties  
3       have seen enough things that they believe are going  
4       wrong that they have come to the conclusion they are  
5       not receiving a fair hearing. In this case, the final  
6       straw was unquestionably the release of the transcript  
7       of the *ex parte In camera* proceedings the Commission  
8       conducted with B.C. Hydro.

9               In our submission, however, it would be  
10       wrong to focus solely on that transcript, as it must  
11       be taken in context. In our submission, the issues  
12       leading to a concern about reasonable apprehension of  
13       bias and denial of natural justice have their roots in  
14       the scoping of the hearing, the Commission's rulings,  
15       and treatment of confidential material in particular,  
16       scheduling of the hearing, and finally, of course,  
17       what we and others see as the deeply troubling  
18       comments of the Chair during the course of the  
19       Commission *ex parte In camera* meeting with B.C. Hydro  
20       on January 19<sup>th</sup>.

21              As you know, your decision in this hearing  
22       will have impact on an enormous amount -- or how an  
23       enormous amount of ratepayer money will be spent over  
24       the next 25 years. Accordingly, in the view of the  
25       JIESC, the debate around the issues must be a full,  
26       open debate, not subject to fears that the outcome

1       could in any way possibly be pre-determined. What is  
2       of concern to the JIESC throughout this proceeding is  
3       that many parties talk about doing things in the  
4       ratepayer interest, but the ratepayer groups, or  
5       representatives of those groups, are concerned that  
6       they are not being given a fair opportunity to be  
7       heard.

8                       I'd like to -- in describing what the  
9       Intervenors are looking for in terms of fair process,  
10      I can't do much better than in setting out the basics  
11      than a quote, I believe attributed to Mr. Elton, at  
12      page 1134 of the transcript, taken from another  
13      proceeding.

14                    "It is very important that there be a BCUC  
15                    process that gives everybody the  
16                    satisfaction of one more chance to say what  
17                    happened, how did it happen, was this fair,  
18                    was it open, was it done properly."

19      The one thing I would add, of course, is that this  
20      right to be heard in that hearing must be to be heard  
21      in a full and fair manner without fear of a  
22      predetermined outcome.

23                    The JIESC submits that this requires the  
24      Intervenors to be properly informed about the issues,  
25      and given a reasonable opportunity to be heard in a  
26      considered manner.

**Proceeding Time 9:20 a.m. T13**

The JIESC, as has been indicated in another review and reconsideration application, does not accept the Commission's ruling that the full panoply of rights that may be afforded to parties in a full-blown hearing process do not apply in this Section 71 hearing. Much as this statement may reflect the Commission's view behind how it has proceeded, we submit it has no basis in law.

I'd like to turn now and look at the legal background and then come back and apply the relevant factual background.

First, the general requirement is that this application is made pursuant to Section 71 of the *Utilities Commission Act*, which requires the Commission determine that the EPA is in the public interest. In our submission, a broad mandate, of course, requires a broad review.

With respect to Commission procedures, the JIESC recognizes that the Commission has a great deal of latitude to determine its own processes, and that comes under the common law and more recently under the *Administration Tribunals Act*. However, this discretion is always subject to natural justice and fairness.

Section 11 of the *Administrative Tribunals*

1        *Act* has recently codified this power and provides that  
2        the Commission has the power to control its own  
3        processes, and may make rules respecting practice and  
4        procedure to facilitate the just and timely resolution  
5        of the matters before it.

6                    Section 42 of the *Administrative Tribunals*  
7        *Act* provides that

8                    "...a tribunal may direct that all or part of  
9                    the evidence of a witness or documentary  
10                  evidence be received by it in confidence to  
11                  the exclusion of a party or parties or any  
12                  intervenors on terms the tribunal considers  
13                  necessary, if the tribunal is of the opinion  
14                  that the nature of the information or  
15                  documents requires that direction to ensure  
16                  the proper administrative of justice."

17                  This may sound like it gives the Commission  
18                  unlimited discretion. But in our submission it does  
19                  not, as it remains subject to the need to ensure  
20                  fairness and natural justice. I will discuss what I  
21                  suggest are limits on the powers of the Commission  
22                  then with respect to this under two general headings:  
23                  first, *ex parte* and *In camera* proceedings, and  
24                  secondly, apprehension of bias.

25                  Historically the courts have shown a strong  
26                  aversion to receipt of confidential information and *In*

1        *camera ex parte* proceedings. This has been  
2        demonstrated in two cases. And I can say from the  
3        start that these two cases did not have the powers  
4        that the Commission has, but I think the principles  
5        are important in any event.

6                    In *Vancouver (City) v. British Columbia*  
7        (*Assessment Appeal Board*) (1996) 39 Admin. Law  
8        Reports, 2d edition, page 129, the British Columbia  
9        Court of Appeal held that the Assessment Appeal Board  
10       had no statutory right to conduct a part of a hearing  
11       *In camera* in order to avoid prejudice to the  
12       commercial interests of a developer. The developer  
13       had objected to testifying with respect to certain  
14       financial information on the grounds that it would  
15       prejudice its negotiations with the City on other  
16       matters. The City, although not a party to the  
17       proceedings, did have an observer present at the  
18       public hearing. The court relied on the general rule  
19       that there are few exceptions to the requirement that  
20       judicial proceedings be conducted in public,  
21       notwithstanding any commercial disadvantage that may  
22       result from a public hearing.

23                    Page 139, the Court stated:

24                    "Given the absence of an express provision  
25                    for *In camera* hearings in the *Assessment*  
26                    *Act*, and the public nature of the assessment

1 process, I find it impossible to say that by  
2 necessary implication the board must have  
3 the jurisdiction to conduct a portion of its  
4 hearing *In camera*."

5 In *Yukon Conservation Society v. Yukon*  
6 *(Water Board)* (1982) F.C.J. No. 26, five members of  
7 the Yukon Water Board had become so involved in an  
8 application as to put themselves in the position of  
9 being considered gratuitous consultants of the  
10 applicant. In that decision, the board held that  
11 meetings -- or in that matter, the board held that  
12 meetings *In camera*, which constituted *ex parte*  
13 hearings without any invitation to the public, even  
14 though there was nothing in the *Northern Island Water*  
15 *Act* that presented such meetings. Addy, J. held that  
16 due to the reasonable apprehension of bias and lack of  
17 public hearing, the five members of the board should  
18 be enjoined from sitting on the application.

19 **Proceeding Time 9:25 a.m. T14**

20 Well, we recognize that unlike the  
21 *Vancouver City* and *Yukon Water Board* cases, it is  
22 clear that Section 42 of the *Administrative Tribunals*  
23 *Act* allows the Commission to receive *ex parte In*  
24 *camera* evidence, if the Commission is of the opinion  
25 that the evidence must be received in confidence to  
26 assure the proper administration of justice. However,

1       it is our submission that in order to ensure the  
2       proper administration of justice, the Commission must  
3       not forget this general aversion to *in camera*  
4       proceedings, and must choose the least restrictive  
5       means for maintaining the confidentiality of the  
6       evidence.

7               This principle was recognized in *Ruprez v.*  
8       *Lakehead University*, [1981] O.J. 1083, Ontario High  
9       Court, and I do not believe I passed that forward. I  
10      think I will have to get a copy of that, we were -- it  
11      appears to be a slip there. Which was an application  
12      for judicial review of a decision made by the Board of  
13      Governors of Lakehead University to deny the applicant  
14      tenure as a professor. The applicant alleged the  
15      decision was unfair as he was not given an opportunity  
16      to become acquainted with the substance of the  
17      material which was considered by the Board. Galligan  
18      J. held that the non-disclosure can constitute a  
19      procedural unfairness, and the decision must be  
20      squashed. While the Court recognized there was a  
21      legitimate interest in maintaining confidentiality, it  
22      found effectively that the Board could have chosen a  
23      less restrictive means of protecting that interest,  
24      such as removing the sources of information in the  
25      reports in that case.

26             In this case, it is our submission that it



1 was unnecessary for the Commission to totally exclude  
2 all parties except B.C. Hydro from its discussions  
3 with witness Panel 2. The Commission has the power to  
4 adopt its own procedure, and it could have struck a  
5 better balance between the interests of protecting  
6 confidentiality of bidder information and ensuring  
7 that the public hearing was meaningful and free of  
8 apprehension of bias.

9 For example, I've mentioned previously in  
10 these proceedings the Canadian International Trade  
11 Tribunal often requires parties to submit  
12 commercially-sensitive information in anti-dumping  
13 cases which, if disclosed to a business rival, and  
14 that business rival is often a party in the case,  
15 could have significant adverse financial consequences.  
16 Accordingly, the CITT has adopted a set of guidelines  
17 for the designation, protection and use of  
18 confidential information which include placing  
19 opposing counsel and experts on strict undertakings to  
20 maintain confidentiality. Following that, they are  
21 free to see the evidence, free to cross-examine on it,  
22 and free to provide -- prepare and deliver argument in  
23 proceedings in which the general public is kept out,  
24 but those subject to the confidentiality provisions,  
25 and who have signed the agreements, are prepared --  
26 or, permitted to participate. If this type of

1 protection can work with such sensitive material,  
2 something similar could work here.

3 In our submission, the Commission was aware  
4 of the potential for alternatives but, in the haste to  
5 proceed with this matter, did not take action.

6 I'd like to turn then to bias cases. The  
7 major cases on bias have already been argued during  
8 the hearing with respect to the recusal of  
9 Commissioner Birch, and I do not intend to go into  
10 that same depth by any means, simply to refer the  
11 Commission to that part of the transcript. Other than  
12 to say that the -- in general terms, the test for  
13 reasonable apprehension of bias was set out by De  
14 Grandpré J. writing in dissent in *The Committee for*  
15 *Justice and Liberty v. The National Energy Board*, in  
16 the passage already referred to by Mr. Andrews.

17 Many of the factors that can go to a  
18 reasonable apprehension of bias have been outlined in  
19 the following cases. And again, I won't go into them  
20 in depth, but I think they should be flagged for the  
21 Commission. In *Baker v. Canada (Minister of*  
22 *Citizenship and Immigration)*, [1999] S.C.J. No. 39,  
23 Supreme Court of Canada, the majority of the Supreme  
24 Court of Canada held that the duty of procedural  
25 fairness is flexible and variable, and depends on an  
26 appreciation of the context of the particular statute

1 and the rights affected. Those -- generally, those  
2 affected must have the opportunity to put their views  
3 in evidence fully and have them considered by the  
4 decision-maker.

5 In *Newfoundland Telephone Company v. The*  
6 *Board of Commissioners of Public Utilities*, [1992] 1  
7 S.C.R. 623, again Supreme Court of Canada, Corey J.,  
8 writing for the Court, held that statements by a  
9 member of a Board manifesting a mind so closed as to  
10 make submissions futile would constitute a basis for  
11 raising an issue of apprehended bias. And that is a  
12 case that was, I believe, discussed earlier.

13 **Proceeding Time 9:30 a.m. T15**

14 In the case of *Vanton v. British Columbia*  
15 *Council of Human Rights* [1994] B.C.J. 497, B.C.  
16 Supreme Court, established that attitudinal bias  
17 results where a decision-maker has prejudged an issue  
18 and has not brought an open mind to the decision-  
19 making process. In *Vanton*, Dorkin J. stated:

20 "What constitutes attitudinal bias? In *Re.*  
21 *United Steelworkers of America* the Court  
22 found that the conduct of the chairperson of  
23 an arbitration board raised a reasonable  
24 apprehension of bias. In that case the  
25 Chair had interfered in the cross-  
26 examination of witnesses by counsel for the

1 union, had exhibited hostility toward that  
2 counsel, and purported to make a finding  
3 against the union when that party's counsel  
4 had not yet completed his cross-examination  
5 of the witness."

6 Clearly I'm not suggesting these are  
7 specifically related to this, but I do believe that  
8 they give a general tone of the breadth of matters  
9 that can be considered.

10 It is our submission that the manner in  
11 which this hearing has been conducted is sufficient to  
12 establish a reasonable apprehension of bias and/or a  
13 denial of natural justice. Some of the acts of the  
14 Commission which support the allegation of reasonable  
15 apprehension of bias include, and I'll be coming back  
16 to them:

17 First, the Commission's haste in the  
18 conduct of this hearing, including the time limits it  
19 has imposed on cross-examination. It would appear  
20 that the Commission has driven this process to yield  
21 the decision within 90 days, without or with limited  
22 regard for conditions as they are met.

23 Second, the Commission's failure to ensure  
24 that necessary information from B.C. Hydro was made in  
25 a timely manner.

26 Third, the Commission's failure to order

1 disclosure of all important confidential information  
2 to all parties, if necessary on a non-disclosure  
3 basis.

4 Fourth, the Commission's decision to go *In*  
5 *Camera* without any party present other than B.C.  
6 Hydro, where other less restrictive means of ensuing  
7 confidentiality could have been available.

8 And fifth, the Commission Chair's comments  
9 in the *In Camera* proceeding which would indicate the  
10 Panel's mind may be so closed as to make submissions  
11 futile.

12 Turning to the facts of this case and the  
13 issues that have been raised, first, scope. The  
14 erosion of public confidence, I would submit,  
15 commenced early on with the Commission's rulings on  
16 scope and confidentiality. The Commission defined the  
17 principal in this proceeding on November 30<sup>th</sup>, Day 11  
18 of the 90 days, is Tier 2, Tier 1 or the no award  
19 option the most cost effective option to meet the  
20 capacity deficiency on Vancouver Island commencing in  
21 the winter of 2007-2008? This question, while broader  
22 than the question B.C. Hydro wished you to consider,  
23 significantly limited the issues that could be  
24 discussed from the full review sought by the  
25 Intervenor, as was clearly demonstrated in the flurry  
26 of review and variance applications that followed.

1                   The question put by the Commission  
2                   originated with B.C. Hydro's executives in their own  
3                   cost effectiveness review. It did not arise out of  
4                   issues defined by the Commission itself or by the  
5                   stakeholders to this review. While some may argue that  
6                   there is room for movement in the Commission's  
7                   decision on scope during the hearing, clearly the  
8                   Commission did not want to vary from that decision, as  
9                   evidenced by the numerous times the Chair has referred  
10                  back to that scope decision.

11                 Furthermore, the decision on scope had an  
12                 immediate impact when it was applied to determine the  
13                 information requests that B.C. Hydro was required to  
14                 respond to. From November 30<sup>th</sup> on, it would be our  
15                 submission that we were on a path that could only  
16                 decide between Tier 1, Tier 2, and the no award  
17                 option.

18                 Confidentiality. The Commission's decision  
19                 on confidentiality and the manner in which it decided  
20                 to deal with confidentiality have been a constant  
21                 source of frustration to the Intervenor, and in the  
22                 end, I would submit, led to this motion. The absolute  
23                 basic minimum information to be able to assess the  
24                 EPA, that is the basic financial information under the  
25                 EPA contained in Appendix 3, was not ordered to be  
26                 made public by this Commission until December 24<sup>th</sup>,

1 2004, some 35 days into this proceeding, when B.C.  
2 Hydro was directed to disclose the bulk of Appendix 3.

3 **Proceeding Time 9:35 a.m. T16**

4 The same day we wrote to B.C. Hydro requesting that  
5 information, and all Information Responses which  
6 should no longer be held confidential in light of the  
7 Commission's decision on Appendix 3 as soon as  
8 possible. Appendix 3 was finally provided by B.C.  
9 Hydro to interested parties and Intervenors on  
10 December 29<sup>th</sup>, 2004, day 40.

11 On January 6<sup>th</sup>, 2005, day 48, the Commission  
12 issued the Reasons behind Order number G-119-04. In  
13 that decision, the Commission stated at page 10 that  
14 B.C. Hydro and DPP, however, are encouraged to make  
15 all public -- or make public all documents, including  
16 Information Request responses, that contain  
17 information or are created using information that's  
18 been made public pursuant to Order number G-119-04.

19 In spite of this encouragement, the  
20 Commission stated in response to an application by the  
21 JIESC, on January 11<sup>th</sup>, 2005, that the Commission Panel  
22 agrees with B.C. Hydro's submission that Order G-119-  
23 04 did not direct the public disclosure that is  
24 suggested by the submissions of the JIESC, and denies  
25 the JIESC request for an Order that -- or for the  
26 Order the JIESC claims arises out of Order G-119-04.

1                   In our submission, this effectively gave  
2       B.C. Hydro *carte blanche* on deciding when and how it  
3       would deliver the responses that no longer needed to  
4       be confidential. As a result, many of those responses  
5       dribbled in in the week prior to the commencement of  
6       the hearing, approximately 50 days into the  
7       Commission's self-imposed 90-day period.

8                   On January 11<sup>th</sup>, 2005 the Commission also  
9       rejected a request that B.C. Hydro answer JIESC  
10      Information Requests 9 and 10, which were filed after  
11      the filing deadline established for Information  
12      Requests. These Information Requests requested  
13      information that was confidential as of the deadline  
14      established for Information Requests, most  
15      particularly the request for a copy of the QEM model  
16      populated with the Duke Point project data. The  
17      result of the Commission denial was that B.C. Hydro  
18      again took a great deal of time in responding and this  
19      information was eventually only delivered to the JIESC  
20      on Friday, January 14<sup>th</sup>, immediately prior to the  
21      commencement of the hearing and day 56 of this  
22      process.

23                  The inability to have this information a  
24      significant time in advance of the hearing  
25      significantly impacted the JIESC's ability to prepare  
26      and present its case in this matter, and as such



1       worked to the advantage of B.C. Hydro and Duke Point.  
2               Throughout this proceeding, the Commission  
3       has handled confidential information in a manner that  
4       fails to recognize the legitimate interest of  
5       Intervenors and interested parties in that  
6       information. And I think the legitimate interest  
7       could not be more clearly demonstrated than by the *in*  
8       *camera* proceedings.

9               The JIESC does not dispute that there is  
10      information that should not be made publicly  
11      available. It does say, however, that the Commission  
12      has failed to find a way to deal with this material in  
13      a manner that recognizes all interests, as other  
14      tribunals have. Furthermore, when it has been raised,  
15      the Commission has shown little or no interest in the  
16      question. The only interest the Commission showed in  
17      this topic was during a discussion by myself and the  
18      Chairman at transcript pages 3695 to 3697 of the  
19      transcript. During the discussion, I indicated some  
20      tribunals have dealt with this sort of matter. I  
21      think the International Trade Tribunal has processes  
22      under which the information is provided to counsel and  
23      consultants, cross-examinations do happen in  
24      confidence under non-disclosure agreements. But even  
25      setting those procedures and getting the Board is not  
26      a -- not a quick process, and is something that has

1 evolved with them over many, many years, and not over  
2 the course of a hearing. So we did not believe we  
3 could leave that to chance development during the  
4 course of these proceedings.

5 That concern, about the difficulty to do  
6 things in a 90-day time frame, did not mean we thought  
7 nothing should be done. On January 11<sup>th</sup>, 2005, day 53,  
8 the Commission wrote and asked for comments on a  
9 procedural letter put forward by B.C. Hydro's counsel  
10 dated January 10<sup>th</sup>, 2005. In its reply of January 12<sup>th</sup>,  
11 2005 the JIESC, wisely or not, indicated its extended  
12 frustration with its perceived inability to get a fair  
13 and full hearing in this matter, dating its efforts  
14 with supporting correspondence going back as far as  
15 November 21<sup>st</sup>, 2003.

16 **Proceeding Time 9:40 a.m. T17**

17 Specifically the JIESC addressed the  
18 importance of the EPA, the purpose of the EPA, its  
19 view of the urgency for completion of the review of  
20 the EPA, and responded to B.C. Hydro's procedural  
21 suggestions. In particular, the JIESC once again  
22 raised its concerns with respect to how the Commission  
23 was handling confidential material, stating:

24 "B.C. Hydro raises certain issues with  
25 respect to confidentiality, acknowledging  
26 the Commission is entering uncharted waters.

1 We agree that those waters are uncharted,  
2 and if the Commission wishes to proceed and  
3 take evidence in confidential matters, it  
4 must go further than Mr. Sanderson has  
5 suggested. Someone must test this  
6 confidential material through cross-  
7 examination, and must present argument on  
8 its significance. The Commission must find  
9 ways for counsel and consultants on behalf  
10 of all parties to examine the material, with  
11 meaningful time for review and  
12 reconsideration, as other boards such as the  
13 Canadian International Trade Tribunal have  
14 done in even more sensitive and difficult  
15 cases."

16 On January 13<sup>th</sup>, 2005, the Commission  
17 responded to the detailed submissions of all parties  
18 on procedure by issuing a schedule for the hearing of  
19 all panels in the proceedings, that was in our  
20 submission unreasonable and unfair, without any  
21 significant comment on the reasons behind that  
22 schedule. Essentially it gave effect to B.C. Hydro's  
23 submissions while ignoring the submissions of the  
24 Intervenors. B.C. Hydro's four panels, which had  
25 filed extensive information, were to be cross-examined  
26 by all intervenors, in many cases up to eight parties,

1 Commission Counsel and the Commission in four and a  
2 half days.

3 In contrast, B.C. Hydro and Duke Point  
4 Power, along with Commission and Commission Staff,  
5 were given a day or close to a day to cross-examine  
6 each of the major intervenor panels which had filed a  
7 small, limited amount of directed evidence. The  
8 unreasonableness of the schedule resulted in extreme  
9 pressure on Intervenor counsel and little, if any, on  
10 B.C. Hydro and Duke Point counsel.

11 On the other hand, I guess it --

12 MR. SANDERSON: It bears a remark.

13 MR. WALLACE: Well, in my submission.

14 MR. SANDERSON: I hope you're blushing.

15 MR. WALLACE: Well, no, I'm not, and I would ask that  
16 counsel not interrupt in the middle of my submissions.

17 THE CHAIRPERSON: Can you repeat it, please?

18 MR. WALLACE: Yes, I can. The unreasonableness of the  
19 schedule resulted in extreme pressure on Intervenor  
20 counsel, and in our submission, little if any on B.C.  
21 Hydro and Duke Point counsel, who had as much time as  
22 they required.

23 I'd like then to turn to the *In Camera*  
24 session and it's not my intent to say much about that  
25 because -- or as much, because Mr. Andrews has covered  
26 it in great detail. In our submission, the concerns

1 of the Intervenors, which had been before the  
2 Commission for a period of time and not dealt with in  
3 any meaningful or useful manner, came together to form  
4 a perfect storm on the third day of the technical part  
5 of the hearing when the Commission went into an *ex*  
6 *parte In Camera* meeting with B.C. Hydro. The purpose  
7 of that meeting, as we understood it, was to review  
8 the evidence filed in confidence, and to test the  
9 evidence or seek further evidence.

10 In our submission, that is clearly not what  
11 happened when one reads the transcript. And Mr.  
12 Andrews also dealt with that. From the start it  
13 appears the Commission was seeking opinions on what it  
14 could do, opinions, in our submission, that should  
15 properly be subject of argument involving all parties  
16 and not the subject of discussions undertaken with one  
17 party. In our submission, what happened was  
18 completely improper and on its own would warrant the  
19 disqualification of this Panel.

20 This desire for personal discussion in  
21 confidence did not appear to end with the conclusion  
22 of that meeting. Clearly the Chair found the meeting  
23 useful and wanted to carry on the confidential  
24 dialogue, stating at page 1756, after cautions about  
25 the difficulty of an extended *In Camera* process by  
26 Commission counsel:

1 "THE CHAIRPERSON: Maybe to assist that,  
2 then -- so that we can try to accomplish  
3 that, although I think the public interest  
4 always trumps that; but nevertheless, if you  
5 were to respond in writing, Mr. Sanderson,  
6 as a result of the issues that are -- or  
7 with respect to the issues that are raised  
8 now in confidence, that will give the panel  
9 an opportunity to review that so the next *In*  
10 *Camera* session may very well be the last  
11 one. And we can -- and if there are issues  
12 that arise out as a result of that, that  
13 lead to us issuing a confidential letter,  
14 that may be preferable, Mr. Fulton, if  
15 that's your advice, to a series of *In Camera*  
16 sessions. Replace a series of *In Camera*  
17 sessions with some confidential document  
18 exchanges. I find this much more helpful,  
19 though. I mean, it's much more dynamic."

20 **Proceeding Time 9:45 a.m. T18**

21 Clearly, in our submission, the Chair  
22 failed to understand that Mr. Fulton's concern with  
23 extended *In Camera* proceedings was also a concern  
24 about the public interest.

25 Even more unfortunate than this  
26 inappropriate desire for secret dialogue are the

1 Commission Chair's statements at 1741 and 1742, and  
2 they state:

3 "This may be an area where I can add some  
4 value to customers. And I thought your  
5 answer would be just what it is, that but  
6 for the rules of the CFT, you would have  
7 chosen Pristine with duct firing. It may be  
8 -- I don't know enough about this yet, but  
9 it may be the coincidence that both  
10 portfolios are the same proponent is helpful  
11 in moving us to the outcome that's in the  
12 customer's best interest.

13 So you know what I want to try to do.  
14 I need your help in telling me how I can get  
15 there."

16 In our submission, this shows the  
17 Chairman's state of mind with respect to a key issue,  
18 and raises, in our submission, a reasonable  
19 apprehension of bias.

20 In concluding, in summary, it is our  
21 submission that this Commission has followed a course  
22 of action from the commencement of the proceedings to  
23 the *In Camera* session that leads to the conclusion  
24 that there are grounds to find a reasonable  
25 apprehension of bias and/or a denial of natural  
26 justice.

1 Thank you.

2 MR. BOIS: Mr. Chairman, I'm rising just to alert the  
3 Commission that Norske is going to take no position  
4 with respect to this application. However, having  
5 said that, it is extremely concerned that the  
6 proceedings have evolved to the point that we are  
7 discussing this application. And having said that, it  
8 should also be clear that Norske's position -- non-  
9 position with respect to the application should not be  
10 construed as opposing the application, if anyone is  
11 tallying those opposed or in favour.

12 Thank you, Mr. Chairman.

13 **SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MR. QUAIL:**

14 MR. QUAIL: The BCOAPO *et al.* endorse the motion that has  
15 been filed by Mr. Andrews, and adopt the submissions  
16 of Mr. Andrews and Mr. Wallace in their entirety.

17 We have no doubt that the Commission Panel  
18 believed that it was motivated by a desire to achieve  
19 what it perceived as the customer's best interest.  
20 But in fact this hearing is about determining what is  
21 in fact in the customer's best interest and in the  
22 public interest. And the nub of the problem in terms  
23 of bias is a clear prejudgment of the answer to that  
24 question, the very issue of these proceedings, without  
25 first hearing the evidence and the parties'  
26 submissions.



1                   My friend Mr. Wallace has already referred  
2           to the case of *Newfoundland Telephone Company v.*  
3           *Newfoundland Board of Commissioners of Public*  
4           *Utilities*, which has already been canvassed in these  
5           proceedings. I assume that people have received  
6           copies previously of the proceedings, but I've brought  
7           just a few copies because we'll be making some  
8           reference to it.

9                   In that case the board had undertaken a  
10          review of the company's costs and accounts over the  
11          preceding period. One board member was an outspoken  
12          consumer advocate who had made strong public  
13          statements prior to the hearing and also in the course  
14          of the hearing. At page 22 of the decision of the  
15          Supreme Court of Canada, the Court said the following:

16                   "Although the duty of fairness applies to  
17                   all administrative bodies, the extent of  
18                   that duty will depend upon the nature and  
19                   the function of the particular tribunal..."

20          And there is cited one of the *Martineau* cases.

21                   "The duty to act fairly includes the duty to  
22                   provide procedural fairness to the parties  
23                   that simply cannot exist if an adjudicator  
24                   is biased. It is, of course, impossible to  
25                   determine the precise state of a mind of an  
26                   adjudicator who has made an administrative

1 board decision. As a result, the courts  
2 have taken the position that an unbiased  
3 appearance is, in itself, an essential  
4 component of procedural fairness. To ensure  
5 fairness, the conduct of members of  
6 administrative tribunals has been measured  
7 against the standard of reasonable  
8 apprehension of bias. The test is whether a  
9 reasonable informed bystander could  
10 reasonably perceive bias on the part of an  
11 adjudicator."

12 At paragraph 34 the Court said, and this is  
13 partway -- this is towards the bottom of that  
14 paragraph:

15 **Proceeding Time 9:50 a.m. T19**

16 "During the investigative stage, a wide  
17 licence must be given to board members to  
18 make public comment. As long as those  
19 statements do not indicate a mind so closed  
20 that any submissions would be futile, they  
21 should not be subject to attack on the basis  
22 of bias."

23 Referring, of course, to the public comments made to  
24 the press in advance of that proceeding being  
25 commenced.

26 Paragraph 35, partway through the

1 paragraph:

2 "However, the quoted statement of Mr. Wells  
3 was made on November 13, three days after  
4 the hearing was ordered. Once the hearing  
5 date had been set, the parties were entitled  
6 to expect that the conduct of the  
7 commissioners would be such that it would  
8 not raise a reasonable apprehension of bias.  
9 The comment of Mr. Wells did just that."

10 Paragraph 36.

11 "Once the matter reaches the hearing stage a  
12 greater degree of discretion is required of  
13 a member. Although the standard for a  
14 commissioner sitting in a hearing of the  
15 Board of Commissioners of Public Utilities  
16 need not be as strict and rigid as that  
17 expected of a Judge presiding at a trial,  
18 nonetheless procedural fairness must be  
19 maintained. The statements of Commissioner  
20 Wells made during and subsequent to the  
21 hearing, viewed cumulatively, lead  
22 inexorably to the conclusion that a  
23 reasonable person, appraised of the  
24 situation, would have an apprehension of  
25 bias."

26 At paragraph 39.

1 "Once the order directing the holding of the  
2 hearing was given the Utility was entitled  
3 to procedural fairness."

4 In this case, the utility being the complainant.

5 "At that stage something more could and  
6 should be expected of the conduct of Board  
7 members. At the investigative stage, the  
8 "closed mind" test was applicable. Once  
9 matters proceeded to a hearing, a higher  
10 standard had to be applied. Procedural  
11 fairness then required the board members to  
12 conduct themselves so that there could be no  
13 reasonable apprehension of bias."

14 Some key propositions, which I believe are  
15 reasonably well-settled in the law, would be as  
16 follows. First of all, the parties are entitled to  
17 procedural fairness. Second, that includes the  
18 requirement that the adjudicator be free of bias. And  
19 while I'll be speaking to the bias issue, I want to  
20 make it clear, we also adopt Mr. Wallace's submissions  
21 regarding other fairness issues that have arisen.

22 Third, bias is normally not determined on a  
23 subjective basis, that is, by attempting to determine  
24 the actual thoughts of the adjudicator, because that  
25 normally is not going to be possible to determine on  
26 the evidence, nor is the issue whether parties

1 personally feel that the process is unfair.

2 Four, bias is determined on an objective  
3 basis, whether a reasonably informed bystander could  
4 reasonably perceive bias on the part of an  
5 adjudicator. And five, once a public hearing is  
6 constituted, and especially once it's underway, an  
7 adjudicator is subject to a higher standard of conduct  
8 so that there could be no reasonable apprehension of  
9 bias. That is, once the hearing is underway, not  
10 having a closed mind is simply not good enough. The  
11 standard is higher than that.

12 A key part of the analysis is the proper  
13 characterization of the evidence on the record. Here,  
14 primarily, the transcribed record of the proceeding is  
15 viewed in their full context. And our position is  
16 that the record provides an ample basis for a  
17 reasonably informed bystander to reasonably perceive  
18 potential bias on the part of the Commission Panel.

19 Some comments about -- I won't belabour  
20 this, because Mr. Wallace has spoken to this, about  
21 the Commission's jurisdiction to proceed on a  
22 confidential basis. Mr. Wallace has referred to  
23 Section 42 of *The Administrative Tribunals Act*, but in  
24 my submission, a very close careful reading of the  
25 power under Section 42 is required.

26 The Section reads:

1 "The tribunal may direct that all or part of  
2 the evidence of a witness, or documentary  
3 evidence, be received by it in confidence to  
4 the exclusion of a party or parties, or any  
5 intervenors, on terms the tribunal considers  
6 necessary. If the tribunal is of the  
7 opinion that the nature of the information  
8 or documents..."

9 So we're speaking only of information and documents,  
10 and no other matters,

11 "...requires that direction to ensure the  
12 proper administration of justice..."

13 In my submission, other considerations, such as  
14 commercial interests, are not within the ambit of  
15 Section 42.

16 **Proceeding Time 9:55 a.m. T20**

17 And there's no statutory power on the part of this  
18 Commission to conduct the receipt of information or  
19 documents *in camera* by virtue of those considerations.  
20 Any such authority would have to rest in the common  
21 law.

22 "The Commission has jurisdiction to receive  
23 evidence, including documents, in  
24 confidence, but beyond that a hearing must  
25 be an open public process."

26 And I won't take you to the Sections of *The Utilities*

1        *Commission Act* which make it clear, Section 71, that a  
2        public hearing is required in a Section 71 matter such  
3        as this. And -- or that a hearing is required and,  
4        further, that if a hearing is required it must be a  
5        public hearing.

6                Again, the key part of the process will  
7        consist of the proper characterization of what was  
8        done, discussed and considered in the *in camera*  
9        session, to what extent it consisted of evidence, and  
10       to what extent, on the other hand, it consisted of  
11       legal submissions and a joint deliberation of the  
12       hearing outcome as between the Commission Panel --  
13       and, I must say, the entire Commission Panel  
14       participated in that discussion; and one of the  
15       parties, being the Applicant, B.C. Hydro.

16               Our position is that much, in fact,  
17       probably all of the *in camera* discussion fell in that  
18       latter category, and could be fairly characterized as  
19       a cooperative, one might less charitably say collusive  
20       process between the Commission Panel and the Applicant  
21       to fashion the Commission's Order that would be the  
22       end result of the hearing, and this less than a  
23       quarter of the way through the scheduled time of the  
24       public hearing.

25               What did the out of camera record say about  
26       the *in camera* proceedings? The transcript that was

1 provided to the parties and the public, up to and  
2 including Volume 9, which was the day after the *in*  
3 *camera* session, created a clear impression that the *in*  
4 *camera* process contemplated by the Commission would  
5 consist of seeking information that was confidential  
6 because it touched on competitive bids or other  
7 commercially sensitive evidence. To be noted, this  
8 issue was expressly raised in the pre-hearing process.  
9 The parties expressed a great deal of concern about  
10 private meetings or *in camera* confidential discussions  
11 and passing of information. The Commission knew full  
12 well that Intervenors were concerned about the  
13 prospect of off-line discussions between the  
14 Commission and B.C. Hydro about the merits of the  
15 application. And I'll simply cite some references in  
16 the transcript without taking the time to read them  
17 aloud. Volume 3, page 372, line 15, to page 373 line  
18 9. Volume 4, page 699, line 21 to page 700, line 22.  
19 And again from Volume 4, page 715, line 10 to 16. I  
20 could cite other instances as well.

21           Once the hearing was underway the  
22 Commission Panel and B.C. Hydro both conveyed a clear  
23 sense that the *in camera* proceedings were confined to  
24 obtaining confidential commercial evidence which would  
25 be in line with the Commission's jurisdiction, at  
26 least potentially, under *The Administrative Tribunals*





1 session tomorrow.

2 We have very few questions of an *in*  
3 *camera* nature. I did provide a copy of  
4 those questions to Mr. Sanderson, and what  
5 we have agreed, subject to the Chair's  
6 approval, is that we will ask those  
7 questions on the record, absent the numbers,  
8 have provided the numbers to Mr. Sanderson,  
9 and the answer will come back on a  
10 confidential basis, but at least everyone  
11 here will have the questions absent the  
12 numbers. That will avoid the need for an *in*  
13 *camera* session tomorrow.."

14 This of course, tomorrow being the date when the  
15 session that was called at the instance of the Panel  
16 itself took place.

17 Volume 7, page 1572, beginning at line 19:

18 "THE CHAIRMAN: And the only reservation I  
19 have, Mr. Sanderson, and that sounds like a  
20 good proposal, but my only reservation is  
21 questions that the panel may wish -- of this  
22 panel. So it will take -- I'm not expecting  
23 any. But it may take an evening for us to  
24 make that determination, and so I think when  
25 we excuse your panel tomorrow it will be  
26 with that reservation, that they may need to

1           be called back for an *in camera* session with  
2           the panel."

3       Then at page 1718, line 12:

4           "THE CHAIRMAN:   Is the third portfolio  
5           better value to customers than the first  
6           portfolio?

7       MR. SOULSBY:   A:   Are you asking me if the  
8       values in the cells related to the third  
9       portfolio are higher or lower than the first  
10      portfolio?

11      THE CHAIRMAN:   Well, no, I know the answer  
12      to that question.  I'm asking you if the  
13      value of that portfolio is better value to  
14      customers than the first portfolio.

15      MS. HEMMINGSEN:   A:   I think that would be  
16      an appropriate conclusion.

17      THE CHAIRMAN:   Thank you.

18      MS. HEMMINGSEN:   A:   Because you get 28  
19      megawatts of capacity for a low price.

20      THE CHAIRMAN:   Right.  Then, Mr. Sanderson,  
21      you can take your seat.

22      MR. SANDERSON:   Not on the witness panel  
23      right now.

24      THE CHAIRMAN:   I want to pursue this issue,  
25      and I think in order to pursue this issue I  
26      need to do it *in camera*, which I think

4 Mr. Sanderson, down about four lines:

**Proceeding Time 10:35 a.m. T25**

24                   And at 1722, also in Volume 8, this is  
25       immediately following -- no, I'm sorry, this is  
26       immediately before breaking for an *In Camera* session.

1 "THE CHAIRPERSON: And at the end of the *in*  
2 *camera* session, I will do my best to  
3 disclose as much as possible with respect to  
4 the line of questioning that I had.

5 That then, I think, what that suggests  
6 is I will deal with my other questions, and  
7 then very likely it's going to be I think  
8 probably an early lunch break, with the *in*  
9 *camera* session at the beginning of the lunch  
10 break."

11 And at Volume 8, page 1759, I'll be  
12 referring to this in a little while as well in my  
13 argument. Mr. Sanderson there reported back from the  
14 *In Camera* session:

15 "MR. SANDERSON: Yes, I do. I guess first  
16 let me just report on this morning's *in*  
17 *camera* session.

18 At the conclusion of that  
19 session, Mr. Fulton and I had undertaken to  
20 discuss together the best means of making as  
21 much of that session available generally as  
22 possible. We've commenced that discussion  
23 but not concluded it, and so with your  
24 leave, I'll report back or Mr. Fulton will  
25 tomorrow morning."

26 The impression that was given expressly to

1 the hearing by the Panel itself was that the *In Camera*  
2 discussion had only touched on one limited issue  
3 within the range of matters involved in the hearing.  
4 My reference there is Volume 9, page 2268 -- I'm  
5 sorry, it's Volume 10, page 2268, line 7.

6 Again, that's 2268, line 7.

7 "THE CHAIRPERSON: Thank you. I might add  
8 that the *In Camera* session -- this is for  
9 everyone's benefit. The *In Camera* session  
10 was dealing with one of many issues that are  
11 before this proceeding. I think that's all  
12 I really need to say..."

13 **Proceeding Time 10:05 a.m. T22**

14 With the greatest respect, in my  
15 submission, that was a misleading impression that was  
16 conveyed to the participants in the proceedings as to  
17 what the content was of the *in camera* discussion.

18 Regarding the scope of the issues canvassed  
19 *in camera*, it is clear that the discussion addressed  
20 the final determination of the very issues at the  
21 heart of the proceedings, and not some limited single  
22 question within a range of issues.

23 Mr. Andrews has already provided some  
24 characterization of the *in camera* session and what's  
25 revealed in the transcript, but I will make a few  
26 comments. The first three-quarters or so of the

1 transcript creates a strong impression that  
2 participants seem to have forgotten what they were  
3 saying was being recorded and transcribed, and that it  
4 may be subject to public disclosure, as most of it  
5 ultimately was. The ostensible purpose of the *in*  
6 *camera* session was to follow up on the exchange I've  
7 already quoted between the Chair and the B.C. Hydro  
8 panel, at pages 1718 to 1719. But, in fact, almost no  
9 further information on that subject was elicited in  
10 the *in camera* session. The Panel already had it on  
11 the public record that morning, that the third  
12 portfolio was better value to customers than the first  
13 portfolio because of 28 megawatts for a low price.

14 The *in camera* session did not really  
15 consist of the Commission chasing down more  
16 information along that line, or any other line, but  
17 engaging in consultation with B.C. Hydro about how it  
18 should craft its final decision.

19 And the passage which has already been  
20 quoted by Mr. Wallace, I believe, at page 1742, really  
21 says it all, where the Chair said:

22 "So now you know what I want to try to do.  
23 I need your help in telling me how I can get  
24 there."

25 What follows, in my submission, is properly  
26 characterized as a joint enterprise in crafting the

1 decision, to achieve an outcome that the panel had  
2 already determined. It also consisted of the Chair's  
3 seeking legal advice, or legal submissions, from Hydro  
4 and its legal counsel about the Commission's  
5 jurisdiction, about the interpretation of *The*  
6 *Utilities Commission Act*, and about the interpretation  
7 of the contract. Much of the record consists of an *in*  
8 *camera* legal argument by Hydro that was solicited and  
9 participated in by the Panel, and I must say by both  
10 Panel members.

11 One rather disturbing passage out of many  
12 occurs at page 1749 of the transcript, line 21. And  
13 this is the Chairperson speaking, proceeding time  
14 11:30 a.m.

15 "It wasn't in the context of a CFT, which  
16 makes it more difficult to do, and also was  
17 -- there was less risk to Dr. Jaccard that  
18 he was going to lose the deal altogether  
19 than there might be here, although that is  
20 difficult to assess..."

21 In my submission, reading that, a  
22 reasonably informed observer would conclude that the  
23 Chair was exhibiting an almost proprietary interest in  
24 the final implementation of some version of the energy  
25 purchase agreement, to the extent that he appears to  
26 fear that he will lose the deal.



1                               Page 1750, lines 6 through 9.

2                               " MR. SANDERSON:       Mr. Chairman, let me  
3                               just define the approach and then we should  
4                               discuss whether it's appropriate to address  
5                               that now or whether we can address that as  
6                               part of argument..."

7                               And carrying on from that.

8                               What we have there, and through much of the  
9                               transcript, is B.C. Hydro and the Panel appearing to  
10                              engage in a collaborative exercise in crafting Hydro's  
11                              argument and the position that it will take at the  
12                              conclusion of the proceedings and, in turn, how that  
13                              will mesh with the end result that is being jointly  
14                              crafted in the final outcome of the application.

15                              **Proceeding Time 10:10 a.m. T23**

16                              Later the Commission and B.C. Hydro discuss  
17                              setting up two or more additional *In Camera*  
18                              discussions, clearly to conduct more off-line  
19                              consultations about how to jointly achieve a  
20                              substantive outcome in the proceeding. It also  
21                              contains discussion about the process for vetting what  
22                              should be released by way of a transcript of that  
23                              proceeding. But there is no reasonable doubt that the  
24                              Panel had already made up its mind on the issues of  
25                              the heart of the proceeding, and were discussed --  
26                              pardon me, and were discussing their thinking off-line

1 with one of the parties. And Mr. Andrews and Mr.  
2 Wallace have made that point quite forcefully.

3 The Commission has the power to receive  
4 evidence in confidence, but it does not have the power  
5 to conduct private consultations with a party in the  
6 course of a public hearing, or to seek out a party's  
7 private collaboration in the determination of the end  
8 result. And accordingly, with respect, I must submit  
9 that the Chair's statement of the law found at page  
10 1756, line 24 to 26, is simply not correct.

11 "THE CHAIRMAN: Maybe to assist that then  
12 -- so that we can try to accomplish that,  
13 although I think the public interest always  
14 trumps that..."

15 That being having a public process.

16 My friend Mr. Wallace has made some  
17 reference to the *Yukon Conservation Society* case,  
18 decision of the Federal Court Trial Division, has  
19 distributed copies. I want to speak a little bit to  
20 that and its application to this situation. It  
21 concerned an application by a mining company for a  
22 permit to constructing tailing containment facilities.

23 I know I have a tendency to speak quickly,  
24 and if the Panel finds that I'm rattling ahead too  
25 fast, please don't hesitate to ask me to slow down.

26 THE CHAIRPERSON: Your pace is fine, thank you.

1 MR. QUAIL: Most of the members of the board who  
2 ultimately heard the application participated in a  
3 series of meetings in private with the company in  
4 advance of the hearing. So it's important to note  
5 that this concerned pre-hearing activity. If you  
6 place this in the context of the *Newfoundland*  
7 *Telephone* case, this is analogous to the comments that  
8 were made there by the panel member before the  
9 proceeding was set and under way. And I want to  
10 emphasize that there is a higher standard, once the  
11 hearing commences, than the standard that was properly  
12 applicable in the *Yukon* case.

13 **Proceeding Time 10:13 a.m. T24**

14 At paragraph 24, the Federal Court said:

15 "It is quite evident, and also fairly  
16 conceded by all parties, that the Board, in  
17 hearing applications for licence, is  
18 performing a quasi-judicial function and  
19 must govern itself accordingly. Each  
20 adjudicator thus has a duty not only to  
21 decide matters before the Board without bias  
22 but also to avoid being involved in  
23 situations which might create a substantial  
24 possibility or a real likelihood of bias, or  
25 even the reasonable apprehension of bias on  
26 the part of the parties involved or the

1 public generally. Although there is no  
2 evidence whatsoever, or even any allegation  
3 of actual bias, the conduct of the Five  
4 Members, which I have described, constitutes  
5 circumstances from which one must find that  
6 there exists the very real probability of a  
7 reasonable apprehension of bias on the part  
8 of the public in general, and of all persons  
9 directly involved in the decision in  
10 particular. This goes far beyond the mere  
11 impression, and might reasonably be left on  
12 the minds of an aggrieved party or the  
13 public. ... The Five Members have become so  
14 involved in the application as to put  
15 themselves in the position of being  
16 considered gratuitous consultants of Cyprus  
17 Anvil and the application, to some limited  
18 extent at least, becomes their own. The  
19 principle of *nemo iudex in causa sua debet*  
20 *esse...*"

21 That is, no person may be a judge of his own cause,  
22 "...may well be considered applicable."

23 Here, there is no suggestion that the  
24 Commission Panel set itself up as a kind of gratuitous  
25 consultant. But in my submission, the confidential  
26 collaborative, one might say collusive approach



1 speak.

2 No one can contemplate any final result in  
3 the proceedings, in my submission. In terms of the  
4 Commission's final determination of the EPA  
5 application, it is not badly coloured by the *In Camera*  
6 record and what it's transposed.

7 On the question of the involvement of both  
8 Panel members and the taint that attaches to the  
9 entire Panel, in addition to adopting my friends'  
10 previous submissions, I would like to point out that  
11 Panel Member Boychuk was an active participant in the  
12 *In Camera* discussions and the subject matter. I won't  
13 read it, but I'd read for example -- I would point,  
14 for example, to page 1748 at line 6 and carrying on  
15 from there in the *In Camera* proceedings, and also draw  
16 your attention to paragraph 22 of the *Yukon* decision.  
17 I won't read it but basically it says there that,  
18 while not all of the five panel members were at all of  
19 the meetings and apparently some of them really didn't  
20 have much to say, the fact that they did not dissent  
21 and participated in that process effectively tainted  
22 the entire panel.

23 And I want to end by echoing my friend Mr.  
24 Wallace's comments about the failure of the regulatory  
25 process. And I must say that even if the Panel were  
26 to rule against this motion, in my submission it

1 cannot be said with confidence that these proceedings  
2 are not highly vulnerable. And everyone needs to  
3 consider the situation after a hypothetical ultimate  
4 decision by the Panel to approve the EPA in some form,  
5 if that's the course of events, and contemplate the  
6 odds of Duke Point Power starting to commit its  
7 resources to the construction of the project, and its  
8 implications in terms of the alleged timeline crunch  
9 facing the implementation of this project.

10 **Proceeding Time 10:18 a.m. T26**

11 Basically, the proceedings have gone off  
12 the rails to the point where, in real-life terms,  
13 things are not going to unfold in the manner which  
14 B.C. Hydro, at least, is claiming is necessary in  
15 order to meet the needs of energy consumers on  
16 Vancouver Island. I -- that's sort of getting close  
17 to final arguments on the main subject matter of the  
18 proceedings, so I won't pursue that further. But  
19 there's a serious problem in terms of the course that  
20 the regulatory process has taken in these proceedings,  
21 and those are my submissions.

22 THE CHAIRPERSON: Thank you.

23 MR. WEISBERG: Mr. Chairman, I just note the time. I  
24 expect to be perhaps 15 to 20 minutes. Would you  
25 prefer to take the morning break now? Or --

26 THE CHAIRPERSON: Well, I won't -- why don't you proceed,

1 and then we'll take the break.

2 MR. WEISBERG: Thank you.

3 THE CHAIRPERSON: Or we'll take the break at twenty to  
4 eleven, whichever comes first.

5 **SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MR. WEISBERG:**

6 MR. WEISBERG: Mr. Chairman, Commissioner Boychuk, my  
7 client, Green Island Energy Limited, chose to  
8 participate in this proceeding in the hope that the  
9 Commission panel would evaluate the cost-effectiveness  
10 of its Gold River power project as part of the  
11 solution to the capacity shortfall on Vancouver Island  
12 beginning in the winter of 2007/2008. Green Island  
13 properly expected that the Commission Panel would  
14 fairly and fully consider its evidence and submissions  
15 in argument, together with the evidence and arguments  
16 of other parties, before it determined what project or  
17 projects best served the public interest.

18 **Proceeding Time 10:20 a.m. T27**

19 We address the motion before you with  
20 reluctance, but the gravity of the issue and its  
21 implications leaves Green Island without any other  
22 choice.

23 It's important to observe, we believe, that  
24 the Commission Panel's motivations appear to have been  
25 well-intentioned; to provide the optimal capacity  
26 solution for B.C. Hydro's ratepayers. Regrettably,



1 the manner in which the Commission Panel chose to  
2 pursue that objective has given rise to a reasonable  
3 apprehension of bias and denial of procedural fairness  
4 and natural justice.

5 Green Island supports the motion filed by  
6 Mr. Andrews, and we generally concur with the  
7 submissions of Messrs. Andrews, Wallace and Quail  
8 before me, as well as their characterizations of the  
9 applicable law. To that, we add the following  
10 submissions.

11 Pre-determination of the optimal project,  
12 before evidence was complete, or argument was made;  
13 the *ex parte in camera* proceedings held on the morning  
14 of January 19<sup>th</sup>, 2005, included the following exchange  
15 at transcript volume 8, page 1754, lines 6 through 18:

16 "THE CHAIRMAN: What helps, though, if we  
17 look at the numbers. There is only -- there  
18 are only two bids that are, if you will, in  
19 the game.

20 MS. HEMMINGSEN: A: Yeah.

21 THE CHAIRMAN: And that may help with  
22 respect to that concern. It may be that we  
23 are able, because of that, to restrict this  
24 to just those two portfolios. Because the  
25 others are so far out of the money.

26 MS. HEMMINGSEN: A: Yeah. It just raises

1 the spectre of kind of setting up that  
2 expectation in the future.

3 THE CHAIRMAN: Yeah. How often, though,  
4 would one expect that there would be an  
5 optimal project, from the customer's  
6 perspective, that's not the winning bid?"

7 It's apparent from the context of that  
8 discussion, and the focus of the discussion throughout  
9 the *ex parte in camera* session that when the Chairman  
10 referred to the "only two bids in the game," he meant  
11 the winning bid and the optimal project. We submit  
12 that there's no question that the phrase "winning bid"  
13 refers to Pristine without duct firing. That is the  
14 project that is the subject of the energy purchase  
15 agreement executed by B.C. Hydro.

16 It's clear from transcript Volume 8, page  
17 1741 through 1746, that the Chairman's reference to  
18 "optimal project" means Pristine with duct firing.  
19 More specifically, at page 1741, lines 11 and 12, the  
20 Chairman identified that project as "better customer  
21 value than Pristine without duct firing".

22 Then at transcript page 1741, line 26  
23 through transcript page 1742, line 1, the Chairman  
24 noted that both portfolios are the same proponent,  
25 which must be taken as a reference to Pristine with  
26 and Pristine without duct firing. As well, at

1 transcript page 1744, lines 20 through 23, the  
2 Chairman stated:

3 "... And what Mr. Sanderson is suggesting is  
4 an approval of the sub-optimal project in  
5 the hopes that the parties reach an  
6 accommodation that leads to the optimal  
7 outcome."

8 As an aside, and for clarity of the record,  
9 I just note that in Volume 8 of the transcript,  
10 statements are attributed to both the chairperson and  
11 the chairman, and I submit that both terms are --  
12 refer only to Chairman Hobbs.

13 With that context, I return to the  
14 previously-quoted passage from transcript page 1754.

15 **Proceeding Time 10:25 a.m. T28**

16 The Chairman's statement that only two bids are in the  
17 game clearly infers that the Commission Panel had  
18 concluded that Pristine with or without duct firing  
19 are the only projects the Commission Panel would  
20 consider in this proceeding. That interpretation of  
21 the Chairman's statement is supported by a subsequent  
22 statement referring to "just those two portfolios".

23 Merriam Webster's dictionary defines  
24 "optimal" as "most desirable or satisfactory". The  
25 Chairman's choice of the phrase "optimal project" to  
26 describe Pristine with duct firing strongly suggests

1       that the Commission Panel had concluded that the  
2       project was the one that best served the public  
3       interest. We submit that the record leaves no doubt  
4       that the Commission Panel reached that conclusion  
5       before or during the *ex parte In Camera* session held  
6       on January 19<sup>th</sup>. The Chairman referred to the "optimal  
7       outcome" at transcript 1744, line 23. He stated:

8               "...there is a bid that is optimal for  
9               customers than the winning bid..."

10      At transcript 1753, lines 6 and 7; and stated:

11               "...there is a bid that's preferable for  
12               customers than the winning bid..."

13      At transcript 1756, lines 8 and 9.

14               In the context of the *In Camera* discussion,  
15      we submit that the only reasonable interpretation is  
16      that the Chairman was referring in each instance to  
17      Pristine with duct firing.

18               In support of his view, and this is found  
19      at transcript page 1754, that the Commission Panel  
20      could restrict this to just those two portfolios, the  
21      Chairman stated:

22               "... Because the others are so far out of the  
23               money."

24               Those others are presumably portfolios that  
25      were identified in the confidential result summary  
26      that was the starting point for the *In Camera*

1 discussion. Due to the confidential status of the  
2 results summary, Green Island can only speculate on  
3 what portfolios were or were not included therein.  
4 However, the record is absolutely clear that Exhibit  
5 C9-10, that being the evidence of Green Island Energy  
6 Limited filed on January 6, 2005, identified four  
7 portfolios that Green Island asserts have costs of  
8 just 53 percent, 48 percent, 68 percent, and 65  
9 percent of Pristine without duct firing.

10 We respectfully submit that the Chairman  
11 would not and could not have concluded and suggested  
12 that other portfolios could be effectively excluded  
13 from further consideration because they were "so far  
14 out of the money", unless the Commission Panel had  
15 already rejected Green Island's evidence and had no  
16 intention of considering it further.

17 That view, we submit, is supported by the  
18 fact that throughout the entire *ex parte In Camera*  
19 session, there was not a single reference to Green  
20 Island's evidence, the projects or portfolios  
21 discussed therein, or their relative cost. The  
22 Chairman characterized Pristine with duct firing as  
23 the "optimal project", without any express or implied  
24 qualification regarding consideration of projects or  
25 portfolios other than Pristine without duct firing.

26 To conclude that only the two Pristine

1 projects were "in the game", that all other portfolios  
2 were "out of the money", that Pristine without duct  
3 firing was not the most cost-effective option, and  
4 that Pristine with duct firing was the "optimal  
5 project", we submit that the Commission Panel also  
6 must necessarily have concluded the following:

7 (1) that there was no possibility that the  
8 privative clause in Section 17.3 of the CFT should  
9 have or could have been invoked by B.C. Hydro;

10 **Proceeding Time 10:30 a.m. T29**

11 (2) that there was no possibility that  
12 B.C. Hydro could have, or should have, exercised its  
13 discretion, pursuant to Section 18.17 of the CFT, to  
14 deem that the non-compliance of the Campbell River co-  
15 gen bid was not material.

16 (3) that there was no possibility that  
17 fairness considerations, such as resource option bias,  
18 or requirements that were more stringent or less  
19 flexible than the minimums needed might have any  
20 impact on the application of Sections 17.3 or 18.17 or  
21 the relative cost-effectiveness of various projects or  
22 portfolios.

23 Number (4) that there was no possibility  
24 that the Commission panel would order B.C. Hydro to  
25 confidentially file the price information for Epcor's  
26 bid or Calpine's bid, despite the fact that both

1 parties, in Exhibits E-122 and E-123, respectively,  
2 confirmed that they would not oppose such an order.

3 (5) that there was no possibility that  
4 before the close of the evidentiary phase of the  
5 hearing, Epcor and/or Calpine would seek leave to  
6 voluntarily file the price information for their  
7 respective bids, or to file any other evidence,  
8 including the specific circumstances of the  
9 disqualification of Calpine's bid.

10 We submit that the Commission Panel could  
11 not properly have reached any of the five conclusions  
12 I have just identified in the absence of the  
13 following:

14 Number (1) Cross-examination of Panel 3,  
15 the independent reviewer witnesses, whose testimony  
16 directly addressed issues of fairness and bias, the  
17 "clearly-defined" process rules for moving to an  
18 evaluation of Tier 2, and the appropriate processes to  
19 give effect to the second tier of decision-making  
20 pursuant to Section 17.3; and the discretion to  
21 determine whether non-compliance was material,  
22 pursuant to Section 18.17.

23 Number (2) Cross-examination of Panel 4,  
24 the cost-effectiveness analysis witnesses, whose  
25 testimony did, or should have, addressed B.C. Hydro's  
26 sole and unfettered discretion not to accept a

1 portfolio if it was not the most cost effective  
2 solution, having regard to B.C. Hydro's ratepayers,  
3 pursuant to Section 17.3.

4 **Proceeding Time 10:33 a.m. T30**

5 Number (3) Argument from Intervenors on  
6 issues including but not limited to the application of  
7 the privative clause per Section 17.3, the  
8 determination of material non-compliance per Section  
9 18.17, fairness considerations, resource option bias,  
10 and CFT requirements that were too stringent or less  
11 flexible than necessary.

12 Number (4) The close of the evidentiary  
13 phase of the hearing to conclusively establish that  
14 the Commission of its own volition, or on an  
15 application from a party, would not order B.C. Hydro  
16 to confidentially file Epcor's and Calpine's price  
17 information for their respective bids.

18 And Number (5) The close of the  
19 evidentiary phase of the hearing to conclusively  
20 establish that Epcor and Calpine would not seek leave  
21 to voluntarily file the price information for their  
22 respective bids, or other evidence including evidence  
23 of the specific circumstances of the disqualification  
24 of Calpine's bid.

25 We submit that at the time when the  
26 Commission Panel made the impugned statements on



1 January 19<sup>th</sup>, just two and one half days into a hearing  
2 estimated by the Commission Panel itself to require  
3 eleven hearing days, none of the above five conditions  
4 were or could have been satisfied. Each of those  
5 conditions was met or may yet be met, after the *ex*  
6 *parte In Camera* session held on the morning of January  
7 19<sup>th</sup>, 2005.

8 I'm going to move into a different area  
9 now. Two Pristine projects, only one is before the  
10 Commission. In Exhibit A-36, Reasons for Decision on  
11 the JIESC reconsideration application, at page 4, the  
12 third full paragraph, the Commission stated:

13 "It is important to recognize that as a  
14 result of this EPA review the Commission  
15 will not be making, nor will it be in a  
16 position to make, determinations or grant  
17 approvals for energy supply contracts in  
18 relation to other potential projects."

19 The matter before the Commission is the EPA  
20 related to the Duke Point Power Project. Green Island  
21 submits that the Commission should have been clearer  
22 in that regard. The matter before the Commission, we  
23 submit, is the EPA related to Pristine without duct  
24 firing. Pristine with duct firing was a separate bid  
25 and therefore, we submit, a separate project.

26 **Proceeding Time 10:36 a.m. T31**

1                   The record is clear that Pristine with duct  
2                   firing, Pristine without duct firing, were two  
3                   separate bids as confirmed by the Chairman at  
4                   transcript 1742, lines 22 through 24.

5                   Equally clear, at transcript 1744, line 21,  
6                   the Chairman used the phrase "sub-optimal project" in  
7                   reference to Pristine without duct firing. And at  
8                   transcript 1745, lines 2 through 10, Mr. Sanderson  
9                   confirms the distinction between the two Pristine  
10                  projects.

11                  In the *ex parte in camera* session the  
12                  Commission Panel actively explored ways to make  
13                  determinations or grant approvals, conditional or  
14                  otherwise, for an energy supply contract in relation  
15                  to an unsuccessful project, that being Pristine with  
16                  duct firing. When I say "unsuccessful," I mean within  
17                  the context of the CFT. By doing so, the Commission  
18                  panel directly contradicted its own specific ruling as  
19                  to the scope of possible hearing outcomes, which is  
20                  found in Exhibit A-36, page 4, and made only six days  
21                  earlier, on January 13<sup>th</sup>.

22                  The final area I wish to address is  
23                  consideration of projects absent the CFT rules. At  
24                  transcript 1743, lines 16 through 25, Mr. Sanderson  
25                  stated:

26                  "Within the CFT process, there is an ability

1 to..."

2 I'm sorry.

3 " Within the CFT process there's not an  
4 ability to chose anything other than a  
5 winner under that and it would be a rigid  
6 process. ...

7 Having said that, once the CFT process  
8 is complete, the commitment is recognized,  
9 as always, it is free between two parties to  
10 amend the agreement between them. And if  
11 they had reason to do that, and they both  
12 saw it to be in their mutual interest, then  
13 that could be done."

14 At transcript page 1745, line 19 through  
15 page 1746, line 2, Mr. Sanderson stated:

16 " There is nothing to stop the Commission,  
17 and there's nothing stopping the parties  
18 from acting on the Commission observing that  
19 if certain things were to happen, then there  
20 might be a better one. And if those things  
21 do happen -- that is, both parties see it in  
22 their mutual interest to revise the  
23 agreement in a particular way, then  
24 obviously that observation by the Commission  
25 will be a significant incentive to the  
26 parties to do it and an encouragement for

2 THE CHAIRPERSON: Mr. Weisberg, is this a good time to  
3 take a break?

5 THE CHAIRPERSON: Okay.

7 THE CHAIRPERSON: Yes.

Those passages, and the subsequent statements in the *in camera* session from both Commissioners, suggest that the Commission Panel considered what it could do to accommodate Pristine with duct firing after the CFT process was over. However, the Commission Panel appears to have failed to consider that the only reason that a portfolio of Green Island, Ladysmith peaker, and Campbell River co-gen projects, together aggregating 170 megawatts, was not evaluated, was because of the way the rules of the CFT process were applied. The rules of the CFT process are precisely what prevented B.C. Hydro from bringing forward the "optimal project", Pristine with duct firing.

24                   The Commission Panel actively explored  
25       whether it would be possible to find a way to approve  
26       Pristine with duct firing, notwithstanding the CFT

1 rules. Considering only one project in that context  
2 and not extending that approach to other projects, we  
3 submit, was fundamentally unfair.

4 In conclusion, we reiterate that Green  
5 Island is in no way questioning or impugning the  
6 motives of the Commission Panel. It appears to us  
7 that the Commission Panel's intentions were proper, a  
8 genuine albeit mistaken attempt to arrive at the  
9 outcome that best served the public interest. It is  
10 the Commission Panel's chosen means to that end that  
11 created the problem.

12 Green Island respectfully submits that the  
13 Commission Panel came to definite and specific  
14 conclusions that Pristine without duct firing was not  
15 the most cost-effective option, and that Pristine with  
16 duct firing was the "optimal project" and as such best  
17 served the public interest. The Commission Panel  
18 reached those conclusions well before the bulk of the  
19 testimony was adopted or was tested by cross-  
20 examination, before procedural avenues to file  
21 additional evidence had been exhausted, and before any  
22 formal argument from parties had been received or  
23 considered. By prejudging the outcome and actively  
24 seeking B.C. Hydro's assistance to achieve that end,  
25 the Commission Panel has raised a reasonable  
26 apprehension of bias.

1                   In addition, the Commission Panel  
2           contradicted its own January 13<sup>th</sup> scope ruling that it  
3           would not make determinations or grant approvals for  
4           energy supply contracts in relation to any projects  
5           other than Pristine without duct firing. The entire  
6           focus of the *ex parte In Camera* session was to explore  
7           possible determinations or approvals, conditional or  
8           otherwise, for a different project. That approach  
9           also gives rise to a reasonable apprehension of bias.

10                   Then finally, the Commission Panel actively  
11           explored the possibility of Pristine with duct firing  
12           absent the constraints of the CFT rules. By failing  
13           to extend that approach to its consideration of other  
14           projects, the Commission Panel gave rise to a further  
15           reasonable apprehension of bias.

16                   On the basis of the foregoing, we submit  
17           that an informed person viewing this matter  
18           realistically and practically and having thought the  
19           matter through, would conclude that it's more likely  
20           than not that the Commission Panel, whether  
21           consciously or unconsciously, will not decide the  
22           matter fairly. And accordingly we respectfully submit  
23           that the Commission Panel should disqualify itself.

24   COMMISSIONER BOYCHUK:   Mr. Weisberg, just before you go,  
25           in terms of the discussion in the *In Camera* proceeding  
26           that's on the record related to the scope of the

1 Commission's authority under Section 71, recognizing  
2 that the *In Camera* proceeding was part of the larger  
3 process and that there would be argument, would that  
4 not have helped your client in terms of its positions  
5 to have an opportunity to discuss and further examine  
6 the Commission's scope under Section 71?

7 MR. WEISBERG: I would just say that that discussion,  
8 because for the most part it was that section of the  
9 discussion, I believe, was not originally redacted.  
10 And I believe the reason that it was not redacted is  
11 that it didn't go back to confidential matters.

12 **Proceeding Time 10:44 a.m. T33**

13 COMMISSIONER BOYCHUK: It wasn't -- yes, it was put on  
14 the record, right after the *in camera* session.

15 MR. WEISBERG: That --

16 COMMISSIONER BOYCHUK: So it was never confidential  
17 following the *in camera* proceeding. Once the  
18 transcript was issued, that discussion was on the  
19 record and available to parties. Are we agreeing?

20 MR. WEISBERG: Yes, we are, Madam Commissioner. My point  
21 being, though, that the nature of that discussion  
22 being what it was, and not being specifically tied to  
23 confidential information, and therefore the  
24 requirement to protect that information, it would have  
25 best been held in the presence of all parties.  
26 Disclosing that discussion to parties, in the form of

1 the transcript, is certainly one step in the right  
2 direction. But, as things unfolded, parties did not  
3 have an opportunity to make their views known  
4 contemporaneously with B.C. Hydro's opportunity to do  
5 so.

6 COMMISSIONER BOYCHUK: Thank you, Mr. Weisberg.

7 MR. WEISBERG: Thank you.

8 THE CHAIRPERSON: We will adjourn for 20 minutes.

9 **(PROCEEDINGS ADJOURNED AT 10:46 A.M.)**

10 **(PROCEEDINGS RESUMED AT 11:06 A.M.)** T34

11 THE CHAIRPERSON: Please be seated.

12 Ms. Cochrane, you may proceed.

13 **SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MS. COCHRANE:**

14 MS. COCHRANE: Good morning, panel. Penny Cochrane on  
15 behalf of the Commercial Energy Consumers to speak  
16 this morning. And these are grave matters before us,  
17 and the Commercial Energy Consumers Association adopts  
18 the positions of Mr. Andrews, Mr. Wallace, Mr.  
19 Weisberg and Mr. Quail. And -- but still, there are a  
20 couple of areas of concern and comment that have not  
21 been brought forth. And certainly the CEC agrees that  
22 the panel has shown they're in favour of finding the  
23 EPA as the most cost-effective resource addition to  
24 meet the predicted two-year capacity shortfall  
25 predicted for Vancouver Island in 2007. With the  
26 scope as set down for these proceedings, before these



1 proceedings have concluded, and all have spoken, I  
2 think the record shows that.

3 When we're looking at bias, and I am  
4 unencumbered by formal legal education, so instructed  
5 to look at decisions, remarks and behaviours of those  
6 responsible for final decision-making, in terms of  
7 determining if their bias has been demonstrated. And  
8 as much as there are decisions to do things, there's  
9 also been decisions not to do things by -- as has been  
10 demonstrated by behaviour. And in particular was when  
11 the concern was -- arose with the panel, particularly  
12 with the Chair, with regards to the finding of the  
13 most cost effective solution, and that that most cost  
14 effective solution in fact was not the EPA as  
15 submitted.

16 The Chair chose not to consult his counsel,  
17 the Commission's counsel. He also chose not to share  
18 that concern, and it's not a confidential matter, it  
19 was -- and he chose not to share that with the other  
20 participants in this proceeding to see, in fact, what  
21 their comments and input would have been. And in fact  
22 if he had done that, I think he would have realized  
23 that it was not a confidential matter, simply because  
24 it was not part of the EPA.

25 So the decision to move quickly to an *in*  
26 *camera* process was, as has been said, was over -- an

1 over-response, an over-reaction, and showed a lack of  
2 forethought and consideration for others that are  
3 involved in this process.

4 **Proceeding Time 11:10 a.m. T35**

5 The CEC finds it of great concern that the  
6 panel perceives that negotiating an amended EPA *in*  
7 *camera* is in the customer's best interest. CEC  
8 believes that that would never be the case, and would  
9 notify the Panel of that.

10 The CEC is also very concerned that, after  
11 finding that the B.C. Hydro CFT process, QEM model and  
12 cost effectiveness model, in fact did not yield the  
13 most cost effective model in what now the Chair may  
14 view as the most optimal solution for customers, that  
15 the Commission Panel continues to rely exclusively on  
16 a process and model that are not believed to be fair  
17 by many of those in these proceedings. This has been  
18 confirmed by the Applicant during the *in camera*  
19 session that in fact that process and model did not  
20 yield the most optimal solution.

21 The CEC are also concerned that the  
22 Commission continues to utilize B.C. Hydro analysis  
23 and is selecting among non-winning bids to arrive and  
24 what is purported to have already been submitted by  
25 B.C. Hydro, and that is the most cost effective  
26 solution.

1                   And while an *in camera* session, we  
2       appreciate, is confidential, quite frankly the  
3       ratepayers of -- and certainly the CEC, are surprised  
4       at the application of informal to these discussions as  
5       well. It would have been expected that there would  
6       have been protocols and procedures that would have  
7       been followed, and we would have expected them to  
8       mirror that which are in the public. The transcript  
9       is quite shocking in the wide range of topics that  
10      were discussed, and also in the fact that the  
11      Commission Panel did not limit discussion to  
12      confidential matters, and allowed the panel to be  
13      party -- in fact, to what was B.C. Hydro's planning  
14      and negotiation strategy -- strategizing. And also  
15      that the Panel did not recognize that they were  
16      hearing argument *in camera*, out of order, and in  
17      advance of schedule.

18               We are also disappointed, and I think this  
19      goes to talk of behaviour, and decisions or lack of  
20      decisions, in that there have been no provisions made  
21      since the *in camera* session whatsoever to allow  
22      participants to review the outcomes that are causing  
23      the changes, prepare evidence and present testimony on  
24      this different analysis result. And that the  
25      Commission continues to rely on B.C. Hydro's analysis  
26      in determining the acceptance and the applicability of

1       this EPA or an amended EPA as the most cost effective  
2       solution for the ratepayers in the long term.

3               Those are the comments from the CEC.

4       **SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MR. LEWIS:**

5       MR. LEWIS:    Good morning.  After considerable review of  
6       the *ex parte in camera* transcripts from the January  
7       19<sup>th</sup>, 2004 meeting, it is the Village of Gold River's  
8       belief that these proceedings cannot move forward  
9       without a pall that has been cast over them, that is  
10      largely due to the reasonable apprehension of bias,  
11      and the denial of fair process, that I believe has  
12      been demonstrated in the content of the transcripts  
13      from that meeting.

14              Therefore, the Village of Gold River agrees  
15      with the motion put forward by Mr. Andrews on behalf  
16      of the GSX CCC.  In addition, we largely agree with  
17      the positions taken by all of the preceding speakers.

18              The Village of Gold River entered into  
19      these proceedings with the hope that they could  
20      provide value and public insight into the process, and  
21      the decisions that would result.  We were encouraged  
22      by the determinations of the Panel in Volume 2, page  
23      312, lines 18 to 22, when it was stated:

24              "However, the Commission Panel also notes  
25      that in the absence of evidence from  
26      developers, it may not be persuaded that the

1 CFT is not satisfactory evidence that Duke  
2 Point is the most cost effective resource  
3 for Vancouver Island at this time."

4 This would tend to indicate to me that  
5 evidence from developers would be heard and valued  
6 with regard to the decision-making process.

7 **Proceeding Time 11:15 a.m. T36**

8 Without getting into the specifics, I will  
9 once again refer you to transcript Volume 8, pages  
10 1741 and 42 and Transcript Volume 8, page 1754, as  
11 speakers before me have done. I believe the fact that  
12 these statements have been made before hearing all of  
13 the evidence presented, it is indeed troubling.

14 While we agree with the Commission Chair's  
15 thoughts on approving a suboptimal result because of  
16 regulatory parameters that were established in the  
17 earlier decision being abhorrent, we find it  
18 prejudicial that he has taken such a narrow view to  
19 what portfolios are optimal and what parameters are to  
20 be re-examined, especially at that stage of the  
21 process. There are many such parameters that need to  
22 be re-examined. The fact that B.C. Hydro refused to  
23 look beyond the unchecked and what I believe to be  
24 unfair criteria in the CFT, and the implementation of  
25 them, that does not exclude the Commission from doing  
26 that.

1                   I very much appreciate your comments this  
2 morning, and I do have some comments in reply.  
3 Unfortunately when it comes to an issue of bias, the  
4 perception of bias is as much a concern as the  
5 definitive proof. It is impossible for a decision-  
6 maker tasked with upholding the public interest to  
7 carry out their duties in a manner that is beyond  
8 reproach once the perception of bias has been  
9 identified. What is most important here in my mind is  
10 the sanctity and the integrity of the process and the  
11 institution. Given that reasonable grounds can be  
12 demonstrated for the motion, I believe that it is up  
13 to those involved to look beyond their own personal  
14 interests, and to seek to ensure first and foremost  
15 that the process and the public confidence in the body  
16 tasked with carrying it out are preserved. That is  
17 the problem with perception, and that is why the law  
18 acknowledges it. Once it has occurred, you can't go  
19 back.

20                   Regardless of your interest to assist in  
21 ensuring that my question to Ms. Hemmingsen would be  
22 answered, I still have reservations to not only the  
23 weight that it would receive, but also the weight that  
24 the entirety of the other evidence that had been filed  
25 prior to the Commission's and counsel meeting on  
26 January 19<sup>th</sup> would receive.

1                   At the outset of these hearings, many of my  
2                   constituents expressed the concern that the B.C.  
3                   Utilities Commission was merely a puppet of B.C.  
4                   Hydro, and it wouldn't matter what we did, that they  
5                   were not going to even consider our position opposing  
6                   the EPA or the grounds for that opposition. I  
7                   answered those reservations quickly and with  
8                   conviction. I did so publicly. I told them that I  
9                   was impressed by the Commission Panel's depth and  
10                  breadth of knowledge and felt that the Chairman's  
11                  pursuit of preserving process was an indication that  
12                  we could trust the Panel's judgment.

13                 You have been very accommodating to me in  
14                 these proceedings and I want to thank you for that.  
15                 Unfortunately though, I must insist that you consider  
16                 this motion without any consideration or concern for  
17                 the personal perception or consequences that may occur  
18                 should you choose to disqualify yourselves.  
19                 Institutions can be granted power and  
20                 responsibilities. They cannot be granted integrity.  
21                 Integrity for and respect of an institution is earned.  
22                 For you to carry on under these circumstances  
23                 undermines, I believe, a great deal of the respect and  
24                 integrity that this institution has.

25                 As an elected official bound to uphold the  
26                 public interest, I sincerely believe that preserving

1 the public trust in this institution trumps all other  
2 concerns, personal or otherwise. To help me in my  
3 duties as mayor, I have a saying by a civil  
4 libertarian named James Bovard posted beside my desk,  
5 that I try to reference when faced with problematic  
6 decisions that relate to my position as a person  
7 charged with ensuring that democracy be applied fairly  
8 and evenly. It says that democracy must be more than  
9 two wolves and a sheep voting on what to have for  
10 dinner.

11 **Proceeding Time 11:20 a.m. T37**

12 I believe, finally, that a number, a  
13 significant number of the issues that have been  
14 brought forward this morning are largely supported by  
15 issues that relate to the decision to hold an  
16 expedited process. For a decision as contentious and  
17 significant as this, I sincerely hope that one of the  
18 findings that rises like a phoenix from these ashes is  
19 that an expedited process only serves to undermine the  
20 public interest rather than to serve it.

21 Thank you very much.

22 MR. FULTON: Mr. Steeves.

23 **SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MR. STEEVES:**

24 MR. STEEVES: Good morning, Mr. Chairman.

25 Mr. Chairman, having reviewed the  
26 information that has been presented over the past day



1 or two, and listening to the comments that I've heard  
2 today from the various Intervenors that have been  
3 presenting their arguments, I have nothing direct to  
4 say what has not already been said. It has been more  
5 eloquently said than what I can do. I'm not a lawyer  
6 so I cannot add in more detail anything that they have  
7 not said.

8 I will just comment that the proceedings *In*  
9 *Camera* may, from a legal point of view, not have any  
10 direct bearing with finding direct evidence for the  
11 apprehension of bias *per se*. However, all the issues  
12 surrounding the event and contained within the event  
13 presents too much evidence to go unnoticed. There  
14 must be cause and effect, and hence the claim of  
15 apprehension of bias must stand.

16 And I think that's pretty well it, but I  
17 would like to -- I had one other thought on my mind  
18 here. I've lost it. But I think I'll leave it at  
19 that, but I will say just that overall the decision  
20 must be that the Panel must stand down, and -- oh, I  
21 have now remembered my thought and it's one thought  
22 that has been overlooked and I must bring it up  
23 because of a news article that was published on  
24 Monday; and that is, in the statements that have been  
25 made, the opinions that have been expressed with  
26 regards to the Pristine Power with duct firing as

**Proceeding Time 11:25 a.m. T38**

So, that's all I have to say, so thank you very much. Bye.

**SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MS. MILLER:**

MS. MILLER: Since this is the first time I am appearing before this panel, although I have sent in numerous submissions, my name, for the record, is Dodie, D-O-D-

1 I-E, Miller, and I represent Shadybrook Farm.

2 I would like to begin by affirming that I  
3 support the application by GSX CCC *et al.*, for an  
4 Order that the Commission Panel disqualify itself on  
5 the grounds of a reasonable apprehension of bias and  
6 denial of procedural fairness and natural justice  
7 during the hearing. I adopt the arguments presented  
8 by Mr. Andrews in his letter of January 23<sup>rd</sup>, 2005,  
9 which is Exhibit C20-35. I also fully endorse the  
10 comments made by each and every speaker that has  
11 preceded me.

12 As with Ms. Cochrane, I also am  
13 unencumbered by a legal background. I think it's fair  
14 to say that, however, I represent it to some extent a  
15 reasonable and responsible and intelligent person  
16 who's given due consideration to the matters  
17 presented. I have followed the issues surrounding the  
18 B.C. Hydro Vancouver Island gas strategy for five  
19 years. I believe I have an excellent view of the  
20 context of the present proceedings. I have read all  
21 the transcripts, and most of the evidence that has  
22 been submitted to date.

23 I would like to begin by commending the  
24 BCUC staff and counsel, who have shown, through their  
25 Information Requests and cross-examinations, a great  
26 degree of insight into the issues and no hesitation in

1 going to the heart of areas where the proponents may  
2 have glossed over important information. In addition,  
3 the panel and the Chair have shown an excellent grasp  
4 of the evidence as it has developed, and have had some  
5 insightful questions of their own.

6 However, as the hearing has evolved, I have  
7 become increasingly uncomfortable and have come to  
8 doubt the impartiality of the panel. This was partly  
9 the result of a series of procedural decisions, all of  
10 which were favourable to the proponents and, more to  
11 the point, did not appear to me to respect the need  
12 for fairness and justice. I will list some of these  
13 decisions briefly.

14 Limitation of the scope of the hearing to  
15 preclude a full examination of the resource options  
16 available for Vancouver Island. Selection of  
17 Vancouver, rather than Nanaimo, for the main hearing  
18 venue, thereby disadvantaging the participation of the  
19 people of Vancouver Island, those most directly  
20 impacted by the decision to be made. Refusing the  
21 request for just one minute of cross-examination time  
22 by John Hill, who appeared marginally late after  
23 traveling here by ferry. Rejecting a request from  
24 Shadybrook Farm for minor adjustments to hearing start  
25 times to respect the needs of ferry travel.  
26 Limitation of the time available for cross-examination

1 of B.C. Hydro panels, while leaving more than ample  
2 time for cross of Intervenor panels. Adoption of a  
3 decision date of February 17<sup>th</sup>, a date which is  
4 integral to the EPA under review, as the time driver  
5 for this hearing. Adopting this date without  
6 receiving submissions from the parties.

7 After accepting a compressed time frame to  
8 accommodate B.C. Hydro, viewing favourably many of  
9 their consequent pleas concerning the burden of  
10 Information Requests. Readily ruling in favour of  
11 B.C. Hydro concerning the confidentiality of the EPA,  
12 despite the fact that Hydro, in redacting the EPA  
13 document, was clearly in contravention of an earlier  
14 Commission order. Stating on the record that the  
15 interests of Duke Point Power are congruent with the  
16 public interest in this matter. Allocating  
17 dramatically more time on a per capita basis for  
18 cross-examination of Intervenor who questioned the  
19 EPA than for cross-examination of the proponents, B.C.  
20 Hydro and Pristine Power.

21 **Proceeding Time 11:30 a.m. T39**

22 However, my concern regarding bias became a  
23 real apprehension when I studied the records of the *ex*  
24 *parte In Camera* session held on January 19<sup>th</sup>. The  
25 ostensible reason for holding an *In Camera* session, as  
26 I understand it, is to elicit further evidence of a

1 nature that would, if revealed in public, give  
2 information that could do commercial damage to a  
3 party. Any other use of *In Camera* meetings is  
4 prejudicial to the interests of other intervenors and  
5 causes concern that there may be matters being  
6 discussed in secret that should be public.

7 Upon careful inspection of the transcript,  
8 it is apparent to me that within the first two minutes  
9 of the *In Camera* session, the Chairperson was  
10 declaring his opinions or decisions about the central  
11 issues of the hearing. For example, starting at page  
12 1741, line 26, the Chairperson states:

13 "It may be that the coincidence that both  
14 portfolios are the same proponent is helpful  
15 in moving us to the outcome that's in the  
16 customer's best interest."

17 In my reading of this extract, it is clear  
18 to me that the Chair has already decided that the Duke  
19 Point proposal with duct firing is the outcome that he  
20 wishes to achieve, and that he is seeking ways of  
21 rendering a decision that will achieve this outcome.  
22 In fact, he goes so far as to next state:

23 "So you know now what I want to try to do.  
24 I need your help in telling me how I can get  
25 there."

26 In my view, this is a clear declaration of

1 the intention of the Panel to seek B.C. Hydro's  
2 assistance in engineering the Panel's desired outcome,  
3 namely altering or manipulating the EPA, which is for  
4 Duke Point without duct firing, not the most cost-  
5 effective choice, so as to allow a decision in favour  
6 of Duke Point with duck firing, felt by the Chairman  
7 to be the more cost effective outcome but not the  
8 subject of the EPA under review.

9 At page 1742 starting at line 12, Ms.  
10 Hemmingsen states:

11 "I would also like to get the dual fuel  
12 capability option in there as well, to  
13 mitigate the Terasen impacts. So perhaps  
14 there could be a recommendation that stems  
15 from the decision that the contract is  
16 supportive, but it's recommended that B.C.  
17 Hydro secure these additional features."

18 The Panel, without also inviting input from  
19 other parties -- woops, sorry, I've included -- the  
20 Panel, in privately soliciting B.C. Hydro's input as  
21 to what might be included in the final decision of the  
22 Panel, without also inviting input from other parties,  
23 is, I believe, acting improperly. The recurring theme  
24 of the discussion during this *In Camera* session seems  
25 to be, if we, that is, the Panel and B.C. Hydro, work  
26 privately together, we can work out something that

1 will allow us, that is, the Panel, to approve the DPP  
2 with duct firing project that we, the Panel, has  
3 already determined to be the preferred project.

4 At line 5 on page 1743, Ms. Hemmingsen  
5 states:

6 "Whereas, if we can reach an accommodation  
7 where we could achieve those terms as a side  
8 agreement, or an amendment to the contract,  
9 that would be a better outcome than the  
10 Commission endorsing the third portfolio."

11 In my view, the phrasing of this makes it  
12 plain that Ms. Hemmingsen has been led to believe by  
13 the Panel that both she and the Commission are taking  
14 the same view of the desired outcome, and that a side  
15 agreement is a suitable means of achieving that goal.

16 Commissioner Boychuk says on page 1747  
17 starting at line 7:

18 "Is there some way that we would be in a  
19 position to have more weight or more  
20 motivation for the parties to come up to  
21 something, not approve the EPA unless  
22 certain conditions are met, or certain  
23 provisions are included?"

24 **Proceeding Time 11:35 a.m. T40**

25 I submit that any reasonable person would  
26 read this as a statement that the Commission is



1 seeking a way to sidestep the approval or the denial  
2 -- or denial of the EPA as filed, and instead is  
3 seeking a means to approve a project that was not the  
4 winner of the CFT process, and does not have an EPA  
5 under consideration with the Panel. The Panel appears  
6 to be trying to engineer this outcome irregardless of  
7 any evidence that has been or will be presented in the  
8 remainder of the hearing.

9 At page 1750, starting at line 2,  
10 Commissioner Hobbs states:

11 "But nevertheless that approach may have  
12 some merit in it. I'd like your comments  
13 now with respect to whether there is any  
14 merit in that approach."

15 I respectfully submit that it is most  
16 improper for the Commission to be asking the proponent  
17 for their views on the approach the Commission might  
18 choose to take, without all parties being present.  
19 Unless all parties are equally invited to present  
20 their views for the consideration of the panel, it  
21 implies bias towards the one party that is so invited.

22 When at page 1752, starting at line 12, the  
23 Chair states:

24 "I think we should. So I'd ask you to do  
25 that. That means that we'll need to have  
26 another in-camera session in order to do

1                   that."

2           The implication is clear, that the view of the panel  
3           is that B.C. Hydro and the panel are somehow joined  
4           together in working towards a mutual objective, namely  
5           approval of DPP with duct firing; and that it is  
6           acceptable that this collaboration occur without any  
7           other parties being privy to it.

8                   At page 1754, starting at line 6, the  
9           Chairman makes the incredible statement that:

10                   "What helps, though, if we look at the  
11                   numbers. There is only -- there are only  
12                   two bids that are, if you will, in the  
13                   game."

14           This is such a blatant expression of the pre-judgment  
15           of the outcome of the hearing in advance of evidence  
16           and argument that no further comment is necessary.

17                   The Chair then continues:

18                   "And that may help with respect to that  
19                   concern. It may be that we are able,  
20                   because of that, to restrict this to just  
21                   those two portfolios. Because the others  
22                   are so far out of the money."

23           This clearly shows that the Chair has already, in his  
24           own mind, determined that all other portfolios are out  
25           of consideration. Again, the inference of bias is so  
26           obvious that it requires no further comment.

1                   At page 1756, starting at line 11, Mr.  
2           Fulton points out to the Chair that there is already  
3           potentially apprehension of bias amongst other  
4           parties, regarding decisions being made outside the  
5           public process.

6                   "Mr. Chairman, I do want to speak to the  
7           point of having more than one *In Camera*  
8           session, and it's to this effect -- that  
9           we've indicated that there are potentially  
10          two *In Camera* sessions. My concern would be  
11          that if we start adding *In Camera* sessions  
12          to this proceeding, that we can't accomplish  
13          in the two, that there will be a heightened  
14          level of concern from the other  
15          participants, and the public, that decisions  
16          are being made outside the public process.  
17          So to the extent that we can keep the number  
18          of *In Camera* sessions to two, that would be  
19          my preference and my recommendation."

20                   I can assure both Mr. Fulton and the panel  
21          that my level of concern at this point was  
22          significant, and continues to be so.

23                   On page 1757, starting at line 22, the  
24          Chairman states:

25                   "Right. I also think it's preferable if  
26          counsel provides comment with respect to

1           this *In Camera* session, than I do."  
2       My understanding of this comment is that the Chair, at  
3       this point, recognizes that there will be an  
4       apprehension of bias amongst those excluded from this  
5       secret session, and would prefer to not be the one to  
6       provide comment, in a belated effort to distance  
7       himself from the consequences of the *In Camera*  
8       session.

9 I submit that the evidence of the *In Camera*  
10 session clearly demonstrates that the panel has pre-  
11 judged the desired outcome of the hearing and is  
12 desirous of finding a means to award an EPA to that  
13 outcome, namely DPP with duct firing.

14 Proceeding Time 11:40 p.m. T41

15                   The difficulty, it seems to me, is that  
16           although the CFT process selected DPP without duct  
17           firing as the least cost option, the CFT itself also  
18           provided numbers that showed that DPP without duct  
19           firing was not as cost effective as DPP with duct  
20           firing.

21 Under the terms of the CFT, B.C. Hydro had  
22 only two choices: complete an EPA for DPP without  
23 duct firing, as the least cost bid as selected by the  
24 CFT process, and try to get the remaining 28 megawatts  
25 later, which is what they chose to do; or not sign an  
26 EPA with any bidder. B.C. Hydro clearly chose the

1       former. The fact that DPP with duct firing has been  
2       shown to be more cost effective than DPP without duct  
3       firing, and that the Panel's stated preferred option  
4       is to approve DPP with duct firing even though the EPA  
5       is for DPP without duct firing, clearly shows that the  
6       Panel is convinced that the most cost effective  
7       solution is not the EPA.

8               That they have come to this conclusion in  
9       advance of hearing all the evidence and argument is  
10      clear indication that parties have grounds for  
11      reasonable apprehension of bias. All the evidence  
12      clearly points to the Panel having reached conclusions  
13      and made a decision in advance of hearing all the  
14      evidence and the argument.

15             In light of these circumstances, I conclude  
16      that the Commission Panel, whether consciously or  
17      unconsciously, would not decide this proceeding  
18      fairly. Consequently I believe that the Panel, and by  
19      that I mean both members of the Panel, have no choice  
20      but to disqualify itself.

21             Thank you very much.

22   MR. FULTON:   Mr. Hill.

23   **SUBMISSION IN SUPPORT OF NOTICE OF MOTION BY MR. HILL:**

24   MR. HILL:    Mr. Chairman, Ms. Boychuk, I'd like to accept  
25      my submission C13-6 as my position in this matter.

26             I must present myself as an example of the

1 right-minded, reasonably informed individual. I don't  
2 believe that I'm without bias in the issue. I don't  
3 believe that there are any bystanders in this process,  
4 as all British Columbians use and will be affected by  
5 power and its price.

6 I can do naught but listen to the legal  
7 arguments made for the Panel's consideration. The  
8 reasonableness in the Machiavellian sense cannot be  
9 questioned by me. The process that has been pursued  
10 by B.C. Hydro, and I must submit, supported by the  
11 Commission, either by decision in conferences and  
12 hearings or by silence in the CFT process, leave me in  
13 great doubt as to the likelihood that the outcome was  
14 other than preordained.

15 I ask you to consider my position as I  
16 attempt to prepare an argument to support an outcome  
17 which, however sensible and obvious, does not conform  
18 to the apparently previously crafted reasonable  
19 outcome. I ask you to consider the future of this --  
20 as you consider the future of this hearing, I ask you  
21 to understand my difficulty in rounding up the  
22 confidence to present and argue a conflicting case.

23 Thank you.

24 MR. FULTON: Mr. Chairman, I believe that concludes the  
25 list of the people who are speaking in favour of the  
26 motion, who have indicated to me that they wish to do

1 so. So I'll just canvass the room to see if I've  
2 missed anybody.

3 No one is coming forward, Mr. Chairman, so  
4 that does complete the list of those who are in favour  
5 of the motion.

6 THE CHAIRPERSON: Thank you. We will now hear from those  
7 who oppose the motion, and we will break at 12  
8 o'clock.

9 **Proceeding Time 11:45 a.m. T42**

10 **SUBMISSION OPPOSING NOTICE OF MOTION BY MR. SANDERSON:**

11 MR. SANDERSON: Thank you, Mr. Chairman. I will probably  
12 -- in fact, I will assuredly take us beyond noon, so I  
13 will try and find a convenient spot around noon to  
14 break.

15 I want to begin by saying, fairly simply  
16 and directly, that the application before you, in my  
17 respectful submission, is entirely without merit. I'm  
18 frankly surprised and a little disappointed at the  
19 support that it's managed to attract. In my  
20 respectful submission, the Commission must guard  
21 against, and not allow itself to be, frankly, bullied  
22 into abdicating the serious responsibilities that it  
23 has under *The Utilities Commission Act*.

24 You've heard much this morning about the  
25 integrity of the process, the importance of the  
26 process, and that part of what my friends have said, I

1 completely agree with. But I also think that you must  
2 have in your mind the importance of the substantive  
3 responsibilities you have, and those being exercised  
4 in the manner that the Act contemplates.

5 I don't envy you the position that leaves  
6 you in. That is, you have a difficult decision to  
7 make, I accept that, and you have that decision to  
8 make because any time allegations of the nature that  
9 have been made this morning are made, it puts you in  
10 an uncomfortable position. And I'm sympathetic with  
11 that. But having said it, whatever your personal  
12 discomfort is, you have to separate yourself from  
13 that, with great respect, and make the decision that  
14 you believe to be correct on the law in light of the  
15 significant obligations you've got under the Act.

16 In responding to what I've heard this  
17 morning, I want to make a clear distinction between  
18 three quite distinct arguments; two of which I  
19 somewhat anticipated, one of which I had no reason to  
20 anticipate, and I think was totally inappropriately  
21 made.

22 The first area and general issue that I'll  
23 deal with, is the *in camera* nature of the exchange  
24 that took place that's reported in transcript Volume  
25 8. And that, I say, I had notice of, and was prepared  
26 to talk to, because it's clear in Mr. Andrews'



1 submission, and I'll stress that it's only Mr.  
2 Andrews' motion that I'm speaking to here -- he  
3 defined the parameters of what this hearing this  
4 morning is about. And what he did, in my respectful  
5 submission, was confuse, combine, and conflate two  
6 different complaints.

7 One, the first one, I've just said, is the  
8 *in camera* session. The second, and I submit an  
9 entirely distinct submission, is an apprehension of  
10 bias. And as I will elaborate in a moment, I consider  
11 to be -- I consider the two to be quite distinct. And  
12 I'm quite prepared to deal with both.

13 **Proceeding Time 11:48 a.m. T43**

14 The third was introduced by Mr. Wallace in  
15 his submissions. It's that third that I say was  
16 introduced quite inappropriately, and that is what I  
17 can only characterize as a long complaint about all of  
18 the process and all of the decisions that the  
19 Commission has reached, decisions which, as I'll  
20 elaborate in the third part of my argument, have been  
21 fully addressed by this Commission in considered  
22 reasons, some of which have been the subject matter of  
23 applications for reconsideration, some of which  
24 haven't, but which it was quite unnecessary and  
25 inappropriate to raise again this morning, because  
26 they don't go to the two issues that are really

1        implicated by Mr. Andrews' motion.

2                    Dealing now with the first of those two  
3 matters raised by Mr. Andrews, and that is the effect  
4 of the *In Camera* proceeding on the procedural fairness  
5 and natural justice issues that he raises, I think we  
6 just need to look at the facts. And the basis of Mr.  
7 Andrews' submission is that in holding part of the  
8 hearing *In Camera* the Commission is inappropriately  
9 receiving information which other parties are either  
10 unaware of or don't have the opportunity to comment  
11 on. And frankly, if that's what the Commission did or  
12 were doing, and if it didn't have a compelling reason  
13 to do it, I would agree with Mr. Andrews.

14                    If you look through the submissions that  
15 have been made to you, certainly by B.C. Hydro and I  
16 think also by Duke Power throughout the submission,  
17 and if you review your own reasons in the major  
18 decision dealing with that issue, which was G-119-04,  
19 I think the record discloses (a) a complete  
20 understanding by all parties invoking confidence and  
21 the Commission of the importance of limiting in every  
22 way possible the extent of that information which  
23 would be kept in confidence; and (b) the importance of  
24 allowing, to the maximum extent possible, full comment  
25 by everybody on as much of that information as could  
26 be released, consistent with the obligation of

1 confidentiality, that the Commission had accepted in  
2 G-119-04.

3 Whether -- and speaking frankly, I think  
4 B.C. Hydro has always been troubled with how that last  
5 sharing was going to be accomplished, depending on the  
6 nature of the information that the Commission  
7 ultimately would consider to be central to its  
8 considerations.

9 The concerns we may have had with respect  
10 to that, however, have been entirely dealt with by the  
11 ultimate release of the transcript of the *In Camera*  
12 session. What the Commission was looking for was a  
13 way to receive the *In Camera* information with respect  
14 to unsuccessful bids in a way that allowed fair  
15 comment on it, by virtue of Duke Point's waiver of  
16 confidentiality with respect to its own information,  
17 and by virtue of the fact that the issue that the  
18 Panel chose to pursue with the Hydro witnesses related  
19 solely to information that related to Duke. Any  
20 problem with confidentiality was eliminated, and the  
21 *in camera* session could be, and was, released.

22 **Proceeding Time 11:51 a.m. T44**

23 So in my respectful submission at that  
24 point, where we are, and where the process is, is  
25 where we would have been if the exchange that occurred  
26 had happened at the end of Panel 2, in the main

1       hearing, in the public portion of the hearing.  
2       There's no party who's in any different position today  
3       than they would have been if, at the end of Panel 2,  
4       the Chair had asked exactly the same questions that  
5       were asked and recorded in the *in camera* session, if  
6       Ms. Hemmingsen had responded in exactly the same way  
7       that she did there, and if the submissions that I made  
8       were exactly the submissions I made there.

9               All of those things could have happened,  
10       and frankly frequently do happen, at the end of  
11       various panels' submissions. There is a frank and  
12       open "what if" sort of dialogue going on between the  
13       panel of witnesses and the Chair. And this Commission  
14       has engaged in those kinds of open policy debate, if  
15       you'll have -- if you can characterize it that way, on  
16       a consistent basis for many years, and this panel in  
17       particular has done that.

18              Once that was released publicly, we're in  
19       exactly that situation. And so, as I'll come to in a  
20       minute, when we come to look at the bias issue, we  
21       ought to do it completely unencumbered with the *in*  
22       *camera* aspect. The *in camera* aspect was rendered  
23       meaningless by the release of the transcript.

24              There has been much talk this morning about  
25       how it was that it was *in camera* in the first place.  
26       I think it's important to go back there, and analyze

1        why the session was *in camera*. The first thing is  
2        that we had the ruling of the Commission, a ruling  
3        which all parties to this proceeding, however much  
4        they may wish to ignore it this morning, I think, were  
5        accepting in the context of the process as it pursued;  
6        that is, that information of unsuccessful bidders  
7        would not be released. We had that Order, and then we  
8        had a panel of witnesses from Hydro who had available  
9        to them all of the results of the QEM model.

10                The panel of witnesses from Hydro was put  
11        up to speak to one issue and one issue only, and that  
12        was the QEM process. In my opening, and in the  
13        testimony of that panel, it was made clear that they  
14        would speak only to the QEM. That if people wanted to  
15        compare Tier 1, Tier 2 and no award, what's been  
16        characterized by the Chair as the central issue in the  
17        hearing, that would have to wait till Panel 4. That  
18        was the panel that would speak to that.

19                Panel 2 completed its testimony, there was  
20        unfettered cross-examination of that panel, there was  
21        -- all parties participated in asking questions with  
22        respect to it. The end of that, the Chair asked a  
23        question of Mr. Soulsby, at page 1718 of Volume 8,  
24        which has been referred to by other counsel, I won't  
25        take you there again. And having got a response,  
26        indicated that he thought to go further he needed to

1 go *In Camera*.

2 **Proceeding Time 11:55 a.m. T45**

3 At that stage nobody knows why the Chair  
4 felt the need to go *In Camera*, but it's apparent that  
5 it's with respect to the QEM and the results in it,  
6 and any doubt about that is very quickly cleared up  
7 when the *In Camera* session opens.

8 What I would take you to page 1719 of  
9 Volume 8 before I go to the *In Camera* session,  
10 however --

11 THE CHAIRPERSON: Volume --

12 MR. SANDERSON: Sorry, Volume 8, page 1719, which you've  
13 been taken to before. I thought I wouldn't have to go  
14 here but I see I should, and that is at lines 3 to 7  
15 you said this:

16 " I want to pursue this issue, and I think  
17 in order to pursue this issue I need to do  
18 it *in camera*..."

19 And that's what I've just referenced. But then you go  
20 on and say:

21 "...which I think unless there are objections  
22 to me doing that, I need advice as to how  
23 best to do that."

24 Now, I then commented on how we might  
25 structure that session, but there wasn't a hint of  
26 objection from anybody to the process that you then

1 quite openly indicated you were going to engage in.

2 If parties now are going to hold up the *In*  
3 *Camera* session as being something which in and of  
4 itself discloses a bias, or is otherwise unfair, it  
5 was quite wrong of them not to have signaled that to  
6 you then. You were given no warning that people were  
7 going to object to the *In Camera* session that you were  
8 about to engage in, to deal with the issue that you  
9 raised by Mr. Soulsby at that reference.

10 Mr. Chairman, any doubt about what -- I may  
11 say as well that the onus, I think, on the parties to  
12 complain about the process if they had trouble with it  
13 further, has also got to be assessed in the context of  
14 the exchange that had happened in response to B.C.  
15 Hydro's letter -- or the letter I wrote on B.C.  
16 Hydro's behalf, on January 10<sup>th</sup>. In that letter you'll  
17 recall that as one of the procedural issues that I  
18 sought to identify at the time and obtain  
19 clarification on, was the issue of confidentiality.

20 **Proceeding Time 11:58 a.m. T46**

21 And at paragraph 12 of that letter on page 4, the  
22 letter says this:

23 "Where the Commission does hear *In Camera*  
24 evidence, B.C. Hydro respectfully submits it  
25 will be very important in the interests of  
26 transparency that the Commission provide a

1 full and complete description of the nature  
2 of the evidence it has heard *In Camera*, and  
3 the influence that evidence had, if any, on  
4 its final decision. The reasons ought to  
5 discussion this portion of the proceeding as  
6 fully as is possible without disclosing the  
7 particular data in respect of which  
8 confidence has been invoked by the  
9 unsuccessful bidder in the first place."

10 Now in response to that letter, the  
11 Commission issued its January 11<sup>th</sup> letter, which became  
12 Exhibit Number A-24, and in that the Commission Panel  
13 sought participant comments with respect to the  
14 submissions in my letter. There were comments and  
15 then there was subsequently the Commission's order for  
16 process that came out of those prehearing exchanges.

17 No one complained about that outcome, that  
18 is, the letter that was issued in response to those  
19 exchanges, and certainly B.C. Hydro assumed that was  
20 the set of rules under which the process was being  
21 conducted. In my respectful submission, everybody  
22 else had reason to believe those were the rules, and  
23 if they didn't like them then that was their time and  
24 that was the place where their complaints should have  
25 been lodged.

26 In that respect finally on the *In Camera*



1        notion, after the *In Camera* transcript was released,  
2        the Chair on January 24<sup>th</sup>, in response to a question of  
3        mine at transcript Volume 12, 2517, said this in  
4        responding to why it was that the session had gone *In*  
5        *Camera* in the first place.

6                Having referenced the exchange with Mr.  
7        Soulsby, Mr. Chairman, you said this:

8                " And what is the significance of that?  
9                Well, the evidence of Ms. Hemmingsen  
10              suggests that the QEM model may have  
11              resulted in the selection of a Tier 1  
12              portfolio that may not be the optimal  
13              portfolio for customers."

14              Now again, much was made of this word  
15              "optimal" as it appears in the redacted transcript --  
16              or, I'm sorry, the *In Camera*, no longer redacted  
17              transcript. Here we see the context, I think, that  
18              clarifies the optimal word in the *In Camera* transcript  
19              to the extent it needs clarification.

20              Because what you go on to say is  
21              "If that ultimately is the conclusion of the  
22              Panel..."

23        And I note "if",

24              "...one of the issues is, is that conclusion  
25              fatal to the selected portfolio? If it is  
26              not fatal and the Commission Panel concludes

1           that one of the Tier 1 portfolios should be  
2           accepted, should the Panel disallow the  
3           selected or filed EPA and state that it  
4           would accept a new EPA with DPP that  
5           includes the duct firing?

6                     We expect that participants will want  
7           to draw their own conclusions from this new  
8           evidence, and may also identify additional  
9           issues that may arise from the evidence, and  
10          this will be particularly important in the  
11          context of the legislative parameters for us  
12          and what options are available to us under  
13          Section 71 of the Act."

14                    Now, I don't think any reasonable person  
15          reading that and reading the *In Camera* transcript, any  
16          reasonable person with any attempt to be fair-minded,  
17          could think that those questions addressed first to  
18          Panel 2, could have meant anything other than  
19          reconcile for us -- and this is a point I think it was  
20          Mr. Wallace made; reconcile for us your contention  
21          that you put forward the best outcome, when the Tier 1  
22          portfolios you were looking at may have disclosed  
23          something that's more in the interests of customers.  
24          It's a within Tier 1 comparison that's going on to  
25          panel that had as its exclusive area of testimony and  
26          responsibility the QEM model that only looked at the

1 Tier 1 outcomes.

2 **Proceeding Time 12:02 p.m. T47**

3 All that was done in the Tier 1 -- or, sorry, in the QEM  
4 analysis, was to compare the Tier 1 outcomes, because  
5 they never went to Tier 2 within the QEM.

6 That's all that panel could talk to, and  
7 what I think you have to read the redacted transcript  
8 and this passage to be saying is, I wish to compare  
9 within Tier 1 the different portfolios and understand  
10 (1) what you're saying, B.C. Hydro, was the best one,  
11 and (2) if it's one other than the one that won the  
12 bid, under the rules of the CFT, what it is you say I  
13 should do about it? Further, I want all other  
14 participants to make comment on that same issue.

15 And if you again read the *in camera*  
16 transcript, you'll see, there's expressions by the  
17 Chair, by Mr. Fulton, and by myself, all saying,  
18 "These are issues which are going to have to be  
19 addressed in argument by all parties." No reasonable  
20 person could possibly read that transcript and think  
21 there was any thought in anyone's mind, and most of  
22 all in the Chair's mind, that the issues being  
23 discussed that flowed out of the confidential  
24 information relating to the bid with duct firing, were  
25 not going to be fully debated on the record. And what  
26 was being looked for in the exchange was, how are we

1 going to get there? Meaning, how are we going to  
2 allow that information to be shared to allow this  
3 important issue to be dealt with? This important  
4 issue being the concern that the Tier 1 outcome being  
5 put forward wasn't the Tier 1 outcome that was most in  
6 customers' interests.

7 And I'll close on this note, that in none  
8 of that could any fair-minded person think any  
9 discussion was going on for what would become a Panel  
10 4 issue, and that is the comparison of whatever that  
11 Tier 1 outcome was with either the Tier 2 outcome that  
12 Mr. Weisberg wants you to consider, or the no award  
13 outcome that Mr. Wallace, Mr. Bois want you to  
14 consider, and various other parties, no doubt, will  
15 fall somewhere in there. Those were on the table with  
16 this panel, and there's nothing in any of the  
17 transcript that would suggest to the contrary.

18 **Proceeding Time 12:05 p.m. T48**

19 And Mr. Chairman, that takes me to noon, or  
20 five past, and it's probably a good place for a break.

21 THE CHAIRPERSON: We'll adjourn now until 1:30.

22 **(PROCEEDINGS ADJOURNED AT 12:05 P.M.)**

23 **(PROCEEDINGS RESUMED AT 1:30 P.M.)** **T01A**

24 THE CHAIRPERSON: Please be seated.

25 Mr. Sanderson, you may proceed.

26 MR. SANDERSON: Thank you, Mr. Chairman.

1                   Mr. Chairman, I had indicated there were  
2                   three topics I was dealing with, the first of which  
3                   was the *in camera* session and the whole issue of  
4                   confidentiality. I'm almost done with that, but I do  
5                   have two observations to make with reference to one  
6                   case. That case is a decision of the Alberta Court of  
7                   Queen's Bench, which has not previously been referred  
8                   to, and that's *R. v. Trang*, which I've distributed  
9                   just now to my friends.

10                  This is an enormously complicated case, Mr.  
11                  Chairman, although it does bear some similarities to  
12                  this. It's a criminal law case, and of course that is  
13                  the kind of case which imposes the highest degree of  
14                  procedural fairness, et cetera, on the parties. So  
15                  the first thing to note is that this is a case in  
16                  which the standards are set, or the bar is set at the  
17                  highest it possibly can be.

18                  It has some characteristics in common with  
19                  this in that it seems as if defense counsel for a  
20                  number of parties bounded together at a point in the  
21                  proceeding and brought an application which complained  
22                  of any number of different procedural steps along the  
23                  way, with which they took issue. And the result is --  
24                  what they sought, in light of that, was the particular  
25                  Judge hearing it to recuse himself, and on the grounds  
26                  that he had demonstrated a bias.

1 **Proceeding Time 1:33 p.m. T2A**

2 And so the matter was referred to another judge of the  
3 same bench, the original judge having declined to hear  
4 it.

5 And in dealing with that, there are some  
6 instructive comments. One of the issues that had  
7 arisen was information received, *In Camera* because  
8 there were apparently some national security issues or  
9 some such matters invoked with respect to certain  
10 aspects of the evidence. And there's a discussion of  
11 that. It starts at the bottom of page 20 in paragraph  
12 72, and you'll see at the top of page 21 there's a  
13 reference to a decision of the Supreme Court of Canada  
14 in *Ruby*, and actually all of page 21 and over onto the  
15 top of page 22 are in fact quotes from the *Ruby*  
16 decision. And it's really the quotes from the *Ruby*  
17 decision that I wanted to rely on with respect to the  
18 *In Camera* aspect, and this is starting at the bottom  
19 of page 21, paragraph 40 and it says this:

20 "As a general rule, a fair hearing must  
21 include an opportunity for the parties to  
22 know the opposing party's case so that they  
23 may address evidence prejudicial to their  
24 case and bring evidence to prove their  
25 position..."

26 And there's some citations for that.

1 "The exclusion of the appellant from  
2 portions of the government's submission is  
3 an exceptional departure from this general  
4 rule. The appellant operates in an  
5 informational deficit when trying to  
6 challenge the legitimacy of the exemptions  
7 claimed by the government.

8 However, the general rule does tolerate  
9 certain exceptions. As indicated earlier,  
10 some situations require a measure of  
11 secrecy, such as wiretap and search warrant  
12 applications. In such circumstances,  
13 fairness is met through other procedural  
14 safeguards such as subsequent disclosure,  
15 judicial review, and rights of appeal."

16 Now in my respectful submission, this  
17 Commission, in a way that at this point at least is  
18 unchallenged, determined that we were in such a  
19 circumstance. That is, we needed to have  
20 confidentiality attached to certain information. It  
21 made that determination in what I submit were in a  
22 very carefully reasoned decision, balancing the public  
23 interest that it recognized in favour of both  
24 disclosure and confidentiality.

25 If you'd look at the discussion in the  
26 transcript around process, in the confidential

1 transcript, some of which was highlighted by some of  
2 my friends this morning, I think you'll see that there  
3 is a communal effort, if I can put it that way, to  
4 determine how to develop the procedural safeguards  
5 that will allow all parties to make submissions with  
6 respect to the information which was being disclosed  
7 in confidence. That the adequacy of those procedural  
8 safeguards that were ultimately developed through that  
9 discussion surely cannot be questioned because in the  
10 end, the answer was, we'll disclose all of it.

11 So that now that all of the *In Camera*  
12 session has been disclosed, as I said earlier this  
13 morning, the adequacy of the procedural safeguards  
14 that were developed around that information and around  
15 that process are surely beyond dispute.

16 **Proceeding Time 1:36 p.m. T03A**

17 I do, while I have *Trang* in front of  
18 everybody, want to also point out that it is authority  
19 for a proposition that I began my submissions with,  
20 and that is that the Commission has a duty to weigh  
21 the public interest, not just with respect to the  
22 appearances which were addressed at such length today,  
23 but also the carrying-on of its own duties, and for  
24 that I refer you to page 39 of the decision, the very  
25 concluding paragraph, paragraph 155. And it is a  
26 result and a conclusion which, at the end of my



1        remarks, I will be urging upon you, and that's this:

2                "In the end result, I concluded the  
3                Applicants have failed to show a basis for a  
4                reasonable apprehension of bias on the part  
5                of Binder J. on any of the grounds alleged,  
6                either individually or collectively.

7                Although a judge may have a duty to recuse  
8                when disqualified, a judge equally has a  
9                duty to continue when there is no valid  
10               reason for recusal..."

11               So that takes me, Mr. Chairman, to the  
12        whole question of reasonable apprehension of bias, and  
13        as I say, I'm making these submissions on the basis  
14        that what's been said was said on the public record,  
15        and the question before you is, does a reasonable  
16        person on the basis of those have a reason to  
17        apprehend a bias?

18               Mr. Andrews and others have referred you to  
19        the *Committee for Justice and Liberty v. The National*  
20        *Energy Board* decision, and as they did with the debate  
21        with respect to Commissioner Birch's recusal, they  
22        referred to only a portion of the relevant law as it's  
23        found there, in the judgment -- the dissenting  
24        judgment of Mr. Justice Grandpré. And I don't know  
25        whether you still have a copy of that case, but I know  
26        it's been entered, and I will just read what I read on

1 the Birch motion, but also the next passage, because I  
2 think they're useful. My friends -- I'm sorry,  
3 thanks.

4 MR. FULTON: Mr. Chairman, I have copies of the Supreme  
5 Court report on the case.

6 THE CHAIRPERSON: I do as well.

7 MR. SANDERSON: Commissioner Boychuk?

8 COMMISSIONER BOYCHUK: Yes.

9 MR. SANDERSON: Mr. Chairman, in my version, which is the  
10 Dominion Law Reports version, the passage which my  
11 friends have quoted starts at page 735, it's the sort  
12 of seminal -- the beginning of the seminal passage.  
13 I'm hoping you're in the same version. We're just  
14 looking for --

15 COMMISSIONER BOYCHUK: It's the Supreme Court Reports  
16 version.

17 MR. SANDERSON: Pardon me?

18 COMMISSIONER BOYCHUK: We have the Supreme Court Reports  
19 version.

20 MR. SANDERSON: I'm just looking -- or Mr. Kleefeld is  
21 just looking in there. But, Commissioner Boychuk, if  
22 you look to the beginning of de Grandpré's judgment,  
23 which is roughly halfway through.

24 **Proceeding Time 1:40 p.m. T4A**

25 It's 394 of your version, Mr. Fulton has  
26 helped me, to point out. So 394 is labelled "Part 1"

1 at the bottom of the page there, and that's where the  
2 seminal passage begins. My friends have taken you to  
3 it.

4 What they have not taken you to is the  
5 paragraph commencing at the bottom of the page: "I  
6 can see no real difference..."

7 "I can see no real difference between the  
8 expressions found in the decided cases, be  
9 they reasonable apprehension of bias,  
10 reasonable suspicion of bias, or real  
11 likelihood of bias. The grounds for this  
12 apprehension must however be substantial,  
13 and I entirely agree with the Federal Court  
14 of Appeal, which refused to accept the  
15 suggestion that the test be related to the  
16 very sensitive or scrupulous conscience."

17 And then it goes on and it says:

18 "This is the proper approach which of course  
19 must be adjusted to the facts of the case."

20 And that's a very important comment, in my respectful  
21 submission.

22 "The question of bias in a member of a court  
23 of justice cannot be examined in the same  
24 light as that in a member of an  
25 administrative tribunal entrusted by statute  
26 with an administrative discretion exercised

1           in the light of its experience and that of  
2           its technical advisors."

3       And then the case goes on to discuss the particular  
4       nature of the duties of the National Energy Board that  
5       were in issue in that case.

6           But the point being made is two things.  
7       One, there isn't an absolute standard that applies in  
8       every circumstance. You have to look at the facts of  
9       the case, you have to look at the public duties that  
10      the tribunal is performing in determining whether what  
11      it did was appropriate or not and gave rise to a  
12      reasonable apprehension of bias to a reasonable, as  
13      opposed to a very sensitive or scrupulous conscience.

14           That test, as I see it, can be broken down  
15      into three pieces. In order -- well, the three  
16      pieces, I guess, could be said to encompass three  
17      notions. The first is the notion of the reasonable,  
18      fair-minded and fully informed person. The second  
19      I'll characterize as the notion of substantiality.  
20      That is, the apprehension must be more than a  
21      suspicion or a sensitivity, because to impugn the  
22      impartiality of a decision-maker is not a trivial  
23      thing, and the integrity of the decision-making  
24      process requires that mere suspicion or sensitivity  
25      not interfere with the carrying out of the public  
26      obligations that the decision-maker has.

1                   And then third, as I think that paragraph  
2                   clearly discloses, the notion, the test involved is  
3                   flexible in application depending on the context of  
4                   the tribunal and of the specific of decision to be  
5                   made.

6                   So I'll talk about both of those -- well,  
7                   I'm sorry, all three of those tests, in that sequence.  
8                   And that takes me to parsing, if you will, I think  
9                   perhaps, I think, more closely than we've heard today,  
10                  the words that I think set off this whole chain of  
11                  events, and those are the words that appear at page  
12                  1741-42 of the transcript. That's Volume 8. And in  
13                  my respectful submission, the sentence which, taken  
14                  out of context, causes the most basis for concern in  
15                  terms of an apprehension of bias, is the sentence or  
16                  the two sentences that begin at line 4.

17                  And these sentences have been chosen in the  
18                  transcription to be laid out as a separate paragraph.  
19                  As I read the whole passage, that's perhaps not in a  
20                  drafting sense particularly accurate. They're  
21                  integrally related with the previous sentence. The  
22                  sentence at line 4 and 5 or the sentences, I guess,  
23                  is:

24                  "So you know now what I want to try and do.  
25                  I need your help in telling me how I can get  
26                  there."

1 The crux of the matter is, well, what is it that you,  
2 Mr. Chairman, were saying that you wanted to try to  
3 do, and what was it that you were inviting the B.C.  
4 Hydro Panel to assist you with? To find an answer to  
5 that, you have to read the passage immediately  
6 preceding. And first of all, at line 22 you draw a  
7 conclusion, and that is -- and that's based on the  
8 answer you've received. You say

9 **Proceeding Time 1:45 p.m. T05A**

10 You say,

11 "...I thought your answer would be just what  
12 it is, that but for the rules of the CFT,  
13 you would have chosen Pristine with duct  
14 firing."

15 So it does appear to me that the Commission  
16 is drawing a conclusion on the evidence provided by  
17 Ms. Hemmingsen, and that conclusion is that, but for  
18 the rules of the CFT, B.C. Hydro would have chosen  
19 Pristine with duct firing. That's conclusory, but  
20 it's conclusory of what that evidence meant to you,  
21 put to the witness you'd just heard it from.

22 And then, you move on to the "So what?", if  
23 you will, of that piece of evidence. You say, "It may  
24 be." Now, I stress as no one else has, "It may be."  
25 Not that it is, not that anything is a certain state  
26 of affairs, but rather they may be, and to emphasize

1 it, you say, "I don't know enough about this yet."

2 So, the incompleteness of your thinking and  
3 your knowledge with respect to the issue couldn't be  
4 more transparent than in that first part of that  
5 sentence. And then you say

6 "...but it may be that the coincidence that  
7 both portfolios are the same proponent is  
8 helpful in moving us to the outcome that's  
9 in the customer's best interest."

10 So the next thing is, the thing that you're  
11 trying to do, as identified in line 4, is to get to  
12 the customer's best interest. And you're conjecturing  
13 that the coincidence of the same bidder being involved  
14 may, in this specific context, that is in the with-or-  
15 without duct firing context, assist you in getting to  
16 the customer's best interest.

17 Does it suggest anywhere that you are  
18 selecting Duke as being the best overall to get to the  
19 customer's best interests? Does it suggest anywhere  
20 that you've rejected either the Tier 2 or no award?  
21 It doesn't say anything about Tier 2 or no award. It  
22 doesn't bear any interpretation that would hint you  
23 were going there. And indeed, if you work through the  
24 transcript thereafter, you'll not see any place at  
25 which those issues, that is the next issues, which are  
26 what you identified previously as the fundamental

1 issues in the proceeding, are brought in. And when I  
2 said this morning I didn't see how any fair-minded  
3 person could read this that way, that's what I meant.  
4 You just can't take this sentence and fairly  
5 extrapolate it, I don't think, in the way that has  
6 been done.

7 There is one reference to what has become  
8 known as cost effectiveness, which is the broader  
9 questions that Mr. Weisberg in particular, in his  
10 submissions, raises. And the question of a comparison  
11 between the Tier 1 outcome on the one hand, and Tier 2  
12 and no award on the other, and that's, as far as I can  
13 see in this transcript, exclusively a comment of mine  
14 at page 1752. And at that page, where it seemed as if  
15 the discussion was moving in that direction, at line  
16 I said this:

17 "Mr. Chairman, there is an element of cost-  
18 effectiveness here, so maybe we can deal  
19 with this again at the end of Panel 4."

20 And after that, there's a discussion about how, if  
21 necessary, there would be a session with Panel 4.

22 So it seemed clear to me in reading this,  
23 that in your mind at least, the next set of issues,  
24 that is the issues around comparing the Tier 1  
25 outcome, whether it be the one that was before you or  
26 the optimum one that you'd talked about in here, that



1 is the with-duct-firing version, how that then is  
2 compared to Tier 2 and no award is going to be the  
3 subject matter of any session that you have with Panel  
4 4, that having been the pre-ruling. And that having  
5 been the way in which B.C. Hydro had identified it  
6 would present its evidence.

7 So, would a reasonable, fair-minded and  
8 fully -- person believe the Commission Panel has  
9 already made up their minds on the matter, that is,  
10 the big issue before them, reading that? I don't  
11 think so, Mr. Chairman.

12 The second part of the test is that --  
13 requires substantiality. And as I've said, the bar is  
14 set high. I'll make reference to -- I'm not sure I  
15 need to distribute, but -- a decision -- I have it  
16 here, if anyone needs it, but I don't really want to  
17 burden the record if we don't have to. This is a  
18 decision of the Ontario Superior Court of Justice,  
19 Summary Conviction Appeal Court, dated May 5<sup>th</sup>, 2001.  
20 It can be found at (2001) O.J. 2054. It's *R. v. J.F.*  
21 In paragraph 39 of that decision, it's simply observed  
22 by Justice Hill that:

23 "A public allegation of bias and prejudice  
24 against a judicial officer is warranted in  
25 only the clearest of cases, where the  
26 evidence is manifest enough to a very

**Proceeding Time 1:50 p.m. T6A**

We come now, then, to the specific bias that is alleged here. And I want to say it did get pretty confused, as I said at the outset this morning. When I went into this argument I thought once we were past the *In Camera* notion, the issue raised -- and to be fair, spoken to by Mr. Andrews; raised in his

1 submission and I think fairly spoken to in his  
2 submissions, is a preliminary view has been formed.  
3 So the bias has a specific character, that is, you've  
4 made up your mind.

5 There's very few cases that deal with that,  
6 and I'll come to the ones that do, but that's a  
7 relatively rare form of bias application or at least  
8 basis for recusal, because it's a very difficult thing  
9 to demonstrate. But the remarks you heard today went  
10 way beyond that. They tried to find the bias in all  
11 kinds of procedural inequities that people were  
12 alleging. And I will come to that at the end of my  
13 remarks, but in brief my submission there will be, the  
14 question of the fairness of the overall proceeding is  
15 entirely distinct from a bias allegation. If the  
16 proceeding is unfair, people have their remedies on  
17 appeal, if they feel moved to do so after they see the  
18 Commission's decision. And that's the proper way to  
19 deal with those things if there's a need to deal with  
20 those things.

21 The unique bias allegation here, I think,  
22 is restricted to the notion that the Commission has  
23 predetermined the issue. The only place that anyone  
24 has suggested that can be found, the only evidence of  
25 that in any of the conduct of the Commission, is in  
26 the Volume 8 transcript at the remarks I've already

1 referred to.

2 And so you have to take those remarks and  
3 hold them up against the other precondition decisions.  
4 And the most prominent of those is the decision of the  
5 Supreme Court of Canada in *Newfoundland Telephone*  
6 *Company v. Newfoundland Board of Commissioners*.  
7 Again, counsel have referred to it, but I'm going to  
8 actually refer to it in some detail.

9 I know this has been distributed, you may  
10 have it, but because I'm going to be going through it  
11 I do have extra copies if you need them. I put a few  
12 copies behind me in case there are those who need to  
13 have reference to it. And I'm looking at the online  
14 version.

15 This is the decision involving the Public  
16 Utilities Board in Newfoundland and it is probably the  
17 leading case on disqualification on this basis. And  
18 basically what happened in this case was that a noted  
19 consumer advocate was appointed to that board, and the  
20 board member was disinclined to adopt a different  
21 public stature than he had displayed previously, I  
22 think it's fair to say from reading the decision, and  
23 was very open with the press and the public about what  
24 he was thinking, both before the decision started --  
25 sorry, before the hearing started and after.

26 **Proceeding Time 1:55 p.m. T07A**

1                   And he seems to have been a uniquely  
2           colourful participant in the debate. I don't know  
3           that we have any quite like this involved in these  
4           processes.

5                   Mr. Fulton is telling me that he continues  
6           to be a prominent and colourful figure in  
7           Newfoundland, and I didn't know that, but I'm not  
8           surprised, reading the judgment.

9                   Mr. Wells, upon his appointment, made it  
10          clear that he was very concerned with the executive  
11          pay structure, amongst other things, within one of the  
12          utilities that was regulated by the Board of which  
13          he'd just become a member. And he was given to, as I  
14          say, publicly pronouncing these concerns, in fairly  
15          dramatic language. Before the decision started --  
16          sorry, before the hearing commenced, and I'm now  
17          referring to page four, he was quoted as saying, and  
18          I'm referring here to paragraph five of the judgment:

19                  "'Who the hell do they think they are?' Mr.  
20                  Wells asked. 'The guys doing the real work,  
21                  climbing the poles, never got any 21 percent  
22                  increase.

23                  'Why should we..."

24          And I note "we" --

25                  "...the rate payers, pay for an extra pension  
26                  plan,' he continued, adding that if the

1 executive employees want more money to put  
2 in their pensions they should take it out of  
3 shareholders' profits."

4 So the applicant, going into this hearing, was facing  
5 the prospect of having heard an application by someone  
6 who pretty clearly was more than a little skeptical of  
7 what they were going to hear.

8 Now, later in the Court's reasons, the  
9 Court determined those remarks did not constitute the  
10 basis for an apprehension of bias. They were made  
11 before it started and while, as the Court  
12 characterizes them, they were "colourful" and strongly  
13 expressed, they didn't disclose the level of closed-  
14 mindedness or the level of predetermination required  
15 in and of themselves to require Mr. Wells to recuse  
16 himself or to render any decision in which he  
17 participated bad.

18 Shortly after he made those remarks, the  
19 hearing started on December 19<sup>th</sup>, and then it appears  
20 that Mr. Wells went back to the press on December the  
21 20<sup>th</sup>, and on what is now the second day of the hearing,  
22 he is quoted in the newspaper as having said, and this  
23 is paragraph seven:

24 "'I don't think those expenses can be  
25 justified,' said Mr. Wells. 'I'm concerned  
26 about bias the other way.'"

1        So he continues, the next day -- or not the next day,  
2        I'm sorry, the next month, on January 24<sup>th</sup>, to be  
3        quoted on the evening news, and the interviewer, we're  
4        now in mid-hearing, who interviews him characterizes  
5        the interview and summarizes it by saying:

6                "He nailed in particular increases in salary  
7                and pension benefits for top executives,  
8                including President Anthony Brait, and let  
9                it be known even before the board heard any  
10               evidence what his judgment would be."

11        So that's the way the newspaper reporter heard it.  
12        Andy Wells, the Board member involved, is quoted --  
13        which is probably a fairer thing to refer to, as  
14        saying:

15                "I was absolutely astounded to find out for  
16                1988 that, that Brait is now about up to two  
17                hundred and thirty-five thousand dollars and  
18                I think that's an incredible sum of money to  
19                be paid for to manage a small telephone  
20                company."

21        And then down, the next quote:

22                "And I just think that it's unfair to expect  
23                ratepayers, the consumers, you and I, to pay  
24                for this kind of extravagance."

25                And then, a few days later on January 30<sup>th</sup>,  
26        he's back in the press again, and here he says -- and

1       this is in the middle of the page --

2               "'I can't see what circumstances would  
3       justify that kind of money,' Mr. Wells said.

4       'I don't think the ratepayers of this  
5       province should be expected to pay that kind  
6       of salary. The company can bloody well take  
7       it out of the shareholders' profits.'

8       Mr. Wells said he doesn't know when the case  
9       will be before the court, but said that if  
10      he is biased, it is on the side of the  
11      consumers who pay too much for their phone  
12      bills."

13      And so on. I won't burden with any more, Mr.  
14      Chairman.

15               What I'm getting to is this. Mr. Wells  
16      ultimately was found to have been biased, and that the  
17      telephone company's concern about his conduct was  
18      sufficient to raise a reasonable apprehension of bias  
19      that rendered the ultimate decision invalid. The  
20      egregious nature of what was being said, the absolute  
21      clarity of the finality of the decision, the colourful  
22      expression of a refusal to change his mind, couldn't  
23      have been more apparent.

24                               **Proceeding Time 2:00 p.m. T8A**

25               And to try and compare the transcript from  
26      Volume 8 and hold it up against that, and suggest that



1 the standard that is implicit in these remarks is  
2 somehow met in those, I think is to stretch credulity.  
3 There is simply no comparability between what's gone  
4 on in this hearing and what was going on in that  
5 process. And the standard that is found in that  
6 *Newfoundland Telephone Company* case is one that I  
7 think is fairly consistently held. It is a high  
8 standard and it's not going to be one that my friends  
9 can easily meet.

10 Just before I leave the decision, I think  
11 it was Mr. Quail who took you to this decision as  
12 well. He referred you to paragraph 39, and if I can  
13 just take you there for a moment because he stopped in  
14 the middle of the paragraph. I think he read to about  
15 the middle of the sentence that says in paragraph 39:

16 "Procedural fairness then required the board  
17 members to conduct themselves so that there  
18 could be no reasonable apprehension of  
19 bias."

20 And he stopped there, and I'd like to go on and read  
21 the rest:

22 "The application of that test must be  
23 flexible. It need not be as strict for this  
24 Board dealing with policy matters as it  
25 would be for a board acting solely in an  
26 adjudicative capacity. The standard of

1           conduct will not of course inhibit the most  
2           vigorous questioning of...witnesses and  
3           counsel by board members."

4       And then goes on:

5           "Wells' statements, however, were such, that  
6           so long as he remained a member of the Board  
7           hearing the matter, a reasonable  
8           apprehension of bias existed."

9                       So what's being said here, I think, again  
10          is that the discussion of policy matters which went on  
11          after the exchange which I've focused on at 1741 and  
12          1742 of the transcript, is something which was  
13          appropriate in light of the circumstances of this  
14          Panel and its obligations. There are policy aspects,  
15          you're looking at the public interest and trying to  
16          decide whether to use your authority to intervene in a  
17          contract in the public interest. That is a policy  
18          issue. The rights, if you will, that are being  
19          interfered with, the parties that have vested rights  
20          that are being interfered with in that process are the  
21          contracting parties. The rest of the participants are  
22          participating in the context of the submissions they  
23          can make and the input they can give with respect to  
24          the public interest, i.e. matters of policy. And I do  
25          suggest that in looking at the context of what you're  
26          doing, that's part of the background circumstances

1 important in determining whether it was appropriate  
2 for you to go on and discuss the policy implications  
3 of the facts, which up to that point have been  
4 confidential, that you disclosed or obtained in your  
5 discussion with Panel 2.

6 It was said by many that, you now, that --  
7 this morning, that that discussion needn't have been  
8 confidential, it went on for far too long and far too  
9 far. I think that's, with great respect, quite wrong.  
10 If you look at the transcript you'll find that so long  
11 as Duke's confidential information was held in  
12 confidence, the redactions kept occurring. In other  
13 words, when Mr. Fulton and I redacted the transcript  
14 for the purpose of not allowing it to be known that it  
15 was the duct firing option that was being talked  
16 about, and it appears some will say we were  
17 unsuccessful in that endeavour but that was the nature  
18 of the endeavour; that the redactions continue till  
19 quite near the end of the exchange, right up through  
20 till 1754, because there were things said all the way  
21 through that only made sense in reference back to the  
22 two Duke bids and the comparison that was being made  
23 of them. So it was quite necessary, if that  
24 discussion was going to go on, that it remain *In*  
25 *Camera* until the confidentiality was waived by Duke.

26 There's one other case that I wanted to

1 make reference to because I think it is the only other  
2 case of significance that I found where a decision-  
3 maker was disqualified for a preliminary view, if you  
4 will, and I feel obliged to bring it to your  
5 attention. Now Mr. Kleefeld is going to tell me I'm  
6 going to pronounce this as badly as I pronounce his  
7 own name, so you'll forgive me but I think it's either  
8 "Mignott" or "Migno", depending what nationality that  
9 gentleman was, and I don't know. Or I guess -- I'm  
10 not sure if it was gentleman or not, actually.

11 In any event, that was a case in which at  
12 the first day of a hearing, the lawyer for the party  
13 whose -- I think it was an immigration hearing.

14 **Proceeding Time 2:05 p.m. T09A**

15 The lawyer for the party who had made the application  
16 asked for leave to go back to her office and obtain  
17 some more law. She wanted to go and get some  
18 references. And the client, that is the applicant,  
19 deposed in an affidavit that the adjudicator hearing  
20 it, having declined to allow counsel to go and get the  
21 cases, said to the client, "There's no point in her  
22 going to get the cases because the decision's already  
23 been made." And she swore an affidavit and filed it  
24 with the Court, and sought review, on the basis of  
25 predetermination, because the hearing was still in  
26 mid-hearing.

1                   The Court, in reaching its decision, in  
2           paragraph 8 at page 5 of the version that I've handed  
3           up, says this:

4           "The question is not whether actual bias  
5           existed. The question is whether a  
6           reasonable apprehension of bias could be  
7           raised in the mind of a knowledgeable and  
8           reasonable person. The decision in this  
9           case is very much dependent upon exactly  
10          what was said. If the adjudicator merely  
11          indicated he was tending towards a certain  
12          decision, or was working on a text which it  
13          is contemplated would become part of that  
14          final decision, then, I don't think one  
15          could say that a reasonable apprehension of  
16          bias was raised. If, however, the  
17          adjudicator said that a decision had been  
18          made and, then, later, when challenged on  
19          that statement, attempted to explain by  
20          saying that the decision he had referred to  
21          was only preliminary, in my view, such  
22          comments could raise a reasonable  
23          apprehension of bias."

24          And then they go on to say, in paragraph 9:

25          "In this case, I have to accept the  
26          affidavit of the applicant to the effect

1                   that it was the latter which occurred."

2                   So in order for the Court to conclude that  
3                   there was an apprehension of bias, they had to accept  
4                   the uncontradicted evidence in the affidavit that an  
5                   unqualified decision was expressed to have been made  
6                   by the adjudicator himself.

7                   Again, applying that standard here, it is  
8                   inconceivable to me that this transcript, in Volume 8,  
9                   discloses an unqualified final decision. I've said it  
10                  discloses not even a predisposition, frankly. It's  
11                  focused on a narrow issue, but if that submission's  
12                  not accepted, and someone can succeed in broadening  
13                  the significance of the words used, to say a final  
14                  decision was made and is evidenced there, I think is  
15                  still beyond what the words will bear.

16                  Mr. Chairman, there are -- there's a lot of  
17                  law, where a reasonable apprehension of bias  
18                  obligations -- or, allegations have been made, and not  
19                  succeeded. I'm not going to take you through them  
20                  all. I don't think that they add to, in the end, the  
21                  submissions I've made.

22                  I do want to deal briefly with Mr.  
23                  Wallace's submissions in particular, dealing with the  
24                  broader procedural complaints. And I said at the  
25                  outset I think -- and I say again, that those (a) are  
26                  completely outside the scope of anything Mr. Andrews

1        raised, or Mr. Andrews quite properly dealt with in  
2        his submissions. They have to do with a complaint  
3        about the entire process. While I say they have no  
4        merit, if JIESC disagrees with that submission, the  
5        proper course is for them to take steps with respect  
6        to those decisions, not to allege bias, and not to  
7        interfere with this procedure that is now in place,  
8        and this hearing that's now in place. And in the end,  
9        once they have a decision, they'll no doubt consider  
10       the overall conduct of the hearing, together with the  
11       decision they obtain and the reasons for it, and  
12       conclude what further relief, if any, they think it's  
13       appropriate for them to seek.

14                But that shouldn't give rise to the motions  
15       we've heard today, and it shouldn't give rise to them  
16       particularly -- and I use this word carefully, but  
17       it's particularly inappropriate where the Commission  
18       has issued reasoned decisions on precisely these  
19       points and indeed, reconsideration has been sought.  
20       And in some cases declined, in one case, I think,  
21       still outstanding. But we've argued this again and  
22       again. And to re-argue it here, I say, is just  
23       inappropriate.

24                                **Proceeding Time 2:10 p.m. T10A**

25                When I make those submissions, at the heart  
26       of them is the notion that really Mr. Wallace

1 complains of two things. The first is he doesn't  
2 accept there was ever a need for an expedited process.  
3 In one of my many previous submissions, I've handed up  
4 a chronology of the Commission's rulings with respect  
5 to the need for expedition. It goes back 18 months to  
6 the VIGP decision. It's been a consistent theme. All  
7 parties have known about it. The Commission has  
8 articulated in any number of different ways why it  
9 felt that was necessary. And indeed, the 90 days  
10 which gives rise to the need for a decision by  
11 February 17<sup>th</sup> was arrived at because the Commission  
12 advised Hydro that it didn't think it could get  
13 through the process it believed was necessary in the  
14 60 days that the original CFT called for.

15 And you may recall that the CFT in one of  
16 its earlier incarnations in the fall of 2003 provided  
17 for 60 days' termination right after -- sorry, a  
18 termination right if the Commission hadn't yielded a  
19 decision within 60 days. The Commission wrote back  
20 and said it thought that provision should be extended  
21 to 90, and that's what was done. And so all parties  
22 have known from very early on in this process that the  
23 Commission at least had committed to endeavour to make  
24 its decision within 90 days, and that the whole  
25 process was set up to accommodate that.

26 Now, I'm not asking that the JIESC accept



1       that that's the end of the story, but it should be the  
2       end of the story for today in respect of that. This  
3       is not the place to complain about that long-ago  
4       decision.

5               The second thing is that I think they  
6       continue to complain that information of unsuccessful  
7       bidders should not be made public. That is, the  
8       confidentiality order. Again I go back to the very  
9       carefully reasoned G-119-04 and say, if the Commission  
10      does the parties the courtesy of providing full,  
11      complete and well articulated reasons as to how it's  
12      balanced public interests, the parties can do the  
13      Commission the courtesy of focusing their complaint on  
14      that decision if they don't like it, indicating what  
15      they find wrong in the way the Commission has balanced  
16      its public interest, and taking it to a higher court  
17      if that's what they need to do. And to wrap it up in  
18      bias I just think is not the right approach at all.

19             I do need to comment as well that the  
20      Commission ought not to let it get sandbagged -- let  
21      itself be sandbagged, if you want, on one additional  
22      issue. You have been criticized today by a number of  
23      parties, again Mr. Wallace first, I think, and then  
24      others, for the balance with respect to the hearing of  
25      evidence. That is, five days for the Hydro panels and  
26      five days later -- and it's been said that I've had a

1 much easier row, along with Mr. Keough, to hoe because  
2 we've had more time for our cross-examinations et  
3 cetera.

4 Mr. Chairman, we laid out in a letter of  
5 January 10<sup>th</sup> some procedural submissions. The  
6 Commission received those, said, consistent with the  
7 ruling that we've been making for a long time, that is  
8 that we have to get this done within the 90-day  
9 window, we are going to try and complete this by  
10 January 28<sup>th</sup>. We would like to hear whether the  
11 submissions that Hydro has made around when -- or the  
12 time allotted for different panels, amongst other  
13 things, is appropriate.

14 There were some very long submissions in  
15 response. Not one of them, not one made the complaint  
16 that we've heard so often today. If any of them had  
17 that concern, the concern that the balance that we had  
18 proposed between five days for Hydro and the balance  
19 for the rest, was inappropriate, they had an  
20 absolutely obligation to come forward with that  
21 complaint, rather than now turn on you and say, "Oh,  
22 you're showing bias by having done what you were asked  
23 to do and to which we didn't object."

24 They chose instead to attack the notion of  
25 getting it done in the time allotted at all. And fair  
26 enough, that was their right to do. But they can't

1 complain now for having said nothing, that they don't  
2 like the result. And indeed, frankly, in putting that  
3 proposal together, I had no doubt in my mind that if  
4 we'd said, "Well, you know, give twice as long to  
5 Hydro as you give to everybody else," we would have  
6 heard complaints about that from exactly the other  
7 side when we were here this morning. In other words,  
8 there was no procedure which was going to satisfy  
9 everybody, but my point is this one wasn't attacked by  
10 anybody. And if they want to make their point now  
11 they should have done that.

12 **Proceeding Time 2:15 p.m. T11A**

13 Mr. Chairman, that's what I have to say  
14 about the overall procedural things. And I want to  
15 close with this. This hearing has been going on now  
16 for most of the time that was allotted for it. We are  
17 very nearly finished. All of the parties have chosen  
18 to have you hear the evidence, with the exception of  
19 GSX CCC, who I understand are prepared to proceed  
20 today. All of the undertakings and additional  
21 information that hasn't yet been filed will be  
22 completely -- the filings will be complete today once  
23 -- and we're ready to do that now.

24 And so that all that's left is rebuttal and  
25 final argument. Administrative efficiency, here,  
26 demands that this process be completed. If parties

1 wish to pursue their remedies, and ultimately the  
2 submissions that I've made here today are accepted,  
3 and it's concluded there is no reasonable apprehension  
4 of bias, huge prejudice will have done to the public  
5 interest and to the interests of the contracting  
6 parties before you, by your standing down. We will  
7 not have a decision, and the process will have ended.  
8 I'm not sure what happens next, but whatever it is,  
9 the results are unhappy for the public interest as we  
10 would have it, at least, and certainly they're unhappy  
11 for the parties.

12 If we continue, and a Court does determine,  
13 ultimately, that there was a reasonable apprehension  
14 of bias, and your ultimate decision is struck down in  
15 consequence, the parties are no worse off than they  
16 would be from your recusing yourself, and the only  
17 prejudice suffered by anybody else is today, the  
18 evidence heard over the balance of today -- or, sorry,  
19 the evidence heard tomorrow, I hope only tomorrow, and  
20 the final arguments were made unnecessarily. That, at  
21 this stage of this proceeding, when it's almost over,  
22 is a very minor prejudice indeed, set up against the  
23 other.

24 And for that, I want to close with a  
25 reference to the Canadian Judicial Council's "Ethical  
26 Principles for Judges." And that's a lengthy

1 document, much of which is not germane to this. And I  
2 don't by any means suggest we're in this circumstance,  
3 but I cite this just to make the point that you can't  
4 ignore where you are in the process in terms of  
5 determining what your obligations are. The principles  
6 for judges, at paragraph E.17, say this, under the  
7 heading "Necessity".

8 "Extraordinary circumstances may require  
9 departure from the approaches discussed  
10 above. The principle of necessity holds  
11 that a judge who would otherwise be  
12 disqualified may hear and decide a case  
13 where failure to do so would result in an  
14 injustice. This might arise where an  
15 adjournment or mistrial would work an undue  
16 hardship or where there is no other judge  
17 reasonably available who would not be  
18 similarly disqualified."

19 Now, I don't suggest for a minute we're in  
20 that circumstance, but I just suggest that that  
21 passage demonstrates that for judges, they're there to  
22 soldier on and complete their work even if, in normal  
23 circumstances, there might be a reason why they  
24 shouldn't, if the requirements of justice in the  
25 circumstance require that. And if you look further in  
26 to where that comes from, the remedy for those who, as

1       here, allege more serious problems that they say  
2       underlie everything, they have their appellate rights,  
3       they've got the other safeguards the Acts give them to  
4       prevent permanent prejudice. But the loss of this  
5       process is a permanent prejudice that can't be  
6       remedied if wrongly opposed.

7                       Those are my submissions, Mr. Chairman.

8   THE CHAIRPERSON:   Thank you. Mr. Keough, I think we'll  
9       take a break at about quarter to three.

10   **SUBMISSION OPPOSING NOTICE OF MOTION BY MR. KEOUGH:**

11   MR. KEOUGH:    I hope I'm done by then, Mr. Chairman.

12                   Mr. Chairman, Ms. Boychuk, Duke Point Power  
13       opposes the motion brought by the GSX CCC *et al.*,  
14       requesting an Order that the Commission Panel hearing  
15       this case disqualify itself on the grounds of a  
16       reasonable apprehension of bias and a denial of  
17       procedural fairness and natural justice during the  
18       hearing.

19                   We will be submitting to you that the GSX  
20       CCC motion is ill-founded and, in fact, ill-conceived.  
21       We will be submitting to you that it relies on only a  
22       partial statement of the relevant law, that it  
23       severely mischaracterizes the matter which underpins  
24       the motion itself, and that in fact it is grounded in  
25       little more than pure conjecture. There is simply no  
26       evidence to support the motion.

**Proceeding Time 2:20 p.m. T12A**

Mr. Andrews starts his submission to you by, in our view, restricting the scope of the test to be applied to only the quote from the Supreme Court of Canada decision in *The Committee of Justice and Liberty et al. v. The NEB et al.* that he cites on page 1 of his submission to you. While not taking issue with this single paragraph which Mr. Andrews has recited, he has ignored other very important aspects of the consideration of an application regarding an apprehension of bias. In this regard we would note that the allegations of procedural fairness and natural justice, or a denial of those, but we submit to you that the grounds do not stand on their own and are wholly unsupported once the allegations of bias are disposed of.

One need only turn the page in the *Committee for Justice and Liberty* decision, as Mr. Sanderson did, to find the following quote, and I think he read from this as well but it's important:

"This is the proper approach which of course must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as in a member of an administrative tribunal entrusted by statute, with an

1 administrative discretion exercised in light  
2 of its experience and that of its technical  
3 advisors."

4 The court then goes on to cite approvingly  
5 from Tucker L.J. in *Russell v. Duke of Norfolk et al.*  
6 further down the page, as follows:

7 "There are, in my view, no words which are  
8 of universal application to every kind of  
9 inquiry and every kind of domestic tribunal.  
10 The requirements of natural justice must  
11 depend on the circumstances of the case, the  
12 nature of the inquiry, the rules under which  
13 the tribunal is acting, the subject matter  
14 that is being dealt with, and so forth."

15 We would likewise point you to the  
16 *Weiwaiken Indian Band v. Canada* decision that was  
17 discussed earlier in these proceedings, and that's, I  
18 think, available here, but the cite is [2003] 2 S.C.R.  
19 259. And in that case the Supreme Court states as  
20 follows. It's at page 4 of the excerpt that was over  
21 on the table anyway. And there it says:

22 "In light of the strong presumption of  
23 judicial impartiality, the standard refers  
24 to an apprehension based on serious grounds.  
25 Each case must be examined contextually and  
26 the inquiry is fact-specific."





1 lines 9 and 10 that the summary results are being  
2 discussed, and if we go on, we see that you're talking  
3 about the ranking of the portfolios and a conclusion  
4 that could be drawn from the numbers. That is clearly  
5 all that is being discussed.

6 Now, Mr. Chairman, if we fast-forward to  
7 the redacted version of the transcript, at page 1741,  
8 again Volume 8, it's clear that the Chair goes back to  
9 the very same results summary. So the issue has not  
10 changed and the context has not changed. When you  
11 follow through the discussion on the next two, three  
12 or four pages, the scope and the context never change.

13 What is noteworthy is that there is  
14 absolutely no discussion, no evidence, absolutely  
15 nothing to support what I will call Mr. Andrews'  
16 sleight of hand, which sees him in almost every  
17 paragraph of his submission make reference to the most  
18 cost-effective option for meeting the identified  
19 capacity need on Vancouver Island. There he's trying  
20 to quote what you've called "the central issue in this  
21 proceeding," or the main issue. It was never  
22 discussed. Look at the words.

23 The GSX CCC is deliberately attempting to  
24 completely mischaracterize the context in which the  
25 exchange they assert is offensive is taking place.  
26 There was no mention in the whole exchange to

1 achieving the most cost-effective option for the  
2 needed capacity on Vancouver Island.

3 Now, we submit to you, Mr. Andrews knows  
4 this, because it's patently obvious on the face of the  
5 record that that discussion does not take place. It  
6 is equally clear, we would submit to you, that this  
7 mischaracterization is designed to elevate this debate  
8 to a context that would go to the main issue before  
9 the Commission, and thereby somehow bootstrap the GSX  
10 CCC's, what we submit are unfounded allegations. We  
11 submit to you Mr. Andrews knows the discussion took  
12 place in the narrow confines of a summary of the  
13 model.

14 He also knows that if this were to be the  
15 focus of his submissions, they would be viewed as  
16 groundless. So he jumps the great divide. And he  
17 asserts that the discussion was all about the central  
18 issue in this case. Well, we would submit to you, on  
19 any read, reasonable man or not, that is quite simply  
20 not the case.

21 The GSX CCC has badly mischaracterized the  
22 context of this whole exchange, and we're simply going  
23 to call them on that.

24 We submit it is equally clear from the  
25 remarks of the Chair that he is seeking to advance the  
26 best interests of customers by this narrowly-focused

1 inquiry. We would submit to you that, contrary to  
2 what you've heard, this is wholly consistent with your  
3 public interest mandate that the Commission must  
4 perform, and the decision you are -- the  
5 determination, I suppose, you must make pursuant to  
6 Section 71 of the Act.

7 The clear context of the Chairman's remarks  
8 is regarding the pursuit of this mandate on a specific  
9 issue. Not a predetermination or pre-judgment of the  
10 issue before the Commission for consideration and  
11 ultimate decision.

12 **Proceeding Time 2:30 p.m. T14A**

13 At the highest, the Chair is seeking advice  
14 on how he can reach this public interest goal in the  
15 context of this specific issue.

16 Now, when I was talking about Mr. Andrews'  
17 leaping the great divide to the most cost-effective  
18 option language that he uses numerous times in his  
19 submission, I think it is informative to take a look  
20 at what is on the record regarding what constitutes  
21 this assessment of the most cost-effective option.  
22 And the record is littered with it, but the most handy  
23 one last evening for me was at Volume 7 of the  
24 transcript, page 1377, where Ms. Hemmingsen talks  
25 about the cost-effectiveness issue. And here's a  
26 number of things that she says you take into account

1 when you're trying to consider what is the most cost-  
2 effective option. She says:

3 "B.C. Hydro took into account the  
4 Commission's direction to consider  
5 reliability, timing, location and other non-  
6 cost factors."

7 And in fact, at that same page she also discusses that  
8 in B.C. Hydro's cost-effective analysis, it also  
9 looked at other factors they thought were important,  
10 such as managing the supply/demand balance, the timing  
11 of the cables, the load requirement that they might  
12 face, and the gas and electricity price relationship.

13 So we would submit to you that a  
14 consideration of the most cost-effective option for  
15 Vancouver Island is a very, very different thing than  
16 the narrow issue that was being discussed in the  
17 transcript that everyone is focusing on, being the  
18 model summary.

19 So, Mr. Chairman, we can't lose sight of  
20 the context. The case law says look at the context.  
21 And when you do look at the context, we submit to you  
22 it is extremely clear that Mr. Andrews and those who  
23 have supported him have badly mischaracterized the  
24 appropriate context here.

25 Now, Mr. Chairman, I also submit to you  
26 that the words that were used in the discussion in no

1 way convey a position that the Commission's mind is  
2 made up on anything, and surely not on the overall  
3 matters that are before you which were not even being  
4 discussed.

5 Now, as Mr. Sanderson has done, I want to  
6 take you to some of the words that people have focused  
7 on, because I think they've glossed over some of the  
8 most important ones. Again if we look at page 1741 of  
9 the formerly redacted version of the transcript at  
10 line 25, all you have to do is read the words. They  
11 start: "It may be..." and I stress the word "may".  
12 Then it's followed: "I don't know enough about this  
13 yet..."

14 If you go back to line 21 on that page:  
15 "This may..." and again I stress "may", "...be an area  
16 where I can add some value to customers." These words  
17 clearly do not convey a position, or even an  
18 impression, that the Chair's mind is made up about  
19 anything.

20 Look over the page to 1742, lines 20 and  
21 21: "If". "If the Commission issues a decision that  
22 approves Portfolio 3..." The clear words are that you  
23 are exploring this possibility, not that you've  
24 already made up your mind and decided that this will  
25 be the case. In fact, the next comment recognizes  
26 that this raises a legal issue that will have to be

1 the subject of subsequent debate.

2 **Proceeding Time 2:35 p.m. T15A**

3 I'd like to look at these comments in the  
4 context of the question frequently posed by the courts  
5 in situations such as this, relating to the open-  
6 mindedness of the adjudicator. And I'm going to cite  
7 from a case just briefly, and I have it available, but  
8 I'm -- I'll give people a cite, and if they want a  
9 copy, I can get it for them. But it's *Thompson vs.*  
10 *Chiropractors' Association of Saskatchewan*, [1996]  
11 S.J. 11, Q.B.

12 MR. ANDREWS: Mr. Chairman, may I ask that copies of the  
13 case be made available? It's not fair for counsel to  
14 cite cases without providing copies. If he's got them  
15 here, especially.

16 MR. KEOUGH: Mr. Chair, I am certainly prepared to make  
17 it available as I stated. I'm not sure my friend need  
18 rush to the podium, but I will oblige him.

19 MR. FULTON: I do want to say something here, Mr.  
20 Chairman, because, you know, fairness has taken up all  
21 the day today.

22 **Proceeding Time 2:36 p.m. T16A**

23 But it seemed to be my recollection this  
24 morning, when Mr. Andrews was talking about cases,  
25 there was one case in particular that he referred to  
26 that he didn't have, which was a labour case.

1                   So I suppose if people are going to refer  
2           to cases we should see them.

3   MR. KEOUGH:    Mr. Chairman, that was my observation.  
4           We've had some very loose rules here about producing  
5           cases and citing from them. So I don't want to get  
6           into the debate. I'll give my friend the copy, but I  
7           think the record will demonstrate not everybody is  
8           producing cases, and certainly not in a time frame  
9           that would be of any use to anyone. But nonetheless.

10                   Mr. Chairman, in this case, the  
11           Saskatchewan Court of Appeal considered the matter of  
12           whether the disciplinary committee of the  
13           Chiropractors' Association of Saskatchewan was biased  
14           for reasons of pre-judging the outcome of a case prior  
15           to its final disposition. And the Court, in that  
16           case, said the following:

17                   "Bias can arise by reason of a pre-judgment  
18                   or by reason of personal interest."

19           And then it goes on to say,

20                   "It must be remembered that a person who is  
21                   serving in an adjudicative role must have an  
22                   open mind, but not necessarily a blank or  
23                   void one. Frequently a person will have  
24                   some opinion, preliminary or otherwise,  
25                   about one or more aspects of a case. This  
26                   does not ordinarily constitute bias if there



1           is an ability and a willingness to change  
2           the opinion when appropriate. It is this  
3           flexibility or open-mindedness which must be  
4           present."

5                     We submit to you that the wording used by  
6           you, Mr. Chairman, that we've cited repeatedly here  
7           throughout the transcript, clearly indicates that your  
8           mind is still open, and that no decision has been  
9           reached. There is nothing in the GSX CCC's  
10          submissions or, we would submit, in the comments of  
11          others, to support a contrary view.

12                    I would like to look at certain of the  
13          comments that were made, specific comments made, in  
14          the GSX CCC motion. At page 1, paragraph number 1, at  
15          the bottom, there's two points there. First, we are  
16          not sure what Mr. Andrews is relying upon to support  
17          his restrictive interpretation of the Commission's  
18          discretion or jurisdiction regarding the receipt of  
19          confidential information.

20                    I think it's pretty clear here, as Mr.  
21          Sanderson has noted, that we were dealing with  
22          information related to a non-winning bidder, and that  
23          issue had been disposed of without anyone contesting  
24          it long before. And it was clear that that was the  
25          type of information that was being discussed.

26                    We would also submit to you that the --

4 Proceeding Time 2:40 p.m. T17A

26 Paragraph 3; now, notwithstanding what Mr.

1 Andrews asserts here as the Commission Panel clearly  
2 told B.C. Hydro, there is again nothing on the record  
3 to support these hollow assertions. The transcript  
4 which has been provided confirms that this assertion  
5 is indeed baseless. It appears that the GSX CCC is  
6 simply making up positions and stating conclusions  
7 that simply do not exist.

8 The same comments apply to paragraph  
9 number 4.

10 In paragraph number 5, Mr. Andrews is  
11 speaking to conclusions regarding the most cost-  
12 effective option before you've heard the evidence.  
13 Again, Mr. Chairman, this goes back to my comments  
14 that he's badly mischaracterized what's happened here,  
15 and I don't think I say more.

16 I thought I heard him this morning  
17 essentially withdraw paragraph number 6.

18 Paragraph 7, it raises an interesting  
19 point, I suppose, but again it's wrong. There was  
20 considerable discussion of the potential legal  
21 implications of what had occurred on the record, and  
22 it's equally clear that the issue would be put on the  
23 record for public debate. And as Mr. Sanderson  
24 mentioned, it was raised by him and that's at  
25 transcript 1752, it was raised by you, Mr. Chairman,  
26 at 1753 and 1755, and it was also raised by Mr. Fulton

1 at 1755. So any suggestion that this legal debate was  
2 not going to occur and in a complete manner on the  
3 public record, is contrary to the very evidence that's  
4 there.

5 Furthermore there haven't been any other *In*  
6 *Camera* sessions, and unless something magical happens  
7 that we get one of the B.C. Hydro panels back, or it  
8 happens in rebuttal, I suppose, I don't think that  
9 there's anything other than academic interest in  
10 reading the balance of this paragraph.

11 Paragraph number 8, I think I've covered it  
12 off by my earlier comments. The last sentence on this  
13 point on page 3, we would submit to you is also a  
14 misstatement of the situation, and I think the actual  
15 transcript of the events confirm that the exact  
16 opposite is true. I know my friend said he wrote the  
17 submission before he got the transcript. He didn't  
18 take the time to correct for that, but I think if you  
19 look at the transcript you will find the opposite is  
20 true from what he says.

21 Paragraph 9, I think there Mr. Andrews  
22 speaks of implications. I think that's an  
23 inappropriate word to use there. I would use  
24 "unsubstantiated speculation" as being more accurate  
25 in terms of what he engages in.

26 **Proceeding Time 2:44 p.m. T18A**

1 Paragraph number 10, this paragraph speaks  
2 to impressions. I can only say that I think if you  
3 read the transcript to the *In Camera* session, which  
4 has been disclosed, it properly characterizes what's  
5 going on. It certainly indicates that the scope of  
6 the *In Camera* discussion was within the context of  
7 your earlier ruling on confidentiality. I just don't  
8 think his position is accurate.

9 The parties that are bringing forward or  
10 supporting this motion, Mr. Chairman, see what they  
11 want to see in isolating certain words of the  
12 transcript. But I think when you read the actual  
13 words, what they want to see is simply not there. I  
14 think when you read the words in context, which you  
15 have to do, there is simply nothing to support the  
16 motion.

17 Mr. Chairman, before I sit down I do want  
18 to make some comments on a couple of the specific  
19 arguments that were raised this morning. I think I  
20 probably effectively dealt with Mr. Andrews because I  
21 think his positions were as outlined in his argument  
22 and he followed through on them.

23 The same cannot be said of Mr. Wallace.  
24 And I endorse the remarks made by Mr. Sanderson, and  
25 in fact I had meant to say at the outset we endorse  
26 the submissions he has made in their totality. But

1 Mr. Wallace goes far beyond speaking to the issues  
2 raised in Mr. Andrews' motion. I do think it was  
3 incumbent upon him to file his own Notice of Motion if  
4 he were going to embark upon this. And if what he had  
5 said to you contained any substance, I would probably  
6 complain. However, since that is not the case, we  
7 will let his remarks stand unchallenged --  
8 unchallenged in the sense of demanding procedural  
9 fairness.

10 Mr. Wallace burdened the record this  
11 morning with an extensive list of complaints regarding  
12 the procedural record to date, some of which he's  
13 already complained to you about and you've made  
14 rulings on; some of which he's complained to you  
15 about, made applications for reconsideration, and  
16 you've made rulings on; some of which he's complained  
17 about and left it at that.

18 As Mr. Sanderson said, this is not the  
19 forum to deal with those issues. I think my friend  
20 Mr. Wallace clearly knows what his rights are if at  
21 any stage, including at the end, he thinks he has been  
22 unfairly treated from a procedural point of view. He  
23 has remedies, he should follow them. But they are not  
24 issues going to the matter of a reasonable  
25 apprehension of bias. I'm going to submit to you, you  
26 can totally discount or disregard the submissions made

1 to you by Mr. Wallace on these matters.

2 **Proceeding Time 2:48 p.m. T19A**

3 Mr. Wallace cited from the *Newfoundland*  
4 *Telephone* case, and Mr. Sanderson spoke from it  
5 extensively, and I don't think I need take up any more  
6 of your time with it, other than to make two points.  
7 The first being, if people haven't read it, they  
8 should read it for its intrinsic humour value, because  
9 it does show what is described charitably as the  
10 colourful nature of the positions advanced by the  
11 parties involved. But on a serious note, I think it  
12 does stack up well against a comparison of this case  
13 versus that case, and what is needed to show a  
14 reasonable apprehension of bias in a pre-judgment  
15 circumstance. And of note is the fact that the Court  
16 of Appeal actually didn't disqualify Mr. Wells. So I  
17 would just leave that at that.

18 I think my next remark is reserved for Mr.  
19 Weisberg. No one can doubt his undaunting effort to  
20 get his client's project repeatedly before the  
21 Commission as one that should be seriously considered  
22 and pursued. He has taken that at every opportunity  
23 to reiterate his evidence on that point. So, you  
24 know, I think he's done a remarkable job of  
25 reiterating that in the context of this process as  
26 well.





1                   Mr. Chairman, I think probably covers my  
2           comments and I will close simply by submitting to you  
3           that Duke Point Power requests that you dismiss the  
4           motion before you as it has not been substantiated on  
5           any basis at all.

6                   Thank you, Mr. Chairman.

7   THE CHAIRPERSON:    Thank you.

8                   We will take a 20-minute break now.

9                   **(PROCEEDINGS ADJOURNED AT 2:53 P.M.)**

10                  **(PROCEEDINGS RESUMED AT 3:18 P.M.)**                   **T21A**

11   THE CHAIRPERSON:    Please be seated.

12                   Mr. Johnson, you may proceed.

13   **SUBMISSION ON NOTICE OF MOTION BY MR. JOHNSON:**

14   MR. JOHNSON:       Thank you, Mr. Chairman.

15                   I appear on behalf of Terasen Gas  
16           (Vancouver Island) and I'll start by saying I'm not  
17           here to endorse or adopt anyone else's argument.  
18           These arguments are made on behalf of my client and  
19           not in adopting anyone else's position.

20                   As a starting point, I reviewed the motion  
21           of Mr. Andrews in Exhibit C20-35 in an attempt to  
22           determine what it was that he and his client was  
23           complaining of.

24                   I suppose I should interject that in  
25           preparing this argument I didn't in any way  
26           collaborate with Mr. Sanderson. And I say that only



1        today, what I examined was the motion that was filed,  
2        Exhibit C20-35. And as I understand it, all  
3        participants were invited to submit motions by Monday  
4        at 4:30. I looked at my e-mail, and made enquiries,  
5        but the only one I learned of was Mr. Andrews' motion.  
6        And in that motion, Mr. Andrews refers to 10 numbered  
7        paragraphs that relate to the *in camera* session. His  
8        allegations respecting bias all turn on the *in camera*  
9        session and what was said there. And it doesn't  
10       appear to me that there is any motion before you that  
11       properly raises issues of bias that are now raised by  
12       Mr. Wallace. Mr. Wallace has, in effect, put forward  
13       a list of his unhappiness respecting procedural  
14       matters. But those, as far as I can see, are not  
15       before you in form of a motion. Mr. Wallace could  
16       have filed a motion and chose not to.

17                And while, as I said, I haven't fully  
18       participated in the hearing, I have read some of the  
19       multitude of e-mail that has come across my computer,  
20       and skimmed some it, read some of it; I have to say I  
21       deleted some of it. But from my recollection, many,  
22       if not most, of the submissions of Mr. Wallace  
23       relating to procedural matters appear to have been  
24       dealt with earlier in the hearing, and in some cases,  
25       appear to have been dealt with more than once already.  
26       And in sort of my concluding comment on those

1 procedural issues, I submit that applications alleging  
2 bias should not be founded on unhappiness over  
3 procedural rulings.

4 Turning then to what is in Mr. Andrews'  
5 motion, and when I, as I say, looked through it to try  
6 to discern what it was that was the heart of the  
7 complaint, and this is where my analysis is quite  
8 similar to that of Mr. Sanderson's, I concluded there  
9 were really two areas. There was a complaint about  
10 the *in camera* session, and there was a complaint about  
11 bias, in terms of pre-judgment.

12 In dealing with that first item, the *in*  
13 *camera* session, Mr. Andrews appears to be saying that  
14 -- well, he does say quite openly that he doesn't  
15 challenge the right of the Commission to have *in*  
16 *camera* sessions. But appears to be saying that the *in*  
17 *camera* session was dealing with something that  
18 shouldn't be -- have been dealt with on a confidential  
19 basis, or an *in camera* basis. And says that the  
20 Commission took the opportunity of that session to  
21 discuss matters which should have been dealt with in  
22 public.

23 **Proceeding Time 3:25 p.m. T23A**

24 I looked to see what was the subject matter  
25 of the *In Camera* session, how did it arise. And I  
26 submit that the session arose because in the public

1 session there arose an issue about another portfolio  
2 that appeared to have a lower cost to the customers.  
3 And as I understand it, the details of that  
4 unsuccessful bid, that other portfolio, are  
5 confidential. The financial details of that are not  
6 in the record that I and Intervenors can see. That is  
7 confidential information.

8 And it seems to me that the only practical  
9 means for the Commission to obtain information on that  
10 other bid, to explore the issue that arose as a result  
11 of the Chair's questions, is to do exactly what they  
12 did. There was no other practical means for this  
13 Commission to explore the question of was there  
14 another bid that was more in the interests of the  
15 customers; did it have higher customer value.

16 And so from my submission, the request for  
17 and the fact of that *In Camera* session does not  
18 indicate bias or a reasonable apprehension of bias.  
19 The request for and the existence of that session  
20 demonstrates that the Commission Panel was attempting  
21 to obtain information that might be relevant to the  
22 issue of whether or not the EPA is in the public  
23 interest. That was the only practical means of  
24 obtaining that information. And so to suggest that  
25 there was something wrong or improper or that an *In*  
26 *Camera* session, what went on in it, demonstrates bias,

1 I just can't see that that can be supported.

2 Leaving the *In Camera* nature of the  
3 session, the other sort of topic of Mr. Andrews'  
4 motion is that the words that were used in that  
5 session demonstrate in effect a pre-judgment of  
6 issues. And I must say that I simply can't support  
7 that argument, and think it wrong.

8 The Commission Panel had before it  
9 information which suggested that this other option  
10 which we now know as the Duke Panel duct firing  
11 option, might be more cost-effective. So the  
12 information indicated that the EPA may not be -- EPA  
13 bid that was before the Commission may not be the most  
14 cost-effective option. And in some way the supporters  
15 of the motion twist what is an appropriate examination  
16 of the relative merits of these two proposals and what  
17 is the Commission to do with the fact that there may  
18 be another option out there that is more cost-  
19 effective. The supporters of the motion twist that  
20 into a conclusion that the Panel has already  
21 predetermined the results of this hearing. And how  
22 one can go that far from what was said by the  
23 Commission is really beyond me.

24 The Commission, I submit, was doing what it  
25 should do, and that was look into the issue of whether  
26 or not there's something else out there that may be of

1 greater value to the customers. And that was done in  
2 an *In Camera* session, but then the transcript was  
3 released, and so not only did the intervenors and all  
4 participants have available the question and answer  
5 that had been given in the public session between the  
6 Chair and Ms. Hemmingsen, in terms of another --  
7 something else that maybe have greater value to  
8 customers, but the participants then had available to  
9 them a transcript which raised this issue.

10 **Proceeding Time 3:30 p.m. T24A**

11 And when I look at it, I don't see how that  
12 can be said to be pre-judging things. If anything,  
13 what that initial exchange in the public proceeding,  
14 and then the subsequent release of the transcript;  
15 what that does is point out to parties that there is  
16 another issue. Now, I can't disagree that this  
17 becomes complicated by the confidential nature of some  
18 of the information. But I look at it and say, what  
19 would the disinterested bystander have the Commission  
20 do? Would we have the Commission ignore the fact that  
21 there is some relevant information out there? Would  
22 we have the Commission ignore the information, and not  
23 ask the questions?

24 I submit that the discussion during the *in*  
25 *camera* session indicates that the Panel was exploring  
26 the evidence, that they started -- the discussion

1 starts from the point that the public proceeding left,  
2 and the Commission is asking the question of, "How do  
3 we deal with the evidence, and the fact that there is  
4 a different project out there, that may be better?  
5 How do we deal with that?" And I say, the *in camera*  
6 session does not indicate that the Commission is  
7 intending to approve the EPA. And it appears to me  
8 that the *in camera* session may do just the opposite.

9 The Commission session raises a question  
10 that was not on the record earlier. That question  
11 relates to the B.C. Hydro data that indicates that  
12 another project may be of greater customer value. And  
13 that fact that's now before us, before everyone in  
14 this proceeding, is an issue that will have to get  
15 resolved at the end of the day. I don't know how B.C.  
16 Hydro's going to resolve that, but -- or what  
17 submissions they'll make on it, or how the Commission  
18 will deal with it, but the fact that it has been  
19 brought forward doesn't in any way indicate the pre-  
20 determination of -- you're going to approve the EPA or  
21 you're going to refuse the EPA. I read that material,  
22 and I have no idea if you're going to approve the EPA  
23 or not. I just know that there's another issue out  
24 there that people are going to have to address.

25 I have one other point that I wish to  
26 raise, and I again say I didn't collaborate with Mr.



1 Sanderson, and that's the issue of necessity. The  
2 principle of necessity is discussed in terms of the  
3 legal writings on apprehension of bias, and there are  
4 some cases where, even though there has been an  
5 apprehension of bias the Court or tribunal has had to  
6 deal with it.

7 There's an old Saskatchewan case where the  
8 Judges were deciding on the constitutionality of  
9 whether or not judges had to pay income tax. Perhaps  
10 this panel could decide that issue as well. And  
11 obviously all of the judges had an interest in that,  
12 so there was an apprehension of bias that all of them  
13 might be biased. But there was no one else to try the  
14 case, and so whether or not they were biased was, in  
15 effect, irrelevant, because of necessity they had to  
16 address the issue -- or a judge had to address the  
17 issue.

18 And there's really two aspects I ask you to  
19 keep in mind in terms of necessity. One is what Mr.  
20 Sanderson said, that in some circumstances an  
21 adjournment or a mistrial, as was quoted in that  
22 passage from the judge's handbook, or whatever it was,  
23 would work undue hardship. And if you were to decide  
24 to disqualify yourselves, it's my submission that that  
25 could very much work undue hardship.

26 **Proceeding Time 3:35 p.m. T25A**

1                   There in effect is, in practical terms,  
2           there is no other panel of the Commission that can  
3           hear this EPA application in the timeframe that is  
4           required to meet the timing of this project. And I  
5           submit that Mr. Andrews and his supporters really have  
6           two objectives in this proceeding. The first  
7           objective is to have the Commission deny B.C. Hydro's  
8           application for approval of the EPA. And a second  
9           objective is to delay the proceedings to the extent  
10          that the Duke Point Project cannot proceed within the  
11          timelines required by that project. And if the  
12          Commission does disqualify itself, then certainly that  
13          second objective will occur. The project will be  
14          delayed and I would submit that it will not be able to  
15          meet the time limits.

16                 The other aspect of -- other reason I raise  
17          the issue of necessity, and I have to say it's not  
18          directly on point but -- directly related to necessity  
19          but it sort of leads into this topic, is that in some  
20          circumstances where a judge or a member of a tribunal  
21          is challenged on the basis of bias, the person  
22          challenged steps aside simply to avoid a debate. It's  
23          much easier to step aside and say, let's start all  
24          over and we won't debate whether or not I'm biased;  
25          and in some proceedings perhaps that's the appropriate  
26          method of proceeding, where it's very early on in the

1 proceedings or before the proceedings get started and  
2 there's some sort of a challenge and it may be quite  
3 appropriate to step aside.

4 But this proceeding is well advanced. And  
5 in the circumstances here, I submit that you should  
6 not step aside unless you clearly conclude that there  
7 is a reasonable apprehension of bias. As I said  
8 earlier, a motion for disqualification on the basis of  
9 bias is -- it's a difficult one for the members of the  
10 Panel such as yourself. There may be an inclination  
11 on your part to disqualify yourselves just to avoid  
12 debate or disqualify yourselves just if you have some  
13 slight inkling of, well, maybe there is something to  
14 the motion. But I say that that's not the appropriate  
15 test. You have to look at this -- as Mr. Quail said,  
16 bias is to be determined on an objective basis. You  
17 have to step back, look at this on an objective basis,  
18 and don't determine, don't decide to disqualify  
19 yourselves just to avoid the debate or just because a  
20 number of parties have come forward.

21 Mr. Lewis for Gold River commented on  
22 democracy and he said it wasn't two wolves and a sheep  
23 voting on who was going to -- what they were going to  
24 have to eat. Equally well, this sort of a motion  
25 isn't how many people are on one side or another.  
26 Everyone that has made presentations to you, none of

1 us can claim to be totally disinterested. All of us  
2 have a certain objective in mind, our clients have  
3 objectives in mind, and you have to in some manner  
4 overcome all of that, recognize that all of the  
5 submissions are in some way -- are not from  
6 disinterested parties, but the test that you have to  
7 look at is from the perspective of an informed,  
8 disinterested bystander. And would they say, on the  
9 basis of what's in front of them, that there is a real  
10 likelihood of bias or real apprehension of bias?

11 And I submit that that informed person,  
12 viewing the matter realistically and practically, and  
13 having thought the matter through, would conclude that  
14 there is no apprehension of bias in this case.

15 **Proceeding Time 3:40 p.m. T26A**

16 I submit that what you did in going into *in*  
17 *camera*, to look at the issues, was entirely  
18 appropriate. What was said in that *in camera* session  
19 followed from the *camera* -- from the public session;  
20 and it is quite appropriate, entirely appropriate, for  
21 this Commission to be examining an issue as to which  
22 of these options is most in the customer's interest.  
23 And you would be wrong not to do that. And in the  
24 circumstances, the only way that that could be done  
25 was through the *in camera* session.

26 Those are my submissions.

1 THE CHAIRPERSON: Thank you.

2 MR. JOHNSON: Thank you.

3 THE CHAIRPERSON: Mr. Fulton.

4 **SUBMISSION ON NOTICE OF MOTION BY MR. FULTON:**

5 MR. FULTON: Thank you, Mr. Chairman. I can be brief in  
6 terms of my submissions.

7 I wanted to, first of all, refer the panel  
8 to two cases. One has been spoken of already today,  
9 that's the *Wewaykum Indian Band* case. That case was  
10 also spoken about on December the 22<sup>nd</sup>, and I had  
11 referred to that case at transcript Volume 12, page  
12 769, lines 19 to 24, and in the context of paragraph  
13 76 and 77 of that case, which relate to the standard  
14 being referable to an apprehension of bias that rests  
15 on serious grounds, in light of the strong presumption  
16 of judicial impartiality, and the fact that the  
17 context and the particular circumstances are of  
18 supreme importance, and the facts must be addressed  
19 carefully in light of their entire context, there  
20 being no short-cuts.

21 That case has been applied now in all  
22 jurisdictions, including British Columbia. One case  
23 that wasn't referred to last December was the case of  
24 *Eckervogt v. British Columbia*, [2004] B.C.C.A. 398,  
25 and I'll pass copies of that case up to you. This was  
26 a case where a five-Judge panel of the Court of Appeal

1 decided that it wasn't bound by a decision of a three-  
2 member quorum of the Court, in circumstances that were  
3 quite similar, but at paragraph 6, Mr. Justice Donald,  
4 who spoke for the Court, said:

5 "I do not feel bound by *Golden Valley*..."

6 Which was the earlier case.

7 "...The majority saw the facts in that case in  
8 one way, I see the facts in this case in  
9 another. Where differences arise in an  
10 appreciation of evidence, reasonable persons  
11 may differ without one being right and the  
12 other wrong."

13 And then jumping forward, the issue on that  
14 appeal was whether the Board erred in not  
15 disqualifying itself on the basis of the reasonable  
16 apprehension of bias created by the involvement of a  
17 Mr. Greenwood in the hearing, and discussions leading  
18 up to the Board decisions after he had applied for,  
19 and accepted, employment with the Crown.

20 At paragraph 22, the Court referred to  
21 *Wewaykum*, and then over to paragraph 31 through to 33,  
22 and especially 33,

23 "The key holding was that disqualification  
24 cases are fact specific. A categorical  
25 approach, one that leads to automatic  
26 disqualification, was rejected..."

1 Speaking of *Wewaykum*.

2 "In this respect the court distanced itself  
3 from the English view in the case involving  
4 Lord Hoffman and his association with  
5 Amnesty International which association was  
6 said to disqualify him from hearing General  
7 Pinochet's extradition appeal..."

8 And then dropping down to paragraph 35, there is the  
9 cite from *Wewaykum* at paragraph 77, which I won't  
10 repeat.

11 The last reference that I wish to provide  
12 the Commission panel with in *Eckervogt* is the one at  
13 paragraph 47, under the heading of "Procedural  
14 observation". And the Court comments:

15 "If, during the course of a proceeding, a  
16 party apprehends bias, he should put the  
17 allegation to the tribunal and obtain a  
18 ruling before seeking court intervention.  
19 In that way the tribunal can set out its  
20 position and a proper record can be formed.  
21 This, of course, would not apply when the  
22 ground of disqualification is discovered  
23 after the tribunal has completed the case  
24 and rendered a decision on the merits of the  
25 dispute..."

26 Those are the cases that I wish to refer

1 to, Mr. Chairman.

2 **Proceeding Time 3:45 p.m. T27A**

3 In terms of contextual matters, for the  
4 most part the contextual references in the transcript  
5 Volume 8 from the *In Camera* sessions that has been  
6 made public, which relate to the Commission not  
7 predetermining the results, have been referred to --  
8 in fact, all of my references to that have been  
9 referred to by either Mr. Sanderson or Mr. Keough.

10 There are, however, two references from  
11 Commissioner Boychuk that weren't referred to and I  
12 think should be on the record, and the first is at  
13 1746 over to 1747. Commissioner Boychuk is speaking  
14 to Mr. Sanderson and says as follows:

15 "Just to go back to your point, Mr.  
16 Sanderson, your argument to us would be that  
17 we approve the contract as filed and make  
18 suggestions, am I understanding that  
19 correctly? Or are we in a position to --  
20 let's say we didn't accept that position, to  
21 say we're entitled under the *Act* to not  
22 enforce certain provisions."

23 And then the second reference is at page 1748  
24 beginning at line 23 over the 1749, line 3:

25 "We're not to argue the legal aspects of it,  
26 but I just wanted to raise that because I



1 appreciate your strong position will be what  
2 you've suggested it will be, and I'm trying  
3 to understand what our options might be,  
4 given your legal position and what this  
5 Commission has done in the past, recognizing  
6 that we're not bound by precedent."

7 The last area of the record that I wish to  
8 address related to something said by Mr. Quail in the  
9 course of his submissions this morning, Mr. Chairman,  
10 and it probably would be helpful if you had before you  
11 Transcript Volume 10, pages 2267 and 2268. Now if you  
12 turn to 2268 first, Mr. Quail this morning referenced  
13 the Chair's comments at lines 7 to 11 and suggested  
14 that those comments created a misleading impression.

15 In my submission, Mr. Chairman, that is not  
16 a reasonable conclusion to draw because the provision  
17 -- or the extract that was read needs to be read with  
18 what appears beginning at page 2267, line 1, where I  
19 discuss the *In Camera* session, I say that we've  
20 reached an agreement as to what is to be deleted, and  
21 then dropping down to -- I comment on the fact that  
22 Commissioner Boychuk has added back a reference to Ms.  
23 Hemmingsen. And then beginning at line 23:

24 " And I probably should say the areas of  
25 redaction, Mr. Chairman, so people will know  
26 the type of information that was redacted.

1 And the information that was redacted  
2 related either to the disclosure of the  
3 names of parties or projects or rankings in  
4 one category, and the second category was  
5 information that might affect the  
6 negotiating -- the future negotiating  
7 positions of any parties in the event that  
8 there were future negotiations."

9 And then your comment:

10 "Thank you. I might add..."

11 **Proceeding Time 3:50 p.m. T28A**

12 So that your comments need to be taken in  
13 the context of what I said immediately before your  
14 comments, and also the fact that you would have had  
15 knowledge, Mr. Chairman, of what was being redacted  
16 and what was being left in, and we had made that clear  
17 on the record."

18 So for those reasons, in my submission, one  
19 cannot draw the conclusion that Mr. Quail sought to  
20 draw, that your comment made at lines 7 through 11  
21 conveyed a misleading impression.

22 Those are my submissions.

23 THE CHAIRPERSON: Thank you. I think we have heard from  
24 everyone except for Mr. Andrews in reply. Am I  
25 correct?

26 MR. FULTON: That's correct, Mr. Chairman.

1 THE CHAIRPERSON: Mr. Andrews.

2 **Proceeding Time 3:52 p.m. T29A**

3 **REPLY BY MR. ANDREWS:**

4 MR. ANDREWS: Mr. Chairman, Madam Commissioner. My reply  
5 will roughly follow the points made by the speakers  
6 opposed to the motion. The downside of that is, I  
7 admit that it may appear to jump from point to point.  
8 In part I have to say that it puts me in something of  
9 an awkward position to be replying on behalf, in a  
10 sense, of other counsel who made their own submissions  
11 in support of the motion. But I will endeavour to do  
12 my best to do justice to their -- to reply.

13 And I will also, as I go, bear in mind what  
14 I think is the proper approach to reply, which is not  
15 to repeat arguments that were made in the original  
16 submission, and I will not constantly say that because  
17 I'm not mentioning it now, I said it in my first  
18 submission, and endorse it. I mean my submissions now  
19 to be read in conjunction with all of the earlier  
20 submissions. And the same goes regarding the  
21 submissions by other counsel.

22 Point number one, when I began this  
23 morning, I responded to the subject raised by the  
24 Chair earlier in the morning in which he provided  
25 evidence regarding the deliberations between the two  
26 members of the panel, and raised the issue of whether

1 that affected the motion that was making. And I  
2 referred to a case without citation. I don't have a  
3 copy of it, but I can give you the citation for the  
4 record. It is *B.C. (Labour Relations Board) v. C.D.*  
5 *Lee Trucking Ltd.* It is [1998] B.C.J. No. 2776, a  
6 decision of Mr. Justice Pitfield. It was appealed  
7 unsuccessfully and that decision is at [1999] B.C.J.  
8 No. 2063. And the reason that I cited the case is the  
9 reference to the persistence of bias, the "bias virus"  
10 argument, which is at paragraph 58. And I will read  
11 it into the record, because I think it is particularly  
12 pertinent here.

13 This was a case, *C.D. Lee Trucking*, where  
14 the Chairman of the Labour Relations Board had taken a  
15 phone call from the president of a union which was a  
16 party in a proceeding before the L.R.B.

17 **Proceeding Time 3:55 p.m. T30A**

18 The president of the union attempted to persuade the  
19 chair of the board to remove the panel chair because  
20 of a perception that she was not properly taking in  
21 account the union's interests. The chair had phone  
22 calls with the panel chair and with another tribunal  
23 member who might have stepped in to replace the panel  
24 chair who the union was complaining about, and the  
25 court states:

26 "The conversation between the board chair

1                   and the union official infected Ms. Junker..."  
2       She was the panel chair,  
3                   "...and Mr. Johnson..."  
4       The possible panel chair,  
5                   "...with the apprehension of bias virus. In  
6                   the absence of judicial intervention, the  
7                   bias will persist. This is particularly so  
8                   given that the chair of the board is charged  
9                   with the responsibility for the appointment  
10                  of panels. While the chair may act through  
11                  a delegate, he ultimately remains  
12                  responsible for the decisions with respect  
13                  to the appointment of panels."

14                 Counsel for B.C. Hydro referred to the  
15       application and the Intervenors supporting it as being  
16       what he referred to as an attempt to bully the Panel.  
17       In my submission, the comment itself is barely worth  
18       reply except that I think obviously it's not supported  
19       on the evidence, and secondly that it's inappropriate  
20       to insinuate that the Panel would allow itself to be  
21       bullied even if there was an attempt to do so.

22                 Mr. Sanderson appears to focus heavily on  
23       the argument, as I understood it, that the questions  
24       and answers in the *In Camera* session related only to  
25       Tier 1, and that somehow that helps his case in ways  
26       which I'll respond to.

19                   So my submission is that by going into an  
20       *In Camera* session to deal with issues that are all  
21       about DPP with duct firing, the Commission Panel had  
22       already gone beyond the Tier 1 outcome.

24                   If I may refer to the transcript,  
25           essentially the most that could be said is that the  
26           very first question and the first answer relate to DPP

1 without duct firing. The answer being that --  
2 confirming that Hydro's position was that, we accept  
3 the DPP without duct firing, troubled by the outcome,  
4 explored it further within the rules, we'd have an  
5 opportunity -- would we have an opportunity, we  
6 confirmed with the independent reviewer that we  
7 couldn't, we would be violating the selection on a  
8 lowest-cost dollar basis. That would be the end of  
9 it. There'd be nothing more to discuss, if it were  
10 only the Tier 1 outcome that were under discussion.  
11 But yet the -- that was just the introduction to the  
12 entire session.

13 It's also indicative that Mr. Soulsby was  
14 asked the question, but Mr. Soulsby did not answer the  
15 question. It was answered by Ms. Hemmingsen. It was  
16 a policy-level response. And Ms. Hemmingsen was not  
17 only on Panel 2, she was on Panel 4, which dealt with  
18 the cost-effectiveness analysis. And further, there  
19 are a number of instances where Ms. Hemmingsen refers  
20 to DPP with duct firing as being -- using the term --  
21 the cost-effectiveness terminology. And I refer you  
22 to page 1751, lines 16 to 20, where Ms. Hemmingsen  
23 talks about the suggestion of overturning the Tier 1  
24 outcome, and says,

25 "I mean, I would be concerned about  
26 overturning the competitive process based on

1           the rules. I agreed that we all had a  
2           concern that it didn't produce the cost-  
3           effective -- the most cost-effective outcome  
4           in terms of what was bid in. That was a bit  
5           of a trade-off in the simplification of the  
6           model."

7                       So it's clear that Ms. Hemmingsen's answers  
8           are by no means limited to the Tier 1 outcome, she is  
9           dealing with the big picture, and that was what the  
10          Commission asked her to comment on.

11                      I note too that at page 1752, lines 16 and  
12          on, Mr. Sanderson notes specifically that Ms.  
13          Hemmingsen is on Panel 4, and notes that this topic of  
14          discussion in the *in camera* session involves  
15          implicitly Panel 4 issues, which are cost-  
16          effectiveness issues, and suggests that they could  
17          also be dealt with in the context of Panel 4, which  
18          confirms that the subject of the *in camera* session was  
19          not restricted to the Tier 1 outcome alone.

20                      Mr. Sanderson also argues that the release  
21          of the transcript of the *in camera ex parte* session  
22          cures any defect that was -- or would have been caused  
23          by the session. And he -- in support of that, he says  
24          that the release of the transcript put the parties in  
25          the same position as they would have been in if the  
26          exchange had occurred in the public hearing at the end



1 of Panel 2.

2 Well, I argue that that is just  
3 fundamentally incorrect. First of all, the basis for  
4 the reasonable apprehension of bias argument is not  
5 only the contents of the *in camera* session. It comes  
6 in the context of the hearing as a whole, and the  
7 decision to go into the *in camera* session, and the  
8 contents of it itself. But secondly, the transcript  
9 was not available until after the cross-examination  
10 had finished on Panel 3, and after at least my cross-  
11 examination had finished on Panel 4.

12 So, if as Mr. Sanderson's suggested, the  
13 exchange that had happened in the *in camera* session  
14 had occurred at the end of Panel 2 in a public forum,  
15 the intervenors would have been on their feet saying,  
16 "This is an interesting discussion, we're entitled to  
17 be part of it."

18 **Proceeding Time 4:05 p.m. T32A**

19 So issuing the transcript simply confirmed  
20 that there was an important issue discussed by the  
21 Panel in the absence of the parties who ought to have  
22 been there.

23 Mr. Sanderson also tries to draw something  
24 from what he describes as the Intervenor not  
25 objecting to the Commission Panel going into an *In*  
26 *Camera* session. But with respect, the Intervenor had

1 no reason to expect that the Commission Panel would do  
2 anything other than obtain confidential evidence from  
3 witnesses, as it's fully entitled to do. To suggest  
4 that the Intervenor would have objected based on  
5 speculation is exactly what Mr. Sanderson accuses us  
6 of doing in retrospect. We were not speculating. We  
7 assumed that it would be done properly.

8 Mr. Sanderson refers to the case of *Regina*  
9 *v. Trang*, and two points in reply. First of all, no  
10 one that I have heard has argued that the Commission  
11 Panel has no authority to hear confidential  
12 information in the appropriate circumstances. So  
13 that, I think, is simply off the mark.

14 Secondly, in the context of *Trang*, Mr.  
15 Sanderson expressed surprise at Mr. Wallace's  
16 arguments, and I would note that in my motion itself I  
17 state specifically that the basis for my motion is  
18 broader than reasonable apprehension of bias, and that  
19 I expect that other parties will present their own  
20 reasons in support of the motion.

21 THE CHAIRPERSON: Okay, Mr. Andrews, can you repeat that  
22 for me, please?

23 MR. ANDREWS: In my motion I state:

24 "Please note this application is based on  
25 grounds broader than those I identified  
26 orally on January 22<sup>nd</sup>..."

1 et cetera, with the reference.

2 "I anticipate that other parties may choose  
3 to support this motion for reasons of their  
4 own that may or may not coincide precisely  
5 with the reasons set out herein."

6 And the grounds for the motion are expressly,  
7 reasonable apprehensive of bias and denial of  
8 procedural fairness and natural justice during the  
9 hearing.

10 Now, if counsel had any concerns about  
11 that, he was entitled to ask for particulars and  
12 didn't. So, and I guess I would also argue that there  
13 was nothing in Mr. Wallace's submission that I heard  
14 that would take counsel by surprise. He was referring  
15 to everything that's on the record and quite properly  
16 so. In fact, Mr. Sanderson and other speakers against  
17 the motion argued that what Mr. Wallace complained of  
18 was already the subject of decisions.

19 Well, that, with respect, on that topic,  
20 first of all to the extent that items that he dealt  
21 with had in fact been the subject of panel decisions,  
22 does not mean that those points are not relevant to an  
23 allegation that the hearing as a whole has not been  
24 conducted in accordance with procedures of natural --  
25 principles of natural justice and fair procedures.  
26 Indeed, that's what's supposed to happen. You're

1       supposed to make a motion if you don't like the  
2       procedure, and if you get a decision and you get a  
3       reconsideration decision then you live with it. But  
4       that applies to the actual decision. It doesn't mean  
5       that you can't, in combination with other factors,  
6       point to that as an instance of supporting the  
7       allegation that you haven't had a fair hearing.

8               In addition, a number of the points raised  
9       by Mr. Wallace are the subject of the reconsideration  
10      application which is before ht Panel now and on which  
11      a decision has not been made.

12             Mr. Sanderson referred to the *Committee for*  
13      *Justice and Liberty* case, and he had three points that  
14      he was drawing from it, one being that there is no  
15      absolute standard. He argued that the bar is set  
16      high. I don't quarrel with that, I don't think the  
17      issue is going to be resolved by -- in the abstract,  
18      wording as to whether the bar is set high or set low.

19                             **Proceeding Time 4:10 p.m. T33A**

20             He then talked about substantiality, and I  
21      think what that amounted to was, he was saying that on  
22      his reading of the transcript of the *in camera*  
23      session, there was nothing wrong, and I -- so I won't  
24      reply to that beyond saying -- referring you to all  
25      the arguments that have been made by the supporters of  
26      the motion

1                   To the extent that he was arguing that a  
2                   disqualification for apprehension bias should be not  
3                   -- should not be made lightly, of course I agree. And  
4                   Mr. Johnson, to jump ahead, argued that you should not  
5                   disqualify yourself because of a desire to avoid  
6                   debate. And I totally agree with that, and I'm not  
7                   asking or suggesting that you would do that. While  
8                   that may be a practical approach that's taken before a  
9                   panel is assigned to a case, that is completely  
10                  inappropriate by this point in a hearing.

11                  And lastly, he referred to the nature of  
12                  the decision to be made, and I'm not sure what point  
13                  he's trying to make there, because the decision  
14                  actually in the *Committee for Justice and Liberty* was  
15                  a National Energy Board decision which is in a very  
16                  similar position to the B.C. Utilities Commission in  
17                  terms of the similarities and differences between it  
18                  and a court.

19                  There's been quite a bit of discussion of  
20                  the *Newfoundland* case. First, there are helpful  
21                  statements in that case to do with the law as a whole,  
22                  and my submission -- the factual basis of that case is  
23                  totally different than what is alleged here. That was  
24                  a case involving an individual who had a prior pre-  
25                  conceived opinion -- a personal attitude, and that  
26                  there are other cases of that sort, but this is not

1       one of them. So, to say that somehow we should -- the  
2       Panel should draw some comfort from the fact that even  
3       though Mr. Wells was found to have -- create a  
4       reasonable apprehension of bias, but Mr. Wells used  
5       colourful language which the Chair of this panel does  
6       not, that somehow that should mean that this panel is  
7       not creating a reasonable apprehension of bias -- I  
8       think that that's a straw man argument, and the case  
9       is not pertinent in terms of the facts.

10               Now, in that case, they also talk about the  
11       nature of the decision. And Mr. Sanderson argued,  
12       regarding paragraph 39 of the case, that the -- that a  
13       discussion of policy was appropriate. And my reply  
14       there is that certainly the topic that the Commission  
15       was raising in the *in camera* session was a very  
16       appropriate and important topic. What was totally  
17       inappropriate was that was it was happening in an *ex*  
18       *parte in camera* session.

19               And the next key point that follows here is  
20       that the allegation is that the panel, the Commission  
21       panel, did not express a fixed opinion as to how it  
22       was going to get there. It did not say, and we  
23       certainly are not alleging, that it said, "This is how  
24       we're going to do it, we're going to approve the EPA  
25       with conditions, or we're going to do this, or we're  
26       going to do that." What it said is that the

1 Commission panel knows where it wants to go, and  
2 invited submissions from Hydro on how to get there.

3 It was the panel saying that it knows where  
4 it wants to go that encapsulated the -- having made up  
5 its mind. And there were two aspects of that. One is  
6 that DPP without duct firing, is not the most cost-  
7 effective.

8 **Proceeding Time 4:15 p.m. T34A**

9 And (2) on a very different issue, is that  
10 DPP with duct firing is the optimal option for the  
11 ratepayers. Those are the two key points that the  
12 Commission expressed that it had a fixed opinion on,  
13 it knew where it wanted to go and on which it was  
14 seeking input as to how to get there.

15 Now, it was argued by Mr. Sanderson that  
16 for some reason this policy discussion had to be made  
17 *In Camera*, and that that was shown by the redactions  
18 which were illustrated by the unredactions afterward.  
19 In my submission, that argument is simply without  
20 merit.

21 The fact it's sprinkled through this  
22 discussion of an important legal and policy issue were  
23 references to DPP with duct firing, doesn't mean that  
24 the discussion had to be done *ex parte* and *in camera*.  
25 And the fact that the whole -- that the unredactions  
26 were later made illustrates that there was nothing in

1       those references that had to be done on an *ex parte in*  
2       *camera* basis.

3               The *Mignott, M-I-G-N-O-T-T*, case was one in  
4       which the decision-maker expressed an unqualified  
5       decision about the outcome of the case. And in that  
6       case there were issues about whether it was a matter  
7       of one phrase or one sentence. Here it's not a matter  
8       of one phrase or one sentence. There are phrases and  
9       sentences that are particularly telling, but in my  
10      submission they are supported by the context of the *In*  
11      *Camera* sessions and the events that preceded it, and  
12      even without those key phrases the argument would  
13      still be substantiated.

14             In response -- in reply, rather, to Mr.  
15      Sanderson's response to Mr. Wallace's arguments, I've  
16      mentioned that my letter gives notice of arguments  
17      that Mr. Wallace ended up bringing. Those arguments  
18      provide a context that both stand on their own in  
19      terms of the allegation of lack of fairness, and they  
20      provide a context for the reasonable apprehension of  
21      bias argument. As I mentioned earlier, at least some  
22      of those points are the subject of an undecided  
23      reconsideration request.

24             Mr. Sanderson interestingly referred to a  
25      list of references to the desirability of an expedited  
26      hearing in the context of responding to Mr. Wallace.



1 I note that Mr. Sanderson's list comes in his response  
2 argument on my reconsideration motion, which has not  
3 been decided yet, and so therefore he is essentially  
4 doing the same thing, that is going back to the  
5 arguments on previous issues, that he accused Mr.  
6 Wallace of doing.

7 And lastly on that whole list of Mr.  
8 Sanderson and Mr. Wallace, Mr. Wallace's earlier  
9 application was not a reasonable apprehension of bias  
10 argument as was implied, so to the extent that Mr.  
11 Sanderson was arguing that Mr. Wallace was bringing  
12 the same motion twice, that would not be correct. And  
13 I'm not sure if I'm characterizing Mr. Sanderson's  
14 argument accurately, but if that's what he was  
15 suggesting, that would not be correct.

16 Mr. Sanderson said that no one complained  
17 about the schedule, and that somehow that excuses or  
18 explains what happened at the *In Camera* session. Two  
19 points. First of all, the schedule was an order, not  
20 an invitation for submissions. And secondly, my  
21 reconsideration request argument does object to  
22 aspects of the schedule that involved curtailing  
23 cross-examination by the Intervenor.

24 **Proceeding Time 4:20 p.m. T35A**

25 Mr. Sanderson argued that administrative  
26 efficiency demands that the process be completed. He

1 argued that there's a huge prejudice for the public  
2 interest if you stand down. And he appeared to argue  
3 that if you don't stand down and it goes to the Court  
4 of Appeal and is struck down there, that there's no  
5 prejudice to the public -- the public interest.

6 In reply, number one, B.C. Hydro has a  
7 contractual obligation to endeavour to have this EPA  
8 approved by this Commission. So it shouldn't be taken  
9 as any surprise that B.C. Hydro takes the position,  
10 quite properly, that it does, that it wants a decision  
11 by this panel. But that does undermine any suggestion  
12 that B.C. Hydro's in a position to argue to this  
13 Commission about the broader administrative efficiency  
14 aspects of your decision. Because it has no  
15 opportunity, legally, pursuant to contract, to take a  
16 contrary position even if administrative efficiency  
17 did suggest a different outcome.

18 And secondly, unless B.C. Hydro is saying  
19 that it will not proceed with DPP unless and until the  
20 B.C. Court of Appeal finally deals with any appeal  
21 resulting from this panel's decisions, then I submit  
22 that the Commission panel should discount counsel's  
23 argument that there is no prejudice.

24 Mr. Sanderson put to you an excerpt from  
25 the Ethical Principles for Judges. In brief, my reply  
26 is that I don't believe that that particularly helps

1 the panel. The principles state -- and re-state,  
2 paraphrase, essentially, the test set out by De  
3 Grandpré in *Committee for Justice and Liberty*, and I  
4 don't think it really stands for anything more than  
5 that.

6 Turning to Mr. Keough's response, he began  
7 by noting that I restricted the quote from De Grandpré  
8 in *Committee for Justice and Liberty* to the statement  
9 of the legal test, ignoring the other aspects. The  
10 other aspects which he brought to your attention are  
11 that the approach to a reasonable apprehension of bias  
12 case must be suited to the facts of the case, with  
13 which I totally agree, and which is exactly what I did  
14 in my motion. I turned to the facts of the case  
15 rather than talking about how it was important to turn  
16 to the facts of the case.

17 Mr. Keough made a point about how there has  
18 to be a distinction drawn between cases involving  
19 courts and cases involving tribunals. Again, that  
20 doesn't get him very far, because the *Committee for*  
21 *Justice and Liberty* involved the National Energy  
22 Board.

23 He cited the *Wewaykum* case for a strong  
24 presumption of judicial impartiality. I don't dispute  
25 a strong presumption of judicial impartiality, and I  
26 note freely that there is an oath of office under *The*

1       *Utilities Commission Act*; but, with respect, that  
2       doesn't in and of itself assist an analysis of the  
3       facts that are pertinent to this particular reasonable  
4       apprehension of bias argument.

5               Now, Mr. Keough, like Mr. Sanderson, tried  
6       to develop the thesis that the *in camera* session was  
7       not dealing with the most cost-effective option. And  
8       he refers to page 1741.

9                               **Proceeding Time 4:25 p.m. T36A**

10               He referred to the transcript in the  
11       hearing prior to the Commission going into the *In*  
12       *Camera* session, and argued that the topic discussed in  
13       the public portion was the context, scope and ranking  
14       of portfolios within the CFT. And he argued that the  
15       same issue was raised in the first question of the *In*  
16       *Camera* session. And from that I believe he was asking  
17       you to conclude that that meant the entire *In Camera*  
18       session had to do with the ranking of the portfolios  
19       and not to do with what is the most cost-effective  
20       option, and that therefore it's impossible to read the  
21       transcript as a conclusion by the Panel that it has  
22       made a decision regarding DPP with and without duct  
23       firing. And he notes that there's no mention of a  
24       most cost-effectiveness, and I'm not sure if he was  
25       referring to just the page 1741 or the whole *In Camera*  
26       session. I thought he meant the whole *In Camera*

1 session but perhaps he did not.

2 In any event, on page 1751, Ms. Hemmingsen  
3 clearly uses the term "cost-effective" as I referred  
4 to earlier. And as I said earlier as well, there  
5 would be no point in the Commission discussing the  
6 ranking of the portfolios, except in the context, by  
7 this stage in the hearing, of comparing, as it did,  
8 DPP with duct firing to DPP without duct firing, which  
9 is totally beyond the call for tenders in terms of its  
10 relevance to this hearing.

11 THE CHAIRPERSON: Because it's your submission that DPP  
12 with duct firing is a Tier 2 project?

13 MR. ANDREWS: Well, I have never understood and I don't  
14 think that Hydro has ever clearly defined what it  
15 means by a Tier 2 project. But the Tier 1 projects as  
16 I understand them really should be saying portfolios,  
17 of which there are five, and one of them is the Tier 1  
18 outcome. And projects that were bid into the CFT were  
19 chosen by Hydro to be in Tier 2, and essentially the  
20 whole discussion in the *In Camera* session was should  
21 DPP with duct firing be another project that is  
22 compared to the Tier 1 outcome?

23 THE CHAIRPERSON: In your view is DPP with duct firing a  
24 Tier 2 portfolio?

25 MR. ANDREWS: Well, Hydro has defined what is a Tier 2  
26 portfolio, and the Commission made a ruling on whether

1       that is a fixed definition which is subject to  
2       challenge. So whether it's -- my answer would be, it  
3       is apparently being treated by the Panel as like a  
4       Tier 2 portfolio in the sense that it appears to be  
5       treated as an option in substitution for DPP without  
6       duct firing. And if that's the definition of Tier 2,  
7       then it would meet that definition.

8               And that is the key issue, because once  
9       we're talking about comparing the Tier 1 outcome, DPP  
10      without duct firing, to anything else, we're talking a  
11      comparison of a lot of different projects, not just  
12      DPP with duct firing. And the Panel having concluded  
13      that the customer's best interests are served by DPP  
14      with duct firing, forecloses all the coming evidence  
15      to do with other projects that people submit will meet  
16      the customer's best interests.

17             Mr. -- should I continue?

18   THE CHAIRPERSON:    Yes.

19   MR. ANDREWS:    Mr. Keough refers in particular to line 25  
20      of page 1741 and he points to it as showing some  
21      degree of uncertainty or hypothetical characteristic.  
22      This is where the Chair says,

23             "And I thought your answer would be just  
24      what it is, but for the rules of the CFT,  
25      would have chosen Pristine with duct  
26      firing...I don't know enough about this yet,

1 but it may be that the coincidence that both  
2 portfolios are the same proponent is helpful  
3 in moving us to the outcome that's in the  
4 customer's best interest.

5 So you know now what I want to do. I need  
6 your help in telling me how I can get  
7 there."

8 And Mr. Sanderson referred to that as well, I think,  
9 in terms of whether the transcript ought to have put a  
10 new paragraph in there

11 **Proceeding Time 4:30 p.m. T37A**

12 In my submission, the sentence about it  
13 being a coincidence that both portfolios are the same  
14 proponent is indeed in the -- in an uncertain tense.  
15 It may be, but the uncertain tense applies to the  
16 issue which is one that hasn't been discussed so far,  
17 which is that DPP with and without duct firing are  
18 both by the same proponent, and observing that DPP  
19 with duct firing is in some way more cost-effective  
20 than DPP without duct firing doesn't answer whether  
21 the competitor to DPP with duct firing would be more  
22 or less expensive than DPP with duct firing. And my  
23 submission is that it was that issue that the panel  
24 was addressing when it expressed the uncertainty. The  
25 part that is certain is where I want -- what I want to  
26 try to do.

1                   The *Thompson* and the *Chiropractors*  
2       decision, my submission, adds nothing of particular  
3       importance.

4                   Mr. Keough's response to Mr. Wallace's  
5       arguments was essentially null -- that is, he didn't  
6       respond to the merits of Mr. Wallace's arguments. Mr.  
7       Keough did say that he was -- he noted that the  
8       Federal Court of Appeal did not disqualify the  
9       colourful Mr. Wells, but that is a bit of a dead-end  
10      argument, because the Supreme Court of Canada did.

11                  In his itemized response to the points in  
12      my motion, Mr. Keough said that, regarding paragraph 1  
13      in my motion, the discussion *in camera* was a non-  
14      winning bidder discussion, and was therefore  
15      appropriate. My reply is, it was appropriate for that  
16      discussion to happen in the context of all of the  
17      parties, that the -- that there was no confidential  
18      information being sought by the panel beyond the very  
19      first question to confirm what it had actually already  
20      -- had received. From then on, his comments are  
21      largely to simply deny that there are facts to support  
22      what he calls the unsubstantiated speculation, and I  
23      simply refer you to the arguments that have been made  
24      in the original motion and in support of it.

25                  Regarding my point number 7, point number 7  
26      is to do with that the Panel, rather than bringing its



1 findings to the attention of the parties other than  
2 B.C. Hydro, the Commission Panel in the *in camera*  
3 session proposed one or more additional *ex parte in*  
4 *camera* exchanges of information. Mr. Keough's  
5 response was that that was dealt with by the fact that  
6 the issue would be put on the transcript, but in point  
7 of fact, it was not put on the transcript -- I mean,  
8 the transcript of the *in camera* session was released,  
9 but the Panel did not raise, for the parties'  
10 attention, the issue that was discussed in the *in*  
11 *camera* session.

12 **Proceeding Time 4:35 p.m. T38A**

13 The Panel came back from the *In Camera*  
14 session and did not raise at the first available  
15 opportunity the issues that were discussed in the *In*  
16 *Camera* session.

17 Mr. Keough's response to Mr. Weisberg's  
18 submission is essentially to deny that there's merit  
19 to Mr. Weisberg's statements, saying that they're  
20 conjectural. I would refer you to the transcript  
21 references that Mr. Weisberg provided in support of  
22 his submissions. And again, Mr. Keough says that Mr.  
23 Weisberg's characterization of the GIE evidence is in  
24 some way not accurate or not helpful, and I would  
25 refer you back to the transcript references that Mr.  
26 Weisberg provided.

1                   Mr. Johnson's submissions, I can say in  
2           reply I certainly agree that the Commission Panel has  
3           a difficult task. It has to make a decision from the  
4           perspective of a third party, a reasonable person. He  
5           -- I guess I'll deal with that when it comes up. He  
6           commented on Mr. Wallace's arguments that they're not  
7           before you in the form of a motion, and I would reply  
8           that that is addressed in my letter, Exhibit C20-35,  
9           paragraph 3.

10                   He says that an application regarding bias  
11           should not be founded on unhappiness with procedural  
12           rulings. Obviously I would agree with that statement.  
13           Mr. Wallace's submissions go far beyond unhappiness  
14           with procedural rulings, and I won't repeat his  
15           arguments.

16                   Now, Mr. Johnson correctly noted that I  
17           don't challenge that the Commission has the authority  
18           to receive *in camera* evidence. I would also note that  
19           he referred to *in camera* throughout, and of course the  
20           issue involves not only *in camera* but *in camera ex*  
21           *parte* hearings, which goes to one of Mr. Wallace's  
22           main points. And then Mr. Johnson said that he turned  
23           his mind to the subject of the *In Camera* meeting and  
24           looked at -- in the public session it was said that  
25           another portfolio appeared to have a lowest cost to  
26           customers, and that the financial details of that

1 would be confidential. And then he goes on to argue  
2 that the only practical way to obtain information on  
3 that bid was through *in camera ex parte*.

4 I don't disagree that to the extent that  
5 the Commission needed additional information about the  
6 DPP with duct firing bid itself, it would have to do  
7 that *in camera* according to the procedures that it has  
8 adopted. But the point is that it didn't have to have  
9 an *in camera ex parte* meeting to discuss the  
10 jurisdictional and legal implications, and it didn't  
11 have to come to any conclusion about a DPP with duct  
12 firing being in the customer's best interests.

13 So Mr. Johnson's -- the second part of his  
14 sentence went on to say the only -- well, he said the  
15 only practical way was to do the *In Camera* session to  
16 get information on the bid, which I've agreed with, or  
17 to explore the issues that arose. That's where I  
18 disagree. That the so-called exploration of the  
19 issues that arose is what was improper.

20 Mr. Johnson said that he disagreed with the  
21 conclusion that the transcript indicates that the  
22 Panel had reached a pre-judgment. He said that the  
23 Panel had information that DPP without duct firing was  
24 not the most cost-effective option, and with that I  
25 agree. That panel had that information, and is in  
26 fact the appropriate measure -- cost-effectiveness

3 Proceeding Time 4:40 p.m. T39A

21                   He says that the -- that it -- that the  
22                   circumstances don't prove that the Commission is  
23                   intending to approve the EPA. I agree. That's where  
24                   the Commission says, help me to find how to do it.  
25                   And he again talks about another project to be  
26                   considered. And again, that's right. That was the

1 whole point of the *in camera* discussion, was comparing  
2 two projects; one of them being the CFT winner, and my  
3 submission is that once you start comparing that to  
4 one other project, you need to compare it to all the  
5 other projects that are within the terms of reference.

6 Mr. Johnson makes an argument of necessity  
7 in relation to reasonable apprehension of bias. I  
8 would distinguish the Saskatchewan Judges' income tax  
9 ruling case on the facts. It is not the case, at  
10 least there is no evidence before this panel, that  
11 there is no other conceptual way that the Commission,  
12 the Utilities Commission under the Act could strike a  
13 panel to hear -- to review a filing under Section 71.

14 He argued that an adjournment or a mistrial  
15 would work undue hardship, and said that me and GSX  
16 CCC have two objectives, the second being to delay the  
17 project and kill it. I take offense at that. I think  
18 that GSX CCC has participated in this hearing in good  
19 faith, and has done everything it can to comply with  
20 the accelerated time frame, and, you know, has made  
21 its objections in the proper way, and there's no  
22 evidence, furthermore, that a ruling on the reasonable  
23 apprehension of bias would have a definitive effect on  
24 the project. It's a matter of speculation, and  
25 concern, but there's no evidence on that.

26 Mr. Johnson responded to Mr. Lewis, saying

12 | Proceeding Time 4:45 p.m. T40A

21 | Proceeding Time 4:46 p.m. T41A

26 He concluded by saying that it's quite

1 appropriate for the panel to examine which option is  
2 in the public interest and it would be inappropriate  
3 not to. I say I entirely agree if that discussion is  
4 happening in public and that it is entirely  
5 inappropriate for that discussion to be happening *ex*  
6 *parte* in camera.

7 Mr. Fulton referred to the *Wewaykum* case  
8 and noted among other things that the context and  
9 circumstances are of supreme importance in a  
10 reasonable apprehension of bias case, have to be  
11 looked at in detail. I endorse that and would ask  
12 that the Panel bear in mind the importance of  
13 developing a record when it makes its decision. That  
14 it keep in mind the importance of full written reasons  
15 or oral reasons that will be transcribed so that the  
16 record of the decision-making process is complete.

17 And similarly Mr. Fulton cited the  
18 *Eckervogt* case. In paragraph 47, and I won't read it,  
19 there is again a reference of the importance of a  
20 record being established and, of course, these  
21 reasonable apprehension of bias cases are fact  
22 specific. *Eckervogt*, on its own facts, is a different  
23 basis of bias than this one.

24 Mr. Chairman, Madam Commissioner, that  
25 concludes my submission unless you have any questions.

26 THE CHAIRPERSON: No.

5                   The Panel will adjourn and reserve at least  
6       until tomorrow morning.  If we proceed tomorrow, that  
7       is we dismiss your application, in the event that we  
8       dismiss your notice of motion and your application,  
9       will your panel be ready to proceed?

11 THE CHAIRPERSON: Thank you. I think that also means,  
12 Mr. Sanderson, that we'll be calling your rebuttal  
13 panel tomorrow as well.

16                   The one thing that I did wonder as I  
17       watched the clock move on today is whether the  
18       Commission wanted the morning in order to further  
19       consider what it's heard today. If it does, I haven't  
20       canvassed this with Mr. Fulton, but I would think  
21       certainly if the Commission does determine to proceed,  
22       Thursday afternoon and Friday should certainly be  
23       sufficient to deal with the evidence, unless Mr.  
24       Fulton knows more about what's in store for the  
25       rebuttal panel than I do.

**Proceeding Time 4:50 p.m. T42A**



1                   In other words, I don't think that the  
2                   cross-examination of GSX CCC, should they proceed,  
3                   will be lengthy, and I don't of course knows what's in  
4                   store for rebuttal. But we're sort of throwing out  
5                   there the notion that commencing tomorrow in the  
6                   afternoon may be a possibility, if that makes it  
7                   easier for the Commission to deal with what it has on  
8                   its plate.

9   THE CHAIRPERSON:   That is an attractive offer or  
10                   suggestion.

11                   Mr. Fulton?

12   MR. FULTON:   It find it appealing as well, Mr. Chairman.

13                   I just wanted to say that the only party  
14                   that's indicated that they wish to make a presentation  
15                   is the Village of Gold River, and so I would  
16                   anticipate that that would not take very much time.  
17                   I'll canvass with the people at the end of the day  
18                   today who has cross-examination for Gold River. I  
19                   haven't seen their statement yet, so that that may  
20                   well determine how long people are going to be with  
21                   cross-examining Gold River, although I wouldn't expect  
22                   it to be a long time in any event.

23   THE CHAIRPERSON:   Okay.

24                   Are there any other matters until we  
25                   adjourn? Mr. Keough.

26   MR. KEOUGH:   Thank you, Mr. Chairman. I just have a

1 filing. It was filed electronically yesterday and we  
2 move on to file it in the hearing room. And this is  
3 the Duke Point Power Limited Partnership responses to  
4 undertakings, and they're bundled together in one  
5 package. They were numbered with exhibit numbers, but  
6 Mr. Fulton advises me I got it wrong, and the exhibit  
7 number for the package should be C17-20 and it's just  
8 a three-page attachment to a brief cover letter with  
9 those attached.

10 THE HEARING OFFICER: Marked C17-20.

11 (DUKE POINT POWER LIMITED PARTNERSHIP RESPONSES TO  
12 UNDERTAKINGS, MARKED AS EXHIBIT C17-20)

13 MR. KEOUGH: Thank you, Mr. Chairman.

14 THE CHAIRPERSON: Thank you.

15 MR. FULTON: While we're on the subject of exhibits, Mr.  
16 Chairman, there is one correction on the transcript.  
17 Sorry, while we're on the subject of exhibits, there  
18 is one correction to the transcript. At transcript  
19 2543 there's a reference to Exhibit 9-20. That should  
20 be Exhibit C9-20.

21 (EXHIBIT 9-20 REMARKED AS EXHIBIT C9-20)

22 MR. SANDERSON: Mr. Chairman, just before Mr. Andrews  
23 finished his reply, I obtained a dispensation from Ms.  
24 Cane. She has been diligently preparing all of the  
25 outstanding responses we'd undertaken to have today.  
26 They are there. We could do it tonight. On the other

1 hand, there is no need that I can see to do it  
2 tonight.

3 So if you'd prefer, rather than my going  
4 through all that paper according to the script she's  
5 developed, that I do that tomorrow, I'm happy to do  
6 whichever you prefer.

7 THE CHAIRPERSON: I think tomorrow is preferable.

8 Is there anything else before we adjourn?

9 We are adjourned until tomorrow at 1:30.

10 **(PROCEEDINGS ADJOURNED AT 4:53 P.M.)**

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