

August 7, 2013
Vancouver, B.C.

(DAY 1)
(PROCEEDINGS COMMENCED AT 10:06 A.M.)

THE CLERK: Calling the matter of Pacific Booker Minerals Inc. versus the Minister of the Environment and others, My Lord.

MR. HUNTER: John Hunter, My Lord, for the petitioner Pacific Booker, and with me is Andrea Glen.

MS. GLEN: Good morning, My Lord.

THE COURT: Thank you.

MS. HORSMAN: My Lord, it's Horsman, H-o-r-s-m-a-n, initial K, for the respondents, and with me is Ms. Bevan, B-e-v-a-n, initial S.

THE COURT: Thank you.

MS. NOUVET: Dominique Nouvet appearing for the intervener Lake Babine Nation.

THE COURT: Thank you.

MS. FRIESEN: Cherisse Friesen, initial C, F-r-i-e-s-e-n, appearing for the six Gitxsan hereditary chiefs who are interveners.

THE COURT: Thank you. Mr. Hunter?

MR. HUNTER: Yes, My Lord, I want to just raise a couple of housekeeping matters at the outset and then give you a bit of an overview of what this is about and why we're here and then Ms. Glen will take you through the statutory provisions and the background facts and I'll come back and give you the argument, so that's sort of our game plan for today.

Just before we get into that though, this is, as you may have noted, a judicial review application brought by Pacific Booker with respect to an environment assessment that was done a couple of years ago and which resulted in the denial of a certificate for a mine and I'll explain the circumstances of that in a moment.

There are two interveners, as you will see, both representing First Nations. Ms. Nouvet brought intervention application a few weeks ago and was granted limited intervener status, but Justice Butler left the question of oral submissions to the hearing judge, and with respect to the Gitxsan, they came in rather late, but in all the circumstances we just consented to the

1 intervention and so they are here as well, but
2 there has been no determination on oral
3 submissions and so that would be a matter for Your
4 Lordship and I think they would like to know
5 sooner rather than later if they are going to be
6 permitted to make oral submissions. I don't think
7 we have time issues with the time allocation that
8 we have, so I simply raise that.

9 THE COURT: If there are oral submissions you are
10 saying you don't think there's time problems?

11 MR. HUNTER: I don't think so.

12 THE COURT: All right.

13 MR. HUNTER: So I can then --

14 THE COURT: How do you want to address the oral
15 submission issue for the interveners?

16 MR. HUNTER: Perhaps the starting point would be to
17 find out how much time, I should have asked them
18 myself, about how much time they anticipate they
19 need and that might help.

20 THE COURT: Can you advise me of that, counsel?

21 MS. NOUVET: My Lord, I would like to have up to an
22 hour to make intervenor submissions. I can
23 probably be done in 45 minutes given, you know,
24 given the important issues that we've raised in
25 our memorandum of argument. The fact that the
26 reply has already not quite accurately stated our
27 legal argument, I do think it could be important
28 for the court to have the opportunity to ask us
29 questions about our position and for us to give a
30 bit of an overview about the unique constitutional
31 duties that apply in the environmental assessment
32 in respect to First Nations just to make sure that
33 the court has that context in making any ruling if
34 it makes one in favour of Pacific Booker.

35 THE COURT: So you think you might need an hour?

36 MS. NOUVET: I think so. I mean, I think I can
37 probably be done in 45 minutes, but would
38 appreciate knowing that I can have up to an hour,
39 depending on how the hearing unfolds up to that
40 point.

41 THE COURT: All right, thank you. Ms. Friesen?

42 MS. FRIESEN: My Lord, my time assessment is similar to
43 that of Ms. Nouvet. I believe that we would,
44 wouldn't need any longer than an hour and probably
45 could get it done in 45 minutes. The Gitksan
46 hereditary chiefs, who are interveners here,
47 assert a distinct right from the Lake Babine

1 Nation in that they assert fishing rights along
2 the Skeena River, so that is not immediately in
3 the area of the proposed project, but it would be
4 affected by the proposed project if the project
5 goes ahead and so therefore the submissions,
6 written and oral, will bring that unique
7 perspective to the court. Given that the reply
8 written submissions from the petitioner deal only
9 with the First Nation's arguments, we do believe
10 it would be just and fair to have an opportunity
11 to provide the court with some oral submissions.

12 THE COURT: All right. Mr. Hunter, do you have a
13 position on whether there ought to be oral
14 submissions by the interveners?

15 MR. HUNTER: No, I have none.

16 THE COURT: Ms. Horseman?

17 MS. HORSMAN: No, My Lord.

18 THE COURT: All right. Well, I have no difficulty in
19 hearing you orally, so you should assume that you
20 will have an hour, but it sounds like together
21 your time could well take the best part of half a
22 day. Does that sound right?

23 MS. FRIESEN: That's probably correct, My Lord.

24 THE COURT: All right. Thank you.

25 MR. HUNTER: My Lord, you have before you a number of
26 binders. That is the record for the application.
27 The parties have filed written arguments, they are
28 contained in the last volume, volume 4, and
29 basically the last six tabs are the written
30 arguments of the various parties. I don't ask you
31 to turn to it now, just so you know what's in
32 front of you. What I wanted to do at the outset
33 was to give you an overview of what this is about
34 and why we're here before we get into the detail,
35 and there is a fair bit of detail unfortunately to
36 get into.

37 Pacific Booker is a company that sought to,
38 and seeks to open a mine in British Columbia
39 called the Morrison Copper Gold Mine and it has
40 been working on this project for about a decade.
41 Now, to open a mine of course one needs a
42 certificate under the environmental assessment
43 procedures and statutory provisions in British
44 Columbia and so Pacific Booker applied for that
45 environmental assessment many years back and has
46 worked on that assessment for the better part of a
47 decade, and as you probably know, the way the

1 assessment works is the environment assessment
2 office sets some terms of reference, then there
3 are meetings back and forth with the proponent,
4 the environmental assessment office indicates
5 concerns they have, the proponent is invited to
6 try to satisfy the environmental assessment office
7 that it can meet those concerns and on it goes
8 back and forth, and this happened in this
9 assessment process, as you will hear in a few
10 moments in some detail, for many, many years at
11 the cost of about \$10 million by Pacific Booker to
12 go through this assessment and to address all of
13 the issues that the EAO raised.

14 At the end of that process the environmental
15 office issued an assessment and under the statute
16 an assessment is to be, must be made and then must
17 be given to the two ministers who make the
18 decision as to whether the certificate is issued,
19 so at the end of this process an assessment was
20 issued and it was an assessment that -- and the
21 issue for the assessment is are there any material
22 adverse effects, will there be any material
23 adverse effects, environmental effects from this
24 project that cannot be mitigated by the proponent
25 and the proponents's plans, and often in these
26 assessments at the end of it all there will maybe
27 be one, maybe there will be two and then there
28 will be a question of whether the mitigation can
29 be altered or changed or whether they are
30 acceptable effects in the total scheme of things.

31 In this particular case the environmental
32 assessment office concluded there were no adverse
33 effects that could not be reasonably mitigated by
34 the plans that the proponent had, and the
35 proponent, Pacific Booker, was made aware of that
36 assessment as it was going to the ministers and
37 obviously that was a source of some satisfaction
38 because with no material adverse effects it cannot
39 be reasonably mitigated, one would expect, unless
40 there was some other kind of policy concern of the
41 ministers that lay right outside the environmental
42 world, which is possible, the ministers have a
43 broad discretion, but what one would expect with
44 having gone through that process and achieved
45 that, what I call a clean report because yes,
46 there will be effects, yes, they have to be
47 mitigated, but the environmental assessment office

1 has looked at it and said these are reasonable
2 mitigations, there should be no material adverse
3 effects, one would expect to get the certificate.

4 The statute says that the assessment has to
5 be provided to the ministers by the executive
6 director of the environmental assessment office
7 and the executive director can also provide
8 recommendations to the ministers and reasons for
9 his recommendations. He doesn't have to, has to
10 provide an assessment, has the option of providing
11 recommendations as well, and our position is
12 that's there for ambiguous assessments. If an
13 assessment comes in and says there will be two
14 material adverse effects one might say, well, how
15 serious are they, should we give them a
16 certificate anyway, should we hold the
17 certificate. The executive director might say
18 these aren't really that serious, so you should
19 issue the certificate, in my view that's my
20 recommendation, or no, they are very serious, you
21 shouldn't. Here there's a clean environmental
22 assessment, no adverse effects and yet it turned
23 out that the executive director recommended
24 against issuing a certificate.

25 The executive director has given an affidavit
26 and said, well, I wasn't really satisfied, I
27 thought there were other concerns that I had and
28 issues, and Ms. Glen will take you through his
29 letter because he does give some reasons for this,
30 and Pacific Booker never saw that recommendation,
31 never had an opportunity to address these concerns
32 that the executive director said he had
33 notwithstanding the clean assessment that his own
34 office has provided. The statute in fact says it
35 has to be an assessment prepared by the executive
36 director that goes to the ministers. He doesn't
37 have to prepare it personally obviously, but it's
38 his responsibility, it's his assessment, so he
39 sends an assessment up to the ministers and says
40 there will be no adverse effects that can't be
41 mitigated and at the same time he sends a
42 recommendation saying but I recommend against.
43 \$10 million on this assessment, this process back
44 and forth making changes all up in smoke.

45 Now, our position is that there are two legal
46 issues that arise from that kind of circumstance.
47 The first is another statutory construction and

1 the question is whether or not it is open to the
2 executive director of the environmental assessment
3 office, whose role is purely a role of assessing
4 the environmental impacts of a project, to
5 recommend against a certificate when the
6 assessment says there will be no material impacts.
7 We say it's not open to him to do that. The
8 statute doesn't require a recommendation, the
9 recommendation is clearly there as a matter of
10 statutory construction to deal with ambiguous
11 assessments or assessments which could take you in
12 different directions, but you can't, we say, as a
13 matter of statutory authority, issue a
14 recommendation that's completely incompatible with
15 the assessment that you, through your officers,
16 have prepared and are sending to the ministers, so
17 as a matter of statutory construction we say it's
18 not open to it, to make that recommendation. He
19 can make no recommendation or he can make a
20 recommendation that's consistent with the
21 assessment, but not one that's completely
22 inconsistent and incompatible with it.

23 And the second legal issue is if he does have
24 that statutory authority to issue a recommendation
25 that's completely insistent with the assessment,
26 he's got an obligation through normal rules of
27 procedural fairness to provide that assessment to
28 the proponent before sending it off to the
29 ministers and give the proponent an opportunity to
30 address the issues and, as you will see, there are
31 several things that are mentioned in this
32 recommendation, the reasons for it that Pacific
33 Booker takes issue with, they could take a
34 position on that would assist either in changing
35 the recommendation or at least providing a
36 counterbalance to the ministers that the ministers
37 might need, because what are the ministers going
38 to do when they get a recommendation from the
39 director of the -- executive director of the
40 environmental assessment office against issuing
41 the certificate without even knowing what Pacific
42 Booker's position is on the specific items that
43 are referenced by the executive director.

44 So in my submission those are the two issues.
45 In either one the ministers' decision is flawed
46 either because they relied upon, understandably
47 because it was put before them, a recommendation

1 which was ultra vires the executive director to
2 make in these circumstances or because they are
3 the end part of a process that was procedurally
4 unfair to Pacific Booker and in either case we
5 don't ask Your Lordship to issue the certificate,
6 although we wouldn't turn it down, but we
7 recognize that's not available through judicial
8 review, we ask that it be turned back to the
9 ministers and depending on which route is taken
10 either to the ministers directly to consider
11 without this flawed recommendation or back to the
12 EAO and the executive director, to provide an
13 opportunity for Pacific Booker to deal with the
14 issues that are raised in this negative
15 recommendation before it goes to the ministers so
16 the ministers have a proper information base to
17 make a decision. That's what we're seeking in
18 this application.

19 Now, Ms. Glen will take you through the
20 statutory provisions and then in some detail the
21 background. This assessment, and I think she'll
22 probably take some time with the assessment that
23 was done over this many, many, multi-year period,
24 it's over 200 pages, very detailed, very nice
25 piece of work, but in my submission, although it
26 may seem like we're spending a lot of time on it,
27 it's an important element in this case to
28 understand that this assessment statutorily
29 required was done pursuant to the statute, was
30 done properly. You will hear a lot about First
31 Nations concerns in the assessment because they
32 weren't overlooked, they were dealt with in great,
33 great detail and at the end of the day the
34 assessment is as clean as it can be for someone
35 who wants to start a mine, and yet the executive
36 director took it upon himself, I say completely
37 beyond the scope of his statutory responsibilities
38 and authority, to recommend against. That's the
39 opening.

40 THE COURT: Thank you.

41 MR. HUNTER: Ms. Glen.

42 MS. GLEN: Good morning, My Lord. Just as a brief
43 housekeeping matter before I go into the statutory
44 background, it has come to my attention that tab
45 27 in the petition record that was handed up to
46 the court or filed last week, that was supposed to
47 contain an order dated June 26 from Mr. Justice

1 Butler which was entered July 25th with respect to
2 the intervention of the Lake Babine Nation. In
3 fact, I understand that the incorrect order was
4 included at that tab, so I have a replacement tab
5 27 for the petition record here.

6 THE COURT: All right. I have an order here that's the
7 26th of June. That's the wrong one?

8 MS. GLEN: That's the wrong one. There were two orders
9 made that date and the one that I've handed up is
10 the one that was meant to be included.

11 THE COURT: All right.

12 MS. GLEN: And I also have a copy of the authorities of
13 the petitioner which, if Your Lordship would like,
14 I could hand up. It contains the statute and the
15 case law that we'll be relying on.

16 So as Mr. Hunter mentioned, this petition
17 relates to actions taken by the respondents who
18 are the Minister of the Environment, the Minister
19 of Energy, Mines, and Natural Gas and the
20 executive director of the Environmental Assessment
21 Office under the B.C. Environmental Assessment Act
22 which is [SBC 2002] c.43, and I'm going to refer
23 to that this morning as the act, and that act is
24 at, in our authorities at volume 2, tab 22 and I'm
25 going to be walking through it in some detail, so
26 I think it would be useful to have open at this
27 point.

28 So in essence the act establishes a regime
29 for the review of large-scale projects to
30 determine --

31 THE COURT: Now, are you following your written
32 submission?

33 MS. GLEN: I will, I do intend --

34 THE COURT: You are not quite there yet?

35 MS. GLEN: I do intend to follow the written
36 submissions loosely. I'm going to follow the same
37 general order as the written submissions, but I do
38 intend to provide additional context and
39 information, so I'm essentially at paragraph 18 of
40 our written submissions.

41 So as I mentioned, the act establishes a
42 regime for the review of large-scale projects to
43 determine the project's potential effects and it
44 requires that certain projects undergo an
45 environmental assessment and obtain an
46 environmental assessment certificate before the
47 project can proceed.

1 The act was enacted in 2002 and replaced
2 B.C.'s first Environmental Assessment Act which
3 was [SBC 1994] c.35 and the 1994 act had been
4 enacted by the then governing New Democratic
5 Party. The 2002 act, while it doesn't contain an
6 explicit purposes clause, was part of a broader
7 deregulation initiative by the liberal government
8 and was intended, among other things, to make the
9 environmental assessment process more timely and
10 cost efficient and to reduce delays in the
11 process, and there are some authorities cited in
12 our written submissions with respect to sort of
13 the purposes of the act. I'm not going to spend
14 any time on that right now, but they are there in
15 our written submissions and in the book of
16 authorities.

17 So under the act the assessment of reviewable
18 projects is managed by the EAO which gets its
19 authority from section 2 of the act, and if His
20 Lordship will turn to that section which, sort of
21 using the page numbers at the top of tab 22, it's
22 page 6 of 56. That section simply provides the
23 Environmental Assessment Office is continued as an
24 office of the government and the purpose of the
25 Environmental Assessment Office is to carry out
26 the responsibilities given to it under this act.

27 Section 3 of the Environmental Assessment Act
28 provides that the lieutenant governor in council
29 must appoint an individual to be the executive
30 director of the Environmental Assessment Office
31 and at the times relevant to this petition, the
32 executive director was a man named Derek Sturko.

33 Section 4 of the act authorizes the executive
34 director to delegate his powers and duties to
35 subordinates within the EAO, so section 4(1) says:

36
37 The executive director, by conditional or
38 unconditional written authority, may delegate
39 any of the powers and duties of the executive
40 director under this Act to any person
41 (a) employed in the Environmental Assessment
42 Office, or
43 (b) assigned to the Environmental Assessment
44 Office although not employed in that office.

45
46 Subsection (2) there provides that:

47

1 A person to whom the executive director
2 delegates powers and duties under subsection
3 (1) may exercise the powers and must perform
4 the duties in accordance with the written
5 authority.
6

7 So in practice the executive director can't of
8 course complete all of the assessments, so he
9 often delegates the assessment of a particular
10 project, whether it's a mining project or a hydro
11 project or some other type of project, to a
12 project assessment director or a project
13 assessment manager within the EAO, and that's what
14 occurred in this case, which I will discuss in a
15 bit more detail when I get into the actual facts
16 of Pacific Booker's case.

17 In order to fall within the purview of the
18 act, a project must first be designated as a
19 reviewable project and that term is defined in
20 section 1 of the act. If the court would turn to
21 page 5 of 56 there's a definition there and it
22 says that:

23
24 "Reviewable project" means a project that is
25 within a category of projects prescribed
26 under section 5 or that is designated by the
27 minister under section 6 or the executive
28 director under section 7, and includes
29 (a) the facilities at the main site of the
30 project,
31 (b) any off-site facilities related to the
32 project that the executive director or
33 minister may designate, and
34 (c) any activities related to the project
35 that the executive director or the minister
36 may designate.

37
38 And there's no dispute in this case that the
39 Morrison copper and gold mine was a reviewable
40 project within the meaning of the act, so I'm not
41 going to spend any further time on the different
42 ways in which projects become designated
43 reviewable.

44 If the court would turn to section 8 of the
45 act, which is at page 9 of 56, that section
46 provides that:
47

1 Despite any other enactment, a person must
2 not
3 (a) undertake or carry on any activity that
4 is a reviewable project, or
5 (b) construct, operate, modify, dismantle or
6 abandon all or part of the facilities of a
7 reviewable project, unless
8 (c) the person first obtains an environmental
9 assessment certificate for the project, or
10 (d) the executive director under section
11 10(1)(b) has determined that an environmental
12 assessment certificate is not required for
13 the project.

14
15 So that provision there is what creates the
16 requirement for the certificate.

17 The term environmental assessment certificate
18 as used in this provision is again defined in
19 section 1 and that's at page 4 of 56 and it is
20 simply defined as.

21
22 ...an environmental assessment certificate
23 issued by the ministers under section 17(3).

24
25 And we'll come to section 17 a bit later because
26 that's sort of a critical provision for today's
27 purposes.

28 And while we're in the definition section it
29 might be useful to look at a couple of other
30 definitions that are relevant. The first is the
31 definition of assessment, which is just one page
32 back on page 3, that says:

33
34 "Assessment" means an assessment under this
35 Act of a reviewable project's potential
36 effects that is conducted in relation to an
37 application for
38 (a) an environmental assessment certificate,
39 or
40 (b) an amendment of an environmental
41 assessment certificate.

42
43 And the next definition there is:

44
45 "Assessment report" means a written report
46 submitted to ministers under section 17(2),
47 summarizing the procedures followed during,

1 and the findings of, an assessment.
2
3 So under the act the process for obtaining an
4 environmental assessment certificate is outlined
5 in part 3 which starts on page 11 of 56 and,
6 broadly speaking, the process has three phases.
7 The first is the pre-application phase, the second
8 is called the application review phase and the
9 third step is the ministers' decision, and so I'm
10 going to start with the pre-application phase.
11 The purpose of this phase is to ensure that
12 when an application for an environmental
13 assessment certificate is ultimately reviewed by
14 the EAO and then by the ministers, that it
15 contains the necessary information to allow the
16 EAO to undertake its assessment of the project's
17 potential effects. So the first step in the
18 process is for the EAO to determine whether or not
19 an environmental assessment certificate, and by
20 implication an assessment, is needed for the
21 project, and that step is addressed in section 10
22 of the act which is on page 11 of 56 and that
23 section says the executive director by order may,
24 and it gives three options, so the first option
25 is:
26
27 (a) refer a reviewable project to the
28 minister for a determination under section
29 14.
30
31 And if the court will flip three pages to section
32 14, which is on page 16 of 56, that section
33 provides that:
34
35 If the executive director under section
36 10(1)(a) refers a reviewable project to the
37 minister, the minister by order
38 (a) may determine the scope of the required
39 assessment, and
40 (b) may determine the procedures and methods
41 for conducting the assessment...
42
43 So that's the first option, the executive director
44 can refer a project to the minister and then the
45 minister gets to determine the scope of the
46 assessment. That's not what happened here, so
47 we're not under section 14, but it's relevant and

1 I just wanted to highlight that because it comes
2 into play with some of the other provisions that
3 we deal with.

4 Under section 10, again back on page 11 of
5 56, the second option is:

6
7 (b) if the executive director considers that
8 a reviewable project will not have a
9 significant adverse environmental, economic,
10 social, heritage or health effect, taking
11 into account practical means of preventing or
12 reducing to an acceptable level any potential
13 adverse effects of the project, may determine
14 that

15
16 (i) an environmental assessment
17 certificate is not required for the
18 project, and

19 (ii) the proponent may proceed with the
20 project without an assessment.

21
22 That didn't happen here. We're also not under
23 section 10(1)(b).

24 So we're under section 10(1)(c) which
25 provides that:

26
27 (c) if the executive director considers that
28 a reviewable project may have significant
29 environmental, economic, social, heritage or
30 health effect, taking into account practical
31 means of preventing or reducing to an
32 acceptable level any potential adverse
33 effects of the project, may determine that

34
35 (i) an environmental assessment
36 certificate is required for the project,
37 and

38 (ii) the project may not proceed without
39 an assessment.

40
41 So in practice the way the process typically works
42 is as follows. The proponent will submit a
43 project description to the Environmental
44 Assessment Office which will outline the nature
45 and scope of the project. The executive director
46 or one of his delegates, maybe a project
47 assessment director, will use that description to

1 determine whether a project is a reviewable
2 project within the meaning of the act, and if it
3 is reviewable, the executive director or his
4 delegates will use the description again to
5 determine whether, under section 10, the project
6 requires an assessment or not, and if they do
7 determine that an assessment is required, they
8 will issue what's known as a section 10 order
9 which is simply an order that confirms that a
10 certificate is required for the project, and it's
11 once a section 10 order is issued that the actual
12 environmental assessment begins.

13 Generally at this point the project
14 assessment director or manager in the EAO will
15 contact affected First Nations to discuss their
16 participation in the process and will also form a
17 working group which will include representatives
18 from various provincial and federal agencies,
19 department of fisheries, department of -- you
20 know, various government departments that may have
21 an interest in the project, and it will include
22 the Canadian Environmental Assessment Agency,
23 First Nations and perhaps local governments, and
24 the purpose of the working group is to provide
25 input on the project.

26 Section 11 of the act, which is at page 13 of
27 56, provides that:

28
29 If the executive director makes a
30 determination set out in section 10(1)(c) for
31 a reviewable project, the executive director
32 must also determine by order
33 (a) the scope of the required assessment of
34 the reviewable project, and
35 (b) the procedures and methods for conducting
36 the assessment, including for conducting a
37 review of the proponent's application under
38 section 16, as part of the assessment.

39
40 And then section 11 subsection (2) then goes on to
41 clarify that:

42
43 The executive director's discretion under
44 subsection (1) includes but is not limited to
45 the discretion to specify by order...

46
47 A list of various issues that the executive

1 director may address, and I'm not going to take
2 the court through all of them, I just want to
3 highlight a few. Section 11(2)(b) says that the
4 executive director has the discretion in a section
5 11 order to address the potential effects to be
6 considered in the assessment, including the
7 potential of cumulative environmental effects.
8 Subsection (c), they get to specify the
9 information required from the proponent, and then
10 turning over the page to subsection (f), there's a
11 few other provisions, I'm going to skip to (f),
12 sorry, which says that the executive director gets
13 to specify the persons and organizations,
14 including but not limited to the public, First
15 Nations, government agencies and, if warranted in
16 the executive director's opinion, neighbouring
17 jurisdictions to be consulted. So he has a fairly
18 broad discretion to determine the procedures for
19 the assessment.

20 And then on page 15 of 56, subsection (3) of
21 section 11, says that:

22
23 The assessment of the potential effects of a
24 reviewable project must take into account and
25 reflect government policy identified for the
26 executive director, during the course of the
27 assessment, by a government agency or
28 organization responsible for the identified
29 policy area.

30
31 So there are some limits on the executive
32 director's discretion there to establish the
33 procedures.

34 Section 13, just at the bottom of that page,
35 authorizes the executive director to vary the
36 scope and methods determined under section 11
37 during the course of an assessment. So the basic
38 point is that the executive director has the
39 discretion to determine the procedures and methods
40 for conducting the assessment and they will
41 typically specify these in what's known as a
42 section 11 order.

43 Now, in practice, the way the process works
44 is that the project proponent and the EAO will
45 often negotiate what's known as terms of reference
46 and for our purposes I'm using the term that was
47 in use at the time that Pacific Booker went

1 through the process. That term, the EAO now uses
2 the term application information requirements
3 instead of terms of reference, but it essentially
4 means the same thing. So the EAO and the
5 proponent will negotiate, go back and forth over
6 the terms of reference, and then they will agree
7 on them and then the proponent must then satisfy
8 the terms of reference for the assessment.

9 So the act itself doesn't explicitly refer to
10 the terms of reference, but the role of the terms
11 of reference was discussed in a user guide that
12 the EAO published on its website for the general
13 public, and if I could maybe just have the court
14 set aside the act for a moment but keep it handy
15 because we'll come back to it, and turn to the
16 petition record, volume 3 of the record, and at
17 tab 7 of that volume that's an affidavit from
18 Derek Sturko who was the executive director of the
19 EAO at the times relevant to this application and
20 we're going to look at tab C to that affidavit, so
21 there should be a C tab marked there and that's
22 the EAO user guide which is basically an overview
23 of this process provided to the general public,
24 and if the court would turn to the page that's
25 marked in the top right corner as page 489, those
26 are the page numbers to the affidavit of Mr.
27 Sturko. That page there discusses information
28 requirements for the application, so under the
29 heading in the middle of the page that says draft
30 application information requirements (formerly
31 terms of reference), I'm just going to read that
32 portion because that outlines the role of the
33 terms of reference in this process. It says:

34
35 The next step in the environmental assessment
36 process is to specify the information that
37 must be included in the application for an
38 environmental assessment certificate. The
39 EAO does this by issuing a document referred
40 to as the "Application Information
41 Requirements" (formerly referred to as the
42 terms of reference). This is an important
43 document because it identifies the issues to
44 be addressed in the assessment and the
45 information that must be included in the
46 application (e.g. baseline studies, approach
47 to assessing cumulative impacts, etc.).

1 Proponents must pay particular attention to
2 the application information requirements
3 because the Environmental Assessment Act does
4 not allow the EAO to accept an incomplete
5 application.
6

7 To develop the application information
8 requirements the proponent prepares a draft, the
9 EAO seeks feedback from the working group, First
10 Nations and the public. The EAO also obtains
11 public input through posting the draft information
12 requirements on the e-PIC website, issuing an RSS
13 feed to interested parties, specifying a period
14 and process for public written input and directing
15 the proponent to hold a public open house in one
16 or more locations near the project.
17

18 And then turning to the next page:
19

20 The EAO approves and formally issues the
21 application information requirements document
22 when it is satisfied that the document is
23 complete and appropriate for the assessment
24 to be undertaken:
25

26 Then it says the application information
27 requirements generally contain the following core
28 elements and there's a list of bullet points
29 there. Those are description of the project
30 including all key project elements, spatial and
31 temporal boundaries of the assessment,
32 consultation that will take place, project setting
33 and characteristics, including a description of a
34 wide range of baseline studies that the proponent
35 will undertake, scope of the assessment including
36 a list of all potential effects that will be
37 considered, methodology for assessing impacts and
38 mitigating effects, assessment of the potential
39 significant adverse effects including proposed
40 mitigation measures and residual effects, and
41 commitment to provide environmental management
42 systems and monitoring plans. So those are the
43 types of things that end up in the terms of
44 reference and that's what defines the scope of an
45 assessment for a project.

46 Now, once the terms of reference have been
47 agreed to the project proponent then has to follow

1 through on them, so they will undertake all of the
2 technical studies and collect all of the data and
3 information that's specified and for some projects
4 this will take many months, if not years, and once
5 the proponent has finished collecting all of this
6 data they will put together an application to the
7 EAO and submit it, and section 16 of the act,
8 which is again back in our book of authorities, if
9 the court will maybe leave that tab open, the user
10 guide, we'll come back to it in a moment, but look
11 for the moment at section 16 of the act which is
12 at page 19 of 56, that section provides that:

13
14 The proponent of a reviewable project for
15 which an environmental assessment certificate
16 is required under section 10(1)(c) may apply
17 for an environmental assessment certificate
18 by applying in writing to the executive
19 director and paying the prescribed fee, if
20 any, in the prescribed manner.

21
22 And then subsection (2) says:

23
24 An application for an environmental
25 assessment certificate must contain the
26 information that the executive director
27 requires.

28
29 And the information that the executive director
30 requires is what's set forth in the section 11
31 order and the terms of reference.

32 And then subsection (3) provides that:

33
34 The executive director must not accept the
35 application for review unless he or she has
36 determined that it contains the required
37 information.

38
39 So the EAO user guide again also talks about
40 applications, so once a proponent has completed
41 all of the analysis they put together their
42 application, and if the court would turn briefly
43 to page 494 of the user guide, which was the
44 document we just had open, that again talks about
45 the application that's prepared and submitted, and
46 looking at the second to last paragraph on page
47 494, it says:

1
2 The application must address all issues
3 outlined in the application information
4 requirements. It will include the
5 proponent's baseline data of the study area
6 as well as the proponent's analysis of the
7 potential environmental, social, health,
8 heritage and economic effects of the project.
9 Much of the application will focus on the
10 mitigation measures or compensation
11 strategies the proponent is prepared to take
12 to avoid or minimize those significant
13 adverse effects. The particularly important
14 part of the application is a table of
15 commitments. This table, which will likely
16 undergo changes during the review of the
17 application, outlines the commitments (e.g.,
18 mitigation strategies, monitoring, etc.),
19 that the proponent will make if a certificate
20 is issued. The finalized table of
21 commitments is attached to the environmental
22 assessment certificate.

23
24 And turning to the next page:

25
26 As part of their application the proponent
27 must prepare a report indicating the public
28 and First Nations consultation activities
29 that they have completed and how they plan to
30 consult during the review of their
31 application.

32
33 Then it says:

34
35 Once a proponent completes the application,
36 it is submitted to the EAO for screening.

37
38 So the application gets submitted to the EAO, the
39 EAO reviews it to determine whether it contains
40 all the required information or not because the
41 statute that we just, the section 16 that we just
42 looked at showed that if it is incomplete the EAO
43 cannot accept it. If it's not accepted for review
44 the proponent will be notified and will have an
45 opportunity to rectify any deficiencies and then
46 they can re-apply, and then section 16, subsection
47 (4) and subsection (5) of the act, which are again

1 in our authorities at tab 22 and starting on page
2 19, they outline what happens once an application
3 is accepted. So it says:

4
5 On accepting the application for review, the
6 executive director
7 (a) must notify the proponent of acceptance
8 for review, and
9 (b) may require the proponent, for the
10 purpose of the review, to supply a specified
11 number of paper or electronic copies of the
12 application, in the format specified by the
13 executive director.

14
15 And then subsection (5):

16
17 On receipt of the copies of the application
18 required under subsection (4), the executive
19 director must proceed with and administer the
20 review of the application in accordance with
21 the assessment procedure determined under
22 section 11(1) or as varied under section 13.

23
24 So it's once the application is accepted that that
25 marks the beginning of the second stage of the
26 process, the application review period.

27 During the application review period the EAO
28 will review the application and solicit input from
29 the public and the working group, including First
30 Nations, regarding the application, and the
31 proponent is expected during this phase of the
32 process to keep track of comments from the working
33 group and the public and respond to all of the
34 concerns that are raised about the project, and
35 proponents will often make changes to the project
36 design or commit to various mitigation measures or
37 other measures to address concerns that are raised
38 in the process, and at the end of the application
39 review process when the EAO has completed its
40 assessment of the potential effects of the
41 project, they've reviewed all of the studies, all
42 of the data, taken into account the views of the
43 working group, the application for a certificate
44 will be referred to the ministers for a decision,
45 and who the ministers are will depend on the type
46 of project. In this case because it was a mine,
47 the ministers who made the decision jointly were

1 the Minister of the Environment and the Minister
2 of Energy, Mines, and Natural Gas.

3 And the procedures governing referrals are
4 outlined in section 17 of the act, so section 17,
5 subsection (1) says:

6
7 On completion of an assessment of a
8 reviewable project in accordance with the
9 procedures and methods determined or varied
10 (a) under section 11 or 13 by the executive
11 director,
12 (b) under section 14 or 15 by the minister,
13 or.
14 (c) under section 14 or 15 by the executive
15 director, a commission member, hearing panel
16 member or another person

17
18 the executive director, commission, hearing
19 panel or other person, as the case may be,
20 must refer the proponent's application for an
21 environmental assessment certificate to the
22 ministers for decision under subsection (3).

23
24 So just looking at those sort of three options in
25 section 17(1), we're dealing with 17(1)(a) because
26 the procedures and methods for the assessment in
27 this case were determined under section 11 by the
28 executive director. This wasn't one of those
29 cases where it went under section 14 to the
30 ministers.

31 Now, there's a reference in section 17 at the
32 bottom, it talks about the executive director,
33 commission, hearing panel or other person, as the
34 case may be, and the court may be wondering who is
35 being referred to with respect to the words
36 commission, hearing panel or other person, as the
37 case may be, and I think that the context for that
38 is clear if one looks at section 14 of the act
39 which, as I noted, is a provision that we are not
40 under, but it puts 17 in context.

41 So section 14, as we looked at before,
42 subsection 14(1), deals with situations in which
43 the executive director is determining the scope of
44 an assessment, and then 14(3) says in order --
45 sorry, I made a -- I misspoke there. Section 14
46 sub (1) is dealing with situations in which the
47 minister, not the executive director, is

1 determining the scope of an assessment, and
2 section 14 sub (3) down at the bottom of the page
3 says:

4
5 An order of the minister making a
6 determination under this section may
7 (a) require that the assessment be conducted

8
9 And then there's three options:

10
11 (i) by a commission that the minister
12 may constitute for the purpose of the
13 assessment...

14
15 And then there's option number (ii) is by a
16 hearing panel with a public hearing to be held, or

17
18 (iii) by any other method or procedure
19 that the minister considers appropriate
20 and specifies in the order, and by the
21 executive director or any other person
22 that the minister may appoint.

23
24 So that's sort of an alternative method for
25 environmental assessments to take place. The
26 minister can decide that it has to go out to a
27 commission, a hearing panel or any other person by
28 any other method that the minister determines.
29 We're not under this section.

30 But if the court will just flip back to
31 section 17, I submit that the references in
32 section 17, 17(1) and later in 17 subsection (2)
33 to the executive director, commission, hearing
34 panel or other person, the words commission,
35 hearing panel or other person are referring back
36 to situations that arise under section 14 of the
37 act.

38 Section 17, subsection (2) of the act states
39 that:

40
41 A referral under subsection (1) must be
42 accompanied by
43 (a) an assessment report prepared by the
44 executive director, commission, hearing panel
45 or other person as the case may be.

46
47 Again, commission, hearing panel or other person

1 as the case may be we submit don't apply in this
2 circumstance, so in our submission it's an
3 assessment report prepared by the executive
4 director.

5 In subsection (b) then it says a referral
6 must also be accompanied by:

7
8 (b) the recommendations, if any, of the
9 executive director, commission, hearing panel
10 or other person, and

11 (c) reasons for the recommendations, if any,
12 of the executive director, hearing panel or
13 other person.
14

15 So it's clear from section 17, subsection (2) that
16 the executive director must prepare an assessment
17 report and that was something that we, a
18 definition that we looked at earlier which was
19 just a written report submitted to the ministers
20 under subsection 17(2) which summarizes the
21 procedures followed during and the findings of an
22 assessment, and that they have the option to also
23 provide recommendations and reasons, but they
24 don't have to.

25 And then the third and final step in the
26 environmental assessment process is for the
27 ministers to make a decision about whether or not
28 to issue a certificate to the project and that
29 section is, that step in the process is addressed
30 in section 17(3) and that says:

31
32 On receipt of a referral under subsection
33 (1), the ministers

34 (a) must consider the assessment report and
35 any recommendations accompanying the
36 assessment report,

37 (b) may consider any other matters that they
38 consider relevant to the public interest in
39 making their decision on the application, and

40 (c) must

41 (i) issue an environmental assessment
42 certificate to the proponent, and attach
43 any conditions to the certificate that
44 the minister considers necessary,

45 (ii) refuse to issue the certificate to
46 the proponent, or

47 (iii) order that further assessment be

1 carried out in accordance with the
2 scope, procedures and methods specified
3 by the ministers.
4

5 So the ministers basically have three options,
6 issue a certificate, deny a certificate or send it
7 back for further assessment, and it's clear from
8 section 17(3)(b) that when they are making that
9 decision they have a very broad discretion to
10 consider whatever factors they consider to be
11 relevant to the public needs. So that's where the
12 real sort of political decision gets made as to
13 whether a certificate will be issued.

14 Section 24 of the act which starts on page 30
15 provides that various steps in the assessment must
16 be completed within certain time limits and
17 there's a regulation, the prescribed time limits
18 regulation which specifies the exact time limits,
19 but section 24(2) and 24(4) authorize the
20 executive director to suspend or extend time
21 limits under certain circumstances. So there's a
22 fair bit of flexibility in terms of the timing of
23 all of this. I think the time limits are set as a
24 goal basically, but it's not uncommon for them to
25 get extended.

26 The lieutenant governor in council has made
27 five regulations under the act. They are outlined
28 at paragraphs 36 through 41 of our written
29 submissions. None of them are really central to
30 the issues that we're dealing with today, so I'm
31 not going to walk through them, but they are in
32 our written submissions and they are in our book
33 of authorities if the court would like to refer to
34 them at any point.

35 Now, this isn't part of the statutory scheme,
36 but the EAO has also issued a fairness and service
37 code which is a document that it has published on
38 its website which sets out the EAO's guiding
39 principles and service standards that they will
40 apply in their dealings with interested parties
41 when they are conducting environmental
42 assessments, and the fairness and service code can
43 be found again as an attachment to the affidavit
44 of Derek Sturko, so it's in the same binder that
45 we were looking at before, just at the next tab,
46 tab B, so it's volume 3 of the petition record,
47 tab 7B, and I'm just going to highlight a few

1 aspects of that code that Pacific Booker submits
2 are relevant here. The page numbering is a bit
3 hard to see, the numbering to the Sturko affidavit
4 because it sort of overlays with the images that
5 are at the top of the pages, but if the court
6 looks at the page numbering within the document
7 itself, there's a page 9 and that page numbering
8 is sort of on the -- about three inches down from
9 the top of the page which says guiding principles.

10 THE COURT: Yes.

11 MS. GLEN: And the first guiding principle there is
12 fairness and it says:

13
14 The EAO will undertake objective
15 environmental assessments and will give full
16 and fair consideration to all interests.

17
18 And then if the court skips down to the bottom,
19 the second to last principle is comprehensiveness,
20 it says:

21
22 The EAO will deliver a comprehensive
23 assessment report at the conclusion of each
24 environmental assessment but considers the
25 proposed project's potential significant
26 adverse environmental, economic, social,
27 heritage, and health effects.

28
29 So it's clear that the assessment report is meant
30 to be comprehensive. And the final one there is
31 efficiency and it says:

32
33 The EAO will promote the efficient use of
34 resources by all participants at all stages.

35
36 And then on the next page under the heading
37 service standards, the first one is, with respect
38 to proponents it says:

39
40 Timeliness
41 The EAO will manage the pre-application and
42 application review stages to support a timely
43 and effective assessment process.

44
45 And flipping over to page 11 sort of about
46 two-thirds of the way down the page, it says:

47

1 Early identification of potential concerns
2 and challenges
3 The environmental assessment will identify
4 and evaluate potential effects of a proposed
5 project as early in the process as possible,
6 allowing time for adjustments to be made
7 before design decisions are finalized.

8
9 And in our submission, you know, the way that the
10 process unfolded in this case is not really
11 consistent with those guiding principles and
12 standards, to go through an entire environmental
13 assessment which takes 10 years, get a clean
14 assessment report and then have the executive
15 director turn around at the end of the day and
16 recommend again the issuance of a certificate.

17 THE COURT: Your reference to the comprehensive
18 assessment report, what do you take from that?

19 MS. GLEN: I think that the fact that the assessment
20 report is meant to be comprehensive indicates that
21 it's meant to cover --

22 THE COURT: Is it meant to be inclusive of any
23 considerations that are relevant?

24 MS. GLEN: Exactly, at least with respect to issues
25 that are wherein the scope of the terms -- within
26 the terms of reference of the assessment.

27 Now, obtaining a certificate under the act is
28 obviously a critical step in the process, the
29 regulatory process that governs mining projects,
30 but it's not the only regulatory requirement
31 associated with opening up a new mine. In
32 addition, certain mining projects, including this
33 one, also require approval from the Canadian
34 Environmental Assessment Agency pursuant to the
35 Canadian Environmental Assessment Act, and in
36 addition to the federal approval that's required,
37 proponents of mining projects must also go through
38 an extensive permitting process in which they are
39 required to obtain various additional permits,
40 licenses, approvals under a number of federal and
41 provincial statutes, and for the Morrison copper
42 and gold mine, in addition to the certificate --
43 and at this point I'm at paragraph 49 of our
44 written submissions -- approvals would have been
45 required under the following provincial or federal
46 laws, and this is not an exhaustive list, but it
47 just gives a sense of how regulated these projects

1 are and how many additional approvals there would
2 have been after the certificate. The Mineral Land
3 Tenure Act, the Land Act, the Forest Act, the
4 Mines Act, the Environmental Management Act,
5 Fisheries Act, the Water Act, the Drinking Water
6 Protection Act, the Fire Services Act, the
7 Heritage Conservation Act, the Wildlife Act, the
8 Navigable Waters Protection Act, Explosives Act,
9 the Migratory Bird Convention Act of 1994 and the
10 Species at Risk Act. So this is, you know, a very
11 heavily regulated industry, as it should be.

12 So that's basically the statutory context in
13 which the environmental assessment here occurred
14 and I'm now going to go into some of the key facts
15 from Pacific Booker's perspective. A complete
16 summary of the facts is in our written submissions
17 starting at paragraph 49, it goes through to
18 paragraph 111. I'm going to generally follow the
19 same order as that section, but I don't intend to
20 stick to it paragraph by paragraph. I want to
21 provide a more high-level overview at some stages
22 and I also want to go into some detail on the
23 assessment report.

24 So I'll start with a little bit of background
25 about Pacific Booker Minerals and the project and
26 in this section just when I'm talking about
27 Pacific Booker and the project, I think that the
28 facts are not really disputed, so I'm not going to
29 take the court to all of the documents in the
30 record that support every assertion, but those are
31 cited in our written submissions.

32 Pacific Booker is a company incorporated
33 under the laws of B.C. with its records and
34 registered address in Vancouver. It's publicly
35 traded on the TSX Venture Exchange and on the New
36 York Stock Exchange Market Equities Exchange.

37 The proposed Morrison Copper Gold Mine
38 project is located 65 kilometers northeast of
39 Smithers and about 30 kilometers north of the
40 village of Grenisle, B.C. on the eastern shore of
41 Morrison Lake and the project is designed to
42 extract approximately 30,000 tonnes of ore per
43 day. It's based on a conventional
44 truck/shovel/open pit mine and copper flotation
45 process that has been designed to produce an
46 average of 130,000 tonnes of concentrate per year
47 containing copper and gold and a separate

1 molybdenum concentrate would also be produced.

2 So as noted, Pacific Booker -- sorry, the
3 project is near the edge of Morrison Lake.
4 Morrison Lake drains into Lake Babine which in
5 turn drains into the Babine River which ultimately
6 drains into the Skeena River, so the footprint of
7 the proposed mine is situated within the asserted
8 traditional territory of the Lake Babine Nation,
9 and a section of the proposed transmission line
10 route to the property also passes through the
11 northeastern section of the Yekooche First
12 Nation's asserted traditional territory.

13 Now, the Gitxsan hereditary chiefs, who are
14 interveners in this proceeding, and also the
15 Gitanyow hereditary chiefs allege that they are
16 affected by the project to the extent that they
17 fish in the Skeena River since the water from
18 Morrison Lake ultimately ends up in the Skeena
19 River.

20 THE COURT: Are you in your written submission now on
21 these most recent remarks?

22 MS. GLEN: The most recent remarks regarding the
23 Gitxsan and the Gitanyow are not in our written
24 submission. I don't think those facts are
25 contested, but if I'm wrong I'm sure that Ms.
26 Friesen will correct me, and now I'm at paragraph
27 54 of the written submission.

28 If the project proceeds as planned it is
29 expected to have significant economic benefits to
30 British Columbia and Canada and I'm going to come
31 to the part in the final -- in the Environmental
32 Assessment Office's assessment report that
33 outlines specifically what those benefits are a
34 bit later when we talk through that report more
35 closely.

36 So now I'm just going to provide an overview
37 of Pacific Booker's involvement in the
38 environmental assessment process. Pacific Booker
39 began working towards obtaining a certificate for
40 the Morrison Copper Gold Mine in 2002 when it
41 started collecting baseline data regarding water
42 quality in Morrison Lake and other factors
43 relevant to an environmental assessment.

44 In September, 2003 Pacific Booker submitted
45 an initial project description to the EAO and the
46 EAO determined that the project was a reviewable
47 project and issued a section 10 order on September

1 30th, 2003 confirming the certificate was required
2 for the project, and if the court would turn to
3 the section 10 order, it's in the petition record
4 at volume 1 and it's at tab 4 which is the
5 affidavit number 1 of Erik Tornquist who is a
6 representative of Pacific Booker, and it's at tab
7 H to that affidavit, so there should be a little H
8 tab which should make it easy for the court to
9 find. So that's just the section 11 order. It's
10 dated September 30th, it just provides that
11 whereas Pacific Booker Minerals proposes to
12 construct and operate an open pit copper and gold
13 project 65 kilometers northeast of Smithers and 35
14 kilometers north of the village of Grenisle,
15 British Columbia. In (b), it provides that the
16 project constitutes a reviewable project pursuant
17 to part 3 of the reviewable projects regulation.
18 I'm not going to read it word for word, I'm just
19 going to paraphrase a bit. (c), on September
20 30th, 2003 the executive director, in accordance
21 with section 4 of the act, delegated certain
22 statutory and regulatory powers and duties to the
23 undersigned project assessment manager, and at
24 that time the project assessment manager was a man
25 named Bob Hart. That changes a few times over the
26 course of the assessment.

27 The actual order there appears after the
28 words now thereof, it says:

29
30 Now therefore, pursuant to section 10(1)(c)
31 of the act, the undersigned project
32 assessment manager orders that an
33 environmental assessment certificate is
34 required for the project and the proponent
35 may not proceed with the project without an
36 assessment.

37
38 So that's again back in September, 2003. So
39 that's the beginning of the formal environmental
40 assessment process.

41 Just to skip ahead a tiny bit, so Bob Hart is
42 the project assessment manager at the time of this
43 order. From February, 2009 onwards which is,
44 includes the sort of critical time frame for
45 purposes of this petition, the project assessment
46 director was a man named Chris Hamilton, and in
47 his capacity as project assessment director Mr.

1 Hamilton exercised certain powers and duties that
2 had been delegated to him from the executive
3 director and the delegation of authority to Mr.
4 Hamilton is also in the petition record, it's at
5 volume 4, and our apologies that the record is so
6 bulky, there's a lot of affidavit evidence here,
7 so it's difficult to deal with.

8 So at tab 26 of volume 4, that's the third
9 affidavit of Chris Hamilton, he attaches as
10 exhibit A a true copy of the delegation order of
11 the executive director under section 4 of the
12 Environmental Assessment Act which was in effect
13 at the time that you prepared the assessment
14 report, and so then the exhibit is a copy of the
15 delegation of authority. It says:

16
17 Pursuant to section 4 of the act the
18 executive director of the Environmental
19 Assessment Office hereby delegates the powers
20 and duties assigned to the executive director
21 under...

22
23 And then there's a list of sections of the act and
24 regulations, I'm not going to read that. It says
25 it delegates those powers to each person employed
26 by the Environmental Assessment Office as project
27 assessment director or project assessment manager
28 and says this delegation is in effect until
29 rescinded by the executive director or until a
30 person the authority has been delegated to is no
31 longer a project assessment director or project
32 assessment manager. The powers and duties
33 referred to in this delegation must be exercised
34 in accordance with any directions, policies or
35 guidelines set by the executive director. Nothing
36 in this delegation derogates from the executive
37 director's ability to exercise or carry out any of
38 the above powers and duties during the terms of
39 this delegation.

40 So that's the delegation pursuant to which
41 Chris Hamilton, who is the project assessment
42 director during the final stages of this
43 assessment, was acting, and he was the one who was
44 the primary drafter of the assessment report that
45 I'm going to take the court to in a few moments.

46 So after issuing the section 10 order in this
47 case, and that order again was in 2003, the EAO

1 established a multi-agency working group to
2 provide advice on the potential effects,
3 mitigation measures and conditions required in the
4 environmental assessment. The working group
5 included various provincial and federal agencies
6 and the village of Grenisle which was the closest
7 community to the mine. The Lake Babine Nation and
8 the Yekooche First Nation were both invited to
9 join the working group because the mine, or parts
10 of it, lay within their asserted traditional
11 territory and the Lake Babine Nation participated
12 throughout the process.

13 On January 18th, 2008 the EAO issued a
14 section 11 order defining the scope of the
15 proposed project and the procedures and methods
16 for conducting the review and that order is quite
17 important from our perspective. It can be found
18 again in volume 1 of the petition record at tab J
19 to the Tornquist affidavit, so just two tabs -- so
20 it's volume 1, tab 4J. So the first page of that
21 order says order under section 11, it has a bunch
22 of whereas clauses. I'm just going to skip over
23 them because the actual order is on the next page,
24 the orders after the words now thereof, and it
25 says:

26
27 Now thereof pursuant to section 11 of the act
28 I order that the environmental assessment of
29 the project be conducted according to the
30 scope, procedures and methods set out in
31 schedule A to this order.

32
33 And then there's a schedule A and that has detail
34 regarding the scope of the project and the
35 assessment, the assessment procedures that need to
36 be followed.

37 The scope of the environmental assessment is
38 set forth in section 4.1 of schedule A which is
39 on, if you look at the bottom right-hand corner of
40 the page, page 5, and that says:

41
42 The scope of the assessment for the project
43 will include consideration of potential
44 adverse environmental, social, economic,
45 health and heritage effects and practical
46 means to prevent or reduce to an acceptable
47 level any such potential adverse effects, and

1 potential adverse effects on First Nations,
2 aboriginal interests and, to the extent
3 appropriate, ways to avoid, mitigate or
4 otherwise accommodate such potential adverse
5 effects.
6

7 So that's the scope of the assessment. There's a
8 reference in that section to First Nations.
9 That's a defined term in schedule A to the section
10 11 order. On the previous page there's the
11 definitions and in that order First Nations is
12 defined to mean the Lake Babine Nation and the
13 Yekooche First Nation.

14 Now I'm going to skip ahead a bit in the
15 chronology, but this order was ultimately amended,
16 and I'm happy to take a break whenever the court
17 would like.

18 THE COURT: Is this a convenient moment to take the
19 morning break?

20 MS. GLEN: Yeah, that's fine.

21 THE COURT: Thank you.

22 THE CLERK: Order in chambers. Chambers is adjourned
23 for the morning recess.
24

25 (PROCEEDINGS ADJOURNED AT 11:14 A.M.)

26 (PROCEEDINGS RECONVENED AT 11:33 A.M.)
27

28 THE COURT: Ms. Glen.

29 MS. GLEN: All right. When we left off we were just
30 looking at the section 11 order and I just pointed
31 out that the original section 11 order defined
32 First Nations to mean the Lake Babine Nation and
33 the Yekooche First Nation and I was about to skip
34 ahead a bit chronologically just to point out that
35 the section 11 order was later amended to add the
36 Gitxsan hereditary chiefs and the Gitanyow
37 hereditary chiefs to the definition of First
38 Nations and to add a new requirement for
39 consultation with those First Nations, and the
40 amendment is found in what's known as a section 13
41 order. We're going to come back to the binder
42 that's open in a moment, so if the court perhaps
43 could set that aside for a moment and I'll just
44 take the court to the section 13 order which is in
45 volume 3 of the petition record, it's at tab 8 to
46 that binder at exhibit G, so that's an affidavit
47 from Chris Hamilton who was the project assessment

1 director for the project and exhibit G is a copy
2 of the order under section 13 amending the section
3 11 order and there's a bunch of whereas
4 statements. Again, if the court will just look
5 down to number F under the whereas, it says on
6 September 20th, 2010 the Gitxsan chief's office,
7 on behalf of the Gitxsan chiefs, and the Gitanyow
8 hereditary chiefs office on behalf of the Gitanyow
9 chiefs wrote to the British Columbia Minister of
10 the Environment asking to be consulted about the
11 proposed project and asking that a representative
12 of the Skeena Fisheries Commission be invited to
13 join the working group.

14 On October 12th, 2010 the undersigned project
15 assessment director wrote to the Gitxsan chiefs
16 office and the Gitanyow hereditary chiefs office
17 in order, one, to confirm that a representative of
18 the Skeena Fisheries Commission had been invited
19 to and had attended working group meetings, and
20 two, to identify additional ways in which
21 consultation would take place. And H, in view of
22 the recent decision of the British Columbia Court
23 of Appeal in NNTC v. Griffin, the undersigned
24 project assessment director considers it
25 appropriate to amend the order made under section
26 11 of the act so as to incorporate therein the
27 consultation referred to in recital G above.

28 And then on the next page there's the actual
29 amendment to the order, I won't read through it in
30 detail, but essentially it adds the Gitxsan chiefs
31 office and the Gitanyow hereditary chiefs office
32 to the definition of First Nations and then
33 includes some specific additional requirements
34 with respect to consultation of those First
35 Nations. So -- but in all other respects the
36 section 11 order that had been initially issued
37 back in 2008 remained the same in terms of the
38 scope of the assessment and the procedures for the
39 assessment.

40 On May 21st, 2009, and I'm now at paragraph
41 61 in my written submissions, which I'm again
42 following loosely, the EAO approved terms of
43 reference for the project and those terms of
44 reference had actually been under negotiation for
45 three and a half years by that point, so they were
46 approved in May, 2009, but Pacific Booker had
47 submitted the first draft in 2005 and they had

1 been back and forth with the EAO and with members
2 of the working group and the public over those
3 terms, but they were finally finalized in May,
4 2009, and the terms of reference are found in the
5 petition record, volume 1, tab 4, it's again the
6 affidavit of Erik Tornquist at exhibit K, so
7 that's just right after the section 11 order that
8 we were looking at. I believe it may be the
9 binder that's open in front of the court, I could
10 be wrong --

11 THE COURT: Volume 1 did you say?

12 MS. GLEN: Volume 1, yes, volume 1, tab 4, exhibit K,
13 and it says it's the terms of reference as
14 approved by the Environmental Assessment Office on
15 May 21st, 2009 for Pacific Booker Minerals'
16 application for an environmental assessment
17 certificate.

18 Now, this is a 75, or an over 75 page
19 document. I'm not going to take the court through
20 it in full today, we wouldn't have time for that,
21 but I just maybe want to highlight a few sections.
22 Just on the first page after the title page, it
23 has a little (ii) in the bottom, it's project
24 background to the draft application terms of
25 reference, down in the third paragraph it says:

26 The contents of this document constitute the
27 TOR --

28
29
30 That's short for terms of reference,

31
32 -- for the proponent's application. The TOR
33 identifies the issues to be addressed and the
34 information that must be provided by the
35 proponent in its application.

36
37 And then it goes on. And if the court will flip
38 ahead to the page that's marked in the bottom
39 right-hand corner as page 8, numerical 8, there's
40 a table of contents there, so it provides an
41 overview of everything that's in the terms of
42 reference. If the court will flip over to page 9,
43 you'll see section 4, just at the very top of the
44 page, it's the environmental assessment
45 methodology. Section 6, down about two-thirds of
46 the way down the page is assessment of project
47 effects, mitigation measures and significance of

1 residual project affects and then there's a whole
2 list of environmental factors that are to be
3 addressed in the application. Atmosphere and
4 climate, air quality, geology, etcetera, etcetera.
5 Again, we don't, I think, have time to read
6 through the whole document because it's quite
7 lengthy, but if the court will turn to page 28
8 which is the environmental assessment methodology
9 section, that section provides an overview of the
10 methodology for the assessment and, you know,
11 requires the application to describe the
12 methodology used, and in the third paragraph it
13 says:

14
15 The information collected will be gathered
16 and analyzed by qualified professional
17 scientists, engineers and consultants using
18 sound scientific principles.

19
20 So that was what Pacific Booker had to do, it's
21 what it did do. It had scientists, engineers who
22 prepared its application.

23 Going down to the last sentence in that third
24 paragraph it says:

25
26 The application will contain a sufficient
27 level of baseline information to predict
28 positive and negative impacts and will
29 demonstrate the extent to which negative
30 impacts may be mitigated and positive effects
31 augmented by mine design and construction,
32 operational and reclamation practices and
33 environmental management plans.

34
35 And then it goes on, and again I'm not going to
36 read through the whole thing here today.

37 If the court would flip perhaps to page 44 of
38 the terms of reference, that section talks about
39 how the assessment of projects affects mitigation
40 measures and significance of residual project
41 effects will be done, so it says that the
42 application will analyze potential environmental,
43 economic, health, social and heritage effects of
44 the project, including cumulative effects, and it
45 defines what an environmental effect is going to
46 mean.

47 On the next page it has a heading entitled

1 mitigation and it describes how the application
2 will identify technically and economically
3 feasible measures to mitigate potential adverse
4 effects. We describe them and so forth. So this
5 section, and then there's, you know, more detail
6 about the assessment methodology throughout the
7 rest of section 6, so this basically provides a
8 template which sets out what was required to be in
9 Pacific Booker's application, and Pacific Booker
10 prepared an application that was consistent with
11 those terms of reference. In fact, the first
12 version that Pacific Booker submitted to the EAO
13 was on September 28th, 2009, so just a few, four
14 or five months after the terms of reference was
15 finalized, and the EAO first reviewed the
16 application and determined that it did not contain
17 all the required information, so it went back to
18 the company, and the company submitted an addendum
19 and the EAO accepted the addendum for review, so
20 it determined that it did contain all the
21 information required in the terms of reference.

22 The application was ultimately accepted for
23 review on June 28th, 2010 and I'm not going to
24 take the court to the application itself, the full
25 thing is over 15,000 pages, we haven't included a
26 full copy of the application in the record. It is
27 available on -- the EAO has a public website that
28 has information about all the projects, so that
29 application is there, but it's really not --

30 THE COURT: I'm not likely to look it up and read it?

31 MS. GLEN: No, it's not material for the court's
32 purposes.

33 So the application review period formally
34 began on July 12th, 2010 and it took over two
35 years to complete and there was significant back
36 and forth between the EAO, the company, First
37 Nations and other members of the working group
38 during the application review period with respect
39 to the concerns that various stakeholders had with
40 the project. Some of that back and forth is
41 discussed at paragraph 65 through 89 of our
42 written submissions. I'm not going to go through
43 all of that back and forth in my oral submissions
44 today. It's in the written submissions. There's
45 also significant detail about it in the
46 affidavits; in particular, the affidavits 1 and 3
47 of Erik Tornquist, who is a Pacific Booker

1 representative, and the affidavits 1 and 2 of
2 Chris Hamilton, but the key point from Pacific
3 Booker's perspective is that during the
4 application review period Pacific Booker agreed to
5 make various design changes to the mine in
6 response to concerns that various parties had
7 raised and that included, in April, 2012, agreeing
8 to line the tailings storage facility for the mine
9 with a geomembrane liner that would reduce seepage
10 from the tailing storage facility in an attempt to
11 address concerns that various parties had about
12 water quality in Morrison Lake and the impact that
13 the mine might have on that.

14 Another key aspect of the application review
15 stage from our perspective, which I'm not going to
16 go into all the back and forth about, was that it
17 included sending the project out for an
18 independent third party review of water quality
19 issues, so the EAO initially determined that they
20 could not determine, based on the information that
21 Pacific Booker -- or they weren't satisfied based
22 on the information that Pacific Booker had put
23 before them as to whether or not the project would
24 have a detrimental effect on water quality, so
25 they commissioned an independent third party
26 scientist to review that data and the third party
27 review ultimately concluded that the water quality
28 data used by Pacific Booker in its application was
29 reasonable, and I'm going to take the court to a
30 statement in the final assessment report of the
31 EAO that supports that.

32 So the key point basically is that at the end
33 of the application review process when everything
34 was said and done and all the changes had been
35 made to the mine design, the EAO ultimately was
36 satisfied that the project would not result in any
37 significant adverse effects with the successful
38 implementation of all of the mitigation measures
39 that the company had committed to undertaking.

40 So consistent with that conclusion, the EAO
41 started sending draft assessment reports to the
42 company in the spring of 2012 which outlined the
43 fact that it was going to conclude there were no
44 adverse effects. So if the court would turn to
45 volume 4 of the petition record briefly, that's
46 the -- at tab 18 of that volume there's an
47 affidavit number 3 of Erik Tornquist who is a

1 representative of Pacific Booker, and if the court
2 will look at page 13 of that affidavit -- sorry,
3 paragraph 13 I meant to say, it's on page 5, it
4 says:

5
6 On May 7th, 2012 Mr. Hamilton sent an e-mail
7 to me and Harvey McLeod, one of Pacific
8 Booker's consultants from Klohn Crippen
9 Berger --

10
11 Which is a firm,

12
13 -- attaching a revised draft of the EAO's
14 assessment report dated March 14th, 2012
15 which tentatively concluded that the project
16 would not result in any significant adverse
17 effects. Attached hereto as exhibit D is a
18 true copy of Mr. Hamilton's May 7th e-mail on
19 the attached draft assessment report.

20
21 And if the court flips to tab D of that affidavit,
22 that's the e-mail that he's talking about, so the
23 first line is from Chris Hamilton, it says:

24
25 Hi Harvey --

26
27 Again, that's Pacific Booker's consultant,

28
29 -- I've attached my latest version of the
30 draft assessment.

31
32 And then he goes on a bit. If the court will look
33 at the third paragraph down it says:

34
35 You will see longer descriptions of the
36 significant analyses. At the present time,
37 prior to hearing from the CEAA --

38
39 That's a reference to the federal environmental
40 assessment agency,

41
42 -- or any other FN reviewers --

43
44 FN is a reference to First Nations,

45
46 -- I have concluded that there are no
47 significant adverse effects. That is

1 different from earlier versions; however,
2 that could change based on reviews. I'm just
3 saying that to let you know that it's not the
4 final version. With that said, I am feeling
5 comfortable moving ahead given the recent
6 commitments.

7
8 And then there's an attached draft report.

9 And then a couple of days later Mr. Hamilton
10 sends Mr. Tornquist another e-mail.
11 Mr. Tornquist -- if the court would flip back to
12 paragraph 14 of the affidavit which again is at
13 tab 18, he says:

14
15 On May 10th Mr. Hamilton provided Mr. McLeod
16 and me with a revised draft of the assessment
17 report by e-mail. Again the draft assessment
18 report tentatively concluded that the project
19 would not result in any significant adverse
20 effects.

21
22 And then it's attached as exhibit E. And if the
23 court looks at exhibit E, there's the cover e-mail
24 from Mr. Hamilton. I won't take the court through
25 the e-mail today, and then there's an attached
26 assessment report, and just so that the court is
27 clear, if the court looks at page 164 using the
28 numbers in the top right-hand corner which are the
29 page numbers to the Tornquist affidavit, this is
30 the, sort of the draft of the conclusion section
31 of the assessment report. So there it says the
32 proposed project would/would not result in any
33 significant adverse effect. So it's clear that
34 it's not a final draft, he hasn't filled in that
35 part, but if one actually goes through the body of
36 the report and there's each issue that's being
37 examined, water quality, wildlife impacts, for
38 each issue the conclusion in this draft report
39 says no significant adverse effects that can't be
40 mitigated. So the report is clearly in draft
41 form, but that's the direction that the EAO is
42 going.

43 If the court will flip back to paragraph 15
44 of the Tornquist affidavit, it says:

45
46 On June 17th Mr. Hamilton sent Mr. McLeod and
47 me an e-mail in which he attached a draft

1 certified project description for the
2 project. In that e-mail Mr. Hamilton again
3 noted his conclusion that no significant
4 adverse effects had been found.
5
6 And the e-mail is attached as exhibit F, and if
7 the court turns to exhibit F, there's actually two
8 e-mails in that chain, but looking at the lower
9 one, the second paragraph in that e-mail, it says:
10
11 We will go over this document in a fair bit
12 of depth Wed. and we want it ready to go to
13 the WG --
14
15 That's working group,
16
17 -- by Friday along with our assessment report
18 with conclusions this time. No significant
19 adverse effects found.
20
21 And then at the bottom of that paragraph he says:
22
23 We will provide WG with three weeks and note
24 that we will proceed with the referral to the
25 ministers shortly after that.
26
27 So it's June 17th Mr. Hamilton is telling
28 Mr. Tornquist we're planning to provide the draft
29 assessment report to the working group at the end
30 of this week. No adverse effects have been found.
31 Then if the court will just flip to the next
32 exhibit, which is exhibit G, on June 22nd the
33 assessment report, as we understand it, does go
34 out to the members of the working group. Pacific
35 Booker was not in fact copied on the transmission
36 e-mail or letter or whatever it was, but Erik
37 Tornquist from the company e-mailed Mr. Hamilton
38 on that day and says:
39
40 Hi Chris, do you have everything you need?
41 Water EMP to follow. Erik.
42
43 Mr. Hamilton writes back:
44
45 We're all good, Erik. All letters out this
46 aft.
47

1 Short for afternoon.

2
3 It's over to us now, so for the next month
4 just stand by to answer questions and be
5 prepared to discuss small editorial changes.

6
7 So the message being conveyed there is that the
8 draft assessment report has gone out to the
9 working group. There was just going to be small
10 editorial changes from now on.

11 And then the next tab, tab H, just a few days
12 later Chris Hamilton sends an e-mail to Erik and
13 then two other individuals and he says:

14
15 Hi Erik, James and Jen, I wanted to put you
16 all in touch to manage the potential handoff
17 of concurrent permitting for the Morrison
18 mine project. As you may know, the draft
19 assessment report is out with the working
20 group and we are tentatively considering a
21 referral to the ministers as early as the
22 last week in July. Erik is the CEO of
23 Pacific Booker Minerals and will provide you
24 with additional details on the status of work
25 to support the concurrent permits.

26
27 So the concurrent permits, that's a reference
28 there to some of the additional permits that I
29 mentioned earlier that the company would need to
30 get in order to move forward with the mine. So
31 the message really being conveyed by the EAO here
32 is the assessment report has gone out, the EAO
33 seems to be expecting that the mine is soon going
34 to be moving into the permitting phase and that
35 was what the company understood.

36 So after the working group -- sorry, after
37 the draft report went out to the working group,
38 various members of the working group continued to
39 express concerns regarding the project and these
40 were some of the same concerns that had been
41 raised throughout the application review period,
42 issues relating to water quality in Morrison Lake,
43 issues relating to the potential impact that the
44 project might have on the salmon fishery,
45 etcetera, and on July 30th, 2012 a conference call
46 was held with Mr. Hamilton, members of the working
47 group, representatives of Pacific Booker to

1 discuss the concerns and the upcoming referral of
2 the project to the ministers and Mr. Hamilton has
3 discussed this call in his affidavit which is
4 found in volume 3 of the petition record at tab 8,
5 and at paragraph 6 -- this is volume 3 of the
6 petition record, tab 8, and it's paragraph 68 of
7 that affidavit.

8 So here Mr. Hamilton says:

9
10 On July 30th, 2012 I participated in a
11 conference call with members of the working
12 group and representatives of Pacific Booker
13 to discuss the pending referral to the
14 ministers. The participants on this call
15 included Mr. Tornquist and Mr. McLeod.
16 During the call we discussed the ongoing
17 concerns about regulatory agencies with the
18 project. Kim Bellefontaine (MEM) --

19
20 That stands for Ministry of Energy, Mines, and
21 Natural Gas, it's shorthand,

22
23 -- and Greg Tamblyn (MOE) --

24
25 That's short for Minister of the Environment,

26
27 -- were both on the call and the concerns of
28 their respective agencies were specifically
29 discussed. It was agreed that the EAO would
30 provide Pacific Booker with written memos
31 from Ms. Bellefontaine and Mr. Tamblyn
32 setting out the concerns. I suggested to
33 Pacific Booker representatives more than once
34 in the course of the July 30th, 2012
35 conference call that Pacific Booker had two
36 alternatives. Continue with the referral to
37 the ministers on the understanding that the
38 existing concerns of working group members
39 around risk and long-term uncertainty with
40 the project be highlighted to the ministers,
41 or defer referral of the project to the
42 ministers and continue in a review and
43 discussion process with the EAO. Pacific
44 Booker representatives advised that they
45 wished to continue with the referral
46 notwithstanding the uncertainties associated
47 with the project.

1 Now, Mr. Tornquist has also included some evidence
2 about that conference call in his affidavit which
3 is, and I apologize for switching between volumes
4 here, at volume 4 of the petition record at tab
5 18, so it's the same affidavit we were just
6 looking at a few moments ago, and at paragraph 19
7 of that affidavit which again is at tab 18 of
8 volume 4 Mr. Tornquist says:

9
10 In paragraph 68 to 70 of the affidavit number
11 1 of Chris Hamilton, Mr. Hamilton discusses a
12 July 30th, 2012 conference call with the EAO
13 members of the working group and
14 representatives of Pacific Booker. When Mr.
15 Hamilton advised me during the July 30th,
16 2012 conference call that the concerns of the
17 working group would be highlighted for the
18 ministers as part of the referral, I
19 understood him to be saying that he intended
20 to bring those concerns to the ministers'
21 attention by including in the referral
22 package that went to the ministers memos by
23 Ms. Bellefontaine and Mr. Tamblyn in which
24 they set out their concerns relating to the
25 project. At that time I was not particularly
26 troubled by the prospect that such memos
27 would be included in the referral package as
28 I knew the final assessment report had
29 already taken into account the issues that
30 Ms. Bellefontaine and Mr. Tamblyn raised on
31 the July 30th conference call and had
32 concluded, in spite of those concerns, that
33 the project would not result in any
34 significant adverse effects for the
35 successful implementation of mitigation
36 measures. Pacific Booker was not advised
37 during the July 30th conference call, or at
38 any time prior to the ministers' decision, to
39 deny the certificate that the EAO considered
40 the concerns of the MEM --

41
42 That's the Ministry of Energy, Mines, and Natural
43 Gas,

44
45 -- and the MEO --

46
47 That's supposed to say MOE, Ministry of the

1 Environment,
2
3 -- to be of such significance that the
4 executive director of the EAO intended to
5 recommend against approval of the certificate
6 notwithstanding the conclusions of the final
7 assessment report.
8
9 So the company was aware that there were still
10 some concerns even though the assessment report
11 had found no significant adverse effects, but the
12 EAO never told the company that those concerns
13 were of such a level that it was going to issue a
14 negative recommendation.
15 In late July and early August, 2012 the EAO
16 received written submissions from various members
17 of the working group in response to the draft
18 assessment report and in those written submissions
19 certain members of the working group outlined
20 concerns that they had about the project. I'm not
21 going to go to those, each of those letters today,
22 the respondents may take you to them, but they are
23 all included at exhibit A to the affidavit number
24 1 of Derek Sturko which is in the petition record,
25 volume 3, tab 7, exhibit A, and so there's -- it
26 includes -- there's a letter from the Lake Babine
27 Nation, from the Gitanyow First Nation and the
28 Gitksan, there's a letter from August 2nd from the
29 Skeena River -- sorry, Skeena Region Environmental
30 Protection Division of the Ministry of the
31 Environment and then there's a memo dated August
32 8th from the Ministry of Energy, Mines, and
33 Natural Gas.
34 THE COURT: And where do you say I'll find those in the
35 record?
36 MS. GLEN: They are in the petition record at volume 3,
37 tab 7, exhibit A which is the -- that's the
38 affidavit of Derek Sturko, affidavit number 1 of
39 Derek Sturko, and they are at pages 363 to 386 of
40 the exhibits.
41 THE COURT: I see, all right. It's footnoted there.
42 Yes, thank you.
43 MS. GLEN: Okay. So the EAO forwarded the letters that
44 it had received from the Ministry of Environment
45 and the Ministry of Energy & Mines to Pacific
46 Booker on August 9th, 2012 and asked Pacific
47 Booker to provide a response by August 14th, which

1 was just a few business days later, and if the
2 court would look to volume 2 of the petition
3 record, which I think is perhaps the one binder
4 that you have yet to go to, this binder includes a
5 continuation of the affidavit of Erik Tornquist.
6 That starts in volume 1, but it has a lot of
7 attachments, so it goes into volume 2, so that's
8 at tab 5, and we're -- if the court would turn to
9 exhibit U, so that's tab U, this is a letter from
10 Chris Hamilton to Erik Tornquist. He notes in the
11 first paragraph that the EAO has recently received
12 comments from a number of reviewers on their draft
13 assessment report, draft certified contract
14 description and draft table of conditions for the
15 proposed project and that they will be moving to
16 finalize the documents in preparation for a
17 referral. A couple of paragraphs down he says:

18
19 Comments made by reviewers focus on a number
20 of key areas of concern, including --

21
22 And then there's a bullet point list of some of
23 the concerns that were raised. And then on the
24 second page of that letter, the first full
25 paragraph, he says:

26
27 While these issues have all been identified
28 in EAO's draft assessment report, you should
29 be aware that referral documents may also
30 highlight these issues for the ministers when
31 they are considering whether to issue an
32 environmental assessment certificate for the
33 proposed project. Prior to our referral I
34 would like to provide you with a final
35 opportunity to comment on these issues.
36 Irrespective, this will be brought to the
37 attention of the ministers.

38
39 And then he asks for the comments by August 14th.

40 So Mr. Hamilton acknowledged in this letter
41 that all of the issues that were being raised by
42 members of the working group had been identified
43 and addressed in the assessment report and he
44 noted that they might be highlighted for the
45 referral -- highlighted for the ministers, but
46 gave no indication that the EAO was going to
47 either, you know, change its assessment report or

1 issue a negative recommendation that contradicted
2 the assessment report.

3 And then at the next tab, tab V, there is
4 Pacific Booker's response, and I'm not going to
5 take the court through it, but this is just the
6 letter that Pacific Booker wrote in response to
7 those issues, and that brings us to the EAO's
8 final assessment report which I am going to spend
9 a fair bit of time on now.

10 On August 21st, 2012 the EAO issued its final
11 assessment report relating to the project and that
12 report summarized the results of the assessment,
13 and despite the concerns that have been raised by
14 members of the working group, the report continued
15 to reach the same conclusion that the draft
16 reports had reached which was that the project
17 would not result in any significant adverse
18 effects with the successful implementation of
19 mitigation measures.

20 Now, I'll note just in passing that the
21 company didn't actually receive a copy of the
22 final assessment report on August 21st, the date
23 that it was finalized. The EAO told the company
24 on that day that the referral had been made to the
25 ministers and forwarded them a copy of the final
26 assessment report about a week later and there's
27 some citations in the footnotes to the written
28 argument that identify the exhibits where some of
29 those exchanges take place. It's not really
30 critical to go to those exhibits, I don't think
31 there's any dispute here that the company was
32 provided with a draft of the -- or not a draft,
33 the company was provided with a copy of the final
34 assessment report in late August.

35 So now I would like to walk through the final
36 assessment report in some detail and there are
37 actually a couple of copies of it in the record.
38 There's one copy that we cite to in our written
39 submissions, which was the copy that was attached
40 to Erik Tornquist's affidavit. That copy doesn't
41 include the appendices which are quite lengthy.
42 Mr. Sturko's affidavit attaches a copy that does
43 include the appendices, so I'm going to work today
44 from the version that's in Mr. Sturko's affidavit
45 just because that's the more complete version. So
46 that's in volume 3 of the petition record and it's
47 at tab 7 which is again Mr. Sturko's affidavit at

1 exhibit A.

2 THE COURT: Give me a moment while I put these back.

3 MS. GLEN: Sorry about that. So exhibit A is
4 actually -- oh, you're --

5 THE COURT: So which one?

6 MS. GLEN: Sorry, it's at volume 3, tab 7A, so just at
7 the very beginning of volume 3. Now, exhibit A is
8 actually sort of a compilation of a whole bunch of
9 documents and the final assessment report starts
10 on the page that's marked in the top right-hand
11 corner as 57.

12 THE COURT: What number?

13 MS. GLEN: 57. Actually it's 56, but -- so this is the
14 results of the assessment. The cover page says
15 it's with respect to the Morrison Copper Gold Mine
16 project with respect to the application by Pacific
17 Booker Minerals Inc. for an environmental
18 assessment certificate pursuant to the
19 Environmental Assessment Act. It was prepared by
20 the Environmental Assessment Office on August
21 21st. Then there's a preface and then a table of
22 contents and the table of contents shows that
23 there's basically five parts to the report, parts
24 A through E, so part A is introduction and
25 background which includes an overview of the
26 purpose of the report, the project overview and
27 the assessment process. Part B is an assessment
28 of the potential effects, mitigation and
29 significance of residual effects. There's a
30 description at the beginning of assessment
31 methodology and then there's an overview of all of
32 the potential environmental effects of the project
33 and there's various different sub-issues like
34 surface and ground water quantity, ground water
35 quality, aquatic resources and so forth. If the
36 court will turn to the next page and I'm going to
37 refer here to the pages of the assessment report
38 now which are at the bottom of the page.

39 Part C is First Nations consultation, so
40 there's a lengthy discussion in the report of
41 consultation of First Nations in respect of the
42 project, part D on the end of the table of
43 contents is federal requirements and then there's
44 conclusions, and there's two appendices at the end
45 and a variety of tables throughout.

46 If the court will turn to pages 10 and 11 of
47 the report, again using the page numbers at the

1 bottom of the page, that's a summary of the
2 assessment report, so under the heading overview
3 of the environmental assessment it says:
4

5 The Environmental Assessment Office assessed
6 whether the proposed project would result in
7 any significant adverse environmental,
8 social, economic, heritage and health
9 effects. The environmental assessment
10 focused on assessing specific potential
11 effects on the following aspects.
12

13 And there's a list.
14

15 Surface water quality and quantity, ground
16 water quality and quantity, aquatic
17 resources, ecosystems and wetlands, wildlife
18 resources, employment and economy, land and
19 resource uses, human and ecological health
20 factors, heritage and archeological
21 resources.
22

23 The EAO assessed relevant issues raised by
24 First Nations during the course of the EA and
25 whether the Crown has fulfilled its
26 obligations for consultation and
27 accommodation. This assessment report and
28 the EAO's First Nations consultation report
29 have been provided to the provincial
30 ministers for consideration in their decision
31 of whether or not to issue an EA certificate
32 for the proposed project. The EAO is
33 satisfied about that.
34

35 And there's a number of bullets. The first is:
36

37 Consultation with government agencies and the
38 public have been adequately carried out by
39 the proponent.
40

41 The second bullet:
42

43 Relevant issues identified by the public and
44 government agencies were duly considered and
45 assessed by the proponent during the review
46 of the application.
47

1 The third bullet:
2
3 The Crown's consultation duty has been
4 discharged.
5
6 And the fourth says:
7
8 The proposed projects would not result in any
9 significant adverse effects with the
10 successful implementation of mitigation
11 measures and conditions.
12
13 On the next page it outlines the purposes of the
14 report. It says:
15
16 The purpose of this report is to summarize
17 the EA of the application by the proponent
18 for an EA certificate for the proposed
19 project. The EAO is required to prepare this
20 report for provincial ministers who are
21 responsible for making a decision on the
22 proposed project under section 17 of the B.C.
23 Environmental Assessment Act. For mine
24 projects the deciding ministers are the
25 Minister of Environment and the Minister of
26 Energy & Mines. The report describes the
27 proposed project provincial EA process and
28 consultations undertaken during the EA;
29 identifies the potential environmental,
30 economic, social, heritage and health effects
31 of the proposed project and how the proponent
32 proposes to mitigate the effects; identifies
33 the residual effects after mitigation;
34 identifies the commitments proposed by the
35 proponent and sets out conclusions based on
36 the proposed project's potential for
37 significant adverse residual effects.
38
39 And then the report, there's an overview of the
40 project, talks about sort of the nature of the
41 project, its location. I won't go through that,
42 it's not really very controversial. Then on page
43 18 of the report there's a heading that says
44 changes from original mine design resulting from
45 the EA process, and in this section, and I'm not
46 going to read through it because in the interests
47 of time, but there's an overview here of various

1 concerns that were raised with the initial mine
2 design, changes that were made by the proponent to
3 address those concerns, talks about some back and
4 forth between the EAO and the proponent with
5 respect to those concerns.

6 On page 20 there's a table showing some of
7 the major waste management changes that the
8 company agreed to make. That's not all of the
9 changes that the company made over the process,
10 but that's just an example of some of them.

11 On the next page, page 21, it talks about
12 concerns with the revised mine design, so this is
13 again sort of a summary of the EA process that
14 I've already provided an overview of. It says
15 under that heading that the EAO suspended review
16 on day 176 of the 180 day review, on September
17 29th, 2011, because it could not come to a final
18 conclusion on the potential for impacts to water
19 quality and sockeye salmon in Morrison Lake due to
20 lack of appropriate information.

21 Then it talks about the third party review,
22 how they sent the matter out to a third party
23 review. At the bottom of that page it talks about
24 some of the changes that Pacific Booker agreed to
25 make on April 30th of 2012, including the addition
26 of the -- there's two bullets there, it talks
27 about new design options including a 60 mill low
28 density polyethylene geomembrane liner that would
29 cover 96 percent of the five kilometer square TSF,
30 that's the tailing storage facility. The liner
31 was proposed to virtually eliminate seepage from
32 the TSF and address many water quality issues, and
33 then also secondary water treatment facilities to
34 address parameters of concern.

35 Then at the top of page 22 it says, and it's
36 underlined:

37
38 This report is an assessment of the current
39 mine plan described in section 2.32 below
40 which reflects a number of significant
41 changes to both the design of the major
42 mining components and effects analyses over
43 the course of the EA for the proposed
44 project. This report also reflects the
45 findings and analyses of third party
46 reviewers.
47

1 The next part of the report, there's a brief
2 overview of the EA process, the environmental
3 assessment process. I'm not going to take the
4 court through that, we've already gone through
5 that, but this sort of provides a bit more detail
6 on that. There's -- on page 25 there's a short
7 overview of public consultation relating to the
8 project, it talks about 70 day public comment
9 period, open houses, etcetera. There's a very
10 short mention on page 26 of First Nations
11 consultation. That's really just an intro,
12 there's a whole separate section on that, on First
13 Nations consultation later, and then on page 27
14 there's an overview of the assessment methodology
15 and it says, the first paragraph:

16
17 In undertaking this evaluation EAO assessed
18 whether the project as proposed would have
19 significant adverse environmental, economic,
20 social, heritage and health effects including
21 cumulative impacts and potential effects on
22 First Nations asserted aboriginal rights and
23 interests having regard to the mitigation
24 measures proposed in the application or
25 otherwise developed through the EA process.
26 In addressing what may constitute a
27 significant adverse effect, EAO considers the
28 following factors.

29
30 And then there's a list of factors. I'm not going
31 to quote them, but I'll paraphrase briefly, they
32 are context which refers to the ability of the
33 environment to accept change, probability which
34 refers to the likelihood that an adverse effect
35 will occur, magnitude which refers to the
36 magnitude or severity of the effect, geographic
37 extent which refers to the extent of change over
38 the geographic area, whether it's local or
39 regional, duration and frequency refers to the
40 length of the time the effect lasts and how often
41 the effect occurs, and reversibility refers to the
42 degree to which the effect is reversible.

43 Then on the top of page 28 it says:

44
45 The development and refinement of mitigation
46 measures is a key component of the EA process
47 and where the EAO spends an extensive amount

1 of time facilitating discussion and
2 negotiation among the proponent interested
3 parties and First Nations. For this proposed
4 project a key component of the EA process was
5 the design changes made by the proponent to
6 reduce potential effects. The proponent has
7 made commitments which are set out in detail
8 in appendix 2.
9

10 So again it talks about mitigation is a very
11 important aspect of this report, heavily studied,
12 and the company made a number of changes in an
13 attempt to get a clean environmental assessment
14 report and address all of the concerns that people
15 had raised.

16 Now if the court will turn to page 33 of the
17 report. That's the beginning of the actual
18 assessment of potential environmental effects, so
19 this is where the report starts to get into the
20 more technical stuff surrounding surface and
21 ground water quality, quantity, aquatic resources,
22 fish, etcetera, and it talks about all of those
23 issues. I don't have time to go through the
24 conclusions with respect to each of those issues,
25 but just to give a sense of how the assessment
26 worked and the amount of analysis that went into
27 the issue, I do want to kind of provide an
28 overview of one of them.

29 So the first issue that's addressed is
30 surface and ground water quantity, that's starts
31 on page 35, and the framework for the analysis of
32 this issue is basically the same as the way the
33 EAO analyzed each of the other issues that came
34 after it. So it starts with a bit of background
35 information and then on the top of page 36 there's
36 a heading project issues and effects identified in
37 the application, so there's an overview there of
38 potential issues and effects that were inputted in
39 the application materials.

40 Then the next heading is project issues,
41 effects and mitigation identified during
42 application review, so there's a discussion under
43 that heading of concerns that came up during the
44 review, including concerns raised by members of
45 the working group, and at the bottom of that page
46 it says:
47

1 During the application review the technical
2 working group, including First Nations,
3 expressed considerable concerns over
4 uncertainty related to --

5

6 And then there's a number of bullets relating to
7 water quality issues.

8 The second main paragraph on page 37 says:

9

10 During the first suspension --

11

12 And that's referring to a suspension of the 180
13 day time limit for conducting applications,

14

15 -- EAO requested that the proponent present
16 both an expected case and upper bound case,
17 i.e., worst case for the water balance, that
18 took into account new site specific
19 information, information from other similar
20 mines near by (analogous or analogue data),
21 and the potential for climate change. The
22 upper bound information request was in
23 response to concerns that the effects
24 assessment for water quantity was not
25 sufficiently conservative. The predictions
26 discussed below show both the proponent's
27 expected and upper bound scenarios. It
28 should be noted that most of EAO's analysis
29 has been completed on the upper bound or
30 worst-case scenario.

31

32 So this is a conservative assessment there.

33

34 Now, for about the next 10 pages the report
35 continues to discuss various concerns that were
36 raised by members of the working group, goes into
37 some detail, we can skip over that.

38

39 If the court could turn to page 47. At the
40 end of that there's sort of a summary of the key
41 issues that came up during the review with respect
42 to that issue and at the bottom of the paragraph
43 under the heading summary of issues and
44 mitigations it says:

45

46 Examples of some of the key issues and
47 additional commitments include --

48

49 And then the first bullet says:

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Many concerns were expressed by reviewers over the adequacy of comprehensive baseline hydro, geology and water inflow information.

And then there's a bit more detail. And then the white bullets below that show the steps that were taken to address those concerns in the assessment. It's just a summary. It says:

EAO commissioned a third party review of the proponent's hydro, geology, baseline and modelling. The initial third party review indicated some concerns about modelling and UB --

That's upper bound,

-- predictions, in particular ground water flow to the open pit during operations. The proponent addressed these outstanding concerns in their third party review response report and provided new predictions. The third party reviewer confirmed that the new proponent models represented a reasonable upper bound and ground water flow predictions from Morrison Lake to the open pit during operations were reasonable. The third party reviewer also indicated that the proponent's commitment to on closure keep the final pit lake below the elevation of Morrison Lake would prevent water in the open pit from impacting Morrison Lake. The EAO is satisfied with the recommendations of the third party review.

And then there's a couple more bullets that discuss some of the other additional commitments that the company made to address this issue.

And then if the court would turn to the next page, page 49, that's where the EAO goes into a residual effects and cumulative effects analysis. So the EAO says:

After considering all relevant mitigation measures, the EAO concludes that the proposed project would result in residual adverse

1 effects on water quantity.

2

3 So there's some residual effects, but the EAO then
4 has to determine whether they are significant, and
5 this is sort of the approach that it follows for
6 each of the environmental issues in the
7 assessment.

8 So then it goes through a significance
9 analysis and that's what's in the chart and it
10 goes through all of the factors that I identified
11 below and evaluates whether the effect is
12 significant or not and concludes on page 52:

13

14 The EAO has considered the high-valued
15 fisheries and aquatic resources in the
16 Morrison Lake watershed, but recognizes that
17 the affected catchment is only approximately
18 2 percent of the overall Morrison Lake
19 catchment area. The change in water flow
20 would be well within the natural variation in
21 stream flow, the effects would be limited to
22 the LSA, and most effects would be reversible
23 after mine closure. These factors outweigh
24 the certainty of the effects' extended
25 duration and permanence of effects to a
26 limited number of streams. Given the above
27 analysis and having regard to the proponent's
28 commitments (which will become legally
29 binding as a condition of the certificate)
30 the EAO is satisfied that the proposed
31 project is not likely to have significant
32 adverse effects on surface and ground water
33 flow with a successful implementation of
34 mitigation measures and conditions.

35

36 So that's sort of what the EAO's analysis looks
37 like. It goes through the same analysis
38 throughout the remainder of the report with
39 respect to all of the other environmental issues
40 that were within the scope of the assessment, so
41 fisheries, water quality and aquatic resources,
42 wildlife, etcetera, and in each case the EAO finds
43 no significant adverse effects that can't be
44 mitigated.

45 If the court would now turn to page 106 of
46 the report. That's the assessment of the
47 potential economic effects of the project, so on

1 page 108 actually it identifies under the heading
2 construction phase effects the results of the B.C.
3 IOM presented in the application, state that
4 during the two year construction period the
5 proposed project would create about 1,117 jobs
6 each year and it talks about how some of them are
7 expected to be part time or temporary and the
8 nature of the jobs. On the next page, page 109,
9 there's a table that shows predicted annual
10 economic effects from construction and tax revenue
11 in particular and that's annually, so at the
12 bottom the total tax revenue figure is \$35.8
13 million annually as a result of the project, so
14 that will be 71.6 million in tax revenue over the
15 two year construction period.

16 Then it talks about the jobs that will be
17 created during the operations phase and then
18 there's a similar table on page 111 showing the
19 tax revenue during the operations phase and it
20 shows that it's going to be 11.7 million in tax
21 revenue annually, and again that's multiplied by
22 21 years, the life span of the mine, so that will
23 be 245.7 million over the mine's life span.

24 The report then goes on to an analysis of
25 social effects, heritage effects, health effects
26 and again in each case finds no adverse effects
27 that can't be mitigated. Then starting on page
28 133 there's a First Nations consultation report,
29 and the First Nations consultation report takes up
30 about 70 pages, almost the whole rest of the
31 report, it's about a third of the whole report, or
32 more than a third actually, and it starts with the
33 Lake Babine Nation and starts with an overview
34 under section 11.1, Lake Babine Nation occupation
35 and use of the proposed project area, so there's a
36 bit of an historical overview there of how the --
37 Lake Babine's historical occupation and use of the
38 proposed project area. Then on page 141, the next
39 section heading is 11.2, Lake Babine Nation
40 aboriginal rights, including title. So the EAO
41 here does an analysis under the Haida spectrum to
42 determine the strength of the Lake Babine Nation's
43 claim and the degree to which they need to be
44 consulted under applicable law and concludes at
45 the end of that section, which is on paragraph 142
46 right above the heading consultation, Lake Babine
47 Nation:

1
2 With regard to the Haida spectrum, EAO's
3 preliminary assessment was that the required
4 scope of consultation with the Lake Babine
5 Nation was on the deep end of the spectrum.
6 This was originally communicated to Lake
7 Babine Nation in December, 2008. EAO has
8 engaged with Lake Babine Nation in a manner
9 which is consistent with this assessment.

10
11 And then there's a discussion of all of the
12 consultations that have occurred with the Lake
13 Babine Nation and it includes Lake Babine's
14 consultations with the EAO directly and dealings
15 between the proponent, Pacific Booker, and Lake
16 Babine Nation, and that discussion takes 30 pages.
17 I can't go through it all here today, but it
18 illustrates just, you know, how much back and
19 forth there was over the years regarding the
20 project with the Lake Babine Nation.

21 On page 171 of the report, so that's the end
22 of the discussion of all of the consultation
23 letters, there's an analysis of potential impacts
24 to Lake Babine Nation asserted aboriginal rights
25 and measures to mitigate or otherwise accommodate
26 impacts, and so in this section they highlight
27 some of the key concerns that the Lake Babine
28 Nation raised and those are highlighted, sort of
29 the bold headings, and then there's bullets that
30 express how those concerns were responded to and
31 addressed, so there's concerns relating to
32 consultation, on the next page health, water
33 quality, tapping, wildlife, aboriginal rights and
34 benefits, fish, that goes on for a number of
35 pages, and then finally on page 179 the EAO
36 reaches its conclusions regarding the Lake Babine
37 Nation and they conclude:

38
39 In view of the consultation that has taken
40 place with Lake Babine Nation, the EAO
41 concludes that the process of consultation
42 has been carried out in good faith with the
43 intention of substantially addressing
44 specific concerns expressed by Lake Babine
45 Nation. The process of consultation was
46 appropriate and reasonable in the
47 circumstances and EAO, on behalf of the

1 Crown, has made reasonable efforts to inform
2 itself of the impacts the proposed project
3 may have on Lake Babine Nation's asserted
4 aboriginal rights and by way of both draft
5 and final copies of this report it is
6 communicating its findings to the Lake Babine
7 Nation.
8 Based on the EA of the proposed project and
9 on a careful consideration of the record of
10 consultation with Lake Babine Nation, EAO
11 concludes that the risk of adverse effects to
12 lands and resources associated with the
13 exercise of Lake Babine Nation's asserted
14 aboriginal rights has been appropriately
15 avoided or mitigated (with the successful
16 implementation of mitigation measures and
17 conditions) to the extent necessary to
18 maintain the honour of the Crown.

19
20 The report then goes through a similar analysis
21 with respect to the Gitanyow and the Gitksan
22 Nations again who fish on the Skeena River into
23 which water from Morrison Lake ultimately ends up.
24 The analysis with respect to the Gitanyow and the
25 Gitksan takes about 15 pages and the conclusion
26 with respect to those two First Nations is found
27 on page 195, and I won't read it, but it's
28 essentially sort of a mirror conclusion to the
29 conclusions made with respect to the Lake Babine
30 Nation, in effect, that they have been adequately
31 consulted and that any impacts of the mine have
32 been appropriately avoided or mitigated to the
33 extent necessary to maintain the honour of the
34 Crown.

35 There is then a similar analysis with respect
36 to the Yekooche First Nation, it takes up a few
37 pages, and on page 203 there's a heading that says
38 federal requirements. It notes that the Canadian
39 Environmental Assessment Agency is preparing a
40 separate comprehensive study report that will
41 address the requirements specific to the Canadian
42 Environmental Assessment Act. That report is in
43 the petition record. It's at exhibit C to the
44 affidavit number 1 of Erik Tornquist. Like this
45 report it's very lengthy. It wasn't actually ever
46 finalized, there was a draft report, but the draft
47 report reached similar conclusions to this one,

1 and I won't go to it today, but it is in the
2 record.

3 THE COURT: Is this a convenient moment for lunch?

4 MS. GLEN: Sure. I think I have probably about 20 more
5 minutes, so I'm happy to take lunch now or I can
6 finish up and --

7 THE COURT: All right. No, we'll break now.

8 MS. GLEN: Okay.

9 THE COURT: Two o'clock.

10 THE CLERK: Order in chambers. Chambers is adjourned
11 until two p.m.

12

13 (PROCEEDINGS ADJOURNED AT 12:31 P.M.)

14 (PROCEEDINGS RECONVENED AT 2:03 P.M.)

15

16 THE COURT: Yes, Ms. Glen.

17 MS. GLEN: Good afternoon My Lord.

18 When we left off we were just about to go
19 through the conclusions of the final assessment
20 report which again is in volume 3 of the petition
21 record, tab 7, page 261 of the exhibits to Mr.
22 Sturko's affidavit and so we've gone through the
23 report and then the final page of the report is
24 where the EAO sets out its conclusions with
25 respect to the Morrison Copper Gold Mine project
26 and it says there:

27

28 Based on information contained in the
29 application the proponent's efforts at
30 consultation with First Nations, government
31 agencies, including local governments and the
32 public, and its commitment to ongoing
33 consultation, comments on the proposed
34 project made by participating First Nations
35 and government agencies, including local
36 governments as members of the EAO's working
37 group and the proponent's responses to these
38 comments, comments on the proposed project
39 received during the public comment period and
40 the proponent's responses to these comments,
41 issues raised by participating First Nations
42 regarding potential impacts of the proposed
43 project and the proponent's responses and
44 best efforts to address these issues and
45 commitments and mitigation measures to be
46 undertaken by the proponent during the
47 construction, operation and decommissioning

1 of the proposed project, EAO is satisfied
2 that --
3
4 And then there are six bullet points which set
5 forth its conclusions.
6 The first is that the environmental
7 assessment process has adequately identified and
8 assessed the potential significant adverse
9 environmental, economic, social, heritage and
10 health effects of the proposed project.
11 Second is that consultation with First
12 Nations, government agencies and the public and
13 the distribution of information about the proposed
14 project have been adequately carried out by the
15 proponent and that efforts to consult with First
16 Nations will continue on an ongoing basis.
17 Three, issues identified by First Nations,
18 government agencies and the public, which were
19 within the scope of the environmental assessment,
20 were adequately and reasonably addressed by the
21 proponent during the review of the application.
22 Four, practical means have been identified to
23 prevent or reduce any potential negative
24 environmental, social, economic, heritage or
25 health impacts of the proposed project such that
26 no direct or indirect significant adverse effect
27 is predicted or expected, and in parenthesis it
28 notes (with the successful implementation of
29 mitigation measures and conditions).
30 The fifth bullet point says the potential for
31 adverse effects on the Lake Babine Nation, the
32 Gitanyow and the Gitxsan Nations and the Yekooche
33 First Nation uses of the proposed project area has
34 been avoided or mitigated -- or sorry, or
35 minimized to an acceptable level, and again in
36 parenthesis (with the successful implementation of
37 mitigation measures and conditions).
38 And finally, the provincial Crown has
39 fulfilled its obligations for consultation and
40 accommodation to First Nations relating to the
41 issuance of an environmental assessment
42 certificate for the proposed project.
43 At the end of a long environmental assessment
44 process which lasted 10 years, cost the company
45 over \$10 million, Pacific Booker ultimately
46 obtained favourable environmental assessment from
47 the EAO. On the same day that the final

1 assessment report was issued, August 21st, the
2 executive director issued his recommendations to
3 the minister regarding Pacific Booker's
4 application for a certificate and those August
5 21st, 2012 recommendations are found in the
6 petition record at volume 2, tab 5, so that's the
7 affidavit --

8 THE COURT: Can I put the present volume 3 aside?

9 MS. GLEN: Yes, I believe that we're done with volume
10 3. Yeah.

11 THE COURT: Where do I look in volume 2?

12 MS. GLEN: It's tab 5, exhibit Y. So these are the
13 recommendations of the executive director of the
14 EAO and they are dated August 21st and the
15 document is 32 pages long and basically the first
16 30 or so pages are much like an executive summary
17 of the EAO's assessment report. It summarizes the
18 conclusions of the report, the findings of no
19 adverse effects, sort of walks through the various
20 conclusions, discusses First Nations consultation
21 and the EAO's conclusions with respect to that
22 consultation.

23 On page 30 towards the end of the
24 recommendations there's a brief paragraph that
25 says position of federal agency under a heading
26 that says the same and that says:

27
28 The CEA agency considers that the issues
29 examined by its agencies have been addressed
30 through project design, mitigation measures
31 and other commitments agreed to by the
32 proponent. The CEA agency has produced a
33 draft comprehensive study report that
34 concludes that the proposed project is not
35 likely to cause significant adverse
36 environmental effects.

37
38 So the federal agency's draft report reached
39 essentially the same conclusion as the provincial
40 assessment process.

41 And then finally on page 32 of this
42 recommendations document there is the executive
43 director's actual recommendation and he says:

44
45 I recommend ministers consider the assessment
46 report prepared by my delegate which was an
47 analysis of the technical aspects of the

1 project as proposed by the proponent. The
2 assessment report indicates that with the
3 successful implementation of mitigation
4 measures and conditions, the proposed project
5 does not have the potential for significant
6 adverse effects and First Nations have been
7 consulted and accommodated appropriately.

8
9 He then goes on:

10
11 I also recommend that ministers consider a
12 number of additional factors which were
13 raised during the assessment of the proposed
14 project. In particular, I recommend that
15 ministers adopt a risk/benefit approach when
16 weighing the conclusions of the EAO's
17 assessment report against these additional
18 factors. These additional factors include:

19
20 And then there's a list of bullet points. He
21 revises the recommendation somewhat on September
22 20th, so I'm not going to walk through the bullet
23 points with respect to this draft, I'll do that
24 with respect to the updated recommendations, and
25 then at the end of the page he says:

26
27 I recommend that an environmental assessment
28 certificate not be issued to Pacific Booker
29 Minerals Inc. in connection with its
30 application for the Morrison Copper Gold Mine
31 project.

32
33 So he's introducing here a recommendation that the
34 ministers adopt a risk/benefit approach in
35 evaluating the application and the important point
36 is that that approach is not something that was
37 set forth in the section 11 order or the terms of
38 reference and is a new test that is being
39 introduced at this stage in the process.

40 On September 20th the executive director
41 updated his recommendation document and that's
42 just at the next tab, tab Z, and it's essentially
43 the first 30 pages or so are very similar to the
44 original draft, it's just the recommendation
45 section at the end has been flushed out a bit, so
46 turning to page 32 the court will see that the
47 recommendation is a bit longer than the previous

1 document, but it's to similar effect. So the
2 first paragraph is very similar. The second
3 paragraph has been flushed out a bit, he now says:
4

5 As set out in section 17(3)(b) of the
6 Environmental Assessment Act, ministers may
7 consider any other matters that they consider
8 relevant to the public interest in making
9 their decision on the application.

10 Therefore, in addition to the technical
11 conclusions presented in the assessment
12 report which assumes successful
13 implementation of all mitigation strategies,
14 I recommend ministers consider a number of
15 additional factors which were raised during
16 the assessment of the proposed project. In
17 particular, I recommend that the ministers
18 adopt a risk/benefit approach that considers
19 the following factors in making its decision
20 on whether to issue an environmental
21 certificate.
22

23 And then there's a list of bullets and a list of
24 what he characterizes here as additional factors,
25 so the first one is, you know, the location of the
26 project directly adjacent to Morrison Lake which
27 has a genetically unique population of sockeye
28 salmon at the head waters of the Skeena River that
29 could be impacted if the proponent's mitigation
30 measures are unsuccessful, and then it goes on.

31 Most of these factors that he lists here as
32 additional factors are issues that were squarely
33 within the environmental assessment that were
34 addressed by the assessment report, but they are
35 being characterized here as new factors, and then
36 at the end the recommendation is that a
37 certificate not be issued.

38 Now, there's no dispute between the parties
39 that Pacific Booker was not provided with a copy
40 of the August 21st version of the recommendations
41 or the September 20th version of the
42 recommendations when its application was referred
43 to the ministers or at any time before the
44 ministers made their ultimate decision to deny the
45 certificate, so Pacific Booker had been provided
46 with the assessment report, so it knew it had a
47 clean assessment report, and on the same day the

1 assessment report goes out the minister makes
2 recommendations, but Pacific Booker didn't receive
3 notice of the recommendations.

4 On or about September 28th, 2012, acting on
5 the executive director's recommendations, the
6 ministers made their decision to deny Pacific
7 Booker's application for a certificate and the
8 minister's decision letter is unfortunately in a
9 different binder, it's in volume 1 of the petition
10 record and it's at tab 4, exhibit E to that
11 binder, and this is a letter from minister of
12 environmental Terry Lake to Erik Tornquist, a
13 representative of Pacific Booker, and it says:

14
15 I am writing on behalf of The Honourable Rich
16 Coleman, minister of energy, mines, and
17 Natural gas and minister responsible for
18 housing and deputy premier and myself to
19 advise you of our decision under section
20 17(3)(c) of the Environmental Assessment Act
21 regarding Pacific Booker Minerals'
22 application for an environmental assessment
23 certificate in respect of the proposed
24 Morrison Copper Gold Mine project.

25
26 We have decided to refuse to issue an EA
27 certificate for the project as proposed. In
28 reaching this decision we considered the
29 August 21, 2012 assessment report prepared by
30 the Environmental Assessment Office as well
31 as the September 20, 2012 recommendations of
32 the executive director of the EAO. As set
33 out in section 17(3)(b) of the Environmental
34 Assessment Act we considered a number of
35 other factors we considered to be in the
36 public interest. These are set out below.

37
38 And then there's a list of bullet points, and the
39 bullet points come almost word for word from the
40 September 20 version of the recommendations. If
41 the court compares those two documents side by
42 side they will see they are almost identical.

43 And then on page 3 the letter goes on:

44
45 We recognize that Pacific Booker Minerals has
46 actively participated in the EA process since
47 2003 and has made a number of major design

1 proposals and commitments in an attempt to
2 address concerns including:
3
4 And then there's a list of the changes that have
5 been made.
6
7 We also recognize that your proposed project
8 would have provided economic benefits
9 including the creation of jobs and tax
10 revenue. Despite these positive aspects of
11 your proposed project we remain of the view
12 that an EA certificate should not be issued.
13 We emphasize that our decision relates to the
14 project as proposed and we wish to note that
15 the Environmental Assessment Act allows
16 Pacific Booker Minerals Inc. to submit
17 another proposal based on a new project
18 design in the future should you wish to do
19 so.
20
21 So in the final sentence there there's a reference
22 to Pacific Booker being able to submit a new
23 project proposal. There's no dispute that that's
24 true. The problem is that submitting a new
25 project proposal would require Pacific Booker to
26 essentially go back to step one of the
27 environmental assessment process and go through
28 all of the steps included in the act, including
29 new public consultation periods and, you know,
30 development of new terms of reference and all of
31 that, so it's really not a feasible or an
32 attractive option from Pacific Booker's
33 perspective.
34 And, finally, I just want to highlight the
35 unprecedented nature of the executive director's
36 recommendations in this case. Pacific Booker is
37 not aware of any prior instance where the
38 executive director has recommended against
39 approval of an environmental assessment
40 certificate where the EAO's assessment and
41 assessment report has found that with the
42 successful implementation of mitigation measures a
43 project would not cause significant adverse
44 effects, and in that connection I would direct the
45 court to one final affidavit here, it's the
46 affidavit of Alexander Young and it's at volume 4
47 of the petition record at tab 17.

1 So Mr. Young is an articulated student in our
2 office and he went through the EAO's online
3 project information centre which is a website
4 where they include documents and information
5 relating to various projects that are under the
6 Environmental Assessment Act being reviewed and he
7 looked at all of the mining projects on that
8 website and reviewed relevant documents from the
9 website such as assessment reports, executive
10 director's recommendations, the minister's
11 decisions and he outlines that in the affidavit,
12 and then in paragraph 6 he concludes:

13
14 Based on my review of this information
15 published by the EAO, I conclude that the
16 Morrison copper/gold mine project proposed by
17 Pacific Booker Minerals Inc. is the only
18 instance in which the executive director of
19 the EAO (or for projects prior to 2000 the
20 project committee) --

21
22 And that's because prior to 2000 under the old
23 Environmental Assessment Act there was a slightly
24 different process,

25
26 -- is the only instance in which the
27 executive director of the EAO has recommended
28 that a certificate not be issued after the
29 EAO assessment report has found that the
30 project would result in no significant
31 adverse effects to the environment.

32
33 Now, the respondents have filed an affidavit from
34 Mr. Hamilton, the project assessment director,
35 which challenges some of Mr. Young's analyses in
36 his review of that EAO data from the EAO website
37 and they criticize Mr. Young, they say he only
38 reviewed mining projects and they allege that
39 there's some inaccuracies in his work, but the
40 bottom line is that despite their criticisms of
41 Mr. Young's work, Mr. Hamilton and the respondents
42 have been unable to identify a single instance in
43 which the executive director of the EAO has
44 recommended against the issuance of a certificate
45 where an assessment report has concluded that the
46 project would result in so significant adverse
47 effects. There are a few instances in which the

1 ministers, exercising their political, their power
2 pursuant to section 17(3)(c) have reached a
3 decision that was a departure from the assessment
4 report, but there's no instance where the
5 executive director himself has recommended, made a
6 recommendation that is, we submit, incompatible
7 with the executive director's own assessment
8 report. So this is a really unique situation.

9 And with that I think I would like to turn
10 the matter over to Mr. Hunter to address Pacific
11 Booker's legal arguments.

12 THE COURT: Thank you, Ms. Glen.

13 MR. HUNTER: My Lord, I'm going to pick up the argument
14 at the section argument on page 32 and I do
15 propose to follow the submissions reasonably
16 closely and I will try to elaborate and highlight
17 as I go through. I think I indicated at the
18 outset of what our two points are, but just as a
19 reminder, the first point is we say that the
20 executive director in these circumstances didn't
21 have the statutory authority to make a
22 recommendation against a project that his own
23 report said had no adverse effects, and I do that
24 by an analysis of the statute, and it's very terse
25 when it comes to these recommendations, but
26 looking at it from a couple of different
27 perspectives. Then I say if that's right, then
28 there was an improper consideration by the
29 ministers of considering the recommendation and on
30 that basis alone the decision should be quashed
31 and sent back for reconsideration on proper
32 material.

33 Then the second point is that if that
34 position is wrong and the executive director did
35 have the authority, the statutory authority to
36 issue that kind of a recommendation, it's such an
37 extraordinary thing to do in the circumstances
38 that you've heard about this morning that he had
39 an obligation out of fairness to give Pacific
40 Booker that recommendation in advance of sending
41 it forward and give him an opportunity to respond
42 and beef up their materials.

43 So those are the two points and I'm at, I can
44 start off really around page 34 I think of our
45 argument and I just want to focus you on the
46 statutory language which I've got at paragraph 121
47 which you've seen this morning that references the

1 recommendation. There is not a specific provision
2 that says the executive director may make
3 recommendations and then with some kind of
4 curtailment of what considerations he should have
5 in mind, there's nothing like that, there's simply
6 a reference in 17(2) to the referral to the
7 ministers, and as you heard this morning, the
8 language following executive director you can
9 ignore for purposes of today.

10 So the referral to the ministers must be
11 accompanied by an assessment report prepared by
12 the executive director and that's the assessment
13 report that you've seen, and when it says prepared
14 by the executive director, of course it doesn't
15 necessarily mean personally prepared, and Ms. Glen
16 has shown you the statutory line of authority
17 whereby that is done. Nevertheless, I say that
18 it's really the executive director's report that
19 has to be -- is to be sent, it must be sent. Then
20 (b), the recommendations, if any, of the executive
21 director, that's really about the only reference
22 that's relevant to the recommendations here, so he
23 doesn't have to send a recommendation, but he can,
24 and then thirdly, the reasons for the
25 recommendations, if any, of the executive
26 director, and as I understand this, although it
27 would seem logical that if he's going to send a
28 recommendation he should send reasons, these two
29 seem to be separated out so he could send one
30 without the other, and I think he did here and if
31 I could just -- I won't do this very much this
32 afternoon, but if I can just take you back to the
33 material that you were just looking at and I'll do
34 it from volume 3 if I may because, you know, the
35 question that sort of jumps off the pages it seems
36 to me is with this kind of a clean environmental
37 assessment report why did he do it, why did he
38 recommend against it, and it's difficult to
39 discern.

40 If we go to his actual recommendation, and
41 there's a copy of it in volume 7, so you don't
42 have to jump around too much, volume 7 at tab A is
43 the entire referral documentation, and the first
44 part of it is his recommendations and you've seen
45 that in another form, but I just wanted to point
46 out, it's at page 54 and 55 in the upper
47 right-hand corner, this is the recommendation

1 portion of his own recommendation document.
2 You'll see the way its structured is he says
3 firstly I recommend, this is over at page 54,
4 ministers consider the assessment report prepared
5 by my delegate which was an analysis, he says, of
6 the technical aspects of the project as proposed
7 by the proponent. I just pause to say it's
8 obviously a little bit more than that when one
9 looks at all the attention that was given to First
10 Nation concerns and the like, and the assessment
11 report indicates that with the successful
12 implementation of mitigation measures and
13 conditions the proposed project does not have the
14 potential for significant adverse effects, so we
15 have that, that's fair.

16 Then he points out that under 17(3)(b)
17 ministers may consider other matters they consider
18 relevant and then, as it was pointed out to you a
19 moment ago, it lists a lot of the factors which he
20 considers additional factors, and as Ms. Glen
21 said, and I want to emphasize, these aren't
22 additional factors, these are factors, virtually
23 every one, that were contained and analyzed in the
24 assessment report. There's nothing additional
25 about them at all. The location of the project,
26 the long-term environmental liability and risk to
27 the environment, the dilution capacity of the
28 lake, declining water quality, there may be one or
29 two things that weren't examined precisely, but
30 they are virtually the same as what was dealt with
31 in the assessment report, and he calls them
32 additional factors and, you know, the way it's
33 framed they sound like a problem. The anticipated
34 long-term decline in water quality in Morrison
35 Lake he writes. Well, there's a whole section in
36 the assessment report about this concluding that
37 there's no adverse effect that will come from the
38 mine with reasonable mitigation efforts. So he
39 does all of that and then at the end he just
40 recommends not to issue, that's in the bolded part
41 right at the very end.

42 Now, when I first read that I kind of assumed
43 that these bullets must be his reasons for the
44 recommendation, but when you actually read the
45 section he doesn't express them as reasons, there
46 really aren't any reasons. Why wouldn't he
47 recommend it? He says these are additional

1 factors. They are largely not. The assessment
2 report is clean. This comes right out of the blue
3 and one can, you can imagine [indiscernible]
4 reaction when they see this after knowing that
5 they've managed to answer every single problem
6 that the EAO could throw at them and get a clean
7 assessment report [coughing - indiscernible]. So
8 we have something here which doesn't really have
9 any reasons associated with them, although I
10 suppose one could take these bullets as being
11 problems, and obviously the ministers did, they
12 sort of lifted them out and put them out and said,
13 well, we're not going to give you a certificate
14 because of this, there's really nothing in here
15 that could support that, so --

16 THE COURT: I suppose when he refers to a risk/benefit
17 analysis that these are the risks?

18 MR. HUNTER: Yes, yes, I suppose that's right,
19 although -- but they are the risks that have been
20 studied to death.

21 THE COURT: No, I take your point, that they are not
22 newly discovered risks.

23 MR. HUNTER: Correct, correct, and you're right, these
24 would be the risks. It doesn't say too much about
25 the benefits other than the second last bullet,
26 but of course the whole point of this idea of a
27 risk/benefit analysis again is not part of the
28 assessment of the project under the Environmental
29 Assessment Act. It might have been I suppose, it
30 could have been part of the terms of reference or
31 part of the section on the order, but it wasn't,
32 it just comes up here unbeknownst to Pacific
33 Booker and then there's a listing of a bunch of
34 risks, no real attention to benefits, but in any
35 event, not given to Pacific Booker, and my friend
36 says, well, they knew these were problems, they've
37 had an opportunity to address them before, but the
38 fact of the matter is they had to address them and
39 address them satisfactorily, and the assessment
40 report came out saying no adverse effects.

41 So we look at that in the context of a
42 statute and we see, well, there is a statutory
43 authority for recommendations, yes, there's a
44 statutory authority for reasons which don't seem
45 to be given, although one might infer that by
46 listing the risks here those are the reasons for
47 the recommendation, is this really a

1 recommendation within the meaning of the statute.
2 It's apparent that the executive director couldn't
3 say, well, I recommend we don't do this because I
4 think that they should go to Alberta instead,
5 there would have to be some rational reason that's
6 connected with his job, with the statutory mandate
7 that he has, so what is that and how does it fit
8 in and that takes me back to my argument.

9 Now, I've reinforced the statutory provision
10 at paragraph 121. At 122 I emphasize that this is
11 the executive director's report, and this of
12 course is the somewhat bizarre thing about this
13 case, is that the executive director is giving a
14 report to the minister saying there's no adverse
15 effects that can't be mitigated and at the same
16 time a recommendation that says but here are the
17 risks that don't create adverse impacts and I
18 recommend against it. In my submission they are
19 completely contradictory. Now, Mr. Sturko says he
20 doesn't think they are, but I say they clearly
21 are.

22 So then in 123 we say it appears that he must
23 have determined that his power pursuant to this
24 section authorized him to recommend that they deny
25 it if he thought it was appropriate even though
26 his own assessment of the potential effects of the
27 project was as has been indicated, and that these
28 impacts were adequately and reasonably addressed
29 by Pacific Booker during a review of the
30 application, that comes out of the assessment, but
31 that must have been what his assumption was.

32 It's interesting though when one says, well,
33 why did he do this. He filed an affidavit in the
34 proceedings and I just want to turn to it, it's in
35 the same volume which is why I thought it would be
36 useful to work from that volume 3 just in the
37 previous tab.

38 THE COURT: Tab A?

39 MR. HUNTER: That's right. No, even before that
40 because between seven and A is his affidavit.

41 THE COURT: Oh, the body of the affidavit?

42 MR. HUNTER: That's right. This is pretty pithy stuff,
43 but at that last page of the affidavit, page 6, he
44 talks about this recommendation he made, and the
45 second line, he says at the end of the second
46 line:
47

1 The conclusion in the assessment report of no
2 significant adverse effects assumed a
3 best-case scenario.
4

5 And I pause there. Where does that come from? We
6 know that certainly some of the analysis was done
7 on a worst-case scenario, that upper bound that
8 you saw in the assessment report. It was a
9 best-case scenario in which all conditions were
10 met and all mitigation measures were successful.
11 It assumes that there are reasonable mitigation
12 measures that deal with the impacts.

13 Then he goes on to say:

14
15 As I see it, my recommendation simply took a
16 broader view encompassing risks of whether
17 conditions were being met and mitigation
18 measures would be successful.
19

20 Well, in my submission it's not a broader view at
21 all, he's taking a different view, he's simply
22 taking an opposite view from his office of his own
23 report that he's sending to the ministers, because
24 the assessment report deals with all of this, and
25 that's all he says. I mean, he doesn't say there
26 was some part of this report that I realized was
27 completely wrong or something like that or there
28 was some additional factor that we should have
29 looked at and didn't and I suddenly realized this
30 or something like that. Of course had he done
31 that he would have certainly had to give that to
32 Pacific Booker, but it's not that kind of case.
33 He's just looking at the same kinds of risks that
34 his report had already considered and made
35 determinations on and he says I take a broader
36 view. In my submission it's not a broader view,
37 it's just an opposite view.

38 So the question is does he have the statutory
39 authority to do that. He's not a completely free
40 actor, discretion has to be exercised in the
41 context of a statute. We have very little to go
42 on in the statute because there isn't an actual
43 provision authorizing recommendation other than
44 this 17(2)(b), so how do we determine what if any
45 constraints exist with respect to these
46 recommendations. Well, I'll say, I'll make a
47 comment at the outset -- I'm over on page 35 of

1 the argument -- and I have a section here under
2 the court's jurisdiction to grant the relief
3 sought and this really is focused on whether or
4 not the recommendations are capable of review as
5 to their, whether they are ultra vires or not
6 because they are recommendations and not an actual
7 decision. The thrust of this of course is aimed
8 at the minister's decision which I think we all
9 agree is capable of judicial review and if it's
10 based on an improper consideration that's the
11 basis for setting it aside. But even the
12 recommendations themselves can be the subject of
13 judicial review and this is set out in really --
14 it's a little indirectly in the Taku River case in
15 the Court of Appeal here before it went to the
16 Supreme Court of Canada and I've outlined some of
17 the considerations there starting at para 126.

18 Essentially at para 127 the judge of first
19 instance, Justice Kirkpatrick as she was then,
20 quashed the certificate and remitted it for
21 reconsideration, but found that the report and
22 recommendations and the referral were not subject
23 to judicial review in their own right, and then at
24 the top of 36 I've set out a paragraph from her
25 decision where she comes to that conclusion.

26 And then paragraph 128 I've referenced
27 Justice Southin's decision, she was dissenting,
28 but not on this issue, where again the ultimate
29 decision to quash the certificate, which was
30 ultimately reversed, was affirmed, but she
31 rejected Justice Kirkpatrick's findings that the
32 committee's reported recommendations and the
33 referral by the executive director were not
34 subject to judicial review in their own right, and
35 then there's an excerpt here which you can see and
36 in the last portion it has been underlined in para
37 128. It references this proposition.

38 Then further along in 129, again the
39 underlined portion which you can see, comes to
40 similar effect, so it's not critical to my
41 argument because our challenge is to the
42 minister's decision, but nevertheless one can look
43 at these recommendations as to whether or not they
44 are intra vires or ultra vires in the same way
45 that one can look at any kind of exercise of
46 statutory power.

47 Now, if I move along to the top of 38 and

1 this really gets to the question of these
2 recommendations under section 17(2)(b), are there
3 any constraints on them, can he do whatever he
4 wants, or is there some kind of a constraint
5 within the statute, and I pointed out at 134 that
6 so far as we can determine the courts have never
7 addressed the scope of the executive director's
8 power pursuant to this subsection to issue
9 recommendations in respect of an application for a
10 certificate, so the scope of this power is a first
11 impression and I'm not going to be able to give
12 you any case authority for that, it's a matter of
13 looking at the statute, and what we've done is
14 we've looked at it from three different
15 perspectives to try to come to some sense of what
16 this means when it says the recommendations of the
17 executive director, if any, and the first one is a
18 textual analysis which starts at the bottom of the
19 page at paragraph 137.

20 I say here the text of section 17(2) of the
21 act provides little guidance regarding the scope
22 of the executive director's power to make
23 recommendations to the ministers in connection
24 with a referral. That section merely refers to
25 the recommendations, if any, of the executive
26 director, and I say at the top of 39 through that
27 reference that section can be taken to implicitly
28 authorize the executive director to make
29 recommendations of some sort.

30 138, the ordinary meaning of the word
31 recommendation is any action that is advisory in
32 nature rather than one having binding effect.
33 That doesn't help a great deal. And there's no
34 real direction, as I point out at 138, in this
35 subsection or anywhere else in the act regarding
36 the former content of the recommendations. I'm
37 putting some emphasis on this because of course
38 the whole procedure for the assessment report is,
39 in such a detailed fashion, covered through the
40 statutory scheme and yet here we have simply this
41 word that appears. What does it mean, what's
42 the -- do we get anything from the text? Mostly
43 we're going to get it from the context.

44 At 139, and this is really the main
45 proposition, that the absence of statutory
46 guidance regarding the scope of the executive
47 director's power to make recommendations to the

1 ministers doesn't mean that there are no limits on
2 such power. I've quoted from Brown and Evans
3 where they say:

4
5 Whether express or implied, the purposes and
6 objects of a statute prescribe the limits of
7 legal authority of a decision maker
8 exercising discretionary power even where the
9 power is conferred in subjective terms.

10
11 And they quote from Roncarelli v. Duplessis, and
12 I'll just point out towards the bottom of that
13 quote, that line that's much quoted:

14
15 There's always a perspective within which a
16 statute is intended to operate.

17
18 So in other words, as I say in 140, it's clear
19 that the executive director's power to issue
20 recommendations is not unconstrained. The fact
21 that the act contains no express limits on this
22 power simply means that the source of these limits
23 must come from a consideration of the objects and
24 purposes of the provision in the context of the
25 statutory scheme as a whole, and that's really the
26 extent of our textual analysis because there isn't
27 much text to analyze, but the absence of that
28 nevertheless is consistent with and requires there
29 be some kind of constraint.

30 So then we look at context starting in 141,
31 we say the guidance regarding the intended scope
32 of the executive director's power to make
33 recommendations in connection with the referral of
34 an application can be found by examining the
35 overall scheme of the act and the role that
36 section 17(2) plays in that scheme, and we say
37 that the examination leads to the conclusion that
38 17(2)(b) must be afforded a narrow construction.

39 We've pointed out in 142 the act creates a
40 framework for the assessment of projects to
41 determine their potential effects on the
42 environment. Reviewable projects must obtain a
43 certificate after undergoing an assessment which
44 is defined, and we've seen that definition before.
45 The role of the assessment is to enable the
46 ministers to be able to decide whether to issue a
47 certificate on the basis of a full understanding

1 of the likely environmental and other effects of a
2 project and understanding the ministers wouldn't
3 be able to achieve without the scientific and
4 technical work that goes into an assessment under
5 the act. So that's the role of the assessment
6 report, is to provide that information to the
7 ministers.

8 Now 143, that means there has to be a
9 communication of the findings and that requires
10 that the executive director prepare an assessment
11 report which is, and then the definition is
12 provided, and the fact that 17(2)(b) refers to the
13 recommendations, if any, of the executive
14 director, suggests that it was contemplated that
15 the assessment report will be sufficiently
16 comprehensive that in some, or perhaps many cases,
17 the executive director will not issue
18 recommendations in conjunction with a referral,
19 but will merely provide the assessment report to
20 the ministers, and I pointed out earlier today
21 when I was giving you a bit of an overview that
22 one can see a circumstance where recommendations
23 from the executive director might be very helpful
24 or indeed necessary for the minister where the
25 report itself was ambiguous or it was unclear,
26 where it didn't come to a clear conclusion if
27 there were one or two adverse effects that
28 couldn't reasonably be mitigated, what's the
29 significance, all of those things could lead to
30 the value of the recommendations. So there's a
31 role for recommendation, but the fact that it's
32 optional indicates that it's not a central role.
33 A central role is given to the assessment report.

34 Now 144, I talked about the broad powers that
35 the act gives to the executive director to carry
36 out environmental assessments. That's the
37 structure of the statute, is how the assessments
38 are going to be carried out, not the
39 recommendations. Some of the powers that are
40 expressly conferred upon the executive director,
41 and over at the top of 41, and I won't read them
42 all, but you can see I've given you statutory
43 references to all of these, these are all in
44 reference to how the assessment is to be done
45 because that's the manner in which impacts are to
46 be determined and, of course, the significance of
47 efforts to mitigate any impacts.

1 So 145, we say the ultimate substantive
2 determination is tasked to the ministers, that's
3 clear, and we recognize that that's a policy
4 driven and polycentric decision and it's open to
5 the ministers to consider other matters if they
6 are properly before them, but not in the manner in
7 which this matter went to the ministers. So I say
8 in 145 the overall scheme of the act draws an
9 important distinction between the role of the
10 executive director and the role of the ministers.
11 Whereas the executive director carries out the
12 administrative steps needed to complete an
13 assessment of the project and to communicate the
14 findings of the assessment to the ministers, it is
15 the ministers who are left to decide whether or
16 not to issue a certificate. Other determination
17 includes consideration of how much weight to place
18 on the findings of the assessment. These are the
19 other factors that the ministers might consider in
20 the public interest. But I just pause to say
21 other factors other than those that are considered
22 in the assessment because the assessment is the
23 one that is statutorily required.

24 And then there's a reference to the
25 legislative history of the act which I won't get
26 into, but it does indicate that the EA was to be a
27 neutral act to ensure that the act is implemented
28 in a timely and responsible fashion.

29 So then in 146 I say that's really the
30 context in which we look at and must look at this
31 discretion, apparent discretion that the executive
32 director has to make recommendations and I say
33 it's a very narrow discretion when you look at the
34 statutory provisions that give him authority with
35 respect to the assessment, giving some other
36 references to provisions in the statute. Again,
37 I'm trying to get the context from the statute
38 itself and there are other recommendation
39 provisions, though not in respect to this
40 particular issue.

41 And I say at 147 that really 17(2) is more
42 procedural than substantive. There isn't in fact
43 a grant of authority or a responsibility for the
44 executive director to make recommendations. There
45 must be some basis on which he can because of the
46 wording of 17(2)(b), but the fact that the power
47 is said to flow from a single reference in a

1 procedural provision, that is to say, what is the
2 material that should be transmitted to the
3 ministers, militates in favour of a narrow
4 construction of the power. It can't be suggested,
5 I say, that the executive director's
6 recommendations form an integral part of the
7 environment assessment process. We know, for
8 example, they are optional, and when one looks at
9 the way the statute is constructed, it's the
10 assessment that really counts with respect to
11 environmental matters.

12 Then I've drawn a contrast between 148
13 between 17(2)(b) and 17(3)(b), 17(3)(b) which is
14 the authorization of ministers to consider any
15 other matters that they consider relevant, but
16 17(2)(b) doesn't talk about that with respect to
17 the executive director, it just talks about it as
18 one of the material pieces that goes to the
19 ministers' recommendations, if any.

20 Then 149 I made a similar point with respect
21 to the requirement for a narrow interpretation of
22 17(2)(b) that given that the EAO is to be a
23 neutral act, that they are to administer the act
24 and do the kind of assessment that was done here,
25 and I would just pause to say in my submission the
26 assessment is a pretty impressive document, very
27 lengthy document, very detailed, it's as detailed
28 as anything I've seen with respect to First
29 Nations considerations and the technical issues
30 are handled with considerable deftness, but then
31 you contrast that with these recommendations which
32 basically scupper the whole \$10 million operation
33 which is basically a line which is almost a
34 non-sequitur when you look at that 32 page report.

35 So then at 150 I say it's unreasonable to
36 extrapolate from the brief reference in section
37 17(2)(b) of the act that the legislature intended
38 through this provision to bestow upon the
39 executive director a broad authority at the time
40 of a referral to make whatever recommendations he
41 sees fit based on whatever factors he considers to
42 be appropriate. It's similarly unreasonable to
43 construe 17(2)(b) of the act as authorizing the
44 executive director to recommend that an
45 application for a certificate be denied after his
46 own assessment of the project in accordance with
47 procedures and terms that he himself has

1 established has concluded that the project would
2 not cause any adverse effects that could not be
3 mitigated, and yet that seems to be how the
4 executive director has construed his powers in
5 this case. I'm not asking that you define in any
6 detail what the scope of these powers are to make
7 recommendations, but they must be surely
8 consistent with his own assessment, and that's
9 really the fundamental problem here, is that
10 there's a complete inconsistency between the
11 recommendation and the assessment and he gave the
12 incompatibility with the two.

13 So that really is the contextual assessment,
14 what can we glean from the statute itself as to
15 what is meant by recommendations and what are the
16 necessary constraints. There are always going to
17 be some constraints on the exercise of discretion,
18 what can we -- how can we determine what they are
19 given how little is said about these
20 recommendations in the statute. Well, that's our
21 analysis.

22 And then the final way in which we've looked
23 at it, the third approach is the purpose of
24 analysis, trying to determine the object and
25 purposes of the statute. There isn't a provision
26 in the act that specifically outlines its purpose,
27 and I'm now on para 153, but I do say the act as a
28 whole may be construed in light of the broad
29 public purposes that underlies statutory schemes
30 mandating environmental assessment in general, and
31 I've quoted the well-known dictum from Oldman
32 River when Justice La Forest talked about
33 environmental impact assessment as a planning tool
34 that's now regarded as an integral component of
35 sound decision making, and I just pause to say
36 that concept of environmental assessment as a
37 planning tool is really consistent with how this
38 operation works. There's a detailed, very
39 detailed terms of reference, you saw that in the
40 section 11 order, very detailed as to what's to be
41 considered, and then the Environmental Assessment
42 Office works with the proponent over a period of
43 years. It says, well, here are the problems we
44 see, can you fix them, can you satisfy us that
45 either this isn't going to have any impact or it's
46 going to have an impact that can be reasonably
47 mitigated, and that iterative process goes back

1 and forth consistent with this as a planning tool.
2 One can see at the end of the process there can be
3 a negative conclusion and a negative
4 recommendation, but surely only in circumstances
5 where the proponent is unable to satisfy the
6 Environmental Assessment Office that they can
7 successfully mitigate the environmental impact.
8 There's always going to be some environmental
9 impacts on any land development in the province.

10 So we look at it from an objects and purposes
11 point of view and we say, well, the object here is
12 one of sound decision making as part of a planning
13 process. At 154 I've cited a reference by Justice
14 Melnick in R.K. Heli-Ski and I've included that in
15 the authorities. The facts of these cases are all
16 so different that I didn't know if they would be
17 very helpful, they take a lot of detail, but
18 there's a few comments about the process that may
19 be helpful, and here Justice Melnick, and I'm at
20 the top of page 45, says that:

21
22 Environmental assessments enable ministers to
23 decide on the overall acceptability of major
24 development proposals, within the context of
25 the government's regulatory, policy and
26 technical requirements, and taking into
27 account public and First Nations input.

28
29 And you can see all of that was done here.

30
31 Environmental, economic, social, heritage and
32 health effects are all considered in the
33 environmental assessment review process. The
34 intent of the process is to identify any
35 foreseeable adverse impacts and to determine
36 ways to eliminate, minimize or mitigate those
37 impacts to an acceptable level.

38
39 And that last sentence is as close as I think we
40 can come really to the purpose of the statutory
41 scheme. And that's exactly what happened in this
42 case, foreseeable adverse impacts were identified
43 and ways to eliminate, minimize or mitigate those
44 impacts were determined to a level that was
45 acceptable to the office that has the statutory
46 responsibility of assessing these matters.

47 THE COURT: Do I understand your position correctly

1 that the ministers have a broad discretion to
2 exercise?

3 MR. HUNTER: Yes.

4 THE COURT: And I don't know whether they exercise
5 that -- I'm not quite sure what the parameters of
6 that discretion are, but nonetheless they have a
7 very broad discretion. The executive director
8 though, when making a recommendation, you say must
9 have regard for the considerations that have come
10 to him from the assessment and in this case the
11 assessment advised the executive director that
12 there were no adverse environmental and other
13 effects that couldn't be properly mitigated, and
14 although the ministers have this wide discretion,
15 in this instance it was driven by a recommendation
16 from the executive director which, in normal
17 circumstances, we would not find a minister of the
18 Crown saying I'm going to ignore the
19 recommendation of my officials.

20 MR. HUNTER: Yes.

21 THE COURT: Is that where you are?

22 MR. HUNTER: I think that's very much where I am and I
23 think particularly in the context of having a very
24 lengthy assessment report and then a rather more
25 succinct summary of it from the head of the office
26 ending up with a recommendation against clearly
27 will have tremendous impact with the ministers.
28 If the ministers were considering some other
29 matters, and we've seen their decision and they
30 weren't, they were only considering what Mr.
31 Sturko put in his report, that might be a
32 different -- that might be a different problem,
33 well, it would be a different problem for us,
34 because the ministers can consider other matters
35 of a policy nature. What the parameters on them
36 are is for another day, but we know in this case
37 they didn't, in this case they just considered
38 what the executive director put in, and I say
39 while they have broad powers, he doesn't.

40 THE COURT: Presumably a minister can take into account
41 a wide variety of things, including perhaps
42 political consequences of making a particular --
43 political consequences in the wider sense of
44 making a particular decision.

45 MR. HUNTER: Yes.

46 THE COURT: But I take it what you are saying here is
47 that there is no suggestion of that at all, they

1 have simply looked at the recommendation from the
2 executive director and parroted back what he had
3 to say which was obviously the basis for the
4 decision that the ministers made.

5 MR. HUNTER: Yes.

6 THE COURT: There's nothing more here to it than his
7 recommendation.

8 MR. HUNTER: It certainly appears that way. We don't
9 have evidence from the ministers in this case, we
10 only have the letter itself which does effectively
11 parrot back.

12 THE COURT: Yes. I have not made my way through all
13 this material yet, but I haven't heard anything
14 yet about the ministers saying anything in the
15 evidence about how they approached this matter.

16 MR. HUNTER: No.

17 THE COURT: And it's not in the evidence.

18 MR. HUNTER: They don't file evidence, no. There may
19 be an affidavit in here about one issue with
20 respect to a minister's -- whether a minister had
21 read the material or not, we're not pursuing any
22 of that, so if you happen to see that, we're not
23 pursuing that, but there's nothing from the
24 ministers, there's just the letter, and that's --
25 really that's the point, and I won't belabour it
26 much more. I just wanted to say, to try to
27 indicate that we've tried to approach this -- I
28 mean, there's a certain, in my submission, logic
29 to that, but also one can approach it more
30 analytically by saying all right, how do we give
31 some content to the statutory provision. Well, we
32 can look at it from a textual point of view, what
33 does the text say, not much, but we know from the
34 general law that there's some kind of constraints.
35 Then with the context we look at the statute as a
36 whole, everything is really put on the assessment,
37 this is just a half liner in what goes to the
38 ministers. And then if we look at it from a
39 purpose of the analysis, what is this intended to
40 do, well, it would really undermine the purposes
41 of the statute if proponents were required to go
42 through a 10 year process like this, throwing \$10
43 million into it, satisfy the office of every
44 concern they could have and then have the
45 executive director at the very last minute flip it
46 around for essentially on the same kinds of
47 considerations that have been dealt with and

1 satisfied. He can't have that kind of authority
2 under the statute. The ministers do, the
3 ministers have that broad authority, but there's
4 no indication in this case that they were doing
5 anything other than looking at what the executive
6 director did and their understanding of that, and
7 it's understandable that they would be influenced
8 by that which is why the scope of his authority
9 under the statute is so important.

10 THE COURT: Would you go so far as to say that the
11 executive director was the one who actually made
12 the decision?

13 MR. HUNTER: Well --

14 THE COURT: You are not going to push it out that far?

15 MR. HUNTER: I won't push it out that far because
16 clearly in a formal sense it didn't.

17 THE COURT: In a legal sense that wouldn't be correct.

18 MR. HUNTER: In a legal sense he didn't and in a formal
19 sense he didn't, but as soon as you read that
20 recommendation you know it's over and the fact
21 that the ministers didn't have anything else that
22 was bothering them apparently with what the
23 executive director said, he went -- the executive
24 director went way beyond what he should be doing
25 in this case, in this kind of a case. Having put
26 Pacific Booker through its paces is properly so,
27 that's the environmental assessment process, and
28 then faced with a conclusion that they had met all
29 the standards, that there weren't going to be any
30 negative impacts that couldn't be satisfactory
31 mitigated, nevertheless deciding or recommending
32 against, which was clearly going to have a huge
33 impact on the ministers as their disapproval
34 letter indicates it did, and that's really the
35 essence of the argument on the first point.

36 I've got a section starting at page 46 on
37 application to this case and I think that really
38 Your Lordship has my point on this. I'll see if
39 there's anything that may be helpful to you from
40 this.

41 THE COURT: Do you want to come back to that after the
42 adjournment?

43 MR. HUNTER: Why don't we do that. I think probably
44 I'm mostly finished that first part.

45 COURT CLERK: Order in chambers. Chambers is adjourned
46 for the afternoon recess.

47

1 (PROCEEDINGS ADJOURNED AT 3:01 P.M.)

2 (PROCEEDINGS RECONVENED AT 3:20 P.M.)

3

4 THE COURT: Where are we now, Mr. Hunter?

5 MR. HUNTER: Page 47, My Lord, I'll just make one or
6 two more points and then move to my second main
7 issue. I had pointed out before the break that
8 the so-called additional factors were not really
9 additional at all and I've developed that a little
10 bit from 163 to 165, I won't take you through
11 that, but there's just a bit more detail there if
12 it's of help to you.

13 I did want to make a point that I made at
14 para 162 and that is that the way the
15 recommendation was framed by referring to the
16 assessment report as technical conclusions and
17 then characterizing those risk factors as
18 additional factors really does undermine the
19 assessment report in the mind of an ordinary
20 reader as if to say there's some technical
21 considerations here, but here's some additional
22 factors suggesting that they weren't considered in
23 the assessment report, which of course they were
24 virtually all, and then I've indicated, I've given
25 you some detail in the next few paragraphs.

26 At 166 I've pointed to a couple that weren't.
27 One is a reference to the scale of the bond that
28 would be required which wasn't part of the
29 assessment and isn't part of the environmental
30 terms of reference that were designed as I say a
31 little further along. That and also this risk
32 benefit approach that's introduced for the first
33 time was inconsistent with the scope of the
34 assessment set forth in the section 11 order which
35 was issued by the executive director himself which
36 made no mention whatsoever of a risk/benefit
37 approach, nor was that approach called for in the
38 terms of reference. So there are a couple of
39 things that aren't covered by the assessment, but
40 they are things that if they were significant
41 ought to have been part of the terms of reference
42 and dealt with in the assessment, not added at the
43 very end unbeknownst to everyone by the executive
44 director who is really just supposed to be
45 transmitting this to the ministers who are the
46 decision makers.

47 So with those two additional points I say

1 that the executive director went well beyond the
2 statutory authority in recommending against the
3 certificate being issued when the assessment was
4 as positive as it was, so what I ask, and if you
5 are with me on that, is that the ministers'
6 decision be quashed because it's based upon an
7 improper consideration, a recommendation that's
8 beyond the statutory authority of the executive
9 director to make so that either the ministers
10 consider the matter based on the assessment
11 without recommendations, because they don't need
12 recommendations under the statute, or if the
13 executive director wants to issue another
14 recommendation document that is not inconsistent
15 with the assessment report, that would be another
16 direction that could be given, but one way or the
17 other this needs reconsideration without the cloud
18 of a negative recommendation from the head of the
19 very department that says there will be no adverse
20 effects from this project.

21 So that is the first issue and if that's, if
22 you accept that, that's as far as I need to go,
23 but I wanted to make one other point and it's
24 really the second issue and that is that if, since
25 this is a point of first instance, if you don't
26 accept the limitation that I say exists on the
27 executive director's statutory authority to make
28 recommendations, if he's entitled to make this
29 kind of a recommendation, then I simply say in the
30 circumstances of this case it was surely incumbent
31 upon him to advise Pacific Booker of that and give
32 them an opportunity to buttress their position
33 against the recommendations being made. They
34 could have pointed out that all of these factors,
35 virtually all of them were covered in the
36 assessment report and were satisfactorily dealt
37 with. That wasn't said to the ministers, they
38 presumably didn't know that unless they read the
39 assessment report carefully alongside the
40 executive director's recommendation, which I'm
41 guessing they may not have done, but Pacific
42 Booker could have done that, could have made some
43 comments, didn't have an opportunity to do so, and
44 so I say that's a question of procedural fairness
45 and that's dealt with in my submissions beginning
46 at page 50 starting at paragraph 169, and I'm
47 going to pass over the jurisdiction and the

1 standard of review, I don't think there are issues
2 there.

3 There is one point on the procedural fairness
4 that I should address and that is whether or not
5 this statute supplants the common-law duties of
6 procedural fairness. I address that towards the
7 bottom of page 52 because there is a pleading that
8 the common-law duties of procedural fairness were
9 supplanted by the scheme of the act, and what I've
10 given you over on the next page is an excerpt from
11 the R.K. Heli-Ski decision in para 177 and this
12 involved a challenge to an environmental
13 assessment certificate that was issued, a
14 challenge by an opponent, so it wasn't even the
15 proponent, but an opponent was challenging this
16 and he was unsuccessful, but in the course of
17 considering the issue Justice Melnick dealt with
18 whether or not duties of procedural fairness were
19 owed by R.K. in this context and I've given you
20 the quote here at 177 where His Lordship says:

21
22 I also accept, however, that, if the EAO did
23 not discharge its duty to provide R.K. with a
24 process that was procedurally fair, the
25 decision of the Ministers cannot stand
26 because of the extent to which the Ministers,
27 although making a political decision, relied
28 so closely upon the report and
29 recommendations of the EAO.

30
31 And that sounds very reminiscent of our case.

32
33 Thus, if the actions of the EAO, and its
34 delegate Sierra, had the result of R.K. not
35 being fully and properly heard, then the
36 appropriate remedy is to set aside the EA
37 Certificate and remit the matter to the EAO
38 to conduct a hearing which does accord with
39 the principles of procedural fairness.

40
41 So Justice Melnick held that the procedural
42 fairness was required, as one might expect, and I
43 say he reached that conclusion even though the
44 act, regulations and the section 11 order in that
45 case all outlined public and stakeholder
46 consultation procedures and included specific
47 procedures relating to the consultation of R.K.,

1 and that decision was affirmed by the Court of
2 Appeal which agreed that the common-law duties of
3 procedural fairness applied both to the ministers'
4 decision to issue the certificate as well as to
5 the conduct of the EAO during the environmental
6 assessment process leading up to that decision.

7 Now, I've pointed out at the bottom on the
8 footnote 239, I have a reference to an earlier
9 judgment of Justice Bauman in which he found that
10 the act effectively empowered the executive
11 director to establish the scope of the opportunity
12 to be heard and thereby supplanted the common-law
13 rules of procedural fairness, but that was an
14 earlier decision and the Court of Appeal didn't
15 comment on that in their decision affirming his
16 judgment, and then subsequently we have this R.K.
17 Heli-Ski case where the Court of Appeal did
18 confirm that the common-law duties of procedural
19 fairness did apply. So in my submission the
20 procedural fairness, as one might expect, is
21 required and then the question would be was it
22 followed in this case, and certainly up until the
23 time of the actual preparation of the
24 recommendations, my client has no complaints at
25 all. There was a good process in that adjustment
26 report, a lot of back and forth as you can see
27 from the material. He had an opportunity to
28 address the problems that were, and the concerns
29 that were expressed and did so, and did so to the
30 satisfaction of the EAO right up until the point
31 where the recommendations are prepared and then,
32 almost inextricably, the negative recommendation
33 is written down but not provided to him even
34 though he had received drafts of the assessment
35 report. When I say he, I mean Mr. Tornquist as
36 the representative of Pacific Booker, he had
37 received drafts of the assessment report and had
38 been told they were going to find no adverse
39 effects, and even to the point where you may
40 recall Ms. Glen pointed you to a section of the
41 final assessment report in which they commented in
42 the report that most of their analysis on this
43 water quantity issue was done on an upper bounds
44 or worse-case analysis. That same language was in
45 the drafts that were sent to Pacific Booker before
46 the report was even finalized, so they knew at
47 that point not only that they were going to get a

1 no adverse effect, but also it was done largely on
2 a worst-case basis, so how could anyone assume
3 from that they were going to get a negative
4 recommendation. Not only did they get it, but
5 they didn't know that they got it until after the
6 ministers had made their decision, so in my
7 submission that's clearly something that should
8 have been disclosed to them and they should have
9 had an opportunity to address.

10 Now, content is of course variable with the
11 circumstances. On page 54 I've given you a
12 lengthy excerpt from Justice L'Heureux-Dube's
13 judgment in Baker which is generally cited. I
14 wasn't take you to it, or through it, but it's
15 there for you, but I'll just mention briefly how
16 the factors apply in this case starting at 180.
17 I've said that there's no dispute that the
18 ultimate ministerial decision whether to issue a
19 certificate is a polycentric, policy-driven
20 decision. We appreciate that. The ministers do
21 have a broad discretion, not an unlimited one, but
22 a broad one, and we're not challenging that at
23 all, but with respect to the second one, the
24 nature of the statutory scheme and the terms of
25 the statute, the ministers have a broad
26 discretion, but as I've already pointed out, the
27 executive director's referral power is a
28 qualitatively different type of power and I say
29 quite a bit narrower.

30 And then 182 again in terms of the importance
31 of having procedural fairness here, there can't be
32 any dispute that the ministers' decision to deny
33 the application for a certificate was
34 determinative of the fate of the application.
35 There's no provision for appeal procedure or an
36 ability to request reconsideration of a decision
37 made by the ministers.

38 Para 183 I address the third factor in Baker,
39 the importance of the matter. Well, clearly this
40 is of huge importance to Pacific Booker. I think
41 I've mentioned once or twice the amount of money
42 that they've spent on this environmental
43 assessment and this is their only proposed
44 project, this is a company that is set up to deal
45 with this project. They've dealt with the
46 assessment office for a decade and they are ready
47 to go, so it's clearly very important to the

1 company and that factors into what, the extent of
2 the procedural fairness that's required.

3 Para 185 refers to legitimate expectations of
4 the party who is affected by the decision and
5 that's one that very much favours Pacific Booker.
6 In this kind of situation, given the iterative
7 nature of the environmental assessment process, it
8 surely would have been understood, and Pacific
9 Booker said they did understand, they would know
10 if there was a problem, they would be told so they
11 could try and deal with it and try and address it,
12 and you will recall that the EAO's policies that
13 Ms. Glen showed you talked about, on the
14 assessment side, indicating to the proponent at an
15 early stage where the problems were so they could
16 be addressed and that's a clear expectation that
17 you are not going to be sandbagged at the end of
18 the process by something you have never heard of
19 like a risk/benefit analysis, but if they were and
20 they did get notice of concerns as they went
21 along, to not get notice of the executive
22 director's decision to recommend against the
23 project notwithstanding the clean assessment in my
24 submission cannot be procedurally fair. So from a
25 legitimate expectation's perspective, Pacific
26 Booker has to be on strong ground, and in 186 and
27 187 I've elaborated on that, and 188 pointing out,
28 as Ms. Glen did towards the end of her
29 submissions, that we have not been able to
30 determine a single instance in British Columbia
31 where the executive director recommended to the
32 ministers that they refused to issue a certificate
33 after an assessment report had concluded that the
34 project at issue would not result in any
35 significant adverse effects and that surely would
36 underline the importance and the necessity, from
37 the EAO's perspective, the executive director's
38 perspective, of letting them know that this very
39 unexpected and unusual circumstance had arisen and
40 given them a chance to address it.

41 And at 189 the respondents have said the ED
42 doesn't usually provide his recommendations to
43 proponents and in my submission that doesn't count
44 for anything because we're not saying he always
45 has to do it, we're just saying he has to do it in
46 this kind of case.

47 And then in 190 there's a reference to the

1 agency's choice of procedure. It seems to me that
2 that doesn't probably take us anywhere.

3 So at 191, in my submission, all of these
4 factors suggest, or certainly most of them, the
5 obligations of procedural fairness require at the
6 very least that a proponent of a project under the
7 act must be given an opportunity to put forward
8 its views and its evidence regarding the ED's
9 recommendations in a case like this. Again, I
10 don't say it, I'm not asking you to make a
11 determination that in all cases this has to be,
12 but in this kind of a case surely that is the
13 case, and again I go back to Justice Melnick's
14 judgment in the R.K. Heli-Ski and you'll see
15 towards the bottom of that internal quote when
16 Justice Melnick refers to:

17
18 The fundamental rule is that, if a person may
19 be subjected to pains or penalties ... or
20 deprived of remedies or redress, or in some
21 such way adversely affected by the
22 investigation and report, then he should be
23 told the case made against him and be
24 afforded a fair opportunity of answering it.
25

26 So I say that Pacific Booker was entitled to know
27 that the executive director's recommendations had
28 gone against it and to be given a meaningful
29 opportunity to respond to such recommendations,
30 and I would simply say this, you will recall that
31 there was the phone call on July 30th involving
32 Pacific Booker and Mr. Sturko and others in which
33 Mr. Sturko said something like, well, I'm going to
34 send these negative letters along with my referral
35 package to the ministers, do you still want to go
36 ahead, and Mr. Tornquist said sure because, as he
37 explained, he knew the assessment was giving him a
38 clean bill of health, but there was never any
39 suggestion in that phone call or at any other time
40 that the executive director was going to recommend
41 against the certificate. In my submission that
42 should have been disclosed and an opportunity
43 given to respond, so I -- and I dealt with that
44 starting at page 192 and following and I don't
45 know that I need to read you that, I think the
46 point is probably fairly straightforward.

47 So the point is simply this, if it is the

1 case that the executive director does have the
2 authority to recommend against a proposal that his
3 office is saying has no adverse effects, which I
4 say is not right, but if it is concluded that it
5 is, at the very least in a case like this there
6 ought to be an opportunity to consider and respond
7 to that negative recommendation and in that event
8 procedural fairness here requires it. It was not
9 given and the decision of the minister, just in
10 terms of Justice Melnick's comment where
11 procedural fairness has not been afforded the
12 proponent in this case, the decision it relies on
13 in that process cannot stand and it must be
14 quashed and again sent back, and of course we all
15 recognize that there are hazards in it going back
16 to the same offices, but in my submission that's
17 the appropriate remedy. It gives Pacific Booker a
18 chance either to have their application dealt with
19 by the ministers without an improper negative
20 recommendation from the office that's given them
21 the clean bill of health or, if that
22 recommendation can be permitted to stand, with an
23 opportunity to address it to the ministers so the
24 ministers have the full picture, and those are the
25 two arguments, either one of which, in my
26 submission, leads to the same conclusion which is
27 a referral back and that's what we ask.

28 THE COURT: On the question of the risk/benefit
29 analysis which you have described as a new factor
30 that was introduced by the executive director when
31 he made his recommendation, it is, I suppose,
32 possible to look at the risk/benefit analysis as
33 just another way of describing the question of
34 whether there are adverse environmental effects
35 that might be experienced if this mine goes into
36 operation which cannot be adequately mitigated,
37 and if that -- if the risk/benefit analysis is
38 just a shorthand way of saying that, does that
39 have an impact on your argument that the executive
40 director introduced a new and inappropriate
41 factor?

42 MR. HUNTER: Well, I guess I would answer that in two
43 ways. If it means the same, if it's simply a way
44 of saying you should look at the risks of whether
45 they can be mitigated, there's an implication that
46 that hasn't been done, and it has been done of
47 course because that's what the assessment is all

1 about, but I do say that it is different than the
2 way in which the assessment was framed and the way
3 in which it was conducted, because the way in
4 which it was framed and conducted was to identify
5 risks and then see whether they could be
6 mitigated. The risk/benefit seems to suggest that
7 we should look at the risk and we should look at
8 the offsetting benefit and try to measure them
9 against one another and it's a somewhat different
10 concept than simply looking at the risk to see if
11 it can be reasonably mitigated. There's never
12 going to be perfect knowledge and perfect
13 certainty about these things, but with all of the
14 people who looked at this project there's a
15 reasonable basis for saying, all right, that risk
16 can be mitigated and the plan is a reasonable one
17 to mitigate that. That doesn't really take into
18 account benefits at all, a risk/benefit like
19 cost/benefit analysis I suppose looks at costs on
20 one hand, benefits on another and kind of compares
21 them, but the one that was really undertaken for
22 the assessment was to look at the risks to see if
23 they could be mitigated, because whether or not
24 there's a benefit, if there's an adverse effect
25 that can't be mitigated it's going to be referred
26 to in the assessment report and it's going to be a
27 negative, but if it's the same thing, then in my
28 submission it's a very misleading kind of
29 recommendation because that has been done, if it's
30 the same thing, in the assessment report. We saw
31 it as something different. It has never been
32 framed in that way, it has never been called a
33 risk/benefit analysis in the process.

34 THE COURT: Thank you. Ms. Horseman, you are next?

35 MS. HORSMAN: I believe I am, My Lord.

36 The respondents have provided a written
37 argument which you should find at tab 29 of --
38 sorry, I've lost track of the volume numbers, My
39 Lord. Give me one moment. Volume 4 of 4. I do
40 have an extra loose copy if it would assist.

41 THE COURT: That would be helpful if we're going to be
42 moving through the binders from time to time.

43 MS. HORSMAN: Yes, and just while we're on that topic,
44 My Lord, I expect, unless I need to look at other
45 material to answer questions, that I'll be looking
46 at two affidavits, the affidavit of Chris Hamilton
47 and the affidavit of Derek Sturko, and they are

1 both in volume 3.

2 THE COURT: All right.

3 MS. HORSMAN: And I think that's all I should need to
4 look at.

5 THE COURT: All right, thank you.

6 MS. HORSMAN: I do have some books of authorities for
7 Your Lordship, but I don't think I'll get to the
8 law this afternoon, so perhaps I'll hand those up
9 tomorrow morning when we start.

10 So, My Lord, I do plan to stick to the
11 respondent's written argument fairly closely and
12 with one diversion that I'll take right at the
13 beginning, and I'll follow my friend Mr. Hunter's
14 lead in providing Your Lordship with an overview
15 of the respondent's position which I hope will
16 assist in focusing matters as I go through the
17 respondent's argument.

18 What was omitted, in my submission, from Ms.
19 Glen and Mr. Hunter's submissions to you was very
20 much in the way of detail about the nature of the
21 operation of this mine proposal and the specifics
22 of the concerns that had been specifically and
23 consistently voiced by members of the working
24 group and which in turn influenced the ministerial
25 decision making.

26 The Morrison Lake mine proposal, My Lord,
27 envisioned the operation of an open pit copper,
28 gold, molybdenum mine which was to be constructed
29 about 200 meters from the banks of Morrison Lake,
30 and Morrison Lake, My Lord, is in the Skeena
31 watershed, it's a spawning ground to a population
32 of, as you've heard, genetically unique salmon
33 which in turn contribute to the salmon population
34 of the Skeena River, so an area of high ecological
35 value.

36 Mr. Hunter told you this morning, My Lord,
37 that an environmental certificate was required for
38 the project because it was a mining project and
39 that's not entirely accurate, My Lord. It's the
40 scope of the mine's anticipated operations that
41 triggered the requirement for --

42 THE COURT: Sorry, I missed what you said.

43 MS. HORSMAN: It's the scope of the mine's anticipated
44 operations that triggered the need for an
45 environmental review, so this was a mine facility
46 that during operations would have a production
47 capacity of equal to or greater than 75,000 tons

1 per year of mineral ore, so under the reviewable
2 projects regulation the requirement for an EA
3 certificate was triggered because of that volume
4 of production, and I make that point, My Lord,
5 because it's quite important to bear in mind at
6 the outset that the assessment process under the
7 Environmental Assessment Act requires assessments
8 only of major projects, projects that may be
9 expected to have broad environmental, economic,
10 social and First Nations impact and this one did.

11 Now, my friend Ms. Glen summarized to you, My
12 Lord, the concerns of the working group members as
13 concerns with water quality and that may be
14 accurate in a general sense, My Lord, but in a
15 more specific sense the concern was with metal
16 leaching and acid rock drainage, and I will be
17 getting into this in greater detail in the
18 argument, My Lord, but in general terms it's a
19 phenomenon that's of quite significant concern to
20 mining and environmental regulators. It can lead
21 to significant and permanent ecological damage and
22 also multi-million dollar cleanup costs for
23 government if mitigation measures fail. That was
24 the concern here.

25 What Pacific Booker proposed by way of
26 mitigation strategy to address the potential for
27 metal leaching and acid rock drainage was to
28 collect contaminated water generated by the mine
29 during its 20 some year operation, to put it in
30 the open pit on mine closure, treat the water and
31 then pump it into Morrison Lake by way of a
32 pipeline and a diffuser, and the design plan
33 assumed that the treated affluent would be flushed
34 out semiannually on the basis of some scientific
35 modelling that was carried out around lake
36 behaviour.

37 Members of the working group, My Lord,
38 expressed consistent concerns throughout the
39 assessment process that this form of end-stage
40 mitigation strategy it's referred to at times, is
41 a collect and treat strategy, was contrary to
42 provincial policy which focused on prevention of
43 metal leaching and acid rock drainage, that it
44 carried with it in perpetuity environmental
45 liability risks requiring medication conditions as
46 we'll get to, My Lord, which anticipated the need
47 for ongoing monitoring of Morrison Lake water

1 quality perhaps for decades, and also it brought
2 with it potentially enormous cost to government if
3 the mitigation measures didn't succeed.

4 So the concern, in other words, My Lord, was
5 not so much with whether the Morrison mine
6 proposal on technical review demonstrated adverse
7 effects assuming successful implementation of
8 mitigation measures, because that's what the
9 assessment report assumed, the concern was with
10 the magnitude of the potential environmental
11 liability risk if mitigation measures failed,
12 because if mitigation measures failed in this case
13 the result could be the irremediable contamination
14 of the Skeena watershed and that was an ongoing
15 concern, My Lord.

16 THE COURT: What I'm not understanding, and maybe you
17 can help me with this, is what you are telling me
18 now about these very considerable problems that
19 might become, that might manifest themselves at
20 some time in the future, why would that sort of
21 thing not be picked up in the environmental
22 assessment when they are considering the very
23 question of whether there are significant
24 environmental risks that cannot be adequately
25 mitigated?

26 MS. HORSMAN: What they, and I'll call it a technical
27 review, my friend objects to this, but what the
28 environmental assessment process did as part of
29 the technical review, My Lord, was that it
30 identified significant adverse effects with
31 successful implementation of mitigation measures,
32 so it presumed the successful implementation of
33 mitigation measures. What I'm talking about, My
34 Lord, is, in my submission, a fundamentally
35 different thing which is a measurement of risk
36 even if one presumes successful implementation of
37 mitigation measures, and while I'm on that point,
38 My Lord, one more theme, and I will come back to
39 it, is that the suggestion that what I'm telling
40 you this afternoon, My Lord, came as a surprise
41 and out of the blue was I think various ways that
42 my friend put it to you for Pacific Booker when
43 they received the decision and a copy of the
44 executive director's recommendations is not borne
45 out by the record. Pacific Booker was told before
46 the referral to the ministers that the very kind
47 of concerns that I've just described to Your

1 Lordship would be highlighted to the ministers and
2 they were.

3 THE COURT: I think I heard something of that from your
4 friends.

5 MS. HORSMAN: Yes, but what Your Lordship hasn't heard
6 and what I'll get to is that the page of Mr.
7 Sturko's recommendations that was explained to
8 Your Lordship by my friends, what the source of
9 the points that Mr. Sturko made, where those came
10 from and what the history of them was.

11 THE COURT: All right. What is troubling me at the
12 moment, and I'll express my mind on this so you
13 can respond to it, is that what appears so far
14 from what I've heard from the petitioner is that
15 it went through an elaborate, expensive process
16 over many years which involved a great deal of
17 consultation with others and the result of all
18 that was that there was an environmental
19 assessment which, from the point of view of the
20 petitioner, was entirely satisfactory, that is, it
21 had met the test imposed by the Environmental
22 Protection Act in the circumstances that it found
23 itself, at least that's the way it appears at the
24 moment.

25 Then it knows that notwithstanding it has met
26 the test that the ministers have the ultimate
27 decision on what's going to happen, but the
28 petitioner reasonably expects, and you may tell me
29 this was not a reasonable expectation, but the
30 petitioner reasonably expects that what the
31 executive director has determined is that the
32 risks, I'm putting this rather loosely, that the
33 risks and benefits can be adequately -- that the
34 benefits outweigh the risks, to use a rather loose
35 expression, that the environmental mitigation
36 overcomes the significant problems. Then the
37 executive director, notwithstanding that, tells
38 the ministers that they should decide against the
39 petitioner.

40 Now, putting aside the petitioner, as your
41 friend Mr. Hunter says, didn't have an opportunity
42 to respond to what the executive director had to
43 say to the ministers, it appears that the
44 petitioner went through an elaborate process,
45 satisfied all the environmental concerns that
46 needed to be satisfied and then a decision is made
47 against it not by the ministers, but by the

1 executive director who had been engaged with them
2 entirely throughout the process and it looks like
3 a sham, they've been drawn into something in which
4 they've done everything they are supposed to do
5 and they still, they are handed the
6 [indiscernible]. So on the surface it looks like
7 a sham. You can tell me why that's not so.
8 MS. HORSMAN: Well, I can tell you why that's not so,
9 My Lord. It may take me --
10 THE COURT: Tomorrow you can probably tell me that.
11 MS. HORSMAN: -- a little bit longer.
12 THE COURT: I'll give you time to tell me why that's
13 not right.
14 MR. HUNTER: There isn't enough time.
15 THE COURT: There isn't enough time says Mr. Hunter,
16 but we'll have lots of time.
17 MS. HORSMAN: Well no, My Lord, I don't want to shy
18 away from this because it was not a sham, it was
19 not.
20 THE COURT: No, I'm quite satisfied that's what you are
21 going to submit to me, that it was not a sham, but
22 right now, not having heard you yet, it looks to
23 me a little bit -- not a little bit, it looks to
24 me as if the petitioner got drawn into a process
25 in which it couldn't win.
26 MS. HORSMAN: Well, My Lord, that may be true, it may
27 be ultimately that the ministers were not going to
28 issue an environmental assessment certificate here
29 because of their perception of the degree of risk
30 posed by this project.
31 THE COURT: Yes, that's no doubt the case, but at least
32 they could expect to get the executive director on
33 side.
34 MS. HORSMAN: Well, My Lord, again it requires a
35 distinction that I'm hoping I can draw more
36 clearly when we go through what actually happened
37 here --
38 THE COURT: All right, I'll listen to you.
39 MS. HORSMAN: -- between the kind of review that's
40 entitled by the assessment report and the kind of
41 opportunities that were given to Pacific Booker in
42 the course of that assessment process to
43 understand what the liability risk concerns were
44 and what the concerns of the working group members
45 were and to respond to them and then, prior to
46 referral to the ministers, they were specifically
47 put on notice that there were memorandums of

1 working group members that were going to be put
2 before the ministers that highlighted the very
3 concerns that the ministers picked up on in their
4 decision.
5 THE COURT: All right. I don't want to rush you into
6 trying to convince me between now and four o'clock
7 that what I've just said is inaccurate, so take
8 your time. I'm quite prepared to listen to your
9 argument to be developed in a coherent way rather
10 than try to respond to my concerns immediately.
11 MS. HORSMAN: My Lord, I absolutely appreciate hearing
12 what's on your mind so that I know where to direct
13 my submissions tomorrow, but it really requires a
14 more in-depth look at what happened here than my
15 friends took you to, so I wonder if I can do that
16 tomorrow and come back to this point?
17 THE COURT: Certainly. Oh yes, indeed. Do you want to
18 adjourn now and start tomorrow?
19 MS. HORSMAN: If that's acceptable to Your Lordship.
20 THE COURT: Yes. All right, 10 o'clock.
21 COURT CLERK: Order in chambers. Chambers is adjourned
22 until 10 a.m., August the 8th.

23
24 (PROCEEDINGS ADJOURNED AT 3:56 P.M.)

25
26 I, Karen Hinz, Official Reporter,
27 in the Province of British Columbia, Canada,
28 do hereby certify:

29 That the proceedings were transcribed
30 by me from audiotapes provided of taped
31 proceedings, and the same is a true and
32 correct and complete transcript of said
33 recording to the best of my skill and
34 ability.

35 IN WITNESS WHEREOF, I have hereunto
36 subscribed my name and seal this 12th day of
37 September, 2013.

38
39 _____
40 Karen Hinz
41 Official Reporter
42
43
44
45
46
47

1
Proceedings
Submissions by Ms. Horsman (continuing)

Vancouver, B.C.
August 8, 2013

(PROCEEDINGS RECONVENED AT 10:04 A.M.)
(DAY 2)

THE CLERK: In the Supreme Court of British Columbia,
at Vancouver, on this 8th day of August, 2013. In
the matter of Pacific Booker Minerals versus
Minister of the Environment, and others, My Lord.

THE COURT: Ms. Horsman.

MS. HORSMAN: Thank you, My Lord. I did bring the
respondents' book -- books of authority for Your
Lordship. I'll just hand them up.

MS. HORSMAN: Now, My Lord, when we left off yesterday
afternoon, it was with Your Lordship's suggestion
to me that the submissions my friends had made to
you may have left the impression that the
environmental assessment process had been -- a
sham was, I think, the way Your Lordship put it.
It was a suggestion that, frankly, took me by some
surprise, for a number of reasons, apart from what
I know about the process, but also because I
didn't understand the -- my friends were making
the allegation that the EAO assessment process was
a sham.

THE COURT: Well, your friend didn't say that. I -- I
used that word as -- as a -- well, I was just
describing my concerns about the process, having
only heard one side of the argument, of course,
and I used that word because I wanted you to
respond to it.

MS. HORSMAN: Yes, My Lord. And so I'm not suggesting
I'm not going to. Those introductory comments are
not by way of saying, well, my friend hasn't made
that argument so I'm not going to respond to it.
Your Lordship's put it to me and I'm going to
respond to it, but it's going to require me to --
in order to do so effectively, to go through the
material in perhaps a little bit greater detail
than I had originally anticipated and -- and I --
that's the reason why I'm doing it.

THE COURT: All right. No, take your time.

MS. HORSMAN: So, My Lord, I'll -- I'll start in our
written argument at paragraph 13, which is on
page 5. And so what we do in the first part of
our argument is go through a chronology of the

1 history of this project with the EAO office, and
2 the first significant event is the issuance of the
3 s.10 order, which Your Lordship heard about
4 yesterday, on September the 30th, 2003 which
5 confirmed that an environmental certificate was
6 required.

7 It appears from the EAO record, at least --
8 My Lord, I'm at paragraph 14 -- that as of the
9 summer of 2004, the petitioner had anticipated
10 conducting a feasibility study on the project and
11 while the petitioner provided the EAO with draft
12 terms of reference in October 2005, those draft
13 terms didn't contain any project details and so
14 Mr. Hamilton was deposed to his understanding that
15 at that point in time the petitioner was still in
16 the early stages of project design.

17 And my point, My Lord, in highlighting that
18 is simply because my friend made a submission to
19 you a number of times yesterday that this was 10
20 years of intensive review at the Environmental
21 Assessment Office. The review really just got
22 going in a significant way in September of 2008.
23 That's the date at which intensive communications
24 between the EAO and the petitioner really started
25 -- and that was at paragraph 16, My Lord -- when
26 the petitioner provided their revised and more
27 detailed project description. That was in
28 September of 2008.

29 Now, what the EAO did, My Lord, is
30 established this working group that you've heard
31 about to assist in project review and the members
32 of that group included representatives of federal
33 and provincial regulatory agencies, including the
34 Department of Fisheries and Oceans, Environment
35 Canada, the Ministry of Energy and Mines, the
36 Ministry of Environment. The Babine Lake Nation
37 participated throughout. And as Your Lordship
38 heard, the Gitxsan First Nations participated
39 after as of September 2010.

40 It was apparent from the outset of the
41 project that issues of water quality and
42 management and the risks imposed by metal leaching
43 and acid rock drainage, as I explained to Your
44 Lordship late yesterday afternoon, would be at the
45 forefront of the environmental assessment process.

46 Paragraph 19, My Lord, is taken from
47 Mr. Hamilton's affidavit. I don't know that I

1 need to go through it with Your Lordship. It
2 explains in kind of scientific terms what the
3 problem of -- phenomenon of metal leaching and
4 acid rock drainage is. And I don't think there's
5 any contention in this courtroom that those -- all
6 sides understood that that was a very significant
7 concern with this particular project.

8 Given the long-term environmental risks posed
9 by metal leaching and acid rock drainage, there is
10 provincial policy on the prevention and mitigation
11 at mine sites. And that policy is included in the
12 material, My Lord. I've excerpted part of it at
13 the base of page 6. But because this became a
14 concern that ran from the early stage of the
15 provincial policy through to the ministers'
16 decision making, this is the first point at which
17 I'll actually diverge from my written argument and
18 take you to the policy, which is also exhibited in
19 the material. It's in Mr. Hamilton's affidavit
20 which is at Tab 8 of Volume 3 and it's at Exhibit
21 -- Exhibit W.

22 And so what Your Lordship should have in
23 front of you is a policy for metal leaching and
24 acid rock drainage at mine sites in British
25 Columbia.

26 THE COURT: Yes.

27 MS. HORSMAN: And so if Your Lordship would just turn
28 to page 240 in the upper left-hand corner which is
29 the next page in under introduction. The
30 introduction explains what the problem with metal
31 leaching and acid rock drainage is from a public
32 interest perspective. There are numerous examples
33 throughout the world where elevated concentration
34 of metals in mine drainage have had adverse
35 effects on aquatic resources and created severe
36 impediments to the reclamation of mine land.
37 Metal leaching problems can occur over the entire
38 range of Ph conditions, but are most commonly
39 associated with acid rock drainage.

40
41 Once initiated, metal leaching may persist
42 for hundreds of years. In North America,
43 metal leaching and acid rock drainage have
44 led to significant ecological damages
45 contaminated rivers, loss of aquatic life and
46 multi-million dollar clean-up costs for
47 industry and government. The acid rock

1 drainage liability associated with existing
2 Canadian tailings and waste rock is estimated
3 to be between 2 and 5 billion dollars.

4
5 Preventing attacks from ML/ARD is the most
6 costly and time-consuming environmental issue
7 facing the British Columbia mining industry.
8 It is also one of the most technically
9 challenging. Due to poor historic practices,
10 large remediation costs, technical
11 uncertainty and the potential for negative
12 environmental impacts, ML/ARD is a major
13 issue of public and regulatory concern.

14
15 Now, My Lord, just -- just two more points to
16 make about that policy while we are on it 'cause
17 it will assist in understanding some of the
18 comments that Ms. Bellefontaine of the Ministry of
19 Mines, in particular, was making on Pacific
20 Booker's proposal. The first is under 4.2 at the
21 base of page 243 in the upper right-hand corner
22 under the heading avoidance:

23
24 From the perspective of environmental
25 protection and minimizing liability and risk,
26 the most effective mitigation strategy and
27 the first that should be considered is
28 avoidance through prediction in mine
29 planning. Total or partial reduction in
30 excavation or exposure of problematic
31 materials can limit or prevent sulphate
32 oxidation and metal release. If avoidance
33 is not practical other mitigation strategies
34 may be necessary to insure the environment's
35 protection. Where avoidance is the only
36 practical mitigation strategy the need for
37 ML/ARD protection may preclude all or part of
38 the mine.

39
40 And, then, finally, My Lord, there's a
41 section under the heading long-term chemical
42 treatment at page 247 in the upper right-hand
43 corner. Section 4.6.2:

44
45 While long-term drainage treatment with
46 chemicals such as lime contained effective
47 means of protecting the off-site environment,

1 it also results in significant long-term
2 liability ... risk liability and land
3 alienation. Therefore, long-term chemical
4 treatment will only be acceptable under the
5 following conditions:

6
7 (1) if either preventative mitigation
8 strategies such as underwater disposal are
9 not feasible or create more risk of
10 environmental contamination or as a
11 contingency measure where there is a small
12 but significant uncertainty regarding ML/ARD
13 prediction or performance primary mitigation
14 strategies and with satisfactory fulfillment
15 of the information and design requirements.

16
17 Now, My Lord, I'll come back to that point in
18 a minute 'cause when I take Your Lordship to some
19 of the comments that Ms. Bellefontaine made it
20 will put that policy in some perspective in terms
21 of the concerns of the members of the working
22 group and her, in particular.

23 But returning to paragraph 21 of our written
24 argument. In the case of the petitioner's
25 application for an environmental assessment
26 certificate, the concern with water quality was
27 evident in the nature of the operation, the waste
28 management plan for storing potentially acid rock
29 drainage generating waste, and the close proximity
30 of the mine to Morrison Lake. I think I told Your
31 Lordship yesterday that it was 200 metres from the
32 edge of the lake. I've been corrected by those
33 who know more than me that it was actually 60
34 metres. So it was immediately adjacent to
35 Morrison Lake.

36 The Environmental Assessment Office
37 established the "ML/ARD-Water Technical
38 Subcommittee" of the working group to address
39 these issues and -- and specifically the potential
40 impacts of ML/ARD.

41 Now, on October 2008 -- My Lord, I'm at
42 paragraph 22 -- the petitioner provided draft
43 terms of reference for the project and that
44 triggered the formal review comment period under
45 s.11 -- under the s.11 order. And then on
46 November 10th, 2008 the petitioners submitted
47 revised terms of reference which triggered a new

1 40-day comment period. The feedback that was
2 received from members of the working group during
3 the comment period included the importance of
4 accurate baseline data in order to assess
5 environmental impacts of the project, particularly
6 with respect to water management issues.

7 Now, I just pause there to note, My Lord, at
8 that point in time the details in the draft terms
9 of reference didn't provide the kind of details of
10 project design that we eventually got from Pacific
11 Booker in terms of what mitigation strategies were
12 specifically proposed. So the comments at this
13 time were just to the effect of what should be
14 included so that those water quality impacts could
15 be accurately assessed.

16 At paragraph 23, My Lord. On May 14th and
17 15th, 2009 the EAO hosted a meeting of the ML/ARD-
18 Water Technical Subcommittee of the working group
19 and representatives of Pacific Booker attended and
20 their environment consultant. And at that meeting
21 the petitioner made a commitment that is quoted at
22 the base of paragraph 23:

23
24 Will coordinate with EAO and ML/ARD-Water
25 Technical Subcommittee members to arrange a
26 follow-up meeting prior to the application
27 submission. The purpose of this meeting is
28 to review the additional data and water
29 analysis for water quality, water treatment,
30 ML/ARD and closure plans to ensure
31 information needed in the application is
32 complete.
33

34 That was the commitment that Pacific Booker
35 gave in May of 2009, My Lord. And then the EAO
36 then issued the approved terms of reference in May
37 of 2009.

38 The chronology that I've -- we've recited at
39 paragraph 25, My Lord, I'm going to take you to
40 the e-mails themselves rather than go through
41 what's captured in this paragraph. And that
42 e-mail is also in -- exhibited to Mr. Hamilton's
43 affidavit. It's a bit -- it's, I'm sorry,
44 Volume 3, Tab 8.

45 THE COURT: Tab 8.

46 MS. HORSMAN: Yes.

47 THE COURT: Yes.

1 MS. HORSMAN: It's Exhibit L. And if we could start,
2 My Lord, with the first e-mail that was sent,
3 which is -- will be the last e-mail at this tab,
4 beginning at page 140 in the upper left-hand
5 corner. At the base of that page Your Lordship
6 should see an e-mail from Chris Hamilton to a
7 number of people, including Erik Tornquist.
8 Mr. Hamilton wrote: [as read in]

9
10 Speaking for myself, I really appreciate the
11 efforts that Booker put into organizing this
12 excellent tour. I have a much better sense
13 of the area and the issues, including the
14 proximity of the operations to Morrison Lake
15 and the surrounding landscape. Thanks, in
16 particular, to you and Don for the logistics
17 of the tour. My main concern at a strategic
18 level is water. For me the issue appears to
19 come down to the quality of water around the
20 site, its chemistry, and how it's managed.
21 I'll admit to being somewhat confused around
22 water balance as the relationship between
23 water in the pit and water in the ...

24
25 That's the tailing storage facility, My Lord.

26
27 ... TSF, pumping pit water to the TSF and
28 then returning to the lake, how much water
29 will be in the TSF. I believe we have been
30 presented with a scenario where there is
31 little water in the TSF and another where
32 there is more water in the TSF, how
33 untreated water will be prevented from
34 influencing Morrison Lake as well as how any
35 excess water is treated and disposed. While
36 I understand these issues are complex and
37 require complex engineering solutions, I was
38 hoping to hear at a strategic level design
39 solutions which were comprehensive and well
40 thought out recognizing that more detailed
41 engineering will not come in the near future
42 at the permitting stage. I hope that the
43 application when submitted to the EAO will
44 clearly address these issues.

45
46 THE COURT: What's the TSF?

47 MS. HORSMAN: That's the tailing storage facility, My

1 Lord.
2 Now, Mr. Hamilton didn't get a response to
3 this e-mail from Pacific Booker, My Lord, so three
4 weeks later he sent a follow-up e-mail. At that
5 point in time Mr. Hamilton had been advised that
6 Pacific Booker was intending to imminently file
7 its application with EAO, and there hadn't been an
8 answer to this e-mail and there hadn't been a
9 follow-up with the ML/ARD subcommittee. And so on
10 August 20th, 2009, My Lord, right at the base of
11 139, Mr. Hamilton wrote to Pacific Booker
12 representatives, including Mr. Tornquist:
13

14 I'm writing in relation to Selena's recent
15 e-mail suggesting that the application for
16 the proposed Morrison copper gold project
17 will be formally submitted to the EAO
18 imminently.
19

20 As you are aware, the EAO's Fairness and
21 Service Code commits to EAO providing "early
22 identification of potential concerns and
23 challenges." I write to you to express my
24 concerns regarding the application. I sent
25 the e-mail below three weeks ago upon
26 returning from the working group's site
27 visit. During the site visit, it became
28 apparently [sic] that there were still a
29 number of outstanding concerns relating to
30 water and ML/ARD that myself and key members
31 of the working group expressed. I outline
32 those concerns below and I am reiterating
33 them now.
34

35 And then Mr. Hamilton quotes that commitment
36 that I've already taken Your Lordship to in my
37 written argument and he ends the e-mail with the
38 paragraph: [as read in]
39

40 I consider this meeting for the provision of
41 information prior to application review to be
42 critical to completing an effective and
43 timely assessment of the project. Could you
44 provide me with an explanation as to why you
45 no longer plan on sharing this information
46 with the EAO and the working group for review
47 consistent with the minutes of the last

1 working group meeting.

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And then, My Lord, there's an e-mail back to Mr. Hamilton from Mr. Tornquist at the top of page 139. On August 25th Mr. Tornquist writes:
[as read in]

Hello, Chris, as you know, Pacific Booker Mineral Inc.'s expectation has been to submit the application as early as February of this year. Unfortunately, it has taken Rescan ...
That's their environmental consultant, My Lord.

... much longer to complete the application than expected. We now expect to submit the application within the next two weeks. With respect to submitting information to working group members prior to screening, PBM respects the need for working group members to receive information as soon as possible. However, up to this time PBM has not been in a position to submit information since it's not been available. PBM does not wish to submit incomplete information as this would create confusion and delays. PBM will now be in a position to submit information to working group members during the next two weeks prior to submission. Please inform me as to which documents that you would like to be submitted.

With respect to your comments re: The EAO's Fairness and Service Code, which PBM is in support of, and commitment to the EAO providing early identification of potential concerns and challenges, there are no such statements in the Code that relate to the pre-application stage.

And so, My Lord, in August of 2009, Pacific Booker was taking the position that the Fairness Code wasn't even applicable to the project review. Now, Mr. Hamilton responds to this e-mail, My Lord. It begins at the base of page 137 in the upper right-hand corner. It's an e-mail from Mr. Hamilton to Mr. Tornquist. Mr. Hamilton

1 writes: [as read in]

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Thanks for your note, Erik. That helps me understand where you're at with your application. For clarification I'd like to make a number of points. One, the EAO's Fairness and Service Code applies to the overall process, not specifically to pre-application or application. Review the section. The section I refer to is the service standard of early identification of potential concerns and challenges and reads:

The environmental assessment will identify and evaluate potential effects of the proposed project as early in the process as possible, allowing time for adjustments to be made before design decisions are finalized.

The intention of my earlier e-mails and statements made on the site visit was to let Pacific Booker know that the EAO and other agencies in the working group have concerns related to your ML/ARD waste management and water management on the project. We have consistently asked for more information on your plans so we can give you constructive feedback and let you know where the challenges may lie in the review of your application so your project can be improved and the potential effects mitigated or eliminated.

And so on, My Lord, and I won't read the whole thing out to you.

And then the final e-mail, My Lord, is a response from Mr. Tornquist to Mr. Hamilton on August 29th: [as read in]

Chris, Pacific Booker Minerals shares the concerns of the EAO working group members, stakeholders and the public related to ML/ARD waste management and water management issues. We have been working diligently to obtain consistent transparent and quality documents on these issues with our environmental

1 consultants, Rescan. PBM is fully aware of
2 the requirements and objectives related to
3 ML/ARD water quality and water
4 balances but will not circulate to the
5 working group members anything but carefully
6 reviewed and acceptable documents prepared to
7 accurately reflect best engineering and
8 scientific practices and environmental
9 responsibility and safety.

10
11 Furthermore, we are closely referencing the
12 approved terms of reference in order to
13 ensure that all requested documents will be
14 included in the application. There is
15 absolutely no advantage in circulating
16 incomplete documents which will only waste
17 reviewers' time. Unfortunately, we have not
18 yet received completed documents on these key
19 issues that meet our standards or the
20 standards of our external reviewers. When
21 completed documents on these key issues are
22 received and acceptable to PBM, PBM will
23 circulate them to working group members via
24 e-mail on the Sharepoint site.

25
26 Unfortunately, we will not be able to provide
27 a long lead time for preliminary review in
28 advance of the application's submission. As
29 a junior public company, PBM depends on our
30 shareholders to finance the company and PBM
31 is obligated to deliver timely results to our
32 shareholders. We have consistently been
33 given by our consultants cost estimates and
34 projected deadlines for the completion of the
35 application that have been far exceeded.
36 This has resulted in numerous unmet
37 commitments being presented to our
38 shareholders, the EAO, and working group
39 members. PBM simply doesn't have the luxury
40 or resources to extend the submission date of
41 the application. Every delay costs the
42 company thousands of dollars in extra costs
43 and loss of revenue for delayed production.
44 It's extremely difficult in today's economic
45 climate to raise additional funds.

46
47 The point of those e-mails was simply to

1 demonstrate, My Lord, the extent that -- first of
2 all, my friend's submission to you that this had
3 been a 10-year process of intensive review by the
4 EAO with Pacific Booker repeatedly responding to
5 the EAO's requests for additional information is
6 already not borne out when we get to August 2009.
7 What we have is an early identification by the EAO
8 of what the water quality management issues are
9 and what they expect to see in the way of
10 information that's going to be provided by Booker,
11 and no information yet being provided by Pacific
12 Booker. That's where we are at in August 2009.

13 Now, My Lord, returning to our written
14 argument. On September -- I'm sorry, paragraph
15 27. On September 28, 2009 the petitioner
16 submitted its application for an environmental
17 assessment to the EAO. The petitioner did not
18 arrange for a meeting with the ML/ARD-Water
19 Technical Subcommittee in advance as it had
20 committed to do so. Following the evaluation of
21 the application, and with input from the working
22 group, Mr. Hamilton approached the petitioner to
23 advise that the EAO couldn't accept the
24 application for review because it didn't meet the
25 information requirements of the terms of
26 reference.

27 So, again, My Lord, I'll just pause there to
28 say not that the EAO wanted additional
29 information, but they wanted the information that
30 Pacific Booker was supposed to have provided as
31 part of the terms of reference.

32 And then Mr. Hamilton provided what he called
33 a screening evaluation table which set out in
34 detail a comprehensive set of comments from the
35 working group members regarding aspects of the
36 project that raised concern or question at this
37 screening stage.

38 I'm at paragraph 29, My Lord. The petitioner
39 resubmitted its application for an environmental
40 assessment certificate to the EAO on May 28, 2010,
41 and that was by way of an addendum to its 2009
42 application. And the EAO did accept this
43 application for review in June of 2010, although
44 Mr. Hamilton emphasized to the petitioner that the
45 evaluation that went into the acceptance of the
46 application for review was in the nature of a scan
47 and that what was going to follow was a more

1 in-depth review by members of the working group.
2 A 70-day -- I'm at paragraph 31, My Lord. A
3 70-day period of formal review on this application
4 began on July 22nd, 2010. Members of the working
5 group continued to express concern through the
6 formal comment period that the petitioner had
7 provided insufficient baseline data to assess
8 environmental impacts, that the project as
9 proposed was high risk with significant attendant
10 long-term liabilities, and that it would
11 negatively impact First Nations' interests and
12 rights. Those -- those concerns, My Lord, were
13 concerns that remained consistent throughout the
14 EAO review process.

15 Now, My Lord, at paragraph 31 of our argument
16 we've summarized in kind of point form some of the
17 concerns that emanated from this working group
18 review, and I'm just going to go through them.
19 And, then, My Lord, I'm going to take you to two
20 documents in particular, if I might, that was
21 provided to the EAO at this point in time.

22 So the concerns included that, firstly,
23 inadequate baseline water quality sampling had
24 been provided to adequately predict water quality
25 conditions and effects resulting from the
26 discharge of seepage and treated effluent to
27 Morrison Lake; that the Morrison-Babine areas had
28 high ecological values where water quality was
29 already impacted by acid rock drainage of existing
30 closed mines, the Bell-Mine and Granisle, and
31 therefore that a "low risk tolerance threshold"
32 should be assumed; the proximity of the proposed
33 mine pit to Morrison Lake and the potential for
34 contaminated ground water flux from the pit lake
35 to Morrison Lake during operations and on closure
36 was a significant risk; the proposed mitigation
37 strategy of collection and long-term chemical
38 treatment of contaminated drainage was contrary to
39 provincial policy on metal leaching and acid rock
40 drainage at mine sites, which was the policy I
41 took Your Lordship to earlier that was appended to
42 Mr. Hamilton's affidavit; the enormous preliminary
43 liability cost estimates in the form of the
44 financial security that would be required of
45 Pacific Booker given its mitigation strategy; and
46 concerns of First Nations regarding the impact of
47 the project on its rights and also, in particular,

1 with respect to rights in the salmon fishery.

2 Now, given what happened after this point, My
3 Lord, it would be helpful to just draw your
4 attention to two documents, in particular, that
5 summarize these concerns. And the first is the
6 notes of the working group which are appended as
7 Exhibit Q to Mr. Hamilton's affidavit, which again
8 is Volume 3, Tab 8. And these are the working
9 group meeting notes from October 4th, 2010. And I
10 won't take you through the list there, My Lord,
11 but you'll see at the very bottom that
12 representatives of the proponent were there,
13 including Mr. Tornquist.

14 And, My Lord, the comments are reflected
15 beginning at page 179 in the upper left-hand
16 corner, and I won't read through all of them, but
17 I wanted to give Your Lordship a flavour of the
18 kind of feedback the working group is giving at
19 this point in time. So under the member Ministry
20 of Energy and Mines, MEM, the first bullet point:

21
22 Clarification of some information as required
23 to determine whether the proponent has
24 provided enough information to determine the
25 effects of the proposed project. A complete
26 list of topics requiring clarification will
27 be included in written comments from the
28 Ministry of Energy and Mines. It has been
29 difficult to navigate the water quality
30 assessment in the application because of the
31 various information submissions and a lack of
32 cohesion between them. Water quality
33 protections need to be clarified. The water
34 quality modeling approach needs to be more
35 transparent so it can be assessed.

36
37 And then if you flip over to the MLE comments
38 on the following page, My Lord, the two bullet
39 points are:

40
41 There is insufficient water quality data on
42 Morrison Lake to assess potential water
43 quality effects. Water quality data are
44 needed across seasons and at varying depths
45 to yield an understanding of how discharge
46 would affect water quality. Water quality
47 predictions may be inaccurate due to

1 incomplete information and our sampling
2 methodologies. Diversion of unnecessary
3 amounts of clean water may overcharge the
4 water management system in certain streams.
5 There is not enough information to assess
6 flow in the winter and results in
7 hydrological and water quality effects.
8 Local data should be used rather than
9 extrapolated regional data. There is not
10 enough information to determine hydrological
11 effects. It has been challenging to review
12 this application because of the lack of
13 cohesion between the various application
14 submissions.

15
16 So those are the kind of comments that were
17 coming back from members of the working group, My
18 Lord. And, again, not to belabour the point, but
19 they were comments that were directed at not new
20 issues -- well, we were satisfied with that and
21 here's another issue we want you to look at. It's
22 with Pacific Booker's failure to provide the
23 information that the working group members
24 required to assess the water quality issues that
25 had been identified at the outset.

26 And then the other memo by way of feedback
27 that I just wanted to highlight, My Lord, is
28 Exhibit T to Mr. Hamilton's affidavit. This is an
29 October 13th, 2010 memorandum from Kim
30 Bellefontaine, who is a geoscientist with the
31 Ministry of Energy and Mines, to Mr. Hamilton.
32 And I won't read the whole thing out, My Lord,
33 but, again, just because these concerns are ones
34 that are consistently expressed and make their way
35 into the ministers' decision it's useful to see
36 how they were highlighted at this stage. And so
37 under the heading: Provincial ML/ARD Policy,
38 Ms. Bellefontaine writes: [as read in]

39
40 The Minister of Energy and Mines and the
41 Ministry of Environment have a joint policy
42 on ML/ARD entitled Policy for Metal Leaching
43 and Acid Rock Drainage at Mine Sites. The
44 emphasis of the policy is to prevent
45 long-term liabilities associated with ML/ARD
46 whenever possible. In cases where these
47 liabilities cannot be prevented they are

1 required to be minimized to the extent
2 possible and residual effects must
3 effectively be managed. The collection on
4 long-term chemical treatment of contaminated
5 drainage can be an effective mitigation
6 strategy for protecting the environment, but
7 because it has significant risk liability and
8 alienates land from future productive use it
9 is considered a mitigation strategy of last
10 resort.

11
12 The provincial policy states that mine
13 drainage treatment will only be acceptable as
14 a permanent mitigation strategy if other
15 preventative mitigation strategies such as
16 underwater disposal are not feasible or
17 create more risk of environmental
18 contamination.

19
20 The Morrison project is currently being
21 designed in a manner that does not prevent
22 ML/ARD from the waste rock dumped in low
23 grade or stockpile and so a close analysis of
24 the alternative assessments of these mine
25 components is required to determine whether
26 the current project design is consistent with
27 provincial policy.

28
29 And then the same points are made by
30 Ms. Bellefontaine effectively at her comments at
31 paragraphs 49 and 50. And, again, My Lord, this
32 isn't information that is being kept hidden from
33 Pacific Booker. This is information that's being
34 conveyed to Pacific Booker about what the
35 difficulties are with the project design as
36 proposed.

37 THE COURT: Would this memo have gone to Pacific
38 Booker?

39 MS. HORSMAN: I'm almost certain it would have, My
40 Lord. I can confirm that. But every -- I mean,
41 it was no secret Pacific Booker was being given
42 everything and encouraged to participate with
43 members of the working group about these problems
44 and how to address them. And you'll see -- 'cause
45 we'll get to some more kind of memos from
46 Ms. Bellefontaine later in the process where she's
47 encouraging and, in fact, identifying alternative

1 design proposals that Pacific Booker might want to
2 consider. So this -- this was very much a
3 conversation, My Lord. But to the extent that my
4 friend left the impression yesterday that it was a
5 process of repeated and changing and demands from
6 the EAO for more and more and more information on
7 different topics from Pacific Booker, I'm simply
8 trying to make again the point, My Lord, that
9 there's consistent concerns being expressed to
10 Pacific Booker by members of the working group
11 throughout this process.

12 Now, My Lord, I expect the point I've made at
13 paragraph 32, which is taken from Mr. Hamilton's
14 affidavit, answers Your Lordship's point about
15 whether Pacific Booker was aware of memorandums
16 like the one I just took Your Lordship to on
17 October -- it should actually say 2010, My Lord.
18 That's a typo in paragraph 32 of my written
19 argument. I think it says 2009, but that was
20 actually 2010. The petitioner wrote to request a
21 temporary suspension of the time limit for review
22 of the application to allow it additional time to
23 consider the comments of the working group and
24 develop a comprehensive response. That was at
25 Pacific Booker's request, My Lord.

26 And then on November 18th, 2010 the
27 petitioner provided its response to the working
28 group's comments and concerns in a document that
29 was entitled: "The Review Response Report." At
30 the time that was provided Pacific Booker asked
31 Mr. Hamilton to lift the suspension period and
32 Mr. Hamilton declined to do so, My Lord, until
33 after a scheduled January 2011 meeting of the
34 working group. And he advised Pacific Booker at
35 that time that the EAO continued to have what he
36 characterized as significant concerns regarding
37 the project design and its potential impacts on
38 Morrison Lake. That, then, is at the very end of
39 2010.

40 Now, following meetings of the working group
41 in January 2011 and the technical subcommittee's
42 in February 2007 -- or 2011, the petitioner agreed
43 to develop a formal addendum to its application.
44 And so by letter dated March 9th, 2011,
45 Mr. Hamilton advised the petitioner that he would
46 defer a decision on lifting the time limit
47 suspension until after that addendum had been

1 received and reviewed. And that letter also
2 detailed the information the EAO required to be
3 included in this addendum. And that, My Lord --
4 it would be useful to take you to Mr. Hamilton's
5 letter. It's Exhibit Z to his affidavit. It's a
6 March 9th, 2011 letter to Mr. Tornquist from
7 Mr. Hamilton. Starting in the second paragraph of
8 that page: [as read in]:
9

10 Firstly, I should note that the EAO met with
11 you, your staff, and chairman Will Deeks, on
12 December 16th, 2010 in Vancouver to discuss
13 the current status of your proposed project
14 with a focus on the information the EAO would
15 require in order to remove the time limit
16 suspension. At that time I informed you that
17 the EAO had serious concerns about the
18 long-term environmental liability of the
19 proposed project with particular respect to
20 the land based waste tailing storage, the
21 plan for a mine drainage water collection and
22 treatment system in perpetuity, and the
23 potential impacts on water quality on the
24 environment. I also informed you that in
25 light of EAO's preliminary assessment of the
26 strong prima facie strength of the claim of
27 the Lake Babine First Nation for the project
28 area you should seriously consider the issues
29 which they had raised regarding aspects of
30 the project design and mine component
31 locations.
32

33 At the culmination of that meeting you
34 informed us that you took our concerns
35 seriously and would consider proposing
36 changes to the project. You committed to
37 provide additional information to the working
38 group at a meeting scheduled for January
39 25th, 2011. In mid-January Pacific Booker
40 provided the CEAA...
41

42 And that's the Canadian Environmental Assessment
43 Agency, My Lord.
44

45 ... with several conceptual documents which
46 attempted to address some of the issues
47 raised by Lake Babine Nation and which also

1 proposed design changes with respect to waste
2 rock management in the closure phase. These
3 changes were intended to reduce the potential
4 for long-term treatment of high volumes of
5 mine drainage and reduce the potential
6 impacts to the receding environment. These
7 conceptual plans were discussed at the
8 working group meeting but you did not request
9 a formal review by the EAO or CEAA, nor a
10 formal response from the working group. I
11 consider those documents as draft planning
12 tools and they will not form any part of the
13 formal record.

14
15 And then Mr. Hamilton lists what is -- he's
16 going to be looking to Pacific Booker to provide.
17 Now, returning to the chronology in our
18 written argument, My Lord, paragraph 35. On July
19 8, 2011, the petitioner delivered its Review
20 Response Report, Volume 2. And at that time
21 Mr. Hamilton advised he would lift the time limit
22 suspension on the delivery of the report to
23 members of the working group. Following technical
24 review of the Review Response Report, Volume 2 by
25 members of the working group it became apparent
26 that there was still considerable uncertainty
27 regarding the environmental impacts of the
28 proposed project and concerns about gaps in the
29 information. Not new concerns, My Lord, the same
30 concerns that hadn't been addressed.

31 At that point in time the EAO commissioned,
32 at its own cost, an external third-party review of
33 hydro geology, water balance, water quality and
34 related aquatic resources and fishery components
35 of the proposed project in an effort, My Lord, to
36 try and fill some of the uncertainties that were
37 left by the material that Booker was putting
38 forward. And so the time limit for review of the
39 petitioner's application was once again suspended
40 to permit that third-party review the EAO did
41 where it subsequently retained a third-party
42 fisheries expert, again on its own expense, a
43 Dr. Todd Hatfield of Solander Research and a
44 hydrologist, Dr. Wells, of Robertson
45 Geoconsultants. And Dr. Hatfield provided his
46 report in November 2007 and Dr. Wells in December
47 of 2011, and both reports concluded that

1 additional analysis and data was required in order
2 to assess the water impacts of the project.

3 One of the issues that was raised by
4 Dr. Wells in the Robertson Geoconsultant's report
5 was uncertainty in the lake mixing model that was
6 used by the petitioner's consultants. And so as
7 we talked about yesterday, My Lord, the plan was
8 to pump treated effluent into Morrison Lake using
9 a pipeline and a diffuser. And there was
10 scientific modelling around lake behaviour that
11 presumed the lake turned over twice a year, and
12 that's how the contaminated water would diffuse.
13 And that assumption was quite critical to the
14 efficacy of the petitioner's proposal. And so
15 Dr. Wells identified some uncertainty around that.
16 So the EAO then retained, at its own expense, a
17 third expert, a Dr. Laval, who was a lake
18 behaviour specialist from the University of
19 British Columbia, to provide advice on that issue.

20 Now, on January 20th, 2012, My Lord,
21 Mr. Hamilton met with Mr. Tornquist to discuss the
22 outstanding issues which needed to be addressed
23 before the suspension could be lifted. And in a
24 letter dated January 31st, 2012 Mr. Hamilton
25 summarized discussions at the meeting, reviewed
26 the history of consistent data deficiencies in the
27 petitioner's application material, and encouraged
28 the petitioner to take time to develop a
29 submission that complied with the repeated
30 information requests from the members of the
31 working group. And that letter, My Lord, is at
32 Exhibit C to Mr. Hamilton's affidavit. Sorry,
33 that's not at Exhibit C. It's --

34 THE COURT: Double C?

35 MS. HORSMAN: CC, double C.

36 Yes, My Lord, it's a letter to Mr. Tornquist
37 dated January 31st, 2012. I pause there to say
38 this is six months before the draft assessment
39 report that Your Lordship heard about yesterday.
40 [as read in]:

41
42 I'd like to thank you for taking the time to
43 meet with me on Friday regarding the
44 environmental assessment of Pacific Booker
45 Mines and you providing me with a letter
46 indicating Pacific Booker submitting new
47 information to the EAO shortly and requested

1 that we lift the time suspension currently in
2 place. In this letter I wish to address a
3 number of issues and set out next steps from
4 the perspective of the Environmental
5 Assessment Office.

6

7

 And then under the heading January 20th, 2012
8 discussion, Mr. Hamilton writes:

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 At our meeting on January 12th, 2012 we also
discussed potential proponent commitments
which can include studies of the flows,
currents, temperatures and stratification
regimes.

 And, so, just one point I wanted to emphasize
about that, My Lord, is at this point in time the

1 parties haven't settled on the table of
2 commitments that was eventually incorporated into
3 the environmental assessment report which
4 reflected Pacific Booker's commitments when it
5 came to mitigation, so that that was something
6 that was still being discussed in January.

7 And, then, if you skip down to the base of
8 that page 2, My Lord, under the heading history of
9 the project, information gaps, Mr. Hamilton
10 writes:

11

12 At this point I wish to reiterate a number of
13 statements which I've made through the course
14 of the EA for the proposed project, primarily
15 as they relate to the completeness of
16 information required to determine effects.

17

18 And then what Mr. Hamilton does is basically
19 go through a kind of history of the difficulty
20 that the EAO has had in terms of getting the
21 required information from the proponent. And so I
22 won't go through all of that, but under the
23 heading next steps at page 7 of Mr. Hamilton's
24 decision, which is page 269, the very base of that
25 page, My Lord, Mr. Hamilton writes:

26

27 In summary, EAO has not received the
28 technical information from Pacific Booker
29 that has been requested over the course of
30 the application review period. I will
31 reiterate once again that the information
32 requested is required in the EA phase of the
33 project in order for the EAO to be able to
34 ascertain with a reasonable amount of
35 certainty that the potential for significant
36 adverse effects on environmental, social,
37 economic, health and heritage value
38 components can be mitigated or averted.

39

40 Should Pacific Booker's fifth supplemental
41 submission not provide the information
42 necessary to come to conclusions, EAO's
43 assessment report may identify that the
44 proposed project, as designed, has the
45 potential for significant adverse
46 environmental effects. I would like to
47 clarify that, under British Columbia's

1 Environmental Assessment Act, ministers must
2 consider the assessment report and any
3 recommendations accompanying the assessment
4 report in making a decision on an EA
5 certificate. Ministers have the option to
6 issue an EA certificate; to not issue an EA
7 certificate; or request that additional
8 information be collected.
9

10 Which is a passage that makes it quite clear as
11 the statute anticipates, My Lord, that it's the
12 ministers that have the statutory decision-making
13 role in this particular context.

14 My Lord, at paragraph 40, going back to our
15 chronology and the written argument. The
16 petitioner's further third-party review response
17 report which was dated January 31st, 2012 did not
18 satisfy the concerns of members of the working
19 group or the EAO's third-party reviewers. The
20 areas of continuing concern included seepage from
21 the tailage -- tailing storage facility, the
22 long-term effects on Morrison Lake water quality,
23 and the influence of mine dewatering on the base
24 flow in Morrison Creek.

25 The comments of the Ministry of Energy and
26 Mines were provided again by Ms. Bellefontaine and
27 this memorandum included the suggestion that
28 consideration should be given to apparently
29 feasible design alternatives that would be
30 preventative in terms of metal leaching and acid
31 rock drainage.

32 My Lord, again, it would be helpful just to
33 briefly review the two -- refer to two of those on
34 a third-party review comment on the third-party
35 review response report and also the report of
36 Ms. Bellefontaine. And so Dr. Wel's report is at
37 Exhibit FF of Mr. Hamilton's affidavit. That's a
38 memo dated March 31st, 2012 from Robertson
39 Geoconsultants and it's Re: Comments on Third-
40 Party Review Response Report Morrison Project.
41 And so, My Lord, if you if you can skip to
42 conclusions and recommendations at page 291, it
43 usefully summarizes what Dr. Wells had to say:
44 [as read in]

45
46 In our opinion, the final assessment of the
47 potential for adverse environmental impacts

1 in terms of water quality will depend on the
2 water quality criteria applicable to the
3 site. An assessment of the ...

4

5 Something to do with water quality, My Lord. I
6 can't even hazard a guess on -- on that one.

7

8 ... proposed by the proponent for the project
9 site was beyond the scope of our review. We
10 note that additional potential seepage
11 mitigation options are currently proposed as
12 part of the adaptive management plan.
13 Depending on the water quality objectives of
14 the project these measures may have to be
15 included in the project description.

16

17 And that refers to the problem first to do with
18 seepage from the tailing storage facility.

19

20 The following recommendation should be
21 considered to further reduce any potential
22 environmental impacts of the proposed
23 Morrison project. Proactive seepage
24 prevention measures, i.e., use of liners,
25 should be preferred over seepage recovery, in
26 particular considering the high sensitivity
27 of the environment. A water treatment plant
28 should be constructed and operated if
29 required at mine start-up. Continued
30 dewatering of the open pit and treatment of
31 contact water should be required during any
32 periods of temporary closure and additional
33 analyses should be completed to assess the
34 influence of the proposed pit dewatering on
35 winter base flow in Morrison Creek.

36

37 And, again, that's the March 31st, 2012
38 report of Dr. Wels.

39

40 And then Ms. Bellefontaine's comments are at
41 Exhibit DD. And, My Lord, I won't -- I won't take
42 Your Lordship through the whole thing 'cause
43 Ms. Bellefontaine repeats a number of concerns
44 she's had all along, but if you'd flip to
45 paragraph 5 of that report at page 273.

46

THE COURT: Did -- did you say Exhibit --

47

MS. HORSMAN: I'm sorry, it's Exhibit D --

THE COURT: Double D.

1 MS. HORSMAN: Double D, yes. And so it's -- it's
2 Ms. Bellefontaine's one-page memo. And then
3 immediately behind it is a technical memo she
4 received from Lorax Environmentals. And I'm on --
5 it should be a memo to Chris Hamilton and Tracey
6 James from Ms. Bellefontaine.

7 THE COURT: A March 2 memo?

8 MS. HORSMAN: Yes.

9 THE COURT: All right.

10 MS. HORSMAN: And it's paragraph 5, in particular.

11 THE COURT: Yes.

12 MS. HORSMAN: [as read in]:

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Based on the information provided, the
Ministry of Mines concludes that the
alternative mine waste handling option of
PAG ...

That's potential acid generating waste.

... in the TSF during operations appears to
be both economically and technically feasible
as well as environmentally preferable from a
water quality perspective since it
proactively prevents metal leaching and acid
rock drainage inputs from large quantities of
waste materials for both the operational and
post-closure periods. It could also allow
for greater flexibility of management of
LGO.

I don't know what that means, My Lord, but I
can find out, if necessary.

Given the express concern related to
incomplete processing of the full quantity of
stockpiled LGO this waste management option
has not been sufficiently evaluated in the
application. Given the sensitivity
importance of Morrison Lake and the
possibility of adverse effects, all
reasonable and feasible alternatives that
could lead to better water quality outcomes
and reduce risks for the project should be
fully considered and incorporated.

And, again, My Lord, that stems back to the

1 policy around metal leaching and acid rock
2 drainage of mine sites and the emphasis on the
3 collect and treat strategy as a -- as a last
4 resort measure.

5 So if I -- if I can just pause there again in
6 the narrative, My Lord. Whatever money that
7 Pacific Booker may have expended in the EAO review
8 process up until March 2012, they cannot in my
9 submission possibly say that such money was
10 expended in reliance on any false impression they
11 were given by the Environmental Assessment Office
12 that they were going to get an environmental
13 assessment certificate out of this project. It
14 was a project that had been in trouble for some
15 time and for reasons that Pacific Booker had been
16 advised of repeatedly. It was a high risk project
17 in an area of ecological value and Pacific Booker
18 hadn't provided information to the working group
19 that addressed the uncertainty and risk.

20 By this point in time, My Lord, which is
21 March of 2012, in my submission the project was
22 effectively moribund. And so what kick-started
23 it, if I might put it that way, is not further
24 analysis or data gathering or studies or anything
25 of the like. It was Pacific Booker committing on
26 paper to a number of mitigation conditions that it
27 promised to undertake to address the concerns,
28 including, most dramatically, My Lord, the
29 commitment to line the entire five-kilometre
30 square area of the tailing storage facility with a
31 geomembrane liner.

32 And that, My Lord, takes me to the draft
33 assessment report where perhaps this point is most
34 effectively made. That --

35 THE COURT: Now, just before you do that. My use of
36 the word sham yesterday was not meant to imply
37 that this was all some kind of a phony exercise.
38 There's obviously been an enormous effort been put
39 into evaluating this project by people within the
40 government and, of course, by the petitioner, but
41 -- it's -- it's clear that it's an impressive
42 effort. My -- my concern that I expressed
43 yesterday is that -- is driven by the fact that
44 what happens here is that eventually the
45 petitioner is told you have -- you have reached
46 the point where we are satisfied that the
47 potential environmental impacts can be adequately

1 mitigated. And, well, in Exhibit double C that
2 you referred to a moment ago you read a passage
3 under the heading of next steps where -- where
4 it's expressly said that -- the expression is used
5 again that the potential for significant adverse
6 effects on environmental, social, economic, health
7 and heritage value components can be mitigated or
8 avoided. And, of course, that's a theme
9 throughout. And my -- my concern has been that
10 the petitioner engages in the process and whatever
11 -- whatever the background of all this is that
12 you've taken me through, the outcome of all that
13 is that the petitioner is advised that it has
14 achieved what it's asked to achieve. At least,
15 that's the way it appears to me at the moment.
16 And as you said a moment ago, perhaps the project
17 hit some pretty low points at times and, in fact,
18 it might have been moribund, to use your word, at
19 one point. But then the petitioner does things to
20 get it up and going again. And, ultimately, as I
21 say, it comes to the point where it has jumped
22 through all the hoops. And, then, notwithstanding
23 that, the recommendation goes forward to the
24 ministers that they should decline the
25 certificate.

26 That's what I meant by sham. That you -- you
27 -- to put it a bit differently, you -- you kick
28 the ball and it goes through the goalpost, but
29 then the referee says no, sorry, we moved the
30 goalpost just -- just before you kicked the ball
31 or just after you kicked it, whatever the --
32 however the metaphor works. That's the sort of
33 concern I have. And, no doubt, you're going to
34 get to that.

35 MS. HORSMAN: I -- I understand that is Your Lordship's
36 concern, and it was necessary for me to go through
37 the history in this degree of detail to get
38 through what happened at the next stage of the
39 decision-making process, which was the executive
40 director's recommendation to the ministers and the
41 ministers' decision.

42 THE COURT: All right.

43 MS. HORSMAN: Just, if I can pause for a moment, My
44 Lord. With your -- your comment about they jumped
45 through all the hoops, they hadn't jumped through
46 all the hoops, My Lord, because the most important
47 hoop is to get the certificate from the ministers.

1 And that's an entirely separate statutory decision
2 making under the Act. And my concern with the way
3 my friend has framed the argument and with the
4 notion that having achieved a favourable
5 assessment report that ends any consideration of
6 the environmental, economic, social, heritage
7 impacts, effectively collapses the ministers'
8 policy making decision into a technical review and
9 their conclusions of the technical review report.
10 That's what my friend's submission does.

11 THE COURT: No, I -- I appreciate that the ministers
12 have a -- have a different task to perform than
13 the executive director. And, no doubt, you're
14 going to take me to that in some detail.

15 MS. HORSMAN: Yes.

16 THE COURT: All right. We'll take the morning
17 adjournment.

18 THE CLERK: Order in chambers. Chambers is adjourned
19 for the morning recess.

20

21 (PROCEEDINGS ADJOURNED AT 11:01 A.M.)

22 (PROCEEDINGS RECONVENED AT 11:18 A.M.)

23

24 THE COURT: As you mentioned, before I forget, that
25 tomorrow morning I've -- I'm required to go to New
26 Westminster for a nine o'clock hearing, which I
27 expect is going to take something in the order of
28 30, 40 minutes and then I'll be coming back here.
29 So I suggest tomorrow morning that rather than
30 getting you here and sitting around just waiting,
31 that we start at 10:30. And how are we doing for
32 time? Are we going to get through this today and
33 tomorrow, including interveners?

34 MS. HORSMAN: I -- I'm still hopeful, My Lord.

35 THE COURT: Yes. All right.

36 MS. HORSMAN: If it's up to me, I'll do my best.

37 THE COURT: All right. I'll -- I'll avoid asking you
38 questions that cause you to --

39 MS. HORSMAN: Oh, no, please don't.

40 THE COURT: -- to spend more time.

41 MS. HORSMAN: My Lord, just before the morning break I
42 think we were on the point about what got Pacific
43 Booker over the hurdles, so -- so to speak, was
44 not the additional studies or analysis or data; it
45 was the on-paper commitments it was prepared to
46 give to the Environmental Assessment Office. And
47 that point, My Lord, in terms of what was

1 committed to is perhaps most effectively made by
2 going to the table of commitments to the draft
3 assessment report which is appended to the
4 affidavit of Derek Sturko, Volume 3, Tab 7, I
5 believe. This is the final assessment report, My
6 Lord. I don't think the table of conditions
7 changed as between the two. And the conditions
8 are that they dropped -- the formal assessment
9 report. I'm sorry, you're at Exhibit A, Tab 3.
10 And then --
11 THE COURT: Exhibit --
12 MS. HORSMAN: I'm sorry, Exhibit A and then there's a
13 number of tabs to Exhibit A. So it's Tab 3.
14 THE COURT: Sorry, I'm not -- I'm not with you to be
15 following the tabs here according to --
16 MS. HORSMAN: Sorry.
17 THE COURT: Exhibit -- Tab 7 is Derek Sturko's
18 affidavit.
19 MS. HORSMAN: Yes.
20 THE COURT: And then I have Tab A and which is a --
21 MS. HORSMAN: Yes.
22 THE COURT: -- very thick tab, and then on they go
23 after that, B, C --
24 MS. HORSMAN: My Lord, do you have in your version
25 behind Exhibit A to Mr. Sturko a number of
26 numbered tabs: 1, 2, 3 and so on?
27 THE COURT: No.
28 MS. HORSMAN: Okay. I'll go to the page number,
29 perhaps.
30 THE COURT: All right.
31 MS. HORSMAN: It's page 329 in the upper right-hand
32 corner.
33 THE COURT: Three twenty-nine.
34 MS. HORSMAN: Not of the report, but in the -- the
35 upper right-hand corner of the page --
36 THE COURT: Yes.
37 MS. HORSMAN: -- should be numbered.
38 THE COURT: I think I'm almost there. Yes. Table of
39 conditions?
40 MS. HORSMAN: Yes, My Lord, precisely. That was
41 Appendix B to the final assessment report.
42 THE COURT: Yes, I have that.
43 MS. HORSMAN: And so you'll see it's divided by topic.
44 And so the first topic is metal leaching and acid
45 rock drainage. And -- and I won't go through
46 every one of them in the interests of time, My
47 Lord, but just to give some notion of what was

1 being agreed to by Pacific Booker, if you go to
2 number 9.

3 THE COURT: Now, remind me what this appendix is. It
4 says table of conditions, but remind me what it
5 is.

6 MS. HORSMAN: I'm sorry, My Lord. This is -- this is
7 the -- it's the table of conditions that set out
8 the mitigative measures that Pacific Booker has
9 committed to fulfill as -- as part of the project.

10 THE COURT: Is -- is this Pacific Booker's work
11 product?

12 MS. HORSMAN: It's the product of -- of a combined
13 consultation effectively between Pacific Booker
14 and Mr. Hamilton, and I don't know if it involved
15 members of the working group as well.

16 THE COURT: All right. But this -- this is something
17 that Pacific Booker accepted?

18 MS. HORSMAN: And agreed to, indeed, My Lord.

19 THE COURT: Yes. All right.

20 MS. HORSMAN: And, indeed, agreed to in the spring of
21 2012, many of these conditions as a way of
22 addressing these outstanding concerns that we've
23 been discussing with the uncertainties around
24 water quality and water management. And my
25 understanding, My Lord, of -- of environmental
26 assessments generally is the table of conditions
27 are -- are concomitant to the environmental
28 assessment process and they eventually become, if
29 a certificate is issued, attached to the
30 certificate and ethically binding on the -- on the
31 proponent.

32 THE COURT: Yes.

33 MS. HORSMAN: And, so, I'm sorry, My Lord, with that
34 context I'm -- I'm at number 9: Tailing Storage
35 Facility Seepage Effects. And so what Pacific
36 Booker has committed to is the proponent must
37 design and install a geomembrane liner in the
38 tailing storage facility area sufficient to insure
39 that the seepage rate from the TSF does not
40 exceed, et cetera, without restricting the --
41 paragraph (a):

42
43 If any seepage from the tailing storage
44 facility at Morrison Lake or any streams
45 occurs which exceeds any limits for seepage
46 the proponent must prepare a plan of measures
47 to control the seepage in order to meet the

1 limits, obtain approval from the Ministry of
2 Environment for the plan, and implement the
3 plan. Annual reports on updated ground water
4 seepage must be prepared by the proponent and
5 shared with the Environmental Assessment
6 Office, Ministry of Environment, and Ministry
7 of Energy and Mines.

8
9 I should stop there and give you the complete
10 context for why I'm taking you through this, My
11 Lord, so when -- when we've made the point to Your
12 Lordship that Mr. Hamilton's findings in the
13 assessment report assumed successful mitigation
14 measures, these are the mitigation measures that
15 we are talking about. And so number 10: Seepage
16 of potentially acid draining poor water from open
17 pit into Morrison Lake following closure, which is
18 20 some odd years in the future, My Lord:

19
20 The proponent must maintain the elevation of
21 the pit lake below the elevation of Morrison
22 Lake to insure no pit seepage discharged to
23 Morrison Lake. Ground water monitoring wells
24 must be installed between the open pit and
25 Morrison Lake to monitor potential seepage of
26 contaminated water from the open pit to
27 Morrison Lake. Morrison Lake water quality
28 must be monitored at least twice each year,
29 summer and winter, to insure changes to water
30 quality in the lake are detected.

31
32 And then going on to the next page, My Lord.

33
34 The proponent must ...

35
36 I'm at 11:

37
38 The proponent must prepare an annual
39 calculation of site water balance. If
40 surplus water accumulates for more than two
41 years and requires treatment according to the
42 requirements of an Environmental Management
43 Act permit, the proponent must construct a
44 water treatment plan to collect, treat, and
45 discharge any excess contact water to
46 Morrison Lake via pipeline and diffuser. Any
47 water discharged to Morrison Lake must be

1 outside a mixing zone established by the
2 Ministry of Environment. Either British
3 Columbia water quality guidelines cites
4 specific water quality objectives or an
5 alternative requirement.

6
7 Tailing Storage Facility Water Enclosure,
8 number 13:

9
10 The proponent must manage and/or treat the
11 tailing storage facility water pond beyond
12 closure until such time as a direct discharge
13 without management or treatment is authorized
14 under the Environmental Management Act.

15
16 Morrison Lake Characterization:

17
18 The proponent must develop for EAO's approval
19 a plan to collect additional biological,
20 physical and chemical information on Morrison
21 Lake to further validate effects assessment
22 provided during the environmental assessment.

23
24 And that had to do with the uncertainty around
25 lake behaviour, My Lord.

26
27 This information must also be used by the
28 proponent to support and supplement
29 Environment Management Act permitting and
30 must be collected prior to applying for those
31 permits.

32
33 And then there's requirements for what must
34 be included in those studies.

35 And for Morrison River:

36
37 The proponent must complete a plan for the
38 approval of the Department of Fisheries and
39 Oceans and Ministry of Forests, Lands and
40 Natural Resource operations to measure year
41 round water flows in Morrison River. The
42 plan must include a follow-up monitoring
43 program to verify the proponent's predictions
44 that there will be no adverse effects to
45 physical fish habitat or flow augmentation.

46
47 And flow augmentation is used as mitigation and --

1 and so on, My Lord.

2 And so I've read those out just to
3 demonstrate the point that the type of conditions
4 that Pacific Booker had committed to, which is
5 again what Mr. Hamilton refers to when he talks
6 about successful implementation of mitigation
7 measures, were future commitments that involved
8 ongoing monitoring. And one of the points of the
9 working group members was given the nature of this
10 particular mine operation it might require ongoing
11 monitoring for 100 plus years. I think that's a
12 point that Mr. Hamilton makes in his assessment
13 report.

14 And, then, finally, just one -- one point on
15 the assessment report itself, My Lord, just to --
16 to demonstrate that these commitments were what
17 motivated Mr. Hamilton's finding around mitigation
18 measures. If you can turn to page 104 in the
19 upper right-hand corner which is page 47 of that
20 same report that you're on.

21 THE COURT: Page 47?

22 MS. HORSMAN: It's page 47 at the bottom of the report
23 and it's page 104 in the upper right-hand corner.

24 THE COURT: All right. I have that.

25 MS. HORSMAN: So under the heading: Summary of Issues
26 In Mitigation. During the review of the
27 application additional issues were raised by the
28 working group, First Nations, and members of the
29 public. These issues, the proponent's responses,
30 and the EAO's assessment of adequacy of responses
31 are detailed in Appendix 1. The project
32 description and table of conditions, which is what
33 we were just looking at, My Lord, contains
34 specific mitigation measures. Examples of some of
35 the key issues and additional commitments include
36 -- and then the first bullet:

37
38 Many concerns were expressed by reviewers
39 over the adequacy of comprehensive baseline
40 hydro geology and water flow information. In
41 particular, there were gaps noted in ground
42 water quantity, including ground water
43 levels, et cetera.

44
45 And a common theme was the lack of
46 information relating to ground water flow into the
47 TSF and in areas between the TSF and Morrison Lake

1 and Morrison Lake and the open pit. And then
2 there's a description of the third-party review
3 that the EAO had provided.

4 And so in the first bullet point beginning
5 with the words EAO Commission, My Lord, if you can
6 just skip down to the sentence about four from the
7 bottom:

8
9 The third-party reviewer also indicated that
10 the proponent's commitment on closure to keep
11 the final pit lake level below the elevation
12 of Morrison Lake would prevent water in the
13 open pit from impacting Morrison Lake. The
14 EAO was satisfied with the recommendations of
15 the third-party review. The proponent
16 committed to installing ground water
17 monitoring wells between the open pit and
18 Morrison Lake to annually monitor water
19 quality to insure the predicted water quality
20 of Morrison Lake is being met. The proponent
21 committed to monitor water inflows to the
22 open pit and report annually on the ground
23 water seepage. The proponent committed to
24 lining the TSF with the geomembrane.
25

26 And so on, My Lord. But that page and page 105
27 highlights what mitigation measures were
28 ultimately proposed that led Mr. Hamilton to reach
29 the conclusion he did in the assessment report.
30 And my point is simply they consisted of
31 commitments legally binding, yes, but which
32 anticipated future mitigation measures and ongoing
33 into the very far future in -- in some respects.

34 Now, My Lord, I'm back in our written
35 argument at the draft assessment report on page
36 13, the heading: Draft Assessment Report. You've
37 already heard from my friends about the
38 circulation of the draft assessment report
39 authored by Mr. Hamilton in June 2012. I wanted
40 to say a word about the conference call that was
41 held on July 30th, 2012. I don't know if Your
42 Lordship remembers that bit of evidence from
43 yesterday.

44 THE COURT: Yes.

45 MS. HORSMAN: That's at paragraph 40. I'm at paragraph
46 47 of my written argument. And so what had
47 happened by July 30th, 2012 is that Mr. Hamilton

1 had received comments back from members of the
2 working group on the draft assessment report. And
3 some of the members of the working group continued
4 to express concern and so Mr. Hamilton arranged a
5 conference call that was attended by
6 representatives of Pacific Booker and also
7 representatives of the Ministry of Energy and
8 Mines, Ms. Bellefontaine, and the Ministry of
9 Environment, Mr. Tamblyn. I believe Mr. Hunter
10 said yesterday that Mr. Sturko was on the phone,
11 but he wasn't, My Lord. It was Mr. Hamilton that
12 facilitated the call, just by way of
13 clarification. And my friend, Ms. Glen, took you
14 to part of Mr. Hamilton's affidavit on this call,
15 but she -- she missed a part that's quite
16 important, in my submission, and so I just wanted
17 to go back to it.

18 This is again back to the affidavit of Chris
19 Hamilton, My Lord, which is Volume 3, Tab 8, and
20 it's paragraph 60 -- it begins at paragraph 68 in
21 the body of the affidavit.

22
23 On July 30th, 2012, I participated in a
24 conference call with members of the working
25 group and representatives of Pacific Booker,
26 et cetera.

27
28 And I believe Ms. Glen read you out paragraph
29 68 and 69, so I won't do that again. And then I
30 -- she read you out the first sentence of
31 paragraph 70:

32
33 Pacific Booker representatives advised that
34 they wished to continue with the referral
35 notwithstanding the uncertainties associated
36 with the project.

37
38 But I don't think she read you out the second
39 sentence or took you to that e-mail, and that's
40 the point I wanted to highlight. What
41 Mr. Hamilton deposes is that at his request
42 Mr. Tornquist confirmed in writing the advice that
43 he wanted this project to go to the ministers
44 without review, and Mr. Tornquist provided an
45 e-mail confirming that that was Pacific Booker's
46 wish. And that's at Exhibit HH. It's an e-mail
47 of July 30th, 2012 from Mr. Tornquist to

1 Mr. Hamilton. And Mr. Tornquist states:

2

3 Hello, Chris. Pacific Booker Minerals Inc.
4 recognizes that some uncertainties were
5 raised by the agencies in their review of the
6 Morrison Copper Gold project. However,
7 Pacific Booker Minerals requests that you
8 continue with the referral.

9

10 All right. Now, the uncertainties, My Lord,
11 were uncertainties that were explained by
12 Ms. Bellefontaine and Mr. Tamblyn on the telephone
13 call on July 30th. And what they committed to do
14 in the course of the call was provide Pacific
15 Booker with follow-up memorandums that gave a
16 written summary of what the concerns were. And
17 those, My Lord, are in -- again back to Derek
18 Sturko's affidavit at Tab 7, Volume 3. I'm hoping
19 to find it at page 369, My Lord. Is that an
20 August 8th --

21 THE COURT: Yes.

22 MS. HORSMAN: So this was Ms. Bellefontaine's memo that
23 she had committed to prepare following the July
24 30th phone call. And so just starting in the
25 third paragraph down: [as read in]

26

27 The Ministry of Energy and Mines recognizes
28 that Pacific Booker committed to some
29 substantive project design changes during the
30 review process to adjust agency concerns
31 regarding adverse effects and to reduce
32 environmental risks associated with the
33 project. The largest of these commitments
34 included the lining of the tailings with the
35 geomembrane and the backfilling of
36 potentially acid rock generating, PAG, waste
37 rock in the open pit at closure and to
38 annually place surplus PAG material in a
39 tailings impoundment. However, despite these
40 modifications to the project, the Ministry of
41 Energy and Mines believes that the Morrison
42 Copper Gold project still presents
43 significant risks for the following reasons:

44

45 One is the large scale environmental
46 liabilities, and Ms. Bellefontaine notes that the
47 Ministry of Energy and Mines' preliminary analysis

1 of the reclamation closure and environmental
2 liabilities for the proposed project is in excess
3 of \$300 million.

4 Just to explain that point, My Lord, 'cause I
5 believe Mr. Hunter commented yesterday that he
6 didn't perceive the relevance of it 'cause that
7 had to do -- that has to do with security
8 requirements that a mine operator has to give the
9 Ministry of Energy and Mines at the next stage, at
10 the permitting stage. And so Ms. Bellefontaine's
11 point here was just that the \$300 million, which
12 was an unprecedented figure in terms of what sort
13 of security might be required, was a useful kind
14 of shorthand to measure the magnitude of the
15 potential liability risks. Ms. Bellefontaine says
16 in the second paragraph of point one:
17 [as read in]

18
19 The magnitude of this liability would
20 represent a serious risk to the province if
21 the project proceeds to development if the
22 mine were not able to fully carry out the
23 reclamation and closure plan and meet its
24 obligations. The provincial government would
25 have to implement the work to protect the
26 environment. To insure that taxpayers would
27 not have to pay for the cost of the
28 reclamation closure and long-term
29 environmental protection activities the full
30 costs of these liabilities would have to be
31 covered by bonding and liabilities of
32 this scale would be a significant challenge
33 for any industry client.

34
35 And then there's her point two, which we've
36 already been through, My Lord, and I won't do it
37 again, but it's the inconsistency with provincial
38 policy on metal leaching and acid rock drainage.
39 And Ms. Bellefontaine makes the same points there
40 she's made before about Pacific Booker's failure
41 to consider alternative design options that may
42 have been preventative rather than end stage
43 mitigative. And at point 5: The In-Perpetuity
44 Aspects of Liabilities.

45
46 Water from the mine facilities will require
47 water treatment prior to discharge to

1 Morrison Lake, likely during operations as
2 well as long after mine closure. At closure
3 the pit lake will have to be kept at a lower
4 elevation than Morrison Lake to prevent
5 contaminated water from migrating to the lake
6 and surplus water in the open pit will
7 require water treatment. The Ministry
8 acknowledges that if mining were to proceed
9 these liabilities cannot be prevented. The
10 EAO assessment report notes the long-term
11 nature of these mitigation requirements as
12 100 plus years and also notes the long-term
13 nature of the effects to water quality. The
14 Ministry of Energy and Mines wishes to
15 emphasize to the EAO that pit water
16 elevations and water quality will have to be
17 managed and treated in-perpetuity to protect
18 water quality and the resources in Morrison
19 Lake.

20
21 And then Ms. Bellefontaine ends the memo
22 simply saying:

23
24 In summary, the Ministry of Energy and Mines
25 believes these additional factors should be
26 fully considered in a final environmental
27 assessment decision.

28
29 That's at page 371 in the upper right-hand
30 corner.

31 And then the second individual who had
32 committed to providing written details to Pacific
33 Booker of the ongoing concerns is Greg Tamblyn
34 from the Ministry of Environment, and his memo
35 dated August 2nd is at page 372. And if you go to
36 the second page in, Mr. Tamblyn acknowledges the
37 number of commitments that Pacific Booker has made
38 in the course of the review process. In the
39 middle of the paragraph he says:

40
41 Nonetheless, despite the addition of the
42 liner and the other conditions PBM has
43 committed to ...

44

45 THE COURT: Sorry, where are you at?

46 MS. HORSMAN: I'm sorry.

47 THE COURT: No, I'm with you. Go ahead. Carry on.

1 MS. HORSMAN:

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And so on.

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47

... the Environmental Protection Division maintains that the Morrison Copper Gold project presents significant risks to Morrison Lake and Morrison Creek, for the following reasons:

First and foremost, Morrison Lake and Creek are pristine, high valued ecosystems supporting many important fish species, including genetically distinct Sockeye salmon with an irreplaceable gene pool.

The environmental and economic liabilities associated with very long-term (100+ years?) collection and treatment of contaminated mine water, production and storage of water treatment sludge, uncertainty associated with the feasibility of the proposed treatment and "in perpetuity" maintenance of site infrastructure adjacent to a lake with a unique Sockeye salmon stock.

And, My Lord, I -- I believe my friend took this to you yesterday, but just a reminder that those two -- the memorandum of Ms. Bellefontaine and of Mr. Tamblyn -- both were provided to Pacific Booker before the report was referred to the minister. And the cover letter that went with that is at page 363 in the upper right-hand corner. It's a letter from Mr. Hamilton to Mr. Tornquist dated August 9th, 2012, and Mr. Hamilton states: [as read in]

As you are aware, we have recently had comments from a number of reviewers on the Environmental Assessment Office's job assessment of work draft certified project description and draft table of conditions. We will be moving to finalize these documents in preparation for a referral to the ministers. I have provided you with comments we have received from Environment Canada, Health Canada, Department of Fisheries and Oceans, the Lake Babine Nation, the Gitxsan

1 Nation, Gitanyow Nation. I have also
2 recently received comments from the British
3 Columbia Ministry of Environment and Ministry
4 of Energy and Mines. I am enclosing those
5 memorandums.
6

7 Comments made by reviewers focused on a
8 number of key areas, including the location
9 of the proposed project directly adjacent to
10 a genetically unique population of Sockeye
11 salmon at the headwaters of the Skeena River
12 and the importance of that Sockeye salmon
13 population to First Nations, the long-term
14 environmental liability of the proposed
15 project and, in particular, as the proposed
16 project relates to the policy for metal
17 leaching and acid rock drainage at mine sites
18 in British Columbia, uncertainties with water
19 treatment and, in particular, the
20 in-perpetuity nature of the water treatment
21 and the use of an effluent diffuser in
22 Morrison Lake, the use of an assimilative
23 capacity of Morrison Lake as the primary
24 long-term means of mitigation, the long-term
25 change in water quality in Morrison Lake and,
26 in particular, the predicted approach of a
27 number of metals to British Columbia water
28 quality guideline concentrations, unlimited
29 existing knowledge of Morrison Lake
30

31 While these issues have all been identified
32 in EO's draft assessment report, you should
33 be aware that referral documents may also
34 highlight these issues for the ministers when
35 they are considering whether to issue an
36 environmental certificate for the proposed
37 project prior to a referral. I would like to
38 provide you with a final ... of comments.
39 Your perspectives will be brought to the
40 attention of the minister.
41

42 And then the next page, My Lord, page 365 in
43 Mr. Turko's affidavit, is Pacific Booker Mineral
44 letterhead. Are you -- is Your Lordship --

45 THE COURT: Yes, I have that.

46 MS. HORSMAN: Oh, sorry, yes.

47 So that was the response of Pacific Booker to

1 the various comments that were received from the
2 reviewers to the draft assessment report.

3 Now, my friend made the point to you
4 yesterday, My Lord, that there was nothing
5 particularly new in the memoranda of
6 Ms. Bellefontaine and Mr. Tamblyn. And -- and
7 that's quite true, My Lord. Those weren't new
8 concerns. They were concerns that had been
9 expressed -- consistently expressed throughout the
10 environmental review process. And the reality
11 was, for these expert participants on the working
12 group, that despite Pacific Booker's commitments
13 in the table of conditions, these individuals were
14 left with concerns around long-term environmental
15 liability and risk, nonetheless. And Pacific
16 Booker was told this and was told that this would
17 be highlighted for the ministers.

18 Now, My Lord, that brings me to the referral
19 to the ministers and Mr. Sturko's affidavit, which
20 again is Volume 3, Tab 7, I believe. Mr. Sturko
21 was the executive director of the EAO at the time,
22 My Lord, of the referral. And as I'll get into
23 when I move to submissions on the legal issues --
24 and, as you've heard, subsection (17)(2)(b) and
25 (c) of the Environmental Assessment Act permit,
26 but do not require, the executive director to
27 provide recommendations to accompany the
28 assessment report.

29 And so just by way of explanation as to the
30 material you have in front of you in -- in
31 Mr. Sturko's affidavit, much of the volume is a
32 replication of the referral binder that was
33 provided to the ministers by Mr. Sturko at the
34 time the assessment report was referred. And so
35 if Your Lordship could go to paragraph 5 of -- of
36 the text of the affidavit. Mr. Sturko sets out in
37 point form what was included in the referral. And
38 so in addition to the title page and table of
39 contents and cover letters, there was a PowerPoint
40 summary, a cover letter to Minister Lake, the
41 assessment report itself, My Lord -- the final
42 assessment report went to the ministers -- a
43 compliance management plan, the submissions from
44 the various parties -- I've took -- I took Your
45 Lordship through some of them, Ms. Bellefontaine's
46 memo and Mr. Tamblyn's memo. There were
47 additionally comments from the First Nations. And

1 I'll expect I'll hear about that from my friend,
2 so I didn't take Your Lordship there. And then
3 there's the minister of decision record and so on.

4 Now, the recommendations, My Lord, is a
5 document that's -- there's two versions of it.
6 And so the first one is at page 21 in the upper
7 right-hand corner. You'll see, My Lord, that
8 that's a memo from Mr. Sturko to Minister Lake
9 enclosing a revised recommendation report. It's
10 dated September 20th. And so what Your Lordship
11 has in the binder before you is the first version
12 before it was revised and then the revised
13 version. And so the first version is at page
14 55(1) in the upper right-hand corner. So the
15 original recommendations were dated August 21st,
16 2012 and then the revised recommendations were
17 drafted September -- or provided September 20th,
18 2012. And the difference between the two, My
19 Lord, is explained by Mr. Sturko in his affidavit
20 at paragraph 13. So if you start back at
21 paragraph 12, My Lord, Mr. Sturko indicates:
22 [as read in]

23
24 After sending the referral packages to
25 Ministers Lake and Coleman, I participated in
26 two ministerial briefings on September 18th
27 and 24th, 2012. The first briefing on
28 September 18th was one that I, along with EAO
29 staff, John Mazure, Chris Hamilton, and
30 Nicole Vignette [ph], held with Minister
31 Lake. Minister Lake's request for
32 clarification that led to my updated
33 recommendations of September 20th, 2012 arose
34 at this September 18th, 2012 briefing. The
35 clarifications requested by Minister Lake
36 were (a) a correction of a factual error
37 relating to the project's anticipated
38 contribution to the Provincial Gross Domestic
39 Product.

40
41 And I just pause there to say, My Lord, that
42 factual error Mr. Lake identified on paragraph --
43 page 111 of the assessment report, so he was,
44 obviously, giving it a peripheral read.

45 And the second clarification that Minister
46 Lake sought was more specificity regarding the
47 nature and basis of the additional factors cited

1 in Mr. Sturko's initial recommendations at the end
2 of the document.

3 And so you'll notice, My Lord, and I don't
4 think I need to take you through it, but the
5 recommendations in the revised version are -- are
6 more elaborate of -- of what the concerns are.

7 So, if I can just stick with the revised
8 recommendations, the September 20th
9 recommendations. The first --

10 THE COURT: What page are they on?

11 MS. HORSMAN: I'm -- I'm sorry, they're at -- starting
12 at page 23 in the upper right-hand corner.

13 THE COURT: Yes.

14 MS. HORSMAN: And the first 30 odd pages, My Lord, is
15 essentially a summary of what the environmental
16 assessment report concluded. And you'll see under
17 the heading "Conclusions" at the base of page 53
18 in the upper right-hand corner.

19 THE COURT: Page --

20 MS. HORSMAN: I'm sorry, 53. It's --

21 THE COURT: Fifty-three.

22 MS. HORSMAN: -- page 31 of 33 in Mr. Sturko's
23 recommendations.

24 THE COURT: All right. I'm looking at page 31 of 33.

25 MS. HORSMAN: Yes. And I hope Your Lordship will see
26 at the base of that page: (d) Conclusions.

27 THE COURT: Yes.

28 MS. HORSMAN: [as read in]:

29

30 The EAO was satisfied that the assessment
31 process has adequately identified and
32 addressed the potential adverse
33 environmental, economic, social, heritage and
34 health effects of the proposed project having
35 regard to the successful implementation of
36 the conditions and the mitigation measures
37 set out in Schedule B. Public consultation
38 and the distribution of information about the
39 proposed project has been adequately carried
40 out by the proponent and the Crown has
41 fulfilled its obligations for consultation
42 and accommodation.

43

44 So that's all before the ministers. And not
45 only is Mr. Sturko's summary of the assessment
46 report before the ministers, My Lord, the
47 assessment report is before the ministers, as it

1 was required to be under the statute.

2 And then the recommendation portion, My Lord,
3 is at page 54 in the upper right-hand corner under
4 the heading "Recommendations." Mr. Sturko writes:

5
6 I recommend the ministers consider the
7 assessment report prepared by my delegate,
8 which was an analysis of the technical
9 aspects of the project as proposed by the
10 proponent. The assessment report indicates
11 that, with the successful implementation of
12 mitigation measures and conditions:

13
14 the proposed project does not have the
15 potential for significant adverse effects;
16 and.

17
18 First Nations have been consulted and
19 accommodated appropriately.

20
21 As set out in s.17(3)(b) of the
22 Environmental Assessment Act, " [...]
23 ministers may consider any other matters that
24 they consider relevant to the public interest
25 in making their decision on the application
26 [...]." Therefore, in addition to the
27 technical conclusions presented in the
28 assessment report, which assumes successful
29 implementation of all mitigation strategies,
30 I recommend ministers consider a number of
31 additional factors which were raised in the
32 assessment of the proposed project. In
33 particular, I recommend that ministers adopt
34 a risk/benefit approach that considers the
35 following factors ...

36
37 And then there's the list of factors that
38 we're now familiar with, My Lord, to do with the
39 location of the project and the long-term
40 environmental liability and risks. And Mr. Sturko
41 more specifically details the energy -- the input
42 from the Ministry of Energy and Mines and
43 Ms. Bellefontaine and input from the Ministry of
44 Environment, Mr. Tamblyn.

45 THE COURT: Your friend says, of course, these are not
46 additional factors. They're -- they had already
47 been addressed satisfactorily, I think, is the way

1 he put it.

2 MS. HORSMAN: Yes. And I'm just -- they keep circling
3 back, I think, to what is the fundamental divide
4 between my friend and I in terms of whether an
5 assessment report exhausts the minister's ability
6 to consider matters outside of the assessment
7 report. And I'm going to make a submission to
8 Your Lordship that it does. And -- and, really,
9 to understand the executive director's
10 recommendation power it's necessary to understand
11 the nature of the decision-making authority
12 exercised by the ministers when they decide
13 whether or not to issue an environmental
14 assessment certificate.

15 And, but I should also say, My Lord, while
16 we're on this document, that I do not take my
17 friend to be challenging that the ministers could
18 consider these factors. I've never taken that as
19 part of their challenge. I mean, Pacific Booker
20 was told these factors were going to be
21 highlighted to the ministers and they were. What
22 I take my friend to -- what I understand my friend
23 to be objecting to is the executive director
24 including a recommendation with them. So that if
25 you have this exact same document highlighting
26 these exact same factors and you took out the word
27 recommendation and you took out the recommendation
28 at the end, my friend would have no complaint
29 about what happened here.

30 THE COURT: Well, as I understand your friend's
31 position in respect of the -- of, I -- I suppose,
32 what might be called the first issues that -- I'll
33 characterize it as the jurisdictional issue, the
34 question of the vires of what the -- what the
35 executive director did, I think your friend's
36 position is that once the conclusion had been
37 reached that any adverse environmental effects
38 could be adequately mitigated it wasn't open to
39 the executive director then to recommend against
40 the project. The minister might look at a variety
41 of factors and decide the project wasn't going to
42 go forward, but the executive director was more
43 confined in what he could do. There has to be
44 some limit within the statutory scheme to his
45 authority and he did not have authority to, I
46 suppose your friend would say, simply ignore the
47 information that he had, which was proper

1 mitigation, and recommend against the project.

2 MS. HORSMAN: Yes, My Lord. Well, but there's a number
3 of points I could make in --

4 THE COURT: And I'm sure you're going to come to all
5 that.

6 MS. HORSMAN: Well, I will, but I'd -- I'd like to say
7 a couple of points about it right now, if I might.
8 First of all, Mr. Sturko, by no stretch, can be
9 taken to have ignored the conclusions of the
10 environmental assessment report. Most of his
11 recommendation report summarizes it. If there's
12 any doubt as to what the environmental assessment
13 report concluded, it's not in doubt when you read
14 Mr. Sturko's recommendation document.

15 THE COURT: Ignored is not the best word that I could
16 have used to characterize your friend's position.
17 I think Mr. Hunter says that -- that once
18 Mr. Sturko had reached the conclusion that
19 mitigation was -- could be successful, that he --
20 he then had no basis to make the recommendation
21 that he did.

22 MS. HORSMAN: I -- I understand that to be my friend's
23 argument and I -- I will get back to that on a
24 statutory interpretation point, My Lord. But I
25 suppose to some extent Mr. Hunter and I approached
26 the question of the executive director's
27 recommendation power from different perspectives.
28 He started with the role of the delegate preparing
29 the assessment report; whereas, I start with the
30 role of ministers in deciding whether to issue an
31 environmental assessment certificate or not and a
32 consideration of what their powers were as a way
33 of assisting us in understanding what the
34 recommendation power must be comprised of when
35 viewed in its statutory context.

36 And so the point I wanted to make with this
37 document, My Lord, was simply -- and we'll come
38 back to it in the statutory interpretation point
39 -- but I -- I didn't take my friend to take issue
40 with the notion, as I say, that if you took out
41 the word recommendation and you took out the
42 recommendation, the final paragraph of this
43 document, it was otherwise entirely open to
44 Mr. Sturko to forward this document to the
45 ministers. Because Pacific Booker was told that
46 the concerns of the working group were going to be
47 highlighted and this document highlights them.

1 And there's factors that were properly considered
2 by the ministry -- sorry, by the ministers -- and
3 could reasonably and lawfully have led them to
4 decide to exercise their discretion against the
5 issuance of the certificate.

6 Now, I'm -- I recognize that doesn't take me
7 right to the end of my friend's point, but it's an
8 important first point, My Lord, in the statutory
9 interpretation argument I'm going to make to you.
10 And this document just provides a useful
11 illustration of the point, My Lord.

12 THE COURT: All right. I think I understand your
13 position.

14 MS. HORSMAN: Now, My Lord, I -- I did want to say a
15 word about an exchange that Your Lordship had with
16 Mr. Hunter yesterday 'cause now we're getting into
17 the minister's decision-making process and I -- I
18 feel I am still responding to Your Lordship's
19 concern about, I suppose, the transparency and
20 legitimacy of the process. And so I think -- and
21 the suggestion I got from the exchange was that
22 there was some impression that had been left that
23 the ministers had simply -- I don't know the right
24 way of putting it -- rubber stamped the executive
25 director's recommendation; that it wasn't -- that
26 the ministers' decision wasn't the product of some
27 indeliberate [sic] -- independent deliberation on
28 the part of the ministers. And Your Lordship made
29 the comment that -- that we -- there was nothing
30 in the affidavit material from the ministers
31 explaining their reasoning process. And so I -- I
32 just wanted to say a word about that, My Lord.

33 They are quite right. There isn't anything
34 in the material from the ministers about their
35 decision-making process. And that is because, in
36 my experience, it was quite unusual and usually
37 improper for a statutory decision maker to provide
38 affidavit evidence supplementing the reasons they
39 have given for their decision. 'Cause the reasons
40 have to speak for themselves in the same way
41 judges of this court don't provide affidavits to
42 the Court of Appeal, My Lord. And so what we have
43 is the ministers' decision and that's what is
44 being challenged. And so in making their decision
45 ministers, and, again, like judges, are entitled
46 to both the presumption of regularity in their
47 decision-making process and also the protection of

1 deliberative secrecy. So they typically can't be
2 compelled to explain to a reviewing court why they
3 reached the decision they did. Again, the
4 decision stands or falls.

5 Now, the fact that the ministers might have
6 considered Mr. Sturko's summary of the risk
7 concerns relevant, that Mr. Sturko's report
8 conveniently and accurately reflected their views
9 and they adopted them for the purpose of a
10 decision letter, but that's not a basis to
11 conclude that the ministers acted anything other
12 than the independent and proper exercise of the
13 powers assigned to them by statute.

14 And because this point is quite important, My
15 Lord, there is one additional aspect to it, and
16 that is that Pacific Booker did originally have a
17 completely different conception of its challenge
18 than it currently has. What Pacific Booker
19 originally alleged was that the ministers had
20 abused their statutory discretion, failed to read
21 the assessment report, considered factors that
22 were beyond the scope of their powers to consider,
23 and relied on improper advice from their staff
24 about timing issues to do with the decision on the
25 certificate, and the petition sought to quash the
26 ministers' decision on the ground that that made
27 it unlawful.

28 And so just this may explain to My Lord why
29 this material is showing up in your -- your
30 application record even though the parties haven't
31 referred to it. But the primary evidence that
32 Pacific Booker relied upon in support of the
33 challenge to the ministers' decision as opposed to
34 the recommendation power of the executive director
35 was the affidavit of William Deeks, which is at
36 Volume 2, Tab 6. Mr. Deeks is chairman of the
37 board of directors of Pacific Booker, My Lord.
38 And the pertinent paragraphs -- it's quite a short
39 affidavit and it's really just paragraphs 3 and 4
40 that was the basis of the petitioner's original
41 challenge. Mr. Deeks deposed: [as read in]

42
43 On October 25th, 2012, at the B.C. Liberal
44 Party convention opening reception at
45 Whistler, B.C., I was introduced to the
46 Minister of the Environment, Terry Lake.
47 During our conversation I asked Minister Lake

1 why Pacific Booker's application for a
2 certificate had been denied. He replied they
3 had received a dissenting opinion. I advised
4 Minister Lake that Pacific Booker had not
5 been made aware of any dissenting opinion and
6 had not been given an opportunity to comment.
7 Minister Lake then commented something along
8 the lines of: "Isn't this just an American
9 project anyway?" I responded that while some
10 financing to support the project came from
11 the United States, this was a B.C. project
12 supported by a majority of shareholders who
13 are everyday British Columbians.

14
15 On October 26, 2012, at the Liberal Party
16 Convention in Whistler, B.C. I spoke with the
17 Minister of Energy, Mines and Natural Gas,
18 Rich Coleman. On that date Minister Coleman
19 told me that when his deputy minister, Steve
20 Carr, and assistant deputy minister, David
21 Morel, brought him the project for review
22 they told him he couldn't approve Pacific
23 Booker's application for a certificate.
24 Minister Coleman told me he suggested to
25 Mr. Carr and Mr. Morel that the Ministry of
26 Energy, Mines and Natural Gas go back to
27 Pacific Booker for further discussions, but
28 that Mr. Carr advised him there was no time
29 left. Minister Coleman further advised me
30 that at that time he had not read the project
31 report, but subsequently did review it, so he
32 was familiar with it.

33
34 Now, receiving that affidavit, My Lord,
35 prompted us to go further than we might in the
36 ordinary course towards explaining the decision-
37 making process before the ministers. And, so, for
38 example, you see the evidence of Mr. Sturko that
39 we've already been through detailing the briefings
40 that he went through with the two ministers. And,
41 additionally, the respondents put in an affidavit
42 from Tobie Myers. That affidavit is at Volume 3,
43 Tab 10.

44 THE COURT: Shall I go to that one?

45 MS. HORSMAN: Yes, please, My Lord.

46 THE COURT: One moment.

47 MS. HORSMAN: Ms. Myers, My Lord, is the ministerial

1 assistant to Mr. Coleman, and she was present
2 during the conversation that Mr. Deeks recounted.
3 And, so, Ms. Myers states at paragraph 3:
4 [as read in]

5
6 I have read the affidavit number one of
7 William Deeks. As Mr. Deeks deposes, I was
8 present during the conversation with Minister
9 Coleman that he describes at paragraph 4.
10 This conversation took place at the B.C.
11 Liberal Party Convention at the Fairmont
12 Chateau Whistler in Whistler, British
13 Columbia. Minister Coleman was in attendance
14 at the convention but not in the capacity of
15 his official duties as Minister of Energy,
16 Mines and Natural Gas. The convention was a
17 private event.

18
19 To my recollection, Mr. Deeks approached
20 Minister Coleman at the end of a plenary
21 session of the convention on Friday, October
22 26 as several hundred people were exiting the
23 conference room. Mr. Deeks, in the company
24 of Nechako Lake's MLA, John Rustad,
25 introduced himself to Mr. Coleman and asked
26 him to speak about the Morrison Lake mine
27 proposal. An impromptu conversation with
28 Minister Coleman took place that lasted about
29 7 to 10 minutes and took place in the corner
30 of the conference room as attendees at the
31 plenary session continued to exit.

32
33 My recollection of the conversation is that
34 Mr. Deeks expressed concern as to how the
35 decision of Minister Lake and Minister
36 Coleman to refuse an environmental assessment
37 certificate for the Morrison Lake mine
38 project might influence the Canadian
39 Environmental Assessment Agency in its
40 review. Mr. Deeks requested a letter from
41 the ministers outlining the conditions
42 required to remedy any problems in Pacific
43 Booker's application for an environmental
44 assessment certificate. Mr. Deeks stated
45 that he wanted the letter to provide comfort
46 to Pacific Booker's shareholders.
47 My further recollection is that Minister

1 Coleman told Mr. Deeks that Minister Coleman
2 could not comment on the process and that
3 Mr. Deeks should speak to the ministry and
4 Environmental Assessment Office staff about
5 any reapplication process. Minister Coleman
6 offered to facilitate contact. I have no
7 recollection of Minister Coleman advising
8 Mr. Deeks during this brief conversation that
9 he had not read the assessment report. I am
10 certain I would have remembered such a
11 comment. I know that Mr. Coleman received
12 the assessment report from the EAO and was
13 briefed on it by his staff and later by Derek
14 Sturko.

15
16 And also that she has no recollection of
17 Minister Coleman telling Mr. Deeks that his staff
18 told him he couldn't approve the project or there
19 was no time for further discussion.

20 And, then, finally, My Lord, this is the last
21 one. It's the affidavit of David Morel. It's at
22 Volume 3, Tab 9. He -- he is the assistant deputy
23 minister with the Ministry of Energy and Mines and
24 he's the one that Mr. Deeks had suggested gave
25 Minister Coleman indirect advice. And so
26 Mr. Morel deposes at paragraph 3: [as read in]

27
28 I was involved in the briefing of Minister
29 Coleman once the proposed Morrison Copper
30 Gold mine project was referred to the
31 ministers pursuant to s.17 of the
32 Environmental Assessment Act. I approved a
33 September 14th briefing note for information
34 which briefed Minister Coleman on the
35 referral process.

36
37 And that's attached as Exhibit A, My Lord.

38
39 I also attended by telephone the September
40 24th, 2012 briefing of Ministers Lake and
41 Coleman by Derek Sturko and EAO staff. The
42 EAO reviewed the proposed project using the
43 PowerPoint presentation included in the
44 referral binder and the presentation included
45 a review of Mr. Sturko's recommendation that
46 an environmental assessment certificate not
47 be issued.

1 I have read the affidavit number one of
2 William Deeks. I was not present during the
3 conversation that Mr. Deeks purports to have
4 had separately with Minister Coleman and
5 Minister Lake at the B.C. Liberal Party
6 convention. However, Mr. Deeks' evidence is
7 in a number of respects simply inconsistent
8 with my note of the process for review of
9 this project.

10
11 In particular, and importantly, My Lord, at
12 point number 3 Mr. Morel makes the point that:

13
14 At no time did I ever advise Minister Coleman
15 that he could not approve the project or
16 there was no time left for further
17 discussion. The information provided to
18 Minister Coleman as to timelines under the
19 Environmental Assessment Act was set out in
20 the September 14th briefing note which is
21 appended as Exhibit A.

22
23 The briefing note expressing that the ministers do
24 have the option of ordering further assessment if
25 they choose. And the briefing note is there if it
26 would be of assistance, My Lord, but I otherwise
27 don't propose to take you to the exhibit.

28 So, My Lord, at Tab 1 of the application
29 record in Volume 1 you'll see the original
30 petition to the court. I'm sorry, My Lord, it's
31 -- sorry, the legal basis. This is -- the April
32 3rd version of the petition is at page 13.
33 Paragraph 65. The petitioners originally alleged
34 that the ministers' decisions to deny Pacific
35 Booker's application for a certificate violated
36 s.17(3)(a) of the Act and was therefore
37 unauthorized because at least one of the ministers
38 who made the decision had not read and considered
39 the final assessment report and the updated
40 executive director's recommendations prior to
41 making the decision, as required by s.17(3)(a). A
42 quite different allegation is being made here, My
43 Lord, I think, which is that the ministers overly
44 relied on the recommendation. And then at
45 paragraph 67:

46
47

1 The ministers acted unreasonably or, in the
2 alternative, abused their discretion by
3 considering irrelevant factors and in failing
4 to consider relevant factors in making the
5 decision, including the following:
6

7 And there's a list of things that the petitioners
8 say the ministers took into account which they
9 shouldn't have taken into account, including the
10 risk benefit analysis.

11 And, then, finally, at paragraph 69 it was
12 alleged that it was unreasonable for the ministers
13 to deny the application for a certificate and to
14 grant the applications for a certificate for two
15 other projects.

16 Now, My Lord, what we're dealing with now is
17 an amended petition which is at Tab 2 of Volume 1.
18 And at legal basis on page 14 at paragraph -- the
19 struck out paragraph 67, which is at the very top
20 of page 15, My Lord. The ministers' decision to
21 deny, et cetera, was unauthorized, that's been
22 struck out, so that's no longer an issue. And
23 then there's a struck out paragraph 71 at page 16.
24 The ministers acted unreasonably or, in the
25 alternative, abused their discretion, et cetera.
26 That allegation is no longer being asserted by
27 Pacific Booker. And, then, finally, at paragraph
28 63 -- pardon me, 73 at page 17 there's the struck
29 out paragraph 73.

30 Now, my -- my point in doing this, My Lord,
31 is because I was, as I started -- as I said at the
32 start, concerned about some of the comments
33 yesterday about the manner in which the ministers
34 reached the decision in this case. I presume that
35 the petitioners accepted that the allegation of
36 any impropriety on the part of the ministers in
37 their decision-making process was answered by the
38 respondents' affidavits because they have removed
39 those allegations. They've been abandoned. And
40 the petitioner's new theory is that the flaw in
41 this process was not that the ministers' decision
42 was unreasonable or considered irrelevant factors
43 or that the ministers didn't exercise independent
44 discretion under the statute. The sole ground of
45 challenge is that they shouldn't have had Derek
46 Sturko's recommendation in front of them.

47 And, so, for the purposes of this petition,

1 My Lord, the ministers must be presumed to have
2 acted properly, independently, and not simply
3 found -- considered themselves bound by the
4 recommendation that Mr. Sturko made.

5 I have one small point to make on -- on the
6 facts, My Lord, and then I'll -- I'll conclude and
7 move on to the legal argument. And it's just a
8 point of clarification about the delegation to
9 Mr. Hamilton by Mr. Sturko. The delegation order
10 is appended to the affidavit number 3 of Chris
11 Hamilton, which is Volume 4, Tab 26. It's --
12 Exhibit A is the delegation that was in effect at
13 the relevant time, My Lord. It's a general
14 delegation of authority by the then executive
15 director. Oh, I'm sorry, My Lord.

16 THE COURT: Yes.

17 MS. HORSMAN: It's a general delegation of authority
18 under s.4 of the Environmental Assessment Act from
19 the then executive director, Robin Junger, to
20 persons generically described as persons employed
21 by the Environmental Assessment Office as a
22 project assessment director or a project
23 assessment manager. And -- and Mr. Hamilton was a
24 project assessment director and so the delegated
25 powers -- the only point I wanted to highlight, My
26 Lord -- included the power to prepare an
27 assessment report under s.17(2)(a) in the list of
28 powers that had been delegated. So Mr. Hamilton
29 was exercising delegated powers from the executive
30 director in that respect, but the power to make
31 recommendations and offer reasons for
32 recommendations, which are the sub (b) and (c) of
33 17(2), were not delegated by the executive
34 director.

35 My Lord, that brings me to the end of the
36 factual review. Unless Your Lordship had
37 questions, I just propose to move on to --

38 THE COURT: No, carry on.

39 MS. HORSMAN: And so our argument, My Lord, begins at
40 page 22, paragraph 73 of the written argument in
41 front of you. In an attempt to be responsive to
42 some of the comments my friend made on the
43 questions from the court I won't strictly stick to
44 the written argument, but I won't raise new cases
45 or -- or issues or anything like that, My Lord. I
46 did want to, without going into a tremendous
47 degree of detail, not completely pass over

1 paragraph 74 through 80 which deals with the non-
2 reviewability of recommendations. I don't think
3 there's a huge dispute on this point, My Lord, but
4 there is caselaw to the effect that non-binding
5 recommendations issued under a statute are not a
6 statutory power of decision within the Judicial
7 Review Procedure Act. And the cases in question
8 are cited at footnote 54, the British Columbia
9 Teachers' Federation v. British Columbia and
10 U.T.U. And both cases deal with the question of
11 what fits within the definition of a statutory
12 power of decision under the Judicial Review
13 Procedure Act.

14 And why I suggest we don't need to get into a
15 great deal of time into what is clearly a
16 technical point is that the respondents concede
17 that if my friends are correct, if the executive
18 director didn't have the legal authority to make
19 the recommendations he did under the statute, then
20 there was an improper factor before the ministers
21 when they made their decision. And if there was
22 procedural fairness -- if there was a denial of
23 procedural fairness in the process that led to the
24 ministers' certificate, then that's, obviously,
25 something that can be addressed as well. But the
26 recommendations as a stand-alone document are not
27 a statutory decision under the JRPA, and I just
28 didn't want to let that point completely slip by.

29 Now, My Lord, I mentioned earlier that I
30 believe Mr. Hunter and I approached the question
31 of the executive director's power to make
32 recommendations from different points in the
33 statute. And so I approach it from the
34 standpoint, firstly, of the ministers' power under
35 s.17 of the Act. And so I -- I'd like to start
36 with the Act, if I might, on the statutory
37 interpretation point. It's in Tab 1 of the
38 respondents' book of authorities.

39 My Lord, starting, actually, with s.10, which
40 is the section that determined that environmental
41 review was required in this particular case, 10(c)
42 -- 10(1)(c) of -- of the Act provides that if the
43 executive director considers that a reviewable
44 project may have significant environmental,
45 economic, social, heritage, or health effect,
46 taking into account practical means of preventing
47 or reducing to any acceptable level may determine

1 imperative. No natural resource is a
2 forbidden fruit. Indeed, discriminate
3 harvesting from nature's storehouse is as
4 essential to the maintenance and sustenance
5 of life as the preservation of our
6 environment. The challenge is to temper the
7 refrain advocated by developers from time to
8 time to "develop or perish" by assuring that
9 it does not re-echo amongst future
10 generations as "develop and perish." To this
11 end, as Oldman River has observed,
12 governments and international organizations
13 have responded through "a wide variety of
14 legislative schemes and administrative
15 structures."

16
17 One of the primary initiatives taken by
18 governments in rationalizing economic
19 activity with environmental imperatives has
20 been the enactment of statutes providing for
21 environmental assessment. These measures
22 have generally been aimed at moving away from
23 correcting environmental problems ex post
24 facto, towards preventing them from occurring
25 ab initio or, at least, assuring that they
26 are contained at tolerable levels. It is
27 well to point out that this is not only
28 environmentally sound but is economically
29 desirable as well, inasmuch as the costs of
30 rectifying long-term effects often eclipse
31 short term burdens. In any event, it appears
32 just plain common sense to require
33 development of resources to await the
34 relatively short time that will be taken to
35 allow adverse environment effects to be
36 assessed and mitigated, if not eliminated.

37
38 Accordingly, it can be said that the process
39 of environmental assessment is not a frill
40 engrafted on the development process; nor
41 should it be regarded as an administrative
42 hurdle to be gotten over in the march towards
43 economic development. It is, rather, an
44 integral part of economic development.

45
46 And now closer to home, My Lord, there's a
47 couple of cases that have a useful summary of the

1 ministers' role under the -- the Environmental
2 Assessment Act in the context of this type of
3 statutory scheme, and one is the Do Rav Right
4 case, which is at Tab 15 of Volume 1. And I'll
5 come back to this case again a little bit later
6 when I deal with the issues of procedural fairness
7 that my friend has raised. But this was in the
8 first instance a decision by Chief Justice Bauman
9 dismissing an application for judicial review of
10 an environmental assessment process to do with the
11 method of construction for the Canada Line. And
12 the Court of Appeal dismissed an appeal from Chief
13 Justice Bauman. Both decisions are -- are in the
14 book, My Lord, but I wanted to start with
15 paragraph 3 -- 33 -- I'm sorry, paragraph 34 of
16 Chief Justice Bauman's decision.

17 Now, and this -- in these passages Chief
18 Justice Bauman is kind of providing an overview
19 for how the assessment process works under the
20 Act, but I wanted to get to the part that deals
21 with the power of -- of the ministers. At
22 paragraph 34 His Lordship states:

23
24 Third, at the end of the process, a
25 political, policy-driven decision is made by
26 elected Ministers of the Crown; they are
27 given a very broad discretion to consider the
28 issue: They may consider "any other matters
29 that they consider relevant to the public
30 interest in making their decision on the
31 application."

32
33 The environmental assessment process is not,
34 in substance, one engaged in resolving a
35 dispute between a project proponent and
36 affected individuals. It is, on the
37 contrary, one which assesses a project in the
38 context of its broad impacts on society,
39 weighs the efficacy of mitigative measures,
40 and authorizes a project to proceed if it is
41 in the public interest to do so.

42
43 In the language of the cases, the process is
44 highly polycentric, not bipolar.

45
46 And, then, finally, My Lord, the Taku
47 decision that my friend, Mr. Hunter, took you to

1 yesterday. It's at Tab 29 of Volume 2. And this
2 was a case that eventually went to the Supreme
3 Court of Canada. But much like my friend,
4 Mr. Hunter, I -- I wanted to cite a passage from
5 the decision of Justice Southin at the Court of
6 Appeal below. Because her decision on the
7 administrative law issues that were raised is
8 quite illuminating, and I don't think favourably
9 on after -- after this case. And the decisions
10 are divided by a green piece of paper, My Lord.
11 And so the first 14 pages is the Supreme Court of
12 Canada, and then if you turn over the green page
13 you should find the Court of Appeal decision.

14 THE COURT: Yes.

15 MS. HORSMAN: And it's at paragraph 80.

16 THE COURT: Yes.

17 MS. HORSMAN: Her Ladyship stated earlier at
18 paragraph 80:

19
20 Earlier I addressed what I perceive to be the
21 fundamental nature of judicial review. The
22 learned judge, as I read her reasons, did not
23 ask herself what the Legislature in this
24 statute, either expressly or by necessary
25 intendment, required of the tribunal in order
26 for its decision to be lawful. She committed
27 the fundamental error identified in *Ocean
28 Port Hotel Ltd. v. British Columbia (General
29 Manager, Liquor Control Licensing Branch)*,
30 2001 SCC 52 (CanLII), 2001 SCC 52, of not
31 asking whether the Legislature has made its
32 own determination of what procedures are
33 necessary in the administration of the
34 statute in issue. There is good reason for
35 this legislative scheme: A decision as to
36 whether a project shall or shall not proceed
37 engages the tribunal in weighing many
38 considerations put forward by competing
39 interests -- indeed sometimes those most
40 concerned are at loggerheads. The decision
41 in the end must be "political," using the
42 word in its non-pejorative sense.

43
44 The Tlingit, as I indicated earlier, attack
45 the certificate on the ground that the
46 "reasons" are no reasons. To my mind, they
47 are as much reasons as reasons of a judge who

1 says, as judges sometimes do, "I accept the
2 arguments of counsel for the plaintiff [or
3 defendant] and therefore the plaintiff [or
4 defendant] will have judgment."
5

6 And then at paragraph 82:
7

8 As to all the attacks made on administrative
9 law grounds on this certificate, I say that
10 the Legislature has enacted a process that
11 implicitly entrusts to the Ministers an
12 exclusive power to decide whether the
13 purposes of the statute have been met and, if
14 not, what should be the next step. There is
15 no room for a judicial assessment of whether
16 the Ministers are right or wrong.
17

18 Here, when one has the Recommendations Report
19 and the reasons in hand, it is plain that for
20 better (in Redfern's opinion) or worse (the
21 Tlingit's opinion), the Ministers have
22 determined that the benefits of this project
23 outweigh its detriments.
24

25 No argument was addressed to us that we
26 should conclude as a matter of statutory
27 interpretation that the Tlingit were entitled
28 to a hearing before the tribunal made its
29 decision.
30

31 That is before the ministers made their
32 decision, My Lord.
33

34 In concluding that as a matter of
35 administrative law there is no foundation for
36 an order in the nature of certiorari quashing
37 the certificate, I do not wish to be
38 misunderstood.
39

40 I am not saying that a certificate under this
41 Act could never under any circumstances be
42 attacked. I should think it would be a good
43 foundation for attack that a proponent had
44 bribed a member of the Project Committee to
45 recommend favourably. I should be prepared
46 to hold, as a matter of statutory
47 interpretation, that the Legislature did not

1 intend that a certificate should be valid
2 even if it were induced by fraud.

3
4 It might also be a good ground that the
5 process laid down by the Act was so
6 attenuated as to be a sham, simply because I
7 do not consider the Legislature intended the
8 process to be a sham. This process may have
9 been brought to an abrupt end -- "truncated"
10 is Mr. Pape's description -- but it was no
11 sham.

12
13 And, so, my point in highlighting those
14 passages to Your Lordship is they go to both the
15 broad nature of the public interest discretion
16 that's granted when we turn to statute and the
17 highly differential nature of judicial review of
18 such decisions.

19 THE COURT: All right. We will adjourn until two
20 o'clock.

21 THE CLERK: Order in chambers. Chambers is adjourned
22 until 2:00 p.m.

23
24 (PROCEEDINGS ADJOURNED AT 12:30 P.M.)
25 (PROCEEDINGS RECONVENED AT 2:03 P.M.)

26
27 THE COURT: Yes, Ms. Horsman.

28 MS. HORSMAN: Thank you, My Lord.

29 Before the lunch I had finished quoting from
30 the cases that dealt with the role of
31 environmental assessment legislation generally and
32 the role of the decision-making of the ministers
33 in particular. I want to make a few comments
34 about that, My Lord, before turning to -- back to
35 s.17.

36 It is not the case, in my submission, that
37 the assessment report is conclusive and
38 comprehensive as to anything relevant to the
39 ministers' consideration of the environmental,
40 social, economic, and environmental risks
41 associated with a project and that the ministers
42 are bound not to consider factors related to those
43 considerations beyond what's contained in the
44 assessment report. The assessment report findings
45 don't fetter the minister. The ministers have to
46 consider the final assessment report. That's
47 mandated by the statute. But the ministers are

1 not bound to issue a certificate if the assessment
2 report concludes no significant adverse impact
3 with successful implementation of mitigation
4 conditions. The practical reality, My Lord, may
5 be that ministers will often issue certificates
6 where there is such a finding, but they don't have
7 to. And -- and that's an important point, My
8 Lord.

9 The ministers are entitled to take a broader
10 and perhaps more cautious view of risk in the
11 public interest than that taken in the technical
12 review. They are entitled, for example, to
13 consider the in-perpetuity nature of liabilities
14 associated with a mining project, the magnitude of
15 the environmental risks, if mitigation measures
16 fail the ultimate cost to the public and the
17 environment, and the opposition of First Nations
18 with a strong prima facie claim to title and
19 rights, even if there has been sufficient
20 consultation.

21 The ministers here were entitled to make the
22 decision they did on the basis of the factors that
23 they cited in the decision letter in my
24 submission. And, again, I don't take my friend to
25 be saying otherwise. And I dwell -- I dwelled on
26 this point, My Lord, about the nature of the
27 ministers' decision-making powers because if one
28 accepts the premise that the assessment report
29 doesn't bind the ministers, that the ministers are
30 entitled to consider a broader array of
31 considerations related to the economic, social,
32 environmental and heritage impacts of the project,
33 then it's nonsensical, in my view, to suggest that
34 they are not entitled to the benefit of advice
35 from the executive director of the Environmental
36 Assessment Office in doing so.

37 My friend's submission -- and -- and I'm now
38 at that point, My Lord, of the executive
39 director's recommendation power. Their submission
40 will put limiting language on the provisions in
41 s.17 that aren't there. There's no statutory
42 support for the Environmental Assessment Act for
43 the kind of restrictions my friends seek to place
44 on the recommendation power of the executive
45 director. It's contrary to its plain language.
46 It's contrary to principles of the statutory
47 interpretation. And it's also contrary to

1 presumptions of statutory interpretation. And --
2 and so I wanted to take you to those points in
3 turn, My Lord.

4 So, starting first with principles of
5 statutory interpretation as they apply in this
6 particular context. We've cited the decision in
7 Friends of Davie Bay.

8 THE COURT: From what you're telling me now, where are
9 you in your written submission?

10 MS. HORSMAN: Oh, well, yes.

11 THE COURT: Or have you departed from that to a certain
12 extent?

13 MS. HORSMAN: I have departed. I'm going to -- I'm
14 about to come back. After I -- I get through this
15 bit, My Lord, I'll come back into my written
16 argument.

17 THE COURT: All right. Thank you.

18 MS. HORSMAN: Friends of Davie Bay, My Lord, is at Tab
19 17. That's a recent decision of our Court of
20 Appeal. A judicial review of a decision that a
21 project wasn't reviewable under the Environmental
22 Assessment Act. And it's -- paragraph 31 is the
23 relevant starting point, My Lord, under the
24 heading: "Is the EAO's interpretation
25 reasonable?" And, so, at paragraph 31 the court
26 explains what the standard of reasonableness is on
27 judicial review as applied to the decision under
28 review. And I -- I don't think we're in any point
29 of dispute, at least, over standard of review and
30 reasonableness is the standard that governs here.
31 Continuing at paragraph 32:

32
33 The question to be answered here is whether
34 the EAO, through the executive director's
35 delegate, came to a reasonable conclusion in
36 interpreting "production capacity" as that
37 phrase appears in the Regulation to mean the
38 actual rate of a project's production during
39 operation, rather than the maximum production
40 rate the infrastructure and equipment of a
41 project could potentially sustain.

42
43 The modern approach to statutory
44 interpretation has been recently stated in
45 Canada (Information Commissioner) v. Canada
46 (Minister of National Defence), 2011 SCC 25
47 (CanLII), 2011 SCC 25, [2011] 2 S.C.R. 306 at

1 para. 27:
2

3 [27] The proper approach to statutory
4 interpretation has been articulated
5 repeatedly and is now well entrenched. The
6 goal is to determine the intention of [the
7 Legislature] by reading the words of the
8 provision, in context and in their
9 grammatical and ordinary sense, harmoniously
10 with the scheme of the Act and the object of
11 the statute. In addition to this general
12 roadmap, a number of specific rules of
13 construction may serve as useful guideposts
14 on the court's interpretative journey. ...
15

16 Continuing on at paragraph 34, My Lord:
17

18 Here, the object of the legislation is
19 environmental protection. This important
20 object must not be lost in the minutia. In
21 *Friends of the Oldman River Society v. Canada*
22 *(Minister of Transport)*, 1992 CanLII 110
23 (SCC), [1992] 1 S.C.R. 3 at 71, La Forest J.,
24 for the majority, cited with approval the
25 fundamental purposes of environmental impact
26 assessment identified by R. Cotton and D.P.
27 Emond in "Environmental Impact Assessment" in
28 J. Swaigen, ed., *Environmental Rights in*
29 *Canada* (Toronto: Butterworths, 1981) 245 at
30 247:
31

32 (1) early identification and evaluation of
33 all potential environmental consequences of a
34 proposed undertaking; (2) decision making
35 that both guarantees the adequacy of this
36 process and reconciles, to the greatest
37 extent possible, the proponent's development
38 desires with environmental protection and
39 preservation.
40

41 I adopt, as a correct approach to the
42 interpretation of environmental legislation,
43 the following passages from *Labrador Inuit*
44 *Association v. Newfoundland (Minister of*
45 *Environment and Labour)* 1997 CanLII 14612 (NL
46 CA), (1997), 152 D.L.R. (4th) 50 (N.L.C.A.)
47 at paras. 11-12, to which the chambers judge

1 also referred at para. 72:

2

3

4

And that's that case I took you to earlier,
My Lord.

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[11] Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: Canadian Environmental Assessment Act, S.C. 1992, c. 37 (CEAA); Environmental Assessment Act, R.S.N. 1990, c. E-13 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.

[12] The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

And what that suggests here, My Lord, in my submission, is not the narrow approach that my friend has advocated to s.15, but a broad and

1 purposive approach that will insure that statutory
2 objects are met.
3 Now, if we can go back to the language of
4 s.17, My Lord, which, again, is in Tab 1 of
5 Volume 1 of the Province's book of authorities.
6 And the provision we're concerned with, My Lord,
7 is s.17(2). So, what 17(2) does is it -- its
8 purpose is to direct what material is to go to the
9 ministers when they're making this policy
10 decision.

11
12 A referral under subsection (1) must be
13 accompanied by.

14
15 (a) an assessment report prepared by the
16 executive director, commission, hearing panel
17 or other person, as the case may be,

18
19 (b) the recommendations, if any, of the
20 executive director, commission, hearing panel
21 or other person, and.

22
23 (c) reasons for the recommendations, if any,
24 of the executive director, commission,
25 hearing panel or other person.

26
27 Now, again, the language is on its face, as
28 my friend said, not subject to any express
29 statutory constraints, and it's also a provision
30 that creates separate and independent requirements
31 for an assessment report and recommendations and
32 reasons. So my friend's suggestion that the
33 assessment report itself must dictate what the
34 recommendations are to be, that approach, My Lord,
35 is not only an approach not evident on the plain
36 language of the provision, but it's also an
37 approach that would effectively render subsection
38 (b) and subsection (c) meaningless. There'd be no
39 purpose in having those provisions, My Lord, if
40 everything is to be contained in the assessment
41 report.

42 I'm returning -- I'm sorry, My Lord, I'm --
43 I'm back in my written argument at paragraph 96.

44 THE COURT: What page are you at now?

45 MS. HORSMAN: Page 29, paragraph 96.

46 The petitioner, My Lord, in my submission,
47 cast the statutory interpretation issue that's

1 before you in broader terms than the cast [sic] --
2 the facts of this case require. The way the
3 petitioner has put it is whether section 17(2)(b)
4 and (c) entitled the executive director to make
5 whatever recommendations he sees fit based on
6 whatever factors he considers to be appropriate.
7 And that's not what happened here, My Lord. What
8 happened here is that the executive director made
9 recommendations that were not extraneous to the
10 statutory role. They emerge directly from the
11 Environmental Assessment Office's review process.
12 And, again, if you accept my premise that I don't
13 take my friend to be taking issue with it that
14 they were factors properly considered by the
15 minister, then they could properly be the subject
16 of the executive director's recommendation under
17 17(2). In no sense were they extraneous to the
18 statute.

19 The petitioner's argument again, My Lord, is
20 that the executive director can't make any
21 recommendations beyond the conclusion of the
22 assessment report, and that's the narrow
23 interpretation that, in my submission, must be
24 rejected.

25 At paragraph 97, My Lord, the executive
26 director's interpretation of s.17(2) was clearly
27 reasonable within the meaning of Dunsmuir. It's
28 an interpretation that gives meaning to the
29 provision. It's consistent with its plain
30 language and also with the intent and context of
31 the Act as a whole. The executive director
32 reasonably interpreted his authority to provide
33 discretion not only to elect whether to provide
34 recommendations, but also discretion as to their
35 content. And that, again, is consistent with the
36 nature of his statutory role in providing
37 assistance to the ministers in making the kind of
38 high level policy decision that faces them in
39 every case and faced them in this case. That is,
40 My Lord, it's a high level policy decision that
41 will be assisted not only by the assessment
42 report, but also from the executive director's
43 perspective on issues beyond those raised in the
44 report itself, such as long-term environmental
45 liability risk.

46 My Lord, that is what I had to say on the
47 statutory interpretation point, unless Your

1 Lordship has any questions of me.

2 THE COURT: No. Thank you. Carry on.

3 MS. HORSMAN: And so the last section of our written
4 argument starting at page 30 deals with what I
5 understand to be my friend's alternative
6 submission, that even if it was lawful for the
7 executive director in this case to issue
8 recommendations that in the petitioner's
9 perspective were inconsistent with the
10 environmental assessment report, whether that
11 obligated -- triggered some duty of procedural
12 fairness that was beyond what was provided to the
13 petitioner.

14 My Lord, what -- what we've done in paragraph
15 101 through 103 is simply highlight by reference
16 to the footnotes all the decisions we could find
17 that dealt with challenges to decision-making
18 powers under British Columbia's Environmental
19 Assessment Act. Many of them deal with whether
20 the Crown has met their constitutional duty to
21 First Nations to consult, and a further category
22 of cases have involved challenges by public
23 interest groups to the manner in which particular
24 projects have escaped review under the Act. Davie
25 Bay was one of them.

26 And, finally, and of relevance for our
27 purposes, My Lord, is there have been two
28 instances of challenges by non-First Nations
29 stakeholders to decision-making under the Act on
30 the basis of alleged failure of EAO officials to
31 accord them procedural fairness in the course of
32 assessments. And that's the Do Rav Right
33 Coalition case, which I took Your Lordship to this
34 morning, and the R.K. Heli-Ski Panorama Inc. case.
35 In both cases it was a challenge to the fairness
36 of the EAO's assessment process, My Lord, not to
37 the ministers' decision-making process. The Do
38 Rav Right case is closest on point for our
39 purposes. I thought they would be the just the
40 two I would refer Your Lordship to in terms of how
41 the procedural fairness issues were dealt with
42 there.

43 And, so, Do Rav Right, again, is at Tab 15 of
44 Volume 1. And I already took Your Lordship to the
45 paragraphs of Chief Justice Bauman's decision that
46 dealt with the nature of decision-making under the
47 Act. And a particular focus of this case was the

1 s.11 order that had been issued that directed how
2 assessment was to be conducted under the
3 Environmental Assessment Act. And so what Chief
4 Justice Bauman found on this point that was
5 pertinent is at paragraph 123 of this decision.
6 His Lordship said:

7
8 As I have discussed, the common law rules of
9 procedural fairness have been supplanted here
10 by the consultation scheme envisaged by the
11 legislature under the Act and the Regulation
12 and that scheme is very much left up to the
13 discretion of the executive director (or his
14 delegate) to be designed on a project by
15 project basis.

16
17 And, so, what Chief Justice Bauman looked to
18 were the procedures that the EO themselves
19 established. And when it went to the Court of
20 Appeal, My Lord, the Court of Appeal didn't
21 conclusively decide that point, whether Chief
22 Justice Bauman was right that the common law rules
23 of procedural fairness had been completely
24 supplanted. And so the relevant provisions from
25 -- I'm sorry, My Lord -- from the Court of Appeal
26 decision should be immediately following Chief
27 Justice Bauman's decision behind the green paper
28 at paragraph 44. This is the Court of Appeal's
29 discussion of fairness in Do Rav Right:

30
31 Finally in support of the appeal, Mr. Ward
32 argued that the common law rules of
33 procedural fairness were not complied with,
34 and in particular that the common law imposes
35 an obligation on government to "notify" an
36 individual in circumstances where his or her
37 interests are adversely affected by a change
38 in a previously publicized project:

39
40 And you may know this, My Lord, but the
41 change was from a tunnel and bored to a cut and
42 cover method of construction down Cambie Street,
43 and the complaint was that the stakeholders hadn't
44 been sufficiently consulted about that change.

45
46 In Baker, the Court noted that the duty of
47 procedural fairness is "flexible and

1 variable, and depends on an appreciation of
2 the context of the particular statute and the
3 rights affected." (Para. 22, per
4 L'Heureux-Dubé, J.) The learned judge
5 described various factors to be taken into
6 account in determining the contents of
7 procedural fairness in any given case -- the
8 nature of the decision being made and the
9 process followed in making it, the nature of
10 the statutory scheme and the "terms of the
11 statute pursuant to which the body operates";
12 the importance of the decision to the
13 individuals affected thereby; the "legitimate
14 expectations" of the person challenging the
15 decision; and the "choices of procedure made
16 by the agency itself, particularly when the
17 statute leaves to the decision-maker the
18 ability to choose its own procedures, or when
19 the agency has an expertise in determining
20 what procedures are appropriate in the
21 circumstances."

22
23 Those five factors that are set out in that
24 quote, My Lord, that's taken from the Baker
25 decision of the Supreme Court of Canada. And I
26 think at various points in our written argument we
27 simply refer to the Baker factors, and so that's
28 where that comes from.

29
30 This list was not, of course, exhaustive, and
31 in the final analysis, the question was said
32 to be whether persons affected by the
33 decision have had the opportunity to "present
34 their case fully and fairly, and have
35 decisions affecting their rights, interests,
36 or privileges made using a fair, impartial,
37 and open process, appropriate to the
38 statutory, institutional, and social context
39 of the decision."

40
41 The process of environmental assessment
42 mandated by the Act and Regulation does give
43 broad powers to the Director in determining
44 the scope of the required assessment of the
45 project, and the procedures to be followed in
46 conducting that assessment: s.11(1). The
47 assessment in question here involved not only

1 construction methods but, as already
2 mentioned, a long list of disparate concerns,
3 interests and values. The voluminous
4 materials compiled in the assessment process
5 speak to the complexity and polycentric
6 nature of the tasks of the Director and the
7 Ministers. Although the use of 'cut and
8 cover' construction between 2nd and 37th
9 Avenues was but one facet of the assessment,
10 the Director and the Ministers recognized the
11 importance of the matter to the segment of
12 the public represented by the petitioner, and
13 the public obviously responded by expressing
14 their views and objections in letters,
15 petitions and meetings.

16
17 Without deciding finally whether some or all
18 common law rules of procedural fairness were
19 curtailed by the Act and Regulation, I am of
20 the view that in any event, adequate
21 opportunities to object and comment on the
22 construction method for the subject segment
23 of the RAV line were provided. In my
24 opinion, the process followed by the Director
25 was not flawed: The persons represented by
26 the petitioner were treated in a manner
27 consistent with procedural fairness and in a
28 manner "appropriate to the statutory,
29 institutional, and social context of the
30 decision"; the Director did not exceed his
31 jurisdiction either on December 2 or December
32 17, 2004 as contended; and did not exercise
33 his discretion improperly. Finally, to the
34 extent that "legitimate expectations" may
35 inform the application of the principles of
36 procedural fairness, I agree with the
37 Chambers judge that no such expectations were
38 improperly disregarded.

39
40 Now, again, My Lord, in those two cases the
41 procedural fairness complaints related to the
42 process followed at the assessment review level,
43 not at the ministerial decision-making level. And
44 there's an important distinction that's dealt with
45 in the next section of our written argument
46 starting at paragraph 104 which deals with the
47 duty of fairness owed in legislative decision

1 making.

2 THE COURT: Does the question of reasonable
3 expectations play any significant role here, do
4 you say? Did the petitioner, given the whole
5 course of conduct here, have -- by the time this
6 matter went to the ministers have a reasonable
7 expectation as to what the outcome would be, I
8 suppose, and also a reasonable expectation that
9 there would be another opportunity to respond to
10 an adverse recommendation?

11 MS. HORSMAN: I -- I will deal with this in more detail
12 in our written argument. I do, My Lord. But I --
13 I can tell you in brief. My two points in
14 response is, first, that the doctrine of
15 legitimate expectations, the caselaw is quite
16 clear it doesn't give you a substantive -- you
17 can't say I had a legitimate expectation I would
18 get an environmental assessment certificate. What
19 it does is it may influence the content of
20 procedural fairness that you're accorded. So if
21 you've been led to believe that you're going to
22 have participation rights that aren't subsequently
23 given, then that can result in a direction from
24 the court that you be given those participatory
25 rights. And so that is raised by my friends. And
26 our response to that is there's nothing in the
27 record that could have given them a legitimate
28 expectation of participation beyond what they were
29 accorded. And our written argument does flush out
30 the reasons why we say that, My Lord.

31 THE COURT: All right.

32 MS. HORSMAN: And, again, that legitimate expectation,
33 all of the Baker factors, My Lord, they're what
34 the court weighs in totality in deciding what
35 level of procedural protection is required in any
36 particular case.

37 So, My Lord, at paragraph 105 then, the first
38 Baker factor is the nature of the decision. And
39 that's quite fundamental to the definition of the
40 appropriate standard. In order for a duty of
41 fairness to apply at all to statutory decision
42 making it has to be decision making that's
43 administrative rather than legislative. And that
44 point was made as far back as Cardinal v. Kent in
45 the paragraph cited at 106:

46
47

1 This court has affirmed that there is, as a
2 general common law principle, a duty of
3 procedural fairness lying on every public
4 authority making an administrative decision
5 which is not of a legislative nature and
6 which affects the rights, privileges or
7 interests of an individual.

8
9 Now, there's a rather long quote then, a
10 quite helpful quote, in -- in my submission, My
11 Lord, from Brown v. Evans that explores this
12 concept in greater detail. And I won't read the
13 whole thing out to you, but I would highlight the
14 first two and the last two paragraphs:

15
16 It is clearly established that in the absence
17 of a statutory provision to the contrary, the
18 duty of fairness does not apply to the
19 exercise of powers of a legislative nature.
20 Moreover, even where legislation expressly
21 requires a hearing to be held before a
22 particular power is exercised, the courts
23 will not likely augment those procedures
24 where the power in question is of a
25 legislative nature.

26
27 While no precise definition of "legislative"
28 power emerges from the case law, two
29 characteristics seem important for the
30 purpose of defining the extent of the duty of
31 fairness. The first is the element of
32 generality, that is, that the power is of
33 general application and when exercised will
34 not be directed at a particular person. The
35 second indicium of a legislative power is
36 that its exercise is based essentially on
37 broad considerations of public policy,
38 rather than on facts pertaining to
39 individuals and their conduct. Decisions of
40 a legislative nature, it is said, create
41 norms or policy, whereas those of an
42 administrative nature merely apply such norms
43 to particular situations.

44
45 And then flipping over to page 33 at the top,
46 My Lord:

47

1 A decision or other form of administration
2 action may be exempt from the duty of
3 fairness, even though its application is
4 directed to or adversely affects only one
5 person, where it is an exercise of a "purely
6 ministerial" power, or where it is a decision
7 of "general policy." Such a power will
8 almost invariably be discretionary, although
9 the fact that it calls for the use of
10 discretion does not necessarily remove it
11 from the ambit of the duty of fairness, but
12 typically in those instances the fairness
13 requirements are minimal.

14
15 The rationales most often given for the
16 limitation to the reach of the duty of
17 fairness are: that those adversely affected
18 by decisions that turn on broad public policy
19 considerations are not especially well-placed
20 to provide relevant information or insights;
21 that the decision may be based on issues that
22 are not suitable for determination by
23 adjudication; and that those charged with
24 making political decisions should only be
25 accountable to the public through political
26 processes.

27
28 Now, My Lord, the characterization of a
29 decision making as legislative in nature, it's
30 significant not only to the question of whether
31 the duty applies or doesn't apply, but to the
32 question of what the content of the duty is if it
33 does apply. So, a particular kind of decision
34 making -- we've made this point in paragraph 108
35 -- may be insufficiently legislative in nature to
36 exclude the duty of fairness yet still
37 sufficiently situated in the legislative end of
38 the spectrum but only minimal procedural fairness
39 requirements apply.

40 And at paragraph 109, My Lord, we've given an
41 instance of this kind of quasi judicial -- sorry,
42 quasi legislative decision making in the Idziak
43 case. And this was a case in which the court
44 acknowledged that a decision of the Minister of
45 Justice to issue a warrant of surrender under the
46 Extradition Act engaged s.7 of the Charter and
47 attendant constitutionally guaranteed principles

1 of procedural fairness, yet still determined even
2 in that context, when we're talking about
3 procedural rights guaranteed by the Charter, given
4 the highly policy -- had an attenuated content
5 given the highly policy driven nature of the
6 decision making. And, so, consequently, the
7 minister's failure to disclose to the appellant a
8 staff memorandum summarizing his representations
9 and providing a recommendation to the minister was
10 found not to be a breach of the audi alteram
11 partem principle. And La Forest said in the quote
12 we have excised at paragraph 109:

13
14 In making a decision of this kind, the
15 minister is entitled to consider the views of
16 her officials who are versed in the matter.
17 I see no reason why she should be compelled
18 to reveal these views. She was dealing with
19 a policy matter wholly within her discretion.
20

21 Now, My Lord, we don't suggest in this
22 particular case that you need to decide once and
23 for all whether the ministers' decision-making
24 powers under the Environmental Assessment Act are
25 legislative, in the sense that no rules of duty --
26 no procedural fairness rules apply. We just say
27 that they must necessarily be much reduced given
28 the nature of the power as compared to what would
29 apply in a purely adjudicative context. So, on a
30 sliding scale we're at -- we're at the legislative
31 end of the spectrum in terms of defining the
32 content of procedural rights.

33 My Lord, I think the next few paragraphs are
34 points that I've already made. And, then, so one
35 other -- I believe the second of the two cases
36 that I noted at the beginning might have some
37 relevance for the present case, My Lord. It was
38 the other case where in this case a competing
39 business owner was unhappy with -- with the
40 outcome of an environmental assessment process and
41 complained that its procedural rights had not been
42 met in the assessment of the project under the
43 Environmental Assessment Act. That's the R.K.
44 Heli-Ski case. And if we can just go to that case
45 quickly, My Lord, and see how the court dealt with
46 the procedural fairness complaints there. That's
47 Tab 26 of Volume 2.

1 And, once again, My Lord, we have two
2 decisions. We have a decision of Mr. Justice
3 Melnick, which is behind the green page, and then
4 the decision of the Court of Appeal, which is at
5 the centre page. And if we could go to
6 Mr. Justice Melnick's decision first, My Lord,
7 which is the second of the two, at paragraph 59.
8 And, again, this is dealing with the duty of
9 procedural fairness in the assessment process:

10
11 The duty of procedural fairness owed to R.K.
12 included a right to be meaningfully heard and
13 a right to an impartial decision maker. As I
14 mentioned in paras. 3 and 5 in my discussion
15 of the standard of review, the content of the
16 duty of fairness owed in the circumstances is
17 such that any breach must be substantial as
18 opposed to trivial in nature. I say this
19 having determined the content of the fairness
20 duty with reference to the five factors in
21 Baker v. Canada (Minister of Citizenship and
22 Immigration), 1999 CanLII 699 (SCC), [1999] 2
23 S.C.R. 817, 174 D.L.R. (4th) 193. In
24 particular, although the decision of the
25 Ministers is very important to R.K., I find
26 that: The nature of the decision being made
27 is a polycentric one; R.K. had no legitimate
28 expectations that the process would be
29 different than the one ultimately employed;
30 and the polycentric nature of the decision
31 requires me to show deference to the
32 procedure chosen by the Ministers.
33

34 And then the Court of Appeal, I think,
35 essentially affirmed that approach, My Lord. And
36 I won't read it out to you, but we've excerpted
37 the relevant paragraph from the Court of Appeal
38 decision at paragraph 113 in our written argument.

39 So, to the extent, My Lord, that the caselaw
40 has recognized a duty of fairness in this context
41 outside of the consultation -- constitutional
42 consultation duties that are owed to the First
43 Nation participants, that duty has been situated
44 within and structured by the assessment process
45 that culminates in the drafting of an assessment
46 report. And there's been no suggestion in the
47 caselaw that procedural fairness in this context

1 requires the ministers to extend a final right of
2 address to every stakeholder who has participated
3 in the assessment consultations so that those
4 participants may address any aspect of the
5 ministers' contemplated public interest analysis
6 which runs counter to their perspective. And I
7 just make the point, My Lord, that if such a right
8 of participation was to be recognized, it wouldn't
9 be one that could conceivably be limited --
10 limited to the proponent because this isn't a
11 proponent driven process. It's a polycentric one.
12 So if Pacific Booker had -- would have a right of
13 participation at the ministerial decision-making
14 stage, it's impossible to see how the same right
15 wouldn't be accorded to other stakeholders in this
16 process.

17 My Lord, at page 36, paragraph 115 we deal
18 with our submission that the executive director's
19 recommendations must properly be viewed as an
20 adjunct to the ministerial decision making. In
21 our submission, My Lord, the petitioner has
22 misconceived the assessment process in seeking to
23 isolate the executive director's recommendation as
24 a discrete exercise of statutory power in which it
25 has procedural fairness entitlements. When you
26 view the structure of the scheme as a whole, that
27 recommendation power is properly conceived as
28 outside of the assessment stage and is an adjunct
29 to the ministerial decision-making process that
30 ensues under s.17(3).

31 The executive director provides his advice to
32 the minister at the stage after the proponent has
33 had extensive opportunity for input during the
34 assessment consultations and drafting of the
35 assessment report. The recommendations we have
36 suggested are analogous to an internal staff
37 memorandum in respect of which procedural fairness
38 requirements, if any, are derived by content from
39 the nature of the ministerial decision-making to
40 which they're attached. And we've cited Macaulay
41 & Spragg on that point, My Lord. And Macaulay &
42 Spragg, in turn, rely on, among other cases,
43 Idziak, which is a decision I've already referred
44 Your Lordship to.

45 Here, after providing the ministers with a
46 31-page summary of the findings of the assessment
47 report, the executive director then in his

1 recommendations spoke briefly in a page and a half
2 to the broader public interest aspects of the
3 ministerial decision making which proposed a more
4 cautious or perhaps skeptical analysis than the
5 assumption of no significant adverse effects which
6 the assessment report was based on. As my friend
7 has made the point repeatedly, the recommendation
8 did not contain new information on technical
9 matters canvassed in the assessment report. All
10 of the risk factors highlighted by the executive
11 director had been articulated persistently as
12 concerns in the multi-year assessment process.
13 And I won't belabour that point, My Lord, 'cause I
14 went through it in some detail this morning.

15 Now, My Lord, I spent some time focused on
16 the ministers' entitlement to consider these
17 additional factors that might impact -- influence
18 their public interest consideration in the risk
19 benefit analysis. And at paragraph 118 we've made
20 the point that I -- I think I've made already
21 today to Your Lordship, that if the ministers were
22 entitled in their own notion to weigh the various
23 risk factors highlighted by, for example,
24 Ms. Bellefontaine and Mr. Tamblyn in their
25 findings -- in the findings of the assessment
26 report, and the views of the proponent, then the
27 ministers were entitled to receive an articulation
28 of the more cautious approach from the executive
29 director. Given his role as the head of the EAO
30 and the assistant deputy to the Minister of
31 Environment, the executive director is officially
32 uniquely qualified to assist ministers in their
33 broader public interest analysis.

34 Now, My Lord, at 119 we made the point that
35 the content and gist of the executive director's
36 recommendations didn't give rise to new issues of
37 an adjudicative nature on which the petitioner
38 ought to have been accorded a right of response
39 because their views had already been sought and
40 elicited and were included in both the assessment
41 report and the director's recommendations.

42 I did want to just pause and make one note
43 about a point my friend made yesterday about,
44 well, one thing that was new was this risk benefit
45 analysis and that Pacific Booker didn't have an
46 opportunity to say what they thought about the
47 risk benefit analysis that Mr. Sturko had proposed

1 that the ministers carry out. Well, My Lord, the
2 risk benefit analysis that the petitioners object
3 to is an aspect of the policy decision making that
4 was being engaged in by the ministers. Having
5 received the technical details through the EAO
6 report, the ultimate public interest question is
7 going to be, for the ministers, whether the
8 benefits of the project outweigh risks. And in my
9 submission, My Lord, the petitioner cannot
10 conceivably have entitlement as a single
11 stakeholder to influence the ministers' policy
12 deliberations at that level. That was for the
13 ministers.

14 My Lord, I'll skip ahead to page 38 and the
15 heading: "Legislative direction overrides or
16 structures common law procedural fairness
17 requirements." And this is the point alluded to
18 in Do Rav Right as to whether the Environmental
19 Assessment Act and the process it envisions
20 somehow supplants the common law procedural
21 fairness.

22 Now, at paragraphs 122 and 123 we have made
23 the point that it's, of course, open to the
24 legislature to replace common law procedural
25 fairness standards with procedures that the
26 legislature has decided are appropriate for
27 particular decision making. And at paragraph 124
28 we cite back to Chief Justice Bauman and his
29 conclusion that that's what the Environmental
30 Assessment Act has done. Chief Justice Bauman
31 found no breach of the consultation scheme
32 vis-a-vis the petitioners in that case and
33 dismissed the petition, but on appeal the court
34 agreed that the complaints of procedural
35 unfairness were ungrounded, although Her Ladyship
36 took a more conventional common law analysis
37 without deciding the point. But, in any event,
38 the applicable common law standard, as the Court
39 of Appeal conceived it, entailed only limited
40 rights of participation which were "appropriate to
41 the statutory, institutional, and social context
42 of the decision," all of which the coalition had
43 been afforded. And so the point of the Court of
44 Appeal decision in Do Rav Right, My Lord, is that
45 it illustrates whether or not there is an implied
46 exclusion for common law procedural fairness as --
47 as a matter of statutory interpretation, the

1 application of the Baker factors may lead you to
2 the same result.

3 The second factor identified in Baker is the
4 nature of the statutory scheme and the provisions
5 to which the public body operates. And, My Lord,
6 a final, but important point, an implied exclusion
7 of common law procedural fairness, determined from
8 a legislative scheme's existing procedural
9 provisions, does not mean no fairness; it means
10 simply fairness bounded by the limits provided
11 under the statute, which, again, in any event, may
12 narrow the limits applied through the Baker
13 analysis.

14 On any analysis, therefore, if you're in the
15 common law Baker analysis or you're deciding if
16 there's an implied exclusion under the statute,
17 it's significant that s.11 of the Act specifically
18 empowers the executive director or his delegate to
19 "determine the scope of the required assessment,"
20 and "the procedures and methods for conducting the
21 assessment." That's what the s.11 order did in
22 this case. It's included in the affidavit of
23 Chris Hamilton. It's a bit of a lengthy document,
24 My Lord. And all that's said about the assessment
25 report and referral to the minister is what we've
26 captured in clause 19 and clause 20.

27
28 The proponent, along with First Nations and
29 other members of the working group, will be
30 consulted in the preparation of the draft
31 assessment report, prepared by the project
32 assessment manager as the basis for
33 decision by the ministers on the application
34 under s.17(3) of the Act.

35
36 The proponent as well as the First Nations
37 and other members of the working group
38 involved in the drafting of the assessment
39 report will be advised by the project
40 assessment manager of the date that the final
41 assessment report is forwarded to the
42 ministers, and of the decision of the
43 ministers.

44
45 Now, what the order didn't specify was that
46 the petitioner had any rights of participation in
47 the formulation of the executive director's

1 recommendations, other -- other than, of course,
2 My Lord, through the important contribution that
3 the petitioner makes to the draft assessment
4 report or an opportunity to rebut the
5 recommendations if they proved unfavourable. And
6 the absence of any provision in the s.11 order for
7 the petitioner to address the recommendations
8 supports the conclusion in this case, in my
9 submission, that no such right can or should arise
10 at common law.

11 Now, Table 13 is an important point, My Lord,
12 when one considers this notion of the procedural
13 rights of the petitioner in this particular case.
14 Brown v. Evans suggests that in weighing the cost
15 and benefits of fairness pragmatically in the
16 specific statutory context, an important
17 consideration is that the project proponent's
18 procedural rights not become so expansive as to
19 overwhelm the hearing of contrary voices and
20 perspectives.

21 So what the scheme of the Act does, My Lord,
22 is it facilitates dialogue between the project
23 proponent and a variety of technical experts
24 within government and stakeholders outside of
25 government and allows the proponent to modify its
26 project in response to concerns that it otherwise
27 would have been unaware of. And this increases
28 the chance of success and it assists in allaying
29 stakeholder concerns. And in an ideal case --
30 that, obviously, didn't happen here, My Lord -- a
31 compromise that satisfied all interests can be
32 reached. But the ultimate balancing of factors
33 relevant to the public interest is for the
34 ministers to perform. And so restricting the
35 project proponent's procedural rights to
36 consultation on defined issues at the assessment
37 stage is consistent with the objective of the Act,
38 which is to buffer the goal of environmental
39 protection against countervailing pressures. This
40 restriction of procedural rights insures that the
41 proponent doesn't approach -- or any other
42 stakeholder, for that matter, My Lord -- and
43 overwhelm the final public interest determination
44 as simply another adjudicative contest to be won.
45 It's a benefit to the broader interest which the
46 Act was plainly designed to serve.

47 My Lord, I'll -- I'll skip over the -- there

1 are important points, but I think they've been
2 made sufficiently in my submission so far. And
3 the other Baker factors, those paragraphs at 131
4 and 132 through 134, simply make the point that
5 this is a polycentric decision-making process and
6 that's another factor to be considered in
7 determining the content of procedural fairness.

8 The point, My Lord, is -- I -- I think that's
9 captured at paragraph 133 of our written argument,
10 that the according of special procedural rights to
11 a project proponent under the Act in respect of
12 unfavourable recommendations would conflict with
13 the rights of other participants and would lead to
14 a lengthy spiral of last word submissions which
15 would be necessary to resolve the conflict and
16 insure equal fairness to everyone.

17 And, then, finally, My Lord, at the "No
18 legitimate expectation of a hearing before the
19 executive director ..." This is the point Your
20 Lordship asked me about at the outset. The
21 doctrine of legitimate expectations was explained
22 in the Mavi decision, and we've included the quote
23 at paragraph 136:

24
25 Where a government official makes
26 representations within the scope of his or
27 her authority to an individual about an
28 administrative process that the government
29 will follow, and the representations said to
30 give rise to the legitimate expectations are
31 clear, unambiguous and unqualified, the
32 government may be held to its word, provided
33 the representations are procedural in nature
34 and do not conflict with the decision maker's
35 statutory duty.

36
37 Now, My Lord, Pacific Booker might have hoped
38 or anticipated or, in hindsight, expected that
39 they would have been consulted or provided with a
40 last word on the executive director's
41 recommendations, but they haven't pointed to
42 anything in the record that I'm aware of that
43 constitutes a clear, unambiguous and unqualified
44 representation by government that they would be
45 accorded that kind of participation at that level
46 of the decision-making process. And -- and quite
47 the contrary, My Lord, because that's not the way

1 the process works in general. The process works
2 in a way. As I have described, that procedural
3 rights are granted through the rights of
4 participation in the assessment process itself,
5 not at the level of ministerial decision making
6 with the executive director's recommendations as
7 an adjunct. It's the invariable practice of the
8 EAO not to provide recommendations to any
9 stakeholder in advance of providing to the
10 ministers. The ministers' decision and the
11 recommendations are released once the decision is
12 made.

13 And I know my friends will say, well, this
14 case was different because you were making a
15 contrary recommendation. Well, that doesn't
16 affect the legitimate expectations argument, My
17 Lord, 'cause that's only a procedural argument.
18 That's about we received clear, unqualified
19 representation by government that we were to be
20 accorded procedural rights at that stage of the
21 decision-making process. And there's absolutely
22 nothing in the record that supports such an
23 expectation.

24 There are now presumptive participation
25 rights, at least under the statute and under the
26 policies practices and procedures of the EAO, for
27 very good reasons that I've just tried to go
28 through with Your Lordship.

29 My Lord, I'm at my conclusion, unless there
30 was anything I can assist with on the procedural
31 fairness.

32 THE COURT: No. Keep on going.

33 MS. HORSMAN: Okay.

34 THE COURT: Are you done?

35 MS. HORSMAN: I'm just at my conclusion.

36 THE COURT: All right. Thank you.

37 MS. HORSMAN: I'm very close to being done.

38 So, My Lord, just wrapping up. In the end,
39 the respondents' submission is the petitioners
40 pointed to no basis for interference with the
41 ministers' decision refusing an environmental
42 certificate for the Morrison Lake mine project.
43 The petitioner was given the opportunity of
44 participating in a lengthy review process to hear
45 concerns of stakeholders and attempt to address
46 them, and, ultimately, the ministers concluded
47 that a certificate was not in the public interest

1 given the environmental liabilities and risks
2 associated with the project as designed. And --
3 and we say that was a decision for the ministers
4 to make. And that should be sufficient to dispose
5 of this application.

6 The petitioner's argument, in my submission,
7 My Lord, fundamentally rests on the notion that
8 having expended considerable funds in the
9 assessment process and expensive end stage
10 mitigation measures, that if successful would
11 result in no adverse effects, the petitioner is
12 now entitled to a favourable recommendation in the
13 issuance of a certificate. And that notion, My
14 Lord, is completely at odds with the scheme and
15 its focus on environmental protection in the
16 broadest sense. While a proponent's financial
17 interest may give rise to procedural rights in the
18 assessment process, those interests do not trump
19 other considerations in the overall scheme.

20 And the last point, My Lord, our very last
21 paragraph at 144, and it's a point that's
22 important to remember, is that the ministers'
23 decision in this case doesn't even shut the door
24 on the petitioner's ability to apply for an
25 environmental assessment certificate with a
26 revised project design that doesn't carry with it
27 the same long-term environmental liabilities and
28 risks. I know my friends have been very --
29 expressed very much disfavour with this option,
30 but the point is, as I hoped to illustrate to Your
31 Lordship this morning, that at many points
32 throughout the environmental assessment process
33 Pacific Booker was not simply encouraged to
34 consider alternative designs that would have met
35 some of the concerns of the working group members
36 and -- and provincial policy on treatment of metal
37 leaching and acid rock drainage at mine sites, but
38 they were also given specific ideas as to
39 alternate designs that might be considered. And
40 so the ministers' decision doesn't prevent them
41 from pursuing other design options that might not
42 prevent the degree of long-term environmental
43 risks that this design provides. But if the
44 petitioners do want to pursue its proposal for an
45 open pit mine, My Lord, and with this high
46 ecological value, it should do so within the
47 confines of what the ministers of government

1 assisted by the advice and recommendations of the
2 EAO's executive director consider to be an
3 acceptable level of environmental risk.

4 My Lord, I wonder, at the risk of belabouring
5 things, I -- I know I won't -- I expect no further
6 right of replying to the interveners or my
7 friends, but I just had a word or two to say about
8 the interveners' submissions, and I wonder if I --
9 it will take me about 30 seconds, if I could just
10 make a comment or two and then I'll --

11 THE COURT: Carry on.

12 MS. HORSMAN: Okay. I just wanted to make the point,
13 My Lord, 'cause I -- I expect my friends will have
14 submissions to make to you about the government's
15 consultation duty when it comes to First Nations
16 and their involvement in these kinds of
17 environmental assessment review processes. And,
18 in my submission, this is not a case about -- that
19 concerns constitutional consultation and Your
20 Lordship doesn't need to deal with that very
21 difficult area. The assessment report found that
22 the consultation duty had been met. And I -- I
23 know my friends take some issue with that and it's
24 not an issue that, in my submission, needs to be
25 resolved here.

26 The ministers didn't meet any -- reach any
27 contrary conclusion. They just pointed to the
28 fact that consultation had demonstrated the
29 strength of the First Nation claims and their
30 opposition to the project as factors to be
31 considered in the public interests, as they were
32 entitled to do. The submissions of the First
33 Nations on this petition, My Lord, are important
34 to illustrate a fundamental point, that Pacific
35 Booker is not, as Lake Babine puts it, the only
36 stakeholder in this process. So, if the matter
37 was to be remitted back to the ministers so that
38 Pacific Booker can make whatever submission it
39 envisions about the risk benefit analysis, other
40 stakeholders would necessarily have to be afforded
41 the same opportunity, and then Pacific Booker
42 would put in their new analysis and Lake Babine
43 says that they have new analysis they want to put
44 in and the whole assessment process would be
45 reopened, My Lord.

46 And this point, in my submission, highlights
47 the folly of Pacific Booker's intention to extend

1 participatory rights into the ministers' decision-
2 making process. When their proposal went to the
3 ministers it was at Pacific Booker's insistence
4 and the project was in final form. And the
5 ministers have determined that the project as
6 designed creates unacceptable risks for the
7 province and that's the end of it. And as I've
8 said, if Pacific Booker wants to reconceptualize
9 its project in a manner that addresses the
10 concerns highlighted, for example, follow up on
11 Ms. Bellefontaine's persistent advice, they are
12 free to do so. There's no purpose in referring
13 this project back as it is, My Lord, because the
14 ministers have already decided it's not in the
15 public interest to allow it to proceed in this
16 form.

17 THE COURT: Thank you, Ms. Horsman.

18 Who is next? Ms. Nouvet?

19 MS. NOUVET: Yes.

20 THE COURT: Did I pronounce your name properly?

21 MS. NOUVET: You did. Would it be possible to take the
22 break before I start or ...

23 THE COURT: Yes, we can do that if you wish. All
24 right. We'll take the afternoon adjournment.

25 THE CLERK: Order in chambers.

26

27 (PROCEEDINGS ADJOURNED AT 2:54 P.M.)

28 (PROCEEDINGS RECONVENED AT 3:11 P.M.)

29

30 MS. NOUVET: My Lord, I'm just handing up a loose
31 version of Lake Babine's argument which might be
32 easier to refer to than Volume 4 of the record.

33 THE COURT: Thank you.

34 MS. NOUVET: As well as our book of authorities. I
35 don't expect to be taking Your Lordship to the
36 record. Lake Babine Nation is participating in
37 this judicial review because, as Ms. Horsman
38 noted, it is a stakeholder. It was a stakeholder
39 in this environmental assessment process. Lake
40 Babine Nation's reasonably asserted aboriginal
41 rights and title stand to be adversely affected by
42 the Morrison mine. As a result, the environmental
43 assessment for the mine triggered the Crown's
44 constitutional duty to consult with and provide
45 reasonable accommodation to Lake Babine in respect
46 of those rights. This judicial review will not

1 obligations, nor will it determine whether the
2 Crown's rejection of the mine was an appropriate
3 accommodation of Lake Babine Nation's asserted
4 s.35 rights. But regardless of the precise nature
5 of the consultation and accommodation duties that
6 were owed to Lake Babine in this environmental
7 assessment, Pacific Booker's statutory
8 interpretation argument and some of its proposed
9 remedies fail to take into account the Crown's
10 procedural and substantive obligations towards
11 Lake Babine Nation in the environmental
12 assessment, and so Lake Babine Nation has
13 intervened in these proceedings to identify those
14 problems and, quite simply, to advocate for a
15 judgment that does not in any way impede the
16 Crown's ability to discharge its consultation and
17 accommodation obligations towards Lake Babine,
18 either in a reconsideration of the mine, if that's
19 the outcome of this application, or in future
20 environmental assessments.

21 I'll highlight some of the facts stated in my
22 written submissions. The facts start at paragraph
23 1 of my factum. In the interests of time I'm not
24 going to take you to the record, but all of the
25 facts are footnoted.

26 Lake Babine is an aboriginal group and an
27 Indian Band. It's located in the central Interior
28 of British Columbia. It has about 2,389
29 registered Indian members, and as such, it is one
30 of the largest First Nations in British Columbia.
31 The proposed Morrison mine would be situated
32 beside Morrison Lake, which in Babine Carrier is
33 known as T'akh Tl'ah Bin, and the nation has
34 Indian reserves to the north and to the south of
35 Morrison Lake. And Chief Wilfred Adam, the chief
36 of Lake Babine Nation, confirms in his first
37 affidavit that the Morrison mine project area will
38 be situated within the area to which Lake Babine
39 Nation asserts aboriginal title as well as
40 aboriginal rights.

41 Lake Babine's asserted aboriginal rights
42 include domestic fishing rights, hunting and
43 trapping rights, plant harvesting rights and
44 timber harvesting rights in the project area and
45 in its vicinities -- and vicinity. And members
46 continue to exercise those rights in and around
47 the particular area to this day.

1 Lake Babine salmon harvesting rights are
2 particularly important to its culture and to its
3 sustenance. Lake Babine members have fished
4 salmon in Babine Lake and other nearby waters,
5 including Morrison River, for generations, since
6 prior to contact with European settlers, and
7 salmon remain Lake Babine's primary traditional
8 food and salmon harvesting continues to define who
9 the Lake Babine people are to this day.

10 Lake Babine also asserts the right to engage
11 in spiritual and ceremonial activities in the
12 project area and in its vicinity and it continues
13 to use the project area and its vicinity for these
14 purposes. Historically, it cremated deceased
15 members at Morrison Lake Point, which is on the
16 southeast side of Morrison Lake and immediately
17 adjacent to the proposed project area.

18 So, collectively, I'll refer to all of these
19 asserted rights and title as Lake Babine's s.35
20 rights. Lake Babine, as represented by its
21 elected council, opposes the Morrison mine under
22 its currents design. Lake Babine members are very
23 -- on the whole very concerned about the
24 destruction of the project area, the adverse
25 environmental effects that would extend to the
26 surrounding area, and that's whether or not the
27 mitigation measures work. A mine is obviously
28 going to cause -- an open pit mine is bound to
29 cause destruction. And they are also concerned
30 about the potential for contamination of Morrison
31 Lake and the surrounding waters should the
32 proposed mitigation measures fail. And I've set
33 out the concerns of Lake Babine Nation in some
34 detail at paragraph 11 of my written submissions
35 and, again, there are references to the affidavit
36 evidence to support those concerns.

37 As I explain at paragraph 13 of the
38 memorandum, Lake Babine Nation refrained from
39 taking a forward position on the proposed mine
40 throughout most of the environmental assessment.
41 It did express concerns about the project
42 throughout the assessment, particularly through
43 Verna Power, who was formerly a council member and
44 who was the nation's representative on the
45 provincial working group that you've heard about
46 for the environmental assessment. Once the
47 working group and independent experts retained by

1 the environmental assessment office had reviewed
2 and commented on the project, it's at that point
3 that Lake Babine Nation formally took the position
4 against the project based on the impacts that the
5 nation anticipated the mine would have on its
6 rights and title. And that opposition is
7 expressed in a letter by Chief Wilfred Adam to the
8 project lead, Chris Hamilton, on July 26, 2012.
9 And the letter, I won't take you to it, it's not
10 necessary to go over exactly what it says, but it
11 is contained in affidavit number one of Derek
12 Sturko in his letter to Exhibit A at page 375 of
13 Mr. Sturko's affidavit.

14 The petitioner's written submissions state at
15 paragraph 76 that Pacific Booker entered into a
16 memorandum of understanding with Lake Babine
17 whereby the nation agreed it would support the
18 project if the federal and the provincial
19 environmental assessments concluded that the
20 adverse effects of the project on Lake Babine's
21 way of life could be effectively mitigated. Lake
22 Babine disputes having entered into that
23 memorandum of understanding. And if the court
24 considers the alleged memorandum of understanding
25 to be a relevant issue, my submissions on that
26 matter are contained at paragraphs 19 to 24 of my
27 factum. And I'm, of course, happy to answer any
28 questions Your Lordship may have about that MOU.
29 I personally don't think it is relevant, but I do
30 raise it because it is referred to in my friend's
31 written submissions.

32 The assessment report and Derek Sturko's
33 recommendations both provide the conclusion that
34 Lake Babine Nation has a moderate to strong prima
35 facie case for aboriginal title for the project
36 area.

37 THE COURT: Where -- where are you now in your
38 argument?

39 MS. NOUVET: Paragraph 14.

40 So, paragraph 14 notes that the environmental
41 assessment report reached that conclusion. Derek
42 Sturko, it's apparent from his recommendations
43 that he agrees with that conclusion. And that can
44 be seen at page 55 of Derek Sturko's affidavit.
45 In his recommendations he endorses that view.

46 The assessment report also provides a
47 conclusion for the purposes of the environmental

1 assessment that there is a strong prima facie case
2 in support of the Lake Babine's assertion of
3 aboriginal rights in the project area. And the
4 assessment report prepared by Chris Hamilton also
5 concluded that the Crown owed Lake Babine Nation a
6 duty of deep consultation in this environmental
7 assessment and that this duty was met. And those
8 -- there's a long section, as was mentioned
9 yesterday, in the assessment report, you know,
10 giving an overview of -- of who Lake Babine -- who
11 the Lake Babine people are, some of their history,
12 their land use, and then a review of the
13 consultation efforts undertaken by the Crown and
14 by the proponent, followed by some conclusions
15 about that process.

16 And I just want to note that Lake Babine
17 Nation agrees that there was a deep duty of
18 consultation, but it does disagree with some parts
19 of the report's summary of the consultation
20 efforts, and it disagrees with some of the
21 conclusions, in particular, the conclusion that
22 with the mitigation measures Lake Babine's s.35
23 rights would be reasonably accommodated. That was
24 Chris Hamilton's conclusion in the assessment
25 report. Lake Babine, you know, disagrees with
26 that conclusion, as shown by Chief Wilfred Adams'
27 response to the draft assessment report in his
28 letter of July 26, 2012 to Chris Hamilton.

29 Now, I don't expect the court would focus on
30 that section of the report in its reasons for this
31 case, but it's -- it's just out of an abundance of
32 caution I want to emphasize that many of the
33 assertions of fact and conclusions in the
34 assessment report are, in fact, contested.

35 And in the affidavit of Verna Power that we
36 filed in this case, which is, I believe, in Volume
37 4 of the record -- oh, 3. At Tab 13 in Volume 3.
38 It -- it states some of the reasons -- some of the
39 concerns that Verna Power as a working group
40 member had with the consultation process at
41 paragraphs 20 to 22. So, there is a different
42 perspective on the consultation that occurred.
43 Again, I don't think it's material to this case,
44 but I just didn't -- didn't want to let that go by
45 without noting it.

46 Under Justice Butler's order allowing Lake
47 Babine Nation to intervene in this case, it is

1 clear that Lake Babine did not take a position on
2 the overall merits of the application of Pacific
3 Booker and so will not do so. Lake Babine Nation
4 -- we only address two issues. First, Pacific
5 Booker's argument that under the applicable
6 statutory scheme and in light of the content of
7 the assessment report the executive director's
8 recommendation against the project was ultra
9 vires. So the statutory interpretation argument.
10 And --

11 THE COURT: When -- when you say that Mr. Justice
12 Butler, you know, in permitting your client to
13 intervene restricted it to dealing with certain
14 matters which didn't include the merits of the
15 application of the petitioner, which application
16 are you speaking of? This application --

17 MS. NOUVET: Oh, that we --

18 THE COURT: -- for a judicial review or the application
19 for a certificate?

20 MS. NOUVET: This application for judicial review, that
21 Lake Babine Nation was not granted the right to
22 provide overall comments on how this case -- you
23 know, what the overall outcome of this case should
24 be.

25 THE COURT: All right.

26 MS. NOUVET: The second issue that Justice Butler
27 allowed us to make submissions on, and which we've
28 also done in our written submissions, is the
29 appropriate form of remedies should Pacific
30 Booker's application here succeed.

31 So I'll begin with the question of statutory
32 discretion and the interpretation of s.17(2) of
33 the Environmental Assessment Act. And I -- Lake
34 Babine agrees with the Crown's submissions on the
35 -- sort of the plain meaning of the statute and
36 the contextual analysis that leads to the
37 conclusion that the executive director has -- you
38 know, has to have a discretion that's commensurate
39 with the type of decision making, the polycentric
40 decision making that the ministers will ultimately
41 be making, with the help of his advice.

42 And I simply want to emphasize another
43 consideration which feeds into that contextual
44 analysis. Section 17(2) of the Act should, to the
45 extent possible, be interpreted with regard to the
46 Constitution, the Canadian Constitution. I mean,
47 that comes out of a general statutory

1 interpretation principle that we -- we do
2 generally try to interpret legislation where it
3 can sustain such meanings harmoniously with the
4 Constitution. And the constitutional principle at
5 stake here is the Crown's duty to consult with and
6 accommodate aboriginal people. It's an obligation
7 that does apply in the context of environmental
8 assessments, including, of course, the one that
9 took place for the Morrison mine. And so my
10 submission is that the executive director's
11 statutory powers should be interpreted in a manner
12 that supports the fulfillment of that duty as long
13 as -- as long as the provisions can reasonably
14 support that interpretation.

15 Where the executive director considers
16 adverse impacts on reasonably asserted s.35 rights
17 as a factor weighing against a project's approval,
18 it's very important that he or she be free to
19 express that view as part of any recommendations
20 that he or she makes to the ministers. And that
21 is so regardless of what conclusions are reached
22 in the assessment report that may have been
23 prepared -- that would have been prepared already.
24 An interpretation of s.17(2) of the Act that would
25 fetter the executive director's ability to advise
26 the ministers on the important question of whether
27 a project should be rejected on account of its
28 potential adverse impacts on s.35 rights increases
29 a risk that the Crown will fail to adequately
30 discharge its duty of accommodation. And so this
31 is an additional reason when -- when we look at
32 the Act purposively to reject the petitioner's
33 narrow interpretation of the executive director's
34 statutory discretion.

35 And I want to stress that, you know, in
36 making this argument I'm having regard not just to
37 this case and the facts of this case, but the fact
38 that an interpretation of s.17(2) in this
39 application will -- you know, will apply in future
40 cases as well. And so if it comes out of this
41 case that the executive director can't go against
42 the contents of an assessment report, including
43 conclusions about consultation and accommodation,
44 that will have implications in other environmental
45 assessments as well.

46 I'd like to briefly review just a few aspects
47 of the Crown's duty to consult and accommodate, as

1 I don't believe Your Lordship has yet decided any
2 of those -- has sat on any of those cases coming
3 out of the Haida decision, but I'll be --

4 THE COURT: You should assume I know nothing. You tell
5 me.

6 MS. NOUVET: Well, ideally, I'd a -- I'd have a day to
7 give you the background, but I'll just try to do
8 it in like three minutes. But I'm -- I'm thinking
9 probably, though, that the Supreme Court of Canada
10 first recognized a duty to consult and accommodate
11 in the 2004 case of Haida Nation in British
12 Columbia. I won't take you to that case, but it
13 is included in full in our authorities. And if
14 there's one case to read on a duty to consult it
15 remains the Haida decision. It is at Tab 3 of our
16 materials.

17 The core principle underlying the duty to
18 consult and accommodate is that it is not
19 honourable for the Crown to ignore aboriginal
20 rights until they are proven or settled. Because
21 the reality is that proving a right in court can
22 take many years and millions of dollars, and
23 settling a treaty the same thing. So, in order to
24 maintain the honour of the Crown and foster
25 reconciliation the Crown must take reasonably
26 assertive rights into account into its conduct and
27 its decision making pending formal court
28 recognition or the conclusion of treaties.

29 The Supreme Court of Canada first confirmed
30 that the duty to consult is constitutional, that
31 is, a constitutional duty in the subsequent case
32 of R. v. Kapp. And that case is cited at
33 paragraph 30 of our factum. And the relevant
34 excerpt of the Kapp case is in our authorities at
35 Tab 6. And as is explained at paragraph 32 to 34
36 of the factum, the content of the duty to consult
37 and accommodate will vary -- will vary from case
38 to case. I mean, in that sense it's a bit like
39 the administrative law duty of procedural
40 fairness. It varies by case to case. The two key
41 factors that the Supreme Court of Canada
42 identified in -- in Haida as dictating the depth
43 of consultation, whether accommodation is owed or
44 how much accommodation be owed, are the strength
45 of the right's claims -- like how -- how
46 reasonable -- how strong is the asserted right
47 that the aboriginal group is saying is in

1 jeopardy, and how serious are the potential
2 adverse impacts of the proposed decision or course
3 of action on those rights? So the stronger the
4 right's claim the deeper the duties. The stronger
5 -- the more serious the potential adverse impacts
6 the deeper the obligations.

7 THE COURT: You're not asking me to comment on --

8 MS. NOUVET: No.

9 THE COURT: -- on the content of the duty in this
10 particular instance?

11 MS. NOUVET: Definitely not. Definitely not.

12 THE COURT: No.

13 MS. NOUVET: No. But I think it's important to
14 understand what other rights are at play in this
15 process. Because it -- it informs the remedy and
16 I think it -- it informs the interpretation of
17 s.17(2). And I will get to that very shortly.

18 Another point that I need to emphasize about
19 the duty to consult and, actually, more so the
20 duty to accommodate, is that accommodation doesn't
21 always just mean putting mitigation measures on a
22 project. So there's a constitutional duty to
23 accommodate in some cases where that duty arises
24 where the rights are reasonably asserted. Where
25 the potential impacts are serious there could be a
26 duty to mitigate impacts. But in some cases the
27 Crown might actually have a duty to reject the
28 project. And this is confirmed in a couple of
29 British Columbia cases, the British Columbia case
30 of Homalco, which is cited at footnote 43 of my
31 factum -- and the relevant portion of that case is
32 included in the authorities. So it's a
33 consultation -- one of the earlier consultation
34 cases. And it's also confirmed by the British
35 Columbia Court of Appeal in the West Moberly case,
36 also cited at footnote 43 of my factum. And I
37 just wanted to read a quote from that case 'cause
38 this is -- this is actually a really important
39 point to understand about the duty to consult and
40 accommodate and how it factors into environmental
41 assessments.

42 So, the West Moberly case was about a coal
43 exploration program, a proposed coal exploration
44 program, and the West Moberly First Nations
45 objected to that program on the basis that it
46 would threaten an already very vulnerable caribou
47 herd, and they asserted a treaty right to hunt

1 caribou. And their position over the review of
2 the project -- I forget if it was from the get-go
3 or if it evolved to that -- was that this project
4 should not proceed because it would -- it would
5 just pose too much of a threat to this caribou
6 herd. And the trial judge and the Court of Appeal
7 both agreed that one of the problems with the
8 Crown's approach to consultation in that case was
9 that it never had an open mind to not approving
10 the project. And at paragraph 149 of the Court of
11 Appeal's decision -- and that's at Tab 7 of Lake
12 Babine's authorities -- Justice Finch says:

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MEMPR ...

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Which is the Ministry of Energy and Mines and
17 Petroleum Resources.

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... never considered the possibility that the
21 petitioner's position might have to be
22 preferred.

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That position being that the project should not go
26 forward.

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It based its concept of consultation on the
30 premise that the exploration projects should
31 proceed and that some sort of mitigation plan
32 would suffice. However, to commence
33 consultation on that basis does not recognize
34 the full range of possible outcomes ...

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It amounts to nothing more than an opportunity for
42 the First Nations to blow off steam.

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And I think that it's an appropriate case to
48 note that the duties that the Crown owes to
49 aboriginal peoples in an environmental assessment
50 can differ significantly from administrative law
51 duties owed to a proponent. While administrative
52 law duty is a procedural fairness, including the
53 duty of reasonable expectations do not ever give a
54 right to any substantive outcome, the duty to
55 accommodate where it arises will require the Crown
56 to make a final decision that adequately addresses
57 potential adverse impacts on s.35 rights,
58 potentially, in some cases, to the point of
59 rejecting a proposed development that it might

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1 have otherwise approved.

2 Now I'm going to move into how those
3 principles should affect, in my submission, our
4 interpretation of s.17(2). We know that the
5 constitutional law of Canada requires the Crown to
6 consult with aboriginal peoples as part of its
7 environmental assessment decision-making process
8 and potentially to accommodate them in the
9 ultimate decision making. And these are legal
10 enforceable duties.

11 So when -- and now I'm at paragraph 48 of my
12 factum. Where the executive director makes a
13 recommendation about a proposed project to the
14 ministers pursuant to s.17(2)(b) of the Act, those
15 recommendations are part of the Crown's overall
16 environmental assessment decision-making process.
17 And that's confirmed by the fact that, as was
18 mentioned by Ms. Horsman earlier, under s.17(3) of
19 the Act the ministers must consider the assessment
20 report and the recommendations. So the
21 recommendations will form part of the decision-
22 making process. And although the executive
23 director is not required under the statute to make
24 any recommendations, where he does do so I think
25 it's fair to say those recommendations are an
26 important part of the overall decision-making
27 process. They don't determine the outcome, but
28 they can be influential in the process. And,
29 certainly, the petitioner in this case has
30 emphasized the influence of the executive
31 director's recommendations in both the written and
32 oral arguments.

33 And in terms of the emphasis in the written
34 submissions of the petitioner, I would draw Your
35 Lordship's attention to paragraph 194 of the
36 petitioner's argument. So the executive director
37 should base any s.17 recommendations that he
38 makes, at least, in part, on his views as to
39 whether the Crown has met its constitutional
40 obligations towards aboriginal groups. Has the
41 Crown adequately consulted? What accommodation,
42 if any, is required? I mean, these are really
43 things that really should be in an executive
44 director's recommendation when he makes
45 recommendations. And the reason that any
46 executive director would be well advised to
47 include those considerations is that if the

1 ultimate decision is found to be in breach of the
2 Crown's consultation or accommodation duties, if
3 -- if an aboriginal group challenges the ultimate
4 decision, the issuance of a certificate, on the
5 basis that those duties were breached, there is a
6 potential for the certificate to be quashed or
7 suspended. And I have some cites at Paragar 50 of
8 my factum for instances where Crown decisions made
9 in breach of the consultation and accommodation
10 obligations have been quashed or suspended.

11 Now, I don't think Pacific Booker disagrees
12 that it's generally appropriate for the executive
13 director to make recommendations that include a
14 consideration of whether the Crown has adequately
15 consulted and accommodated, but I think the
16 petitioner is arguing that the Environmental
17 Assessment Act precludes the executive director
18 from making such recommendations where they would
19 deviate from the conclusions in the assessment
20 report. That the executive director doesn't have
21 that much discretion.

22 And, in my submission, it would be very, very
23 problematic to fetter the executive director with
24 the conclusions reached in an assessment report
25 written by one of his delegates. As the official
26 Environment Assessment Office advisor to the
27 ministers, the executive director needs to be
28 allowed to express his views on whether a project
29 should be approved in light of its potential
30 adverse impacts on s.35 rights, even where those
31 views may differ from some of the conclusions
32 reached by a delegate in the assessment report.
33 And an environmental assessment scheme that
34 promotes ongoing consideration of the Crown's
35 consultation and accommodation duties, and that
36 allows the executive director to turn his mind to
37 this issue and advise the final decision makers on
38 what the Crown must do to reasonably accommodate
39 aboriginal groups, it will help insure that the
40 Crown pays sufficient attention to these issues
41 and ultimately discharges its constitutional
42 obligations towards aboriginal groups. You know,
43 and, of course, I'm not saying that it's the
44 executive director who is going to get it right
45 every time. There's going to be -- there could be
46 times when the report is cautioning against
47 approval of the project because of s.35 rights and

1 the executive director takes a different view. No
2 doubt, that could happen in some cases. But on
3 the whole, you know, the history of aboriginal
4 rights in Canada is -- is one of neglect and of a
5 government sort of trundling along with all of its
6 plans for this country without taking aboriginal
7 rights into account.

8 But the purpose of the duty to consult and
9 accommodate is to have a whole new dimension, a
10 whole new lens, for considering Crown action and
11 Crown approvals that affect the traditional
12 territories of aboriginal peoples. It can only be
13 a good thing to have that consideration be part of
14 as many stages in the Crown decision-making
15 process as possible, including the very important
16 stage of recommendations ---those final
17 recommendations going up to the ministers.

18 I notice that at paragraphs 11 and 12 of the
19 reply the petitioner seems to downplay the
20 importance of the executive director's
21 recommendations in the decision-making process
22 when it comes to the duty to consult and
23 accommodate, saying that the assessment report has
24 already covered this and the ministers are bound
25 in law, in any event, to discharge those
26 obligations. And true enough, ultimately the
27 ministers are responsible. But the suggestion is
28 that the executive director is just -- you know,
29 that's just one more level and we don't need to
30 get into consultation and accommodation at the
31 level of the recommendations. But this amended
32 petition is based on the very premise that the
33 recommendations are influential with the
34 ministers. And Lake Babine Nation agrees the
35 recommendations are as a practical matter
36 significant and potentially influential on all
37 fronts, including on the issue of what is required
38 for the Crown to properly consult with and
39 accommodate aboriginal peoples. In deciding what
40 is required to satisfy the duty to consult, and
41 particularly the duty to accommodate, can be a
42 very difficult judgment call. So, again, the more
43 thought and attention that can go into that issue
44 the more likely it is that the Crown will reach
45 the right result.

46 And in Lake Babine's submission, this
47 environmental assessment is a case in point. The

1 environmental assessment report does not question
2 the likely effectiveness of the proposed
3 mitigation measures, but when the concerns that
4 were raised throughout the environment assessment
5 process are considered it's apparent that the
6 executive director had legitimate reasons to note
7 and stress the environmental risks posed by the
8 mine under its current design.

9 Ms. Horsman has already taken the court to
10 two key documents: the final memos of Kim
11 Bellefontaine and Robin Tamblyn, which even at the
12 final stages of the environmental assessment, and
13 to the knowledge of the proponent, expressed deep
14 concerns about the project and its risks, concerns
15 that they continued to express even after seeing
16 the draft assessment report.

17 And, of course, another -- another alarm bell
18 for this project is the nearly five-kilometre
19 square geomembrane which the proponent only
20 proposed in April 2012 for the first time. It is,
21 according to Chris Hamilton, an unprecedented
22 technology in British Columbia and it was never
23 the subject of any independent technical review.
24 And I do want to note that. Because the
25 petitioner suggests at paragraph 78 of the written
26 submissions that the geomembrane was vetted by
27 Dr. Laval, but that's not the case. And that's
28 clear when we go to Dr. Laval's reports. I won't
29 take you to them now, but they're included -- his
30 initial report is included with the affidavit of
31 Erik Tornquist, the first one, Exhibit R, and it
32 sets out the scope of Dr. Laval's review. And
33 there's also an e-mail from Dr. Laval to Chris
34 Hamilton, which is Exhibit GG to Chris Hamilton's
35 first affidavit.

36 And, finally, even the proponent's table of
37 commitments for the project, which Ms. Horsman
38 took you to earlier today, it contemplates the
39 potential failure of the geomembrane and the
40 potential need for other mitigation measures to
41 compensate for that. So, the executive director
42 could on the record generated by this whole
43 environmental assessment process very reasonably
44 conclude that -- the concerns that the project
45 carried a significant risk of contaminating
46 Morrison Lake and the surrounding waters because
47 the mitigation measures might not work quite as

1 well as -- as expected by the proponent.

2 And if one concludes that the project poses a
3 high environmental risk, the conclusion that the
4 project mitigation measures will adequately
5 accommodate a moderate to strong aboriginal title
6 claim, strong aboriginal rights claims, including
7 fishing rights, well, that conclusion also becomes
8 very questionable. And so given his concerns
9 about the environmental risks, it was entirely
10 reasonable for the executive director to cite Lake
11 Babine Nation's strong aboriginal title claim and
12 opposition to the project as additional factors
13 militating against the approval of the project, as
14 he did in his recommendations.

15 Now, again, of course, this court is not --
16 and, actually, I'd -- I'd add on that, too, that
17 even aside from the environmental risks posed by
18 the project, it was reasonable of the executive
19 director to cite Lake Babine's opposition to the
20 project combined with its moderate to strong
21 aboriginal title claim as a factor militating
22 against the project, as I explain at para. 41 of
23 my factum. An open pit mine, even if it doesn't
24 contaminate, is a very serious infringement on our
25 aboriginal title. Aboriginal title is a right to
26 the land, to decide how to use it. And the
27 Supreme Court of Canada in the seminal aboriginal
28 title case of Delgamuukw specifically cited strip
29 mining as an activity that would be irreconcilable
30 with aboriginal title where that title is based on
31 traditional land use activities; that, in fact, an
32 aboriginal that proved title wouldn't even be
33 allowed to engage in that activity because it is
34 so incompatible with the right itself. So I think
35 it's -- it's -- you know, there's a -- there's a
36 clear serious adverse impact of a mine in -- on
37 aboriginal title lands.

38 Now, again, this court is not deciding
39 whether the environmental assessment report or the
40 executive director got a better handle on what
41 accommodation was required in this case, whether
42 accommodation in this case required saying no to
43 the project, but the court is in a position to
44 observe that the executive director's concerns
45 about the environmental risks of the project and
46 his focus on Lake Babine Nation's asserted rights
47 and opposition to the project finds support in the

1 record when it's viewed as a whole. The
2 recommendations of the executive director viewed
3 in light of the whole environmental assessment
4 process were not arbitrary or irrational and nor
5 should they be suppressed by reading into s.17(2)
6 of the Act a statutory limitation that would have
7 forbidden him from disagreeing with his delegate
8 and making those recommendations.

9 If this court concludes that Pacific Booker
10 is entitled to a reconsideration in this case --
11 and, of course, Lake Babine Nation is -- is not
12 advocating that it is -- Lake Babine Nation urges
13 the court to base that conclusion on procedural
14 fairness rather than on the petitioner's statutory
15 interpretation argument. At least, then, the
16 executive directors will be allowed in future
17 environmental assessments to advise cabinet of
18 their own views on the depth of the Crown's
19 consultation and accommodation obligations towards
20 First Nations and on whether a project should
21 perhaps be rejected in order to adequately protect
22 reasonably asserted s.35 rights, unfettered by any
23 different opinions from delegates on these
24 critically important and often difficult issues.
25 In my submission, that would allow for the
26 fulfillment of the important purpose of s.17(2).

27 If Your Lordship has no questions about that
28 argument I'll move on quickly to remedies.

29 THE COURT: No. Carry on to the remedies.

30 MS. NOUVET: My submissions on remedies start at
31 paragraph 54 of my factum. Now, as already
32 discussed, Pacific Booker's preferred remedy would
33 compel -- well, would either eliminate the
34 recommendations of the executive director or
35 compel the executive director effectively to
36 recommend approval of the project, and Lake Babine
37 Nation urges the court to reject the
38 interpretation of s.17(2) of the Act that would
39 justify such an order.

40 Lake Babine Nation also has concerns with
41 Pacific Booker's proposed alternative remedy at
42 paragraph 2(c) in the amended petition. The
43 proposal is that the order would be that the
44 Morrison mine application be remitted to the
45 ministers for reconsideration with directions from
46 the court. If the ministers' decision is quashed
47 Lake Babine submits that the project application

1 should be remitted not to the ministers, but to
2 the Environmental Assessment Office so that it may
3 develop the requisite technical review and
4 assessment of any additional information and
5 analysis that is submitted by Pacific Booker and
6 others in respect of the project.

7 As I note at paragraph 57 of my factum, it
8 seems clear that reconsideration would involve new
9 information and analysis. Pacific Booker at
10 paragraph 195 of its written submissions suggested
11 that if it were granted the opportunity to respond
12 to the executive director's recommendations it
13 would make, and I quote: "Submissions regarding a
14 proper risk benefit analysis including providing
15 data to ground a proper risk assessment."

16 There will be new relevant scientific
17 information available by the time any
18 reconsideration takes place. For example, Lake
19 Babine Nation and Gitxsan First Nation have
20 identified a nearly completed hydro acoustic
21 survey for Morrison Lake which was -- is -- is
22 under -- is almost complete, the report is almost
23 complete -- by Charmaine Carr-Harris. And this
24 report is -- is providing new information about
25 the size of the salmon populations that are
26 supported in Morrison Lake. It's a very important
27 salmon rearing habitat. People don't fish there
28 because the salmon are -- you know, spend their
29 first year or two of life there before heading out
30 to sea.

31 And the affidavit of Charmaine Carr- Harris,
32 which I will not take you to, but if you do want
33 to see it it's in Volume 3 at Tab 11, and she
34 summarizes, you know, the contents of that
35 upcoming report. In our submission, that kind of
36 study is relevant to the risks posed by the
37 project and -- and, thus, should be considered in
38 any reconsideration of the risk benefit analysis.

39 And new scientific data and analysis should
40 not go directly to the ministers. The
41 environmental assessment process is structured so
42 that under the management of the Environmental
43 Assessment Office appropriate experts and
44 stakeholders review and comment on the proponent's
45 data, project design, and analysis. And the EAO
46 is responsible for providing the ministers with
47 comments on all of that information to assist them

1 in their decision making. And this is an entirely
2 sound structure. Ministers typically do not
3 possess all of the expertise or time that they
4 would need to assess firsthand technical data and
5 analysis relating to a complex project such as the
6 Morrison mine.

7 So, if the court does quash the ministers'
8 decision and order a reconsideration of the
9 project, Pacific Booker should be directed to make
10 its additional submissions to the EAO rather than
11 to the ministers. And the EAO will then have an
12 opportunity to manage the process and insure that
13 appropriate analysis of the proponent's
14 information is carried out.

15 In paragraph 2(c) of its alternative proposed
16 remedy, Pacific Booker also seeks to -- directions
17 from the court on how the reconsideration
18 application would take place. And I -- I don't
19 think we heard any specifics about what directions
20 Pacific Booker might want, but I just wanted to
21 state, you know, in advance that Lake Babine
22 Nation urges the court to confirm in its reasons
23 or in the order that the order does not prejudice
24 the Crown's duties to take -- does not prejudice
25 the Crown's ability to take the steps that it
26 deems necessary to fulfill its consultation and
27 accommodation obligations towards aboriginal
28 peoples in respect of a reconsideration. In
29 particular, the directions should not grant --
30 offer any exclusive right to make further
31 submissions to the Crown about the project.

32 So Lake Babine is not looking for guidance
33 from the court about what is required to satisfy
34 the duty to consult and accommodate on a
35 reconsideration. Not at all. But we want to make
36 sure that the door is -- is left fully open for
37 those duties to be satisfied by the Crown. And
38 that's because Lake Babine Nation may well be
39 entitled to comment on the petitioner's additional
40 submissions which Pacific Booker has indicated it
41 might make. It's just impossible to predict how
42 much more information will come on a
43 reconsideration. Pacific Booker might develop
44 even new mitigation measures, for example, or
45 provide new modelling for the existing mitigation
46 measures. We just don't know. But as I explain
47 at paragraph 61 of my factum, the caselaw and the

1 duty to consult with aboriginal peoples confirms
2 that aboriginal groups should as part of a
3 consultation process have the opportunity to
4 review and respond to information and analysis
5 that is presented in support of a project or
6 proposed Crown decision.

7 And the cases that -- two cases that confirm
8 this are the White River First Nation decision
9 cited at footnote 67 of my factum and included in
10 our book of authorities, and the Brown v. Sunshine
11 Coast decision and it's -- it's in our book of
12 authorities. It's cited as Brown and it's the
13 first tab.

14 So, to summarize Lake Babine's concerns on
15 the proposed order 2(c), the proponent is not the
16 only stakeholder in this environmental assessment.
17 Lake Babine Nation's reasonably asserted and
18 constitutionally protected aboriginal rights and
19 title are at stake and the Crown holds unique
20 procedural obligations, i.e., consultation and
21 substantive obligations, i.e., accommodation
22 toward Lake Babine Nation as a result of the
23 potential as well as the certain adverse impacts
24 of the project on those rights and title.

25 So, although this application is not before
26 you for determining what those exact obligations
27 towards Lake Babine Nation are, what obligations
28 will arise upon reconsideration, the court should
29 fashion a remedy that in no way fetters the
30 Crown's ability to discharge any outstanding
31 obligations towards aboriginal peoples should this
32 project be ordered for reconsideration.

33 THE COURT: Thank you, Ms. Nouvet.

34 MS. NOUVET: Thank you.

35 THE COURT: Ms. Friesen, are you up now or do you want
36 to start in the morning?

37 MS. FRIESEN: My Lord, if it's agreeable to you I'd
38 prefer to go uninterrupted tomorrow, or if you
39 want me to begin today I'm prepared to do that.

40 THE COURT: That seems sensible. I take it we'll
41 easily finish tomorrow. All right. Ten-thirty
42 tomorrow.

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1 THE CLERK: Order in chambers.
2

3 (PROCEEDINGS ADJOURNED AT 3:53 P.M.)
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7
8 I, Anna Louise Stene, Realtime Certified
9 Reporter in the Province of British Columbia,
10 Canada, do hereby certify:
11

12 THAT the proceedings were transcribed by me
13 from audiotapes or CD's provided of recorded
14 proceedings, and the same is a true and
15 accurate and complete transcript of said
16 recording to the best of my skill and
17 ability.
18

19 IN WITNESS WHEREOF, I have hereunto
20 subscribed my name this 16th day of
21 September, 2013.
22

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27 _____
28 Anna Louise Stene, RCR
29 Charest Reporting
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August 9, 2013
Vancouver, BC

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(DAY 3)
(PROCEEDINGS COMMENCED AT 10:35 A.M.)

THE CLERK: Calling the matter of Pacific Booker Minerals Inc. versus Minister of Environment and others, My Lord.

THE COURT: Ms. Friesen.

MS. BEVAN: My Lord, it's Sarah Bevan for the respondents. If I could just explain, with apologies, that Ms. Horsman is going to be a bit delayed in joining us this morning. We had some issues unexpectedly arise in another proceeding. She's just speaking before Mr. Justice Pearlman in another courtroom, but I expect she'll be here in half an hour.

THE COURT: All right.

MS. BEVAN: We apologize for that.

THE COURT: All right. Thank you.

SUBMISSIONS BY MS. FRIESEN:

MS. FRIESEN: My Lord, I have a book of authorities and a bound copy of my written submissions for you. As you know by now, I'm counsel for the six Gitksan hereditary chiefs who are interveners in this judicial review. They represent the interests of their respective houses. And throughout these submissions I'll refer to them as the Gitksan chiefs.

The August 1st order of Madam Justice Adair grants the six Gitksan chiefs leave to intervene here in this judicial review. And I'll go into some further detail in a moment about the Gitksan chiefs and the characteristics of the Gitksan Nation and their history of involvement in the EA process here.

But at this point, as a quick way to summarize their position in all of this, as was highlighted by Ms. Horsman and Ms. Nouvet, is that they are stakeholders in all of this, and they're stakeholders because they assert aboriginal fishing rights along the Skeena River, and they were consulted, of course, during the EA process. I will, for the most part, follow my written submissions. They're at tab 32, volume

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4. You have a bound copy there.

The Gitxsan chiefs are supported in this application by the Gitanyow hereditary chiefs as well. And the Gitanyow asserts aboriginal fishing rights in the area of the Skeena River as well, and they were consulted during the EA process also. And you may have noticed in the material that they're often spoken of at the same time as the Gitxsan, and they were in there often referred to together, and I think one of the reasons why is because they both assert similar rights in a similar area, but also because they each had one representative speaking or representing them in the working group during the EA process, and that was Davide Latremouille. And Davide Latremouille is with the Skeena Fisheries Commission, and he -- the Skeena Fisheries Commission also supports the Gitxsan chiefs in this judicial review.

Just by way of introduction, the Skeena Fisheries Commission represents fisheries, conservation, and management interests of five First Nations that have traditional territories within the Skeena watershed. And the Gitxsan relied on the Skeena Fisheries Commission for their technical expertise during the EA process.

So what I will do this morning is go over just briefly some of the facts as they're laid out in my submissions. I won't -- I'll try not to repeat what's already been provided to the Court, but I'll go over a little bit of the facts of the project, the EA process in this case, go over some of the principles relating to the Crown's duty to consult and accommodate and, again, try not to repeat what you've already heard, My Lord, and then how this duty to consult and accommodate is relevant here and how it impacts the executive director's ability to make recommendations.

So the facts, as we outline them in our submissions, are in paragraphs 7 to 10 of my written submissions. They include a few details of the proposed mining project. Most of the details of the extent of this open pit mining project were outlined in the submissions of the respondents, so I won't go into a lot of the details there.

1 But the main points that we wish to make
2 with respect to the details of the proposed
3 project are that the location of the mine is
4 situated very close to Morrison Lake. As you've
5 heard, of course, Morrison Lake feeds into Lake
6 Babine and, in turn, that feeds into the Skeena
7 River, which is where the Gitxsan assert their
8 fishing rights.

9 So the location of the mine is about 60
10 metres away from the shore of Morrison Lake. So
11 that we say is a problem.

12 The proposed open pit mine potentially poses
13 a significant risk to the environment and, in
14 particular, to the genetically unique sockeye
15 salmon in Morrison Lake. So those are the two
16 main points in terms of what the project -- there
17 are many concerns that the Gitxsan have with the
18 project. These are the two main ones.

19 Now, I'll provide the Court with a little
20 bit of information about the Gitxsan Nation.
21 It's led by hereditary chiefs. The chiefs hold
22 and exercise the Gitxsan Nation's aboriginal
23 rights on behalf of their respective houses, and
24 all Gitxsan people belong to a house, and this is
25 the basic unit for social, economic, and
26 political purposes. And each house has a
27 hereditary chief and belongs to one of four
28 Gitxsan clans: The Wolf, Frog, Fireweed or Eagle
29 clan. And the term "Gitxsan" means people of the
30 Skeena River. They divide their food, social,
31 and ceremonial fisheries into a number of
32 geographical areas, which I refer to in paragraph
33 15 of my submissions, Merlong [phonetic]/Skeena
34 River. They depend on fish caught in the Skeena
35 River for sustenance. Fish and, in particular,
36 sockeye salmon, are an important part of their
37 social and cultural fabric. All six of the
38 Gitxsan houses represented by their chiefs in
39 this application are the primary Gitxsan houses
40 that assert aboriginal fishing rights beyond the
41 Lake Babine territory which the Court heard
42 yesterday was more in and around the Morrison
43 Lake, and in the area that would be ultimately
44 affected by the petitioner's Morrison Mine
45 project.

46 During the EA process, the Gitxsan provided
47 reports detailing the significant volume of

1 Skeena sockeye salmon harvested annually by the
2 Gitxsan and the Gitanyow. The Gitxsan and
3 Gitanyow fisheries take in approximately 65,000
4 sockeye from the Skeena River annually, and
5 approximately 3.2 to 8.8 per cent of the fish
6 harvested come from the Morrison watershed. Now,
7 the source for this number is the affidavit that
8 we filed in these proceedings of Davide
9 Latremouille. That's at volume 4, tab 25, and
10 Mr. Latremouille is a fisheries habitat biologist
11 with the Skeena Fisheries Commission. He, as you
12 know, is the representative in the working group.

13 Now, the petitioner notes some -- in the
14 petitioner's reply submissions notes some
15 discrepancy with the numbers of the percentage of
16 fish harvested from the Morrison watershed. They
17 note some discrepancy between the numbers that
18 Latremouille has in his affidavit versus what's
19 in the assessment report, which is a bit lower.
20 I cannot comment about why there's a different
21 number in the assessment report versus what
22 Mr. Latremouille has. I know that in a letter
23 from Chris Hamilton to the Gitxsan chiefs, which
24 is Exhibit A to the affidavit of
25 Mr. Latremouille, Chris Hamilton uses the 3 to 8
26 per cent range. So I'm not sure why, in the
27 assessment report, it went a bit lower. But in
28 any event, I don't think that these numbers have
29 any real impacts on the issues in this
30 [indiscernible].

31 About 90 per cent of the sockeye salmon that
32 return to the Skeena originate in Morrison/Babine
33 Lake system and its tributary, the
34 Morrison/Tallow River. And the Gitxsan fisheries
35 -- the Gitxsan/Gitanyow fisheries are the largest
36 First Nations food fisheries in the Skeena.

37 Now, the Gitxsan houses have been harvesting
38 salmon from the Skeena River since time
39 immemorial. That's supported by the affidavit of
40 Rod Sampare filed in these proceedings. Their
41 fishing rights are an important part of the
42 Gitxsan culture and community, and these are
43 precisely the rights that 35(1) of the
44 Constitution Act are meant to protect.

45 Given the close proximity to the proposed
46 Morrison Lake -- of the proposed project to
47 Morrison Lake, there's a real risk that the

1 project will impact the source of the water of
2 the Skeena River and the spawning ground for the
3 salmon which run in the Skeena River.
4 I'm going to move on in my submissions to
5 some of the aspects of the environmental
6 assessment process for the proposed project as
7 they relate to the Gitxsan. There is some
8 discussion in my written submissions on the topic
9 of consultation and accommodation of First
10 Nations within the EA process and, in particular,
11 in paragraph 22 of my submissions, I reference
12 the Environmental Assessment Office Fairness and
13 Service Code, and that code is in Exhibit D of
14 the affidavit of Derek Sturko, and that's at page
15 -- it starts at page 506.
16 Now, the petitioner makes some reference to
17 the Fairness and Service Code in its submissions,
18 and the code is not part of the legislative
19 scheme, but the petitioner does seem to place
20 reliance on this code in support of its position
21 that it had certain expectations regarding the
22 environmental assessment procedure. And it's a
23 public document that's available on the
24 Environmental Assessment Office website.
25 The respondents drew the Court's attention
26 to email exchanges between a representative of
27 the petitioner and Chris Hamilton. This was well
28 before the draft or the final assessment report.
29 This email references the Fairness and Service
30 Code, and so we know that the petitioner was
31 familiar with it.
32 There's parts of the code that specifically
33 highlight parts of the environmental assessment
34 process that give an indication to the kinds of
35 information that can be provided to the ministers
36 by the EAO and, in turn, inform the kinds of
37 recommendations that may be open to the executive
38 director to make.
39 Now, on page 520 of the affidavit of Derek
40 Sturko, that is the Fairness and Service Code, it
41 says that:
42
43 The Environmental Assessment Office will
44 consult First Nations on draft assessment
45 reports and will afford First Nations an
46 opportunity to have their views on the draft
47 assessment reports included in the package

1 of materials sent to the ministers when a
2 project is referred for a decision.
3

4 Now, the code is clear that the response of the
5 First Nations included in the package of
6 materials to the ministers is material that is
7 separate from the assessment report. And given
8 that the response forms part of the package of
9 material that's forwarded to the ministers, and
10 there is a clear indication in this case to the
11 proponent that it will be sent to the ministers,
12 we know that, it is open to the executive
13 director to comment on this material that forms
14 part of the package that's sent to the minister.
15 I'll get into the executive director's discretion
16 a little further down in my submissions.

17 But at this point we say it's open to the
18 executive director to make recommendations based
19 on this material, and that material properly
20 forms part of that package that's sent to the
21 ministers. And in this case this is exactly what
22 the executive director did do, and it commented
23 on the First Nations' response to the assessment
24 report.

25 Now, more significantly, notice to the
26 proponent, that is, Pacific Booker, that the
27 Environmental Assessment Office would provide
28 this material to the ministers is included in the
29 section 11 order. Now, the section 11 order
30 establishes, as you've heard, My Lord,
31 establishes the scope -- assessment scope,
32 procedures, and methods, and the order stipulated
33 that the following section -- I'll back up a
34 little bit, My Lord.

35 The section 11 order, as you've heard,
36 originally did not stipulate that the Gitxsan
37 chiefs need be consulted in the EA process, but
38 that was revised when, in 2010 -- it wasn't
39 revised exactly in 2010 but it was initiated in
40 2010 when the Gitxsan chiefs wrote to the
41 Environmental Assessment Office and said we need
42 to be consulted, and as of October 2010 they
43 were. The section 11 order was amended in the
44 spring of 2011, and it was amended to add the
45 Gitxsan and Gitanyow as part of the definition of
46 First Nations and, therefore, part of the group
47 that needed to be consulted. But it also added

1 -- the amendment stipulated a few other details
2 which I want to draw Your Lordship's attention
3 to. And in particular it stated that:

4
5 First Nations, the Gitxsan Chiefs' Office
6 and the Gitanyow Hereditary Chiefs' Office,
7 will have the opportunity to provide to the
8 Environmental Assessment Office their
9 respective written submissions about the
10 Assessment Report, which written submissions
11 will be included in the package of materials
12 sent to ministers when the Project is
13 referred to the ministers for decision.

14
15 So essentially repeats what was said in the
16 Fairness and Service Code.

17 THE COURT: Are you reading now from your written
18 submission, that passage that you
19 [indiscernible].

20 MS. FRIESEN: Yes, My Lord. That's at paragraph 23 of
21 my written submissions.

22 And the reference for this -- sorry, that's
23 the Fairness and Service Code. Pardon me, My
24 Lord, it's at paragraph 30 of my written
25 submissions.

26 THE COURT: All right. Thank you.

27 MS. FRIESEN: Now, providing this material in this
28 case an outline of the opposition to the proposed
29 project, which is what the Gitanyow -- the
30 Gitxsan and Gitanyow's position was to the
31 ministers, in addition to the assessment report,
32 indicates that the duty to consult and
33 accommodate will likely be assessed by the
34 ministers. And, in fact, it is appropriately
35 assessed by the ministers at that stage, and this
36 Court has heard in the last two days a lot about,
37 well, the discretion -- the broad discretion
38 that's afforded to the ministers, and it's clear
39 that there's no dispute that there is a very
40 broad discretion at that stage.

41 Both the Fairness and Service Code and the
42 section 11 order gave the proponent notice of
43 this consideration of the Crown's duty to consult
44 and accommodate beyond the four corners of the
45 assessment report. And it's difficult to imagine
46 why the executive director would be restricted
47 against providing a recommendation to the

1 ministers regarding material that it was mandated
2 to provide to the minister pursuant to the
3 section 11 order or restrict it against including
4 this material in a list of reasons to the
5 ministers as to why he made the recommendation
6 that he did.

7 Now, the opposition to the project -- after
8 the assessment report was completed, the material
9 that I'm referring to that was provided to the
10 ministers was in the form of a letter from the
11 Gitxsan chiefs' office. The letter was voicing
12 opposition to the project, and it's included in
13 Exhibit A of the affidavit number 1 of Derek
14 Sturko and it's at page 377, and it's a letter
15 from Beverley Clifton-Percival [phonetic] at the
16 Gitxsan chiefs office to the Minister of the
17 Environment, Terry Lake and the Minister of
18 Energy & Mines, Rich Coleman, and it's clear from
19 the evidence presented in this court that this
20 letter, among other letters, stated opposition to
21 the proposed project, but it was delivered to the
22 proponent in advance of the minister's decision
23 to deny this certificate.

24 And the letter reiterates the Gitxsan's
25 asserted fishing rights along the Skeena River.
26 It details the position of the Gitxsan chiefs.
27 The details of their opposition are provided in
28 paragraph 35 of my written submissions. In
29 particular, they note that in order to
30 accommodate the Gitxsan aboriginal rights, the
31 environmental assessment certificate should not
32 be granted to the proponent. It was unequivocal.
33 They were very concerned that the mine's impact
34 would diminish salmon availability in Morrison
35 Lake and Babine Lake, Lake Babine, and the Skeena
36 watershed, and they believed that the proposed
37 mine was a high risk project that had the
38 potential to impact water quality in the
39 Morrison/Babine watershed.

40 And in his revised recommendations dated
41 September 20 of 2012, the executive director
42 specifically noted that the Gitxsan Nation and
43 the Gitanyow Nation disagreed with the
44 Environmental Assessment Office assessment
45 relating to the potential for adverse effects.

46 My Lord, I'm moving on now to a brief
47 discussion of the honour of the Crown and the

1 Crown's duty to consult and accommodate, and I
2 appreciate that Your Lordship heard some of the
3 general principles of those yesterday in
4 Ms. Nouvet's submissions. My written submissions
5 address this from paragraphs 37 to 52. It's the
6 basic principles, and it discusses the existence
7 of the duty, and then goes into a discussion
8 about the level -- the appropriate level of
9 consultation and accommodation.

10 So I won't go into too much detail on the
11 matter as I have in my submissions, but I'll
12 emphasize a few key points this morning starting
13 at paragraph 37. The Crown has a constitutional
14 obligation of duty to consult and accommodate,
15 and this duty arises when the Crown has knowledge
16 of aboriginal or treaty rights. It contemplates
17 engaging in conduct and that conduct might
18 adversely affect one of the aforementioned
19 rights.

20 Now, the duty of consultation and
21 accommodation is constitutionally protected
22 because it's of significance -- because of its
23 significance to First Nations. It ensures that
24 First Nations are able to address issues and
25 conduct that may affect their rights.

26 Now, I reference the Haida decision because
27 that really is the decision that must be
28 considered in order to assess the necessary and
29 appropriate level of the duty of consultation and
30 accommodation. That's at tab 3 of my book of
31 authorities. And in the decision, Chief Justice
32 McLachlin clarifies that until the rights are
33 extinguished or settled, the Crown is bound by
34 its honour.

35
36 And just quoting from the quote that I have in
37 paragraph 47 of my written submissions, she says:

38
39 The controlling question in all situations
40 is what is required to maintain the honour
41 of the Crown and to effect reconciliation
42 between the Crown and the Aboriginal peoples
43 with respect to the interests at stake.
44 Pending settlement, the Crown is bound by
45 its honour to balance societal and
46 Aboriginal interests in making decisions
47 that may affect Aboriginal claims.

1
2 And the Haida case confirms that every case must
3 be approached individually, and the level of
4 consultation and accommodation will depend, of
5 course, on the circumstances of each case. The
6 scope and content of the Crown's duty to consult
7 and accommodate is determined by the strength of
8 the First Nations' claim, the importance of the
9 claimed aboriginal right, and the potential
10 negative effect of the Crown's contemplated
11 conduct on that claimed right. So the Crown
12 maintains this obligation to ensure that the duty
13 has been adequately satisfied, and it is the
14 Crown who bears the consequences if the duty is
15 not satisfied.

16 Now, moving on specifically to the Crown's
17 duty to consult and accommodate with respect to
18 the Gitksan chiefs, in particular, in this case,
19 that's at paragraphs 53 to 63. It's where I
20 address the duty as it pertained to this
21 environmental assessment process. It's not
22 necessary or appropriate for the Court in this
23 proceeding to make findings regarding the
24 adequacy of the level of the duty to consult and
25 accommodate and whether it was fulfilled in this
26 case, although, of course, we say that it was
27 not, that duty was not discharged. But I will
28 provide an overview of the consultation -- or
29 I've provided in my written submissions an
30 overview of the consultation of the Gitksan
31 during this environmental assessment process to
32 highlight two things: That the duty of the Crown
33 to consult and accommodate is ongoing. It does
34 not end with the drafting of the assessment
35 report. And whether the Crown's duty to consult
36 and accommodate has been discharged is a proper
37 consideration for the ministers at that stage of
38 the environmental assessment process.

39 Now, at the outset of the environmental
40 assessment process, the Gitksan were not
41 consulted at all, as you've heard, My Lord.
42 Consequently, they were absent from some of the
43 key initial stages of this environmental
44 assessment process and, in particular, the stage
45 at which the terms of reference were drafted and
46 agreed upon. So they weren't there. And, as you
47 know, they asked to be consulted in September of

1 2010. They were subsequently admitted into the
2 technical working group or their representative,
3 Mr. Latremouille, was. And we say, of course,
4 that the Crown erroneously assessed its level of
5 duty to consult and accommodate at a very low
6 level. That changed, however. It became --
7 THE COURT: Are you asking me to comment on the scope
8 and content of the duty to consult and
9 accommodate in this case, in this particular
10 instance?
11 MS. FRIESEN: No, I --
12 THE COURT: Or -- no. All right, you're not asking me
13 to do that?
14 MS. FRIESEN: No. I really -- going over some of
15 these facts is really a foundation for
16 illustrating the point that the assessment,
17 because it changed with respect to the Gitxsan,
18 the level of consultation assessed by the Crown
19 changed, it's one of the ways in which I'm
20 illustrating that it's an ongoing evaluation.
21 It's not a static process.
22 But in terms of -- it's beyond the scope of
23 the judicial review to determine whether or not
24 the Gitxsan -- or I should say the Gitanyow,
25 whether or not the duty -- the Crown's duty to
26 consult and accommodate these groups was properly
27 discharged. That's not --
28 THE COURT: That's not before me?
29 MS. FRIESEN: No, it's not. However, as I've
30 mentioned, initially the Crown's assessment was
31 that they had a low level of duty to consult and
32 accommodate the Gitxsan and the Gitanyow, and
33 through the participation of their representative
34 in the working group, that assessment changed.
35 So after they provided some information and
36 material to the Environmental Assessment Office,
37 the Environmental Assessment Office looked at the
38 ways in which the Gitxsan and Gitanyow relied on
39 fish from the Skeena River and, in particular,
40 the sockeye salmon, and how heavily they relied
41 on it as a food source, and they looked at the
42 prima facie right that they had to fish in the
43 area, and then with those considerations, they
44 determined then that the level of duty,
45 consultation, and accommodation was at a moderate
46 level.
47 Now, some of the information that the

1 Gitxsan and the Gitanyow provided to the
2 Environmental Assessment Office with respect to
3 their aboriginal fishing rights, the extent of
4 those rights, the importance of those rights to
5 them, but also how the fish from the Skeena
6 linked to Morrison Lake, that was all provided
7 through a report that I reference in paragraph 61
8 of my written submissions. That report was
9 written by a number of biologists at the Skeena
10 Fisheries Commission.

11 So, My Lord, I won't take you through all
12 the details of that. I've commented to some
13 degree on those facts already, but for your
14 reference, the factors -- some of the main
15 factors are listed in paragraph 61 of my written
16 submissions.

17 And we know from the evidence that the
18 Gitxsan and the Gitanyow opposed the proposed
19 project, and their opposition remained strong
20 even after the final assessment report.

21 Now, -- and I'm at paragraph 64 of my
22 written submissions now. We say that -- so we
23 have these outstanding concerns of the Gitxsan
24 and Gitanyow, and we say that making -- the
25 executive director, in making the
26 recommendations, took into account these
27 outstanding concerns that the Gitanyow and the
28 Gitxsan had. And the Act gives the broad level
29 of discretion to the executive director to do so.
30 The petitioner states that the recommendations of
31 the executive director will accompany reports
32 that are ambiguous, but there's no authority
33 cited to support this. It appears to be a
34 presumption. Certainly the executive director is
35 not confined to rendering recommendations only
36 when the report is ambiguous, otherwise surely
37 the Act would say so.

38 The report is distinct from any
39 recommendations that may accompany it. In our
40 submissions we say that is clear from the
41 material. There's no express limitation as to
42 the content and the parameters of the executive
43 director's ability to provide recommendations.
44 Presumably if the recommendations were strictly
45 tied to the conclusions of the report, then there
46 would be no practical reason to stipulate that
47 reasons accompany the recommendations.

1 So in support of the minister's discretion
2 to review matters outside of the scope of the
3 assessment report, the executive director
4 provided an outline of outstanding issues and
5 concerns with respect to the project and,
6 accordingly, recommendations to the minister.
7 Now, it's not in dispute that the ministers
8 have broad discretion to consider not only the
9 reasons and recommendations of the executive
10 director, but also the Act is clear that the
11 ministers may take into account any other matters
12 that they consider relevant to the public
13 interest. This means that the ministers at this
14 stage can and, we say, should consider whether
15 the duty to consult and accommodate has been
16 fulfilled during the environmental assessment
17 process.
18 And knowing this, it was open to the
19 executive director to highlight for the ministers
20 the continued opposition of the Gitxsan chiefs.
21 There does not appear to be any opposition to
22 this. The proponent was duly warned more than
23 once that this would occur and, therefore, if the
24 executive director is supporting or aiding the
25 ministers in their consideration of any matter
26 that they consider significant, then the
27 executive director can highlight and include
28 material and information that does not
29 necessarily coincide with the conclusions of the
30 report.
31 And we say why would it not then be open to
32 the executive director to make recommendations to
33 the minister that took into account this material
34 that's provided to the ministers, in addition to
35 the report? And in our submission, part of the
36 purpose of the executive director's
37 recommendations and reasons is to aid the
38 ministers in being able to render their decision,
39 and it's also to aid the ministers in reviewing
40 relevant material in considerations as part of
41 their decision-making process.
42 Now, finally, I should say in paragraph 55
43 of its amended petition, the petitioner alleges
44 that the executive director never indicated that
45 he might ultimately recommend to the ministers
46 that the application for a certificate should be
47 denied. However, there's no support for the

1 assertion that the executive director is required
2 to give such an indication. The respondents have
3 addressed this issue with you, My Lord. And
4 there's no legal obligation for the executive
5 director to provide his recommendations to the
6 proponent.

7 Now, in this case, the honour of the Crown
8 required that the executive director address the
9 outstanding issues raised by the Gitksan houses'
10 representative during the EA process and
11 accommodate those concerns accordingly. Those
12 concerns remained outstanding, despite the
13 conclusions of the assessment report. And given
14 that it was appropriate for the ministers to
15 consider yet again whether the duty to consult
16 and accommodate the Gitksan was fulfilled, it was
17 appropriate and even incumbent upon the executive
18 director to highlight the Gitksan's outstanding
19 concerns for the ministers.

20 Now, we note in our written submissions, and
21 this is -- I'm now addressing my submissions at
22 paragraphs 70 to 77. And in paragraph 76 we
23 highlight the considerable overlap between the
24 express concerns of the Gitksan, despite the
25 conclusions of the assessment report, the
26 outstanding concerns of the Gitksan and the
27 recommendations of the executive director or the
28 factors listed by the executive director, and
29 particularly over the proximity to and the use of
30 Morrison Lake.

31 So the following executive director's
32 observations echo the concerns of the Gitksan
33 and, in particular, he notes:

- 34
- 35 (a) the location of the proposed Project
 - 36 directly adjacent to Morrison Lake, which
 - 37 has a genetically unique population of
 - 38 sockeye salmon at the headwaters of the
 - 39 Skeena River that could be impacted if the
 - 40 Proponent's mitigation measures are
 - 41 unsuccessful;
 - 42 (b) the use of the dilution capacity of
 - 43 Morrison Lake as the primary means of
 - 44 mitigation for mine effluent, and in
 - 45 particular the "in-perpetuity" nature of
 - 46 water treatment and discharge into Morrison
 - 47 Lake;

1 (c) the anticipated long-term decline in
2 water quality in Morrison Lake;
3 (d) the Proponent's currently limited
4 knowledge about the physical limnology,
5 behaviour and ecosystem of Morrison Lake,
6 recognizing their mitigations depend upon
7 certain assumptions regarding lake behaviour
8 (e.g. lake turnover, flushing rates, etc.);
9 (e) the potential risks to fish populations
10 and water quality if the Proponent's
11 mitigation measures are unsuccessful or do
12 not perform as predicted.
13

14 And, in particular, he also notes the opposition
15 of the Gitxsan and the Gitanyow Nations and the
16 Lake Babine Nation.

17 So we say that highlighting these
18 outstanding concerns of the Gitxsan chiefs, which
19 have been stated, after the receipt of the
20 assessment report and are outside of the four
21 corners of the assessment report, highlighting
22 those for the minister was not only something
23 that the executive director -- the EAO said they
24 would do, but it was also an appropriate thing to
25 do because it was at the ministerial level, then,
26 that there would be that additional level of
27 analysis as to whether or not the duty to consult
28 and accommodate the First Nations and in our
29 case, in particular, the Gitxsan, was withheld.

30 I wanted to say -- just make a couple of
31 quick points with respect to the remedies sought
32 in this case, and essentially I reiterate some of
33 what my friend, Ms. Nouvet, said with respect to
34 the Lake Babine Nation. If the petitioner is
35 successful in its application and the matter is
36 remitted back to the EAO office -- or EA office,
37 and there will be further submissions by the
38 proponent at that stage, then it's important and
39 necessary for the Gitxsan chiefs to be consulted
40 during that process, given notice of meetings and
41 material, and provided an opportunity to respond
42 accordingly. And it's submitted that any order
43 from this Court with respect to remitting the
44 matter back to the Environmental Assessment
45 Office should not preclude this consultation or
46 accommodation with the Gitxsan or the Gitanyow.

47 In conclusion, the Gitxsan have a

1 constitutional right protected by section 35(1)
2 of the Constitution Act to have the Crown deal
3 with them in a manner that upholds that honour of
4 the Crown, and the recommendations of the
5 executive director take into account that the
6 necessary ongoing assessment of the content of
7 the duty to consult and accommodate with the
8 Gitxsan people.

9 Subject to any questions the Court may have,
10 those are my submissions.

11 THE COURT: Thank you, Ms. Friesen.

12 Mr. Hunter.

13

14 REPLY SUBMISSIONS BY MR. HUNTER:

15 MR. HUNTER: My Lord, I have seven points in reply.

16 I want to begin by commenting on a
17 submission of Ms. Horsman early in her
18 submissions that a large part of the difference
19 between us was a difference in perspective, that
20 we were approaching this case from the point of
21 view of the relationship between the assessment
22 report and the executive director's
23 recommendations, and she was approaching it from
24 the point of view of the ministers' powers and
25 the executive director's recommendations. And I
26 think there's some validity to that, that that is
27 a different perspective, and I want to simply
28 reply to her submissions and indicate why the
29 perspective that we're approaching it from is the
30 right perspective.

31 The argument that I hear from the
32 respondents is the ministers have a broad
33 discretion, which we all agree with. Therefore,
34 the executive director must have a broad
35 discretion in order to help them out, and in my
36 submission that doesn't follow from anything in
37 the statute. That's really the essence of this
38 case: Does the executive director have this
39 broad discretion or is it constrained, and I say
40 there's nothing in the statute that suggests he
41 has a broad discretion.

42 And if he had that type of discretion in the
43 circumstances of this case, then it would be fair
44 to say the assessment program was a sham because
45 Pacific Bookers is required to go through this
46 extensive process to meet -- and I'm going to
47 come to some of the complaints that my friend

1 made -- to meet the complaints and concerns, only
2 to find that the same office, the head of that
3 office, has some kind of a broad discretion to
4 effectively disagree with the assessment and
5 recommend against. And that would make that
6 process a sham, but I say it's not really a sham.
7 If it works properly and it's understood that the
8 executive director is, in effect, bound by the
9 assessment, that's really the point of the
10 statutory scheme. He's effectively bound by his
11 own assessment because it is, at law, his
12 assessment that goes to the ministers. He cannot
13 be sending his assessment off and then also
14 sending a recommendation that is, in effect,
15 contradictory to it.

16 So in my submission, if we look at this from
17 that perspective, and that is the right
18 perspective, then the discretion has to be
19 narrow, otherwise this assessment process would
20 be a sham.

21 And I can perhaps illustrate that a little
22 bit with my second point in reply, which is in
23 reply to Ms. Horsman's submissions to you for
24 really the first hour yesterday about all of the
25 concerns that everybody had with this, and a
26 large part of it, you'll recall, was about metal
27 leaching and acid rock drainage and the ministry
28 people were very concerned that there was going
29 to be too much of this. And it's true they were,
30 and it's true Pacific Booker knew about that.
31 That's all entirely correct. But what is really
32 important is that the assessment dealt with all
33 of that, and Pacific Booker responded to the
34 concerns by changing its design.

35 And if I can take a moment, and I won't take
36 too long here, but I'd just like to direct you to
37 some of the portions of the assessment report
38 that indicate this. It's in volume 3, beginning
39 at tab 7A. And you'll recall on Wednesday when
40 Ms. Glen was taking you through this, she pointed
41 to one of the sections of the report as
42 illustrative, and that was dealing with the
43 quantity of water. But I think what
44 Ms. Horsman's submissions were directed to was
45 quality of water, which was a concern of the
46 ministry people and of the First Nations. And so
47 I just want to direct you to that. It's 5.3 of

1 the report, and if I can take you to page 55 at
2 the bottom of the page.

3 THE COURT: I should be at tab 7A.

4 MR. HUNTER: 7A. Maybe it's easier, the upper
5 right-hand corner is 112.

6 THE COURT: 112. Thank you. Yes.

7 MR. HUNTER: You remember that my friend expressed
8 concerns or reiterated the concerns about the
9 tailing storage facility, which is referred to at
10 the bottom of 112, and the possibility of seepage
11 and what would happen and the potential
12 environmental impacts.

13 The beginning of this -- there's a
14 discussion in the next several paragraphs about
15 this problem. And then if I take you on 113 to
16 the last paragraph, the assessment observes that
17 the initial design of the tailing storage
18 facility had between 65 cubic metres per hour,
19 that was what was expected, and 137 cubic metres
20 per hour, that's the worst case of water from the
21 tailing storage facility reporting to ground
22 water; in other words, getting into the ground
23 water. And that's a lot, they say.

24 And then they say the seepage would have
25 formed a plume, et cetera. So it would have been
26 a problem on the initial design, and that's why
27 everybody was so concerned about it.

28 Then we go over to the next page and we see
29 five lines down:

30
31 The proponent commitment to lining the TSF
32 with a geomembrane liner, however, virtually
33 eliminates seepage from the TSF. The new
34 expected case is about 1 cubic metre per
35 hour, and the upper bound, worst case, is 10
36 cubic metres per hour.

37
38 So all of these concerns that you heard, all of
39 which predated this design change, were met by
40 the geomembrane liner, and that was a suggestion
41 that came from the third party reviewer. And
42 I'll just show you that. If you go over to 119,
43 and they're talking about the design changes that
44 Pacific Booker has made to respond to these very
45 concerns, including First Nations' concerns. And
46 at 5.34 under "Project Issues," the assessment
47 says this:

1
2 As previously noted, the Proponent
3 significantly revised aspects of their
4 proposed project during the review of the
5 application due to water quality concerns
6 expressed by members of the working group.
7

8 And then they refer to two distinct design
9 changes:

10
11 During the spring of 2011 the Proponent
12 focussed on changes to the ore and waste
13 rock management strategies. These changes
14 included the elimination of a fully water
15 covered TSF to reduce the risk of a
16 geotechnical instability, as well as
17 proposing to backfill the open pit with
18 waste rock to reduce water treatment
19 requirements in the long term.
20

21 Then they go to the second design change:

22
23 In the spring of 2012 the Proponent focussed
24 on the TSF and water treatment plant,
25 committing to a full geomembrane liner for
26 the TSF and secondary water treatment as
27 early as required.
28

29 So when you were given all of these concerns,
30 yes, they were concerns, and they were responded
31 to to the satisfaction of the EAO.

32 Over on the next page at 120, the assessment
33 continues:

34
35 A more comprehensive list of issues, the
36 Proponent's responses and EAO's assessment
37 of the adequacy of responses are detailed in
38 Appendix 1.
39

40 And I won't take you to that, but I can tell you
41 Appendix 1 is 70 pages worth of issues one by one
42 by one; in fact, there's so much detail you can't
43 even read it, it's so tiny, with the comments and
44 the resolutions of it.

45 THE COURT: Where do I find that?

46 MR. HUNTER: Oh, that will start at page 263.

47 THE COURT: Let me just orient myself to that.

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1 MR. HUNTER: And you see what I mean about the size of
2 the print. I'm sure with a magnifying glass it
3 could be discerned. I assume it must have been
4 large sheets that were then shrunk down for
5 photocopy purposes, but it's a huge list of
6 issues. It just gives you a sense of the
7 incredible complexity of this and the work that
8 was done to meet the very concerns that my friend
9 was raising with you.

10 Then back in 120, the assessment continues:

11
12 The project description and table of
13 conditions, Appendix 2, commits to specific
14 mitigation measures.
15

16 And you may recall Ms. Horsman took you to
17 Appendix 2. That was a table of a number of
18 pages of conditions and commitments by Pacific
19 Booker, and Ms. Horsman said, and she's right,
20 those commitments would form part of the
21 certificate and be legally binding on Pacific
22 Booker. So if they didn't meet the commitments,
23 then the whole thing could be pulled. And that's
24 Appendix 2, just following that Appendix 1.

25 And the other thing I wanted to show you on
26 the same page is in that first main bullet where
27 the assessment is referring to key additional
28 issues and commitments, and the first bullet is
29 concerns about seepage from the TSF, and you've
30 heard a good deal about that yesterday. And then
31 the second sub-bullet says this:

32
33 EAO engaged a third party late behaviour
34 specialist to review issues relating to hot
35 spots and areas of higher effluent
36 concentration. The review indicated that,
37 in the absence of a geomembrane lined TSF,
38 seepage from the TSF would likely create hot
39 spots and areas of higher effluent
40 concentration.
41

42 So this came from the third party reviewer.

43
44 However, the Proponent commitment to a
45 geomembrane liner would effectively
46 eliminate this concern.
47

1 So these are all responses to the concerns, and I
2 won't go through the others. I see there are
3 quite a few of them.

4 And then the final thing I would take you
5 to, and this is at 125, and at 125 at the bottom
6 you'll see under "Conclusion," the EAO says this:

7
8 They consider the contribution of Morrison
9 Lake to the high valued Skeena River sockeye
10 salmon fishery.

11
12 You heard a good deal about that in the last --
13 this morning and yesterday.

14
15 As such, EAO attaches greater weight to the
16 fact that water quality is predicted to meet
17 BC water quality guidelines for the
18 protection of aquatic life, water quality
19 effects are restricted to the LSA...

20
21 I don't know what LSA means.

22
23 ...and the low probability of biologically
24 significant effects on aquatic life from
25 water quality effects than it does to the
26 duration and permanence of effects.

27
28 So you'll see -- you'll recall there was much
29 said about this is going to be a long-term
30 project, the effects will go on for a long term.
31 These were all considered by the assessment and
32 they said, well, gee, considering what they're
33 doing here and the water quality is going to meet
34 the water quality guidelines for the province for
35 the protection of aquatic life, that will put
36 more weight on.

37 And then they conclude by saying:

38
39 Considering the above analysis and having
40 regard to the Proponent's commitments which
41 would become legally binding as a condition
42 of a certificate, EAO is satisfied that the
43 proposed project is not likely to have
44 significant adverse effects on surface and
45 ground water, water quality, with the
46 successful implementation of mitigation
47 measures and conditions.

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So that's the answer to Ms. Horsman's submissions with respect to all of the concerns. They were addressed to the satisfaction of the EAO.

Now, the third -- that's all I need to do on that, I think.

The third point I wanted to comment on was a submission that Ms. Horsman made, a couple of them actually, if I can combine with my response. You'll recall that she addressed the original petition to you where there was an allegation, with evidence supporting it, that one of the ministers hadn't read the assessment report when the decision was made, and then she said and then we revised our petition to focus on the issues that we raise before you, and that's all quite correct. There is evidence that one of the ministers didn't read the report, but the respondent put in evidence from somebody saying she didn't hear him saying that and we just decided not to go with it. My client said let's not go with it, so we're not going with it. I don't know why it was raised, but it's there.

What it does, though, I think lead to is another point that I think I tried to make initially, but I want to make in response to another specific submission, and that is the importance that the ministers attached to the executive director's recommendations as opposed to anything else and why it's so necessary that the executive director be constrained to and limited to consistency with the assessment if this is to be something other than a sham.

You'll recall that on Wednesday when Ms. Glen was taking you through the evidence, she showed you the ministers' decision which effectively parroted the executive director's recommendation page.

There was another document that was put to you by Ms. Horsman that I wanted to reference because I think there's something different to be taken from it, and that's in the same volume, that volume 3. It's part of the referral package, as I understand it, and it's the document at page 22.

THE COURT: 7A, 22?

MR. HUNTER: 7A, 22.

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1 THE COURT: All right.

2 MR. HUNTER: It's hard to read the 22 because it's
3 behind the file copy, but it's just before the
4 23.

5 THE COURT: I must be looking at something different.
6 My 22 simply has the names of two deputy
7 ministers on it.

8 MR. HUNTER: The page before that.

9 THE COURT: 21 is the --

10 MR. HUNTER: Is that 21?

11 THE COURT: 21 is a memorandum.

12 MR. HUNTER: I beg your pardon, I think it is 21,
13 you're quite right. 22 is the last page.

14 THE COURT: All right.

15 MR. HUNTER: 21. Now, you'll recall that my friend
16 was explaining to you there had been an initial
17 recommendation, and then she -- apparently there
18 had been a meeting between Mr. Sturko and the
19 minister and the minister had asked that there be
20 some elaboration of that recommendation, and this
21 memorandum addresses that, and then there was a
22 revised recommendation produced. And my
23 recollection of Ms. Horsman's comments on this
24 memorandum was that it was apparent that the
25 minister was reviewing the I thought she'd said
26 assessment in some detail. I'm not sure if she
27 said that. I think she did. It doesn't really
28 matter. What this shows is not that.

29 What this shows is the minister was reading
30 the executive director's recommendation documents
31 closely, and that's all it shows. There's no
32 reference to the assessment. Both of these
33 clarification points are referenced to the
34 recommendation document, not the assessment
35 report. That doesn't mean he didn't read the
36 assessment report, and I don't ask you to draw
37 that inference. What I ask you to draw is that
38 they placed all of their weight on the executive
39 director's recommendation document.

40 And that takes me naturally into my fourth
41 point, which refers -- which is a reference to
42 that recommendation document. I'm putting it
43 that way because the word "recommendations" could
44 have a couple of different meanings, I suppose.
45 The document itself, which is about 30 pages, is
46 called "Recommendations of the Executive
47 Director." It's the next page in the volume that

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1 we're in. And it, I think it's fair to say,
2 really amounts to an executive summary of the
3 assessment report, plus the couple pages at the
4 very end, pages 54 and 55 under the heading
5 "Recommendation," and then there are the very
6 last three lines, which is the actual negative
7 recommendation. And my friend, I think,
8 suggested to you that if we took out the
9 recommendation, and I think she was referring to
10 the last three lines -- but perhaps not -- we
11 wouldn't have an objection. I don't have a
12 particular objection to the first 30 pages, 31
13 pages, although I don't know that they're really
14 recommendations, but anyway they're there and
15 they're reasonably accurate. But I do object to
16 more than the negative recommendation. That's
17 the critical thing. That's the one that really,
18 in my submission, he couldn't possibly make on
19 the strength of this assessment.

20 But the whole recommendation section is not
21 consistent, notwithstanding the first paragraph,
22 is not consistent with the assessment because he
23 talks about these additional factors that aren't
24 additional at all, and really undermines the
25 assessment. So I just wanted to clarify, and my
26 friend suggested, well, we would be all right, at
27 least as I understood her, if we didn't have
28 these last three lines here about the negative
29 recommendation. I say that whole recommendation
30 section is beyond his authority, given that the
31 assessment that's produced, his assessment at
32 law, dealt with these issues and gave Pacific
33 Booker the green light.

34 Now, the fifth point that I wanted to
35 address was my friend's submission with respect
36 to our first issue, which is what I call the
37 statutory issue -- I'm finished with that, yes --
38 the issue of the scope of the executive
39 director's authority. And in her written
40 submission, and I think in her oral as well, she
41 made the argument that our interpretation would
42 read out subsections (b) and (c), which say as
43 you'll recall, effectively that the executive
44 director can send -- well, he's not required to,
45 but he can send recommendations to the ministers.
46 And in my submission, that isn't so. He can send
47 recommendations to the minister, but they have to

1 be consistent with the assessment.

2 So in my submission there's no -- it doesn't
3 in any way invalidate or make meaningless
4 subsections (b) and (c) to say that he has a
5 constraint on what he can do. Everyone
6 exercising discretion has some kind of constraint
7 on them, and I say the constraint is consistency
8 with the assessment, which is mandatory under the
9 statute and which must be submitted.

10 My sixth point in reply relates to my
11 friend's submissions on our second issue. And as
12 I understood those submissions, I believe the
13 submission -- the point was that there wasn't an
14 obligation to treat Pacific Booker fairly beyond
15 what the statute requires either, as I understood
16 it, because the ministers' decision was
17 legislative in nature or because British Columbia
18 case law indicates that the statute supersedes
19 any requirement of procedural fairness. That's
20 what I understood my friend to be saying and
21 that's what I'll respond to, if I understood it
22 correctly.

23 Firstly on this question of whether the
24 ministers' decision is legislative in nature, my
25 friend's own material and the reference -- the
26 authority that she quotes at para 107 of her
27 argument indicates the distinction between the
28 two types of decision. A legislative decision is
29 one that creates norms or policy, and an
30 administrative one is one that applies the norms
31 and policy to particular situations. And I say
32 this is clearly an administrative decision
33 because the ministers aren't -- it's not like
34 they're issuing a policy document to apply to
35 everybody. They're making a decision that
36 applies just to Pacific Booker based upon certain
37 material in front of them, primarily, it would
38 seem, the executive director's documents. So on
39 the face of that, it's administrative and
40 procedural fairness would be required.

41 Now, the second point that I took from my
42 friend's submissions was the argument that the
43 statutory scheme, in a sense, supersedes
44 procedural fairness because there's the ability
45 of the executive director to set out terms of
46 reference as to how matters will proceed, and I
47 addressed this early on Wednesday so I won't

1 reiterate too much, but I did want to point out,
2 because my friend did put some emphasis on this,
3 that the most recent judgment of the Court of
4 Appeal in that heli-ski case did indicate that
5 procedural fairness was required and they said in
6 that case was met. So that although Justice
7 Bowden did suggest that at least in some
8 circumstances procedural fairness had been
9 overridden by the statutory scheme, the most
10 recent judgment of the Court of Appeal indicates
11 that procedural fairness is still a requirement
12 under this legislation.

13 The other observation I would make is that
14 both of these cases deal with opponents of the
15 proposed project, whereas we're a proponent and
16 to just treat us as another stakeholder seems
17 completely wrong when one looks at the incredible
18 investment that Pacific Booker has had to make in
19 this whole process. But that's perhaps a side
20 issue. So the cases aren't particularly germane
21 except we can see in the most recent Court of
22 Appeal judgment that procedural fairness is alive
23 and well in this legislation.

24 And the final point I wanted to make in
25 reply had to do with the First Nations issues
26 that had been raised yesterday and today. I can
27 start by agreeing with a number of points. I
28 think everybody agreed that the whole question of
29 whether the duty of consultation was met is not
30 before you and you don't need to be concerned
31 about it, and I want to underline that and
32 emphasize that, this is not a consultation case.
33 That, if it ever happens, is for another day.

34 I agree that there is a duty of consultation
35 on behalf of the Crown in a situation like this,
36 and you can see from the assessment report that
37 that duty was addressed in great detail by the
38 EAO.

39 The second thing I would agree with is that
40 nothing in Your Lordship's order, if you do
41 decide to remit this back for reconsideration,
42 should prejudice any rights which either of these
43 groups, First Nations have. Without commenting
44 on whether they have any rights, that's not
45 necessary, but I think what -- my sense is that
46 both counsel were concerned on behalf of their
47 clients that there might be -- the way the order

1 was framed would preclude them, and I agree they
2 shouldn't be precluded, but I think the object is
3 really to remain silent on it, in my submission,
4 because it's a matter that is really for another
5 day, and I think that can be accomplished by
6 simply saying in an order without prejudice to
7 such rights as the Lake Babine, First Nation and
8 the Gitxsan chiefs may have, or something like
9 that, and that should satisfy that particular
10 issue.

11 So those are all points on which there
12 really isn't any issue.

13 There are a couple of issues that I wanted
14 to respond to, and with respect to the whole duty
15 of consultation, I don't want to go down that
16 path for obvious reasons, but because there's
17 much material before you on that, I do want to
18 make a couple of comments.

19 First of all, something that doesn't
20 generally appear in the submissions of First
21 Nations on this point is that it's very, very
22 clear that the duty of consultation does not
23 provide a veto. So the fact that First Nations
24 are opposed is a factor for consideration.
25 That's in the assessment report. There it is.
26 The ministers will know that when they read the
27 assessment report, but First Nations don't have a
28 veto, and they do have a right of consultation.
29 I would suggest that -- well, I'm not going to go
30 to whether it's been met or not. I simply point
31 out that in the assessment report there's
32 extensive addressing of what has been done for
33 First Nations to meet the honour of the Crown.

34 The second observation I wanted to make with
35 respect to this issue was presaged a bit this
36 morning, and that is you'll see in both of the
37 written submissions of First Nations a recitation
38 of certain facts as they see it, and I would
39 simply caution you that a number of those facts
40 are disputed. It's not necessary to deal with
41 that today. I'm sure they were included as sort
42 of a background perspective of their clients. My
43 friend, Ms. Friesen, addressed one this morning,
44 the question of percentage of fish that may come
45 from the Morrison Lake. It's dealt with in the
46 assessment report. It's not necessary to say
47 anything about it, and I just wanted to say that

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1 there are issues with respect to those facts and
2 I don't think it's necessary to resolve them
3 here.

4 The other point that I had, I have to say
5 something about this memorandum of understanding,
6 I think, with the Lake Babine Band because my
7 friend, Ms. Nouvet, made some statements about
8 them yesterday. And I'm not relying on that
9 memorandum to suggest that the Lake Babine Band
10 is estopped from coming in and complaining or
11 changing their mind or what have you, but to the
12 extent there's a suggestion that there was no
13 memorandum of understanding, and I think the
14 suggestion may have gone that far, I have to
15 respond to that and I'll do it briefly. But it
16 also -- there is another point to be taken out of
17 this that has to do with how this assessment
18 proceeded. And I think the way I should do this
19 is ask you to take volume 4, and if you have
20 that, right at the beginning at tab 15 is a
21 second affidavit of Mr. Tornquist, and he
22 attaches the memorandum of understanding.

23 Now, it's a couple pages in. I'm at page 2.
24 And it's about seven pages long, and my friends
25 say, and the Lake Babine Band says, as I
26 understand it, there's no authority -- because
27 you can see it's signed if you go to page -- yes,
28 the second page, page 3, it's signed by the
29 deputy chief, Frank Michael. And the chief has
30 now said, well, he didn't have the authority to
31 do that, and I don't know what the situation is
32 and I'm not suggesting that the Lake Babine Band
33 is bound by this. But it does exist. It's not
34 like we're sort of inventing it. It's there.
35 And it's not just a document that says Lake
36 Babine Band will be supportive. It's a document
37 which includes a number of commitments by Pacific
38 Booker as part of its meeting of the concerns of
39 the First Nations. And you can see that starting
40 around page 7, and you'll see a whole series of
41 commitments, and they're referenced in the
42 assessment report. The assessment report takes
43 these as commitments. It refers to the MOU on
44 several occasions, and I've given you a reference
45 in my reply factum. I won't take you to it now,
46 but the assessment report refers to this, takes
47 these as commitments on behalf of Pacific Booker

1 and holds them to them. And there are nine
2 distinct conditions in that table of conditions
3 that emanate from this document.

4 So the Lake Babine Band says they're not
5 bound by it, it wasn't properly authorized.
6 Maybe that's so, I don't know. But it at least
7 illustrates the extent to which Pacific Booker
8 was trying to meet everybody's concerns. And to
9 the point where in a document which Lake Babine
10 Nation now says doesn't bind them, Pacific Booker
11 is bound because the commitments they've made in
12 this have found their way into the assessment and
13 into the table of conditions and they're bound by
14 those. So there's a little unfairness operating
15 here, but I won't take it any further than that.
16 But I did want to show you the extent to which
17 Pacific Booker has gone to try to meet the
18 concerns not only of the Environmental Assessment
19 Office, but also of the First Nations and the
20 extent to which those commitments have found
21 their way into the final table of conditions that
22 the assessment office recommends or at least
23 indicates would be attached to the certificate.

24 The overall submission with respect to the
25 First Nations' issues is the same one as it is
26 with respect to the environmental issues, and
27 that is the environment -- the executive director
28 is effectively bound by the assessment, the
29 ministers are not.

30 THE COURT: That takes me to asking you about the
31 remedy that you seek. Just to be certain that I
32 understand what you are asking for, you want the
33 question of the application for the certificate
34 to be sent back to be reconsidered by whom?

35 MR. HUNTER: By the ministers. My preferred remedy is
36 that it be sent back to the ministers for
37 consideration based upon the assessment and
38 anything else they regard as relevant, tracking
39 the language of the statute, but not this
40 recommendation document, that that not be before
41 them.

42 THE COURT: All right. Thank you.

43 MR. HUNTER: I should just add there was much said
44 about, well, if it goes back we have to be able
45 to make submissions and they're no doubt going to
46 make submissions and there will be a lot of
47 different things to say. My preferred remedy

Sur-Reply by Ms. Horsman

1 avoids all of that. I say we should carve out
2 the offending part of this process, which is the
3 executive director's recommendations, take the
4 assessment, give it to the ministers, and then
5 the ministers deal with it, and no one makes any
6 more submissions.

7 The secondary remedy, if we're on the
8 secondary point, would take it to the EAO and
9 involve more back and forth, I suppose. But the
10 preferred remedy is that it go to the ministers
11 for decision on proper materials, namely the
12 assessment that's been done and such other
13 materials they regard as appropriate but not,
14 specifically not the executive director's
15 document, the recommendation document.

16 THE COURT: All right, I understand. Thank you,
17 Mr. Hunter.

18 MS. HORSMAN: My Lord, is there a possibility of two
19 points sur-reply very quick? Just one inaccuracy
20 that came out of my friend's reply that I want to
21 respond to and one point on remedy because I
22 haven't heard his [indiscernible].

23 THE COURT: All right. Go ahead.

24

25 SUR-REPLY BY MS. HORSMAN:

26 MS. HORSMAN: The first point, My Lord, was with
27 respect to a submission my friend made to you on
28 this question of the extent to which the
29 ministers relied on the recommendation document,
30 and I won't repeat my submission to you yesterday
31 about why that is an issue that's been abandoned
32 by them. But my friend, Mr. Hunter, did take you
33 to this memorandum that was in Appendix A to
34 Mr. Sturko's affidavit at page 21.

35 THE COURT: Tab 7A.

36 MS. HORSMAN: Yes, it's the page 21.

37 THE COURT: 21, yes.

38 MS. HORSMAN: Yes. And I think what Mr. Hunter
39 suggested to you is that that indicated -- was
40 some indication that --

41 THE COURT: Emphasis on the recommendation not the
42 assessment.

43 MS. HORSMAN: Precisely, My Lord, precisely. And so
44 the point I just wanted to make is the point 1,
45 that clarification on pages 32 regarding -- I'm
46 sorry, it's the second clarification provided on
47 page 4 of 32 about the contribution to the

1 provincial gross domestic product. So that
2 clarification was asked for by Minister Lake
3 because he noted that there was a discrepancy
4 between the figure given in the assessment report
5 and the figure given in the executive director's
6 recommendations.

7 THE COURT: Yes. You had told me yesterday that the
8 minister had picked out something on page 111 or
9 211 or something like this.

10 MS. HORSMAN: Yes. And so I was just concerned that
11 my friend had made the submission to you that the
12 two corrections requested suggested Minister Lake
13 had only looked at the recommendations, but in
14 fact that's not the case.

15 THE COURT: I don't think your friend was going so far
16 as to say that the minister had not had any
17 regard for the assessment report, but I think he
18 was -- I think the point he was seeking to make
19 is that the emphasis had been on the
20 recommendations.

21 MS. HORSMAN: I just wanted to ensure that that was
22 clear, that it was the assessment report itself
23 that prompted that page 111 of the assessment
24 report.

25 And so secondly, My Lord, just with respect
26 to the remedy submission my friend just made to
27 you about it should all go back to the ministers
28 but minus the recommendation report, that goes to
29 a second submission my friend made to you in
30 reply about it's not just the recommendation
31 language that we object to, it's the whole
32 recommendation report. And the point I made
33 yesterday, I won't belabour it, My Lord, but it
34 does flow into remedy, is that what Pacific
35 Booker was told by the Environmental Assessment
36 Office was that the concerns of the members of
37 the working group, and Ms. Bellefontaine and
38 Mr. Tamlyn in particular would be highlighted to
39 the ministers in the ministerial referral
40 process, and if it can't be by way of a
41 recommendation, My Lord, I'm somewhat at a loss
42 as to how that should happen, but it's more than
43 simply sticking them in a referral binder and
44 saying here's all the comments from the working
45 group because you'll recall that Mr. Hamilton's
46 letter to Pacific Booker specifically listed
47 those very factors as factors that would be

Certification

1 "highlighted," and that's got to be permitted to
2 happen in some fashion.

3 That's all. Thank you.

4 THE COURT: Thank you. Well, thank you, counsel.

5 You've given me a great deal to think about.

6 Judgment will be reserved. We will adjourn.

7 THE CLERK: Order in chambers. Chambers is adjourned.

8

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(PROCEEDINGS ADJOURNED AT 11:56 A.M.)

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I, Barbara Neuberger, Official Reporter
in the Province of British Columbia, Canada,
BCSRA No. 582, do hereby certify:

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That the proceedings were transcribed
by me from audio provided of recorded
proceedings, and the same is a true and
correct and complete transcript of said
proceedings to the best of my skill and
ability.

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IN WITNESS WHEREOF, I have hereunto
subscribed my name this 16th day of
September, 2013.

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Barbara Neuberger
Official Reporter
C.S.R./R.P.R.