

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:

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

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

46

47 On June 17th Mr. Hamilton sent Mr. McLeod and  
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

4

5

6

7

8

9

10

11

12

13

14

-- to be of such significance that the executive director of the EAO intended to recommend against approval of the certificate notwithstanding the conclusions of the final assessment report.

So the company was aware that there were still some concerns even though the assessment report had found no significant adverse effects, but the EAO never told the company that those concerns were of such a level that it was going to issue a negative recommendation.

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

In late July and early August, 2012 the EAO received written submissions from various members of the working group in response to the draft assessment report and in those written submissions certain members of the working group outlined concerns that they had about the project. I'm not going to go to those, each of those letters today, the respondents may take you to them, but they are all included at exhibit A to the affidavit number 1 of Derek Sturko which is in the petition record, volume 3, tab 7, exhibit A, and so there's -- it includes -- there's a letter from the Lake Babine Nation, from the Gitanyow First Nation and the Gitksan, there's a letter from August 2nd from the Skeena River -- sorry, Skeena Region Environmental Protection Division of the Ministry of the Environment and then there's a memo dated August 8th from the Ministry of Energy, Mines, and Natural Gas.

34

35

36

37

38

39

40

41

42

43

44

45

46

47

THE COURT: And where do you say I'll find those in the record?

MS. GLEN: They are in the petition record at volume 3, tab 7, exhibit A which is the -- that's the affidavit of Derek Sturko, affidavit number 1 of Derek Sturko, and they are at pages 363 to 386 of the exhibits.

THE COURT: I see, all right. It's footnoted there. Yes, thank you.

MS. GLEN: Okay. So the EAO forwarded the letters that it had received from the Ministry of Environment and the Ministry of Energy & Mines to Pacific Booker on August 9th, 2012 and asked Pacific 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                   Now, for about the next 10 pages the report  
34                   continues to discuss various concerns that were  
35                   raised by members of the working group, goes into  
36                   some detail, we can skip over that.

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

43  
44                   Examples of some of the key issues and  
45                   additional commitments include --

46  
47                   And then the first bullet says:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

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  
12  
13  
14  
15  
16  
17  
18  
19

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

20  
21  
22  
23  
24  
25  
26

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

27  
28  
29  
30  
31  
32

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

33  
34  
35  
36  
37  
38  
39

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

40  
41  
42  
43  
44  
45  
46  
47

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

35                  And, finally, I just want to highlight the  
36                  unprecedented nature of the executive director's  
37                  recommendations in this case. Pacific Booker is  
38                  not aware of any prior instance where the  
39                  executive director has recommended against  
40                  approval of an environmental assessment  
41                  certificate where the EAO's assessment and  
42                  assessment report has found that with the  
43                  successful implementation of mitigation measures a  
44                  project would not cause significant adverse  
45                  effects, and in that connection I would direct the  
46                  court to one final affidavit here, it's the  
47                  affidavit of Alexander Young and it's at volume 4  
                  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 irreparable 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.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

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]

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

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:  
9

10                   The focus of our January 20th, 2012  
11                   discussion was on outstanding issues which  
12                   still need to be addressed before the EAO can  
13                   lift the suspension for the proposed project  
14                   and consider a referral to the ministers.  
15                   The key issues for the EAO relate to water  
16                   quality modelling and potential impacts on  
17                   fish with a focus on Sockeye salmon in  
18                   Morrison Lake and the Morrison River.  
19

20                   During this meeting I outlined more specific  
21                   concerns and information needed on these  
22                   topics, including, but not limited to, an  
23                   increased understanding of Morrison Lake  
24                   patterns as necessary as the lake behaviour  
25                   has a strong bearing on predicting and  
26                   mitigating the potential effects from the  
27                   proposed effluent diffuser and inputs from  
28                   the tailing storage facility. In order for  
29                   the EAO to assess the potential for adverse  
30                   environmental effects in Morrison Lake and  
31                   Morrison River we expect PBM to demonstrate  
32                   that you have a sufficient understanding of  
33                   the lake behaviour. This would include, but  
34                   not limited to, describing any effects on  
35                   seasonal lake turnover and stratification,  
36                   describing the effects on and assessing the  
37                   potential for changes to long-term lake  
38                   behaviour.  
39

40                   At our meeting on January 12th, 2012 we also  
41                   discussed potential proponent commitments  
42                   which can include studies of the flows,  
43                   currents, temperatures and stratification  
44                   regimes.  
45

46                   And, so, just one point I wanted to emphasize  
47                   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]:

13

14

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

19

20 That's potential acid generating waste.

21

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

32

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

35

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

47

48 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:

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

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 so on.

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.

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

[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:

13

14

MEMPR ...

15

16

Which is the Ministry of Energy and Mines and  
Petroleum Resources.

17

18

19

... never considered the possibility that the  
petitioner's position might have to be  
preferred.

20

21

22

23

That position being that the project should not go  
forward.

24

25

26

It based its concept of consultation on the  
premise that the exploration projects should  
proceed and that some sort of mitigation plan  
would suffice. However, to commence  
consultation on that basis does not recognize  
the full range of possible outcomes ...

27

28

29

30

31

32

33

It amounts to nothing more than an opportunity for  
the First Nations to blow off steam.

34

35

And I think that it's an appropriate case to  
note that the duties that the Crown owes to  
aboriginal peoples in an environmental assessment  
can differ significantly from administrative law  
duties owed to a proponent. While administrative  
law duty is a procedural fairness, including the  
duty of reasonable expectations do not ever give a  
right to any substantive outcome, the duty to  
accommodate where it arises will require the Crown  
to make a final decision that adequately addresses  
potential adverse impacts on s.35 rights,  
potentially, in some cases, to the point of  
rejecting a proposed development that it might

36

37

38

39

40

41

42

43

44

45

46

47

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.

43  
44  
45  
46  
47

1 THE CLERK: Order in chambers.  
2

3 (PROCEEDINGS ADJOURNED AT 3:53 P.M.)  
4

5 -----  
6  
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

23  
24  
25  
26  
27 \_\_\_\_\_  
28 Anna Louise Stene, RCR  
29 Charest Reporting  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47



August 9, 2013  
Vancouver, BC

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

(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

1           4. You have a bound copy there.

2           The Gitxsan chiefs are supported in this  
3 application by the Gitanyow hereditary chiefs as  
4 well. And the Gitanyow asserts aboriginal  
5 fishing rights in the area of the Skeena River as  
6 well, and they were consulted during the EA  
7 process also. And you may have noticed in the  
8 material that they're often spoken of at the same  
9 time as the Gitxsan, and they were in there often  
10 referred to together, and I think one of the  
11 reasons why is because they both assert similar  
12 rights in a similar area, but also because they  
13 each had one representative speaking or  
14 representing them in the working group during the  
15 EA process, and that was Davide Latremouille.  
16 And Davide Latremouille is with the Skeena  
17 Fisheries Commission, and he -- the Skeena  
18 Fisheries Commission also supports the Gitxsan  
19 chiefs in this judicial review.

20           Just by way of introduction, the Skeena  
21 Fisheries Commission represents fisheries,  
22 conservation, and management interests of five  
23 First Nations that have traditional territories  
24 within the Skeena watershed. And the Gitxsan  
25 relied on the Skeena Fisheries Commission for  
26 their technical expertise during the EA process.

27           So what I will do this morning is go over  
28 just briefly some of the facts as they're laid  
29 out in my submissions. I won't -- I'll try not  
30 to repeat what's already been provided to the  
31 Court, but I'll go over a little bit of the facts  
32 of the project, the EA process in this case, go  
33 over some of the principles relating to the  
34 Crown's duty to consult and accommodate and,  
35 again, try not to repeat what you've already  
36 heard, My Lord, and then how this duty to consult  
37 and accommodate is relevant here and how it  
38 impacts the executive director's ability to make  
39 recommendations.

40           So the facts, as we outline them in our  
41 submissions, are in paragraphs 7 to 10 of my  
42 written submissions. They include a few details  
43 of the proposed mining project. Most of the  
44 details of the extent of this open pit mining  
45 project were outlined in the submissions of the  
46 respondents, so I won't go into a lot of the  
47 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

## Submissions by Ms. Friesen

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 Gitksan 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.

## Reply Submissions by Mr. Hunter

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.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

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.

## Reply Submissions by Mr. Hunter

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

## Reply Submissions by Mr. Hunter

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

## Reply Submissions by Mr. Hunter

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

9 (PROCEEDINGS ADJOURNED AT 11:56 A.M.)

10

11 I, Barbara Neuberger, Official Reporter  
12 in the Province of British Columbia, Canada,  
13 BCSRA No. 582, do hereby certify:

14

15 That the proceedings were transcribed  
16 by me from audio provided of recorded  
17 proceedings, and the same is a true and  
18 correct and complete transcript of said  
19 proceedings to the best of my skill and  
20 ability.

21

22 IN WITNESS WHEREOF, I have hereunto  
23 subscribed my name this 16th day of  
24 September, 2013.

25

26

27

28

29 \_\_\_\_\_  
30 Barbara Neuberger  
31 Official Reporter  
32 C.S.R./R.P.R.

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47