



# ONTARIO ENERGY BOARD

**FILE NO.:** EB-2011-0120

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**VOLUME:** 1

**DATE:** February 6, 2012

<b>BEFORE:</b>	Cynthia Chaplin	Presiding Member and Vice Chair
	Ken Quesnelle	Member
	Karen Taylor	Member



THE ONTARIO ENERGY BOARD

**IN THE MATTER OF** the *Ontario Energy Board Act*  
1998, S.O. 1998, c.15, (Schedule B);

**AND IN THE MATTER OF** an application by Canadian  
Distributed Antenna Systems Coalition for  
certain orders under the *Ontario Energy Board*  
*Act, 1998.*

Hearing held at 2300 Yonge Street,  
25<sup>th</sup> Floor, Toronto, Ontario,  
on Monday, February 6, 2012,  
commencing at 9:33 a.m.

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VOLUME 1  
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BEFORE:

CYNTHIA CHAPLIN	Presiding Member and Vice Chair
KEN QUESNELLE	Member
KAREN TAYLOR	Member



A P P E A R A N C E S

KRISTI SEBALJ Board Counsel

GEORGE DIMITROPOULOS Board Staff

HELEN NEWLAND Canadian Distributed Antenna  
GORDON KAISER Systems Coalition (CANDAS)

ROBERT WARREN Consumers Council of Canada (CCC)  
SUKEHVINDER DULAY

LAWRENCE P. SCHWARTZ Energy Probe Research Foundation

MARK RODGER Toronto Hydro-Electric System  
AMANDA KLEIN Limited (THESL)



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## U N D E R T A K I N G S

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UNDERTAKING NO. J1.1: TO CONFIRM WHETHER DRAFT  
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FINALIZED, AND IF FINALIZED, TO PROVIDE DATE OF  
FINAL REPORT.

30



1 MONDAY, FEBRUARY 6, 2011

2 --- On commencing at 9:33 a.m.

3 MS. CHAPLIN: Please be seated.

4 Good morning, everyone. The Board is sitting today in  
5 the matter of application number EB-2011-0120 submitted by  
6 the Canadian Distributed Antenna Systems Coalition,  
7 otherwise known as CANDAS, filed on April 25th, 2011,  
8 subsequently amended by letters dated May 3rd and June 7th,  
9 2011, seeking the following, and I will summarize: An  
10 order determining that the Board's RP-2003-0249 decision  
11 and order dated March 5th, 2005, known as the CCTA order,  
12 requires electricity distributors to provide Canadian  
13 carriers, as that term is defined in the Telecommunications  
14 Act, with access to electricity distributors' poles for the  
15 purpose of attaching wireless equipment, including wireless  
16 components of distributed antenna systems, or DAS for  
17 short, D-A-S, and directing all licensed electricity  
18 distributors to provide access, if they are not so doing;

19 Two, in the alternative, an order amending the  
20 licences of all electricity distributors requiring them to  
21 provide Canadian carriers with timely access to power poles  
22 for the purpose of attaching wireless equipment, including  
23 wireless components of DAS; and, three, an order amending  
24 the licences of all licensed electricity distributors  
25 requiring them to include in their conditions of service  
26 the terms and conditions of access to power poles by  
27 Canadian carriers, including the terms and conditions of  
28 access for the purpose of deploying the wireless and wire



1 line components of DAS, such terms and conditions to  
2 provide for, without limitation procedures for the  
3 processing of applications for attachments and the  
4 performance of work required to prepare poles for  
5 attachments, technical requirements that are consistent  
6 with applicable safety regulations and standards, and a  
7 standard form of licensed occupancy agreement with terms of  
8 at least 15 years, including renewal rights.

9 The Board is sitting today to consider matters arising  
10 from its decision and order of December 9th, 2011 and its  
11 decision on motion and Procedural Order No. 8 of January  
12 20th, 2012, which I will refer to as the December order and  
13 the January order.

14 Specifically the Board is here today to deal with four  
15 matters: One, claims of confidentiality in respect of  
16 certain materials which were filed pursuant to the Board's  
17 December order; two, claims of solicitor-client privilege  
18 and/or litigation privilege in respect of certain materials  
19 which were filed pursuant to the Board's December order and  
20 January order; three, whether the balance of the material  
21 outstanding in respect of the Board's December order is  
22 still required and, if so, when it should be filed; and,  
23 four, to set further dates in order that we might complete  
24 this proceeding in an expeditious manner.

25 My name is Cynthia Chaplin and I will be the presiding  
26 member in this hearing. Joining me on the Panel are Board  
27 members Mr. Ken Quesnelle and Ms. Karen Taylor.

28 May I have appearances, please?



1           **APPEARANCES**

2           MS. NEWLAND: Good morning, Madam Chair, Board  
3 members. My name is Helen Newland and I represent the  
4 applicant in this case, the Canadian Distributed Antenna  
5 Systems Coalition, thankfully known as CANDAS.

6           MS. CHAPLIN: Thank you, Ms. Newland.

7           MR. RODGER: Good morning. Mark Rodger, counsel to  
8 Toronto Hydro-Electric System Limited.

9           MS. CHAPLIN: Thank you, Mr. Rodger.

10          MR. WARREN: Robert Warren for the Consumers Council  
11 of Canada, and with me is my colleague, Sukhvinder Dulay.

12          MS. CHAPLIN: Thank you very much.

13          MS. SEBALJ: Kristi Sebalj, Board Staff, and with me  
14 is George Dimitropoulos.

15          MS. CHAPLIN: Thank you, Ms. Sebalj.

16          Before we begin, are there any preliminary matters?  
17 No.

18          I understand that we're going to deal with the  
19 privilege claims first, Mr. Warren? I believe that that  
20 will accommodate your scheduling.

21           **PRELIMINARY MATTERS**

22          MR. WARREN: It will. Thank you, Madam Chair, and I  
23 wanted to begin by expressing my deep appreciation for the  
24 characteristic graciousness of my colleagues and the Board  
25 members in allowing me to jumble the schedule somewhat this  
26 morning. Thank you very much.

27          MS. CHAPLIN: Certainly, Mr. Warren.

28          Just before we proceed with that item, I do want to



1 just briefly address the fourth item, which was the  
2 schedule, schedule matters.

3 In our Procedural Order No. 9, we set out our  
4 expectations for an expert pre-hearing conference, and we  
5 have asked all of the parties to come today prepared to  
6 discuss how that can take place within the first two weeks  
7 of March.

8 So what we're suggesting in the first instance is,  
9 during the break, if parties have the opportunity to  
10 discuss somewhat amongst themselves to see if an agreed  
11 scheduling can be put together, including who would be part  
12 of each of those conferences and when they would take  
13 place. Then if that can be resolved offline, that would  
14 certainly be acceptable to us.

15 Then if there is an opportunity to speak about further  
16 timing beyond that amongst the parties, that would be  
17 welcome, as well.

18 MR. RODGER: Madam Chair, just one other preliminary  
19 matter before we start. It was just on the submissions on  
20 privilege. The way that I have organized my submissions is  
21 there is two distinct sets of submissions, one on  
22 solicitor-client privilege, one on litigation privilege.

23 I believe the one that Mr. Warren wants to address, in  
24 particular, is litigation privilege. And you may be aware  
25 that last night Mr. Warren advised me that he would be  
26 relying on a number of cases, and he has filed his document  
27 brief this morning. I haven't had a chance to look at any  
28 of that material, given when it came in.



1           So what I would propose for the litigation privilege  
2   is that I will make my submissions. Mr. Warren and Ms.  
3   Newland can provide theirs, and if I could provide my reply  
4   in writing on Wednesday, that would give me a chance to go  
5   through this brief of authorities.

6           MS. CHAPLIN: That may well be fine. Were you  
7   actually proposing that we deal with the solicitor-client  
8   privilege separately from the litigation privilege as a  
9   distinct part?

10          MR. RODGER: Yes.

11          MS. CHAPLIN: Do parties have any views on that  
12   distinction? Mr. Warren?

13          MR. WARREN: I'm not sure exactly what my friend  
14   proposes but --

15          MS. CHAPLIN: I don't think your mic is on. I'm  
16   sorry.

17          MR. WARREN: My light is on, but characteristically  
18   the lights are on and nobody is home.

19          MS. CHAPLIN: I don't know. That sounds like it is  
20   working.

21          MR. WARREN: As I understood what my friend was  
22   proposing earlier, he wants to respond to my submissions in  
23   writing on Wednesday. I have no difficulty with that  
24   issue.

25          MS. CHAPLIN: I think he is suggesting we deal solely  
26   with litigation privilege submissions first, or not?

27          MR. RODGER: Well, the order, we do litigation  
28   privilege first, and then thereafter solicitor and client



1 privilege. All my point is is that we have identified the  
2 privileged documents in schedule B of our filing.

3 There are two distinct classifications of documents,  
4 and there are different submissions on each, depending on  
5 the type of privilege claimed.

6 MS. CHAPLIN: Mr. Warren, do you have submissions on  
7 the solicitor-client privilege issue?

8 MR. WARREN: They're about 15 seconds long.

9 MS. NEWLAND: And I could add we do not oppose the  
10 assertion of privilege over the one document in question,  
11 the assertion of solicitor-client privilege over the one  
12 document that is listed in schedule B, part 1.

13 MS. CHAPLIN: Okay. Well, let's proceed. I gather,  
14 first of all, I think some of the parties had questions for  
15 the two witnesses that have put forth affidavits. Am I  
16 correct? Mr. Warren, did you have any questions for Mr.  
17 McLorg or Mr. Labricciosa?

18 MR. WARREN: They're very brief. They're perhaps  
19 three questions in total.

20 MS. CHAPLIN: Well, unless there is any disagreement,  
21 I think we will do that first. Can those witnesses come  
22 forward and be sworn?

23 **TORONTO HYDRO-ELECTRIC SYSTEM LIMITED - PANEL 1**

24 **Ivano Labricciosa, Sworn**

25 **Colin McLorg, Sworn**

26 MS. CHAPLIN: Ms. Newland, does CANDAS have questions  
27 for the witnesses?

28 MS. NEWLAND: Again, one or two very brief questions,



1 Madam Chair.

2 MS. CHAPLIN: We will let you go first. Mr. Rodger,  
3 do you have anything by way of introduction?

4 MR. RODGER: No, Madam Chair.

5 MS. CHAPLIN: Okay, thank you. Ms. Newland.

6 **CROSS-EXAMINATION BY MS. NEWLAND**

7 MS. NEWLAND: Mr. McLorg, may I refer you to item 16?  
8 And I am referring to the affidavit of documents that was  
9 filed last week, and attached to that affidavit, to your  
10 affidavit, is a schedule B, which is divided into parts 1  
11 and parts 2 of Procedural Order No. 8.

12 I should point out that I am only concerned with the  
13 documents that are referred to in part 1 of Procedural No.  
14 8. Those are the documents that pertain to the requests of  
15 CANDAS made in interrogatory 1(h), which is the disputed  
16 interrogatory in question. So my questions are restricted  
17 to part 1.

18 In part 1, I would ask you to take a look at items  
19 number 5 -- Production No. 5 and Production No. 10.

20 Production No. 5 is an e-mail that was distributed to  
21 a distribution list, entitled "NGW" and that acronym, NGW,  
22 appears also in number -- Production item No. 10. My  
23 question is simply: What does "NGW" stand for?

24 MR. McLORG: Ms. Newland, that's an artefact of our e-  
25 mail system, which is a little bit antiquated now.

26 It stands for "Novell GroupWise" and apparently it is  
27 a system name that the e-mail system assigns to users that  
28 it knows.



1 I have some information on what "NGW" actually means  
2 in almost all of the instances, save one, that I am aware  
3 of.

4 So with respect to item number 5, "NGW" means Messrs.  
5 Vellone, Yatchew, Rodger, Wilde and Mr. McLorg.

6 With respect to item number 10, "NGW" refers to  
7 Messrs. Sardana, Vellone, McLorg and Yatchew.

8 MS. NEWLAND: Thank you, Mr. McLorg. I see that "NGW"  
9 also appears in item number 9. Do you have information  
10 with respect to that particular item?

11 MR. McLORG: I do. In that instance, "NGW" refers to  
12 Messrs. Vellone, McLorg, Rodger, Sardana and Wilde.

13 MS. NEWLAND: Thank you. Lastly, item number 12, I  
14 see "NGW" is repeated there. Do you know who that group  
15 was?

16 MR. McLORG: Yes. "NGW" in that instance refers to  
17 Messrs. Harper and Labricciosa.

18 MS. NEWLAND: Thank you. My last question has to do  
19 with item number 1 in part 1 of schedule B. That item is a  
20 draft report of Dr. Yatchew, but it doesn't say who the  
21 report was distributed to.

22 MR. McLORG: I'm sorry, I don't have that information  
23 with me.

24 MS. NEWLAND: Those are my questions. Thank you.

25 MS. CHAPLIN: Thank you.

26 Mr. Warren?

27 MR. WARREN: Is this working now? It is working.

28 MS. CHAPLIN: It is, yes.



1           **CROSS-EXAMINATION BY MR. WARREN**

2           MR. WARREN: Let me start with you, Mr. Labricciosia.

3           In your affidavit you speak about the prospect of  
4 litigation, and I want to explore for a moment the nature  
5 of what that litigation is.

6           Am I correct, Mr. Labricciosia, that the prospect of  
7 litigation arises out of a letter which was written by a  
8 member of the DAScom coalition to Toronto Hydro in or  
9 around January of 2010? Is that correct?

10          MR. LABRICCIOSA: There has been correspondence  
11 between members of CANDAS and Toronto-Hydro in that time,  
12 that's correct.

13          MR. WARREN: Well, I want a more specific answer, if I  
14 can; focus on the issue of the prospect of litigation.

15          Is there one letter that Toronto-Hydro is alleging is  
16 the basis for the assertion that there was a prospect of  
17 litigation, or is there more than one letter?

18          [Witness panel confers]

19          MR. LABRICCIOSA: Again, I would point to the  
20 affidavit, where we did seek permission from CANDAS'  
21 counsel to disclose examples, more than one, of the  
22 correspondence that would indicate or substantiate some  
23 form of litigation was pending.

24          MR. WARREN: I appreciate that the substance of those  
25 letters is the subject of a confidentiality claim. I am  
26 not asking for the substance of the letters.

27          I want to know, is there one letter or was there more  
28 than one letter? Do you know?



1 MR. LABRICCIOSA: I would say there would be two  
2 examples.

3 MR. WARREN: I don't want examples, sir. I want to  
4 know the number of letters. Was there one letter, two  
5 letters, or more?

6 MR. LABRICCIOSA: I would say at least two.

7 MR. WARREN: That doesn't help me, sir. I'm sorry to  
8 be worrisome about this. If there were more than two, how  
9 many were there, and what were the dates of the letters?

10 MR. LABRICCIOSA: I can only recall the two.

11 MR. WARREN: Two letters? And am I right they were in  
12 or around January of 2010?

13 MR. LABRICCIOSA: You are correct. They were in and  
14 around that time frame.

15 MR. WARREN: Since that time, sir, has there been a  
16 Statement of Claim issued by any member of CANDAS against  
17 Toronto Hydro?

18 MR. LABRICCIOSA: Not that I am aware of.

19 MR. WARREN: Would you be the person who would be  
20 aware of it, given that you swore an affidavit on this  
21 subject?

22 MR. LABRICCIOSA: I would think I would be, yes.

23 MR. WARREN: Okay. Has there been any other form of  
24 civil claim, in any form, issued by a member of CANDAS  
25 against Toronto Hydro since the letters of January of 2010?

26 MR. LABRICCIOSA: Short of this application in front  
27 of us, there have been no other letters issued.

28 MR. WARREN: Sorry, I'm distinguishing -- I apologize,



1 Mr. Labricciosa -- between a civil claim, issued in,  
2 presumably, the Superior Court of Justice of this province,  
3 on the one hand, and an administrative proceeding of this -  
4 and I would characterize this as an administrative  
5 proceeding - before this Board.

6 I am dealing only with the category of a civil claim.

7 Has there been any other form of civil claim filed  
8 against Toronto Hydro by a member of CANDAS since the  
9 letters of January of 2010?

10 MR. LABRICCIOSA: Again, the same response. Not that  
11 I am aware of. And I would likely be one that would be  
12 aware of that.

13 MR. WARREN: Since the letters of January '10, have  
14 there been any threats, oral or written, against Toronto  
15 Hydro by a member of CANDAS, threats of a civil claim being  
16 filed?

17 MR. LABRICCIOSA: I'm struggling with the word  
18 "threat". That's a very narrow, harsh word.

19 If you -- you know, I would like to respond that there  
20 was indication or we believed there would be indication of  
21 one. I don't know if that constitutes an affirmative  
22 threat.

23 MR. WARREN: I appreciate the difficulty you and I are  
24 having, a continuum as something as foreboding something as  
25 a threat.

26 Has there been any indication, sir, written or oral,  
27 by a member of CANDAS since January of 2010 that they  
28 intended to bring a civil claim against Toronto Hydro?



1 MR. LABRICCIOSA: We believed in our conversation,  
2 yes.

3 MR. WARREN: And the conversation took place when?  
4 January of 2010?

5 MR. LABRICCIOSA: That's correct.

6 MR. WARREN: Okay. Can you help me, sir, in the  
7 summary of argument that your counsel delivered to us on  
8 Friday afternoon at 4:45 -- do you have that document in  
9 front of you?

10 MR. LABRICCIOSA: I do not. I'm sorry.

11 MR. WARREN: Could you turn it up, please, if you have  
12 a copy of it?

13 MR. LABRICCIOSA: I have it in front of me.

14 MR. WARREN: Now, this document refers, sir, to this  
15 administrative proceeding as the litigation in respect of  
16 which the litigation privilege is being claimed.

17 To your knowledge, sir, was that the first time in  
18 which the assertion had been made that this administrative  
19 proceeding was the litigation in respect of which  
20 litigation privilege was being claimed?

21 MR. McLORG: I don't think the panel is absolutely  
22 clear on your question, Mr. Warren.

23 The first time that litigation privilege had been  
24 claimed embodied in this summary of argument? Is that your  
25 question?

26 MR. WARREN: No. The question is: Was that the first  
27 occasion on which this administrative proceeding was  
28 characterized as litigation in respect of which a



1 litigation privilege claim was being made?

2 To my knowledge, it is the first time. I am trying to  
3 see if it is, to your knowledge, the first time that claim  
4 was made.

5 MR. McLORG: Well, Mr. Warren, in our minds, there has  
6 been a very clear indication that litigation in the form of  
7 an adversarial proceeding, either before this Board or  
8 before a court in the Province of Ontario, has been a  
9 prospect ever since January of 2010.

10 And that was clearly indicated in both written letters  
11 that we received and I believe through discussions,  
12 although I was not present at those discussions.

13 So this, in our minds, is certainly not the first time  
14 that a claim or a threat of litigation was present in our  
15 mind. Now, perhaps that doesn't directly answer your  
16 question.

17 MR. WARREN: It doesn't directly or indirectly answer  
18 my question. So let me go back, in a worrisome way, to Mr.  
19 Labricciosa.

20 Can you tell me where in your affidavit, Mr.  
21 Labricciosa, that you assert that the administrative  
22 proceeding that brings us all before the Panel this morning  
23 is the litigation in respect of which litigation privilege  
24 is claimed? Is it anywhere in your affidavit, sir?

25 MR. LABRICCIOSA: If I can ask you to turn up in the  
26 affidavit, point number 26.

27 MR. WARREN: Please. Go ahead. And it says, what?

28 MR. LABRICCIOSA:



1           "Following the Public Mobile meeting on January  
2           13th, 2010, THESL engaged counsel in anticipation  
3           or contemplation of potential administrative  
4           and/or court proceedings, as well as for the  
5           purpose of seeking legal advice in relation to  
6           various matters that arose as a result of the  
7           Public Mobile meeting and related legal issues."

8           MR. WARREN: Finally, Mr. McLorg, if you could turn up  
9           your affidavit of documents, please? I am looking first at  
10          schedule B.

11          MR. McLORG: Sorry, Mr. Warren. I neglected to bring  
12          that with me. I will just be a moment.

13          I do have Schedule B. It is just the whole affidavit  
14          I neglected to bring.

15          MR. WARREN: There's a reference there, for example,  
16          in item 1 in schedule B -- part 1, sorry, item 1.

17          MR. McLORG: I see that.

18          MR. WARREN: There is a reference, and throughout part  
19          1, to draft reports of Dr. Yatchew.

20          Can you tell me, are those drafts of the reports that  
21          were filed as part of Toronto Hydro's notice of motion  
22          which was, if I can characterize it, their intervention in  
23          this case?

24          MR. McLORG: Are those drafts of --

25          MR. WARREN: Dr. Yatchew's report that forms part of  
26          the pre-filed evidence of Toronto Hydro in this case?

27          MR. McLORG: No, they were not.

28          MR. WARREN: You're talking about a different report



1 from Dr. Yatchew?

2 MR. McLORG: The report is as described in our listing  
3 of item number 1, and I think the listing speaks for  
4 itself.

5 MR. RODGER: Madam Chair, this questioning, there is a  
6 limit to the appropriate questioning in this regard - and  
7 we will get into this in the legal submissions - because  
8 part of the protection of litigation privilege is to not  
9 give so much information as to it talks about the details  
10 to illuminate what the exact issues were that were being  
11 considered.

12 So Mr. McLorg is correct when he says that this was  
13 not part of the evidence that ultimately ended up before  
14 the Board, and of course when this report was done, CANDAS  
15 had yet to even file an application. So it couldn't be for  
16 this application before the Board.

17 MR. WARREN: All right. Let me stay with it for a  
18 moment. I didn't ask for what were the contents of the  
19 draft report.

20 I asked you: Was it a draft of the report that was  
21 filed in evidence in this case?

22 MR. McLORG: I don't believe so, sir.

23 MR. WARREN: Do you know?

24 MR. McLORG: I'm going only by memory, and so I have  
25 to say that in my memory, no, it was not.

26 MR. WARREN: Was the draft report of Dr. Yatchew  
27 referred to ever completed as a final report?

28 MR. McLORG: No, sir, not to my knowledge.



1 MR. WARREN: And turning, then, to the item 4 in part  
2 1, there is a reference there to a draft analysis of  
3 Michael Starkey.

4 MR. McLORG: That's correct.

5 MR. WARREN: Is that draft -- is that a draft of the  
6 report that Mr. Starkey filed in this case?

7 MR. McLORG: I don't believe so, sir.

8 MR. WARREN: Do you know?

9 MR. McLORG: I'm again going according to my best  
10 recollection.

11 MR. WARREN: Have you compared the two of them?

12 MR. McLORG: No, I haven't.

13 MR. WARREN: Okay. Have you compared the report of  
14 Dr. Yatchew in draft form to the one that was filed in this  
15 case?

16 MR. McLORG: No, I haven't.

17 MR. WARREN: So I take it, without comparing them, you  
18 don't know whether one is a draft of the other, or not. Is  
19 that not fair, Mr. McLorg?

20 MR. McLORG: I think that that's fair.

21 MR. WARREN: Thank you very much. Those are my  
22 questions.

23 MS. CHAPLIN: Thank you, Mr. Warren. Ms. Sebalj, do  
24 you have questions?

25 **CROSS-EXAMINATION BY MS. SEBALJ**

26 MS. SEBALJ: I do have a couple of questions. I am  
27 going to start with some follow-up, if you don't mind.

28 Mr. Labricciosa, you indicated to Mr. Warren that the



1 letters, the two letters that you are aware of that were --  
2 that Toronto Hydro sought CANDAS's consent to disclose,  
3 were dated January of 2010.

4 But if I turn you to page 9 of 13 of your -- or I  
5 guess easiest to say paragraph 27 of your affidavit, the  
6 last sentence -- I believe it is the last sentence of that  
7 paragraph starts on page 8 and says:

8 "Through its counsel last week, THESL sought  
9 CANDAS's consent to disclose two examples of such  
10 correspondence in this proceeding. (dated May 7  
11 and June 10, 2010 respectively)."

12 So were the letters dated January 2010 or were they  
13 dated May and June of 2010?

14 MR. LABRICCIOSA: No, Ms. Sebalj. It emanates from  
15 the meetings of January 2010. So the letters, in my mind,  
16 sort of reflect the conversations and the meanings -- the  
17 interaction we had between the companies in January of  
18 2010.

19 MS. SEBALJ: But the letters were dated May 7th and  
20 June 10th respectively?

21 MR. LABRICCIOSA: The letters are correct, on those  
22 dates.

23 MS. SEBALJ: Okay. And I note that also in your  
24 affidavit you indicate, in paragraphs 28 and in paragraph  
25 32 -- in paragraph 28 at the end of the paragraph, you say  
26 the fact that THESL was anticipating or contemplating  
27 litigation is evidenced by the tone and content of CANDAS's  
28 application itself.



1           And then in paragraph 32, at the very first line you  
2 say:

3                   "Regardless, the acrimonious nature of the period  
4                   after the Public Mobile meeting leading up to  
5                   CANDAS filing its application in this proceeding  
6                   with the Board."

7           I am just wondering, is it the tone and the  
8 acrimonious nature that CANDAS was taking that led Toronto  
9 Hydro to anticipate or contemplate litigation, or were  
10 there actual words indicating that litigation was  
11 forthcoming, either in the form of a proceeding before this  
12 Board or before the courts?

13           MR. LABRICCIOSA: It became clear in our conversations  
14 at those meetings that the dialogue was leading towards an  
15 application in front of this Board, as well as potential  
16 litigation in the court system.

17           It became very surprising, in a lot of the meetings  
18 that we had at that time, that there was interrelationships  
19 between all of the companies and each had assumed they had  
20 a relationship with us, when some did and some didn't,  
21 although we did not disclose to whom we had relationships  
22 with outside of the people we met with.

23           And it became clear, the way they described their  
24 business model and how they were setting up their plans,  
25 that it was very strategic and very incumbent on them  
26 having these attachments on our poles, and it was actually  
27 fundamental to their whole business plan.

28           So at that stage, one particular meeting I remember



1 very clearly there was a lot of heated language used by  
2 Public Mobile about basically destroying their business  
3 model.

4 MS. SEBALJ: And was that the meeting of January 13th?

5 MR. LABRICCIOSA: I can't remember the exact dates,  
6 but, yes, it would be sometime in the early January when we  
7 met with them.

8 MS. SEBALJ: I'm just looking at paragraph 22 of your  
9 affidavit, where you say you were:

10 "...advised by Anthony Haines and do believe that  
11 in January 2010 THESL was contacted by the CEO of  
12 Public Mobile."

13 Did you attend the meeting on January 13th?

14 MR. LABRICCIOSA: I did.

15 MS. SEBALJ: Okay. Thank you. I was also curious.  
16 In paragraph 23, you say Public Mobile, and this is in the  
17 last line:

18 "Public Mobile indicated to THESL that it had  
19 concerns about how long it was taking THESL to  
20 process applications for permits to attach the  
21 attachments to THESL's poles."

22 And then at paragraph 24:

23 "THESL declined to discuss these matters at the  
24 Public Mobile meeting on the basis that it did  
25 not have a pole attachment agreement with Public  
26 Mobile and for reasons of confidentiality could  
27 not discuss its contractual relationship with  
28 other customers unless those other customers



1           expressly directed it to do so."

2           And then ultimately this Public Mobile meeting seems  
3   to be the tipping point -- in your affidavit, your  
4   assertion -- the tipping point with respect to apprehended  
5   litigation.

6           And I'm wondering, if you couldn't have a meaningful  
7   discussion with Public Mobile, how that meeting could have  
8   resulted in apprehension of litigation?

9           MR. LABRICCIOSA: Well, again, it became clear to us  
10   in that discussion. They approached us initially thinking  
11   that they had a relationship with us. We were surprised at  
12   the request for the meeting, since we didn't have any  
13   relationship with Public Mobile. But as they disclosed  
14   their business plans to us, which involved the  
15   relationships with these other parties, DAScom, ExteNet and  
16   also Cogeco, it became clear to us that they just assumed  
17   they had a right to be on our poles. They also identified  
18   the fact they were hanging their assets on our poles and  
19   did not have an agreement with us.

20           And so when we began to have that dialogue, it was a  
21   surprise to them that they could not actually attach their  
22   assets on our poles.

23           And at that point, the conversation went very graphic,  
24   very heated, and it quickly turned into a discussion about  
25   next steps.

26           One of those next steps in the discussion that they  
27   asked was in relation to the regulator, which, they  
28   believed at that point, they could go to the regulator for



1 some sort of relief.

2 Then it also went to a discussion of sort of business  
3 models, in terms of, without hanging these antennas on our  
4 poles, that their business model fails.

5 And then it went to some discussion of how to proceed  
6 with getting an agreement with us. So it quickly went from  
7 aggressive to restorative or conciliatory at that stage.  
8 At which point we had discussed with them that we had other  
9 things we had to attend to, and the meeting ended at that  
10 stage.

11 MS. SEBALJ: Okay. Thank you. So turning to Mr.  
12 McLorg's affidavit, I do have some sort of more detailed  
13 questions.

14 One is a follow-on to a question from Ms. Newland with  
15 respect to schedule B, part 1, number 1.

16 She asked you to whom the draft report of Adonis  
17 Yatchew was distributed. I am wondering if you would be  
18 willing to -- Mr. McLorg, I think you indicated that you  
19 didn't know. Is it possible for you to get that  
20 information by way of undertaking?

21 MR. McLORG: I will certainly do my best to do that.

22 MS. SEBALJ: So on a best-efforts basis, can I mark it  
23 as an undertaking?

24 MR. McLORG: That's correct, yes.

25 MS. SEBALJ: That is J1.1.

26 MR. RODGER: If it is helpful, Ms. Sebalj, I can  
27 answer this question.

28 MS. SEBALJ: Sure.



1 MR. RODGER: That report came to me directly.

2 MS. SEBALJ: Okay. Thank you.

3 MS. SEBALJ: Perfect. So we can strike that  
4 undertaking.

5 I did have a couple of questions with respect to --  
6 let me make sure I get this right. I believe it is numbers  
7 13 -- and this is with respect to solicitor/client  
8 privilege, just a clarification.

9 My apologies. Numbers 13 and 24.

10 So number 13 is a briefing note, dated January 20th,  
11 2010, entitled: "Briefing note TH/Public Mobile," prepared  
12 by Lawrence Wilde, dated January 20th, 2010.

13 And number 24 is March -- a document dated March 26th,  
14 2010, a report entitled: "Briefing report ExteNet DAScom  
15 pole attachments," prepared by Lawrence Wilde, dated March  
16 30th, 2010.

17 I am just wondering, in neither of those does it  
18 indicate that the subject matter of the documents is legal  
19 advice, and -- or it was in contemplation of litigation. I  
20 just contrast it for a moment with number 32, which says:

21 "Report titled 'Briefing note, TH/Cogeco,'  
22 prepared by Lawrence Wilde, dated May 18th,  
23 providing legal analysis in preparation for  
24 contemplated litigation."

25 I wonder if you someone can clarify, if someone can  
26 clarify specifically -- understanding of course that  
27 Lawrence Wilde was the general counsel at the time, but he  
28 was also VP and board secretary. So I just want to clarify



1 for the record these are indeed either legal advice or in  
2 contemplation of litigation.

3 MR. RODGER: Yes, I can confirm that, Ms. Sebalj.  
4 Both documents 13 and 24 were from Mr. Wilde to Mr. Haines,  
5 and it was to provide legal advice on these matters.

6 MS. SEBALJ: Thank you.

7 Those are all of the Board Staff's questions. Thank  
8 you.

9 MS. NEWLAND: Madam Chair, with your indulgence, I  
10 have two more questions of a factual nature, not of an  
11 argumentative.

12 MS. CHAPLIN: Go ahead.

13 **CROSS-EXAMINATION BY MS. NEWLAND (cont'd)**

14 MS. NEWLAND: Mr. McLorg, I neglected to ask you about  
15 the reference to "NGW" in item number 7 of part 1 of  
16 Procedural Order No. 8.

17 MR. McLORG: I have that information. "NGW" in the  
18 case of item number 7 refers to Messrs. Vellone, McLorg,  
19 Rodger and Wilde.

20 MS. NEWLAND: Mr. McLorg, rather than me trying to  
21 hunt out the other references to "NGW" I assume you have  
22 gone through this and you have information about who the  
23 other -- with respect to any other references?

24 MR. McLORG: The only item for which I am missing that  
25 information is item number 2. In my review of that, it  
26 seemed to me that --

27 MS. NEWLAND: Sorry, Mr. McLorg, item number 1 of part  
28 1 or part 2?



1 MR. McLORG: In my list they're numbered sequentially.

2 MS. NEWLAND: Okay. Fine.

3 MR. McLORG: That appeared to me to be an internal  
4 circulation of a consultant's report, as it is described in  
5 schedule B. I would be speculating as to who those parties  
6 would be, but I think that it would certainly be the usual  
7 suspects, if you would permit me that term. But I don't  
8 have information specifically on item number 2.

9 Otherwise, perhaps for clarity of the record, I could  
10 go through my list and just identify all of the ones where  
11 I have been able to trace the specific addressees of the e-  
12 mails that were referred to as "NGW".

13 MS. NEWLAND: Mr. McLorg, if I could stop you there -  
14 and thank you for that offer, and I will take you up on  
15 it - but I am a little confused about item number 2,  
16 because item number 2 is an e-mail from Jonathan Wells and  
17 to Mark Rodger and Jon Vellone. It doesn't refer to NGW.

18 MR. RODGER: Perhaps my records are incorrect.

19 I did -- I don't have the materials in front of me,  
20 but I did, perhaps mistakenly, come under the impression  
21 that there was an NGW on that e-mail.

22 If there is not, then...

23 MS. NEWLAND: Do you have a different list, Mr.  
24 McLorg?

25 MR. McLORG: No, I don't believe so.

26 MS. NEWLAND: So I am -- I don't understand your  
27 response. If there is only one list and the list doesn't  
28 show NGW, why are you confused?



1           MR. McLORG: It is easiest for me to believe that I  
2 just made a mistake in that.

3           MS. NEWLAND: Please proceed.

4           MR. McLORG: Okay. Item 5, please tell me if you  
5 already have this information because I can't recall.

6           MS. NEWLAND: You have responded to -- given us  
7 information about items 5, 7, 9, 10 and 12.

8           Are there any more, Mr. McLorg?

9           MR. McLORG: I have -- for item 23, the addressees  
10 were Ms. Byrne and Mr. Labricciosa; and for item 25, Ms.  
11 Byrne, Mr. Labricciosa, Ms. Hoare and Mr. Wilde. And that  
12 completes my list.

13          MS. NEWLAND: Thank you. Mr. McLorg, in paragraph 5  
14 of your affidavit, you describe the distinction between the  
15 documents that are listed in part 1 and the documents that  
16 are listed in part 2.

17          And in that paragraph, you say that the documents that  
18 relate -- that are in part 1 relate to the Board's order to  
19 produce copies of presentations or reports provided to the  
20 THESL board of directors or THESL's senior management.

21          And then you go on to say that the documents listed in  
22 part 2 have to do with the Board's order to produce copies  
23 of samples of all of the reports in support of THESL's  
24 contention that wireless attachments impair operations  
25 efficiency and present incremental safety hazards.

26          I am puzzled by that, because when I look at the  
27 documents or the title of the documents that are set out in  
28 parts 1 and parts 2, the titles of the documents in part 2



1 include, for example, at items 14 and items 17, a reference  
2 to a report entitled, "Draft Board Report", and I am  
3 reading now on item 14. And, again, that is repeated in  
4 item 17, "Briefing Report and Draft Board Report".

5 What is the board that is being referred to in each of  
6 these items? Is it in fact THESL's board of directors?

7 MR. McLORG: Yes, it is.

8 MS. NEWLAND: So my question, then, is: Why were not  
9 those items listed under part 1, which is the part that you  
10 say pertains to the question about board reports?

11 MR. McLORG: In my understanding, Ms. Newland, there  
12 are actually four categories here, schedule A and schedule  
13 B. Schedule A, as indicated in paragraph 3 of my  
14 affidavit, lists all of the documents that are in THESL's  
15 possession, control or power that THESL does not object to  
16 producing for inspection, and schedule B are all of those  
17 arguments which THESL does object to producing.

18 And overlaid on that are the categories part 1 and  
19 part 2 referring to the topics generally. And so our  
20 categorization here represents our views on the four  
21 quadrants, so to speak, that are obtained when you overlay  
22 the differences in topics with the character of whether or  
23 not we object to producing those documents. Does that help  
24 clarify at all?

25 MS. NEWLAND: Not at all, but thank you.

26 Let me try again. It is very clear from the words in  
27 your affidavit -- well, let me ask this question. Did you  
28 write your affidavit?



1 MR. McLORG: No, I did not.

2 MS. NEWLAND: Did you prepare this list, the list that  
3 is attached to the affidavit?

4 MR. McLORG: No, I did not.

5 MS. NEWLAND: Who did?

6 MR. McLORG: Legal counsel at Toronto Hydro and  
7 external counsel, as far as I know.

8 MS. NEWLAND: All right. Let's go back to paragraph 5  
9 of your affidavit where you describe the distinction  
10 between the documents listed in parts 1 and parts 2.

11 MR. McLORG: I see that.

12 MS. NEWLAND: I am not concerned -- just to be clear,  
13 I'm not concerned about the documents in schedule A that  
14 have to do with confidentiality. I am only talking about  
15 how you divided the documents that are listed in schedule -  
16 in part 1 of schedule B, how you divided those into the  
17 different buckets, the part 1 bucket and the part 2 bucket.

18 I am suggesting to you, Mr. McLorg, that in fact none  
19 of the documents that are listed in part 1 appear on their  
20 face, on the basis of the small description that you give,  
21 to be -- have anything to do with presentations to THESL's  
22 board of directors.

23 They all appear to be foundational documents that  
24 might have assisted THESL in the preparation of its August  
25 13th letter.

26 But when we go to part 2, we do see draft reports to  
27 the board of directors of THESL. And, in my submission,  
28 Mr. McLorg, those should have been listed in part 1, and I



1 am asking you why they were not.

2 MR. RODGER: I may be able to be of assistance here,  
3 Madam Chair.

4 MS. NEWLAND: Perhaps, Mr. Rodger, I would just like  
5 to get an answer from the witness, and then you can add  
6 what you would like.

7 MR. McLORG: I am not sure I can be more helpful, Ms.  
8 Newland. The categorization of the documents followed the  
9 scheme that I tried to explain. And to my knowledge, all  
10 of the documents are properly characterized.

11 MS. NEWLAND: Thank you. So is it your contention  
12 that items 14 and items 17 properly belong in part 2 and  
13 should not also be listed in part 1 in response to the  
14 question that asks for presentations to the board of  
15 directors of THESL?

16 MS. CHAPLIN: I am going to interject at this point,  
17 Ms. Newland, to see if the Board's order might bring any  
18 clarity to this question, because I notice items 14 -- is  
19 it 14 and 17?

20 MS. NEWLAND: Yes.

21 MS. CHAPLIN: -- are dated January 2010, and the  
22 Board's order of - which one was it? - January 20th, where  
23 we ordered the production of a subset, there was specific  
24 reference, in respect of the materials that were presented  
25 to the board of directors or senior management, around the  
26 letter of August 13th: Only materials which were provided  
27 to the board of directors or senior management during June,  
28 July or August 2010 shall be provided at this time.



1           So I suspect it may be a timing issue.

2           MR. RODGER: That's correct, Madam Chair. And also  
3 just remember, again, from the Board's order on that part  
4 of the decision, that part 1 dealt with not just the  
5 Toronto Hydro-Electric System Limited board, but also to  
6 senior management.

7           MS. CHAPLIN: Yes.

8           MR. RODGER: Also in part 2, those were -- a number of  
9 them were identified as "draft reports", so they would  
10 never have actually been presented to the board, because  
11 they were still in draft, and they could have also dealt  
12 with issues that crossed over into the safety issues. So I  
13 think that explains that.

14          MS. NEWLAND: Okay, thank you for that. Just one last  
15 question.

16          Mr. McLorg, was the draft report ever finalized, the  
17 draft report to the Board that is referred to in items 14  
18 and 17?

19          MR. McLORG: I don't know.

20          MS. NEWLAND: Could you undertake to find out?

21          MR. McLORG: Yes, I can undertake to find out.

22          MS. NEWLAND: Thank you.

23          MS. SEBALJ: So we will mark that as J1.1. Just so  
24 that the record is clear, it is with respect to both 14 and  
25 17, whether the draft report was ever finalized?

26          MS. NEWLAND: Correct. If it was finalized, I would  
27 appreciate knowing the date of the final report.

28          MS. SEBALJ: Thank you.



1           UNDERTAKING NO. J1.1: TO CONFIRM WHETHER DRAFT REPORT  
2           REFERRED TO IN ITEMS 14 AND 17 WERE FINALIZED, AND IF  
3           FINALIZED, TO PROVIDE DATE OF FINAL REPORT.

4           QUESTIONS BY THE BOARD

5           MS. CHAPLIN: Mr. Labricciosa, I just have one area I  
6           would like to understand a little better.

7           My understanding of your testimony is that litigation  
8           was contemplated at the conclusion of the meetings, meeting  
9           or meetings that took place in and around January of 2010,  
10          and that that -- if I am understanding you correctly,  
11          you're saying that that was -- your expectations were  
12          confirmed subsequent to receiving the letters of May and  
13          June; is that a fair summary?

14          MR. LABRICCIOSA: That's correct.

15          MS. CHAPLIN: But in answer to Ms. Sebalj, you were  
16          describing the tone around the meeting in January 2010, and  
17          what you seemed to describe was a progression from --  
18          perhaps I might characterize it as confusion as to where  
19          the relationships were, to grave concern around the  
20          business model. And then I believe your word was a  
21          movement towards a more conciliatory approach.

22          I am just wondering how the conclusion of that would  
23          lead you to be expecting litigation, if the indications  
24          from the parties were of a conciliatory nature, I gather  
25          meaning trying toward some mutually acceptable agreement.

26          I am wondering, it seems a bit -- I am having  
27          difficulties squaring that.

28          MR. LABRICCIOSA: It is a good point, a good comment.



1           It became clear to us they still did not understand  
2   that wireless attachments were not allowed on our poles.

3           So it seemed, in a move of desperation, that they were  
4   trying to achieve their final outcome, which was install  
5   their network and run their business model, and it became  
6   clear to us that that wasn't going to happen from our  
7   perspective.

8           And so the meeting, we parted our ways with them being  
9   almost distraught or disappointed in terms of being able to  
10   roll their network out.

11          So it just seemed like the next likely outcome was  
12   litigation.

13          MS. CHAPLIN:   How would you describe the tone of the  
14   May and June letters?

15          MR. LABRICCIOSA:   Very much the way we described the  
16   meeting, without the conciliatory approach.   It almost  
17   appeared to us that some of the final sections of the  
18   letter appeared that if they don't get what they need, that  
19   they would approach litigation as one option.

20          MS. CHAPLIN:   Approach the Board?   Or approach  
21   litigation?   Or do you not make a distinction?

22          MR. LABRICCIOSA:   Both.   No, I make the distinction.  
23   Both.

24          MS. CHAPLIN:   But both?   Okay.   Thank you.

25          MS. TAYLOR:   So I would just like to be clear, then,  
26   because, to Mr. Warren's questioning, you referred to the  
27   January communications as letters.

28          So for the record, they were, in fact, two meetings;



1 is that correct?

2 MR. LABRICCIOSA: That's correct. They were meetings.

3 MS. TAYLOR: The letters that came out four months  
4 later and five months later were the crystallization of the  
5 litigation expectation? Because there was a huge gap, if  
6 you will, between when you had this meeting with the  
7 variety of different postures, if you will, to when they  
8 actually filed with you letters.

9 MR. LABRICCIOSA: Yes. It became crystal-clear for us  
10 after the meeting that we would be expecting litigation.  
11 We were surprised that it could take several months to  
12 produce the formality of a letter describing the outcomes  
13 of that meeting, which confirmed litigation from our  
14 perspective, even though there hasn't been any litigation  
15 processed in the courts to date.

16 MR. QUESNELLE: Just a question. I am becoming a  
17 little confused here as to your separation of the two and  
18 what distinction you make between the proceeding here, Mr.  
19 Labricciosa, and litigation as you are referring to it now.  
20 What is the distinction, and does it have a  
21 difference?

22 MR. LABRICCIOSA: In our conversations with Public  
23 Mobile and the other companies, I thought we were educating  
24 them on the process by which telecom firms can attach to  
25 utility poles. It was our conversation that highlighted to  
26 them the 2005 CCTA decision around attachments and our  
27 interpretation of that, around the process by which the  
28 rules governing attachments have been made, through the



1 Ontario Energy Board.

2 It seemed like they had a lot of questions about that  
3 process. And from our perspective, it seemed like they  
4 were unaware that the Energy Board was an option in terms  
5 of a process.

6 However, that is my interpretation. It is up to them  
7 to answer whether they knew that at the time, or not.

8 And one of the things that concerned them about that  
9 process was how long it would take, had they come to the  
10 Energy Board for a resolution.

11 So in my mind, that was one option. And I separate  
12 that from civil litigation, in terms of being able to sue  
13 for rights and damages.

14 So that is how I separate the two. Both can produce  
15 an outcome for them that would allow them to achieve their  
16 goals. Timing was one of the issues, and the other would  
17 be damages sought, recovery of damages. So that is why I  
18 separate the regulatory process from the legal process.

19 MR. QUESNELLE: But in anticipation of litigation,  
20 where do you see the Board's process?

21 MR. LABRICCIOSA: Separate.

22 MR. McLORG: But Mr. Quesnelle, if I may add, I think  
23 it is certainly our view that it is almost a distinction  
24 without a difference. We certainly see an administrative  
25 process before this Board as being essentially adversarial  
26 - with no negative connotation attached to that word, if I  
27 may - and so from our perspective, the different courses  
28 that CANDAS might choose, whether it be to come to this



1 Board or go to a court, were effectively the same, in our  
2 minds, in terms of the gravity of the situation and the  
3 nature of the situation.

4 MR. QUESNELLE: Thank you.

5 MS. CHAPLIN: Mr. Rodger, do you have anything?

6 **RE-EXAMINATION BY MR. RODGER**

7 MR. RODGER: Mr. Labricciosa, just to follow up on one  
8 question from Mr. Warren, where he asked you to point out  
9 where in your affidavit you referred to this administrative  
10 process, and you pointed to paragraph 26 as one example, if  
11 you could also turn to paragraph 32, the very last  
12 sentence, it talks about a concern of a second phase of  
13 legal attack by members of CANDAS, whether that before the  
14 board or in a courtroom.

15 When you make reference to the board, is that the  
16 Ontario Energy Board?

17 MR. LABRICCIOSA: That's correct.

18 MR. RODGER: And to clarify - I think it was one of  
19 your answers to Mr. Quesnelle, perhaps - did you make the  
20 statement that wireless attachments were not allowed by  
21 THESL, or that THESL did not contemplate wireless  
22 attachments?

23 MR. LABRICCIOSA: In the 2005 CCTA decision, we did  
24 not contemplate wireless attachments as being under the  
25 jurisdiction or rules at that time.

26 It is fair for us to say, or it is -- it was our  
27 mindset at the time when we were made aware of wireless  
28 attachments that we didn't contemplate wireless would be



1 attached on our poles. Having reviewed our agreements, it  
2 does not allow for wireless attachments to be on those  
3 poles.

4 MR. RODGER: And did you communicate that position to  
5 the CANDAS family of companies?

6 MR. LABRICCIOSA: Yes, we did.

7 MR. RODGER: Over what period of time?

8 MR. LABRICCIOSA: This would be starting in January  
9 and any subsequent contacts thereof.

10 MR. RODGER: And Mr. McLorg, just to clarify an answer  
11 you gave to Mr. Warren, he asked, in effect: How do you  
12 know that the draft reports were different than the reports  
13 that were ultimately filed in the CANDAS proceeding?

14 I want to understand that, in the context of your  
15 answer, that there was no proceeding at the time of the  
16 first draft reports, if you like, or the first run of  
17 reports being prepared.

18 Can you explain that answer? I am not sure I  
19 understand why you don't know the difference if it was for  
20 a different proceeding.

21 MR. McLORG: I think it is certainly true that the  
22 CANDAS proceeding had not been launched at the time that  
23 those reports were completed.

24 MR. RODGER: And also if you could just clarify, you  
25 described how your internal counsel assisted in putting the  
26 documents together.

27 But if you could also explain your role which led up  
28 to the affidavit and the listing of the documents?



1 MR. McLORG: Well, I have been centrally involved  
2 throughout the CANDAS proceeding. But as a matter of sheer  
3 workload, it was the case that much of the affidavit  
4 preparation was undertaken by both internal and external  
5 legal counsel at Toronto Hydro.

6 I do want to emphasize that I, by no means, blindly  
7 just signed on the dotted line. I carefully reviewed my  
8 affidavit to ensure that I was completely comfortable in  
9 making the statements that I did in that, and to the best  
10 of my belief and knowledge, they're all true.

11 So in terms of my general role, I would have been  
12 certainly involved in discussions with internal and  
13 external legal counsel at Toronto as to how to satisfy the  
14 Board's various orders for production in this way.

15 MR. RODGER: Thank you. Those are my questions.

16 **FURTHER QUESTIONS BY THE BOARD**

17 MS. CHAPLIN: Mr. McLorg, I just have a couple of  
18 clarifying questions. The references to the draft reports  
19 by Professor Yatchew and Mr. Starkey, I believe your  
20 original testimony was you were not -- you did not know  
21 whether those were finalized or not. Is that correct, or -  
22 because in your most recent answer to Mr. Rodger, you seem  
23 to -- you referred to them being completed. I am just  
24 curious if you are -- what your best recollection is of the  
25 state of those drafts.

26 MR. McLORG: I think perhaps the clearest answer that  
27 I can provide is that the drafts were produced in  
28 contemplation and for the purpose of a road that THESL



1 ultimately chose not to go down.

2 I confess to being, if I may say so, rather at a  
3 disadvantage, because THESL does assert privilege over  
4 these documents, and, not being a lawyer myself, I am  
5 trying to give the fullest and most helpful answers that I  
6 can without effectively revealing the nature of the  
7 privilege or, could I say, the content of the material that  
8 we assert privilege over.

9 MS. CHAPLIN: All right. I will leave it there.

10 Thank you. The panel is excused with the Board's  
11 thanks.

12 **FURTHER CROSS-EXAMINATION BY MR. WARREN**

13 MR. WARREN: Sorry, Ms. Chaplin. I apologize.

14 Mr. McLorg's answer appears to raise the possibility  
15 there was some other litigation that was contemplated,  
16 something that Toronto-Hydro may have commenced when he  
17 says a road they chose not to go down.

18 I wonder if I might be permitted to ask the question  
19 whether these reports were prepared in contemplation of  
20 litigation that Toronto-Hydro contemplated. Is that what  
21 we're to understand?

22 MR. RODGER: I object to that question. The  
23 litigation privilege makes no distinction between whether a  
24 party brings an action or whether it is defending an  
25 action. So --

26 MR. WARREN: Well, in fairness, Madam Chair, and we  
27 will get to the cases in a minute, but the cases are  
28 absolutely crystal clear that in order to assert litigation



1 privilege, you have to give information of a sufficient  
2 particularity about the nature of the document and the  
3 litigation in respect of which it is claimed.

4 And if it is the possibility there is some other form  
5 of litigation, then, in my respectful submission, the  
6 courts demand that Mr. Rodger and/or his client tell us:  
7 Is there, was there some other litigation that Toronto-  
8 Hydro was contemplating in respect of which these reports  
9 were prepared?

10 MR. RODGER: Well, I think we're in the realm now of  
11 the legal argument, which we will be getting to shortly,  
12 because we disagree with Mr. Warren's interpretation.

13 **FURTHER FURTHER QUESTIONS BY THE BOARD**

14 MS. CHAPLIN: All right. But, Mr. Rodger, am I  
15 incorrect? Certainly in reading Mr. McLorg's affidavit and  
16 the accompanying materials, all of the references to the  
17 contemplated litigation, and indeed the questions today  
18 from counsel, have been in respect of perceived potential  
19 litigation launched by a member or members of CANDAS.

20 Certainly this Panel would be assisted. Was  
21 litigation also contemplated directly by THESL?

22 MR. RODGER: As we will get to in the legal  
23 submission, it's contemplated litigation, and, yes,  
24 Toronto-Hydro was reviewing all legal process options.

25 MS. CHAPLIN: And was the timing the same? Were the  
26 January meetings followed by the May and June letters --

27 MR. RODGER: That's correct.

28 MS. CHAPLIN: -- the initiating events?



1 MR. RODGER: That's correct.

2 MS. CHAPLIN: All right.

3 We will leave the question. The witness panel --

4 MS. NEWLAND: Madam Chair, I have listened to the  
5 answers or responses of Mr. Labricciosa with respect to  
6 what occurred at those meetings in January of 2010. And I  
7 have listened with interest to his assertion that Public  
8 Mobile was advised that Toronto-Hydro did not permit  
9 wireless attachments on its poles.

10 And I wasn't at that meeting and I don't have  
11 witnesses here who were at that meeting. I would like just  
12 to advise the Board that I am going to be seeking  
13 instructions from my client with respect to the release of  
14 any letters that might shed any light and possibly  
15 contradict Mr. Labricciosa's testimony.

16 I can't get those instructions right now. I will try  
17 to get them at the break. I am not sure whether I will  
18 ultimately be instructed to release those letters, but I am  
19 troubled that his testimony this morning is at odds with  
20 materials in our CANDAS application.

21 MS. CHAPLIN: CANDAS was invited to allow those  
22 letters to be produced, were they not?

23 MR. RODGER: That's right. Two of those letters --

24 MS. NEWLAND: Right. And with your consent, I can say  
25 that one of the letters was from ExteNet and one was from  
26 Toronto-Hydro.

27 MR. RODGER: That's right. And your colleague, Ms.  
28 Newland, has claimed settlement privilege on both of those



1 and refused to disclose them. As we will get to in the  
2 legal argument, that in our view is evidence that not only  
3 Toronto-Hydro was contemplating litigation. You have the  
4 CANDAS members also contemplating litigation.

5 MS. NEWLAND: And when we get to my submissions, Madam  
6 Chair and Mr. Rodger, you will see that I am not disputing  
7 that there were talks of litigation.

8 I think that is perfectly clear from the evidence that  
9 has been filed to date and from our application. There was  
10 a commercial dispute between the parties about a contract.

11 What I am raising right now is Mr. Labricciosa's  
12 assertion, that I am hearing more or less for the first  
13 time, that there was a position taken by Toronto-Hydro in  
14 January of 2010 that there was no obligation on the part of  
15 THESL to accept attachments of wireless equipment on their  
16 poles.

17 That assertion I am hearing for the first time, and it  
18 flies in the face of everything in our application. It  
19 flies in the face of the facts, where we had a pole  
20 attachment agreement and Toronto-Hydro had processed -- has  
21 processed to date over 300 of those applications and that  
22 equipment is hanging on their poles.

23 So I am at a loss to understand Mr. Labricciosa's  
24 testimony in this regard, but I have nothing --

25 MS. CHAPLIN: I don't think we need to be resolving  
26 that issue today. So I take your comment that you will  
27 seek instructions as to whether or not those letters are  
28 going to be produced and we will wait to hear on that.



1 MS. NEWLAND: Thank you.

2 **SUBMISSIONS ON PRIVILEGE**

3 MS. CHAPLIN: Mr. Rodger, how long do you expect to be  
4 in your submissions on, I guess, litigation privilege? You  
5 are just going to do litigation privilege?

6 MR. RODGER: Yes, Madam Chair. Given that my friend  
7 Mr. Warren has said he is going to be very, very brief for  
8 solicitor-client privilege, I don't have all that much on  
9 solicitor-client privilege. Maybe I should just start with  
10 that and move through it. I suspect maybe 20 minutes for  
11 both topics.

12 MS. CHAPLIN: We will take the break then. And, Mr.  
13 Warren, how long did you expect to be in your submissions?

14 MR. WARREN: I expect to be about 20 minutes. I can  
15 advise my friend, if the Board would just turn up Mr.  
16 McLorg's affidavit, schedule B, there is one item, item 3,  
17 in respect of which solicitor-client privilege is claimed.

18 I have no contest with that.

19 MS. CHAPLIN: With number 3?

20 MR. WARREN: With number 3. It appears, on the  
21 surface of the description, to fall clearly within the  
22 ambit of solicitor-client privilege, and I don't contest  
23 that.

24 So from my perspective, that effectively eliminates  
25 any need for my friend to make any submissions on  
26 solicitor-client privilege, and the only thing that is  
27 left, from my perspective, is a litigation privilege claim.

28 MS. NEWLAND: I would agree with that, Madam Chair,



1 from CANDAS's perspective, as well.

2 MR. RODGER: There were, though, additional documents  
3 that we're claiming solicitor-client privilege.

4 If you look, for example, at --

5 MS. CHAPLIN: You know what? Since you think that you  
6 will be only 20 minutes in combination, why don't you go  
7 ahead and give the whole thing? And then we will take the  
8 break, and I think we will still have time for Mr. Warren.

9 MR. RODGER: My friends may not have a problem with  
10 these other ones, as well. They may have just overlooked  
11 the other ones that were flagged under this category.

12 MR. McLORG: Madam Chair, I take it that we are now  
13 excused?

14 MS. CHAPLIN: I think I have excused you twice, but  
15 yes.

16 MR. McLORG: Thank you very much.

17 MS. CHAPLIN: Thank you, as well.

18 [Witnesses withdraw]

19 **SUBMISSIONS BY MR. RODGER**

20 MR. RODGER: So, Madam Chair, as we identify in the  
21 earlier material that we filed with the Board - and I don't  
22 think any of my friends would disagree with this -  
23 privilege is a core value in our legal system. It is both  
24 a fundamental civil and legal right.

25 And communications protected by solicitor-client  
26 privilege have a prima facie presumption of  
27 inadmissibility, unless the parties seeking disclosure can  
28 show why the communication should not be privileged.



1           Therefore evidence from the parties relying on  
2   privilege may not be necessary, if a party seeking  
3   disclosure does not discharge the onus on them.

4           So we have provided a complete description of this  
5   privilege behind tab A of our November 15th document brief,  
6   but for -- for today's discussion, I want to address a  
7   Board decision, which I have included behind the brief of  
8   documents -- the brief of authorities we sent out on  
9   Friday.

10          This is a June 8th, 2007 decision of this Board in EB-  
11   2010-0184. This decision was made in the context of a CCC  
12   Notice of Motion regarding the constitutionality of  
13   assessments used by the Board pursuant to section 26.1 of  
14   the OEB Act.

15          I thought the decision was important, because it shows  
16   your thinking with respect to claims of solicitor-client  
17   privilege.

18          So behind tab 1, if you go over to page 4, starting at  
19   the -- halfway down the page, the Board first determined  
20   that it had authority to adjudicate privileged claims  
21   pursuant to section 5.4 of the Statutory Powers Procedure  
22   Act. And the Board agreed that solicitor-client privilege  
23   extends to all communications made for the purpose of  
24   seeking or providing legal advice, including advice given  
25   by government lawyers.

26          And my suggestion is that the reference to government  
27   lawyers in this case should properly be reformulated to  
28   include in-house counsel of utilities.



1           And then on page 5, you go through, when you review  
2   these claims, what you will be guided by, and the  
3   principles that you identify in the decision is advice  
4   given by lawyers is privileged when given with respect to  
5   legal matters.

6           Second, the advice need not be given directly by the  
7   lawyers to the ultimate recipient, but can be transmitted  
8   to others within the organization.

9           And if the advice is on matters of policy rather than  
10   legal issues, it is not privileged even if made by a member  
11   of legal staff.

12          So the Board's approach is consistent with the case  
13   law on this topic.

14          Now, in our January 30th filing we have identified  
15   several documents under schedule B for which we're claiming  
16   solicitor-client privilege. And for the record, they are  
17   Documents 3, 13, 15, 16, 18, 19, 20, 21, 22, 24, 26, 31 and  
18   32.

19          You will see from the identified documents that all of  
20   these are in the nature of legal advice being provided from  
21   me or my colleagues at Borden Ladner Gervais.

22          For example, Mr. Jon Vellone is my associate. Mr.  
23   Martin Scilisizzi is a senior commercial litigator with our  
24   firm.

25          And so these are from us, or they're from in-house  
26   counsel, Mr. Wilde or Ms. Hoare, to either the Toronto  
27   Hydro board of directors or to senior management.

28          And also in the brief of authorities, there is the



1 Chrusz decision. I just wanted to read one quote - that is  
2 behind tab 2 - which I think puts this in context. In that  
3 decision, the Court said:

4 "If an individual cannot confide in a solicitor,  
5 knowing that what is said will not be revealed,  
6 it will be difficult if not impossible for that  
7 individual to obtain proper candid legal advice."

8 So our view on this, Madam Chair, is that we have met  
9 the requirements, and that along with the presumption of  
10 inadmissibility, which neither CANDAS nor CCC has  
11 discharged, therefore these materials that we have  
12 identified should all be kept confidential within the  
13 solicitor-client privilege rules.

14 That is all my submissions on that front.

15 You will have to bear with me. I am struggling  
16 through a very bad cold.

17 Now, moving to litigation privilege, in the brief of  
18 documents we include cases, the Chrusz case, which was an  
19 Ontario Court of Appeal decision, and the Supreme Court of  
20 Canada in Blank. And both these courts have recognized the  
21 importance of litigation privilege to preserve a, quote,  
22 zone of privacy around potential litigation.

23 And this privilege is related to the collecting and  
24 marshalling of information around potential litigation.

25 And in the Chrusz decision - which we filed on  
26 November 15th, and also in the brief of authorities again  
27 on Friday - it sets out the test for litigation privilege  
28 and that is the so-called dominant purpose test. I gave



1 you a written of this in my argument points on Friday  
2 afternoon:

3 "Litigation privilege applies to communications  
4 generated by a lawyer or a client, or between  
5 them, for the dominant purpose of related  
6 litigation where litigation is realistically  
7 contemplated, anticipated or ongoing."

8 So it doesn't actually have to be a Statement of Claim  
9 filed, or an OEB application filed. It is reasonably  
10 contemplated or anticipated is within the test.

11 So Toronto Hydro in this case has to show a reasonable  
12 prospect of litigation. And we provided affidavit  
13 evidence, and you've heard Mr. Labricciosa this morning and  
14 I am going to speak more to Mr. Labricciosa's affidavit in  
15 a minute.

16 But I can tell you as external counsel to Toronto  
17 Hydro that I was retained and my colleagues were retained  
18 specifically because of the concern about potential  
19 litigation, and Toronto Hydro wanted legal advice in  
20 response, in direct response to that perceived threat.

21 And then second, Toronto Hydro needs to show that the  
22 dominant purpose was assistance in the preparation for  
23 conduct in an adversarial setting.

24 And again, I would say that not only was the  
25 preparation of the documents we're claiming privilege over  
26 -- it wasn't just for the dominant purpose, it was for the  
27 sole purpose to prepare for potential litigation.

28 And again, from the Chrusz decision, that is the point



1 of the privilege, to facilitate the adversary process.

2 So in this case you have to consider the factual  
3 circumstances under which the documents were created. And  
4 the description of the documents for which litigation  
5 privilege is claimed should include the details that will  
6 allow the document to be identified, and information which  
7 will permit the Board to determine whether a prima facie  
8 case for privilege exists.

9 But as I mentioned earlier, the case law is also  
10 pretty clear what does not have to be disclosed to invoke  
11 the privilege.

12 And if you go to tab 4 in our brief --

13 MS. CHAPLIN: Sorry, I actually don't have physical  
14 tabs -- through nobody's fault -- but just what is behind  
15 tab 4, just so I can find it?

16 MR. RODGER: It is the Brewster decision from the  
17 Queen's Bench for Saskatchewan.

18 MS. CHAPLIN: Is that after the Blank decision?

19 MR. RODGER: Yes.

20 MS. SEBALJ: We did actually provide a bound copy. I  
21 know you got printed copies from the Board Secretary, but I  
22 think you do have a bound copy entitled "Brief of  
23 Authorities of Toronto Hydro-Electric System Limited."  
24 Each of the Panel members should have one. I put it in  
25 front of you. It may be under your binders.

26 MS. CHAPLIN: Thank you.

27 MS. SEBALJ: Thanks.

28 MS. CHAPLIN: Thanks, please. So tab 4?



1 MR. RODGER: Yes, tab 4.

2 MS. CHAPLIN: Go ahead. Thanks.

3 MR. RODGER: In paragraph 5, which is on page 3, there  
4 is a quote, and it talks about the information provided.  
5 Then the last sentence of that quote is:

6 "However, no details need to be provided which  
7 would enable the opposite party to discover  
8 indirectly the contents of the privileged  
9 documents as opposed to their existence and  
10 location."

11 And my friend, Mr. Warren, also in their submissions  
12 of November 9th, paragraph 34, Mr. Warren cites the Kennedy  
13 and McKenzie case where the same principle is articulated,  
14 and the quote from that case is:

15 "In order to discharge this preliminary onus, the  
16 party resisting production is not required to  
17 give particulars that would destroy the benefit  
18 of any privilege which might properly attach to  
19 the documents."

20 And I raise this, again, particularly in light of Mr.  
21 Warren's letter last Friday, where he wanted us to  
22 elaborate on the nature of the contemplated litigation, and  
23 our basis for refusing that is based on this part of the  
24 case law.

25 So you have in the affidavit that it was concerned  
26 with both civil litigation and adversarial process through  
27 regulatory proceedings, such as before this Board. And we  
28 cannot go any further than that.



1       As external counsel, I regularly provide advice on a  
2 risk of potential claims or to assess the likelihood of  
3 success of various legal processes, and what you would be  
4 asking us to do, if you were to accept Mr. Warren's view to  
5 provide the nature of the litigation, is to provide, in  
6 this case, CANDAS with potential benefits of legal analysis  
7 that we provided in the strictest of confidence with  
8 respect to either identifying potential exposures or  
9 potential proactive litigation or process, and the risks  
10 and benefits for those, and that would be inappropriate.

11       So staying with the Brewster decision, and I am still  
12 on page 3, it set out the kinds of information that you do  
13 have to provide, and it is things like the date of the  
14 document, a description of the document, the author, the  
15 recipient, whether the document is an original or a copy,  
16 and a description of the nature of the litigation privilege  
17 claimed.

18       And if you go to our filing on January 30th, schedule  
19 B, behind Mr. McLorg's affidavit, you will see that for  
20 each document we have provided a date, a description of the  
21 document, whether a fax, memo or letter, the author and the  
22 recipient.

23       In our view, Toronto Hydro has gone further than what  
24 is typically provided in an affidavit of documents by  
25 providing the names and identities of the persons, and the  
26 experts relevant to the communications.

27       So I want to turn now to Mr. Labricciosa's affidavit,  
28 and this of course was filed -- this was filed as part of



1 the November 15th, 2011 filing.

2 And the Labricciosa affidavit paints a picture. From  
3 the time of the OEB's CCTA decision in 2005 to the Public  
4 Mobile meeting that Mr. Labricciosa talked about again this  
5 morning in January of 2010, Toronto Hydro didn't have any  
6 particular obvious reasons to really think about the range  
7 of issues raised by wireless.

8 The CCTA decision concerned traditional wire line  
9 attachments. That was the focus, and Toronto Hydro  
10 processed applications for wire line attachments as it  
11 always had done. And that is from paragraph 25 in the  
12 affidavit.

13 Toronto Hydro did enter into an agreement with DAScom  
14 in August of 2009 for pole attachments, but, as Mr.  
15 Labricciosa's affidavit clearly states, wireless  
16 attachments were nowhere specified in that agreement.

17 If DAScom sought to attach non-specified attachments  
18 like wireless, it had to seek approval from Toronto Hydro's  
19 senior management. And that is from the Labricciosa  
20 affidavit, paragraphs 18 to 20.

21 Mr. Labricciosa goes on to say that DAScom submitted  
22 permit applications for wireless - that was not  
23 specifically enumerated in the agreement - and Toronto  
24 Hydro's front line permitting staff did not appreciate the  
25 distinction and processed applications for wireless  
26 equipment.

27 Then starting in January 2010, members of CANDAS began  
28 requesting meetings with THESL senior management and it



1 became then apparent, in THESL's view, that DAScom had been  
2 putting in unauthorized wireless attachments on its poles.  
3 And this starts at the January 13th, 2010 DAScom meeting,  
4 and also in the February 5th, 2010 meeting. And this is  
5 from paragraphs 22, 24, 25 and 27 of the Mr. Labricciosa  
6 affidavit.

7 And what emerges then, Madam Chair, through these  
8 meetings, is it becomes clear that the CANDAS group are  
9 intent on establishing a brand new wireless business in  
10 Toronto - not wire line, but wireless - using Toronto Hydro  
11 poles. And this is not what Toronto Hydro senior  
12 management contemplated at all. And that is found in  
13 paragraph 23.

14 So the meetings start in January, as Mr. Labricciosa  
15 affirmed again this morning. It is becoming an  
16 increasingly acrimonious relationship, where Toronto Hydro  
17 came to the conclusion, back in January, that either a  
18 court process or a potential OEB process was going to be  
19 the result. And that is paragraphs 26 and 32. So on  
20 January 24th, Toronto Hydro retains external counsel in  
21 relation to this difficulty.

22 Toronto Hydro forms an internal senior staff team to  
23 collect information and reports, including expert reports  
24 that were provided to me directly so I could provide legal  
25 advice and analysis for my client.

26 And, again, but for this acrimonious situation, this  
27 work would just not have been started. As I am sure you  
28 can appreciate, over the past couple of years Toronto Hydro



1 has had many things on its plate, and to go off with an  
2 exploration of this issue, there would have been no point,  
3 except for these meetings of the CANDAS group.

4 And Mr. Labricciosa also talks about, in paragraph 29  
5 to 30, his view why the relationship had soured and the  
6 reasons for that. And all of this is in the sworn  
7 statement of Mr. Labricciosa.

8 In addition, as we talked about earlier, you have an  
9 indication from CANDAS itself that litigation is  
10 contemplated. And, once again, as part of the  
11 correspondence that was exchanged and which we wanted to  
12 produce for you, CANDAS claimed litigation privilege -- I'm  
13 sorry, settlement privilege. But the basis of settlement  
14 privilege is the same. Like litigation privilege, the  
15 context is a litigious dispute is in existence or within  
16 contemplation.

17 So here you have a situation where both Toronto Hydro  
18 and CANDAS members are concerned with the same prospect of  
19 litigious disputes, and both are taking steps to protect  
20 their respective privileged position and privileged  
21 information.

22 I would also add that this current proceeding that we  
23 are in before the Ontario Energy Board is not the only  
24 proceeding that we believe is still within the range of  
25 contemplated or anticipated litigation. Toronto Hydro  
26 still is concerned about a civil action or some other court  
27 process from this situation.

28 Now, on our January 30th filing, schedule B, we listed



1 some 32 documents, some of which overlap with the  
2 solicitor-client privilege, but in all cases the work  
3 commences shortly after the January 2010 Public Mobile  
4 meeting, and this continues into August of 2010.

5 The descriptions show how information directed to  
6 counsel and gathered from external consultants and also  
7 internal staff in order for THESL to prepare and assess its  
8 situation on various possible legal processes.

9 I would like to read one quote from our brief of  
10 authorities. This is behind tab 5.

11 And this is an excerpt from the Sopinka text on "The  
12 Law of Evidence in Canada" where there is a quote from an  
13 Ontario General Division case, describing the rationale  
14 supporting litigation privilege. And it bears reflecting  
15 on. And the quote says:

16 "The adversarial system is based on the  
17 assumption that if each side presents its case in  
18 the strongest light, the court will be best able  
19 to determine the truth. Counsel must be free to  
20 make the fullest investigation and research  
21 without risking disclosure of his opinions,  
22 strategies and conclusions to opposing counsel.  
23 The invasion of privacy of counsel's trial  
24 preparation might well lead to counsel postponing  
25 research and other preparation until the eve of  
26 or during the trial so as to avoid early  
27 disclosure of harmful information. This result  
28 would be counterproductive to the present goal



1           that early and thorough investigation by counsel  
2           will encourage an early settlement of the case.  
3           Indeed if counsel knows he must turn over to the  
4           other side the fruits of his work, he may be  
5           tempted to forego conscientiously investigating  
6           his own case in the hope he will obtain  
7           disclosure of the research investigations and  
8           thought process compiled in the trial brief of an  
9           opposing counsel."

10          So in conclusion, Madam Chair, we believe that the  
11       documents that we've identified in schedule B should not be  
12       disclosed, on the basis of litigation privilege.

13          Those are my submissions.

14          MS. CHAPLIN: Thank you. All right. We will take the  
15       morning break now. I am conscious that we want to ensure  
16       that Mr. Warren can leave by noon, so we will take a 15-  
17       minute break, but we will endeavour to be as prompt as  
18       possible in returning. Fifteen minutes. Thank you.

19          MR. RODGER: Just to confirm, Madam Chair, Mr.  
20       Labricciosa also has a commitment. Is he permitted to  
21       leave?

22          MS. CHAPLIN: Certainly.

23          MR. RODGER: Thank you.

24          --- Recess taken at 11:07 a.m.

25          --- On resuming at 11:24 a.m.

26          MS. CHAPLIN: Please be seated. Mr. Warren, whenever  
27       you are ready.

28          **SUBMISSIONS BY MR. WARREN**



1 MR. WARREN: Thank you, Madam Chair, members of the  
2 Panel.

3 My client in its Interrogatory No. 1 sought the  
4 production of all reports, analyses, written  
5 communications, including e-mail, with respect to a policy  
6 which is set out in a letter from Toronto-Hydro to this  
7 Board dated August 13th, 2010.

8 And the request was to include copies of all reports  
9 to Toronto Hydro's management and board of directors with  
10 respect to that policy.

11 One of the Board's procedural orders narrowed the  
12 ambit of that request to the three months immediately  
13 preceding that letter.

14 All of the documents in Mr. McLorg's affidavit of  
15 documents of January 30, 2010 list reports, but they claim  
16 privilege in respect of all of them.

17 So we're left in a position now that notwithstanding  
18 the breadth of our request, we are to receive, if the  
19 privilege claims are upheld, essentially no reports.

20 With respect to the solicitor-client -- claim for  
21 solicitor-client privilege in part 1, as I have indicated,  
22 it applies only to item 3 and we have no quarrel with that.

23 With respect to the litigation privilege, I asked my  
24 friend, Mr. Rodger, in a letter to him on February 1st of  
25 this year, to indicate whether the litigation privilege was  
26 claimed in respect of a civil litigation claim or an  
27 administrative claim, and notwithstanding Mr. Labricciosa's  
28 vague assertion -- I submit vague assertion in his



1 affidavit about administrative claims, Friday afternoon was  
2 the first time that we were aware that a claim for  
3 litigation privilege was made in respect of this  
4 proceeding.

5 I will have submissions with respect to whether or not  
6 this proceeding before this Board qualifies as litigation  
7 for purposes of which a litigation privilege can be  
8 claimed.

9 In my respectful submission, it is an issue of  
10 fundamental importance for this Board to decide, and to  
11 decide it with considerable care.

12 I think it is important at the outset of my  
13 submissions to set these issues in context. There is no  
14 civil litigation; none. As the Board will appreciate, any  
15 time there is unhappiness with respect to contractual  
16 dealings, there will be heated suggestions, perhaps  
17 unheated suggestions, that people should govern themselves  
18 accordingly and that they will see them in court. And  
19 very, very few of those heated or unheated suggestions  
20 actually end up in a civil claim.

21 What we have is nearly two years after those heated  
22 suggestions, there is no statement of claim. There are no  
23 further claims that litigation will be filed.

24 And as I will get to when I deal with the case law, a  
25 claim for litigation privilege does not exist in  
26 perpetuity. It does not exist when there is some vague  
27 possibility of a civil claim. There must be something more  
28 concrete than that, and Toronto Hydro is under an



1 obligation to establish there is something more concrete  
2 than that, and it has failed to do so.

3 And as I will indicate later in dealing with the case  
4 law, the mischief in asserting an open-ended, never-ending  
5 claim for litigation privilege is that it shields this  
6 tribunal from access to important documents required to  
7 make a decision in respect of the application it has before  
8 it.

9 What we do have is this litigation -- is this  
10 application, which, in my respectful submission, is not  
11 litigation as contemplated by the litigation privilege, in  
12 addition to which many of the reports in respect of which  
13 litigation privilege is claimed are drafts of reports  
14 which, in my respectful submission, on the evidence, you  
15 should conclude were filed as part of the prefiled evidence  
16 from Toronto Hydro in this case.

17 Mr. McLorg says, no, they weren't, but he doesn't  
18 know. He hasn't compared the two. And it invites a  
19 substantial measure of is scepticism that reports were  
20 prepared by Dr. Yatchew and Dr. Starkey in draft form, but  
21 were not filed as part of this case.

22 And the fact that they were filed in this case, in my  
23 respectful submission, amounts to a waiver of any privilege  
24 claim that might have been made.

25 It is important, in our respectful submission, to keep  
26 in mind the nature of the Board's processes. While we are,  
27 in a formal sense, still at the discovery stage of this  
28 application, evidence has been filed. Many, indeed most,



1 of the cases on privilege - including most of the ones that  
2 I will be referring to and my friend has referred to - are  
3 cases dealing with the ambit of discovery in a civil claim.

4 And different considerations apply at the discovery  
5 stage before evidence is filed, as I will indicate in  
6 referring to some of the cases; whereas here, evidence has  
7 been filed, different considerations apply about what is or  
8 is not subject to litigation privilege and, in particular,  
9 whether waiver of privilege obtains.

10 Why is this material that my client is seeking  
11 relevant and important? In our respectful submission,  
12 certainly from my client's point of view, a central issue  
13 is why Toronto Hydro, having apparently accepted the 2005  
14 decision of the Board as including wireless communication  
15 devices and entertained applications to allow such  
16 attachments, suddenly changed its mind or apparently  
17 suddenly changed its mind in August of 2010.

18 Was that decision made in good faith? Does the  
19 evidence support the expressed reasons for the decision -  
20 namely, safety, administrative concerns - or were there  
21 other factors at work?

22 That is a central concern for my client and one which,  
23 in our respectful submission, should be allowed to be  
24 examined in the hearing.

25 It seeks information solely for the purpose of  
26 pursuing that line of inquiry, whether, for example,  
27 reports were created for the purpose of justifying a  
28 decision that had been taken for other reasons, or whether



1 they were made in a genuine reflection of concerns set out  
2 in Ms. Byrne's affidavit about safety and other  
3 administrative concerns.

4 Against that background, I would ask the Board if it  
5 would turn up my book of authorities.

6 MS. CHAPLIN: Sorry, Ms. Sebalj, should we be marking  
7 these books of authorities?

8 MS. SEBALJ: I thought about that on the first one.  
9 We can for convenience.

10 MS. CHAPLIN: Let's just do that.

11 MS. SEBALJ: We will mark the brief of authorities of  
12 Toronto Hydro-Electric System Limited dated February 3rd,  
13 2012 as K1.1, and the brief of authorities of the Consumers  
14 Council of Canada as K1.2.

15 **EXHIBIT NO. K1.1: BRIEF OF AUTHORITIES OF TORONTO**  
16 **HYDRO-ELECTRIC SYSTEM LIMITED DATED FEBRUARY 3, 2012.**

17 **EXHIBIT NO. K1.2: BRIEF OF AUTHORITIES OF THE**  
18 **CONSUMERS COUNCIL OF CANADA.**

19 MS. CHAPLIN: Thank you.

20 MR. WARREN: The first case I have cited in my book of  
21 authorities is the Chrusz case, which also appears in my  
22 friend's book of authorities. It is, I think it fair to  
23 say, a foundational case, in the sense that it determines  
24 one of the key issues with respect to privilege, litigation  
25 privilege; namely, whether the test is that there be a  
26 dominant purpose, that documents have been prepared for the  
27 dominant purpose of litigation.

28 It is also a foundational case in the sense that the



1 Ontario Court of Appeal examines the nature of solicitor-  
2 client privilege and litigation privilege. And in light of  
3 my friend's - I say this with respect - rather broad-brush  
4 treatment of the nature of litigation privilege, I am going  
5 to take a few more moments than I had intended to discuss,  
6 to canvass, what the Ontario Court of Appeal said with  
7 respect to litigation privilege.

8       There are a number of basic propositions adopted and  
9 followed by the Court of Appeal in the Chrusz case,  
10 followed in the second case, the Blank case, in the Supreme  
11 Court of Canada, about litigation privilege.

12       First of all, it is an exception - an exception - to  
13 the general proposition that in civil litigation documents  
14 should be produced in order to assist the trier of fact in  
15 getting at the truth of what's going on. It is an  
16 exception to that rule.

17       And the cases, over time, track a continuum from the  
18 early cases which narrow the ambit of discoverability to  
19 the current trend in cases, which is a very broad trend of  
20 discoverability subject to very narrow limitations,  
21 exceptions, one of which is litigation privilege.

22       Now, the second thing about litigation privilege - and  
23 I will return to this subsequently when I deal with a  
24 Saskatchewan Court of Appeal case - is that litigation  
25 privilege is limited in the sense that when there is no  
26 litigation, there is no litigation privilege. When it is  
27 not reasonably contemplated, there is no litigation  
28 privilege. And when litigation ends, the privilege ends,



1 as opposed to solicitor-client privilege, which exists in  
2 perpetuity and can only be waived in the narrowest of  
3 circumstances.

4 Now, against that background, I would ask you to turn  
5 up, beginning at page 34 of the decision -- this is the  
6 separate decision of Justice Doherty, in which he discusses  
7 at some length the principles underlying litigation  
8 privilege.

9 Beginning at paragraph 142, he says:

10 "I do not think, however, that every document  
11 which satisfies the condition precedent to the  
12 operation of litigation privilege should be  
13 protected from disclosure by that privilege. In  
14 my view, the privilege should be recognized as a  
15 qualified one, which can be overridden where the  
16 harm to other societal interests in recognizing  
17 the privilege clearly outweighs any benefit to  
18 the interest fostered by applying the privilege  
19 in the particular circumstances."

20 And then continuing on page 36, paragraph 151:

21 "Litigation privilege claims should be determined  
22 by, first, asking whether the material meets the  
23 dominant purpose test described by Carthy, JA.

24 That is in the first part of this decision.

25 "If it meets that test, it should be determined  
26 whether, in the circumstances, the harm flowing  
27 from non-disclosure clearly outweighs the benefit  
28 accruing from the recognition of the privacy



1 interest of the party resisting production. I  
2 would put the onus on the party claiming  
3 privilege..."

4 I underscore those words:

5 "I would put the onus on the party claiming  
6 privilege at the first stage of this enquiry and  
7 of the party seeking production of the document  
8 at the second stage of the enquiry. I appreciate  
9 that the party seeking production will not have  
10 seen the material and will be at some  
11 disadvantage in attempting to make the case for  
12 production."

13 Now, going down to paragraph 154:

14 "The policies underlying the disclosure interest  
15 are adjudicative fairness and adjudicative  
16 reliability. While we remain committed to the  
17 adversarial process, we seek to make that process  
18 as fair and as effective a means of getting at  
19 the truth as possible. Both goals are in  
20 jeopardy where one party can hide or delay  
21 disclosure of relevant information. The extent  
22 to which these policies are undermined by non-  
23 disclosure will depend on many factors. The  
24 nature of the material and its availability  
25 through other means to the party seeking  
26 disclosure are two important factors. If the  
27 material is potentially probative of evidence  
28 going to a central issue in the case, non-



1 disclosure can do significant harm to the search  
2 for truth. If the material is unavailable to the  
3 party seeking disclosure through any other  
4 source, then applying the privilege can cause  
5 considerable unfairness to the party seeking  
6 disclosure."

7 Now, I pause at this stage to say this is a decision  
8 made in the context of civil litigation. We are not  
9 engaged in civil litigation; we are engaged in an  
10 application, non-adversarial in its nature, from this  
11 Board, seeking two forms of relief: the interpretation of a  
12 2005 decision, and, in the alternative, a determination of  
13 whether or not Toronto Hydro, and by definition, by  
14 implication, other utilities, should be required to allow  
15 access for wireless communication devices to their poles.

16 We are engaged, in other words, in a standard form of  
17 administrative decision making by this Board in a non-  
18 adversarial setting.

19 And so looking at the considerations I have just  
20 reviewed in paragraph 154, this Panel should ask itself the  
21 question: Would the failure to disclose this information  
22 impede in a material way your ability to make a decision on  
23 the fulcrum issues in this case?

24 I then would ask you to turn to the Vancouver  
25 Community College case, which is at tab 3 of my materials,  
26 a decision of a single judge of the British Columbia  
27 Supreme Court.

28 This case and the three cases that follow it are all



1 cases which deal with what I call the modern trend towards  
2 greater discoverability. Looking at page 2 of the  
3 decision, you will see in paragraph 1 the issue that is  
4 framed for the judge's determination:

5 "The questions presently for decision are whether  
6 and to what extent documents in the possession of  
7 an expert witness are producible upon his cross-  
8 examination at trial."

9 You will remember, in the context, that many of the  
10 documents for which we are seeking production are, in fact,  
11 drafts of expert's reports that were prepared for Toronto  
12 Hydro.

13 "Cross-examining counsel who seek their  
14 production says any privilege previously  
15 protecting the documents is lost once the witness  
16 takes the stand."

17 Then turning over to paragraph 27 of the decision, and  
18 I am quoting:

19 "So long as the expert remains in the role of a  
20 confidential advisor, there are sound reasons for  
21 maintaining privilege over documents in his  
22 possession. Once he becomes a witness, however,  
23 his role is substantially changed. His opinions  
24 and their foundation are no longer private advice  
25 for the party who retained him. He offers his  
26 professional opinion for the assistance of the  
27 court in its search for truth. The witness is no  
28 longer in the camp of a partisan. He testifies



1           in an objective way to assist the court in  
2           understanding scientific, technical or complex  
3           matters within the scope of his professional  
4           expertise. He's presented to the court as  
5           truthful, reliable, knowledgeable and qualified.  
6           It is as though the party calling him says:  
7           'Here is Mr. X, an expert in an area where the  
8           court needs assistance. You can rely on his  
9           opinion. It is sound. He is prepared to stand  
10          by it. My friend can cross-examine him as he  
11          will. He won't get anywhere. The witness has  
12          nothing to hide.'"

13          Paragraph 28:

14                "It seems to me that in holding out the witness'  
15                opinion as trustworthy, the party calling him  
16                impliedly waives any privilege that previously  
17                protected the expert's papers from production.  
18                He presents his evidence to the court and  
19                represents, at least at the outset, that the  
20                evidence will withstand even the rigorous cross-  
21                examination. That constitutes an implied waiver  
22                over papers in the witness' possession, which are  
23                relevant to the preparation or formulation of the  
24                opinions offered, as well as to his consistency,  
25                reliability, qualifications and other matters  
26                touching his credibility."

27          Now, I step back from that and invite the Board to  
28          consider what we have here today.



1           Even if -- I would invite the Board to find that Mr.  
2   McLorg's description of the draft reports in respect of  
3   which privilege is claimed for Yatchew and Starkey and  
4   other draft reports, that they were prepared for some other  
5   purpose, that that is simply not credible.

6           In my respectful submission, the logical conclusion is  
7   that these are drafts of the reports that were filed in  
8   this case. But even if they were not, even if they were  
9   not, on the reasoning in this case, speaking only for  
10   myself, I should be entitled, in my client's interest, to  
11   cross-examine the witness, to compare what was in those  
12   reports with what was ultimately filed in this case,  
13   because if you look at the description in part 1, they deal  
14   with the same subject matter as the reports themselves that  
15   were ultimately filed.

16          As this Board will know, it is a legitimate line of  
17   inquiry to determine whether or not an opinion was changed  
18   at some point in the process, why was it changed, what  
19   forces required it to be changed. Was it, for example, at  
20   the suggestion of management within Toronto Hydro? Was it  
21   at the suggestion of internal or external counsel? And do  
22   those changes -- if they existed -- go to the credibility  
23   and reliability of the report?

24          That is consistent with why, when the reports are  
25   filed, privilege is waived.

26          The next case is the Delgamo case, again, a decision  
27   this time of the Chief Justice of the Supreme Court of  
28   British Columbia.



1           And in that case, beginning at paragraph 11, Chief  
2 Justice McEachern says, and I quote:

3           "Thus, the present law requires an expert witness  
4 who is called to testify at trial to produce all  
5 documents which are or have been in his  
6 possession, including draft reports, even if they  
7 come from the file of the solicitor with  
8 annotations, and other communications which are  
9 or may be relevant to matters of substance in his  
10 evidence or his credibility, unless it would be  
11 unfair to require production. It is a  
12 presumption of law that solicitor's privilege is  
13 waived in respect of such matters of substance,  
14 et cetera, when the witness is called to give  
15 evidence at trial."

16           These witnesses have, in effect, been called to give  
17 evidence, because their evidence has been filed.

18           Then at paragraph 20:

19           "First, it is settled law that anything in the  
20 possession of the witness relating to the  
21 litigation must be produced for inspection unless  
22 a claim to continue privilege is properly made.  
23 This would include letters of instruction, fee  
24 arrangements, written communications from the  
25 party or its agents or lawyers relating to the  
26 assignments, memos and drafts, suggestions from  
27 others and any other material which has been or  
28 might be considered by the witness preparing his



1 report or opinion or evidence".

2 And this Board will be familiar that in cross-  
3 examination it is a legitimate line of inquiry, routinely  
4 upheld by the Board, to ask for the instructions that were  
5 given to an expert, any material upon which the expert  
6 relies for the preparation of his or her report, any  
7 changes that were made in drafts and at whose requests.  
8 And that is the stage we are at now.

9 We don't have the witnesses in cross-examination, but  
10 one of the reasons for discovery is to focus the issues  
11 more narrowly to truncate, if possible, the extent of the  
12 inquiry at a hearing. But we are notionally at really no  
13 difference in the process.

14 The next decision is a decision of the Ontario  
15 Superior Court of Justice in Browne and Lavery. Browne and  
16 Lavery is at the far end of the continuum on  
17 discoverability, as the Ontario Court of Appeal has  
18 commented in a decision I will get to momentarily.

19 And in that case, beginning at paragraph 17, under the  
20 heading "The waiver of litigation privilege attached to the  
21 report", paragraph 17.

22 "If the report itself had been disclosed to  
23 opposing counsel, then there would be no doubt  
24 that there had been a waiver of privilege."

25 And then we go to the next page, and in this page,  
26 page 7 and 8, what the judge is doing is reciting passages  
27 from a decision of the Supreme Court of Canada in Regina  
28 and Stone.



1       You will see at paragraph 99 on page 8 in the quoted  
2 section, he refers to the judgment of Justice McEachern  
3 that I referred to earlier, and it is important that we  
4 reiterate this is a passage that was adopted by the Supreme  
5 Court of Canada, and I quote:

6               "As noted by McEachern C.J., once a witness takes  
7 the stand, he/she can no longer be characterized  
8 as offering private advice to a party. They are  
9 offering an opinion for the assistance of the  
10 court. As such, the opposing party must be given  
11 access to the foundation of such opinions to test  
12 them adequately."

13       Then beginning at paragraph 29, the judge summarizes  
14 what he says or the applicable common law rules as follows:

15               report prepared by an expert at the request of  
16 counsel for litigation purposes is privileged.  
17 This would be under the category of litigation  
18 privilege.

19               "(b) By announcing in an opening jury address the  
20 opinion of the expert contained in the report,  
21 counsel waives the privilege in the content of  
22 the entire report.

23               "(c) The waiver extends to information in the  
24 report which would otherwise be subject to  
25 solicitor and client privilege. In Stone, there  
26 was such information in the form of a statement  
27 by the client provided to the expert for  
28 litigation purposes.



1           "(d) Counsel cannot waive privilege in only part  
2           of the report.

3           "(e) Once an expert is called as a witness at  
4           trial, the opposing party is entitled to  
5           production of the 'foundation' of the expert's  
6           opinion."

7           The Ontario Court of Appeal in the Consecoco case, which  
8           is at tab 6 of my authorities, says, you know, Lavery goes  
9           too far and at paragraph 14 says:

10           "This is an area of debate concerning the scope  
11           of information that may be obtained pursuant to  
12           this rule."

13           Again, this -- the important thing to remember about  
14           the Consecoco case is that this is a case dealing with the  
15           discovery stage and specifically with the interpretation of  
16           Rule 31.06 of the Rules of Practice, which deals with the  
17           production of experts' reports at the discovery stage.

18           There are narrower rules applying to the discovery  
19           stage than there are at trial. At trial, the ability to  
20           cross-examine and to obtain information is broader than at  
21           the discovery stage.

22           So in that context, what the Court of Appeal says is:

23           "There is an area of debate concerning the scope  
24           of information that may be obtained pursuant to  
25           this rule. It clearly encompasses not only the  
26           expert's opinion, but the facts on which the  
27           opinion is based, the instructions upon which the  
28           expert proceeded, and the expert's name and



1 address. How far beyond this the right to obtain  
2 foundational information ... extends, need not be  
3 determined here. Suffice it to say that we are  
4 of the view that it does not yet extend as far as  
5 is tentatively suggested in Browne (Litigation  
6 Guardian of) v. Lavery ... We simply proceed on  
7 the basis that the rule entitles the appellant to  
8 obtain on discovery the foundational information  
9 for doctor Grafius' final opinion. As will become  
10 clear, we need not decide in this case the  
11 precise extent of the information that is  
12 discoverable."

13 I am obliged, pursuant to the unwritten rules of  
14 professional conduct, to bring to your attention cases that  
15 may disagree with my opinion.

16 In my respectful submission, the Court of Appeal was  
17 looking at a very narrow issue, which is discoverability,  
18 under this rule. But it still said the foundational  
19 information of the expert's report is to be produced.

20 The next three cases turn to the question of whether  
21 or not an administrative proceeding is litigation for the  
22 purposes of attracting the litigation privilege claim, and  
23 this is, in some respects, the most important issue that is  
24 before you today.

25 Ms. Chaplin will recall that this issue raised its  
26 ugly head in the OPG case a year and a half ago, and the  
27 Board was able to resolve the issues without deciding that  
28 issue. But it has popped up its head again, and



1   regrettably, or otherwise, the Board has to deal with it.

2           There are very few cases that we've been able to find  
3   on this issue. We've produced the three that we've been  
4   able to find. They're all in western Canada. I'm not sure  
5   what that says about the state of our Confederation, or  
6   not, but they're all in western Canada.

7           Now, the first case is the Ed Miller Sales & Rentals  
8   case. It is a decision of the Alberta Court of Appeal, but  
9   underlying it, the underlying issue was whether or to what  
10   extent information in the possession of the Competition  
11   Bureau could be produced.

12           And the argument of the Competition Bureau was that  
13   this was an administrative proceeding and that the  
14   litigation privilege obtained -- sorry, didn't obtain.

15           It says on page 5:

16               " For Miller it is urged that an inquiry by the  
17               Director of Investigation and Research under the  
18               Combines Investigation Act is not litigation.  
19               Alternatively it is said that, if the documents  
20               were ever privileged, that privilege ended once  
21               the Director terminated his inquiry. In my view  
22               both arguments take too narrow a view of the term  
23               'litigation'. Once the Director focussed on the  
24               Caterpillar Companies to inquire whether they  
25               were guilty of offences under the Act, litigation  
26               in the fullest sense of the word was then in  
27               actual progress let alone in contemplation. The  
28               parties could look ahead to many possible



1           procedures."

2           So the issue in that case and the reason that it was  
3   deemed to be litigation was that there was a penalty  
4   involved, a serious penalty, as will be disclosed in the  
5   second of the two cases, which is the College of  
6   Physicians' case, which appears at tab 8.

7           Again, in that case, the issue was whether or not in  
8   this case certain documents that had been prepared at the  
9   investigation stage by the College of Physicians and  
10   Surgeons could be produced.

11          And in that case there are -- they comment on the Ed  
12   Miller case simply because there aren't many cases on this  
13   issue. I take you, in this context, to paragraph 74:

14                 "In both Ed Miller Sales & Rentals and Bank Leu  
15                 AG, the 'target' of an investigation by a  
16                 regulatory agency claimed privilege over  
17                 documents prepared by it or on its behalf in  
18                 anticipation much or in response to the  
19                 investigation. Disclosure of the documents was  
20                 requested in later civil litigation between the  
21                 target and another party. In both cases, the  
22                 court held an investigation by a regulatory..."

23          MS. CHAPLIN: not quite so fast. I know you are  
24   pressed for time, but...

25          MR. WARREN:

26                 "Disclosure of the documents was requested in  
27                 later civil litigation between the target and  
28                 another party. In both cases, the court held



1           that the investigation by the regulatory agency  
2           was litigation and the documents were subject to  
3           litigation privilege."

4           I underscore the words "held by the" -- that the  
5   target of the investigation...

6           Then at paragraph 79 on the following page:

7           "I do not disagree that the interests of the  
8           member being investigated is adversarial to that  
9           of the College and the complainant. This is the  
10          ratio of Ed Miller Sales and Bank Leu AG."

11          However, then at paragraph 81:

12          "At the investigative stage, the College is not  
13          seeking to impose penalties or sanctions against  
14          the member, but through a special deputy  
15          registrar acting under section 21(2) of the MPA  
16          to make findings on which to base a  
17          recommendation."

18          And then the conclusion, which is reached at paragraph  
19   91:

20          "Litigation privilege does not apply to the  
21          documents, as litigation was not a reasonable  
22          prospect when they were created and the dominant  
23          purpose for their creation was not litigation.  
24          The college was not engaged in an adversarial  
25          process when it investigated the applicant's  
26          complaint."

27          The key to the reasoning in this case and the Ed  
28   Miller case and the case that I am going to take you to,



1 which is a BC case, another BC case, is the existence of an  
2 adversarial relationship between the parties.

3 That is the key concept. And what the Board, in my  
4 respectful submission, has to determine on this issue is  
5 whether or not there is truly an adversarial relationship  
6 between Toronto Hydro and CANDAS in this proceeding that  
7 would attract the claim for litigation privilege.

8 Turning, finally, to the oddly named order F06-16  
9 case, which is at tab 9 of our book of authorities, this is  
10 the last commentary we have been able to find.

11 Again, the issue was whether or not litigation  
12 privilege should attach to documents in an administrative  
13 proceeding. And again, the issue that the -- had to be  
14 decided was whether or not that proceeding was adversarial  
15 in nature.

16 Beginning at paragraph 40 on page 12:

17 "I have concluded that the information the  
18 Minister refused to disclose and the basis of  
19 litigation privilege was protected by that  
20 privilege. The scope and application of  
21 litigation privilege in relation to  
22 administrative proceedings and principles for  
23 deciding when proceedings are related to each  
24 other are still developing. In deciding that  
25 litigation privilege applies here, I have kept in  
26 view the underlying policy of litigation  
27 privilege, which is, again, to give the parties  
28 who are adverse in interest in contested legal



1           proceedings confidentiality protection for  
2           information they obtain or create in the cases.  
3           I note that in College of Physicians the Court of  
4           Appeal approved of Ed Miller Sales, which held  
5           that a regulatory investigation can support a  
6           claim of litigation privilege in relation to the  
7           adversarial interests of the target of the  
8           investigation. SE2 and British Columbia were  
9           clearly opposed in the interests in the EFSEC and  
10          NEB hearings. Their interests were adversarial,  
11          as was the case in Ed Miller Sales."

12          Now, the distinction between those three cases and  
13          this case - and it is a critically important policy matter  
14          for the Board to decide, at the risk of a mild case of  
15          hyperventilation on the issue - is whether or not this  
16          application is, in fact, an adversarial proceeding, keeping  
17          in mind that what CANDAS has applied for is simply the  
18          interpretation of a decision, and depending on the outcome  
19          of that portion of the request, a determination of whether  
20          or not, as a matter of policy, utilities should be required  
21          to give access to their poles to wireless communications.

22          It is the kind of proceeding that the Board deals with  
23          all of the time. It is not a fight between the two  
24          parties. No penalty can be visited on Toronto Hydro as a  
25          result of this. They may not at the end of the day be  
26          happy with having to make their poles available to wireless  
27          telecommunications, any happier than they might be, for  
28          example, with respect to a rate order. But that doesn't



1 make it an adversarial proceeding. It is a straightforward  
2 administrative proceeding, as opposed to a civil claim, in  
3 which there is a winner and a loser, damages are awarded or  
4 other kinds of civil penalties -- for example, in the form  
5 of declaratory orders -- are issued.

6 That is not the case here.

7 The final authority I have included in my brief of  
8 authorities is a decision of the British Columbia Court of  
9 Appeal in the Hamalainen case. I cite it simply for the  
10 proposition that appears at paragraph 22 of the decision.

11 The court says:

12 "I am not aware of any case in which the meaning  
13 of 'a reasonable prospect' has been considered by  
14 this court. Common sense suggests that it must  
15 mean something more than a mere possibility, for  
16 such possibility must necessarily exist in every  
17 claim for loss due to injury, whether that claim  
18 can be advanced in tort or in contract. On the  
19 other hand, a reasonable prospect certainly does  
20 not mean certainty, which could hardly be  
21 established unless a writ had actually been  
22 issued. In my view, litigation can properly be  
23 said to be a reasonable prospect when a  
24 reasonable person possessed of all pertinent  
25 information, including that peculiar to one party  
26 or the other, would conclude it is unlikely that  
27 the claim for loss will be resolved without it.  
28 The test is not one that would be particularly



1           difficult to meet."

2           Now, applying that reasoning, in every commercial  
3 agreement, every commercial agreement where there is  
4 inchoate in that commercial agreement -- no matter how  
5 happy it may be at the outset -- inchoate in it is the  
6 possibility of divorce and litigation.

7           So you can't look at every commercial agreement and  
8 say there is a reasonable prospect of litigation.

9           The parties become unhappy. They say unhappy things  
10 to one another. As the solicitors, in that terrible  
11 cliché, say: Govern yourself accordingly.

12          Does that mean there is a reasonable prospect of  
13 litigation? Surely not.

14          And in this case, we've had nearly two years' lapse  
15 since the unhappy letters were exchanged, the unhappy  
16 meetings.

17          And the intervening step is a decision by CANDAS to  
18 seek relief from this court; not relief of the specific  
19 contracts, but an interpretation of a Board decision in an  
20 application, as is its right.

21          I say, with respect, that there is, on the evidence,  
22 no reasonable prospect of litigation, and that branch of  
23 the litigation privilege claim should fail.

24          I have indicated, I will repeat simply because I think  
25 it is so significant, that the policy issues are raised by  
26 this claim.

27          This Panel is not resolving a dispute between the  
28 parties. They are carrying out a statutory function. At



1 bottom, this Panel and the Board as a whole must act not in  
2 the interests of the parties, but in the public interest.

3 The parties must provide evidence that allows the  
4 Board to serve that statutory function. To limit the range  
5 of evidence based on considerations that obtain in the  
6 context of civil litigation is dangerous.

7 Turning, then, finally to what Toronto Hydro's claim  
8 is, in my respectful submission, they have provided no  
9 credible evidence that there is a reasonable prospect of  
10 civil litigation.

11 It seems to me, and I would invite the Board to  
12 conclude, clear that CANDAS has chosen and its members have  
13 chosen not to seek civil remedy.

14 What they are seeking instead, CANDAS is seeking, is  
15 what every other party has a right to do, which is the  
16 interpretation of a Board decision. And no penalty, no  
17 damages are visited on Toronto Hydro as a result of that.

18 Turning, then, finally to the relief which we are  
19 seeking in this particular application, if the Board turns  
20 up part 1 of Mr. McLorg's affidavit, part 1 in schedule B,  
21 in our respectful submission, all of the material save and  
22 except number 3 are reports which the Board should order  
23 production of.

24 MS. CHAPLIN: So that is 1 through 12?

25 MR. WARREN: 1 through 12, with the exception of  
26 number 3.

27 Now, part 2 is in a different category, and the reason  
28 for that is that what was requested in part 2 were the



1 reports that were prepared in relation to Ms. Byrne's claim  
2 in her affidavit that there were safety and administrative  
3 issues related to these pole attachments.

4 Now, in my respectful submission, and at a common-  
5 sense level, these reports are purely factual in nature: I  
6 have this safety concern, I have that administrative  
7 concern. By simply providing the reports to your  
8 solicitor, in-house or external, doesn't cover them by any  
9 kind of privilege.

10 If the Board is to be able to decide the issue raised  
11 by Ms. Byrne in her affidavit, raised by Toronto Hydro in  
12 its motion, it has to have access to those reports.

13 So I go back to Justice Doherty's reasoning in Chrusz.  
14 Where is the balance that you strike? What is the societal  
15 interest?

16 The societal interest is for this Board to make a  
17 decision in the interest -- in the public interest. And in  
18 order to be able to do that, it requires simply the factual  
19 information on which Ms. Byrne relied.

20 The fact that that factual information may at some  
21 point have been tucked into reports that were provided to  
22 the solicitors does not protect them from disclosure.

23 Those are my respectful submissions, and again I thank  
24 the Board for accommodating my schedule.

25 Thank you very much.

26 MS. CHAPLIN: Yes. Mr. Warren, so in respect of the  
27 documents - and these would be items numbered 13 to 32  
28 under part 2 - a number of those are also subject to a



1 claim of solicitor-client privilege.

2 Are you limiting your request to the ones where only  
3 the litigation privilege is claimed?

4 MR. WARREN: Based on the information I provided, that  
5 is all I can do. I don't have enough information. It is a  
6 serious challenge to say that we want to breach solicitor-  
7 client privilege.

8 Unless the Board receives those documents and makes  
9 its own assessment, which of course it is entitled to do, I  
10 have no basis on which to say they should be produced. So  
11 it is only the ones in respect to which litigation  
12 privilege is claimed.

13 MS. CHAPLIN: Just taking you back briefly to the  
14 beginning of your submissions where you laid out -- I think  
15 where you touched upon the issue of the harm that would  
16 arise if these documents were not disclosed, and you were  
17 explaining why you believe them to be relevant and  
18 important, and you talked about one of the central issues  
19 being that Toronto Hydro had apparently accepted wireless  
20 attachments, and then apparently changed its mind, and  
21 inquiring into whether or not that was safety or other  
22 factors.

23 And I am wondering how -- is it relevant? Are  
24 motivations relevant in this regard, or is it more relevant  
25 to limit ourselves to the facts as they exist in  
26 determining the questions that are before us, which, as you  
27 have pointed out, are: Do the CCTA decision apply, and, if  
28 not, should it?



1           MR. WARREN: They're relevant in this respect. The  
2 claim from Toronto Hydro is that there are a cluster of  
3 concerns, safety concerns and so on and so forth, that gave  
4 rise to the decision that was embodied in the August 2010  
5 letter.

6           If, in fact, there were no safety concerns or they  
7 were trivial or -- that's the wrong word -- if they were  
8 not material or if they could be managed, if the concerns  
9 expressed in Ms. Byrne's affidavit are not material, then  
10 that goes to the question of whether or not those concerns  
11 are valid and that the Board should rely on them.

12          And all of those documents, the reports that were  
13 produced, would go to that issue. It is not so much the  
14 motivation for their getting out of it, but whether or not  
15 those claims are made in good faith based on the evidence  
16 that you have.

17          MS. CHAPLIN: Thank you. Thank you, Mr. Warren.

18          MR. WARREN: Thank you very much.

19          MS. CHAPLIN: Ms. Newland, are you ready to go?

20          MS. NEWLAND: Yes, thank you.

21          MR. WARREN: If I might be excused?

22          MS. CHAPLIN: Certainly. Sorry, Mr. Warren, just  
23 before you go, did your client -- maybe Ms. Dulay is going  
24 to cover this off. Did your client have any submissions,  
25 because of course there is the balance -- the Board ordered  
26 the production of the materials relating to that August  
27 letter for three specific months, and also circumscribed  
28 the scope of the part 2. Did CCC have remaining



1 submissions on what should be produced?

2 MR. WARREN: Thank you for reminding me of that. With  
3 respect to the first category, the Board asked for the  
4 reports in a three-month period. We are maintaining our  
5 request for all of the reports that were generated in  
6 respect to that August letter, even those that precede  
7 that.

8 With respect to the second category, which is the  
9 reports - and this is where my friend, Mr. Rodger, has said  
10 it is gargantuan task that will take a lot of time and  
11 money - as I have indicated to Mr. Rodger, we have no  
12 interest in putting Toronto Hydro to the time and expense  
13 of doing that.

14 What we are seeking is some kind of representative  
15 sample of the reports, and I am happy to talk to Mr. Rodger  
16 offline about what constitutes a representative sample of  
17 the reports that underlie Ms. Byrne's claim.

18 What has happened, though, is it would appear that  
19 those reports, because they were embodied in reports that  
20 went to solicitors, are now the subject of a privilege  
21 claim. What I don't know is: Is there a category of those  
22 reports which are not subject to solicitor-client  
23 privilege?

24 So I need to resolve the privilege issue. That having  
25 been -- if it were resolved in favour of my arguments, then  
26 we are seeking production of a representative sample of  
27 those reports, and I am happy to talk to Mr. Rodger about  
28 how we arrive at what the representative sample is.



1           With respect to the other issues that are before you  
2   today, which is the dates of the next step, those are  
3   really issues between the parties and not an issue for my  
4   client. So I have no position on those matters at all.  
5   Thank you.

6           MS. CHAPLIN: Thank you.

7           Ms. Newland whenever you are ready.

8           **SUBMISSIONS BY MS. NEWLAND**

9           MS. NEWLAND: Thank you.

10          I am going to be referring to the CANDAS motion, the  
11   original motion that was filed in this proceeding. In that  
12   motion, behind tab 4, I believe is a copy of the CANDAS  
13   application, and I will be referring to certain portions of  
14   that application in response to remarks made by Mr. Rodger  
15   this morning. So if you could have that before you?

16          Also, I will be referring to the CANDAS reply  
17   submissions on its motion, which is a small -- I have it  
18   cerloxed. I'm not sure if you have it cerloxed, but the  
19   reply submissions that were filed on November 22nd.

20          MS. CHAPLIN: We have all of those documents.

21          MS. NEWLAND: Thank you. A key issue in this  
22   proceeding is whether the no-wireless policy that was  
23   articulated in the August 13th, 2010 letter from THESL to  
24   the Board is justified.

25          On its face, the letter appears to suggest that the  
26   principal reasons for the adoption of the no-wireless  
27   policy are the - I am quoting here from the letter - "many  
28   safety and operational concerns about the attachment of



1 wireless communication equipment to poles." That is what  
2 the first paragraph of that letter says.

3 In our submission, to date there has been scant  
4 evidence provided by THESL to support that assertion,  
5 despite the thousands and thousands of pages that it has  
6 filed in this proceeding.

7 CANDAS interrogatory 1(h), which is the only  
8 interrogatory from CANDAS that is subject to the dispute  
9 about litigation privilege, sought to substantiate the  
10 positions taken in the THESL letter and, in particular,  
11 with respect to the claims about safety and operational  
12 concerns.

13 We sought to substantiate it by asking THESL to  
14 produce presentations, reports, memos that were made to the  
15 THESL board of directors in the period leading up to the  
16 August 13th letter.

17 Now, we have reason to believe that such presentations  
18 were in fact made. What we would like to do is to examine  
19 what was -- what THESL told its board of directors versus  
20 what THESL told this Board in its August 13th letter and  
21 its subsequent filings.

22 So that is the genesis, if you will, of our request.

23 MS. CHAPLIN: And how will that help the Board in its  
24 decision making on the three questions before it?

25 MS. NEWLAND: THESL is trying to persuade the Board  
26 that one of the reasons that wireless attachments should  
27 not be permitted on poles, or the principal reason it  
28 should not be permitted on poles, is related to safety and



1 operational concerns. It is a key fulcrum, if I may put it  
2 that way, of their case at least as we understand it.

3 If in fact there is information that was provided to a  
4 third party, such as Toronto Hydro's board of directors,  
5 that doesn't even mention safety, then we would say that  
6 that puts a lie to THESL's evidence in this case.

7 I should say, and I think I mentioned before, Madam  
8 Chair, that my submissions today with respect to the  
9 privilege issue relate solely to the issue of litigation  
10 privilege and not to solicitor-client privilege. We don't  
11 oppose THESL's claims in that regard.

12 There are two reasons why CANDAS in this proceeding  
13 opposes THESL's claim of litigation privilege. The first  
14 has to do with the dominant purpose test. It is our  
15 submission that the documents in respect of which THESL  
16 asserts litigation privilege were not created for the  
17 dominant, or otherwise, purpose of assisting counsel in  
18 anticipated or contemplated litigation.

19 It is clear from the titles of each of the documents  
20 that were generated and which are now listed in the  
21 schedules to Mr. McLorg's affidavit, that these documents  
22 were generated to aid in the formulation of a new policy  
23 with respect to wireless.

24 Accordingly, in our view, the dominant purpose test is  
25 not met.

26 The second reason that we take the position that we  
27 oppose the assertion of privilege is that even assuming  
28 that litigation privilege does attach - and we don't



1 concede this - then THESL waived the right to assert such  
2 privilege when, in its August 13th, 2010 letter, it invited  
3 the Board to establish a further and a more formal process  
4 to deal with this new policy, should it have any concerns.

5 These are not new submissions on the part of CANDAS.  
6 We made these submissions in our reply, our reply  
7 submissions, our written reply submissions, which I will be  
8 taking you to in a moment.

9 Mr. Warren has covered much of the legal ground with  
10 respect to these particular points, these two particular  
11 points, and I am not going to retread that ground. I am  
12 very grateful to Mr. Warren for all his work in laying out  
13 what the law says about these two issues.

14 I do want to make a few additional points about how  
15 the facts in this case apply to the law.

16 Turning, first, to our submission that THESL has not  
17 met the dominant purpose test, the starting point here, I  
18 believe, is that -- is the responding submissions on the  
19 CANDAS motion. I don't think you have to turn it up, but  
20 in those submissions THESL states, and I quote, that:

21 "The applicability or non-applicability of the  
22 CCTA order was the basis for the CANDAS/THESL  
23 dispute."

24 So they're saying what we were fighting about, what my  
25 client and Mr. Rodger's client were fighting about, was the  
26 basis for the CANDAS -- was the CCTA order.

27 And they go on to say in their reply submissions that  
28 the August 13th letter was prepared for the dominant



1 purpose of anticipated litigation, and I say that the facts  
2 just don't bear out these two assertions.

3 The Labricciosa affidavit sets out the evidentiary  
4 basis for THESL, for what THESL says is the contemplated  
5 litigation underpinning the claim of privilege.

6 And in that affidavit, Mr. Labricciosa - and I  
7 apologize to him if I am mispronouncing his name - states:

8 "The potential fact and nature of THESL's  
9 anticipated or contemplated litigation and the  
10 basis for seeking legal advice is evident from  
11 the correspondence between THESL and certain  
12 members of CANDAS exchanged in the first half of  
13 February 2010."

14 And there's been much discussion about that exchange.

15 The dispute between the members of CANDAS and THESL -  
16 and we don't deny that there is -- there was a dispute - is  
17 described in detail in the CANDAS application, but it  
18 requires a big leap to get from what that dispute was all  
19 about - and I will tell you about that dispute in a moment  
20 by taking you to the CANDAS application - it is a big leap  
21 to get from there to this proceeding, which was triggered  
22 by the filing of the August 13th letter.

23 I can say that the August 13th letter was a huge  
24 surprise to our client. We did not -- we were not able to  
25 get a copy of the letter until some two months after it was  
26 served on the Board or filed with the Board,  
27 notwithstanding repeated requests to THESL. And that is  
28 also in the record of this proceeding.



1           When we finally got a copy of the letter in October of  
2   2010, we considered what our options were. We waited for  
3   quite a long time, because we thought perhaps there might  
4   be a generic proceeding initiated by the Board's own  
5   motion, and when that didn't occur we decided that we had  
6   to do something to trigger an investigation about this.

7           And that is all I am going to say about this, Mr.  
8   Rodger.

9           MR. RODGER: I wasn't sure, Helen, if you wanted to be  
10   sworn in for this evidence, but...

11          MS. NEWLAND: Much of what I am saying is in our  
12   application, Mr. Rodger, all of it.

13          That's where I would like to take the Panel now, is to  
14   our application, because I think it is important for the  
15   Panel to understand the nature of the dispute.

16          In our submission, the nature of the dispute between  
17   CANDAS and THESL was a private dispute, commercial dispute,  
18   about a contract, the pole access agreement that had been  
19   entered into between DAScom and THESL.

20          So if I could get you to turn up the application at  
21   tab 4 of the motion, if I could first get you to turn to  
22   paragraph -- page 3, paragraphs 2.2, 2.3 and 2.4, that is  
23   an overview that we provided about why the Board should  
24   intervene in response to the August 13th letter.

25          We say in paragraph 2.2, and I will read it:

26                "Until August of 2010, THESL complied with the  
27                CCTA order. They did so without distinguishing  
28                between wireless and wire line carriers or



1 equipment. They entered into pole access  
2 agreements permitting the attachment of both  
3 wireless and wire line equipment, charging the  
4 Board-approved rate per pole.

5 2.3:

6 "All of this changed suddenly when, on August  
7 13th, 2010, THESL sent a letter to the Board  
8 advising of a new policy, not to permit the  
9 attachment of wireless equipment to its power  
10 poles. In its letter, THESL expressed the view  
11 that CCTA order did not apply to wireless  
12 equipment."

13 And we go on to state what I have just advised the  
14 Board, that THESL chose not to serve the letter on CANDAS  
15 or any other directly affected parties and refused to  
16 provide a copy of the letter to CANDAS.

17 If you could turn now to page 17 of the application,  
18 which is where we start in the application to explain the  
19 genesis and development of the relationship between the  
20 CANDAS, members of CANDAS, and THESL.

21 THESL was first approached by ExteNet in 2008. And I  
22 am referring now to paragraph 6.8 on page 17.

23 So ExteNet first approached THESL in 2008, and they --  
24 through their legal department, I may add, through their  
25 general counsel and senior vice president Mr. Lawrence  
26 Wilde, as he then was, for -- asking what was the process  
27 for obtaining an access agreement.

28 THESL's department forwarded its standard pole



1 attachment agreement to ExteNet and referred to the current  
2 rental rate of 22.35 cents per pole per use.

3 And that correspondence between ExteNet and THESL's  
4 legal department, and Mr. Wilde in particular, is provided  
5 in the application. I won't bother taking you to it.

6 Now, before we entered into the agreement, the pole  
7 access agreement - when I say "we" I mean DAScom and THESL  
8 - before that agreement was actually inked, there was a  
9 course of dealing and communications and meetings between  
10 the representatives of ExteNet and DAScom, on the one hand,  
11 and THESL.

12 And there were many meetings. As part of that  
13 process, DAScom constructed a full-size prototype  
14 installation of wireless equipment on a pole, so that  
15 Toronto Hydro could understand precisely what was going to  
16 go on the pole and where, and talk about whether it worked  
17 -- whether it worked for Toronto Hydro, whether it was in  
18 accordance with all the safety requirements, all of Toronto  
19 Hydro's internal requirements.

20 And so that was an iterative process. It took a few  
21 months before the agreement was actually inked.

22 Then if you turn over to page 18 of the application,  
23 we go on to describe in July of -- 20th of 2009, there was  
24 a meeting between representatives of ExteNet and Public  
25 Mobile, and David O'Brien, who was then the president and  
26 chief executive officer of THESL, to discuss Public  
27 Mobile's new wireless network.

28 At that meeting, Mr. O'Brien expressed his support for



1 the network, for the new wireless network. So it was at  
2 that point, if there was ever any doubt that senior  
3 management at Toronto Hydro did not understand what was  
4 being proposed by Public Mobile and ExteNet and DAScom,  
5 there could have been no doubt after that meeting.

6 And we have filed, in response to an interrogatory  
7 from THESL, a copy of a letter that was subsequently sent  
8 to Mr. O'Brien from Brian O'Shaughnessy of Public Mobile  
9 thanking him for the meeting and confirming the decisions  
10 that were taken at that meeting with respect to the  
11 development of the Toronto DAS network. So that letter is  
12 on the record of this proceeding.

13 Now, subsequently DAScom entered into the agreement  
14 for licensed occupancy of support structures with THESL  
15 effective August 1st, 2009. It also, by the by, entered  
16 into an identical agreement with THESI effective September  
17 4 of 2009 with respect to their light poles. Both of those  
18 agreements have been filed in this proceeding.

19 Now, contrary to the submissions of my friend Mr.  
20 Rodger, and contrary to the evidence provided in the  
21 affidavit of Mr. Labricciosa, and then today again in his  
22 oral testimony, the distribution pole and light -- the  
23 distribution pole access agreement does authorize the  
24 attachment of wireless equipment.

25 And I would like to take you to the words, because I  
26 think it is important to get this -- get some clarity on  
27 this issue.

28 If you would turn to the reply submissions of CANDAS



1 behind tab E, there is an excerpt from the agreement.

2 MR. RODGER: Tab E?

3 MS. NEWLAND: Yes. There is a definition -- and that  
4 is an excerpt from the definitional section of the  
5 agreement which has been filed in full:

6 "'Attachment' is defined to mean any materials,  
7 apparatus, equipment or facility..."

8 And I emphasize "equipment or facility":

9 "...owned in full or in part or controlled and  
10 maintained by the licensee..."

11 In this case DAScom:

12 "...that is affixed to the poles of the owner or  
13 in span including without limitation..."

14 Then there is a list of included items, and then at  
15 little Roman numeral vii, it states:

16 "Other equipment as may be approved in writing by  
17 owner in its full discretion."

18 It is not clear why that particular section had to be  
19 put in there, because it is clear, from the wording of the  
20 definition leading up to the enumeration of the included  
21 items, that this is not an exhaustive list. "Attachment"  
22 includes these things, but it could include other things.

23 But if the Board were to find that this agreement  
24 requires DAScom to get approval from THESL -- and I don't  
25 think it does. Our submission is that it does not, because  
26 of the wording of the introductory paragraph, but if it  
27 did, then our submission is that approval was given by  
28 virtue of the many -- course of communication between many



1 members of -- the employees of THESL, including senior  
2 members at the -- including Mr. Wilde and Mr. O'Brien. And  
3 that is our submission on that particular point.

4       Getting back to the application, just going on with  
5 the course of dealings between THESL and the members of  
6 DAScom, I would ask you to turn up page 19, paragraph 7.1.  
7 After the attachment agreement was inked, there continued  
8 to be regular, sometimes weekly, meetings between members  
9 of -- employees of THESL and the members of CANDAS to  
10 discuss how this was all going to happen, how the  
11 processing of permits, applications, was going to happen,  
12 because this was a new thing for -- at least for the  
13 members of DAScom and possibly also for Toronto Hydro.

14       So there was a discussion about what the practice  
15 would be to process applications for attachment permits,  
16 and THESL advised the members of CANDAS that it thought it  
17 could -- that three to four weeks would be a commercially  
18 reasonable turnaround time. And that was acceptable to the  
19 members of CANDAS.

20       You should also be aware -- and there is a reference  
21 to Cogeco throughout our materials. You should also be  
22 aware that at the same time DAScom making applications to  
23 attach antenna and related equipment, radio equipment, on  
24 the poles, Cogeco was also making application to THESL to  
25 attach the wire line component off the DAS -- Toronto DAS  
26 network.

27       So there were two components. One was -- and there  
28 was a relationship, a contractual relationship, between



1 Cogeco and CANDAS.

2 And so in order to have this Toronto DAS network be  
3 constructed, you need both components, the wire line and  
4 the wireless.

5 So the two application processes were going on at the  
6 same time, and you will see references to Cogeco's  
7 experience with Toronto Hydro in the application.

8 Now, everything was going along fine until, in our  
9 submission, October 1st, 2009 - and I am now referring to  
10 paragraph 7.2 of our application - when Mr. O'Brien was  
11 succeeded by a new CEO at THESL.

12 For example, in September of 2010, and I am reading  
13 now from paragraph 7.2:

14 "...DAScom submitted 44 note applications to  
15 THESL and by November 13th it had received 32  
16 corresponding permits."

17 So very responsive in that period. But soon  
18 thereafter, things really slowed down and it became  
19 apparent that these applications were not going to be  
20 processed and were not being processed in the three- to  
21 four-week time frame that had been promised.

22 MS. TAYLOR: Excuse me, I have a question here. In  
23 September of 2010, you submitted 44 notes and by November  
24 13th of 2009...

25 So is there an error in paragraph 7.2 where that date  
26 should be September of 2009?

27 MS. NEWLAND: Yes, there is, and thank you for  
28 pointing that out.



1           So the problem with the slowing down of processing of  
2 applications continued all the way through the end of  
3 October into November, all through November. There was a  
4 conference call between Mr. Haines, the CEO of Toronto  
5 Hydro, and the members of CANDAS, where Mr. Haines started  
6 to question the right of the parties to put their wireless  
7 equipment on poles, notwithstanding the clear terms of the  
8 agreement.

9           And then on paragraph 7.4, there is a description, a  
10 high-level description, of the meeting that I believe is  
11 the subject of Mr. Labricciosa's affidavit. And it was a  
12 meeting to resolve the ongoing problems with respect to  
13 delays.

14           Now, we're talking about delays. This is what the  
15 substance of the dispute was between my client and Mr.  
16 Rodger's client. The subject of the dispute was always the  
17 delays and the prejudice that it would have for my client,  
18 and that prejudice is well described in the application,  
19 and I will take you to that.

20           After that meeting, which obviously must have been a  
21 very harsh meeting, based on the evidence we've heard,  
22 there was what we have referred to in the application at  
23 paragraph 7.5 as a stop work order. So there was an order  
24 issued by the senior management of Toronto Hydro to stop  
25 processing all permit applications.

26           And there were some further meetings after. That was  
27 very disturbing to my client, because it had -- my client  
28 had its own commercial obligations under other contracts to



1 deliver this network.

2 So all through January, attempts were made to resolve  
3 this situation, and finally in the early September or early  
4 February of 2010, THESL sent a letter to DAScom - and that  
5 letter is in the record and I will take you to it - saying  
6 that they would continue - "they" being THESL - would  
7 continue to entertain and process pole attachment  
8 applications in accordance with the pole access agreement.

9 And that letter from Mr. Wilde is contained in THESL's  
10 reply submissions at tab number F.

11 "Further to our meeting..."

12 And I am quoting from the letter:

13 "...please be advised..."

14 Sorry. There is two letters here. One is with  
15 respect to Toronto Hydro Energy Services' pole access  
16 agreement with DAScom, and the other is with respect to the  
17 THESL one. So what you need to turn up is the second  
18 letter under tab F.

19 "Please be advised that Toronto Hydro Electric  
20 Systems Limited will continue to entertain  
21 applications for permits and process those  
22 applications in accordance with the terms of the  
23 agreement and to exercise its discretion as  
24 described in the definitions."

25 So in our submission, this was the comfort that we had  
26 been seeking, that it would continue to process  
27 applications.

28 MS. CHAPLIN: Sorry, I am just trying to locate this



1 letter.

2 MS. NEWLAND: It is in our reply submissions.

3 MS. CHAPLIN: Oh, in your -- sorry, I am looking in  
4 the wrong place. So it is your reply submission, tab F?

5 MS. NEWLAND: Correct.

6 MS. CHAPLIN: Okay. Thanks. I have that. We have  
7 that, thanks.

8 MS. NEWLAND: Okay. So my client took this letter --  
9 took some comfort from this letter.

10 Now, this letter did not solve all of the problems,  
11 because, as you will see from paragraphs 7.8 to 7.10 on  
12 page 21 of our application, the slow processing continued  
13 and the backlog of unprocessed applications, DAScom  
14 applications and Cogeco applications, continued until June  
15 of 2010, when Public Mobile decided it could not tolerate  
16 any more delays in the construction of the Toronto DAS  
17 network, and it sought alternative ways of rolling out its  
18 mobile network in Toronto.

19 So it was at that point that we still have outstanding  
20 permits that Toronto Hydro hasn't processed and the numbers  
21 of those permits are set out in a response to an affidavit  
22 from Board Staff.

23 MS. CHAPLIN: Ms. Newland, maybe you can help me, just  
24 so I can put your chronology in a context.

25 The way you're describing it would -- is of an ongoing  
26 disagreement, focussed at least in part on the nature of  
27 the agreement between THESL and one or more of your  
28 clients.



1 I am trying to understand -- I mean, that seems to  
2 point to a pre-existing, an ongoing possibility of  
3 litigation, regardless of what this Panel's decision is on  
4 the three questions before the Board, because it has to do  
5 with the agreement.

6 So I guess I am trying to understand why litigation  
7 privilege wouldn't continue to --

8 MS. NEWLAND: Right. I understand your question.

9 But the point that I would like to make is the dispute  
10 here is not about the August 13th generic policy.

11 The dispute between my client is about the timeliness  
12 of the permit attachments, and the reason for the  
13 timeliness that Toronto Hydro gave us was the lack of human  
14 resources, not that they had a no-wireless policy.

15 So what I am trying to say is that, yes, there was a  
16 dispute that could have led to litigation. It hasn't. It  
17 didn't and it hasn't.

18 MS. CHAPLIN: Yet, I guess, is my --

19 MS. NEWLAND: To civil litigation.

20 MS. CHAPLIN: -- observation.

21 MS. NEWLAND: Right. And that disputes had nothing at  
22 all, in our submission, to do with the articulation of a  
23 generic no-wireless policy. That was never our  
24 understanding of what was underpinning Toronto Hydro's  
25 slowness.

26 We have, in the response to Board Staff OR, CANDAS has  
27 explained that the information that CANDAS was provided by  
28 THESL was that the reason that the permits were not being



1 processed in a commercially reasonable and timely way was  
2 because of a lack of human resources.

3 MS. CHAPLIN: Ms. Newland, I'm sorry, your answer is  
4 not helping me.

5 MS. NEWLAND: Okay.

6 MS. CHAPLIN: If, for example, this Panel were to  
7 determine in favour of your client, that the CCTA decision  
8 did apply, it would seem to me you are still -- your  
9 clients may still be contemplating litigation stemming from  
10 the prior agreement. Or likewise, even if we were to find  
11 that the CCTA agreement does not apply and should not  
12 apply, you still have this prior agreement, in which there  
13 appears to be an ongoing dispute as to how it is properly  
14 interpreted.

15 It is not my understanding that this Panel is going to  
16 engage itself in interpreting that.

17 MS. NEWLAND: No, and we are not asking for that.

18 MS. CHAPLIN: So I am trying to understand why there  
19 isn't still a prospect of civil litigation.

20 MS. NEWLAND: I can't speculate on whether there will  
21 be litigation in the future. I can say that there hasn't  
22 been and there isn't at this point, and that is some two  
23 years after the point when Public Mobile decided it had to  
24 seek alternatives.

25 So whether or not there is a prospect of litigation at  
26 some time in the future, I can't speculate about that.

27 What I can say is if we go back to the claim, the  
28 assertion of privilege that THESL is making, and with



1 respect to the lists of those documents, none of those  
2 documents have to do with a private dispute between THESL  
3 and my client.

4 MS. CHAPLIN: Oh. Okay. So you're saying that the --

5 MS. NEWLAND: I am trying to say you have to put that  
6 dispute in a bucket, and then you have to create another  
7 bucket and say: That's the CANDAS proceeding that we're in  
8 right now.

9 And in the context of this proceeding, we have 11  
10 documents over which THESL is asserting privilege. And  
11 we're saying these documents were not created in the  
12 context of the prior dispute of my client. It was purely a  
13 commercial dispute. It had nothing at all to do with any  
14 of these documents or the August 13th letter, and that is  
15 why I have made so much about the fact that we didn't know  
16 about this no-wireless policy and the August 13th letter,  
17 because the dispute with my client has nothing to do with  
18 that.

19 And whether there is or is not litigation in the  
20 future is not relevant to the decision you have to make  
21 about these documents, because these documents have to do  
22 with the August 13th letter, which is what triggered this  
23 proceeding.

24 So I hope that explains any confusion.

25 MS. CHAPLIN: Thank you. That helps.

26 MS. NEWLAND: So I think this is a good point to leave  
27 the description of the dispute - I think I have toiled that  
28 ground enough - and just get back to the assertion of



1 litigation privilege.

2 It is our submission that the August 13th no-wireless  
3 letter was not prepared for the dominant purpose of  
4 anticipated, reasonably anticipated litigation between  
5 CANDAS and THESL. That claim by THESL is simply not  
6 credible.

7 In our submission, it is an after-the-fact assertion  
8 that has been used to cooper up a claim for privilege  
9 that is arising simply to keep documents private.

10 Now, a regulated utility such as THESL has a much  
11 lower expectation of a right to privacy, but there is a big  
12 difference between privacy and privilege. And in our  
13 submission, what is really at stake here is THESL's right  
14 to privacy.

15 Now, we don't know why THESL is fighting so hard to  
16 keep these documents private. We have our suspicions,  
17 based on speculation within the telecommunication industry,  
18 but in this proceeding there is no evidence about what  
19 their motivation may be.

20 We are seeking these documents in order to establish  
21 that motivation.

22 Mr. Warren addressed this point in response to a  
23 question to you. Motivation - in this case, THESL's  
24 motivation - is germane to the decision you have to make,  
25 because motivation may put a lie to the assertion in the  
26 August 13th letter that the fundamental reason for  
27 articulating a new no-wireless policy has to do with safety  
28 and operational concerns. It is as simple as that.



1       Madam Chair, I am not going to make any submissions on  
2 the second point, the second ground that we oppose the  
3 assertion of privilege, which is that once the August 13th  
4 letter was filed with the Board inviting the Board to  
5 commence a proceeding, if it felt that the policy was not  
6 in the best interests of ratepayers or otherwise, once that  
7 letter was filed with the Board our submission is that  
8 THESL waived any privilege that might have attached to  
9 those documents that are at issue, without conceding that  
10 the documents are privileged in the first place.

11       But if you accept that they were privileged, then we  
12 would ask you to also accept that that privilege was waived  
13 once THESL invited a public proceeding, which is what we're  
14 in right now.

15       The fact that the public proceeding was triggered by  
16 an application from CANDAS as opposed to a decision of the  
17 Board to initiate a proceeding on its own motion is not  
18 relevant, in our submission.

19       The proceeding in which we are engaged in now is the  
20 very proceeding that THESL invited the Board to initiate in  
21 the last paragraph of the August 13th letter. And in doing  
22 that, THESL waived any litigation privilege that might have  
23 attached to the 11 documents in part 1 of Mr. McLorg's  
24 affidavit, and, in fact, in part 2, as well.

25       Finally, I would like to suggest a possible middle  
26 ground for the Board, and it is this. If, after  
27 considering all of the submissions that you have received  
28 in this proceeding, you are unable -- if you are still



1   troubled by what you should do, I would invite you to ask  
2   CANDAS to produce the documents at issue for the review of  
3   the Board.

4           You are certainly entitled to do this. And I refer  
5   you to the case that is included in my friend's Mr.  
6   Rodger's brief of authorities, and I am referring to the  
7   case of -- the Brewster case that was discussed earlier and  
8   the very last -- second-last paragraph of that decision,  
9   which is a decision of the Saskatchewan Court of Queen's  
10   Bench.

11          Paragraph 10 of that decision, the court states as  
12   follows:

13                 "To protect the potentially privileged  
14                 information, the party claiming privilege is not  
15                 required to provide a more detailed description  
16                 to the party opposite."

17          And this is the discussion we've had today about: How  
18   much detail do we get in the list of privileged documents?  
19   And it is very difficult, if you look at that list, to  
20   actually, in some cases, figure out what the document is  
21   about and why privilege is being asserted.

22          For example, let me take you to document number 12 in  
23   Mr. McLorg's affidavit. That is an e-mail from Mary Byrnes  
24   to NGW, who we now know was Mr. Harper, and Mr.  
25   Labricciosa, and the subject of the e-mail was forwarding a  
26   pole attachment survey updated. There was one attachment  
27   to that pole attachment survey, and it was entitled "Pole  
28   Attachment Survey". So it was an e-mail with the attached



1 pole attachment survey.

2 On the basis of that terse description, it is very  
3 difficult to understand what the basis of -- the  
4 evidentiary basis is for an assertion of privilege.

5 It would appear to us it is a simple survey of  
6 attachments to poles, which is something that we have  
7 repeatedly asked THESL to provide and THESL has said it is  
8 too difficult to provide.

9 If there is a reason for the assertion of privilege  
10 with respect to this particular document, it is not  
11 apparent to us. If it's not apparent to the Board, the  
12 Board is entitled to ask for that document and examine it.

13 Similarly, with respect to the issue of all of the  
14 draft reports, by my count in part 1 of Mr. McLorg's  
15 affidavit, there are six draft reports, three by Dr.  
16 Yatchew and three by Mr. Starkey.

17 We have no idea what these reports are in respect of.  
18 We have heard a submission from counsel - not the  
19 witnesses, but from counsel - that these drafts were for  
20 some other litigation contemplated by Toronto Hydro, but we  
21 don't have any evidence about that.

22 Again, we're at a loss to make any further submissions  
23 about that. We certainly can say that, on the basis of  
24 that submission from counsel, the Board should be very  
25 reluctant to attach any privilege to these documents. But,  
26 again, we invite you to ask Toronto Hydro to produce them,  
27 and you can review them and decide if in fact they are  
28 properly the subject of privilege.



1           We don't get to review it, but you can.

2           I would just conclude my submissions by referring back  
3 to the Brewster and Quayle decision in Toronto Hydro's book  
4 of authorities as the authority for what I am suggesting  
5 that you can do. It happens all the time in civil  
6 litigation where the judge, the trier of fact - which you  
7 are, a trier of fact - can ask for these documents and can  
8 review them and make your own judgment, if you feel that  
9 the submissions that you have do not enable you to move  
10 forward in making a decision.

11           MS. CHAPLIN: Ms. Newland, does that conclude --

12           MS. NEWLAND: That concludes my submissions. Thank  
13 you.

14           MS. CHAPLIN: I would like to take you back briefly to  
15 motivation. You have described how that's germane to the  
16 decision, because it may call into question Toronto Hydro's  
17 evidence around the concern of safety as being the primary  
18 driver.

19           I am wondering, but won't we -- won't the Panel  
20 determine the issue of whether or not the safety concerns  
21 warrant the approach that THESL is advocating, and then  
22 regardless of whether or not there were other motivations  
23 that pre-dated that or were contemporaneous with that, why  
24 do we need to know that?

25           We will make a determination around safety on the  
26 strength of the evidence that is provided, how well it is  
27 substantiated or how effectively it is called into  
28 question --



1 MS. NEWLAND: Certainly you do that in every case that  
2 you sit on.

3 But participants in proceedings in every case you sit  
4 on are also entitled to test the evidence. And this is  
5 just one way in which CANDAS is seeking to test the  
6 evidence of Toronto Hydro.

7 In terms of the foundation --

8 MS. CHAPLIN: I guess why I'm asking, even if there  
9 were some other to date unidentified motivation, if THESL  
10 is not relying on that now and they are relying on safety,  
11 isn't your client fully able to examine that, the strength  
12 of that claim --

13 MS. NEWLAND: Yes.

14 MS. CHAPLIN: -- and the Panel will make a conclusion?  
15 So, again, I am wondering what relevance other  
16 considerations may have for our decision.

17 MS. NEWLAND: I think the only way I can respond to  
18 you, Madam Chair, is to say if you had a set of documents  
19 in front of you -- and I'm not suggesting that these  
20 documents say this. But just for the sake of argument, I'm  
21 saying if you were to order these documents to be produced  
22 and you found there was a whole -- that safety and  
23 operational concerns were never a concern with Toronto  
24 Hydro and that there were other motivations -- and I agree  
25 whatever those other motivations are, it is not germane.  
26 That is not my point.

27 My point is if you found, by reviewing those other  
28 documents, that safety and operational concerns were not



1 underpinning -- did not underpin -- was not the impetus for  
2 the August 13th letter, notwithstanding what they have told  
3 you, then I think that would be important information for  
4 you to have.

5 So it is not what other motivations might be disclosed  
6 by those documents, it's the fact of whether or not what  
7 we're being told now is the truth.

8 MS. TAYLOR: So if I may, just for my own edification,  
9 it is the absence of safety and administrative concerns as  
10 it relates to communications with the Board and senior  
11 decision makers that would undermine, in your mind, the  
12 efficacy of the position they're putting forward today; is  
13 that correct?

14 MS. NEWLAND: That's correct, Ms. Taylor. And I would  
15 just add to that that we have worked very hard to invite  
16 Toronto Hydro to explain the basis of its safety and  
17 operational concerns. And it is true they filed the  
18 affidavit of Mary Byrne in response to that request.

19 They also filed other responses to interrogatories,  
20 and we have very, very carefully parsed those responses and  
21 we cannot find a basis for their concern that is  
22 articulated in the letter.

23 So now we're looking further afield.

24 MR. QUESNELLE: Ms. Newland, could you expand a little  
25 bit on what you think the potential outcomes would of a  
26 review by the Panel of the documents?

27 If we were to review those documents and to ascertain  
28 whether or not we felt they were of -- worthy and merited



1 litigation privilege, in what aspect should we be looking?

2 In the aspect of whether or not, if there is a  
3 possibility of civil litigation, whether or not we would  
4 view those documents and hold them off the record if that  
5 potential occurred? Or whether or not we would need it for  
6 our decision-making here? And the balance of those two  
7 societal, you know, objectives, one being the litigation  
8 privilege, and a general societal, but then to our  
9 processes here, which is just a competing interest.

10 Is that the analysis that we should be applying to it?

11 MS. NEWLAND: I don't believe so, sir. What I am  
12 suggesting is the Board could, if it felt it warranted -- I  
13 am not suggesting it should, I am just saying this is  
14 something that is an option that is available to you -- to  
15 examine these documents, to understand the nexus between  
16 the disputes between my client and Mr. Rodger, which is the  
17 dispute that they say is the foundation of the litigation  
18 privilege that they claim.

19 So -- sorry, I have just lost my train of thought.

20 You need to examine these documents to see if there is  
21 a nexus between the documents and the dispute, the  
22 commercial dispute between my client and THESL, because  
23 that is the dispute that they say has led to the assertion  
24 of -- and a claim of privilege in this case.

25 MR. QUESNELLE: Then we would be making a finding that  
26 basically put the parameters around THESL's case in that  
27 civil litigation? We would be, then, opining on whether or  
28 not this is at value to them in that potential civil



1 litigation? Is that the analysis we would have to go  
2 through?

3 MS. NEWLAND: May I have a moment to confer?

4 [Ms. Newland confers with Mr. Kaiser]

5 MS. NEWLAND: Mr. Quesnelle, I think the best way I  
6 can respond to your question is just to say that when you  
7 examine the reports, you might be able to make your own  
8 assessment of whether those reports were created for the  
9 dominant purpose of the litigation in this case and for no  
10 other purpose, but that we need to go back to the test that  
11 underpins the assertion of litigation privilege.

12 MR. QUESNELLE: Thank you.

13 MS. TAYLOR: Can I just ask a follow-on question?

14 How much, and it comes back to this -- I think Mr.  
15 Warren brought it up in a discussion of the cases about it  
16 seems to be a lack of discussion about reasonableness, in  
17 terms of the time to expect litigation.

18 The Board has a process here that one argues is  
19 adversarial, and another argues is not.

20 In determining whether litigation privilege should  
21 apply, how much weight -- and you referred to it as  
22 speculation -- how much concern should this Board have  
23 that, at some point in time undefined in the future, one or  
24 both of the parties may wish to put some form of litigation  
25 into the civil arena?

26 MS. NEWLAND: My response, Ms. Taylor, is that you  
27 heard from Mr. Warren that there is a temporal boundary  
28 that is imposed on the assertion of litigation privilege.



1       So it is always possible that litigation between  
2 parties who continue to have a commercial relationship can  
3 arise at any time in the future, and I can't speculate  
4 whether that could or would ever happen.

5       All I can tell you is that the dispute between my  
6 client and Toronto Hydro arose in that six-month period in  
7 2010 with respect to a timing issue, timing of the  
8 processing of permits.

9       And the privilege that is being asserted here is with  
10 respect to documents submitted with respect -- that  
11 underpin the August 13th letter.

12       So I am afraid I can't be of much more assistance to  
13 you, other than I just can't speculate. But I think a lot  
14 of time has passed. I guess a comfort I can give you is  
15 that a lot of time has passed since the acrimonious meeting  
16 of January 10th, 2010, two years.

17       And there has been no civil litigation, so you will  
18 have to draw your own conclusions from that.

19       MS. CHAPLIN: Ms. Sebalj, how long -- was Board Staff  
20 intending to make submissions, and if so, how long?

21       MS. SEBALJ: We should be brief, 10 minutes. Maybe  
22 less.

23       MS. CHAPLIN: Given what you have heard, Mr. Rodger,  
24 are you still of the view that you would like to respond in  
25 writing on Wednesday, as opposed to later this afternoon?

26       MR. RODGER: Yes, indeed, Madam Chair.

27       And actually, listening to my friend's submissions -  
28 which, you know, frankly are much broader than are in the



1 written - I would like to ask for Thursday afternoon to  
2 file, because I am going to have to go through these  
3 transcripts now and respond to, really, a number of new  
4 heads that I hadn't thought about were in scope here. So I  
5 am going to need an extra day, if possible.

6 I have the East-West Tie meeting here tomorrow, but I  
7 think it's going to take me, along with Toronto Hydro, two  
8 days to reply to all of this.

9 MS. CHAPLIN: We will return to that request later.  
10 But in any event, what we will do now is we will break for  
11 lunch, and then we will hear Board staff's submissions and  
12 then we will turn our mind to the other items that are to  
13 be discussed today. So we will --

14 DR. SCHWARTZ: Madam Chair, I'm sorry, Larry Schwartz  
15 on behalf of Energy Probe. I may have a relatively very  
16 small point to raise that connects to the issue of  
17 privilege, so I could do that after Board Staff.

18 MS. CHAPLIN: We didn't really contemplate submissions  
19 from Energy Probe on this issue since they were not parties  
20 to the motion.

21 DR. SCHWARTZ: That's fine.

22 MS. CHAPLIN: I would --

23 DR. SCHWARTZ: It's very brief.

24 MS. CHAPLIN: I would encourage you maybe to speak to  
25 counsel for Board Staff, and we can ascertain whether or  
26 not that will be required.

27 DR. SCHWARTZ: Thank you.

28 MS. CHAPLIN: We will resume at 2:00 o'clock. Thank



1 you.

2 --- Luncheon recess taken at 1:01 p.m.

3 --- On resuming at 2:11 p.m.

4 MS. CHAPLIN: Please be seated.

5 Dr. Schwartz, I believe you had some brief comments?

6 **SUBMISSIONS BY DR. SCHWARTZ**

7 DR. SCHWARTZ: Thank you very much, Madam Chair.

8 The question that we have arises from Energy Probe  
9 Research Foundation's public interest intervenor status.

10 We have a concern that the Board may wish to consider  
11 that relates to privilege at the hearing, the oral hearing,  
12 if there is to be one.

13 We are concerned that lawyers have directed experts to  
14 make certain statements and, indeed, have written portions  
15 of the expert reports and interrogatory responses.

16 Energy Probe wishes to examine experts on this without  
17 fear of having some kind of privilege being asserted that  
18 would prevent answers.

19 MS. CHAPLIN: Thank you. Ms. Sebalj.

20 **SUBMISSIONS BY MS. SEBALJ**

21 MS. SEBALJ: Yes, thank you. I will attempt to be  
22 brief. As you know, Mr. Rodger and Mr. Warren have laid  
23 out the law for the Panel, and Ms. Newland and Toronto  
24 Hydro's witnesses have laid out many of the relevant facts,  
25 and Board Staff doesn't propose to retread this ground  
26 where it is not necessary to do so.

27 I would suggest that the Panel has, subject of course  
28 to Mr. Rodger's right of reply where he may produce other



1 law, the correct legal principles before it with respect  
2 to, in particular, litigation privileges, as I see it, that  
3 that is the biggest issue before you in this matter.

4 But what we would like to do is highlight some aspects  
5 of the law for the purposes of helping to guide the Panel  
6 in its decision making.

7 We do note at the outset that Board Staff of course is  
8 not a party, per se, to this particular motion and that we  
9 did not participate in the request for further and better  
10 answers to the interrogatories that were the subject of the  
11 original motion, and that, therefore, we're not going to  
12 take a position with respect to whether or to what extent  
13 disclosure of each of the disputed documents should be  
14 required. So this is really a submission with respect to  
15 legal principles as we see them.

16 Beginning first with the Board's authority, Mr. Rodger  
17 brought you to the decision and order of this Board in EB-  
18 2010-0184 dated June 8th, 2011, which is found at tab 1 to  
19 Exhibit K1.1.

20 In particular, he took you to page 4 of that decision,  
21 and I won't take you back. As you know, that is an  
22 accurate iteration of the Board's authority with respect to  
23 adjudicating issues of privilege, and that does not appear  
24 to be in dispute by any of the parties here.

25 But I did want to put the relevant sections of the  
26 Statutory Powers Procedure Act just on the record for this  
27 proceeding. I note that the section that Mr. Rodger quoted  
28 referenced section 5.4 of the SPPA, but I also think



1 section 15 is relevant.

2 So if you will just indulge me for a moment, 5.4(1) of  
3 the SPPA says:

4 "If the tribunal's rules made under section 25.1  
5 deal with disclosure, the tribunal may, at any  
6 stage of the proceeding, before all hearings are  
7 complete, make orders for..."

8 And there is a list of:

9 "(a) the exchange of documents; (b) the oral or  
10 written examination of a party; (c) the exchange  
11 of witness statements and reports of expert  
12 witnesses; (d) the provision of particulars; (e)  
13 any other form of disclosure."

14 Subsection (2) of section 5.4 provides:

15 "Subsection (1) does not authorize the making of  
16 an order requiring disclosure of privileged  
17 information."

18 And you will recall that the decision of the Board in  
19 EB-2010-0184 relied on that section, which was the fact  
20 that the Board wasn't authorized to make an order requiring  
21 disclosure of privileged information as its authority for  
22 investigating whether the information was privileged.

23 But I draw your attention also to section 15(1), which  
24 says:

25 "Subject to subsections (2) and (3), a tribunal  
26 may admit as evidence at a hearing, whether or  
27 not given or proven under oath or affirmation or  
28 admissible as evidence in a court,



1           "(a) any oral testimony; and  
2           "(b) any document or other thing, relevant to the  
3           subject-matter of the proceeding and may act on  
4           such evidence, but the tribunal may exclude  
5           anything unduly repetitious."

6           So this is the section this Board relies upon  
7           frequently to -- essentially it's a relaxing of the regular  
8           evidentiary rules that are applied in a court, because we  
9           are at a tribunal, and so we don't -- we're not as strict  
10          about, for instance, who authored a document, whether it  
11          was a copy of a document, that sort of thing.

12          But subsection (2) of 15 says:

13                "Nothing is admissible in evidence at a hearing  
14                "(a) that would be inadmissible..."

15          Essentially subsection (2) is an exception:

16                "... n a court by reason of any privilege under  
17                the law of evidence; or (b) that is inadmissible  
18                by the statute under which the proceeding arises  
19                or any other statute."

20          So I just wanted to make clear that privilege is not  
21          one of the areas of law of evidence that enjoys the general  
22          exemption that this Board, as a tribunal subject to the  
23          SPPA, enjoys with respect to the strict adherence of  
24          evidentiary principles.

25          So moving on to more particularly the aspects of this  
26          proceeding, with respect to solicitor-client privilege,  
27          Board Staff will not spend any time on this branch of  
28          privilege. It seems clear to us that no party is



1     contesting THESL's claims for solicitor-client privilege  
2     over certain documents.

3             And given the fundamental nature of this class of  
4     privilege and the enduring nature of the privilege, it is  
5     and would be very difficult to challenge such a claim, and  
6     Board Staff sees no indication of that challenge being  
7     required.

8             With respect to litigation privilege, the test has  
9     been articulated in a couple of different ways today,  
10    neither of which are inconsistent with Staff's impression.  
11    But, for convenience, I wanted to point you to an  
12    articulation in the materials filed by THESL, and this is  
13    in its response on the -- sorry, on the original motion.

14            So it is its November 15, 2011 filing, which is its  
15    responding submission in respect to the motions brought by  
16    CANDAS and CCC to compel further and better answers to  
17    specific interrogatories.

18            And in that, you should have three tabs, and under the  
19    third tab, sub D, THESL provided an excerpt from a text  
20    entitled "The Law of Privilege in Canada, Volume 1". It  
21    looks like a fairly recent edition. I see the date May  
22    2011 at the bottom of the page.

23            I just thought it was useful, at page 1246, which  
24    unfortunately I think you just have to leaf through - it is  
25    about halfway through - there is a section 12.175, which  
26    doesn't appear to bear any relationship to the page number,  
27    1246. I think it is just a lawyer's way of making things  
28    as complicated as they possibly can. It is entitled "The



1 One or Two Step Approach in Determining Litigation  
2 Privilege".

3 And it says, "In Mamaca (Litigation Guardian of)" -- I  
4 may or may not be pronouncing that properly:

5 "... v. Coseco Insurance Co. connecting the  
6 anticipation of litigation enquiry with the  
7 dominant purpose test, the court confirmed the  
8 master's articulation of a two-step approach in  
9 determining litigation privilege. The two steps  
10 were: (a) On what date was there a reasonable  
11 apprehension of litigation; and, (b) For each  
12 document prepared after that date, was the  
13 dominant purpose in preparing the document to  
14 assist in the apprehended litigation?"

15 And I just note that that was also confirmed in the  
16 Blank case, which is the Supreme Court of Canada's  
17 articulation with respect to litigation privilege at  
18 paragraph 60.

19 Sorry, I just thought it would be helpful to sort of  
20 set that out for you. I also note the Mamaca case has been  
21 also provided in CCC's supplementary book of authorities as  
22 part of its submissions on the original motion.

23 So with respect to the application of litigation  
24 privilege in this case -- so I've sort of broken it down to  
25 whether and when.

26 So whether litigation privilege exists, as Mr. Warren  
27 has suggested and with reference to the cases that he  
28 directed your attention to, the fact that a party retains a



1 lawyer, and that reports are generated subsequent to that  
2 retainer, do not in and of themselves lead inextricably to  
3 a conclusion that litigation was apprehended. If that was  
4 so, you can imagine every client would make a habit of  
5 retaining a lawyer and generating reports to ensure that  
6 nothing could be disclosed later.

7 The test, as articulated again in the cases that Mr.  
8 Warren took you to, is more objective than that.

9 Essentially, it is a reasonable person test.

10 However, I note that obviously the perceptions of  
11 Toronto Hydro -- which are documented in the Labricciosa  
12 affidavit and were part of the cross-examination today --  
13 should, in our submission, be part of what the Panel  
14 considers in determining whether and when litigation was  
15 apprehended.

16 So while it is a reasonable person test, the only  
17 information that you have before you is the information  
18 provided by Toronto Hydro, and so what weight you give to  
19 that evidence is, of course, up to the Panel, but it is  
20 indicative of whether or not litigation was apprehended.

21 In terms of when litigation was apprehended, I  
22 highlight for the Board that there is some question as to  
23 whether -- if the Board is convinced that litigation was  
24 apprehended or contemplated at all -- whether the date of  
25 such apprehension is sometime in January, 2010, which is,  
26 as we've heard, the Public Mobile meeting and dates around  
27 there, sometime in May of 2010, which, as I understand it,  
28 is the first date that we have for a letter from one of



1 CANDAS members, or one or more, to Toronto Hydro, or some  
2 other date, which is different from both of these.

3 It seems from Board Staff's observation that January  
4 2010 is the earliest evidence of acrimonious moments in a  
5 meeting, as Mr. Warren has indicated. However, the law on  
6 the subject of whether litigation is contemplated applies  
7 the reasonable person test, and since commercial dealings  
8 and the relationships that underpin them can often run the  
9 gamut from perfectly civil to disputes at the point of  
10 actually filing a Statement of Claim, this Panel needs to  
11 ask itself, based on the information it has before it,  
12 whether it was reasonable for Toronto Hydro to have  
13 apprehended that litigation at all, and if so, when, based  
14 on the -- again, the reasonable person test and the  
15 knowledge that commercial dealings can often be acrimonious  
16 without being litigious.

17 With respect to the question of whether the Board's --  
18 this proceeding before the Board amounts to litigation for  
19 the purpose of litigation privilege, again, Mr. Warren has  
20 taken you to a number of cases that are relevant. And he  
21 presented, I think, a very balanced approach, because those  
22 cases aren't necessarily definitive on the point.

23 I will tell you that I did spend some time attempting  
24 to get some more definitive law on this point, and -- that  
25 is the point of what is litigation for the purposes of  
26 litigation privilege, and came up wanting. Unfortunately,  
27 the cases are very scant on this point.

28 Since I feel that Mr. Warren has accurately reflected



1 the state of the law on the point, and I anticipate that  
2 Mr. Rodger will provide additional points in his reply,  
3 what I intend to do is provide Board Staff's view, strictly  
4 from a principled or policy point of view with respect or  
5 in the context of the mandate of this Board.

6 Most of this will be painfully obvious to everyone in  
7 the room, but I will set it out for the record in the hopes  
8 of assisting the Panel in its analysis.

9 This Board is, of course, a creature of statute. All  
10 of its powers, rights and obligations are set out in the  
11 OEB Act, mainly with, of course, some -- to a lesser  
12 extent, some other acts, like the Electricity Act and the  
13 Statutory Powers Procedures Act.

14 The Board has objectives, and while I won't go through  
15 the exercise of reading them all into the record, because  
16 many of us could -- probably have them committed to memory,  
17 Board Staff submits that the general view is that the Board  
18 has a public interest mandate.

19 And while there has been much discussion over many  
20 proceedings at this Board and others with similar mandates  
21 about just what that means, what the public interest means,  
22 at the margins I would suggest that at its core, what it  
23 does not mean -- potentially excluding compliance matters  
24 involving penalties -- is that the Board's processes are  
25 litigious. So it does not mean that the Board's processes  
26 are litigious in the sense of being adversarial; in the  
27 sense of needing to provide parties with the protections  
28 afforded by litigation privilege. In other words, the



1 protection from having to disclose strategic information  
2 prepared in anticipation of litigation.

3 At the Board, Board Staff would submit, the stakes are  
4 different. The decisions made and the orders issued are in  
5 the public interest, and they're not intended to redress  
6 some harm as between two or more parties.

7 As such, we would suggest that the Board's processes  
8 are not litigation for the purposes of litigation  
9 privilege, and we would suggest that if you find that this  
10 proceeding is not litigation - in other words, if you agree  
11 with Board Staff that this litigation is not litigation for  
12 the purposes of litigation privilege - then the only way  
13 that any of the documents over which THESL has claimed  
14 litigation privilege can be immune from disclosure is if  
15 you also find that there is another or more than one other  
16 reasonably apprehended piece of litigation for which the  
17 privilege claim is made.

18 And on that point, you have heard much this morning  
19 about the two years that have passed since Toronto Hydro  
20 says it first apprehended the litigation. And again,  
21 unfortunately, while the law is clear on when litigation  
22 privilege ends, when litigation is actually -- has actually  
23 become a reality -- in other words, the case of -- the  
24 Supreme Court of Canada case in Blank is very clear that  
25 when litigation ends, litigation privilege ends.

26 There is very little in the way of guidance that I  
27 could find as to when reasonable apprehension of litigation  
28 ends in the absence of an actual lawsuit, an actual



1 Statement of Claim being filed.

2 What I would suggest -- again, from sort of just a  
3 first-principles basis -- is that it cannot last forever.  
4 And as many have told you, it is very different from  
5 solicitor-client privilege in this way. So it is for the  
6 Board to determine whether the reasonable apprehension of  
7 litigation continues, using the objective test iterated  
8 previously; in other words, based on the evidence before  
9 you and understanding that it is Toronto Hydro's onus to  
10 discharge.

11 I also wanted to speak briefly with respect to  
12 narrowing the ambit of litigation. Mr. Warren spoke about  
13 this also, but again, I wanted to sort of put it in the  
14 context of Board proceedings -- sorry, narrowing the ambit  
15 of litigation privilege.

16 As Mr. Warren told you, there has been a slow erosion,  
17 if you will. While solicitor-client privilege has become a  
18 bit of a vault, in the sense that it is permanent, it is --  
19 it arises immediately upon communications between a lawyer  
20 and his or her client, and if anything, that class of  
21 privilege has increased over time. The litigation  
22 privilege has narrowed over time.

23 I would suggest that this resonates with the views of  
24 this Board, and while the Board doesn't often deal with  
25 privilege claims -- it has of course in the past, but not  
26 on a regular basis -- it does deal with confidentiality  
27 claims, on an almost daily basis.

28 While I understand there are some significant



1 differences between the two -- the policy for it, the  
2 rationale for it, and the purpose -- it is still  
3 instructive to use this analogy for the concept of  
4 balancing disclosure with the public nature of the Board's  
5 mandate, and therefore its proceedings, and the need to  
6 properly protect information that parties claim are, in  
7 this case, privileged or confidential.

8         For this -- I apologize, I didn't make copies, but I  
9 am going to refer to the Practice Direction on  
10 Confidentiality, which I expect, again, people in the room  
11 are familiar with.

12         At the very outset of that practice direction, it  
13 says:

14                 "The Board's general policy is that all records  
15 should be open for inspection by any person,  
16 unless disclosure of the record is prohibited by  
17 law. This reflects the Board's view that its  
18 proceedings should be open, transparent and  
19 accessible. The Board therefore generally places  
20 materials it receives in the course of the  
21 exercise of its authority under the Ontario  
22 Energy Board Act and other legislation on the  
23 public record, so that all interested parties can  
24 have equal access to those materials. That being  
25 said, the Board relies on full and complete  
26 disclosure of all relevant information in order  
27 to ensure that its decisions are well informed,  
28 and recognizes that some of that information may



1           be of a confidential nature and should be  
2           protected as such. This Practice Direction seeks  
3           to strike a balance between the objectives of  
4           transparency and openness and the need to protect  
5           information that has been properly designated as  
6           confidential. The approach that underlies this  
7           practice direction is that the placing of  
8           materials on the public record, which of course  
9           is a bit different than privilege, is the rule,  
10          and confidentiality is the exception. The onus  
11          is on the person requesting confidentiality to  
12          demonstrate to the satisfaction of the Board that  
13          confidential treatment is warranted in any given  
14          case."

15           I understand that, you know, this may be reaching a  
16          bit, but I just thought that when we look at that, and then  
17          we look at paragraph 61 of the Blank, the Supreme Court of  
18          Canada's decision, which is at tab 2 of Exhibit -- no. Tab  
19          3 of Exhibit K1.1, which is Toronto Hydro's brief, it says  
20          there:

21                   "While the solicitor-client privilege has been  
22                   strengthened, reaffirmed and elevated in recent  
23                   years, the litigation privilege has had, on the  
24                   contrary, to weather the trend toward mutual and  
25                   reciprocal disclosure which is the hallmark of  
26                   the judicial process. In this context, it would  
27                   be incongruous to reverse that trend and revert  
28                   to a substantial purpose test."



1           So that was in the context of deciding whether the  
2   dominant purpose or the substantial purpose test applied,  
3   but I thought that first sentence was sort of synonymous  
4   with what the Board is saying in its practice direction on  
5   confidentiality, and just a general sort of -- as a  
6   statement of general policy, reflected the nature of the  
7   Board's proceedings and the need to get as much information  
8   on the record as possible, which, again, I think speaks to  
9   the nature of the Board's processes as not being  
10   adversarial and, therefore, favouring disclosure as opposed  
11   to the keeping of documents either confidential or  
12   privileged.

13           I also had a couple of other points, just small  
14   points, and this may be very obvious, where solicitor-  
15   client privilege and litigation privilege overlap, and if  
16   you are convinced as a Panel that the solicitor-client  
17   privilege claim is founded, the inquiry, in Board Staff's  
18   view, is over and the document may not be disclosed.

19           And so given that there doesn't seem to be any contest  
20   from anyone here with respect to solicitor-client  
21   privilege, that certainly eliminates the number of  
22   documents that need to be considered.

23           I also wanted to bring your attention, again, in the  
24   Blank decision, to just a couple of paragraphs down,  
25   paragraph 64. There is a bit of -- there seems to be a bit  
26   of a conflict in the case law with respect to the question  
27   of whether the collection of documents that pre-existed the  
28   privileged claim by a solicitor in the -- in preparation



1 for litigation can be subject to litigation privilege.

2 At best, this may be considered obiter, but I thought  
3 it was instructive. And the reason I am bringing it up is  
4 I think for the same reason that Ms. Newland brought up  
5 number 12 in the McLorg affidavit, which -- just as an  
6 example, which you will recall is an e-mail from Mary Byrne  
7 to NGW, which we have determined is Harper and Labricciosa,  
8 and the subject is: Forward Pole Attachment Survey  
9 updated, dated August 16th, 2010.

10 To all outward appearances, or certainly in Board  
11 Staff's view, this looks like a pole attachment survey.  
12 The date on it is August 16th, 2010. It is not immediately  
13 obvious to us that a pole attachment survey would have been  
14 done for the purposes of litigation, and if the pole  
15 attachment survey is done as a matter of course, as a  
16 matter of the normal business activities of Toronto Hydro,  
17 the question then becomes whether litigation privilege can  
18 be extended to such a document.

19 And this paragraph in the Blank decision I think is  
20 instructive. It says:

21 "Extending the privilege to the gathering of  
22 documents resulting from research or the exercise  
23 of skill and knowledge does..."

24 Not:

25 "...appear to be more consistent with the  
26 rationale and purpose of the litigation  
27 privilege. That being said, I take care to  
28 mention that assigning such a broad scope to the



1           litigation privilege is not intended to  
2           automatically exempt from disclosure anything  
3           that would have been subject to discovery if it  
4           had not been remitted to counsel or placed in  
5           one's own litigation files. Nor should it have  
6           that effect."

7           So essentially what I think is being said here is  
8 documents that either were otherwise created or would have  
9 been otherwise created, but are then made part of the  
10 solicitor's brief, there is some question as to whether  
11 litigation privilege applies, but certainly the Supreme  
12 Court of Canada seems to say that it should not -- that  
13 litigation privilege should not have that effect.

14          MR. QUESNELLE: Just before --

15          MS. TAYLOR: I was going to ask the same question. Go  
16 ahead.

17          MR. QUESNELLE: It could be. Ms. Sebalj, I want to  
18 see if you perhaps misspoke. This is paragraph 64 you're  
19 citing here?

20          MS. SEBALJ: Yes.

21          MR. QUESNELLE: Starting off - I am going back to the  
22 transcript here - where you picked up on "the research or  
23 exercise of the skill and knowledge does appear to be more  
24 consistent"?

25          MS. SEBALJ: Yes, did I say "does not"?

26          MS. TAYLOR: Mm-hmm.

27          MS. SEBALJ: I apologize Yes, "does appear". I don't  
28 know why I put that in there.



1 MR. QUESNELLE: Okay, thank you.

2 MS. SEBALJ: Just a couple of last points.

3 I just wanted to mention, with respect to schedule B,  
4 part 2, which I think we have spent a little bit less  
5 attention on, and I don't think you need to turn it up, but  
6 I had to go back to the original question that was asked,  
7 because of course the Board reformulated the question in  
8 creating the subset of documents that had to be required.

9 But it originates, I believe, as part of CCC IR 7,  
10 which says:

11 "In paragraph 40 of the affidavit, Ms. Byrne  
12 asserts that wireless attachments create unique  
13 issues that affect the safety, adequacy,  
14 reliability and quality of electricity service.  
15 In paragraphs 42 to 46 inclusive, Ms. Byrne  
16 provides details of those issues. For the period  
17 from the CCTA order to August 13, 2010, please  
18 provide all reports, analyses and communications,  
19 including correspondence and e-mails, describing  
20 or reporting on the issues described in  
21 paragraphs 42 to 46 inclusive of Ms. Byrne's  
22 affidavit."

23 I just wanted to highlight that, because, for me, I  
24 had to go back and remind myself that this is all about  
25 safety, adequacy, reliability and quality of electricity  
26 service being affected potentially by these attachments.

27 When I go to schedule B, part 2 of Mr. McLorg's  
28 affidavit, I don't see the word "safety" once in any of



1 those documents, which I found -- and I may be wrong, if  
2 there it is there and I missed it -- I thought I reviewed  
3 it accurately.

4 So I was a bit confused by that and about the nature  
5 of these documents and how they relate back to the original  
6 inquiry. I guess from Board Staff's perspective, we have a  
7 difficult time determining the relevance of these documents  
8 back to the original inquiry. So I just wanted to raise  
9 that.

10 I do note that in number 16, it says "LDC pole  
11 attachment" issues, but that is the only one where I can  
12 see that we're talking about issues or safety or other  
13 matters that relate back.

14 So the only remaining and sort of concluding remarks I  
15 would make relate back to this question of really what  
16 options the Panel has with respect to findings vis-à-vis  
17 litigation privilege in this proceeding.

18 If the Panel determines that this proceeding is not  
19 litigation for the purposes of litigation privilege and  
20 that there is no other reasonably apprehended litigation,  
21 then I think that logic follows that those documents over  
22 which litigation privilege has been claimed should be  
23 disclosed.

24 If, on the other hand, you find that this is  
25 litigation for the purposes of litigation privilege, then  
26 obviously a review of each of the documents and an  
27 application of the test needs to be done. If -- and then  
28 you get into optionality.



1           If -- then you get into optionality, but if, either  
2   way, whether or not this is or is not litigation for the  
3   purposes of litigation privilege, there is another piece of  
4   litigation which this Panel determines is reasonably  
5   apprehended, then the question for the Panel will be to  
6   what extent the litigation, the claims of litigation  
7   privilege should be sustained or maintained in order to  
8   protect those documents from disclosure for future  
9   litigation.

10          Those are our submissions, unless you have any  
11   questions.  Thanks.

12          MS. CHAPLIN:  Thank you.  We don't have any questions.  
13   Thank you, Ms. Sebalj.

14          All right.  So that brings us to the matter of THESL's  
15   reply, and as I understand it, Mr. Rodger, you are  
16   requesting to file that in writing by close of business on  
17   Thursday; is that correct?  By 4:45?

18          MR. RODGER:  Yes, please.

19               **SUBMISSIONS ON CONFIDENTIALITY CLAIMS**

20          MS. CHAPLIN:  Okay.  And the Board is prepared to  
21   grant that request.  So we will expect that on Thursday,  
22   4:45.

23          So that, I think, brings us back to -- we still have  
24   some items outstanding for purposes of today.  I am going  
25   to suggest that we deal with the confidentiality claims at  
26   this point.

27          Just to ensure that we are all on the same page, I  
28   believe that Toronto Hydro has made a confidentiality claim



1 with respect to sort of two items, one of which is a  
2 package of items. So one is the pole attachment agreement  
3 between Cogeco and THESI, which was filed on December 23rd,  
4 2011. And the other is items 2 through 9, as identified on  
5 schedule A of Mr. McLorg's affidavit, which was filed on  
6 January 30th.

7 Am I correct in my enumeration of the...

8 MR. RODGER: That's correct, Madam Chair.

9 MS. CHAPLIN: Do you have any further submissions on  
10 this?

11 **SUBMISSIONS BY MR. RODGER**

12 MR. RODGER: Yes. I think if I could take the  
13 schedule A ones. First, the nine documents, as I say,  
14 Toronto Hydro believes they're relevant. The only reason  
15 we flagged them as "confidential" is because the  
16 information comes further to an agreement with DAScom, but  
17 I believe - and Ms. Newland can speak to this - I believe  
18 Ms. Newland has no issues with keeping these documents  
19 confidential now?

20 MS. CHAPLIN: Is that correct, Ms. Newland?

21 MS. NEWLAND: That is correct, Madam Chair.

22 MS. CHAPLIN: So just for purposes of making sure the  
23 record is clear, so now items 2 through 9, which were  
24 identified on schedule A of Mr. McLorg's affidavit and were  
25 filed in confidence on January 30th, 2011 will now be --  
26 were they filed, each page identified as "confidential"?  
27 All right.

28 Then perhaps a fresh set could be filed by THESL not



1 marked "confidential" and we will ensure those are put on  
2 the public record.

3 MR. RODGER: And maybe just an add-on to this, that --  
4 I think it was Mr. Warren's point -- that in our view these  
5 documents, 1 to 9, they are representative of the types of  
6 reports, among other things, that deal with safety issues.

7 So for example, we have included, just to give you one  
8 example -- yes, you know, behind tab 4, "April 30th, 2010  
9 safety concern and non-compliance incident report."

10 When you go through that, you will see, among other  
11 things, a picture of a pole with unconnected wires,  
12 unattached and so on. So I think this will go to some of  
13 the issues that have been raised earlier on about giving  
14 examples of representative incident reports. This should  
15 meet that requirement.

16 And for the second document, the Cogeco agreement,  
17 just to step back a moment, Madam Chair, the actual  
18 agreement in question was an agreement from January 2007  
19 and it was between Toronto Hydro Energy Services Inc. and  
20 Toronto Hydro Telecom Inc. And Toronto-Hydro Telecom was  
21 subsequently bought by Cogeco.

22 If you like, this was one of the legacy issues, if you  
23 like, that Toronto Hydro Electric Systems Limited has  
24 inherited because of the street lighting decision.

25 We are actually trying to explore a couple of issues  
26 on this agreement.

27 The initial agreement was entered into January 1,  
28 2007, but it only had a four-year term. And we have not



1 been able to ascertain whether this agreement was actually  
2 renewed.

3 This was a matter that the former general counsel, Mr.  
4 Wilde, would have been responsible for. As you know, he is  
5 no longer with Toronto Hydro. So we don't have the answer  
6 to that, whether this is even a live agreement any more.

7 So on this one, we would like to try and endeavour,  
8 first of all, whether it is still live or it has been  
9 extended. It does contain commercially sensitive  
10 information, both in terms of terms and conditions and  
11 pricing, but as I say, it may be irrelevant now if it's  
12 been expired. It is a number of years old.

13 So on this document we would like the Board -- we  
14 would ask the Board if we could get back to you on this,  
15 once we can nail down some of the facts around its  
16 continuation or not.

17 MS. CHAPLIN: One moment.

18 [Board Panel confers]

19 MS. CHAPLIN: Okay. So I guess we are awaiting  
20 further information from Toronto Hydro. So I guess if it  
21 is not, if it wasn't renewed, then I guess the question  
22 will be what -- is there a document that governs that  
23 relationship? So we will need an answer to that.

24 MR. RODGER: Yes, yes.

25 MS. CHAPLIN: So be that as it may, maybe the best way  
26 to ask this is if either this agreement continues or there  
27 is another one, which may subsequently be filed, which  
28 would also, I expect, be under a confidentiality request,



1 does CANDAS have an -- object to the confidentiality?

2 MS. NEWLAND: No, we do not, Madam Chair.

3 MS. CHAPLIN: And does, Ms. Dulay, does Consumers  
4 Council have any objection to the request for  
5 confidentiality?

6 MS. DULAY: No.

7 MS. CHAPLIN: So we will wait to hear what -- either  
8 that agreement continues in force, or if not, if there is  
9 some subsequent agreement which would also be filed, and it  
10 will be granted confidentiality.

11 MR. RODGER: Thank you. Under the category of  
12 confidentiality, maybe there is just one more matter I  
13 could flag, and Ms. Newland can help with this.

14 This goes to the letters that have been referred to a  
15 couple of times. One is dated May 10th, 2010, from DAScom  
16 to Clare Copeland, the Toronto Hydro chairman. And the  
17 other is dated June 7th, 2010, from Lawrence Wilde, then-  
18 general counsel, to DAScom.

19 These are the two that CANDAS has claimed settlement  
20 privilege over. I wasn't sure from my friend whether they  
21 have now waived that privilege, so that these two letters  
22 would be filed publicly.

23 **SUBMISSIONS BY MS. NEWLAND**

24 MS. NEWLAND: No. What I said is if we thought it  
25 would assist the Board, and if my -- if my client is  
26 prepared to waive settlement privilege, then we will advise  
27 the Board as soon as possible.

28 MR. RODGER: Okay. All right. So we will leave that,



1 then, until we hear from Ms. Newland.

2 It would be helpful to know that before we gave our  
3 reply, because I would quote from the letters in my reply.  
4 That's the only timing issue.

5 MS. NEWLAND: I understand, and we will endeavour to  
6 get back to you as soon as possible.

7 MR. RODGER: All right. Thank you.

8 **PROCEDURAL MATTERS**

9 MS. CHAPLIN: So I believe that completes the  
10 confidentiality item.

11 So another item before us today is the balance of the  
12 materials which remain outstanding from the Board's  
13 December 9th order.

14 The Board in that December order identified material  
15 to be produced by THESL, and the Board subsequently ordered  
16 THESL to produce the subset of material, which it did so on  
17 January 30th. And that is what we have discussed earlier  
18 today.

19 So now what we would like to hear is submissions from  
20 parties as to whether the balance of that information  
21 should still be produced.

22 We heard submissions, some brief submissions from Mr.  
23 Warren, and I gather from that that CCC is looking for the  
24 balance of the materials -- well, he is looking for the  
25 representative sample of the materials that support the  
26 claims of safety concerns, and he is looking for the  
27 balance of the materials in respect of the -- I guess I  
28 will call it the first question, which was communications



1 with reports or briefings for the Toronto Hydro board of  
2 directors or senior management with respect to the August  
3 13th Toronto Hydro letter.

4 So, Ms. Dulay, were there any further submissions from  
5 Consumers Council on those questions?

6 MS. DULAY: He hasn't left me any instructions on  
7 that.

8 MS. CHAPLIN: Okay. Ms. Newland, do you have any  
9 views you would like us to consider when we turn our minds  
10 to that question?

11 MS. NEWLAND: Very briefly. We also, like CCC,  
12 continue to maintain our request, as originally articulated  
13 in our motion, for the presentations that were made --  
14 presentations, reports, memos, anything that was made by  
15 THESL to THESL's board of directors in the period leading  
16 up to the August 13th letter.

17 MS. CHAPLIN: Just so we can be clear on this, so this  
18 is communications to the board of directors of THESL?

19 MS. NEWLAND: Correct.

20 MS. CHAPLIN: Leading up to the August 13th letter.  
21 What beginning date would you think would be reasonable to  
22 apply to that?

23 MS. NEWLAND: The request is quite narrow, because we  
24 are only asking for presentations to the board of  
25 directors.

26 It is difficult for me to respond to that, but I would  
27 expect like possibly a year period, Madam Chair, might be  
28 reasonable, possibly less.



1 MS. CHAPLIN: You are content to not request further  
2 documents which don't involve the board of directors? The  
3 ones with senior management you're not as concerned about?

4 MS. NEWLAND: I have refrained from making submissions  
5 on that issue, because that was not one of our original  
6 interrogatories, but I do adopt and endorse my friend Mr.  
7 Warren's submissions in that request. So, yes, we would  
8 like to see those as well.

9 I would also note that as a result of my questions to  
10 Mr. McLorg this morning, it seems clear now that at least  
11 two of the documents listed in part 2 of his affidavit,  
12 schedule B, pertain to a draft board report, and he has  
13 confirmed that that reference to "board" is to the THESL's  
14 board of directors.

15 So we have at least two reports, draft reports, item  
16 number 14 and item number 17, which have been disclosed as  
17 existing and beyond the three-month period that the Board  
18 articulated in its last order. So we know there is two  
19 draft reports.

20 Presumably there was -- there may be other draft  
21 reports, but presumably there was a final report. Mr.  
22 McLorg was going to ascertain that, as well.

23 So I would specifically ask for production of item  
24 number 14 and item number 17 that are already identified in  
25 the list, as well as any other draft reports and final  
26 reports.

27 MS. CHAPLIN: All right. Now, I am just going back to  
28 the Board's order of December 9th just to make sure....



1           Okay. There the reference was:

2                   "The Board will require THESL to produce the  
3                   information and material requested in CANDAS IR  
4                   1(h) and CCC IR 1."

5           So does that include drafts? I don't believe that  
6           that includes drafts, but you are requesting that now?

7           MS. NEWLAND: Well, I am requesting it pursuant to Mr.  
8           Warren's request in his motion, yes, ma'am.

9           MS. CHAPLIN: All right. But this is quite clear.

10          MS. NEWLAND: You're right.

11          MS. CHAPLIN: There was no specific request for  
12          drafts.

13          MS. NEWLAND: No, you're right. In the CANDAS  
14          interrogatory 1(h) there was not.

15          MS. CHAPLIN: Okay. Do you have any questions?

16          Ms. Sebalj, does Board Staff have any submissions on  
17          this question of the balance of the materials?

18          MS. SEBALJ: I guess only that obviously the original  
19          Board order stands and it was a subset. So I think it is  
20          reasonable for the parties to have additional requests.

21          And, again, this is obvious, but the ability to  
22          circumscribe this to avoid delay -- and I was going to  
23          suggest that some dates were sort of, I think, this morning  
24          -- I wonder if we could limit it to sort of potentially  
25          December 2009 until August 13th, because it seems that that  
26          might have -- January seemed to be some kind of tipping  
27          point.

28          So reports after that date may have led to the August



1 13th letter. It is only a suggestion and I am willing to  
2 hear...

3 MS. NEWLAND: There is a reference in the CANDAS  
4 application to our meeting with Mr. Haines, at which time  
5 he said he was going to seek further advice from his board  
6 of directors on the issue of wireless attachments.

7 I believe that meeting was in November of 2009. So  
8 perhaps that might be a logical starting point.

9 MS. CHAPLIN: Ms. Newland, maybe when you are  
10 informing the Board as to whether or not CANDAS is going to  
11 agree to the release of the letters, you could give us a  
12 reference for where we would find -- a reference to this  
13 November 2009 date.

14 MS. NEWLAND: If you give me a moment, I could  
15 probably find it right away.

16 MR. QUESNELLE: Yes. It is in your evidence at 7.3,  
17 page 19 of 41.

18 MS. NEWLAND: Correct. I am obliged, sir.

19 MS. CHAPLIN: But, Ms. Newland, CANDAS's -- with  
20 respect to the second category of items around the safety,  
21 where we requested the subset of reasonably representative,  
22 your client is satisfied with that characterization or that  
23 limitation, or are you still seeking all of the materials?

24 MS. NEWLAND: We were never seeking those materials --

25 MS. CHAPLIN: Oh, okay.

26 MS. NEWLAND: -- ma'am.

27 MS. CHAPLIN: Okay, thank you. Mr. Rodger.

28 MR. RODGER: With respect to Ms. Newland's submissions



1 on drafts 14 and 17 -- this is from our schedule 2, part 2  
2 of procedural 8. I might be able to provide assistance  
3 here. It is my understanding, first of all, that both 14  
4 and 17 were draft reports. They never actually went to the  
5 board of directors.

6 In this case, the board of directors is Toronto Hydro  
7 Corporation, not Toronto Hydro-Electric System Limited.  
8 That is why they were in this bucket.

9 And, in any event, we are claiming litigation  
10 privilege on them, but just to explain why these drafts  
11 ended up where they were.

12 And just generally for Ms. Sebalj's comments, none of  
13 these are generically identified safety. We put them in  
14 here because safety could be or was one part of the report.

15 They weren't just solely on safety, but safety was  
16 incorporated into them, and that is why they're in this  
17 category.

18 Now, just generally with respect to further board  
19 reports, my information is that there are no reports to the  
20 Toronto Hydro-Electric system board of directors prior to  
21 January 2010.

22 For this last subset of the search, we didn't do it,  
23 because the Board restricted it to the three-month period.  
24 We have identified in schedule B the documents from January  
25 10th to August 10th of 2010. It is possible there could be  
26 more. It is also possible we could be claiming privilege  
27 on those.

28 But we are prepared to do a double-check of any other



1 THESL board reports from January to August 2010, or I guess  
2 it is January to June, since we have already provided June,  
3 July, August.

4 MS. CHAPLIN: Okay. So just so I am clear, what  
5 you're saying is you do know that there were no reports to  
6 the board of directors of THESL prior to January 10 --

7 MR. RODGER: That's correct.

8 MS. CHAPLIN: -- with respect to this issue of  
9 wireless attachments?

10 MR. RODGER: That's correct, that's correct.

11 MS. CHAPLIN: So the only outstanding period would be  
12 from January to June?

13 MR. RODGER: January to May, and we provided June,  
14 July August.

15 MS. CHAPLIN: Okay. And you are -- sorry, are you  
16 offering to do that?

17 MR. RODGER: Yes. We will take another look at that  
18 for THESL board reports.

19 MS. CHAPLIN: All right. So you will respond, and, if  
20 relevant, provide a list, assuming you are claiming some  
21 form of privilege, at the same time as you do your reply?

22 MR. RODGER: Yes, we will.

23 Ms. Klein reminds me, perhaps I overstated when I said  
24 our understanding is there are no board reports prior to  
25 January 2010.

26 As Mr. Labricciosa said, this whole issue of the  
27 wireless situation, Toronto Hydro frankly didn't turn its  
28 mind to the issues as we now have them before the Board



1 until that time. But Ms. Klein advises me that they  
2 haven't actually gone back prior to January 2010 and  
3 checked those other board of directors' reports.

4 So I shouldn't say there is none. We haven't done it.  
5 But it is because the issue didn't come up in management's  
6 mind until January 2010.

7 MS. CHAPLIN: Okay. Well, given this reference --  
8 given this reference in CANDAS' application to  
9 communications and indications received, I gather from Mr.  
10 Haines, in November, I think we would ask -- if you are  
11 going to check January through May, why don't you also  
12 check November and December of the previous year?

13 MR. RODGER: Okay. Okay. On the representative  
14 sample question -- this was (a) and (b) of the January 20th  
15 procedural order -- as I say, the information that now  
16 CANDAS has no issue about, in terms of our schedule A  
17 documents, we believe those are representative samples that  
18 address both questions.

19 However, with respect to any reports pertaining to  
20 paragraphs 42 and 46 of Ms. Byrne's affidavit, there is  
21 potentially up to 40,000 documents that I suppose there  
22 could be some relevant material within those documents, and  
23 we haven't done that 40,000-document search.

24 This goes back to our earlier conversation and  
25 correspondence with the Board of the level of effort and  
26 time it would take to go through all of those.

27 So as I say, we do think there is representative  
28 information before the Board, but there is an office full



1 of boxes back at my shop that we have not gone through yet.  
2 And some of those might be relevant to Ms. Byrne's  
3 affidavit, and some of them might be -- we might be  
4 claiming privilege on.

5 MS. CHAPLIN: But of the materials that you have filed  
6 and which now are not confidential, those don't represent a  
7 sample of these 40,000? Are you describing the 40,000 as  
8 being of some different nature?

9 MR. RODGER: Perhaps I will have Ms. Klein speak to  
10 this, that is closer to that.

11 MS. CHAPLIN: Sure. Thank you, Mr. Rodger. You share  
12 a mic, so...

13 MS. KLEIN: Which Mr. Rodger just turned off  
14 accidentally.

15 The 40,000 documents that Mr. Rodger references is in  
16 respect of e-mails that came as a result of an IT search.

17 So the process, for the Board's information, is that  
18 we had people who had potentially relevant information mine  
19 their files, which included hard-copy files and electronic  
20 files, with the exception of e-mails. And then we had our  
21 IT folks at Toronto Hydro then conduct a separate, parallel  
22 search with respect to those same custodians' e-mails.

23 So the body of 40,000 documents was a result of that  
24 second tranche, the IT search of e-mails.

25 MS. CHAPLIN: All right. So at this point, we don't  
26 have any sort of representative sample of those e-mails?

27 MS. KLEIN: Of those e-mails, right. So without going  
28 through all 40,000 e-mails, then we would not be able to



1 produce a representative --

2 MS. CHAPLIN: Your position is you wouldn't be able to  
3 provide a representative sample without, in fact, going  
4 through all of that?

5 MS. KLEIN: That's correct.

6 MS. CHAPLIN: All of those individually? Okay.  
7 Sorry, was that all you had on those matters?

8 MR. RODGER: Yes, thank you.

9 MS. CHAPLIN: Just so we can go back to this issue of  
10 presentations to the board of directors, you are going to  
11 make inquiries and determine whether or not any  
12 presentations were made to the board of directors any time  
13 between November 2009 and May 2010, and if so, provide a  
14 list.

15 Now, can we just have clarity around which board of  
16 directors you are going to make these inquiries in relation  
17 to?

18 MR. RODGER: This will be --

19 MS. CHAPLIN: It's a very awkward sentence. But the  
20 IR particularly identified THESL's board of directors. Is  
21 that all you would propose to examine?

22 MR. RODGER: Yes. Just to the distribution company.

23 MS. CHAPLIN: Distribution company's board of  
24 directors?

25 MR. RODGER: Yes.

26 MS. CHAPLIN: All right. Thank you.

27 Mr. Quesnelle has some questions. I think I just want  
28 to explore it a little bit, more whether or not it is



1 possible to get some value or use from the 40,000 e-mails  
2 without requiring the review of all 40,000.

3 And so I will let him put his question to you.

4 MR. QUESNELLE: Yes. With that objective, is there a  
5 manner in which we could approach it, whether it would be  
6 through an IT tool or another subject matter in your  
7 records management that would allow us to narrow down to  
8 the item as it has surfaced in an occupational health and  
9 safety arena?

10 Would there be processes that would be easier to get a  
11 handle on, from a subject matter perspective, and then do a  
12 representative sample, or at least be able to mine out of  
13 that subset of records whether or not there's been anything  
14 that is germane to this case?

15 MS. KLEIN: Thank you for the question. So without  
16 being much of a technical expert myself, you will have to  
17 forgive me as I try to describe this in layman's language  
18 to the best of my knowledge. If it would assist the Panel,  
19 we would be pleased, of course, to take this back to  
20 Toronto Hydro and speak to the relevant IT experts to  
21 confirm processes.

22 But as I understand it, our e-mail system is rather  
23 cumbersome with respect to mining information such as e-  
24 mails. So the process that we worked with our IT  
25 department on was to provide keyword searches that captured  
26 the subject matter of the requested and then ordered  
27 interrogatory.

28 And then the 40,000 documents is the result of that.



1       So if it would please the Panel, and if there was some  
2 way to come up with certain keyword searches that would  
3 satisfy the Panel with this request of a representative  
4 sample, then that is certainly something we could explore.

5       But in my own mind, I am struggling to think up what  
6 that might be that would narrow the world of documents to  
7 something that would be more manageable and less costly  
8 than the 40,000 documents we currently have.

9       MR. QUESNELLE: I guess my comments were more about --  
10 with the stated objective of finding something of value  
11 within that, A, search of a type.

12       It is not necessarily coming up with a new word search  
13 for IT. I was mentioning that is a process, but there may  
14 be others, from a strict records-management point of view,  
15 in narrowing the 40,000 down to the subject matter of  
16 occupational health and safety, and not looking at word  
17 search through e-mails necessarily.

18       But are there minutes kept of those meetings? Are  
19 there incidents that have surfaced in that form of  
20 occupational health and safety, that could be looked at as  
21 a first order of business in looking at the records of  
22 those activities and the subject matter of occupational  
23 health and safety as a potential for the much smaller area  
24 to mine, and see if we have data related to anything that  
25 could surface from the health and safety perspective, the  
26 actual activities of people that are concerned with that  
27 area of the business?

28       Not an IT search of all of the e-mails. I am thinking



1 more of a records management or the records of those  
2 activities within the corporation. And that being the  
3 starting point for a search.

4 MS. KLEIN: So this may be, again, my lack of  
5 technical knowledge confusing the matter. But just to go  
6 back from where we started, we certainly did identify a  
7 list of persons in the company, custodians who may have  
8 potentially relevant documents in their files, and asked  
9 them to provide copies of any of those potentially relevant  
10 documents by going through their hard-copy files, as well  
11 as by going through their own electronic files minus e-  
12 mails.

13 So there would have - if my logic follows correctly -  
14 been a representative sample of the types of things that  
15 you are concerned with through that process.

16 MR. QUESNELLE: So the chair of the occupational  
17 health and safety committee would look at their data, that  
18 would include the minutes of those meetings, and they would  
19 have brought that forward already; is that the suggestion?

20 MS. KLEIN: Without having things in front of me, it  
21 would be very challenging for me to attest to exactly what  
22 would or would not have been captured, and who would or  
23 would not have been captured.

24 If it would be helpful to the Panel, I can go back and  
25 speak to relevant people. But this, in my mind, depends on  
26 who is involved in what and corporate structures internally  
27 that I honestly couldn't speak to.

28 MR. QUESNELLE: Is there a point in time where a



1 record stops being an employee's record and becomes a  
2 corporate record in your records management?

3 MS. KLEIN: I would --

4 MR. QUESNELLE: Like, if the records are kept of the  
5 monthly occupational health and safety committee meetings,  
6 and the chair of that committee retires, are they lost?

7 MS. KLEIN: The corporation maintains proprietary  
8 possession over any of the records of an employee, in my  
9 view, and certainly, for example -- for example, my e-  
10 mails, none of my e-mails are mine. They belong to the  
11 company. If I were to leave --

12 MR. QUESNELLE: You are missing my point. Excuse me  
13 for interrupting.

14 MS. KLEIN: Apologies.

15 MR. QUESNELLE: I'm just thinking that to the extent  
16 that things get filed in a records management scheme and  
17 they are the records of the company's business, typically  
18 things that would go in there were things it is required to  
19 do under certain acts and legislation, that they are not  
20 left with to the propriety of the individuals who created  
21 them or the people that oversee their production, but they  
22 go into a corporate records management scheme, and which I  
23 am asking: Do you have availability to that, and is that  
24 an area to start, as opposed to going from the bottom-up  
25 search, which has, to date, created 40,000 records; start  
26 from the top down, and go through the layers of the records  
27 that would be corporate in nature and see if there is  
28 anything within those records that surface or shine a light



1 on the types of things the parties are interested in?

2 MS. KLEIN: I think I understand the question. Thank  
3 you for clarifying it. I will apologize for not having the  
4 institutional memory of some of my colleagues. I have been  
5 with Toronto Hydro for seven months now.

6 If it could please the Panel, I can certainly, again,  
7 go back and inquire with respect to what the current  
8 document retention policies are.

9 But I am not in a position to be able to speak to  
10 historical approaches.

11 MR. QUESNELLE: I appreciate it. Thank you very much.

12 MS. TAYLOR: But to be clear, I want to make sure you  
13 are looking at documents for groups responsible for health  
14 and safety within Toronto Hydro and you are looking for  
15 incident reports that have that would have been discussed  
16 at a committee forum. That is what Mr. Quesnelle is asking  
17 you to find.

18 MS. KLEIN: Okay, I believe I understand that. So let  
19 me just repeat it just so that I am sure we're all on the  
20 same page.

21 So what you would like is -- what you would consider  
22 to be a representative report would be formalized incident  
23 reports that would have formed part of health and safety  
24 committee meetings or otherwise been provided to the health  
25 and safety committee?

26 MR. QUESNELLE: I would rather leave off what I think  
27 they will be once they're produced. What I'm getting at,  
28 and all I am trying to offer here, is another way to get at



1 something perhaps from a top-down perspective rather than a  
2 bottom-up, that has a starting point which is less than  
3 40,000 documents.

4 What I am suggesting is you take another approach to  
5 this and, if it is possible, we do that, and it might  
6 result in something which is of value to the parties and  
7 the Board. I am not sure if it will or not, but I am just  
8 suggesting that it seems that rather than face the barrier  
9 of wading through 40,000 documents, the Board may be  
10 assisted with the results of another approach.

11 MS. KLEIN: Okay.

12 MR. QUESNELLE: That is what I am putting forward.

13 MS. KLEIN: The question being: Is this possible to  
14 do this, and, if it is, can we go through and find  
15 something for you.

16 If I may ask one more question? Is there a limit to  
17 the time period with respect to looking back, for example,  
18 at the corporation's records?

19 MR. QUESNELLE: I think we have talked about other  
20 triggering mechanisms where the mind shift may have  
21 occurred here as to what we're dealing with.

22 But I think anything that would have informed, on an  
23 aggregated basis, a change in the policy as THESL has put  
24 forward may have taken place over 18 months or so, I think  
25 in the run-up to it.

26 With this approach, I wouldn't think that you would be  
27 looking at an exponential number of records by going back  
28 another six months or so. I think to be helpful, it may be



1 that these things are informed over time, and I think  
2 probably longer is probably more informative, but this  
3 approached two years, perhaps, two years prior to the  
4 letter.

5 So it would be August of 2008 onward.

6 MS. CHAPLIN: And just so I am clear on what is looked  
7 at, my understanding is that, to date, there were sort of  
8 two lines of inquiry internally. One was to the  
9 individuals who had been identified, for them to search  
10 their own hard copies and electronic copies, not e-mail,  
11 and, from that, a number of documents were identified which  
12 appear in either schedule A or schedule B in the affidavit.

13 A separate inquiry was made of the e-mail system.  
14 That is what is produced the 40,000 records. So there were  
15 40,000 e-mail records.

16 And what Mr. Quesnelle has requested is for I guess  
17 what could be described as a top-down search of corporate  
18 records, specifically minutes of meetings of occupational  
19 health and safety or some similar entity within the  
20 corporation from the period August 2008 forward.

21 So that is what we are -- we are requesting that you  
22 make inquiries.

23 So there are two -- as I count them, there are two  
24 outstanding inquiries that you are going to undertake to  
25 complete.

26 MS. KLEIN: Madam Chair, sorry, just to be perfectly  
27 clear, the second outstanding enquiry was with respect to -

28 MS. CHAPLIN: The materials to the board of directors.



1 MS. KLEIN: Perfect. Thank you very much. Appreciate  
2 it.

3 MS. CHAPLIN: Okay. So I think that is it for that  
4 topic. The fourth item for today was to make some progress  
5 in terms of scheduling the balance of the proceeding.

6 We had suggested that parties might discuss that  
7 informally. I don't know if parties have had any  
8 opportunity during the brief breaks that we have had to do  
9 that.

10 Has there been any discussion?

11 MS. NEWLAND: Yes, we have had discussions, and both  
12 Mr. Rodger and myself have gone back to our witnesses and  
13 ascertained dates of availability for the upcoming month or  
14 so.

15 The one -- I guess two preliminary matters that it  
16 would be helpful to have the Board's views on -- maybe  
17 three, actually.

18 One is my client is very concerned about containing  
19 costs in this proceeding, given the length of time it has  
20 been carried on. And we were wondering whether there was  
21 any utility in scheduling the settlement conference, which  
22 would be a normal part of the procedural steps leading up  
23 to the public hearing -- or oral hearing, rather, in  
24 advance of the hot-tubbing exercise, if I may call it that.

25 The hot-tubbing exercise could be quite involved, and  
26 it would include incurring considerable expense in terms of  
27 the time of the experts. So I am not sure if there is any  
28 appetite on the Board's part or if the Board has any



1 preference.

2 I did raise this with Mr. Rodger. He didn't say no.  
3 He didn't say yes. He said, Let's raise it with the Board,  
4 which is what I am doing right now. So that is one issue.

5 The other issue would be just to advise the Board of  
6 what we have discussed in terms of the composition of the  
7 two groups of experts, how we have proposed to group them  
8 together in terms of their expertise.

9 The third issue relates to the fact that CANDAS has  
10 not retained an independent expert with respect to - I have  
11 to be very careful how I articulate this - the technical  
12 basis or the technical information with respect to  
13 microcell technology and the need -- you know, the  
14 limitations of microcell technology in terms of where they  
15 have to be placed and where they can't be placed.

16 That expertise resides in Mr. Tormod Larsen. He is an  
17 expert in that area. He testified at the technical  
18 conference in that regard. He answered Board Staff  
19 questions in that regard, but he is not an independent  
20 expert. He is a company expert.

21 But it would be -- so we want to have a discussion  
22 with the Board. We have proposed we would include Mr.  
23 Larsen in the hot tubs, and I didn't hear an objection from  
24 Mr. Rodger, although he is free to raise one now,  
25 obviously. But that was the third issue we wanted to  
26 discuss with the Board.

27 MS. CHAPLIN: So with respect to the first issue, the  
28 proposal that a settlement conference could take place



1 first, is that in the hopes or expectation or possibility  
2 that some level of agreement might be reached, and,  
3 therefore, narrowing the issues which would need to be  
4 examined still through the experts?

5 MS. NEWLAND: That's correct. In the perfect world,  
6 of course, we would get complete settlement, but we have  
7 had no discussions, formal discussions with the parties.  
8 There has been no opportunity to get together in a room and  
9 discuss these issues.

10 The proceeding has been going on a long time. So here  
11 perhaps there might be utility in getting together and  
12 seeing if we can narrow issues, narrow scope, reach  
13 settlement on some issues.

14 Perhaps that is a vain hope on our part. Hope springs  
15 eternal, I guess.

16 MS. CHAPLIN: Mr. Rodger?

17 MR. RODGER: A couple of things, Madam Chair.

18 Just in terms of general timing, just in light of the  
19 new request from the Board this afternoon about additional  
20 material that we're going to look at, I just want to make  
21 sure we build in enough time that we can do that. So that  
22 is the first thing.

23 My friend's idea for a settlement conference in  
24 advance of the expert session, I think that would be fine  
25 with us, if the Board wants to proceed down that route.  
26 But I am sympathetic, and Toronto Hydro has the same  
27 concerns about the costs of this proceeding.

28 And I do think once the experts launch into this new



1 process, that could be quite extensive. So I think we  
2 would be supportive of that.

3 In terms of the two expert groups, yes, we have a  
4 different view or a different reading of how the Board  
5 described this in Procedural Order No. 9.

6 When we read about the expert pre-hearing conference,  
7 we thought it was going to be restricted to the independent  
8 experts, and I don't see how that can be achieved if -- and  
9 whether it is from Toronto Hydro or from CANDAS, how you  
10 have a company official in that process who is obviously --  
11 would not be independent and whose responsibilities are to  
12 advocate his employer's position.

13 So that would be one area where we disagree. We think  
14 if it is going to be an expert session, it should just be  
15 the outside independent experts.

16 I think when we are looking at the new Board's rules  
17 in this regard, 13a.02, it talks about:

18 "An expert shall assist the Board impartially by  
19 giving evidence that is objective."

20 We don't see how an employee of the applicant can do  
21 that.

22 MS. CHAPLIN: One moment, please.

23 [Board Panel confers]

24 MS. CHAPLIN: Okay. I think we are pretty well done  
25 for today. The Panel has conferred, and I think we are  
26 content to initiate the scheduling of a settlement  
27 conference. And we will verify with Staff, but I think it  
28 is our sense that the facilitator that was intended to be



1 used for the expert pre-hearing conference would be the  
2 same.

3 So it may be that we are looking at that same timing,  
4 the first two weeks of March, but we will communicate that  
5 in due course.

6 Mr. Rodger?

7 MR. RODGER: Yes. And just with respect to timing,  
8 Ms. Newland and I did compare calendars, and it does appear  
9 that the week of March 5th to 9th is available, but beyond  
10 that, once we get into the second week of March, that is  
11 March break, and all of the -- both experts and counsel, at  
12 least from our side, are gone from that point on.

13 So we do have a window there of five days between the  
14 5th and 9th.

15 MS. CHAPLIN: In which everyone is available?

16 MR. RODGER: It won't be everybody, but I think there  
17 is --

18 MS. CHAPLIN: I guess I meant if we were going to do  
19 some ADR, and then to follow that up with a pre-hearing  
20 conference amongst the experts.

21 MR. RODGER: All right. Well, right now we have that  
22 week open, the 5th to 9th, yes.

23 MS. CHAPLIN: And CANDAS?

24 MS. NEWLAND: The representative of ExteNet DAScom is  
25 available both the week of March 5th and the week of March  
26 12th.

27 The representative from Public Mobile, neither of the  
28 representatives would be available. That might not be an



1 issue, if we could -- if they're willing to authorize a  
2 representative from ExteNet to speak to for them.

3 I can check that, but I just make that point on the  
4 record.

5 MS. CHAPLIN: So this matter seems a little bit up in  
6 the air, still.

7 So I think we will proceed on the basis that there  
8 will be a settlement conference scheduled, and I will ask  
9 the parties to communicate their availability to Board  
10 Staff, either Ms. Sebalj or Staff, so that we can try and  
11 resolve when that could be.

12 We are also aware of the cost implications, and it is  
13 our sincere desire to proceed with this matter on an  
14 expeditious basis, so we would request parties to make  
15 their best efforts to make the relevant parties available  
16 so that we can conduct these processes.

17 Unless there --

18 MS. SEBALJ: Sorry, I just wanted to know that we also  
19 -- given it is a general settlement conference now, that  
20 other parties would have to be involved in the setting of  
21 dates, that aren't in the room today.

22 MS. CHAPLIN: Perhaps that could be done via e-mail, I  
23 guess.

24 MS. SEBALJ: Yes.

25 MS. CHAPLIN: Just one moment. Thank you very much.  
26 We are adjourned for the day. Thank you.

27 --- Whereupon the hearing adjourned at 3:29 p.m.

28