

Third-Party Information Liability Disclaimer

Some of the information on this Web page has been provided by external sources. The Government of Canada is not responsible for the accuracy, reliability or currency of the information supplied by external sources. Users wishing to rely upon this information should consult directly with the source of the information. Content provided by external sources is not subject to official languages, privacy and accessibility requirements.

Désistement de responsabilité concernant l'information provenant de tiers

Une partie des informations de cette page Web ont été fournies par des sources externes. Le gouvernement du Canada n'assume aucune responsabilité concernant la précision, l'actualité ou la fiabilité des informations fournies par les sources externes. Les utilisateurs qui désirent employer cette information devraient consulter directement la source des informations. Le contenu fourni par les sources externes n'est pas assujéti aux exigences sur les langues officielles, la protection des renseignements personnels et l'accessibilité.

00001

1 IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
2 THE NORTH AMERICAN FREE TRADE AGREEMENT
3 AND THE UNCITRAL ARBITRATION RULES,

4 BETWEEN:

5 WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS
6 CLAYTON AND DANIEL CLAYTON AND BILCON OF DELAWARE INC.

Claimants

- and -

7 GOVERNMENT OF CANADA

Respondent

8
9 ARBITRATION HELD BEFORE
10 JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),
11 PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ
12 held at ASAP Reporting Services Inc.,
13 Bay Adelaide Centre, 333 Bay St., Suite 900,
14 Toronto, Ontario
15 on Friday, October 25, 2013 at 9:34 a.m.

VOLUME 4

14 COUNSEL:

15 Barry Appleton For the Claimants

Gregory Nash

16 Frank S Borowicz, Q.C.

Kyle Dickson-Smith

17 Dr. Alan Alexandroff

18 Scott Little For the Respondent

Shane Spelliscy

19 Jean-François Hebert

Stephen Kurelek

20 Reuben East

Adam Douglas

21 Dirk Pulkowski PCA (Secretary to the Tribunal)

22 Kathleen Claussen PCA

Teresa Forbes Court Reporter

23

A.S.A.P. Reporting Services Inc. © 2013
24 200 Elgin Street, Suite 1105 333 Bay Street, Suite 900
Ottawa, Ontario K2P 1L5 Toronto, Ontario M5H 2T4
25 (613) 564-2727 (416) 861-8720

00002

1

2

3

4

5

(ii)

6

7

INDEX

8

9

10

PAGE

11

12

PROCEDURAL MATTERS

3

13

14

AFFIRMED: BOB PETRIE

16

15

Examination In-Chief by Mr. Douglas

17

16

Cross-Examination by Mr. Nash

17

17

Re-Examination by Mr. Douglas

227

18

Questions by the Tribunal

268

19

20

AFFIRMED: MARK MCLEAN

271

21

Examination In-Chief by Mr. Little

271

22

Cross-Examination by Mr. Nash

272

23

Re-Examination by Mr. Little

353

24

Further Cross-Examination by Mr. Nash

371

25

Questions by the Tribunal

375

1 Toronto, Ontario
2 --- Upon resuming on Friday, October 25, 2013
3 at 9:34 a.m.

4 PRESIDING MEMBER: Good morning.
5 This is the fourth day of our hearing, and before
6 we start with the examination of Mr. Petrie, there
7 is a procedural matter to solve or at least to
8 discuss.

9 MR. NASH: Mr. President, could we
10 wait until Mr. Appleton returns. He had to step
11 out for one moment.

12 MR. APPLETON: Thank you.

13 PRESIDING MEMBER: Mr. Appleton,
14 it was just announced that there is a procedural
15 matter on the table and that comes from --

16 MR. SPELLISCY: Thank you.

17 PRESIDING MEMBER: -- Mr. Little
18 or...

19 MR. SPELLISCY: It will come from
20 me, actually.

21 PRESIDING MEMBER: Yes, you have
22 the floor.

23 PROCEDURAL MATTERS:

24 MR. SPELLISCY: This is a matter
25 we wanted to discuss arising out of some of the

00004

1 testimony that we have heard earlier this week, and
2 we wanted to bring it up now as we have finished
3 with our cross-examinations, but it is ostensibly
4 green time still.

5 We wanted to raise it also because
6 we're not sure of the claimants' position on this,
7 and perhaps they would like some time to think
8 about it and have an opportunity to respond.

9 It relates in this case to the
10 listing of William Ralph Clayton as one of the
11 individual claimants here.

12 Now, William Ralph Clayton, as
13 opposed to William Richard Clayton, William Ralph
14 Clayton is the father of Mr. Clayton who testified
15 here.

16 I wanted to discuss a little bit
17 about what our concern is here, and so if we look
18 at the claim, as I say, the claimants have listed
19 as individual claimants Mr. Clayton we have heard
20 here, his brothers and his father. Together with
21 Bilcon of Delaware, these claimants are referred to
22 as the investors.

23 In their pleadings and in their
24 memorial, they have -- the claimants have alleged
25 that the investors, just like that, own or control

00005

1 investments in Canada through their ownership and
2 control of Bilcon of Nova Scotia.

3 And in their memorial at paragraph
4 34, in particular, they say the Clayton Group of
5 companies were managed by William Ralph Clayton.

6 Now, that may be true in terms of
7 the Clayton Group, but, however, in testimony we
8 heard this week, Mr. Clayton who we heard, his son,
9 has confirmed his father actually had no ownership
10 or control over Bilcon of Nova Scotia.

11 What we have heard this week from
12 Mr. Clayton is the following. With respect to
13 Bilcon of Nova Scotia, Mr. Clayton testified that
14 it was wholly owned and controlled by Bilcon of
15 Delaware.

16 In particular, in his transcript
17 at page 192, lines 18 to 21, Mr. Clayton's
18 testimony was as follows:

19 "QUESTION: And Bilcon of
20 Delaware, that is a sole
21 shareholder of Bilcon of Nova
22 Scotia; correct?

23 "ANSWER: Yes it is."

24 We have heard this week from
25 Mr. Clayton that Bilcon of Delaware was a

00006

1 wholly-owned business him and his two brothers.
2 Again, Mr. Clayton's testimony, at page 18 in lines
3 15 to 17, was as follows, line 15:

4 "QUESTION: Your father has
5 no ownership interest in
6 Bilcon of Delaware?

7 "ANSWER: No."

8 Mr. Clayton has also confirmed
9 this week his father was not a director Bilcon of
10 Delaware in his testimony at page 19, lines 1 to 3:

11 "QUESTION: Your father is
12 not a director Bilcon of
13 Delaware?

14 "ANSWER: Right."

15 He also confirmed that his father
16 was not a director or officer of Bilcon of Nova
17 Scotia, the alleged investment here. In his
18 testimony at page 193, lines 4 to 11, he testified:

19 "QUESTION: And the directors
20 of Bilcon of Nova Scotia,
21 that is you and your
22 brothers, as well?

23 "ANSWER: Yes, it is.

24 "QUESTION: And the officers
25 of Bilcon of Nova Scotia,

00007

1 that is solely you and your
2 brothers, as well?

3 "ANSWER: Yes."

4 Finally, while he indicated that
5 his father had some involvement, he testified that
6 he and his brothers ran the business.

7 Particularly, if we look again at page, I think it
8 is 19, lines 12 to 17:

9 "So your father, then, didn't
10 actually exercise control
11 over Bilcon of Nova Scotia.
12 This was a project that he
13 left to you and your brothers
14 to run; correct?

15 "ANSWER: For as much as he
16 leaves it to run, yes."

17 Finally, on re-examination
18 Mr. Clayton testified, Mr. Nash asked the question,
19 and this is at line -- this is near the end of
20 his -- I can't give a line number for you:

21 "QUESTION: I have one more
22 question."

23 Two, but:

24 "Did your father have an
25 interest in the Nova Scotia

1 quarry?

2 "ANSWER: Yes. Yes, he was
3 very interested in it.

4 "QUESTION: Did he have a
5 financial interest in it,
6 either indirect or direct?

7 "ANSWER: Indirect, because
8 it is a family business and
9 it is family money, and, you
10 know, the companies are all
11 related."

12 This was the extent of what
13 Mr. Clayton testified as to his father's
14 involvement, and it is not enough under NAFTA to
15 make somebody an investor. First, whether or not
16 someone is very interested in the operation of a
17 business does not make that business his
18 investment. Second, NAFTA does not require merely
19 a direct or indirect financial interest in a
20 company. It requires direct or indirect ownership
21 or control.

22 And, finally, the fact that family
23 money is involved cannot be enough under NAFTA.
24 Several family members making investments does not
25 make every other family member an investor.

1 What NAFTA requires in article
2 1139 for something to be an investment of an
3 investor is that the investment be owned or
4 controlled directly or indirectly by that person.

5 It is now clear from Mr. Clayton's
6 testimony that his father does not meet this test.

7 Mr. Clayton is not an investor under the NAFTA and
8 he cannot be an individual claimant here.

9 Now, why are we raising this,
10 because I want to be clear, this doesn't prevent
11 the claim from going forward? We've seen evidence,
12 we've heard testimony, that Mr. Clayton himself and
13 his brothers and Bilcon of Delaware are indeed
14 investors of the United States.

15 This claim can proceed with the
16 individual, the brothers and Bilcon of Delaware as
17 the investors. In terms of whether this claim
18 proceeds, there is no practical effect here.

19 What we're talking about is just
20 one of the individual claimants, but there is in
21 Canada's position a point of principle here, and it
22 is a question that matters to us.

23 An individual cannot be an
24 investor merely because he belongs to a family that
25 has --

1 MR. APPLETON: Mr. President, I
2 must object now. I have been listening very
3 patiently, but this is an argument. This is not a
4 procedural issue, and, in fact -- actually, first
5 of all, good morning to the Tribunal members.

6 PRESIDING MEMBER: Good morning.

7 --- Laughter

8 MR. APPLETON: I have to say that
9 in all of the international arbitrations I have
10 ever been in, I have never seen the closing
11 argument advanced by way of what is called a
12 "procedural point".

13 This is closing argument with,
14 reference to the NAFTA, brought by the respondents
15 in the midst of the witness evidence. This is, to
16 my knowledge, completely unprecedented and most
17 inappropriate.

18 Canada has brought evidence and
19 documents and questions to one of the claimants in
20 this case. Mr. Spelliscy has made reference to
21 some of that evidence.

22 There are questions about all
23 matters with capacity which always need to be
24 proven.

25 This would be appropriate for him

1 to raise in his closing argument.

2 I do point out that this is an
3 entirely new argument, not raised in the
4 respondent's jurisdictional objections, and so it
5 is most unusual to raise a jurisdictional objection
6 at such a late date, because it would affect the
7 ability to be able to bring witnesses to be able to
8 deal with such issues.

9 But, in any event, our view would
10 be that closing would be the appropriate place to
11 address such matters, certainly not procedural. It
12 is, again, unfortunate that we weren't advised of
13 this in advance, because we might have saved the
14 Tribunal disruption today.

15 But, in any event, the proper
16 place for such arguments would be at the closing,
17 if even such an argument may be permitted at this
18 time, but in any event we're prepared to address
19 this argument within our closing.

20 I would suggest that the time that
21 Mr. Spelliscy has taken today should be considered
22 as part of his closing argument and that perhaps it
23 would need to be deducted from the very ample
24 amount of time that is allocated to closing
25 arguments, but I think that that should be

1 considered in that regard.

2 But it is certainly not, by any
3 way, a procedural issue. It is merely an issue
4 based on Mr. Spelliscy's impression of where the
5 evidence has taken us to date.

6 And we may have some impressions
7 about evidence, too, but we're not going to break
8 up the closing and give you a little synopsis each
9 day. We will save it to the closing, because that
10 is the proper and most efficient and economical way
11 to handle the arbitration.

12 PRESIDING MEMBER: Well,
13 Mr. Appleton --

14 MR. SPELLISCY: I would actually
15 like to respond to that.

16 PRESIDING MEMBER: Just to save --
17 in a way, I am glad that this argument or this
18 point was not raised only at the closing, because I
19 think the respondent would be the last to speak,
20 and then that would be a matter for what we're
21 probably going to have the post-hearing briefs to
22 discuss.

23 I am glad, if there were a
24 problem, that the problems are on the table at the
25 moment, that we can still deal with them in a

00013

1 better way, not just as a farewell present going
2 home.

3 --- Laughter

4 PRESIDING MEMBER: So,
5 Mr. Spelliscy, you have said at the end that this
6 is a matter of principle. My guess is that this is
7 more or less the closing statement with regard to
8 this issue, which -- is that correct? So we won't
9 lose much more time. Thank you.

10 MR. SPELLISCY: Yes, I think --
11 Judge Simma, you hit it exactly right.

12 The reason we raised this is
13 because we didn't want to save this to closing
14 argument, not because it is inappropriate to do is
15 it now, but because it is fair to the claimant to
16 raise it now, because it hasn't come up before. It
17 has arisen from the testimony.

18 They now have notice of it. They
19 have an opportunity to address it. I take some
20 objection to the fact that I was interrupted in my
21 remarks only to then have to hear a long remark
22 from the claimant.

23 But, nevertheless, what I think
24 here is that we've raised this now, and I said it
25 at the very beginning we raised it so the claimants

00014

1 can consider it and present their own arguments on
2 it. This is purely a question of fairness. It is
3 not inappropriate to raise it so that everybody is
4 aware that is now on the table from the testimony.

5 I actually don't have anything
6 else to say about it, but certainly depending on
7 what the claimants say, we may address it in our
8 closing. But we put it on the table, the claimants
9 are now aware of it, and I think that is entirely
10 appropriate and take exception to the claim it
11 wasn't.

12 Thank you.

13 MR. APPLETON: Mr. President,
14 again --

15 PRESIDING MEMBER: Let's not lose
16 too much time.

17 MR. APPLETON: I will be very
18 brief. Had the respondents raised this with us
19 privately, we would have addressed this all within
20 less than one minute today.

21 I am not clear of what
22 Mr. Spelliscy's point is. I would like
23 Mr. Spelliscy to make sure that he would tell us
24 now on the record exactly what the nature of
25 their -- I don't even know what to call it --

00015

1 procedural observation is, so that we can
2 appropriately be able to address this.

3 I am not asking him to go and give
4 us, again, a recitation of what he did. I just
5 need to understand the point very specifically so
6 we can very specifically address this in the
7 closing.

8 PRESIDING MEMBER: And you would
9 want this to happen now; right? So Mr. Spelliscy
10 would you be ready to... or if you would prefer to
11 do that -- sorry, if you prefer to do that at a
12 later stage, but anyway before closing, and give
13 the investors' party sufficient time to deal with
14 it. It wouldn't have to be this morning; right?

15 MR. SPELLISCY: I think that, I
16 mean, I have made the point fairly clear. If you
17 read the transcript, it is clear. Mr. Clayton,
18 Mr. William Ralph Clayton, the father, cannot be an
19 individual claimant in this case.

20 That is the only position that we
21 have, because he does not own or control
22 investments in Canada.

23 I think if we went back and read
24 the transcript, it is really clear what I said.

25 MR. APPLETON: I thank

00016

1 Mr. Spelliscy. We understand exactly what his
2 point is. We will be pleased to address this in
3 the closing.

4 PRESIDING MEMBER: Thank you very
5 much. I think we can now enter the stage of the
6 examination of Mr. Petrie.

7 PRESIDING MEMBER: Good morning,
8 Mr. Petrie. Welcome.

9 MR. PETRIE: Good morning.

10 PRESIDING MEMBER: You should find
11 in front of you a statement which I would like you
12 to read, if you please.

13 MR. PETRIE: Yes. I solemnly
14 declare upon my honour and conscience that I will
15 speak the truth, the whole truth and nothing but
16 the truth.

17 AFFIRMED: BOB PETRIE

18 PRESIDING MEMBER: Mr. Petrie, you
19 have also signed an assurance that you would not,
20 let's say, read or view anything about the, let's
21 say, prior examinations.

22 THE WITNESS: Yes.

23 PRESIDING MEMBER: And you have
24 done that?

25 THE WITNESS: I have not viewed

00017

1 anything, no.

2 PRESIDING MEMBER: Thank you.

3 MR. DOUGLAS: Just a couple of
4 quick questions on direct, Members of the Tribunal.

5 PRESIDING MEMBER: Sure.

6 EXAMINATION IN-CHIEF BY MR. DOUGLAS:

7 Q. Thank you, Mr. Petrie, for
8 being here today. You filed and swore two
9 affidavits in this arbitration; is that correct?

10 A. Yes.

11 Q. Do you have any corrections
12 that you would like to make to those affidavits?

13 A. Not at this time.

14 Q. Okay.

15 CROSS-EXAMINATION BY MR. NASH:

16 Q. Mr. Petrie, good morning. My
17 name is Greg Nash, and I am co-counsel for the
18 claimants in this proceeding.

19 A. Good morning.

20 Q. I am going to ask you a few
21 questions about matters arising from your two
22 affidavits. You swore two affidavits in this
23 proceeding, one on December 1st, 2011 and one on
24 March 19th, 2013?

25 A. Yes.

00018

1 Q. And you will see a binder to
2 your left there that has both of those affidavits
3 in it under tabs A and B, respectively. You will
4 also see another binder on the table which is a
5 compendium of statutes, regulations, guidelines,
6 terms of reference, et cetera.

7 So I take it am I correct that you
8 have had no communication with anybody about these
9 proceedings since Monday.

10 A. No.

11 Q. That's correct?

12 A. That's correct.

13 Q. You recall that in your first
14 affidavit there were a number of documents that you
15 attached to the affidavit, a few dozen documents
16 under tab --

17 A. Tab A.

18 Q. Yes. Those documents are not
19 attached to the affidavits in front of you?

20 A. Okay.

21 Q. Do you recall that there were
22 a number of documents attached?

23 A. A number of documents as
24 referenced in the affidavit, yes.

25 Q. Yes. And were those

00019

1 documents presented to you prior to swearing your
2 first affidavit in a bundle?

3 A. We certainly received a
4 number of bundles of documents. I can't recall
5 specifically the timing of when those bundles were
6 received.

7 Q. Did you select from other
8 documents these documents to attach to your
9 affidavit, or were they selected for you?

10 A. Well, the affidavit was
11 certainly prepared with the assistance of counsel,
12 but as far as the selection of documents, certainly
13 relevant documents were -- important documents were
14 pointed out to me.

15 Q. And what do you mean by that?

16 A. Well, insofar as the
17 important documents relevant to the matter, you
18 know, these documents were -- you know, they were
19 available to me in preparation of the affidavit.

20 Q. Do you recall any of the
21 other documents that you saw before swearing your
22 affidavit which were not then attached to your
23 affidavit?

24 A. I honestly -- I honestly
25 can't recall what documents I may or may not have

1 seen before the affidavit.

2 Q. Have you seen any other
3 documents connected to this proceeding and the
4 matters in it since you swore your first affidavit?

5 A. The documents that I have
6 seen in preparation for this hearing were the ones,
7 you know, presented and prepared as part of the
8 various bundles that were provided to me as a
9 witness.

10 Q. If you go to paragraph 1 of
11 your affidavit under tab A?

12 A. Yes.

13 Q. You confirm you were the
14 district manager for the Yarmouth office from 2000
15 to 2005?

16 A. That's correct.

17 Q. Were you a district manager
18 or the district manager?

19 A. I was the district manager
20 for the Yarmouth Tri-County District, one of
21 several district managers in the department.

22 Q. So were you in charge of the
23 Yarmouth office at that time?

24 A. That's right.

25 Q. And were there any other --

00021

1 you were in the compliance division of NSDEL;
2 correct?

3 A. Yes.

4 Q. Were there any other
5 divisions working out of the Yarmouth office?

6 A. No. It was just our
7 compliance staff.

8 Q. How many were in that office
9 at that time?

10 A. At that -- oh, goodness. At
11 that time, we would have had three or four in
12 inspectors, myself, two administrative staff. Our
13 engineer, who supported our work in the Yarmouth
14 office, was actually located remotely in our middle
15 Middleton office, in the valley.

16 Q. And that engineer was
17 Mr. Balcom?

18 A. That's right.

19 Q. He was located where, sorry?

20 A. Middleton. It is a small
21 community in the Annapolis Valley.

22 Q. How far way is Middleton from
23 Yarmouth? I just want to get some sense.

24 A. A couple of hours, give or
25 take.

00022

1 Q. And the inspectors you had
2 working under you included two, named Brad
3 Langille --

4 A. Langille.

5 Q. Langille?

6 A. Yes.

7 Q. And Jacqueline Cook?

8 A. That's right.

9 Q. And they were also in the
10 Yarmouth office the whole time?

11 A. That's right.

12 Q. Were there any provincial
13 environment assessment officers or staff in your
14 division or in that office?

15 A. No.

16 Q. And you are currently
17 employed by the Government of Nova Scotia?

18 A. That's right.

19 Q. And have you spent your
20 entire career with the provincial government?

21 A. Yes, that's right.

22 Q. And was one of your
23 responsibilities as district manager to consider
24 applications for quarries?

25 A. That's correct.

00023

1 Q. And to issue approvals?

2 A. Yes.

3 Q. And you had the authority to
4 issue those approvals?

5 A. Yes.

6 Q. Under an Act of the Nova
7 Scotia legislation?

8 A. The Environment Act, yes.

9 Q. The Nova Scotia Environment
10 Act?

11 A. That's right.

12 Q. And would you agree with me
13 that a public servant in Nova Scotia, both then and
14 now, is required to act in good faith?

15 A. Yes.

16 Q. Fairly?

17 A. Yes.

18 Q. Reasonably?

19 A. Yes.

20 Q. Honestly?

21 A. Yes.

22 Q. With openness and
23 transparency?

24 A. Yes.

25 Q. And in a manner which you

00024

1 would consider that would allow all parties dealing
2 with it due process?

3 A. Yes.

4 Q. Could you turn to tab 1 in
5 that binder before you, please, which is document
6 C-996.

7 A. Yes.

8 Q. This is a values, ethics and
9 conduct code for Nova Scotia's public servants?

10 A. Yes.

11 Q. If you go to page 7 of that
12 code, could you read out the section under
13 "Integrity", please?

14 A. It is entitled "Non-partisan
15 and Honest:

16 "We value and provide service
17 that is honest, open,
18 impartial, and non-partisan.
19 We are committed to standards
20 of behaviour, safety, and
21 expertise befitting our
22 respective duties and
23 responsibilities."

24 Q. That is fine. And that was
25 the standard that you were expected to achieve in

1 2002-2003?

2 A. I would say an equivalent
3 standard would be expected. I don't know when this
4 particular code was prepared, but...

5 Q. Could you also go now to page
6 13 and read, under "Public Good", the section there
7 on "Democratic Process, Law and Policy"?

8 A. Yes.
9 "We know that our elected
10 officials create the laws and
11 policies that advance the
12 public good. We recognize
13 that the implementation,
14 management, and delivery of
15 these laws and policies is
16 how the public good is best
17 served and the essence of our
18 work as public servants."

19 Q. Continue on under there?

20 A. "As public servants we are:
21 "Impartial and non-partisan;
22 deliver on the government's
23 commitments; expect that
24 government policy advances
25 the public good, are

00027

1 professional, ethical way.

2 Q. You expected DFO officials to
3 be candid, transparent?

4 A. Certainly.

5 Q. Open and honest?

6 A. Yes.

7 Q. To share information with you
8 transparently?

9 A. Within the boundaries of
10 their duties as federal public servants, yes.

11 Q. If there was a matter that
12 they were gathering information on with respect to
13 a matter you were dealing with, you would expect
14 them to share that with you; correct?

15 A. I would think as it --
16 assuming that it was directly relevant to the
17 matter we were administering, sure.

18 Q. Did you understand, in the
19 period 2002 to 2007, that environmental assessments
20 were to be conducted impartially?

21 A. Yes.

22 Q. And without political
23 interference?

24 A. Yes.

25 Q. And in 2002 and 2003, there

1 were pits and quarries in Nova Scotia that were to
2 operate within certain guidelines; correct?

3 A. That's right.

4 Q. If you go to the statutes
5 binder, the other binder in front of you, and go to
6 tab 5.

7 A. Yes.

8 Q. Those were the relevant pit
9 and quarry guidelines in 2002-2003?

10 A. Yes.

11 Q. And they were revised in May
12 1999. How long had these guidelines been around?

13 A. Goodness, they certainly
14 preceded 1999 -- pardon me, 1999 going into the --
15 I'm just going on recollection now, but to the
16 early '90s, perhaps, in one way, shape or form.

17 Q. I have seen a version, I
18 think, at least referred to that was 1988. Would
19 that surprise you?

20 A. 1988, did you say?

21 Q. Yes, yes.

22 A. That doesn't surprise me.

23 Q. If you go to page 4 of the
24 guidelines, there is a set of standard separation
25 distances for quarry operations; do you see that?

1 A. Yes.

2 Q. And the distances are 30
3 metres of the boundary of a public or common
4 highway, 30 metres of a bank of any watercourse or
5 ordinary high water mark, and 30 metres of the
6 boundary of the property; do you see that?

7 A. I see that.

8 Q. Those were standard
9 conditions that would be applied to any quarry in
10 Nova Scotia; correct?

11 A. Yeah. We would use these
12 guidelines as the basis for drafting terms and
13 conditions.

14 Q. Similarly, no person under
15 number 2 for the operation of a quarry shall blast
16 within 30 metres of the boundary of a public or
17 common highway; do you see that?

18 A. Yes.

19 Q. And, again, 30 metres of the
20 bank of any watercourse, and, over on page 5, under
21 C, 800 metres of the foundation or base of a
22 structure located off site. Do you see that?

23 A. Yes.

24 Q. And those were, again,
25 standard separation distances that would apply to

00030

1 all quarries in Nova Scotia that were being
2 approved?

3 A. They would be applied to,
4 yes, most of our quarry approvals.

5 Q. That 800 metre separation
6 distance had nothing to do with marine mammals; is
7 that correct?

8 A. No. The 800 metre separation
9 distance is designed to be protective of structures
10 and residences, as you can infer from reading it,
11 buildings, human infrastructure.

12 Q. You wouldn't make any
13 connection between the 800 metre separation
14 distance and the protection of marine mammals;
15 correct?

16 A. The protection of marine
17 mammals is something that would have to be
18 assessed, you know, a matter unto its own.

19 Q. So the answer to my question
20 is "yes"?

21 A. We wouldn't directly connect
22 the 800 metres to marine mammals.

23 Q. If you go to that same
24 binder, tab 4, there is a proponent's guide for
25 environmental assessment. Do you see that?

00031

1 A. Yes.

2 Q. And this was published in
3 February 2001?

4 A. I see that, yes.

5 Q. And if you go to page 3 of
6 that guide.

7 A. Environmental Assessment
8 Branch?

9 Q. Actually, the third page.

10 A. Oh, sorry.

11 Q. It states the purpose of the
12 guide. Do you see that?

13 A. Yes.

14 Q. At the top, under
15 "Introduction".

16 A. Yes.

17 Q. It states:

18 "The Environmental Assessment
19 Branch (EA Branch) has
20 prepared this guide as a
21 reference for proponents
22 prior to registration for
23 environmental assessment. The
24 purpose of this guide is to
25 explain in a clear and

00032

1 concise manner how
2 environmental assessment in
3 Nova Scotia is carried out."
4 That was your understanding at the time.

5 A. Yes.

6 Q. And then could you read down
7 under 1.3, "What is Environmental Assessment?"

8 A. "Environmental assessment is
9 a planning and
10 decision-making tool used to
11 promote sustainable
12 development by protecting and
13 conserving the environment.
14 Environmental assessment
15 promotes better project
16 planning by identifying and
17 assessing possible adverse
18 effects on the environment
19 before a new undertaking
20 begins. This is accomplished
21 by involving government
22 agencies, non-government
23 organizations (NGOs), First
24 Nations, local residents and
25 the general public throughout

1 the review of a proposed
2 development. In addition, in
3 certain circumstances,
4 special consultations may be
5 held with First Nations."

6 Q. And then below, it says:
7 "By identifying and
8 addressing environmental
9 effects at the earliest
10 stages of project
11 development..."

12 I will just stop there. Would you
13 agree that the environmental assessment process in
14 Nova Scotia was a planning and decision-making tool
15 to be implemented at the earliest stage of
16 development of a proposal; is that fair?

17 A. Yes, I think that is a fair
18 characterization.

19 Q. If you go over to the next
20 page, page 2, under "What is an Undertaking?":
21 "An undertaking can be
22 described as a proposed
23 development which may cause
24 significant environmental
25 effects. A list of these

00034

1 undertakings is included in
2 Schedule 'A' of the
3 Environmental Assessment
4 Regulations."

5 Would you agree with that?

6 A. Sorry, section 1.5?

7 Q. Yes?

8 A. Yes.

9 Q. Correct?

10 A. That is how I understand it
11 under the Environmental Assessment Regulations.

12 Q. And it states:

13 "Environmental assessment of
14 these undertakings, as
15 described in this document,
16 is used to promote good
17 project planning and
18 therefore minimize impacts
19 that developments cause to
20 the environment."

21 That was your understanding of the
22 way the assessment process was intended to work in
23 2001-2003?

24 A. Yes, yes.

25 Q. If you go over to the next

1 page, page 3, under "Environmental Assessment
2 Branch", in the second paragraph it says:

3 "The EA branch continually
4 interacts with industry,
5 various interest groups,
6 First Nations, government
7 departments and the general
8 public to ensure that
9 environmental assessment is
10 open, transparent,
11 accountable and effective."

12 And that was the way you
13 understood the process was to work in 2001 to 2006?

14 A. Yes.

15 Q. And if you go over to page 6,
16 it states that Class 1 undertakings -- I am under
17 the second full paragraph:

18 "Class 1 undertakings are
19 usually smaller in scale and
20 may or may not cause
21 significant environmental
22 impacts or be of sufficient
23 concern to the public. A
24 public review of a
25 proponent's initial

00036

1 submission, called a
2 registration document, is
3 required after which the
4 Minister will decide if a
5 more detailed review and/or
6 public hearing is required."

7 And under I will pause there.

8 Under Class 1 undertakings, quarries under four
9 hectares were included as a Class 1 undertaking;
10 correct?

11 A. Quarries under four hectares?

12 Q. Yes.

13 A. Quarries under four hectares
14 would be exempt from the environmental assessment
15 process.

16 Q. So this provision was for
17 quarries over four hectares?

18 A. Four hectares was the trigger
19 for entering the environmental assessment process
20 for quarries.

21 Q. And the actual trigger was
22 when you registered your registration document with
23 the Environmental Assessment Branch?

24 A. That is when the process
25 would commence.

1 ordinary stone, building and
2 construction stone, sand,
3 gravel or ordinary soil."

4 And subsection 2 is referring to
5 road building, so it doesn't apply? So that would
6 encompass a quarry larger than four hectares;
7 correct?

8 A. Yes. And I guess for a
9 more -- perhaps a more fulsome, you know,
10 explanation of the system behind the breakdown of
11 the various undertakings, and while I certainly had
12 connections with the EA process, I was not an
13 environmental assessment officer or staff person
14 myself.

15 So, you know, for perhaps a more
16 fulsome interpretation of the rationale and
17 background behind these groupings, someone from the
18 Environmental Assessment Branch may be able to
19 speak --

20 Q. This reflected the framework
21 for environmental assessment?

22 A. Yes, certainly, this was the
23 framework.

24 Q. Yes. If you go over to page
25 10, "Submitting a Draft Registration Document", it

00039

1 says, it:

2 "... allows the EA Branch and
3 selected government
4 departments to provide
5 preliminary comment on the
6 draft document. The
7 proponent can make changes
8 based on those comments prior
9 to registering the
10 undertaking for environmental
11 assessment. Any proponent
12 that chooses to submit a
13 draft registration document
14 should refer to Section 4 of
15 this Guide.

16 And:

17 "It should be noted that the
18 review of the draft proposal
19 represents only a preliminary
20 examination of the proposed
21 undertaking and does not
22 preclude further examination
23 and commentary during the
24 final review of the
25 undertaking once it is

00040

1 officially registered under
2 Part IV of the Environment
3 Act and the regulations made
4 pursuant to Part IV."

5 So the process would be -- as you
6 understood that it worked, would be that a
7 proponent would come, if they wanted to submit a
8 draft proposal, come to the Environmental
9 Assessment Branch, give their comment, get the
10 review, go back, maybe redraft it. But, in any
11 event, at the time of registration, then, the
12 actual environmental assessment process would
13 commence; correct?

14 A. Yes. That is a fair summary.

15 Q. Could you turn, please, to
16 tab 1 of that binder, which is the Nova Scotia
17 Environment Act, the one that was in force at the
18 time.

19 A. Yes.

20 Q. If go to page 14, you will
21 see under Part IV, "Environmental-Assessment
22 Process".

23 A. Yes.

24 Q. And under section 31:
25 "... the

00041

1 environmental-assessment
2 process under this part
3 applies with respect to an
4 undertaking as determined by
5 the Minister or as prescribed
6 in the regulations."

7 "32. Until the Minister has
8 notified the proponent in
9 writing that an undertaking
10 is approved, no person shall
11 commence work on the
12 undertaking."

13 And under section 33:

14 "Every proponent of an
15 undertaking shall:

16 "(a) register the undertaking
17 with the Minister in the time
18 and manner prescribed by the
19 regulations."

20 All of that was to do with
21 projects that were undergoing environmental
22 assessment; correct?

23 A. Or, yes, that were about to
24 undergo EA.

25 Q. And for a quarry under four

00042

1 hectares, there was no requirement to register with
2 the Environmental Assessment Branch. You could
3 apply for a permit, an approval, and that would
4 be -- could be approved by you; correct?

5 A. Yes, there are a number of
6 quarries under four hectares in the province that
7 don't have to go through EA.

8 Q. The quarry at Whites Point
9 was one of those, correct, the small quarry?

10 A. Well, there was an
11 application received for a 3.9 hectare quarry at
12 that site, yes.

13 Q. Right.

14 A. And that is what was
15 approved.

16 Q. So there is no environmental
17 assessment whatsoever under Nova Scotia provincial
18 law for a quarry under four hectares; that's
19 correct?

20 A. I would call it not
21 environmental assessment in the sense -- in the
22 strict interpretation as contemplated by the Act.

23 I would call it the environmental
24 technical review conducted by staff in the EMC
25 division for these approvals.

00043

1 Q. If you go to paragraph 4 of
2 your affidavit.

3 A. Sorry, can you refer me to --

4 Q. Paragraph 4 on -- in the
5 other binder in tab A.

6 A. Yes.

7 Q. You will see that you stated
8 in the fourth line, "While an EA is not required
9 for a quarry under 4 ha", and that statement is
10 correct?

11 A. Yes.

12 Q. "... a proponent must still
13 apply for a permit - known as
14 an industrial approval -
15 under Part V of the NSEA."

16 And that statement is correct?

17 A. Yes.

18 Q. Do you recall that in
19 February of 2002 a company called Nova Stone
20 applied for a quarry at Whites Point?

21 A. Yes.

22 Q. And that was for a ten-acre
23 quarry?

24 A. Ten acres is the figure that
25 was cited in the application, yes.

00044

1 Q. We will call that the first
2 application?

3 A. Yes.

4 Q. And Nova Stone's
5 representative at that time was a Mr. Mark Lowe; do
6 you recall that?

7 A. Yes, I recall.

8 Q. And your department had
9 previously sent Mr. Lowe the standard conditions
10 that applied to quarries under four hectares. Do
11 you recall that?

12 A. I believe we sent him an
13 example of another quarry approval.

14 Q. If you go to tab 2 of that
15 binder in front of you, document C-29, Exhibit
16 C-29.

17 A. Yes.

18 Q. You will see a fax from
19 Danette Deveau, a clerk, it appears, with the Nova
20 Scotia Department of Environment and Labour?

21 A. Mm-hm.

22 Q. And you will see that she is
23 sending Mr. Lowe standard conditions that apply to
24 any rock quarry, such as Parker Mountain Aggregates
25 Ltd.; do you see that?

1 A. Yes.

2 Q. These standard conditions, if
3 you go over to page 2, you see general terms and
4 conditions, and these would be the normal standard
5 provisions that you would expect to put in a quarry
6 which would be under four hectares; correct?

7 A. This is an example, and you
8 can tell by the way portions are blacked out this
9 was an example from an earlier approval that was
10 sent to Mr. Lowe to give him a sense of the types
11 of conditions one might expect.

12 Q. So this is an approval for
13 another quarry under four hectares?

14 A. That is what I -- I certainly
15 um..., just in an examination of the document, and
16 you can see at the top of the second page there
17 where the project and approval number are blacked
18 out. So it appears as though another quarry
19 approval was used as an example to illustrate.

20 Q. You will see under general
21 terms and conditions, there are a number of them:

22 "The approval holder shall
23 conduct the rock quarry in
24 accordance with the
25 provisions of Environment Act

1 and the regulations."

2 Do you see that?

3 A. Yes.

4 Q. Then if you go over, those
5 conditions continue on to the next page, and if you
6 go to condition (i), it states just about halfway
7 down the page:

8 "The approval holder will be
9 required to register their
10 project under Part IV of the
11 Environment Act should the
12 area exceed four hectares."

13 A. Yes, I see that.

14 Q. So you get an approval for
15 under four hectares, let's say 3.9, and if you want
16 to expand, then you must file a registration
17 document with the Department of Environment?

18 A. Yes. What happens from time
19 to time is a quarry may start off small and
20 subsequently expand over the years, and if they
21 realize they are approaching that 3.9, 4 hectare
22 threshold, then this would direct them to enter the
23 environmental assessment process before they
24 expanded further.

25 Q. So then the environmental

00047

1 process would click in when they registered that
2 document; correct?

3 A. Yes.

4 Q. And then if you go over to
5 page 3, there are -- actually, the bottom of page
6 2, there are conditions regarding particular
7 emissions --

8 A. Particulate.

9 Q. Particulate emissions, and so
10 there have been some calculations done as to what
11 would be reasonable particulate emissions. And
12 over on page 3, there is -- under number 4, there
13 is conditions relating to sound levels. Do you see
14 that?

15 A. Yes.

16 Q. Those would be standard sound
17 levels for all of -- the operation of all quarries?

18 A. Those sound levels have been
19 used consistently, yes, to my knowledge.

20 Q. Then if you go to page 5, you
21 will see the separation distances referred to in
22 this approval, and you've got the standard
23 separation distances of 30 metres, et cetera, most
24 of which we covered before.

25 A. Yes.

00048

1 Q. And there would be also some
2 conditions on the blasting; correct? Do you see
3 any conditions on blasting there?

4 A. Sorry. Can you point me to
5 them?

6 Q. Well, I'm not seeing them on
7 a quick read, but under groundwater separation
8 distances, we're at page 5, reclamation --

9 A. Yes.

10 Q. -- there doesn't seem to be
11 any conditions on actual blasting in this approval
12 that was given for an under four hectare quarry for
13 another proponent, unless you see them where I'm
14 not seeing them?

15 A. No, I don't see them in this
16 particular example that was selected.

17 Q. All right.

18 A. And, again, this was a sample
19 of what approval I'm not sure. So...

20 Q. They were presented to
21 Mr. Lowe, in any event, as the standard conditions
22 that apply to any rock quarry --

23 A. Well, again --

24 Q. -- as Ms. Deveau said?

25 A. She characterized them as

1 standard conditions. I wouldn't characterize them
2 as a standard to be adhered to. The pit and quarry
3 guidelines were our basis for -- you know, used as
4 a starting-off point for writing approvals.

5 Q. All right.

6 A. Yes.

7 Q. If you go to tab 3,
8 document -- Exhibit R-79, the first application was
9 considered by Mr. Balcom, the engineer you referred
10 to earlier. Do you see on page 1 there is your
11 name, Mr. Balcom's name and Mr. Langille's name?

12 A. Yes.

13 Q. And he does a report dated
14 March 21st, 2002. That's correct?

15 A. Yes.

16 Q. And if you go to the second
17 page of that report, he says at the bottom:

18 "The proposed quarry area is
19 less than four hectares and
20 therefore is not subject to a
21 registration under the
22 Environmental Assessment
23 Regulations."

24 That was correct?

25 A. I see that, but this was the

00050

1 first application, I believe, if I am reading the
2 provincial number correctly, and --

3 Q. There was another calculation
4 done later on?

5 A. Yes, yes.

6 Q. A term and condition has been
7 included in the approval requiring registration if
8 the area exceeds the four hectare limit.

9 Then if you go over to page 3
10 under (b) -- sorry, under air emissions, it states:

11 "Environmental effect from
12 noise and dust on land are
13 expected to be minimal as the
14 proposed area meets the
15 required minimum separation
16 distances from the nearest
17 residential dwelling and is
18 surrounded by undeveloped
19 lands. Noise and dust will
20 be further restricted to the
21 limits set forth in the
22 Department of Environment and
23 Labour Pit and Quarry
24 Guidelines and shall be
25 monitored at the department's

00051

1 request."

2 A. Yes.

3 Q. And that was the information
4 that you had at that time?

5 A. Yes.

6 Q. If you could just go to the
7 previous paragraph, it states:

8 "The main environmental
9 effects associated with
10 proposed operation are noise,
11 dust, surface run-off,
12 blasting and rehabilitation
13 and the effect that the
14 blasting operations will have
15 on the marine mammals in the
16 Bay of Fundy. It may be
17 necessary to restrict
18 blasting in the quarry to
19 when the Right Whales are not
20 in the Bay of Fundy. The
21 North Atlantic Right Whales
22 are an endangered species
23 that have been hunted to near
24 extension by mankind."

25 So there was a concern raised

00052

1 about the potential effect of blasting at the
2 Whites Point site --

3 A. Yes.

4 Q. -- on endangered Right
5 Whales?

6 A. That's correct, yes.

7 Q. Mr. Balcom flagged that as an
8 issue?

9 A. He did, and I believe in the
10 proponent's application themselves they had
11 identified it as an issue for consideration, as
12 well.

13 Q. I think that is correct.
14 They originally flagged the issue of the endangered
15 species, and their point was they wanted to comply
16 with whatever was required in order to protect
17 endangered species, endangered Right Whale
18 species. Is that your recollection?

19 A. I certainly recall that they
20 identified it as an issue and proposed mitigation,
21 yes.

22 Q. And at the bottom of the
23 page, there is reference to surface run-off. It
24 states:

25 "Surface run-off from the

00053

1 quarry operation will be
2 restricted to the limits in
3 the quarry guidelines."

4 And then over the page:

5 "The site of the proposed
6 quarry meets the department's
7 guideline for separation from
8 the nearest residence of 800
9 metres. Blasting operations
10 will be restricted to the
11 limits in the Department Of
12 Environment and Labour Pit
13 and Quarry Guidelines. Each
14 blast will be monitored by
15 the approval holder with
16 periodic reports being
17 submitted to the Department."

18 The approval holder here would
19 have been Nova Stone; correct?

20 A. Yes.

21 Q. "The approval holder has
22 indicated that they will
23 monitor the effect of the
24 quarry blasts on marine
25 mammals in the Bay. The

1 applicant has not supplied
2 any information that would
3 indicate what effect blasting
4 will have on the whales in
5 the Bay of Fundy."

6 Again that issue was flagged, but
7 the understanding was the approval holder would
8 monitor the effects of blasting, potential effects
9 of blasting, in the water -- not blasting in the
10 water, but the effects from the blasting?

11 A. The effects, yes.

12 Q. Correct

13 A. That was the assessment, yes.

14 Q. And then Mr. Balcom
15 recommended the approval of the application, and
16 that is just following. And you will see under, on
17 the next page, "approval", Nova Stone, March 14,
18 2002, and it says:

19 "Construction and operation
20 of the quarry and associated
21 work at or near Little River,
22 Digby County in the Province
23 of Nova Scotia."

24 Do you see that?

25 A. Yes, this appears to be a

00055

1 draft approval.

2 Q. That was the quarry that was
3 ultimately approved for a 3.9 hectare quarry at
4 that site; correct?

5 A. Yes.

6 Q. And if you go over to the
7 terms of the approval, page 3, at the bottom you
8 will see some numbers, page 042258.

9 A. Sorry, which page number
10 again?

11 Q. Page 3 at the top.

12 A. Yes.

13 Q. Are you with me?

14 A. Yes. Page 3 of the draft
15 approval, yes.

16 Q. It says, "General terms and
17 conditions". There were a number of conditions.
18 Under A, there is to be compliance with the
19 Environment Act, regulations and any future
20 amendments to the Act or regulations. Do you see
21 that?

22 A. Yes.

23 Q. And then those conditions go
24 over to page 4, and finally finish off on page 5
25 and --

00056

1 A. I think they continue beyond
2 page 5.

3 Q. Right. Well, there is
4 reference to construction of facilities, and so on?

5 A. Sorry. Yes.

6 Q. And then if you go to page 8,
7 you will see the separation distances referred to
8 at number 9. Do you see that?

9 A. Yes.

10 Q. And at page 9, under 10,
11 "blasting":

12 "The approval holder shall
13 have a technical blast design
14 prepared by a qualified
15 person."

16 And that was a standard condition
17 for all quarries at that time?

18 A. Yes.

19 Q. "The design shall be sent to
20 the Department for review
21 prior to any blasting."

22 Was that a standard condition?

23 A. I believe it was -- certainly
24 the preparing of the technical blast design is a
25 standard condition, and I believe the review

00057

1 component by the department is normal, as well.

2 Q. Okay. Under B:

3 "The approval holder shall
4 conduct a pre-blast survey
5 including a water quality
6 analysis of all structures
7 within 800 metres of the
8 facility. Survey shall be
9 conducted in accordance with
10 the department's procedure
11 for conducting a pre-blast
12 survey."

13 Again, that was a standard
14 condition for all quarries?

15 A. Yes.

16 Q. And then if you go over to
17 page 10, there are two conditions at the end, G and
18 H. Do you see those?

19 A. Yes.

20 Q. "The effect of blasting in
21 the quarry on the marine
22 mammals shall be monitored
23 and a report on the effect
24 must be submitted to the
25 department."

00059

1 raised it. Bob flagged it in his engineering
2 report and expressed some degree of concern about
3 it himself, so...

4 Q. If you go, please, in that
5 volume to tab 62, document C-039, Exhibit C-039,
6 which is a map which I understand to be the US
7 geological survey, and it shows shipping lanes. Do
8 you see that?

9 A. Yes, I do.

10 Q. And there is a table at the
11 side which shows concentration -- at the bottom,
12 "concentration of Right Whale sightings 1978 to
13 2004". Do you see that?

14 A. Yes.

15 Q. And you see that there is a
16 spectrum of sightings starting at the lowest, which
17 is yellow, and going to dark blue, which is the
18 most intense?

19 A. I can see that, yes.

20 Q. Do you see that the most
21 intense area of Right Whale sightings was called in
22 what is called the Grand Manan Conservation Area?

23 A. I can see that.

24 Q. Do you see the shipping lanes
25 went through the Grand Manan Conservation Area to

00060

1 Saint John?

2 A. Yes.

3 Q. And did you have any
4 information in your office with respect like this
5 with respect to the sightings of endangered Right
6 Whale?

7 A. Not to my knowledge, at
8 least, and this type of information isn't something
9 we would typically have in a provincial environment
10 office. This is something that we would seek
11 outside advice on from DFO.

12 Q. So at any point along the
13 way, did you ask DFO for any information of this
14 nature as to where Right Whales had been actually
15 sighted?

16 A. I don't recall us asking for
17 sighting information from DFO. You know, we sought
18 their opinion on the risk and what would be
19 reasonable to mitigate that risk.

20 Q. If you go down to the Digby
21 area, you will see the Town of Digby is shown there
22 at the top of Digby Neck?

23 A. Yes.

24 Q. And if you go down Digby
25 Neck, the Whites Point quarry was to be located

00061

1 about ten kilometres from the end of Digby Neck;
2 correct?

3 A. You're in the right
4 neighbourhood, yes.

5 Q. And there is a body of water
6 separating Digby Neck from the next island; do you
7 see that?

8 A. Yes.

9 Q. And that is known as Petit
10 Passage?

11 A. That's correct.

12 Q. Tiverton is on the point
13 right there at Petit Passage in the Bay of Fundy;
14 correct?

15 A. It is, yes.

16 Q. And did you have any
17 information at any point, let's say in 2002, from
18 DFO that there had been no sightings of the
19 endangered Right Whale in the Whites Point area?

20 A. I don't think we had
21 information from DFO indicating that sightings were
22 or were not present in that area.

23 You know, we asked the question of
24 them, given that this had been raised in the
25 application and the review process. I mean, I'm

00062

1 summarizing here somewhat, but basically seeking
2 their opinion on the issue and what would be
3 reasonable precautions to prevent an adverse effect
4 on marine mammals.

5 Q. So you didn't ask them
6 specifically for information and they didn't offer
7 that; is that correct?

8 A. Now, I don't know
9 specifically, you know, whether Balcom, Mr. Balcom,
10 asked for that type of information.

11 He may have or may not. If he
12 did, I haven't seen a record of it.

13 Q. You haven't seen a record of
14 it?

15 A. No.

16 Q. No. If you look closely at
17 where Tiverton is located, you will see some yellow
18 dots, which are a little bit hard to discern on
19 this map. But did you become aware at any point
20 that there had been, although very few, some
21 sightings of endangered Right Whale or Right Whale
22 species in the Tiverton area?

23 A. I don't remember being, you
24 know, personally aware of that -- of that issue,
25 no.

1 Q. Do you recall that the
2 shipping lanes were shifted on July 1st, 2003? Do
3 you recall that being an issue?

4 A. I -- just in listening to the
5 news, I am aware of the matter of shifting the
6 shipping lanes. I don't recall when -- I don't
7 know when it happened.

8 Q. If you take a close look at
9 where the shipping lanes go through the Grand Manan
10 Conservation Area on this map, and then turn to a
11 second map, you will see that the second map shows
12 a shipping lane location that is further to the
13 south of the Grand Manan Conservation area, closer
14 to Tiverton and closer to Whites Point. Do you see
15 that?

16 A. Yes.

17 Q. If you go to, please, back to
18 the first part of that binder at tab 4, Exhibit
19 R-83, you will see that Exhibit R-83 is a letter
20 from Mr. Langille in your office to Mr. Conway.
21 Apparently there was some conversation between
22 Mr. Langille and Mr. Conway which ended up
23 resulting in this letter being sent, and it's with
24 respect to that first application. He states:

25 "As per our conversation

1 earlier today, enclosed is a
2 copy of the application..."

3 And did you understand at that
4 time that Mr. Conway was the DFO's marine mammal
5 expert and coordinator in Nova Scotia?

6 A. That was -- I believe that
7 was our understanding of Mr. Conway's role.

8 Q. The purpose of sending the
9 application over to Mr. Conway was to get some
10 information on what should be done about protection
11 of Right Whales and other marine mammals?

12 A. Yes. We were concerned about
13 potentially approving something with an emission --
14 an impact that might impact these endangered Right
15 Whales, and we needed to, you know, reach out for
16 informed input into what the best course of action
17 might be.

18 Q. And you were going to rely on
19 the information that DFO provided you in that
20 regard in making your determination, first of all,
21 about any other conditions that might be put in an
22 approval, and any resulting changes that might be
23 made to that approval resulting from information
24 received from DFO; is that right?

25 A. I think we would take that

1 information under serious consideration.

2 Q. If you could go, then, to tab
3 5, Exhibit R-76, this is an email from Mr. McLean,
4 Mark McLean, to Brad Langille and to yourself. And
5 essentially this is when the ten acres is actually
6 4.05 hectare at the time --

7 A. Yes.

8 Q. -- was discovered, and,
9 therefore, it was in excess of four hectares, and,
10 therefore, unless the applicant reapplied or did
11 something to correct that application to make it
12 under four hectares, it would have to go through an
13 environmental assessment?

14 A. That's right.

15 Q. Right? And he states at the
16 second line halfway across:

17 "... but the EA regulations
18 state that a pit or quarry in
19 excess of four hectares and
20 in an area primarily engaged
21 in the extraction of ordinary
22 stone, et cetera, is required
23 to register the EA."

24 Do you see that?

25 A. Yes.

1 Q. And if they did that, then
2 there would be -- that would launch an
3 environmental assessment of the property?

4 A. That's right.

5 Q. And at the very bottom, he
6 says:

7 "On an unrelated note I'm
8 impressed that the company
9 has taken the time and effort
10 to examine the whale issue
11 and have offered to monitor
12 the blast levels in the bay."

13 Do you see that?

14 A. Yes, I do.

15 Q. Was that impression shared by
16 you and Mr. Balcom, as well?

17 A. I don't recall Mr. Balcom
18 ever expressing the fact that he impressed by this.
19 I think that it was good that the item was flagged.

20 Q. That the proponent had
21 flagged that matter?

22 A. Certainly, yes.

23 Q. If you go over to the next
24 tab, tab 6, Exhibit R-84, it is a briefing note
25 which is drafted by Mr. Langille. It is dated at

00067

1 the bottom April 11th, and he gives some
2 background. And you will see on the third bullet
3 in the middle of the page:

4 "The application was also
5 sent to the Department of
6 Fisheries and Oceans, DFO,
7 Bedford Institute of
8 Oceanography for comment on
9 the effects of the blast
10 concussion on marine life,
11 i.e., endangered North
12 Atlantic Right Whale."

13 And that was done because you
14 considered them to be the experts; is that right?

15 A. Yes.

16 Q. Then under "Recommendation",
17 it says:

18 "Although the department did
19 not receive written comments
20 from DFO regarding the issue,
21 April 15, 2002 the
22 application was rejected
23 based on the evidence that it
24 exceeded 4 ha and would
25 require the proponent to

1 register the application with
2 the environmental assessment
3 office."

4 That was your understanding of the
5 state of affairs at that time; correct?

6 A. Yes.

7 Q. Go over, please, to the next
8 tab, tab 7, which is Exhibit R-77. You send a
9 letter to Mr. Buxton. Mr. Buxton was the
10 representative, by this point, and spokesperson for
11 the proponent; that's correct?

12 A. He was certainly acting as a
13 technical representative on this matter, yes.

14 Q. He was the person to whom
15 NSDEL was communicating with respect to the 3.9 or
16 four hectare quarry?

17 A. Yes, that's right.

18 Q. And you state:

19 "This is to advise that the
20 application for an approval
21 on behalf of Nova Stone
22 Exporters, Inc. for the
23 following activity 'quarry'
24 under the Nova Scotia
25 Environment Act has been

1 rejected for the following
2 reason..."

3 And you give the reason, which is
4 that, as presented, it would launch an
5 environmental assessment, and then you state that:

6 "In order to obtain more
7 information on the
8 environmental assessment and
9 process, you may obtain a
10 copy of the Proponent's Guide
11 to Environmental Assessment."

12 And that's the document we have
13 been covering earlier this morning; right?

14 A. I see that, yes.

15 Q. If you go then to tab 8,
16 Exhibit R-49, you will see there is an email from
17 Brian Jollymore to Mr. Langille dated April 22nd,
18 '02. It appears there had been a phone call
19 between Mr. Langille and Mr. Jollymore. Jollymore
20 is with the DFO; that's correct?

21 A. Yes. Brian Jollymore is with
22 DFO.

23 Q. And he was at that time?

24 A. Yes.

25 Q. And Mr. Jollymore says to Mr.

00070

1 Langille:

2 "Brad, as a follow-up to our
3 telephone call, attached is
4 the web link with our
5 national blasting
6 guidelines."

7 Just pause there. Were you
8 familiar at this time with the DFO's national
9 blasting guidelines for blasting near waters?

10 A. No, I was not.

11 Q. Had you ever heard of them
12 before?

13 A. I don't believe so.

14 Q. He then states at the last
15 paragraph:

16 "Jerry Conway, our marine
17 mammal person, spoke to me
18 only briefly about this
19 project as he had to leave
20 the office and was to be away
21 from his desk for several
22 weeks."

23 And I will emphasize the next
24 sentence:

25 "Jerry had significant

00071

1 concerns about the use of
2 explosives and their impact
3 on the whales in the area.
4 He wanted documented proof
5 the charges to be employed
6 would not have any disruptive
7 influence on the species."

8 You see he has copied Jerry Conway
9 and Joy Dube. Do you see that?

10 A. Yes.

11 Q. Did you know Jerry Conway at
12 this time?

13 A. I knew of him. I didn't know
14 him personally.

15 Q. Had you ever spoken to him?

16 A. As of April 22nd? I don't
17 know if I spoke to him directly or if it was staff
18 that were -- I mean, staff were certainly
19 conducting those communications with him. I don't
20 remember whether I had spoken to him directly or
21 not.

22 Q. I don't see your name on
23 here. Were you copied with this email or did you
24 learn about its existence?

25 A. I was aware of the

00072

1 communication, the conversation that was unfolding.

2 Q. Right. If you go, then, to
3 tab 9, Exhibit C-40, Mr. Jollymore -- this April
4 24th. Actually, let's go to the originating
5 message. It is a message from Brad Langille to
6 Mr. Jollymore:

7 "Brian, thank you for sending
8 a copy of the guidelines for
9 the use of explosives in or
10 near Canadian fisheries
11 waters. On page 10, under
12 Fisheries Act, it notes that
13 DFO will review the
14 proponent's application in
15 accordance with the Fisheries
16 Act... upon receipt of
17 information, notice, a
18 referral or application for
19 authorization...

20 "From reading this, is there
21 an application the proponent
22 is obligated to fill out on
23 your end, DFO, before
24 blasting could commence?" [As
25 read]

1 Mr. Langille responds by the
2 previous email April 24th:

3 "Good morning, Brad: Thus
4 you have found a weakness in
5 using legislation that was
6 first drafted before
7 Confederation. A person does
8 not have to apply for
9 permission to do an activity,
10 but if you damage fish or
11 fish habitat one is liable
12 under the Fisheries Act."

13 Was that your understanding in
14 April of 2002?

15 A. Yes, I believe that's a fair
16 statement.

17 Q. Could you go, please, to tab
18 7 of the other binder, the statutes and
19 regulations, guidelines binder.

20 A. Tab 7?

21 Q. Yes. You indicated I think
22 you were not specifically aware of these
23 guidelines. These are the guidelines for the use
24 of explosives in this period; have I got that
25 right?

1 A. I didn't -- at that time I
2 didn't have -- whether I had heard of them or not,
3 it is hard to say. I certainly didn't have a
4 working familiarity with them.

5 Q. You see they are authored by
6 D.G. Wright and G.E. Hopky. Do you see that?

7 A. Yes.

8 Q. And Mr. Langille is speaking
9 about a matter on page 10 and refers to the review
10 and decision-making process:

11 "This section summarizes the
12 approach taken by the
13 Department of Fisheries and
14 Oceans in a review of
15 referrals and of applications
16 for authorization."

17 That was what had given rise to
18 the application from Mr. Langille to Mr. Jollymore?

19 A. I see that.

20 Q. If you go to page 15, there
21 is a reference, third of the way down the page, to
22 Mr. Wright, Mr. Hopky, Guidelines for the use of
23 explosives in or near Canadian fisheries waters.
24 It appears to have been published in a journal. Do
25 you see that?

00075

1 A. Yes.

2 Q. It says under table 1,
3 setback distance, "m" for metres, I take it, from
4 centre of detonation of a confined explosive to
5 fish habitat to achieve 100 -- I take that to be
6 kilopascals -- guidelines criteria for various
7 substrates. Do you see that?

8 A. I do.

9 Q. Under substrate type, there
10 is rock, and if you go over across that table to
11 the second to last column, it has a 50 there. Do
12 you see that?

13 A. Yes.

14 Q. And that is the weight of
15 explosive charge, 50 kilograms, and the setback
16 distance is identified as 35.6 metres. Do you see
17 that?

18 A. I do.

19 Q. You do not see that?

20 A. I see the 35.6, yes.

21 Q. Did you ever hear about the
22 35.6 metre setback with respect to the Whites Point
23 quarry?

24 A. The 35.6 setback was
25 certainly referenced in, you know, subsequent

1 correspondence and conversations on this issue.

2 I believe, whether it was 35 or
3 35.6, that the proponent had referenced a minimum
4 35 metre setback in one of their initial
5 application documents.

6 Q. From your standpoint, that 35
7 metre setback would work from the standpoint of
8 your provincial guidelines; correct?

9 A. It wouldn't violate any of
10 our provincial guidelines.

11 Q. If you go then to the next
12 tab in the other binder, your affidavit, and
13 exhibit binder, the bundle, tab 10, Exhibit R-78.
14 You will see that in the meantime Mr. Buxton
15 presented an application for approval, a revised
16 application now. That was received on April 23rd;
17 do you see that?

18 A. Yes. I am at the wrong point
19 in the binder, but I see it on the screen.

20 Q. Let's just have you look at
21 the hard copy. Tab 10, it should be.

22 A. Of?

23 Q. Of that binder right in front
24 of you, the first one.

25 A. Oh, okay. Tab 10. There it

00077

1 is, yes.

2 Q. Here is the reapplication for
3 a 3.9 hectare quarry; correct?

4 A. Yes. Received April 23rd,
5 2002.

6 Q. And if you go to the next
7 tab, tab 11, Exhibit R-86.

8 A. Yes.

9 Q. This is an email from
10 Mr. Jollymore to you, with a copy to Jerry Conway,
11 Thomas Wheaton and Bill Coulter. Did you know
12 Thomas Wheaton or Bill Coulter?

13 A. I knew Thomas. I had worked
14 with him. I knew Bill somewhat, but not very well
15 [].

16 Q. Had you worked with
17 Mr. Wheaton prior to this time?

18 A. I believe I had, yes.

19 Q. Mr. Jollymore states:
20 "Hello, Bob: This email is a
21 follow-up to several
22 discussions I have had with
23 your shop recently. I
24 understand the proponent is
25 now applying for a quarry of

1 under four hectares. A
2 quarry of this size will not
3 trigger the need for an
4 environmental assessment
5 under your legislation."

6 That was correct; right?

7 A. That's right.

8 Q. And then the next but one

9 paragraph down:

10 "I believe the company
11 intends to get much larger.
12 Because they have not applied
13 at this time for a wharf, we
14 have no legislative trigger
15 to request an environmental
16 assessment."

17 Do you see that?

18 A. I do.

19 Q. And that was your

20 understanding at that time?

21 A. I believe so.

22 Q. "Thus at this point the 3.9
23 hectare quarry, if approved,
24 would not be subject to any
25 environmental assessment

1 under any legislation, either
2 federal or provincial."

3 That was your understanding?

4 A. That's right. Assuming that
5 there were no other federal triggers, that's right.

6 Q. Accepting Mr. Jollymore's
7 statement, "we have no legislative trigger to
8 request an environmental assessment", it was your
9 understanding, then, that the 3.9 hectare quarry,
10 when approved, would not be subject to any
11 environmental assessment under federal or
12 provincial --

13 A. The 3.9 hectare quarry once
14 approved would be able to start blasting and
15 producing rock, yes.

16 Q. Right.

17 A. As long as they didn't create
18 any other adverse effects, they would be fine.

19 Q. You weren't aware of any
20 other adverse effects and nor were you aware of any
21 other legislative trigger at this point; that's
22 correct?

23 A. Again, the other adverse
24 effects that were entering our consideration at
25 this time was whether a 3.9 hectare quarry and

00080

1 blasting at that could present some harm to marine
2 mammals, and that.

3 Q. In the absence of that, there
4 was no basis for an environmental assessment by
5 either jurisdiction, federal or provincial --

6 A. Not to my knowledge, no.

7 Q. You have to let me finish my
8 question.

9 A. Sorry.

10 Q. There was no basis for any
11 environmental assessment under any provincial or
12 federal legislation; that's correct?

13 A. Not for the 3.9 hectare
14 quarry.

15 Q. Okay.

16 A. No.

17 Q. Go down, please, to the next
18 paragraph:

19 "Our marine mammal
20 coordinator Jerry Conway has
21 expressed significant
22 concerns about possible
23 blasting impacts on marine
24 mammals in the area. Jerry
25 wanted documented proof the

1 charges to be employed would
2 not have any disruptive
3 influence on the species. I
4 am sure the local people who
5 make their living chartering
6 vessels to tourists wishing
7 to see the whales would be
8 equally concerned. I would
9 appreciate the following two
10 clauses be added to your
11 permit. One, all blasting
12 would be in accordance with
13 the Guidelines for the Use of
14 Explosives In or Near
15 Canadian Fisheries Waters..."

16 Which we already covered; correct?

17 A. Yes.

18 Q. "Number 2, a report be
19 completed in advance of any
20 blasting activity verifying
21 the intended charge size will
22 not have an impact on marine
23 mammals in the area."

24 And then if you go to the next tab
25 at Exhibit C-41, tab 12.

00082

1 A. Yes.

2 Q. You will see there is an
3 email which is just slightly later on April 26th,
4 and it looks to be the same email, but there is
5 some writing under number 2. Do you see that?

6 A. Yes.

7 Q. Is that your writing?

8 A. Yes, it is.

9 Q. So:

10 "A report be completed in
11 advance of any blasting
12 activity verifying the
13 intended charge size..."

14 And you have written in "and blast
15 design"?

16 A. Yes.

17 Q. "... will not have an impact
18 on marine mammals in the
19 area."

20 And then could you read that
21 writing? Is that your writing to the right of that
22 paragraph?

23 A. Yes.

24 Q. Could you read that out,
25 please?

1 A. "The report shall be
2 submitted to the DFO and
3 written acceptance of the
4 report shall be received from
5 DFO before blasting
6 commences."

7 Q. And did that writing result
8 from telephone conversations with Mr. Jollymore?

9 A. My communications with
10 Mr. Jollymore, my recollection is that they
11 primarily resulted in the first iteration of these
12 conditions.

13 In looking at the way he proposed
14 the second condition, (a) I just for clarity wanted
15 to add the reference to a blast design because
16 charge size is, you know, only one component of
17 blasting, so that was an item I wanted to add for
18 clarity.

19 The other concern I had just with
20 the way the condition was written is that, as
21 written, it might be possible to submit a report
22 that, you know, didn't pass the muster, so to
23 speak, but administratively they would have
24 submitted a report. Whether it was a good report
25 or not, is open to debate, but that would have

00084

1 satisfied the condition and they would have been
2 able to blast.

3 So, in essence, I simply just
4 wanted to close the loop and have a provision in
5 there to ensure that whatever report they submitted
6 to us was, you know, technically sound and answered
7 the questions that we were concerned about.

8 Q. So that writing, "this report
9 shall be submitted to the DFO and written
10 acceptance of the report shall be received from DFO
11 before blasting commences", that was your idea?

12 A. Yes. I believe so, yes.

13 Q. And Bill Coulter is copied
14 there. Again, he was the regional head of CEAA at
15 the time, was he not?

16 A. I believe so.

17 Q. And Thomas Wheaton was a
18 local habitat official with the DFO?

19 A. Yes.

20 Q. In the habitat management
21 division?

22 A. Yes.

23 Q. If you go over, please, to
24 tab 13, Exhibit R-87, that letter encloses the
25 approval for the 3.9 hectare quarry at Whites

1 Point; correct?

2 A. Yes.

3 Q. And if you go to the next
4 page, you will see "approval". It is almost
5 identical to what Mr. Balcom had written in his
6 report. Do you see that?

7 A. Yes.

8 Q. And you have signed it on
9 April 30th, 2002?

10 A. That's right.

11 Q. And if you go over to general
12 terms and conditions on page 3, number 3, you will
13 see that three further conditions under 3(a) have
14 been added beyond the first three that were
15 identified in Mr. Balcom's draft approval: Nova
16 Scotia Department of Environment Pit and Quarry
17 Guidelines, May 1999; Guidelines for the Use of the
18 Explosives in or near Canadian Fisheries Waters;
19 and Roman numeral vi, Nova Scotia Department of
20 Environment and Labour Guidelines For the Formation
21 of a Community Liaison Committee. Do you see that?

22 A. I see those, yes.

23 Q. Those three conditions were
24 not in the standard form for quarries in Nova
25 Scotia, correct, for under four hectare quarries in

1 Nova Scotia?

2 A. Certainly conditions v and vi
3 were not normally listed in all quarry approvals.
4 The reference to the pit and quarry guidelines, it
5 is, I guess, common practice or a common assumption
6 that the approvals are based on those guidelines,
7 anyway. So that just might have been trying to be
8 administratively complete.

9 Q. And then if you go over to
10 page 5, under subparagraph (o) -- and these were a
11 whole lot of the standard conditions; right?

12 A. Yes.

13 Q. And under (o):
14 "The approval holder will be
15 required to register their
16 project under Part IV of the
17 Environment Act should the
18 facility and associated works
19 including access roads
20 exceeds and area of four
21 hectares."

22 Again a standard condition;
23 correct?

24 A. Yes.

25 Q. So that if the proponent

00087

1 wanted to expand beyond the 3.9, they would have to
2 do an environmental assessment document and
3 register the document with the branch at that
4 point, and the environmental assessment would be
5 commenced; correct?

6 A. Yes.

7 Q. And if you go over then to
8 page 9 under 10, "Blasting", there is a number of
9 conditions there which are noncontroversial.

10 Then if you go to page 10 under
11 (f), it is monitoring stations for blasting; (g)
12 monthly summaries; and then (h). That is the first
13 of the conditions that Mr. Jollymore had requested;
14 correct?

15 A. Yes.

16 Q. And (i) is the first of the
17 conditions -- the second of the conditions that
18 Mr. Jollymore had requested with your changes to
19 it?

20 A. Yeah. There were some
21 changes, but it is representative of his request.

22 Q. Right. It states in (i):
23 A report shall be completed
24 by the proponent in advance
25 of any blasting activity

00088

1 verifying the intended charge
2 size and blast design will
3 not have an adverse effect on
4 marine mammals in the area.
5 This report shall be
6 submitted to the Department
7 of Fisheries and Oceans, DFO,
8 Maritimes, Aquatic Species At
9 Risk Office, and written
10 acceptance of the report
11 shall be received from DFO
12 and forwarded to the
13 Department before blasting
14 commences."

15 Do you see that?

16 A. Yes.

17 Q. And would you agree with me
18 that that effectively provided DFO with a veto over
19 the proponent's ability to blast at the site?

20 A. "Veto" isn't the word that I
21 would use to characterize it.

22 In our -- you know, the objective
23 in putting this in here was to provide for a
24 preventive step to make sure that -- which we
25 expected effects to marine mammals could be

00089

1 mitigated, but we wanted that verification before
2 blasting could proceed.

3 And, you know, as I explained, the
4 requirement for acceptance of the report was
5 something that I, as an administrator, wanted to be
6 able to close the loop on and, you know, be
7 accountable, in the sense that this condition was
8 doing what it was designed to do.

9 Q. And would you agree with me
10 that this condition was used for almost two years
11 to prevent blasting on the 3.9 hectare quarry?

12 A. I wouldn't characterize it as
13 "using it to prevent blasting". I recognize it
14 took a period of time to work through various
15 iterations of blasting plans that, you know, were
16 in support of DFO requirements.

17 Q. And those blasting plans were
18 sent to you, and then ultimately sent to Mr. Ross
19 at DFO; correct?

20 A. Initially they were sent to
21 my office for forwarding on to DFO. At some point,
22 as it became clear this was going to be an
23 iterative process, I believe I wrote the proponent
24 and said, You can send these plans directly to DFO,
25 copy us so we know that this communication is

00090

1 happening, and we'll monitor that for compliance
2 with this condition.

3 That was simply, I guess, an
4 efficiency step, not seeing the need to act as a
5 post office. We just were promoting direct
6 communication.

7 Q. So were you ever told by DFO
8 that there was -- say in 2002, that they had no
9 concern about the proponent's blasting plan with
10 respect to marine mammals?

11 A. In 2002, was it proposed they
12 had no concern?

13 Q. No concerns.

14 A. About the blasting plan?

15 Q. With regard to marine
16 mammals.

17 A. The communications that I
18 recall, particularly with Mr. Conway and
19 Mr. Jollymore, highlighted the concerns around
20 marine mammals.

21 Q. In 2002, were you told by DFO
22 that Mr. Conway had no concerns with respect to
23 marine mammals with respect to the proponent's
24 blasting plan?

25 A. I know that the discussion

00091

1 with Mr. Conway, there were a number of discussions
2 between Mr. Langille and Mr. Balcom on the issue of
3 marine mammals.

4 Q. That is in April of 2002;
5 correct?

6 A. Sorry.

7 Q. Sorry, that is in April of
8 2002?

9 A. Okay.

10 Q. Were you told at any time
11 after that in 2002 that Mr. Conway had no concerns
12 with respect to blasting with respect to the marine
13 mammal concerns he had earlier expressed?

14 A. I don't specifically remember
15 a reference to that.

16 Q. Did you have any discussions
17 with Mr. Conway about the Whites Point site in 2002
18 that you recall?

19 A. The discussions with
20 Mr. Conway primarily occurred between Mr. Balcom
21 and Mr. Langille.

22 Q. I am just asking: Did you
23 have any discussions with Mr. Conway in 2002?

24 A. Did I? I don't specifically
25 recall any conversations with Mr. Conway.

00092

1 Q. Did you have any discussions
2 with Mr. Ross about the information that he had
3 available to him with respect to the proponent's
4 blasting plan and a concern for marine mammals?

5 A. In 2002?

6 Q. In 2002?

7 A. With Mr. Ross?

8 Q. Yes.

9 A. Later in 2002, as blasting
10 plans became -- you know, came to be submitted to
11 DFO, I would have likely engaged in some
12 conversation with Mr. Ross.

13 Q. Do you recall any discussions
14 with Mr. Ross in 2002 about the proponent's
15 blasting plan and its potential effects on marine
16 mammals?

17 A. I don't specifically recall,
18 you know, a reference to a particular conversation,
19 unless it is --

20 Q. Do you have a general
21 recollection of any discussions?

22 A. -- documented. You know, the
23 general recollection, at least on most of the
24 discussions with DFO on the matter of blasting and
25 marine mammals, there were conversations that, you

1 know, reiterated and confirmed the concerns around
2 the potential adverse effects here.

3 Q. So the information that you
4 recall getting from DFO is that they had remaining
5 concerns about the effect of blasting on the 3.9
6 hectare quarry site at Whites Point with respect to
7 the effects of blasting on marine mammals; is that
8 what you were told?

9 A. They were certainly concerned
10 about the effects of blasting at this site on
11 marine mammals.

12 Q. My question is more specific.
13 Did you have any --

14 MR. DOUGLAS: Mr. President, sorry
15 to interject here, but I believe the witness has
16 answered the question already with respect to his
17 recollection. I don't know, if Mr. Nash would like
18 to take him to a particular document to help
19 refresh his memory, that is fine, but I believe he
20 has asked sufficient questions regarding his
21 recollection at that time.

22 MR. NASH: I think this is an
23 inappropriate interjection in cross-examination,
24 Mr. President. I am asking him very specifically
25 if he has any --

1 PRESIDING MEMBER: Yes, go ahead.

2 MR. NASH: -- general recollection
3 of any discussions from anybody at DFO with respect
4 to information they had to confirm their continuing
5 concern about blasting effects on the Whites Point
6 quarry site, the 3.9 hectare site, on marine
7 mammals.

8 MR. DOUGLAS: Again, I feel the
9 witness has already answered that question, and
10 we're also talking about, you know, over 11 years
11 ago now at this point.

12 PRESIDING MEMBER: Well, indeed
13 the witness can reply accordingly, but I think the
14 question is fine. Go ahead.

15 BY MR. NASH:

16 Q. Did you receive any
17 information from any official at DFO in 2002 to the
18 effect that they had no concerns about the effects
19 of blasting at the 3.9 hectare quarry site at
20 Whites Point with respect to the effects of those
21 blasting -- that blasting on marine mammals?

22 A. My recollection of the
23 ongoing conversation with DFO as 2002 unfolded was
24 that concerns around marine mammals persisted, and
25 that is why we wanted to enter this iterative

00095

1 process of reviewing blasting plans to address
2 those questions.

3 Q. So the DFO officials, at
4 least your recollection is that the DFO officials
5 you were dealing with were maintaining they had
6 remaining concerns about the effects of blasting on
7 the 3.9 hectare site on marine mammals. Is that
8 the information you received?

9 A. Yes.

10 Q. And do you recall having any
11 information about why they had remaining concerns?

12 A. Specifically why they had
13 remaining concerns?

14 Q. Yes.

15 A. I guess I would characterize
16 it by saying that the information that was supplied
17 in the initial application for approval, and
18 subsequent early versions of the blasting plan,
19 weren't sufficient for DFO to form an opinion as to
20 whether effects on marine mammals were going to be
21 avoided.

22 Q. And in this process of the
23 proponent providing information about its blasting,
24 you receiving it and DFO receiving it, you were
25 acquiescing to DFO's consideration of all of that;

1 correct?

2 A. I was acknowledging and
3 respecting their expertise in this area.

4 Q. Did you do any independent
5 investigation yourself about the potential effects
6 of blasting on marine mammals from the Whites
7 Point?

8 A. No. As the competent
9 authority in this business, we realize on DFO for
10 that expertise.

11 Q. You relied on DFO for that
12 expertise and acquiesced to all of their decisions
13 in this regard; is that a fair statement?

14 A. I wouldn't characterize it as
15 acquiescence. We respected their professional
16 evaluation on matters within their areas of
17 expertise.

18 Q. And that is what you were
19 relying upon?

20 A. Yes.

21 Q. Could you go, please, to tab
22 17, Exhibit C-298.

23 A. Yes.

24 Q. A letter from Mr. Buxton
25 enclosing the first blasting plan. Do you recall

00097

1 that?

2 A. Yes. Yes.

3 Q. And that was received by you
4 on September 20th; correct?

5 A. Correct.

6 Q. And if you go to the blast
7 design, second page, you will see that is it for
8 test blast. Do you see that?

9 A. I do see that.

10 Q. Just a question at this
11 point. Did you review the blasting plan at all at
12 this point in time when you received it?

13 A. I certainly would have
14 scanned it so I knew what was being received and
15 what was under DFO, DFO's review. I am not a
16 blasting expert, so I wouldn't have conducted a
17 technical review.

18 Q. There is a second page,
19 Archibald Drilling & Blasting, Whites Point quarry,
20 and there is a form of blasting plan.

21 A. Yes.

22 Q. Archibald Drilling & Blasting
23 was a well-known blasting company in the area;
24 correct?

25 A. I will accept that assertion.

00098

1 I am not personally familiar with them.

2 Q. You had seen their name come
3 up in other blasting designs for 3.9 hectare
4 quarries?

5 A. Again, my role wouldn't have
6 been to review detailed blasting designs. That
7 would be more Mr. Balcom's role.

8 Q. If you go to the next page,
9 you will see the diagram, a form of map. You will
10 see the title "Bay of Fundy, Whites Cove". Do you
11 see that?

12 A. Yes.

13 Q. There is a cross-check box on
14 the right-hand side, 3.9 hectare quarry boundary,
15 initial blast site. Do you see that?

16 A. Yes.

17 Q. You see where the initial
18 blast site is in that area, which I understand to
19 be the 3.9 hectare area?

20 A. The hatch-marked area, yes.

21 Q. Right. That is what your
22 understanding was, is that that was the 3.9 hectare
23 site?

24 A. The larger delineation there,
25 yes.

00099

1 Q. Right. If you go to the
2 arrowed area, it says at the very top "mean high
3 water mark level 2.1 metres"; do you see that?

4 A. I do.

5 Q. There is an arrow going to
6 the next mark with arrows pointing the other way.
7 It says, "min. 35.6 metres"; do you see that?

8 A. Yes.

9 Q. And no blast zone.

10 A. Yes.

11 Q. Would you have understood
12 that to be a 35 metre setback from the mean high
13 water mark?

14 A. That is -- that is what it
15 depicts. That is what I would have taken by it.

16 Q. That would have complied with
17 your guidelines?

18 A. It would have complied with
19 the typical conditions of an approval which,
20 however, we're not designed to take into account
21 these types of considerations.

22 Q. Well, let's just be clear
23 about that.

24 A. Yes.

25 Q. We've gone through standard

00100

1 conditions. We've gone through the initial
2 approval from Mr. Balcom, or recommended approval?

3 A. Yes.

4 Q. We have gone through the
5 actual approval. They all have 30 metres from any
6 water bank.

7 A. Yes.

8 Q. Thirty metres was your
9 standard condition; that's correct?

10 A. That's correct. And it most
11 often applied in terms of fresh water courses, but
12 nonetheless that was the standard condition that
13 was in the permit. Yes.

14 Q. So this 35.6 metre would have
15 complied with your provincial standard; correct?

16 A. That would have complied with
17 those typical conditions of approval. It doesn't
18 necessarily mean that it was sufficient to
19 protect -- prevent an adverse effect.

20 Q. That is another issue?

21 A. Certainly.

22 Q. I am just talking about your
23 provincial approval conditions, and the separation
24 distance was 30 metres from any water bank or water
25 course; isn't that correct?

00101

1 A. Yes.

2 Q. If you go down to the

3 left-hand side, at the bottom it says:

4 "The 'no blast' zone min 35.6

5 metres is from Table 1,

6 Guidelines for the Use of

7 Explosives in or near

8 Canadian Fisheries Water for

9 rock substrate with a 50

10 kilogram weight of explosive

11 charge per delay to achieve a

12 less than 100 kilopascal to

13 fish habitat." [As read]

14 Do you see that?

15 A. I do.

16 Q. And is that in accordance

17 with what we discussed earlier in the blasting

18 guidelines that I took you to?

19 A. It appears to be consistent

20 with those guidelines.

21 Q. If you go over to the

22 right-hand side, this was an initial blast design,

23 Whites Point quarry, August 20th, 2002; do you see

24 that?

25 A. Yes, at the lower right-hand

1 corner it says initial blast plan.

2 Q. Your understanding is that
3 this was a design of an initial test blast for the
4 3.9 hectare quarry which met your provincial
5 conditions; correct?

6 A. Well, the characterization of
7 it as a test blast is something that emerged in the
8 discourse. When we issued the approval, the
9 approval was for a quarry producing, a producing
10 quarry.

11 Q. Right.

12 A. And so that's -- you know,
13 that is the assumption on which the approval was
14 based.

15 Q. So from your perspective --
16 leaving aside 10(h) and (i), which have been
17 inserted at the request of the DFO, from your
18 perspective as the provincial regulatory official,
19 the proponent could have started blasting on the
20 3.9, so long as they complied with your conditions
21 from the time of April 30th on; is that right?

22 A. If it were a different site
23 and a different location, without engaging these
24 concerns about marine mammals, that could be the
25 case.

1 When we review applications for
2 approval, we certainly have to, you know, start
3 from the standard terms and conditions in the pit
4 and quarry guidelines that we use to keep ourselves
5 consistent.

6 But we do from time to time and do
7 have to from time to time account for unique
8 site-specific risks and characteristics that might
9 need to be accommodated through additional terms
10 and conditions; hence, the addition of 10(h) and
11 10(i).

12 So while in a different context,
13 if the quarry was located at a different site which
14 didn't engage marine mammal concerns, they
15 certainly may have been able to blast within these
16 distances, but in this case we were still concerned
17 about possible impacts to marine mammals.

18 Q. So if I understand it
19 correctly, it seems from the documentation that
20 conditions (h) and (i) were included only to
21 address Mr. Conway's marine mammal concerns; that's
22 correct?

23 A. 10(i) was certainly specific
24 to marine mammals. 10(h), the inclusion of, you
25 know, the reference to the guidelines at the time

00104

1 appeared to be a reasonable reference to a
2 technical standard to provide, you know, a
3 technical benchmark on which these, you know,
4 impacts could be assessed.

5 Q. If you could turn to tab 51,
6 please, Exhibit C-489, you were writing to
7 Mr. Buxton. Do you have that in front of you?

8 A. Yes.

9 Q. You were writing to
10 Mr. Buxton saying:

11 "This is in response to your
12 letter of June 25th, 2003..."

13 We're a year later:

14 "... and your request for us
15 to seek verification from DFO
16 as to whether you have
17 satisfied conditions 10(h)
18 and (i) contained in approval
19 number 2002-026397."

20 You then refer to condition 10(h),
21 and you say:

22 "By copy of this letter we
23 are requesting that DFO
24 provide confirmation as to
25 whether the proposed blast is

00105

1 in accordance with these
2 guidelines."

3 You then refer to condition 10(i),
4 and you say:

5 "We acknowledge that the
6 report has been completed,
7 submitted to DFO and includes
8 mitigation measures to
9 prevent adverse effects to
10 marine mammals. Many of
11 DFO's subsequent comments
12 relate to species other than
13 marine mammals. We recognize
14 that while these are
15 important issues, they are
16 outside of the scope of
17 condition 10(i) and are
18 therefore not considered when
19 determining whether condition
20 10(i) has been met."

21 So I would just like to confirm
22 with you that 10(i) was put in in respect to marine
23 mammals and marine mammals only; that's correct.

24 A. Yes. Marine mammals was the
25 important issue that was raised.

1 Q. It was the only issue that
2 was raised, and it was raised by Mr. Conway;
3 correct?

4 A. It was raised both by the
5 proponent and Mr. Conway.

6 Q. Right?

7 A. Yes.

8 Q. And it was the only issue
9 that was raised; correct?

10 A. It was the only, yes,
11 out-of-the-ordinary issue for us, yes.

12 Q. If you could go, then, back
13 to tab 18, Exhibit C-299, recalling that the blast
14 plan for the test blast had been received by you on
15 September 20th, if you could go to the second page,
16 please, of tab 18.

17 This is an email from Jim Ross to
18 Dennis Wright. Do you see that?

19 A. Yes.

20 Q. Have you seen this email
21 before?

22 A. I'm not intimately familiar
23 with it. I may have come across it in my review of
24 the documentation.

25 Q. Do you recall whether you

1 have seen it before? Take your time to read it.

2 A. Mm-hm.

3 A. I don't recall whether I have
4 seen this specific email. It is certainly
5 possible, but I -- I don't specifically recall it.

6 Q. The email states, "Dennis" --
7 from Jim Ross, who you were dealing with with
8 respect to the 3.9 hectare quarry; that's correct?

9 A. Yes.

10 Q. He says:

11 "Dennis, as discussed with
12 you this morning, you believe
13 that the Whites Cove quarry
14 blasting plan dated September
15 17, 2002 seems to be within
16 DFO's Guidelines for the Use
17 of Explosives in or near
18 Canadian Fisheries Waters.
19 However, there may be
20 monitoring requirements that
21 should be included, such
22 as..."

23 He goes on to say:

24 "Visual survey of the area up
25 to one kilometre radius for

00108

1 whales, sitings near or
2 within this radius would
3 delay the blast until the
4 whales had cleared the shore.
5 The use of hydrophones
6 suspended 500 metres offshore
7 to record data..." [As read]

8 And he goes on. "Am I
9 representing our discussions correctly?"

10 If you go to the first page, you
11 will see the reply from Mr. Wright that same date:

12 "Good morning (afternoon) in
13 Halifax, Jim. The explosives
14 guidelines are designed
15 chiefly to protect fish.
16 When we use them for
17 protection of marine mammals,
18 we are really flying by the
19 seat of our pants."

20 Did Mr. Ross ever tell you that
21 DFO was flying by the seat of its pants when it
22 came to the effect of explosives on marine mammals?

23 A. I don't know if Jim ever
24 stated that to me.

25 PRESIDING MEMBER: Mr. Nash, as a

00109

1 non-Canadian, I don't know -- I would like to know
2 the exact meaning of "flying by the seat of one's
3 pants".

4 --- Laughter

5 MR. NASH: Have you heard the
6 expression, Mr. President, "winging it"? No?

7 --- Laughter

8 PRESIDING MEMBER: No.

9 MR. NASH: I don't know. We don't
10 know what we're doing. I think that is a fair --
11 and if I mischaracterized that expression, I am
12 sure Professor McRae and Professor Schwartz will
13 correct me, but I think that is fair: We don't
14 know what we're doing.

15 PRESIDING MEMBER: Thanks.

16 BY MR. NASH:

17 Q. So you don't recall --

18 MR. SPELLISCY: Just for the
19 record, I'm not sure I would agree with "We don't
20 know what we're doing", or "we're operating with
21 less than ideal information", but if we're talking
22 about Canadian idioms, I think it is going to be
23 difficult to provide a definition.

24 PRESIDING MEMBER: What would be
25 the version of the Canadian government --

00110

1 MR. SPELLISCY: I think operating
2 with limited information here, the "seat of our
3 pants" meaning, We don't have much information.

4 PRESIDING MEMBER: Okay. Okay, I
5 think that gives me the idea.

6 MR. NASH: I am prepared to live
7 with a combination of the two of those definitions.

8 BY MR. NASH:

9 Q. Just to go back, you don't
10 remember Mr. Ross coming back to you and saying
11 something along the lines, you know, We don't
12 really have the data, we don't have the
13 information, we're sort of either flying by the
14 seat of our pants or we aren't sure about this?

15 Did he ever come back to you and
16 tell you that?

17 A. I don't remember, you know,
18 getting a sense from DFO that -- I certainly
19 wouldn't characterize it as not knowing what they
20 were doing, so, no.

21 Q. Did you get any sense from
22 them that, Listen, these blasting guidelines are
23 designed for fish, and when we come to marine
24 mammals, it is different and we're not sure, or we
25 don't have the information or we don't have the

00111

1 data?

2 A. Well, as the issue unfolded,
3 and I can't tell you when I developed this
4 understanding, but as the issue unfolded and I
5 became familiar with the -- you know, more familiar
6 with the guidelines, you know, I would have
7 developed an understanding of their intent in
8 managing swimming -- swimming fish.

9 But that's about all I could
10 surmise at this point.

11 Q. So you can't remember anybody
12 from DFO coming back to you and saying, in the
13 context of the 3.9 hectare approval, We don't
14 really have the data, we don't really know exactly
15 how this works. We don't really understand the
16 relationship between blasting on land and marine
17 mammals, or anything along those lines? You don't
18 remember that?

19 A. Well, I know that DFO was,
20 you know, certainly giving a lot of careful
21 consideration to the matter.

22 Q. My question is more pointed
23 than that.

24 A. Yes, yes.

25 Q. That is not really an answer

00112

1 to my question. Did they come back to you with
2 information, words to the effect that I have just
3 used?

4 A. If they did, I don't recall a
5 specific occurrence saying that.

6 Q. Let's continue with
7 Mr. Wright. Remember Mr. Wright is the author or
8 co-author of the guidelines; do you recall that?

9 PRESIDING MEMBER: Mr. Nash, may I
10 ask a question? I wonder whether our stenographer
11 needs a break. She does need a break. Would that
12 be a bad moment?

13 MR. NASH: This would be a perfect
14 moment.

15 PRESIDING MEMBER: So let's have a
16 15-minute break. That would take us to 11:35.
17 And, Mr. Petrie, don't discuss this or don't talk
18 with anybody about it. Just stay isolated.

19 THE WITNESS: Of course.

20 PRESIDING MEMBER: Somebody will
21 bring you coffee, I'm sure.

22 THE WITNESS: Thank you.

23 --- Recess at 11:21 a.m.

24 --- Upon resuming at 11:40 a.m..

25 PRESIDING MEMBER: All right. Let

1 us continue. Let us continue. Mr. Nash, Mr.
2 Petrie.

3 MR. NASH: Thank you,
4 Mr. President.

5 BY MR. NASH:

6 Q. Mr. Petrie, we're back on the
7 record and we're at tab 18 of the bundle in front
8 of you, Exhibit C-299.

9 I would like to just read on
10 further from where we had left off:

11 "We have used the approach
12 that if a blasting plan is
13 within the guidelines, we add
14 a few extra points to try to
15 cover off the marine mammal
16 concerns."

17 Did either Mr. Ross or anyone else
18 from DFO tell you about that?

19 A. No, I don't think I was aware
20 of that particular characterization, or at least
21 not at that point in time.

22 Q. Did you ever become aware of
23 that particular characterization, and I will take
24 you to a point up to and including July 2003?

25 A. And forgive me if I am a

00114

1 little non-specific on dates. I can't recall
2 exactly, but going into 2003 I was aware of
3 correspondence where one could see the guideline
4 values were being tripled as an additional -- my
5 understanding, as an additional safety factor where
6 species at risk might be concerned.

7 Q. My question is a little bit
8 more explicit than that:

9 "We have used the approach
10 that if a blasting plan is
11 within the guidelines, we add
12 a few extra points to try to
13 cover off the marine mammal
14 concerns."

15 Do you remember being told that in
16 2002?

17 A. No, I don't know what they
18 mean by "a few extra points", whether that means
19 you know, feet or, you know, what that means. So I
20 don't think I was advised of this, or I don't know
21 what it means, so...

22 Q. But you don't think you were
23 advised of it, whatever it means?

24 A. No.

25 Q. That's correct?

00115

1 A. That's correct.

2 Q. If you go to the next

3 sentence:

4 "The easiest mitigation is if
5 whales are present within
6 visual limits (about 1 KM)
7 the blast is to be delayed
8 until the whales vacate that
9 perimeter."

10 Were you ever told by DFO that the
11 easiest mitigation was to wait until any whales in
12 the area vacate a one kilometre perimeter?

13 A. No. The review and the
14 mitigation as outlined by DFO, in my recollection,
15 centred around designing and -- designing the blast
16 so as to be of an acceptable intensity in marine
17 waters.

18 Q. So you were never told that
19 the easiest mitigation is, if whales are present
20 within visual limits, about one kilometre, the
21 blast is to be delayed until the whales vacate that
22 perimeter; is that correct?

23 A. By DFO? I don't recall. I
24 seem to remember that visual surveys for local
25 whales was, if I'm not mistaken, a mitigative

00116

1 measure lined up by the proponent in their
2 application.

3 Q. So you don't recall being
4 told by anyone about a one kilometre perimeter zone
5 and the delaying of blast until whales had vacated
6 that perimeter? You don't recall that being told
7 to you by anyone from DFO?

8 A. I don't recall that, but the
9 documentation is substantive, so I might have
10 missed something.

11 Q. Going on in that document:
12 "The one kilometre is
13 arbitrary and is based on
14 what an observer can spot.
15 If the whales are sounding
16 and blowing, it is easier to
17 spot them at greater
18 distances. We also ask that
19 blasts be monitored so that
20 we can add to our database.
21 As I said, these are only
22 guidelines and we can only
23 refine them if we are
24 continually adding to the
25 database."

1 Do you recall Mr. Ross telling you
2 anything along those lines?

3 A. Again, I don't specifically
4 recall. It might have come up, but I can't point
5 to any specific.

6 Q. You don't have any
7 recollection of that?

8 A. No.

9 Q. That's right?

10 A. That's right.

11 Q. The next paragraph starts:

12 "We have had success in
13 monitoring blasting pressures
14 using a system available from
15 an outfit called Instantel.
16 They are a Canadian company
17 located in Ottawa and are
18 more or less the world
19 standard. Their website..."

20 He gives a website:

21 "We work quite often with an
22 explosives contractor, again
23 in Ottawa, called Explotech.
24 I work with a gentleman by
25 the name of Rene (Moose)

1 Morin."

2 Do you recall being told by
3 Mr. Ross or anyone else from DFO that they were
4 particularly expert people in monitoring blasts?

5 A. I don't remember any
6 references to Instantel or Explotech. Those
7 references don't sound familiar to me, so I am
8 going to say I don't recall.

9 Q. Do you have any recollection
10 of Mr. Ross or anyone else in DFO telling you that
11 there were good monitoring companies out there that
12 could monitor blasts for the proponent and that
13 that data could then be provided to DFO?

14 A. I don't recall any
15 conversation like that from DFO. I am aware the
16 proponent had looked into monitoring options.

17 Q. But from the DFO, no
18 conversation along those lines; correct?

19 A. Not that I recall.

20 Q. Can you go to the next tab,
21 please, tab 19. You will see that that document is
22 dated the same day, September 30th, Exhibit 478.

23 Mr. Ross is writing back to you
24 that day saying:

25 "Dear Bob: Fisheries and

00119

1 Oceans (DFO) has conducted a
2 preliminary review of the
3 Whites Cove blasting plan,
4 September 17th, 2002. It is
5 our opinion that, although
6 the plan seems to be within
7 the Guidelines for the Use of
8 Explosives in or near
9 Canadian Fisheries Waters,
10 there is insufficient detail
11 to make an assessment on its
12 effects on threatened or
13 endangered marine mammals
14 that may be present at
15 various times of the year.
16 "In addition, there is no
17 indication of what monitoring
18 the proponent will undertake
19 to ensure they are within the
20 limits of the guidelines, or
21 how they will determine that
22 the area is free of species
23 of concern before detonating
24 a blast."

25 Did you take that comment at its

00120

1 face value?

2 A. Which particular -- the
3 comment in its entirety?

4 Q. The comments that there is
5 insufficient detail in the blasting plan to put
6 their minds at rest about the endangered species,
7 and particularly marine mammals?

8 A. Yes. I would have accepted
9 that assessment from DFO.

10 Q. You never questioned that
11 assessment from DFO?

12 A. No.

13 Q. Did you find it somewhat
14 surprising that on the same day that Mr. Ross is
15 receiving information from the designer of the
16 blasting guidelines, he's writing to you saying
17 that more information is required?

18 A. That on the same -- on
19 September 30th, as he's writing me asking for more
20 information, he's writing Mr. Wright?

21 Q. Mr. Wright is writing to him?

22 A. Sorry.

23 Q. Mr. Wright is writing to him
24 saying these are the mitigation measures that can
25 be taken and here are some explosive experts and

00121

1 monitoring experts, and that information is not
2 being passed on.

3 Do you find this surprising to
4 you, looking at these two documents now?

5 A. Again, I don't know that --
6 no, I don't find it surprising. I mean, I
7 understand that DFO was putting a lot of thought
8 into this and...

9 Q. Well, you were expecting DFO,
10 as I understand it, to be transparent and open and
11 honest with sharing information with you; correct?

12 A. Certainly I would expect them
13 to share information as needed.

14 Q. Well, wouldn't you think this
15 would be needed in the circumstance? It is your
16 condition, 10(i). It is about marine mammals.
17 There is information saying you can blast safely if
18 you wait until the whales and marine mammals are a
19 kilometre offshore, and you can monitor this way.
20 Wouldn't that be important information for you?

21 A. Again, as it pertains to what
22 the acceptable mitigation for marine mammals would
23 be, I relied on DFO expertise to satisfy that.

24 Q. And that if they had
25 information that would satisfy condition 10(i),

00122

1 your condition, you would want to know that and you
2 would want to receive that information; isn't that
3 fair?

4 A. If DFO was satisfied that
5 there was a way that made them comfortable that
6 impacts to marine mammals would be mitigated, if
7 they had a method that satisfied them, which, you
8 know, I am not sure that they were comfortable yet,
9 you know, that information would be relevant.

10 But, again, the discussion, you
11 know, within DFO between experts I would think, you
12 know, I would allow that to -- I guess it would
13 seem to me to be reasonable to allow that to unfold
14 before they provide me with what I would consider
15 informed advice.

16 Q. And if Jerry Conway, the
17 marine mammal expert and coordinator who had
18 requested the inclusion of 10(h) and (i) in the
19 approval, was satisfied about marine mammal
20 concerns and the effects of blasting, that would be
21 very important information that you would want to
22 know about; isn't that correct?

23 A. Well, I would be looking for
24 a response from DFO as an organization.

25 Q. But would that not be

1 important information for you to receive?

2 A. Not being a marine mammal
3 expert, I wouldn't have wanted to be in a position
4 of adjudicating what information was, you know,
5 relevant or important as it pertained to this
6 analysis.

7 We looked to and requested
8 information and confirmation from DFO, and that is
9 what we were waiting for.

10 Q. And if DFO withheld its
11 acceptance of a blasting report for whatever reason
12 it had, so that the proponent could not blast on
13 that site, if they withheld it for any reason, you
14 were happy to live with that?

15 A. No. My assumption and
16 expectation, and I am not -- you know, I don't
17 dispute this -- is that the withholding of
18 acceptance was based on their continued discomfort
19 with the blasting plan, at least as it was
20 articulated to me.

21 Q. And that if they were, "they"
22 being -- I am saying specifically if Mr. Conway was
23 satisfied with the blasting plan, that I suggest to
24 you would be important information for you to know
25 and to have, because it was Mr. Conway's concern

1 that had led to the inclusion of 10(i) and 10(h)
2 into the approval; isn't that right?

3 A. Certainly Mr. Conway's
4 information would be noteworthy. Again, Mr. Conway
5 is, you know, one person within the DFO
6 organization and an important person in this
7 respect, I would assume.

8 Q. Yes?

9 A. But we would be looking for a
10 response from DFO as an organization.

11 Q. And if Mr. Ross, with whom
12 you were dealing, had information that was relevant
13 to 10(h) and (i), you would want to know about
14 that, would you not, so that you could exercise
15 your discretion and your authority as a provincial
16 official as to whether 10(h) and (i) should stay in
17 there?

18 A. We were expecting that
19 information that would allow us to ascertain or the
20 opinion from DFO stating whether 10(h) and (i) are
21 satisfied would -- you know, you would come from
22 Mr. Ross or the DFO.

23 Again, as an administrator of the
24 3.9 hectare approval in Yarmouth, you know, I was
25 not putting myself in a position of adjudicating

1 you know, the advice on marine mammal issues. That
2 is something --

3 Q. You were going to defer
4 completely to DFO; isn't that fair to say?

5 A. I entrusted it to DFO as the
6 experts.

7 Q. And you would defer to them;
8 correct?

9 A. I would respect their advice.

10 Q. And defer to them?

11 A. I would make -- take their
12 advice under serious consideration.

13 Q. And would you defer to them?

14 A. On issues of marine mammals,
15 I would not put my opinion above theirs.

16 Q. You would defer to their
17 opinion?

18 A. Yes, yes.

19 Q. Just going back for a moment
20 to 10(h) and (i) and their inclusion in that
21 approval, but for the existence of 10(h) and (i),
22 conditions 10(h) and (i) under the blasting
23 conditions in the April 30th approval for the 3.9
24 hectare site at Whites Point, the proponent could
25 have started blasting on that site; correct?

1 A. Yes, I don't think there were
2 any other impediments.

3 Q. If you could go to tab 20,
4 Exhibit R-118, you received another a blast design
5 for the initial blast scheduled for October or
6 November. Do you see that?

7 A. Yes.

8 Q. And, again, if you go to the
9 second page of that document, it looks like it's
10 been received October 15th, 2002, and the blast is
11 referred to as a test blast?

12 A. I see that.

13 Q. Do you see that?

14 A. Yes.

15 Q. Did you understand, then,
16 what the proponent wanted to do at that point was
17 to conduct a test blast or test blasts?

18 A. I am aware of the
19 characterization of it as a test blast. Again,
20 when the quarry was approved, it was approved
21 and -- or, you know, referred to DFO and approved
22 on the basis that it could, you know, be a fully
23 operating quarry in theory and producing aggregate.

24 So, you know, I mean, the
25 application itself proposed, you know, an extended

1 time frame over several years and, you know,
2 production schedules that were, you know, 50 weeks
3 a year, 14 hours a day, something like that.

4 Q. They were allowed to do that
5 under your approval; correct?

6 A. Yeah. I mean, and that is
7 the scope of operations one would expect from an
8 operating quarry.

9 Q. But initially they were just
10 going to do, at least at this stage, you
11 understand, a test blast; correct?

12 A. I am aware that that is how
13 it was being characterized. I think, you know, in
14 consideration of these blasts, you know, we had to
15 think about, you know, whether the DFO would have
16 to think about whether these were representative of
17 blasting that was going to be undertaken at the
18 site.

19 Q. Well, you had no information
20 to the contrary that this was the kind of blasts
21 that they were going to undertake at the site in
22 October or November of 2002, that it would be a
23 site that complied, was in accord, with those
24 criteria set out on page 2 of that exhibit, Exhibit
25 R-118; correct. We're at the same exhibit.

00128

1 A. Oh, okay.

2 Q. You had no information they
3 were going to do anything to the contrary but
4 conduct --

5 A. To the contrary of the
6 approval.

7 Q. Of the approval or to the
8 contrary of this test blast in September, October,
9 November of 2002; correct?

10 A. No. Except that this is a
11 blast design for a test blast. It doesn't
12 necessarily describe, you know, what blasting might
13 occur after that in the production of rock at the
14 site.

15 Q. That was to come; correct?
16 This was for a test blast to gather data. Wasn't
17 that the idea?

18 A. This -- in issuing the
19 approval and issuing the approval on the basis on
20 which it had been applied, and, you know, that this
21 quarry could go into producing aggregate, albeit on
22 a smaller scale. And that is what was applied for
23 and that is what was granted.

24 The application itself I don't
25 think was characterized as a test quarry. The

1 application and approval were for a quarry.

2 Q. Right. That is not my
3 question. My question was -- you just confirmed
4 that the approval was for operating a functioning
5 quarry. They could have operated, they could have
6 crushed stone there on that site, but for 10(h) and
7 (i); that's correct?

8 A. Yes.

9 Q. And at this point, however,
10 what they were going to do is do some test blasts
11 to see what the effect of blasting might be in the
12 water and on the land; correct?

13 A. That is how they
14 characterized it.

15 Q. And do you accept that as a
16 fair characterization?

17 A. Well, again, the lens through
18 which I think ourselves and DFO were looking at the
19 blasting is what would be representative of working
20 conditions at the quarry.

21 Q. Let's not look at the lens of
22 DFO because, from what I understand, you're not
23 sure what DFO was thinking; is that fair?

24 A. No. I'm not sure what they
25 were thinking.

1 Q. So from your standpoint, this
2 test blast would have complied with -- in all other
3 respects with the approval given, but for 10(h) and
4 (i); is that correct?

5 A. Yes.

6 Q. If you go, then, to page --
7 sorry, tab 21, Exhibit 242, it is a letter from the
8 Minister of Environment and Labour, and it is a
9 letter to Ms. Michaele Kustudic. I gather you
10 drafted this letter. On the third page, it says
11 "prepared by Bob Petrie"?

12 A. Yes.

13 Q. It is a letter in respect to
14 the Whites Point 3.9 hectare quarry. In the second
15 paragraph on the first page:

16 "The approval given thus was
17 for a 3.9 hectare quarry. No
18 preliminary approval for
19 anything else had been
20 granted. In this case, the
21 only application made thus
22 far was for a quarry of that
23 size. As with other
24 similarly sized quarries in
25 Nova Scotia, the application

1 review is technical in nature
2 and addresses environmental
3 impacts. However, at this
4 application stage the
5 proponent is not required to
6 consult the community in
7 advance. Only those
8 applications for quarries 4
9 hectares or greater in size
10 will trigger the
11 environmental assessment
12 process..."

13 All of that was true at the time?

14 A. Yes.

15 Q. That would be when the
16 process for environmental review, formal
17 environmental -- provincial environmental review
18 would commence; correct?

19 A. Yes. It is referring to the
20 provincial environmental review process.

21 Q. Correct. It states -- you
22 see the Minister states, in the second paragraph:

23 "The provisions relating to
24 quarries exceeding four
25 hectares are contained in the

1 Nova Scotia Environmental
2 Assessment Regulations.
3 These regulations are public
4 documents and available to
5 anyone. The fact that the
6 environmental assessment
7 regulations do not pertain to
8 quarries of 4 hectare or less
9 is not a 'loophole' but a
10 means of distinguishing
11 smaller projects with limited
12 impacts from larger projects
13 with broader impacts." [As
14 read]

15 That was correct at the time?

16 A. Yes.

17 Q. And then over to the next
18 page, the Minister wrote and you drafted, "Chapter
19 11 of NAFTA" at the very top:

20 "Chapter 11 of NAFTA does not
21 prevent any level of
22 government from legislating
23 and regulating in the public
24 interest. Chapter 11 rules
25 ask that the companies be

1 treated fairly and equally
2 whether Canadian, American or
3 Mexican."

4 Which would be the province's
5 policy in any case. That was your understanding at
6 the time?

7 A. Yes.

8 Q. People were raising issues of
9 a NAFTA concern at the time and the fact that the
10 proponent here, through Mr. Buxton, was a New
11 Jersey corporation?

12 A. I would assume that is the
13 reason why I would have made that statement was in
14 response to a question in her letter.

15 Q. There had been public comment
16 generally about this quarry being an export quarry;
17 do you recall that?

18 A. There was -- yes, I mean,
19 there was a lot of discourse about the quarry in
20 general and this being a component of it, yes.

21 Q. That was a component?

22 A. Yes.

23 Q. And that New Jersey
24 consortium was going to take chunks of Digby Neck
25 and export it to New Jersey; do you recall that?

1 A. Some would have characterized
2 it that way, yes.

3 Q. Paragraph -- sorry, tab 22,
4 Exhibit C-126, a letter from Mr. Ross to you. You
5 received it on November 4th:

6 "I received the additional
7 information you faxed us
8 today on the Whites Point
9 quarry blasting plan. The
10 individual I rely on to
11 provide advice on mammals is
12 not available this week, so I
13 can't provide you comments
14 until some time next week.
15 However, I don't wish to
16 approach him with the
17 additional information as it
18 still has not addressed the
19 proponent's responsibilities
20 adequately. Specifically
21 there is no indication of
22 what the bottom is made up
23 of. See my letter to you of
24 September 30th. According to
25 clause 10 of the approval to

1 construct and operate the
2 quarry, we expect the
3 following information to
4 accompany a complete blasting
5 plan." [As read]

6 What is interesting here to me is
7 that he then lists conditions 10(i) -- sorry, 10(a)
8 to (f); do you see that?

9 A. Yes.

10 Q. Including acknowledgement
11 that there will be no blasting on Sundays. These
12 are all provincial conditions, aren't they?

13 A. They appear to reflect the
14 conditions of the approval.

15 Q. These are normal standard
16 conditions for any 3.9 hectare quarry that would be
17 included in every 3.9 hectare quarry?

18 A. Yes.

19 Q. They are your conditions?

20 A. Yes, restated.

21 Q. They are not federal
22 conditions?

23 A. They appear to reflect the
24 conditions in our approval.

25 Q. And then under 10(h),

00136

1 acknowledgement that the proponent will comply with
2 the blasting guidelines?

3 Well, the approval itself provides
4 the proponent will comply with the blasting
5 guidelines; do you recall that?

6 A. Yes.

7 Q. So he's actually requiring
8 something that is already provided for in the
9 approval; correct?

10 A. Yes.

11 Q. Verification that the blast
12 design will not have an adverse effect on marine
13 mammals in the area. In that context, you have no
14 recollection of receiving the information from
15 Mr. Ross that Mr. Wright had given to him on
16 September 30th, in that email that we covered;
17 correct?

18 A. I don't have that
19 recollection, no.

20 Q. There was no suggestion ever
21 from Mr. Buxton, or anyone else on behalf of the
22 proponent, that the proponent would not comply with
23 the blasting guidelines, the federal blasting
24 guidelines; that's correct?

25 A. I don't believe there was any

1 such suggestion.

2 Q. If you go to the next tab,
3 tab 23, Exhibit 296, it is a letter from the
4 Minister, again -- Minister of Fisheries now, to
5 Ms. Hubbert, the senior program officers at
6 Canadian Research Chair Program. She apparently
7 emailed him on October 7, 2002. Then the last full
8 paragraph of that, middle of the page:

9 "On April 30th, 2002 the
10 proponent received provincial
11 approval to operate the 3.9
12 hectare quarry. DFO received
13 a copy of this proposal from
14 the province, which is
15 responsible for the
16 permitting of land-based
17 quarries."

18 All of that is correct so far;
19 correct?

20 A. Yes.

21 Q. "Upon review of the proposal,
22 DFO concluded that there were
23 no significant concerns with
24 respect to the legislation
25 administered by the

1 Department."

2 Were you advised by anyone from
3 DFO that at this point, October 30th, that there
4 were no significant concerns with respect to the
5 legislation administered by that department.

6 A. As of October, no, I don't
7 recall being specifically advised in that regard as
8 of October 2002.

9 Q. That would have been
10 extremely important to you, if you had been told
11 that there were no significant concerns with the
12 legislation administered by that department after
13 you're awaiting their analysis of the effect of
14 blasting on whales and that's holding up the
15 proponent; correct?

16 A. I am just trying to think of
17 the legislation that might be referring -- being
18 referred to here. The Fisheries Act.

19 Q. Well, the Fisheries Act would
20 be the main potential --

21 A. Yes.

22 Q. -- piece of legislation?

23 A. Yes. I am just --

24 Q. Yes?

25 A. I'm taking a moment to think

1 what within the Fisheries Act might be the subject
2 of this reference.

3 Q. Well, the DFO was the expert
4 in the Fisheries Act?

5 A. Certainly.

6 Q. So it would have been
7 important for you to know that they had no
8 significant concerns with respect to any
9 legislation administered by the department, but
10 perhaps most importantly, the Fisheries Act;
11 correct?

12 A. Certainly it would be with
13 specific emphasis on the Fisheries Act, I would
14 say. And I would suspect -- and Mr. McLean may be
15 able to speak to the Fisheries Act better than I
16 could. However, just because -- and, again, I
17 apologize for my understanding of the Fisheries
18 Act, but just because there may not be a
19 legislative trigger with the proposal itself
20 doesn't necessarily mean that an adverse effect
21 might not result if things weren't conducted -- you
22 know, conducted well at the site.

23 Q. Would it not have been
24 important for you to know, in November, October of
25 2002, that the DFO had no significant concerns

1 about the legislation administered by your
2 department with respect to this 3.9 hectare quarry?
3 Would that not have been important information for
4 you to know?

5 A. It would certainly be helpful
6 to our viewing of the issue.

7 Q. Going on, Exhibit C-296,
8 notwithstanding this --

9 A. Sorry.

10 Q. In that same paragraph,
11 simply going on with that sentence, that paragraph,
12 next sentence. We are on Exhibit 296, tab 23.

13 A. Yes, I've got it.

14 Q. The last full paragraph, have
15 you got that?

16 A. Yes.

17 Q. "Notwithstanding this, it was
18 determined that blasting on
19 the proposed quarry lands
20 would pose a minimal risk to
21 marine mammals."

22 That would have been very
23 important information for you to receive in
24 November of 2002, correct, in view of your
25 condition 10(i) in your approval?

00141

1 A. It would be -- if that was in
2 fact -- well, again, the assessments, as I
3 understood them in communicating with DFO staff,
4 continued to reiterate concerns around marine
5 mammals.

6 In this case, since we're talking
7 about the Right Whale species at risk, you know,
8 those concerns, you know, would be elevated. Even
9 if the likelihood of something might be small, the
10 significance of it would be large if the Right
11 Whale were harmed.

12 So I am just, you know, maybe
13 providing a little context to the "minimal risk"
14 statement, but I don't want to get into the head of
15 DFO here. But certainly their view on the level of
16 risk associated with this proposal would be
17 important to us.

18 Q. That would be important?

19 A. Yes.

20 Q. So it would be important for
21 you to know, then, that blasting on the proposed
22 quarry lands would pose a minimum risk to marine
23 mammals. That would be of interest to you and
24 quite important for you to know; that's correct?

25 A. Yes. Again, but that --

00142

1 certainly. The dialogue, as we understood it,
2 continued to reiterate concerns around marine
3 mammals.

4 Q. That's my point, isn't it?

5 A. Yes.

6 Q. That you were being told that
7 they had significant or some concerns remaining,
8 residual concerns, and the Minister of Fisheries is
9 saying here that, first of all, he had no
10 significant concerns with respect to the
11 legislation administered by the department, and
12 they had determined that blasting on the proposed
13 quarry lands would pose a minimal risk to marine
14 mammals.

15 So I would suggest to you that the
16 conclusion to draw from that is that you were being
17 told one thing, and the Department of Fisheries
18 thought another. Is that fair?

19 A. Well --

20 Q. Isn't that the conclusion you
21 draw from that?

22 A. Not knowing the background
23 around how this letter was prepared...

24 Q. What do you need to know
25 about the background of how the letter was prepared

1 in order to draw that conclusion?

2 A. Well, I guess what I'm -- I
3 guess what I'm getting at is we were relying on the
4 technical experts at DFO --

5 Q. Right.

6 A. -- rather than how something
7 would be characterized by the Minister's office, so
8 to speak.

9 Q. So you were relying on the
10 technical experts and the information that you
11 received from them?

12 A. Yes.

13 Q. At the DFO? That's correct?

14 A. Yes.

15 Q. The Minister goes on:

16 "DFO requested that a
17 blasting design report be
18 provided in advance of any
19 blasting activities."

20 Now, that wasn't quite right
21 either, because the provision of 10(i) required
22 that DFO accept the report prior to any blasting
23 going on on that site; that's correct?

24 A. It did, yes. It was an
25 incomplete restatement of that.

1 Q. And the province -- the
2 letter continues:

3 "The province agreed to
4 include this as a condition
5 in its approval. Recently
6 DFO commented on the blasting
7 plan as submitted to the
8 province by the proponent.
9 DFO advised the province and
10 the proponent that the plan
11 was deficient with respect to
12 mitigation of impacts to fish
13 and fish habitat in the
14 marine environment."

15 That wasn't true at that point,
16 was it? 10(i) had nothing to do with fish.

17 A. 10(i) was focussed on marine
18 mammals.

19 Q. It was about marine mammals.
20 It wasn't just focussed on it?

21 A. Yes.

22 Q. It had nothing to do with
23 fish or fish habitat; that's correct?

24 A. That's correct.

25 Q. And so did you know that the

00145

1 Minister of Fisheries was advising a correspondent
2 that the province -- that DFO had advised the
3 province and proponent that the plan was deficient
4 with respect to mitigation of impacts to fish and
5 fish habitat? Did you know about that
6 communication?

7 A. No. I... Again, the
8 communication that we were engaged in at the time
9 was focussed on marine, marine mammals.

10 Q. It was, and the
11 communications you were getting from DFO right
12 through the fall of 2002 was that they had residual
13 concerns and that they would not give an approval
14 to the proponent's blasting plan; is that correct?

15 A. Certainly the concerns
16 remained outstanding and they weren't prepared to
17 accept the plans being provided at that time.

18 Q. If you go, then, please, to
19 the next tab, tab 24, Exhibit R-80, it is a letter
20 from Paul Buxton dated November 20th enclosing a
21 Whites Quarry blasting plan. Do you see that? The
22 plan is dated November 18th.

23 A. Yes.

24 Q. And you would agree this is a
25 very extensive blasting plan?

1 A. It certainly is more
2 comprehensive than the versions received to date,
3 and it goes on in more detail.

4 Q. More comprehensive than you
5 had ever received for the purpose of blasting on a
6 3.9 hectare quarry?

7 A. I would say this report is,
8 you know, quite comprehensive in its approach.

9 Q. You would agree with my
10 characterization, yes?

11 A. Not being able to intuitively
12 compare this across, again, my role was not to
13 review blasting plans. So my sense of the spectrum
14 of blasting plans that are normally received by the
15 province probably wouldn't be an accurate one.

16 One of our engineers might be more
17 informed to comment on that.

18 Q. You're in the compliance
19 division?

20 A. Yes.

21 Q. Are you saying all of the
22 reviews of blasting plans were left to an engineer?

23 A. Well, the engineers were
24 within the compliance division.

25 Q. Right.

1 A. Yes.

2 Q. And so the compliance
3 division was the division that was was dealing with
4 monitoring compliance with an approval?

5 A. That's right.

6 Q. And the approvals had
7 conditions for blasting?

8 A. That's right.

9 Q. And they were your
10 conditions?

11 A. Yes.

12 Q. And I'm suggesting to you
13 that this would have been the most comprehensive
14 blasting plan that you had ever received for a 3.9
15 hectare quarry, is that right?

16 A. I can't say that with any
17 factual, you know, basis, not having seen a wide
18 spectrum of blasting plans received by the
19 province. I would certainly characterize this as a
20 comprehensive blasting plan.

21 Q. And if you go to the page 5,
22 which at the bottom is page 002033, there is a
23 reference to guidelines, fisheries waters. Take a
24 look at that page. Are you with me?

25 Q. "All blasting will be

00149

1 is a whole section on marine mammals:

2 "Some studies indicate
3 excessive noise may have
4 adverse effects on marine
5 mammals, especially whales,
6 effects on hearing, which in
7 turn can interfere with
8 breeding activities, locating
9 food..."

10 Et cetera, et cetera. And then
11 over the next page:

12 "To address potential
13 concerns regarding noise on
14 marine mammals in relation to
15 the proposed blasting
16 activities, a 500 metre
17 observation zone, 500 metre
18 safety radius from the
19 detonation area (see map 2)
20 shall be established as
21 suggested in the Factsheet
22 Blasting - Fish and Fish
23 Habitat, protection
24 department of Department of
25 Fisheries and Oceans." [As

00150

1 read]

2 So you knew at that point that the
3 proponent had no problem with the 500 metre
4 observation zone?

5 A. That's right.

6 Q. Right. And it stated, "As
7 research" -- halfway down the page:

8 "As research continues
9 regarding the possible
10 effects of noise on marine
11 mammals, the above procedure
12 will be reviewed from time to
13 time with the habitat
14 management division of the
15 Department of Fisheries and
16 Oceans."

17 Do you see that?

18 A. Yes.

19 Q. All of this would have been
20 quite reasonable to you; fair enough?

21 A. Again, as a layperson
22 reviewing it, those seem like good -- you know,
23 good measures. Again, we would --

24 Q. You would defer to the DFO?

25 A. We would rely on the

00151

1 expertise on marine mammals as to whether these
2 were sufficient.

3 Q. Right. And if you go over to
4 a couple of pages over, there are some diagrammatic
5 maps, and you will see on the page which, at the
6 bottom, is 002036, that refers to blasting plan.
7 And you will see that there is that little area
8 towards the water which is our 3.9 hectare quarry.
9 Are you with me?

10 A. Yes, yes.

11 Q. Down by the water there, and
12 then there is the cross-hatch which is the
13 observation zone, the 500 metre zone?

14 A. I see that.

15 Q. Still no word from Mr. Ross
16 about this one kilometre perimeter that Mr. Wright
17 had referred to; correct?

18 A. Not to my knowledge.

19 Q. And then if you go over to
20 the next page, which is 002038, it is a blasting
21 plan which shows the legend. Bedrock is shown, and
22 it refers to near shore surficial geology, source
23 Canadian Seabed Research Ltd., June 2002, November
24 18th, 2002, and the map source on the left-hand
25 side is the Nova Scotia Department of Housing and

1 Municipal Affairs.

2 A. Sorry. I was looking at the
3 wrong map for a moment.

4 Q. It is at 002037.

5 A. Yes.

6 Q. And it shows the bedrock out
7 in the ocean, and it shows the 3.9 hectare quarry;
8 correct?

9 A. Yes.

10 Q. And it refers to the near
11 shore surficial geology on the bottom. Do you see
12 that?

13 A. Yes, I can see that.

14 Q. It is obvious the proponent
15 had gone to a great deal of trouble, and likely
16 expense, in order to come up with a blasting plan
17 of this sophistication and complexity. Is that
18 fair, or were you in a position to judge that?

19 A. Well, I can't - I'm sure
20 someone spent -- I'm sure some expense was incurred
21 in putting this together. I can't comment on how
22 much.

23 Q. All right. Let's go to the
24 next tab, then, tab 25, Exhibit C-605. It is an
25 email from Jerry Conway on December 2nd, 2002 to

00153

1 Jim Ross:

2 "Sorry for not getting back
3 to you on Friday. Another
4 issue came up in respect to
5 Bottlenose Whales that
6 required my immediate
7 attention. Anyway, in
8 respect to the Whites Cove
9 blasting, based on the
10 information provided and the
11 undertakings that the
12 proponent is prepared to
13 take, I have no concerns in
14 respect to marine mammal
15 issues in respect to this
16 specific proposal."

17 My first question is: Have you
18 seen this email before today?

19 A. It is possible that I have
20 seen it in my review of the documents in
21 preparation for the hearing. Whether I saw it in
22 2002, I don't know. I can't remember.

23 Q. You may have seen this in
24 2002?

25 A. It's possible, but I -- I

1 can't specifically recall.

2 Q. Was the information provided
3 in this email from Mr. Conway to Mr. Ross provided
4 to you in December 2002?

5 A. I don't remember if it was
6 provided or not. Our contact on the blasting plan
7 was primarily through Mr. Ross and Mr. Zamora.
8 That is where most of the communication was --
9 that's who most of the communication was occurring
10 with at that time.

11 Q. So it is well possible, then,
12 that you could have known in December of 2002 that
13 Mr. Conway, the marine mammal expert and
14 coordinator at DFO, had no concerns with respect to
15 the marine mammals with respect to this blasting
16 plan?

17 A. Again, I don't remember
18 whether we had this particular message at that
19 time. We were coordinating with Mr. Zamora and
20 Mr. Ross on the blasting plan reviews, and that is
21 where we were taking most of our advice from.

22 Q. It strikes me as being
23 extraordinary that if you had this information in
24 2002, that you would not have made further
25 enquiries and that you would not have wondered:

00155

1 How can 10(i) be in effect if their own blasting --
2 their own marine mammal expert and coordinator had
3 no concerns with respect to blasting under this
4 plan that had been delivered?

5 A. Again, without a full
6 understanding of the way DFO was analyzing these
7 issues --

8 Q. I am just speaking about you.

9 A. Yes.

10 Q. And I am speaking about
11 Mr. Conway, whose concern had led to the inclusion
12 of 10(i).

13 A. Yes.

14 Q. And what importance you would
15 have placed on this information with respect to
16 10(i) of your approval.

17 A. It would certainly cause us
18 to ask some questions, I would think.

19 Q. And you had the ability to
20 amend the approval of April 30th, 2002 under the
21 terms of the approval?

22 A. There are amendment --
23 provisions for amendment, yes.

24 Q. You could have amended that
25 approval at any time?

1 A. Not at any time. It would
2 need to be based on a request from the proponent or
3 whether -- if specific circumstances were in
4 place --

5 Q. If you had this information
6 that Mr. Conway had no concerns and you had passed
7 that information on to Mr. Buxton or Mr. Ross had
8 based that on to Mr. Buxton, and Mr. Buxton had
9 made a request for an amendment to the approval,
10 you could have amended it and taken 10(i) out;
11 correct?

12 A. Again, whether we should take
13 10(i) out, whether the justification for 10(i)
14 still existed or not, was an assessment we would be
15 looking for from DFO.

16 Q. But, Mr. Petrie, you put
17 10(i) in because of Mr. Conway's concern.

18 A. Yes.

19 Q. And it was a concern about
20 marine mammals. And if you knew in early December
21 of 2002 that Mr. Conway had no residual concern
22 about marine mammals and this extensive blasting
23 plan, you could have taken 10(i) out and blasting
24 could have proceeded on that site, test blasting or
25 otherwise; correct?

1 A. We would -- we would look to
2 the direction of DFO, you know, management. And I
3 know Mr. Conway was -- I don't know whether he was
4 technically a biologist or what, but we would look
5 to the official opinion from DFO as to whether this
6 should be done or not.

7 Q. It would have put you on an
8 enquiry with DFO as to why they were continuing to
9 maintain the position that blasting on the site
10 could have an effect on marine mammals. You could
11 have asked them about that, couldn't you, Why do
12 you have residual concerns, when the DFO marine
13 mammal expert, upon whose information I inserted
14 10(i) into that approval -- why should I not
15 relieve the proponent of complying with that
16 condition?

17 A. Well, again, with specific
18 reference to 10(h) and (i), while we certainly
19 initiated discussions with Mr. Conway on the issues
20 of marine mammals --

21 Q. Yes?

22 A. -- we took direction on 10(h)
23 and (i) from Mr. Jollymore, is where those
24 specific --

25 Q. Yes.

1 A. -- conditions, conditions
2 originated.

3 So my expectation would be was
4 that the dialogue on whether 10(h) or 10(i) was
5 satisfied or not or whether the need for it still
6 existed, that dialogue would certainly be happening
7 within DFO.

8 Q. And you have said that you
9 expected DFO officials to act transparently, to
10 share information. We went through a whole lot of
11 criteria of conduct that you were expecting of
12 yourself and Nova Scotia officials, and I trust
13 that you were expecting the same from DFO
14 officials; correct?

15 A. Certainly.

16 Q. And if they had this kind of
17 information that would impact upon your condition
18 in your approval, you would want it to be shared
19 with you; is that fair?

20 A. Yes.

21 Q. And so far as you can recall,
22 it wasn't or it was?

23 A. My recollection throughout
24 the, you know, later 2002 and into 2003 and --

25 Q. I am just saying at this

00159

1 time, in December of 2002.

2 A. So in December of 2002?

3 Q. Yes.

4 A. Given that I think two
5 versions of the blasting plan had been submitted at
6 that point, if I am correct, both of which were
7 reviewed by DFO staff and concerns raised about
8 outstanding questions and deficiencies as it
9 pertained to marine mammals, my understanding --
10 you know, it's hard to think of what one's
11 understanding was, you know, 11 years ago, but my
12 sense at the time was that the concerns regarding
13 marine mammals remained outstanding.

14 Q. So you just don't recall
15 right now whether you received this information
16 that Jerry Conway had no concerns or he did?

17 A. Yeah.

18 Q. You just --

19 A. I don't remember at this
20 time, no.

21 Q. It would have been a very
22 significant event, would it not? This was a high
23 profile quarry. If a marine mammal expert had come
24 back and said to you or said to Mr. Ross, to you
25 through Mr. Ross, I have no concerns, that would

00160

1 have been a very important thing for you to know,
2 would it not, on this high profile quarry?

3 A. Well, again, DFO's opinion on
4 the need for 10(i) and whether or not it had been
5 satisfied or whether the condition was still
6 needed --

7 Q. I'm talking about you.

8 A. -- would be important.

9 Q. I'm talking about you. Would
10 it not have been important for you to know that?
11 It would have been an important hallmark event,
12 true?

13 A. I'm not sure what you mean by
14 "hallmark", but it would be important.

15 Q. I would just like to cover
16 one more document at this point in time, and then
17 it might be a time for a break. We will cover this
18 document, and then we will see where we are at.

19 If you go to the next tab, tab 26.
20 Exhibit R-122, this is nine days after Mr. Conway
21 has emailed Mr. Ross.

22 A. Yes.

23 Q. He's writing to you:

24 "Dear Mr. Petrie, Fisheries
25 and Oceans Canada Habitat

00161

1 Management Division has
2 reviewed the Whites Cove
3 blasting plan submitted by
4 Nova Stone Exporters dated
5 November 18, 2002. The
6 information provided is
7 inadequate to give DFO-HMD a
8 sufficient level of
9 confidence that fish, marine
10 mammals, and fish habitat
11 will be adequately protected
12 from the effects of blasting
13 operations at the Whites Cove
14 quarry".

15 Now, you knew that 10(i) had
16 nothing to do with fish?

17 A. That's right.

18 Q. Did you not call up Mr. Ross
19 and say, Mr. Ross, Jim, you're writing me about
20 fish and fish habitat. 10(i) has to do with marine
21 mammals; what is your information on that?

22 Did you not call him up?

23 A. I don't think I called him up
24 with that kind of a question for the purpose --

25 Q. Did you call him up at all?

1 MR. SPELLISCY: Can we make sure
2 the witness has a chance to finish the question? I
3 am watching the transcript. There is a lot of
4 dashes. It is important that the witness can
5 finish his answer before the next question is
6 asked.

7 PRESIDING MEMBER: So finish.

8 THE WITNESS: Certainly. Yes.
9 Insofar as our determination of whether 10(i) was
10 satisfied, I wouldn't necessarily consider his
11 commentary on fish or fish habitat within the scope
12 of making our determination on 10(i).

13 Certainly I understand that as a
14 fisheries department, he is likely to comment on
15 these issues, as is their responsibility. But for
16 the purposes of determining compliance with 10(i),
17 we would have been thinking marine mammals.

18 BY MR. NASH:

19 Q. Well, we've already seen that
20 Mr. Ross and Mr. Wright have had correspondence
21 between each other on September 30th, which is
22 followed up by Mr. Ross's letter subsequent to you
23 saying that the blast design seems to comply with
24 the blasting guidelines. Do you recall that?

25 A. Yes.

1 Q. So in terms of the blasting
2 guidelines, the question of fish and fish habitat
3 was addressed; was that your understanding?

4 A. By the blasting guidelines?

5 Q. Yes.

6 A. Yeah, I understand how the
7 blasting guidelines are designed to mitigate --

8 Q. On fish?

9 A. -- effects on fish. Yes,
10 yes.

11 Q. So, again, with marine
12 mammals you didn't call up Mr. Ross and ask him,
13 What further information do you need? What
14 information can the proponent bring forward in
15 order to comply with 10(i), the condition in your
16 approval? Did you have any discussion along those
17 lines?

18 A. I don't know if I did or did
19 not, no.

20 Q. You can't remember?

21 A. I can't remember.

22 Q. If you go to the next tab,
23 tab 27, Exhibit C-922, it is an email from Bruce
24 Hood December 9th, 2002 to Thomas Wheaton and Jim
25 Ross:

1 "Thomas, Jim: Please be
2 advised that any Digby quarry
3 or marine terminal-related
4 emails or other
5 correspondence being sent by
6 DFO staff to the local
7 constituency office should be
8 copied to Stephanie Tan and
9 Greg Peacock so that the
10 Minister is simultaneously
11 aware of developments on this
12 file."

13 My question is: Did Jim Ross ever
14 tell you that the Minister's office wanted to be
15 kept simultaneously aware of developments on the
16 file?

17 A. I don't recall Jim
18 specifically mentioning that.

19 Q. Do you recall Jim generally
20 commenting on the interest in activity of the
21 Minister and the Minister's office with respect to
22 this matter?

23 A. I can't recall any specific
24 commentary on that.

25 Q. Just generally, though. My

1 question was general.

2 A. Yeah. No. And I meant --
3 sorry.

4 Q. Yes.

5 A. Certainly at this point in
6 time, the public concern around the quarry was, you
7 know, was starting to ramp up, so it is reasonable
8 to think that not only the Minister of Fisheries
9 office, but other parties, were taking an interest
10 in how this matter was being handled.

11 Q. Right. Mr. President, now
12 would be a convenient time for a break in the
13 cross-examination. If you wish to have lunch at
14 this time, this would be a convenient time.

15 PRESIDING MEMBER: Mr. Nash,
16 just -- okay, so we have a break. After that, you
17 will continue?

18 MR. NASH: I will continue.

19 PRESIDING MEMBER: Continue up to
20 the lunch break? How long will -- do you have an
21 idea of how much more time you need for the cross
22 after the break?

23 MR. NASH: After the lunch break?

24 PRESIDING MEMBER: No. After the
25 break we have now.

00166

1 MR. NASH: I think this is the
2 lunch break. It's 25 after --

3 PRESIDING MEMBER: You want to
4 have the lunch break now?

5 MR. NASH: That is what I'm
6 thinking, yes, if it is it convenient.

7 PRESIDING MEMBER: No, no. I
8 think nobody would have a problem with having the
9 lunch break now, so the lunch break would be until
10 1:35, sharp, and, Mr. Petrie, you would still have
11 to be on your own.

12 MR. PETRIE: Certainly.

13 PRESIDING MEMBER: We will
14 reconvene at 1:35.

15 --- Luncheon recess at 12:35 p.m.

16 --- Upon resuming at 1:35 p.m.

17 PRESIDING MEMBER: I think we're
18 going to get going.

19 MR. NASH: Yes, absolutely.

20 MR. DOUGLAS: Before we do that,
21 Mr. President, I just wanted to raise an issue of
22 concern.

23 PRESIDING MEMBER: Did you want to
24 be on the record?

25 MR. DOUGLAS: I believe I am, am I

1 not? Sorry, I didn't hit my microphone, there.

2 The claimants have now been
3 cross-examining Mr. Petrie for approximately -- the
4 claimants have now been cross-examining Mr. Petrie
5 for about two-and-a-half hours. We note they have
6 gone through approximately one-third of the
7 documents in the core bundle.

8 Mark McLean from DFO is here today
9 and scheduled to testify, and he is ready to do so.
10 We also note the claimants have already been
11 provided with an additional hour of examination
12 time today for the schedule, and we're concerned
13 about the time that will be left for Mr. McLean's
14 testimony.

15 PRESIDING MEMBER: Mr. Nash, may I
16 ask you how much time you think you will need?

17 MR. NASH: We won't need
18 two-thirds more time, if that is my friend's
19 concern, and I expect we can get to Mr. McLean
20 today. This is taking a little longer than I
21 expected, but we budgeted six hours today combined
22 for Mr. McLean and Mr. Petrie, and we will be able
23 to stick to that.

24 And I think it's been two hour 15
25 minutes. I think we started about 10:00, had a

1 15-minute and stopped a little after 12:30.

2 PRESIDING MEMBER: Mr. Douglas's
3 re-direct is as quick as your introduction.

4 MR. DOUGLAS: That is my concern
5 is the claimants have budgeted six hours for their
6 cross-examination. If it is supposed to be six
7 hours, they are effectively not budgeting any time
8 for our re-examination.

9 PRESIDING MEMBER: I think we
10 should make every effort to really finish and
11 complete the line of witnesses we have we had for
12 this week, so let's try.

13 MR. NASH: That is certainly the
14 expectation.

15 PRESIDING MEMBER: That is
16 directed, of course, in the first instance, to you,
17 Mr. Nash.

18 MR. NASH: Thank you,
19 Mr. President.

20 PRESIDING MEMBER: Please go
21 ahead.

22 BY MR. NASH:

23 Q. This morning, Mr. Petrie, we
24 covered a number of names: Dennis Wright, blasting
25 expert; Jerry Conway, marine mammal expert; Jim

1 Ross, who was the section head of habitat
2 management at DFO.

3 Did you have any dealings with
4 Paul Boudreau at DFO, also in habitat management
5 division?

6 A. If I did, I don't think they
7 were substantial. The bulk of the correspondence
8 and communications seemed to be with Mr. Zamora and
9 Mr. Ross.

10 Q. Did you have any dealings
11 with Mr. Tim Surette, who was an area director with
12 DFO?

13 A. Not to my recollection, no.

14 Q. Any dealings on this matter
15 with Mr. Neil Bellefontaine from DFO?

16 A. No.

17 Q. Have you heard the name
18 Nadine Belliveau?

19 A. Nadine?

20 Q. Nadine Belliveau?

21 A. I am not familiar with that
22 name.

23 Q. Do you recall Mr. Thibault
24 was appointed Minister of Fisheries in January of
25 2002?

1 A. I am aware he was Minister of
2 Fisheries. I don't recall the appointment date.

3 Q. And he was the sitting
4 member, liberal member, of parliament for the Nova
5 west electoral district?

6 A. Yes

7 Q. Digby Neck was located in his
8 riding?

9 A. Yes.

10 Q. And he had a constituency
11 office in Yarmouth; did you know that?

12 A. I didn't know where his
13 office was located.

14 Q. Were you aware of the
15 possibility of political interference creeping into
16 this Digby Neck Whites Point quarry application and
17 approval?

18 A. From my point of view, you
19 know, certainly recognizing there was a high level
20 of public concern over it, political interference
21 didn't come to my attention.

22 Q. If you go, please, to -- in
23 that binder in front of you, momentarily a little
24 back in time.

25 Go to tab 14, please, Exhibit

1 C-963.

2 A. Yes.

3 Q. This is a fax from Nadine
4 Belliveau special assistant to the Minister, to
5 Mr. Boudreau at the habitat management division.
6 Do you see that?

7 A. Yes.

8 Q. It says:
9 "As discussed, here is the
10 copy of the permit. The
11 Digby municipality faxed it
12 to me. They are on side with
13 the community and are
14 desperately looking for a way
15 to slow the process."

16 And then you will see that what is
17 attached is your letter of April 30th, 2002 and the
18 approval which is in issue in in case, April 30th,
19 2002. If you go to page 14 at the top of the fax,
20 top of the page, and the actual number at the
21 bottom is 779759.

22 A. Yes.

23 Q. And you will see that
24 condition (i) has been asterisked and part of it is
25 underlined; do you see that?

1 A. I see that.

2 Q. Did you become aware of the
3 Minister's active interest in this file at around
4 that time?

5 A. This was...

6 Q. June of 2002.

7 A. June 2002? I don't know what
8 awareness I had of the Minister's interest at that
9 time.

10 Q. Could you go, then, to the
11 next tab, which is tab 15, Exhibit C-256 on the
12 second page. At the bottom, you will see the
13 original message is from Tim Surette, June 26th,
14 2002. Are you with me?

15 A. Yes.

16 Q. It is to Neil Bellefontaine,
17 Faith Scattolon and Paul Boudreau copied to Thomas
18 Wheaton and Greg Peacock. The subject is Nova
19 Stone Exporters, Digby Neck quarry, and the text of
20 the email is on the next page:

21 "I have been advised by the
22 Minister's office (Nadine)
23 that we are not to accept a
24 report on the effects of
25 blasting on marine mammals as

1 per section (i) of item 10 of
2 the Nova Scotia approval
3 issued April 30th until such
4 time as the Minister's office
5 has reviewed the
6 application."

7 Do you see that?

8 A. Yes.

9 Q. Were you aware at or about
10 this time that your approval condition under
11 section 10(i) had gone all the way up to the
12 Minister's office in the DFO?

13 A. I was not aware of this, no.
14 I was not aware of this line of correspondence.

15 Q. Were you aware of the subject
16 matter of the correspondence?

17 A. Again, generally speaking, I
18 was aware that the issue of the quarry was gaining
19 profile both within the community and logically at
20 the elected officials' offices.

21 Q. Yes. But were you aware of
22 the subject matter, in particular, that the item
23 10(i) of the Nova Scotia approval issued April
24 30th, until such time as the Minister's office has
25 reviewed the application?

1 A. I was not aware of that item
2 regarding 10(i) coming to the Minister's office.

3 Q. If you go over to the next
4 page, there is an email from faith -- sorry, back?

5 A. The preceding page?

6 Q. Preceding page, yes, thank
7 you. An email from Faith Scattolon, who it shows
8 as being the Regional Director of Oceans and
9 Environment Branch, copying I think all of the
10 people involved or included in the last copy, with
11 Jerry Conway also copied. Do you see his name on
12 the far right-hand side?

13 A. Yes.

14 Q. "The Minister's office is
15 reviewing the application?
16 Which application? Tim, do
17 you know which application
18 they are talking about. As
19 for accepting a report on the
20 effects of blasting, Paul, I
21 sent you the Minister's draft
22 letter on this quarry wherein
23 the condition that requires
24 the proponent to provide a
25 blasting design report is

1 referenced. My question was,
2 where is the expertise within
3 DFO to assess whether the
4 proposed blasting will affect
5 whales? What do we know
6 about sound propagation in
7 this instance? Who will do
8 this assessment? Mike, you
9 will recall I mentioned this
10 file last week and also spoke
11 briefly with Wayne Stobo
12 yesterday about it.

13 "I am going to give the ADM's
14 office a heads-up on this as
15 they should have aware of
16 MO's involvement."

17 I take "MO" to be the Minister's
18 office. Were you aware at this time of these kind
19 of communications, at what appears to be a fairly
20 high level in the DFO, regarding condition 10(i) of
21 your approval?

22 A. No, I was not.

23 Q. If you go, then, to tab 30 --
24 sorry, 29. You will recall that Mr. Ross had
25 written, by letter of December 11th following

1 Mr. Conway's email, December 11th, asking for more
2 information, and here is another submission from
3 Mr. Buxton of January 28th, 2003. And you would
4 have received this document at the time; correct?

5 A. Yes.

6 Q. And did you review it in any
7 detail at the time?

8 A. I don't have -- certainly we
9 would have reviewed it to understand what
10 information was being -- well, I mean, it was -- it
11 was written to me, so I'm sure I would have
12 reviewed it and ensured that the information was --
13 well, it was copied to Mr. Ross, anyway, but
14 ensured that the information was received by DFO.

15 Q. If you go to page at the
16 bottom 779469, it says:

17 "Specific comment 6, one
18 should note that the 35.6
19 metre setback criterion is
20 computed for 100 kilopascal
21 pressure pulse. Such a pulse
22 has a high probability of
23 lethal effects on
24 swimbladdered fish especially
25 at shallow water depths.

1 Sub-lethal effects were not
2 considered. This is a very
3 severe criterion and the
4 report has not considered
5 this." [As read]

6 That is the comment to Mr. Ross's
7 letter, his earlier letter. Now there is a
8 response from Mr. Buxton:

9 "We agree that swim-bladdered
10 fish could be present in the
11 intertidal and subtidal zone.
12 As previously discussed, the
13 separation distance from the
14 blast site has been increased
15 to approximately 118 metres
16 from the defined water
17 column. Mitigation of
18 potential effects on
19 swim-bladdered fish will be
20 achieved by limiting blasting
21 to within three hours of low
22 tide to ensure no fish are
23 within the separation zone."

24 [As read]

25 Did you have occasion to discuss

1 those criteria with Mr. Ross to see if they were
2 acceptable to him?

3 A. I don't recall whether I
4 specifically discussed that item at that time with
5 Mr. Ross.

6 Q. Do you recall whether he came
7 back to you following this to say that, We still
8 have problems with the blasting plan?

9 A. Yes.

10 Q. And when do you recall him
11 doing that? First of all, do you recall him doing
12 that verbally or by a letter?

13 A. January 20th? My
14 understanding at that time was that despite this
15 submission, that, you know, DFO still was not able
16 to accept that 10(h) and (i) had been met.
17 Particularly how that was communicated, I have to
18 refer to an exhibit to be sure.

19 Q. All right.

20 A. Yes.

21 Q. We will come to that. Under
22 tab 30, Exhibit C-917, it is an email from you to
23 Kim MacNeil regarding blast delay. Is this in
24 relation to the Whites Point project? Have you had
25 a chance to read that?

00179

1 A. Yes, I am just finishing up.
2 Okay.

3 Q. Is this in relation to the
4 Whites Point project?

5 A. It would seem to be.

6 Q. Who is Mr. MacNeil, or is
7 it --

8 A. Mr. MacNeil would have been
9 my director at the time.

10 Q. Director of compliance?

11 A. Regional Director of the
12 western region.

13 Q. And do you recall the
14 circumstances under which you were communicating
15 with Mr. MacNeil, the Regional Director, and why
16 you were communicating with him about the blasting
17 design?

18 A. I don't specifically recall
19 what prompted this particular communication, other
20 than that it was part of the ongoing iterative
21 review of the blasting plans.

22 Q. It states:

23 "Whereas the blaster in this
24 case, Dyno Nobel, have stated
25 that 25 MS would cut off the

00180

1 down lines resulting in a
2 dangerous situation, I
3 believe we have to accept
4 that as an assumption. We do
5 not have any basis on which
6 to refute this, nor does it
7 seem to be an unlikely
8 claim." [As read]

9 Then down below at the bottom, it
10 says:

11 "I have two calls in to DFO
12 to inquire whether 8 MS would
13 be acceptable, provided the
14 company meets the other
15 requirements as they have
16 proposed in their response to
17 DFO's questions."

18 This was a consideration of this
19 January 28th blasting plan; is that your best
20 recollection of that?

21 A. Without going through that
22 January 28th submission to look for a reference to
23 25 milliseconds, I am not 100 percent sure, but it
24 would, if --

25 Q. Does it make sense?

00181

1 A. Pardon?

2 Q. Would it make sense?

3 A. That this was in follow-up to
4 the January 28th?

5 Q. Yes, yes, yes.

6 A. Assuming that 2/7/03 refers
7 to February 7th, '03, that would make sense.

8 Q. If we go over to tab 31,
9 Exhibit R-96, there was another application for a
10 less than four hectare quarry down the road, about
11 ten kilometres down the road at Tiverton; do you
12 recall that?

13 A. There was an application for,
14 yes, Tiverton quarry.

15 Q. That application is shown in
16 this letter from Parker Mountain Aggregates Ltd. to
17 Jacqueline Cook?

18 A. Yes.

19 Q. Do you see that? And if
20 you -- so that arrived in your office on March 3rd,
21 2003. Do you see the stamp?

22 A. Yes, I do.

23 Q. Go to the next tab, tab 20 --
24 sorry, tab 32. That is a note to file. If you can
25 just confirm that the signature at the bottom would

1 be the signature of Jacqueline Cook, one of your
2 inspectors?

3 A. Yes.

4 Q. And it is a note to file of a
5 communication on March 3rd, '03. It says "call
6 received", and it's apparently somebody from the
7 Tiverton Harbour Authority?

8 Was the Tiverton Harbour Authority
9 the proponent of the Tiverton Harbour dredging and
10 wharf project?

11 A. Yes.

12 Q. And it states there, if you
13 can just read -- you will be more familiar with
14 Mrs. Cook's handwriting than I am, but if you could
15 read out where it says "Robert Thibault"?

16 A. It says:

17 "Robert Thibault, Minister,
18 asked if there was anything
19 he can do to speed up
20 process."

21 Q. Then it says "funded"?

22 A. Yes.

23 Q. If you could go back to the
24 previous tab for one moment, and it is about four
25 pages from the end of there I would like you to go

1 to.

2 A. Okay.

3 Q. And that is the page entitled
4 "Proposed Blast Plan Tiverton Quarry"?

5 A. Yes.

6 Q. Was that the blast total sum
7 of the blast design that was submitted in respect
8 to the Tiverton quarry blasting?

9 A. That was the blasting -- that
10 was the blast design information on which the
11 approval was based.

12 Q. Right. As compared to the
13 blasting plan that Mr. Buxton had been sending
14 through to you and Mr. Ross with respect to the
15 Whites Point quarry?

16 A. Well, again --

17 Q. That is a comparable plan; is
18 that correct?

19 A. Well, this was at the
20 application stage, and I believe in the Nova Stone
21 situation there was a simplified blasting plan
22 presented with the application on which the
23 approval was based.

24 Recognize that subsequent
25 iterations of that blasting plan at Nova Stone

1 became more detailed as attempts to address the
2 marine mammals concerns were --

3 Q. Were made?

4 A. Were made, yes.

5 Q. If you go, then, to tab 33,
6 Exhibit R-101, you will see a report has been
7 prepared on the application for approval of the
8 Tiverton quarry signed by Robert Balcom, same
9 engineer as signed the original report on the
10 Whites Point quarry, dated March 21st. Do you see
11 that?

12 A. Yes.

13 Q. 2003.

14 A. Yes.

15 Q. So that was the date that he
16 provided his report and you received his report; is
17 that correct?

18 A. It looks like it was received
19 in my office on March 24th, or this version of it,
20 yes.

21 Q. If you go over to the
22 engineering report starting at page 2, so under
23 "discussion", if you go three paragraphs down:

24 "Just like Whites Point the
25 proposed quarry is less than

1 four hectares and therefore
2 is not subject to
3 registration under the
4 environmental assessment
5 regulations."

6 Just like Whites Point; correct?

7 A. That's right.

8 Q. If you go down to the next

9 paragraph:

10 "The quarry does not meet the
11 minimum separation distance
12 of 800 metres from the
13 structure. A number of
14 releases have been signed by
15 local residents of Tiverton.
16 Most of the homes in the
17 community lie within the 800
18 metre buffer zone. There are
19 no water courses in the
20 immediate vicinity of the
21 quarry. The nearest surface
22 water, the ocean, is at a
23 distance of 160 metres."

24 And that was the understanding at
25 that time, that the nearest body of water was

00186

1 within 160 metres from the ocean; correct?

2 A. At the time of authoring the
3 engineering report, yes.

4 Q. At the time of the
5 authorization of the approval; correct?

6 A. Yes.

7 Q. And:

8 "The remainder of the
9 proposed area of operation
10 covered by this approval will
11 meet or exceed the 15 metre
12 separation distance from
13 other adjoining properties."

14 Then go down to "blasting" at the
15 bottom of page 3:

16 "The site of the proposed
17 quarry does not meet the
18 department's guideline for
19 separation from the nearest
20 residents of 800 metres.
21 Blasting operations will be
22 restricted to the limits in
23 the Department of Environment
24 and Labour pit and quarry
25 guidelines. Each blast will

00187

1 be monitored by the blaster.
2 Blasting in this closely
3 packed community can be
4 carried out safely."

5 Then I would ask you to focus on
6 the next sentence:

7 "The blasting effect on
8 marine mammals should not be
9 a problem since the blasts
10 must not endanger structures
11 within the 800 metre buffer
12 zone."

13 Now, you told me with respect to
14 the Whites Point quarry 800 metre separation
15 distance that had nothing to do with marine
16 mammals?

17 A. No. The 800 metre separation
18 distance is intended to be protective of structures
19 and property.

20 Q. Did you read this report at
21 the time?

22 A. Yes.

23 Q. And did you ask Mr. Balcom
24 why he was making some connection between the 800
25 metre separation distance for structures and making

1 a connection between that and marine mammals?

2 A. I don't know if I
3 specifically asked him that. However, because, you
4 know, the two are -- the 800 metres is not designed
5 with marine mammals in consideration, I understood
6 where he was coming from intuitively, that if the
7 blasting can't hurt the nearest structure off side
8 the property, if it can't damage the foundation,
9 then the likelihood at 160 metres away from the
10 ocean -- and the Tiverton quarry was on top of a
11 hill, as well -- you know, I understand his
12 rationale and that the likelihood of, you know,
13 damage to marine mammals was lessened.

14 That notwithstanding and being
15 mindful of the process that was undertaken at
16 Whites Point, we still wanted to have a
17 double-check with DFO and make sure that -- you
18 know, I didn't want to rely solely on Mr. Balcom's
19 assertion, I guess put it that way.

20 Q. At Whites Point, the
21 application for 3.9, the approval of the 3.9
22 hectare quarry, was subject to conditions 10(h) and
23 (i), and of course there is no conditions, such
24 conditions, in the Tiverton quarry approval;
25 correct?

1 A. That's right.

2 Q. And did you specifically ask
3 the people at DFO why it would be possible to have
4 an approval for the Tiverton quarry, which was at
5 that time believed to be 160 metres away from the
6 ocean, whereas with the Whites Point they were
7 driving ahead with the idea of a protection for
8 marine mammals?

9 A. I don't think I questioned
10 DFO specifically in that way. We certainly
11 referred the application and consulted with DFO on
12 the Tiverton application.

13 You know, being mindful of the
14 differences between -- you know, between the two
15 sites, I can't, you know, speculate necessarily
16 what -- you know, how DFO conducted their
17 assessment.

18 But given the fact that the
19 Tiverton quarry was higher up and further away from
20 the ocean as what was initially applied for in the
21 Whites Cove application, you know, those would seem
22 to have been mitigating factors.

23 Q. So you, however, did know
24 that from your perspective you wanted DFO to give
25 the Tiverton quarry application priority. Do you

00190

1 recall that?

2 A. I recall that the Tiverton
3 quarry application and the project, which it was
4 supplying rock to, were time sensitive. They were
5 trying to meet constraints of the fiscal year, I
6 believe.

7 Q. So on March 3rd, Ms. Cook
8 from your office had received information from the
9 harbour authority that Mr. Thibault wanted the
10 process sped up. Were you aware of that at the
11 time?

12 A. I was aware that there was
13 time sensitivity around the project. I don't
14 recall exactly when Jackie may have conveyed the
15 substance of that phone call to me.

16 Q. If you go to tab 35.

17 A. Sorry.

18 Q. And it is Exhibit 707. This
19 is your note to file?

20 A. This is my note to file, the
21 phone call of Jim Ross.

22 Q. March 10th, a week after
23 Ms. Cook had received the call from harbour
24 authority asking or referring to Minister Thibault
25 wanting that process to be sped up?

00191

1 A. Yes.

2 Q. And could you just read this
3 out, please?

4 A. "I called" -- contact Jim

5 Ross:

6 "I called to advise him of
7 Tiverton quarry application
8 and wanted to know who I
9 could refer to to see if DFO
10 had any concerns. Jim said
11 to fax it in through normal
12 channels and it will get
13 assigned to someone. I asked
14 if this could be given
15 priority and he said he would
16 flag it."

17 Q. And if you go to tab 63,
18 please, Exhibit C-691, tab 63.

19 A. Yes.

20 Q. You will see an entry there.

21 This is a log, action log, from somebody at the
22 DFO. The first date at the top of the entry is
23 26th of March 2003; do you see that?

24 A. I do.

25 Q. And it's a telephone

00192

1 conversation on March 26th, 2003, 10:41 a.m.:

2 "Phoned Bob Petrie NSDEL. He
3 informed me that Parker
4 Mountain Aggregates had
5 applied for a new quarry at
6 Tiverton which was approved
7 on March 24th."

8 So two days before:

9 "The quarry was being
10 developed to provide stone
11 for the Tiverton wharf
12 repairs and future needs.
13 The file has been sent to
14 Joy..."

15 Was that Joy Dube, or do you know?

16 A. I would assume so.

17 Q. "... and was sent to Peter
18 Winchester for review."

19 Peter Winchester was with DFO;

20 correct?

21 A. Yes.

22 Q. And you knew who he was?

23 A. Yes.

24 Q. "Peter reviewed the file and
25 gave Mr. Petrie a verbal okay

1 for the project..."

2 Was that on March 24th or March
3 26th?

4 A. I believe Peter's -- my
5 conversation with Peter was on March 24th.

6 Q. Okay. "... with a letter of
7 advice to follow within the next day." So that was
8 your understanding as of March 26th? The time of
9 that phone call was the extent of the DFO review.
10 It was going to be basically a one-day turnaround;
11 correct?

12 A. Well, the conversation with
13 Mr. Ross happened sometime in advance of this.
14 So...

15 Q. Yes. It happened on March
16 10th.

17 A. Yes.

18 Q. And he reviewed the file and
19 gave Mr. Petrie a verbal okay for the project with
20 a letter of advice to follow within the next day.

21 And of course:

22 "The letter of advice has not
23 been issued yet due to the
24 potential conflict of the
25 project with the requirements

1 under CEAA."

2 Do you see that?

3 A. I do.

4 Q. Now, if you go back to tab
5 36, these are Exhibits C-741 to C-749.

6 A. Yes.

7 Q. You will see that in the
8 first page, blasting started on March 18th, 2003 at
9 the Tiverton quarry; correct?

10 A. I see that, yes.

11 Q. Go back to tab 34, please,
12 Exhibit R-105. That is the letter to Mr. Michael
13 Lowe dated March 24th, 2003.

14 A. Yes.

15 Q. And that's a letter from you
16 to Mr. Lowe enclosing the approval for Tiverton?

17 A. That's right.

18 Q. Right? Do you remember that
19 there were provisions that had been in the Whites
20 Point approval that were not in the Tiverton
21 approval?

22 A. The 10(h) and (i), yes.

23 Q. All right. If you go to page
24 9?

25 A. So page 9 of the...

1 Q. Page 9 of the approval.

2 A. Yes.

3 Q. Under number 10, "Blasting",
4 do you recall that in the Whites Point approval
5 there were the words at the end of 10(a):

6 "The design shall be sent to
7 the department for review
8 prior to any blasting."

9 A. Yes, I do.

10 Q. Yes. And those words weren't
11 in here; correct?

12 A. No. That's right.

13 Q. And if you go back a little
14 further to page 3, under general terms and
15 conditions, there had been, you will recall, in
16 that same section of the Whites Point approval
17 three further matters that the proponent had to
18 comply with. Do you recall that?

19 A. I recall there was reference
20 to the blasting guidelines and the pit and quarry
21 guidelines and CLC.

22 Q. CLC guidelines?

23 A. That's correct, yes.

24 Q. Yes. So then let's go back
25 to tab 36 for a moment. That is March 24th you

00196

1 have given your approval on Tiverton, but blasting
2 has already commenced at Tiverton, right, March
3 18th, '03?

4 A. Blasting did commence at
5 Tiverton before approval was received. I'm not --

6 Q. Were you aware of that?

7 A. I'm not clear on when we
8 became aware that the blasting had happened.
9 Parker Mountain Aggregates had requested of us or
10 notified us that they would be doing road
11 construction on the approach to the quarry and that
12 would entail blasting. So we were aware that at
13 least blasting of a non-quarrying nature was going
14 to occur.

15 Q. And you had their four line
16 blasting design?

17 A. We had their blasting design.

18 Q. If you go to the next page of
19 that to Exhibit C-742, blasting also occurred on
20 March 20th, '03; do you see that?

21 A. Yes.

22 Q. And the next page, Exhibit
23 C-743, also on March 24th, 2003, so that is the day
24 of your approval; correct?

25 A. Yes, I see that.

1 Q. And the next page is Exhibit
2 C-744. Blasting occurred on March 26th?

3 A. Yes.

4 Q. And the next page, March
5 27th?

6 A. That's right.

7 Q. And the page after that,
8 which is Exhibit C-746, March 28th?

9 A. Yes.

10 Q. April 3rd, if you go to
11 C-747; April 12th, Exhibit C-748.

12 A. Yes.

13 Q. April 19th, C-749.

14 A. Yes.

15 Q. Were you aware of all of
16 those blasts being conducted?

17 A. Once the approval was issued,
18 we certainly expected that blasting would be
19 occurring.

20 Q. And then --

21 A. But I --

22 Q. Sorry, go ahead.

23 A. Yes. When we received
24 specific -- I think these reports were filed
25 sometime after the blasts occurred.

1 to live with the verbal okay?

2 A. We had worked with Peter
3 Winchester. You know, he was a known colleague to
4 us at DFO, and I took him at his words that if that
5 was his assessment, that he would stick by that
6 assessment.

7 Q. And Jim Ross was a known
8 colleague at DFO, as well?

9 A. Yes. I hadn't worked with
10 Jim as much over the years, but, yes.

11 Q. And you were prepared to live
12 by what he told you; correct?

13 A. Yes.

14 Q. If you go to tab 39, please,
15 this is a letter to Mr. Buxton from Mr. Ross dated
16 May 29th, 2003. You are copied on this letter:

17 "Dear Mr. Buxton: The
18 Department of Fisheries and
19 Oceans has reviewed the
20 document Whites Point Quarry
21 Blasting Plan submitted
22 November 18, 2002 by Nova
23 Stone Exporters, Inc. and the
24 additional information
25 submitted January 28, 2003

1 and March 28, 2003."

2 I am focussed on the next words:

3 "DFO has concluded the
4 proposed work is likely to
5 cause destruction of fish
6 contrary to section 32 of the
7 Fisheries Act."

8 Do you see that?

9 A. Yes.

10 Q. You would have seen that --

11 MR. DOUGLAS: Sorry to interject.

12 Just to correct the record, it is in fact Mr. Phil

13 Zamora who wrote the letter and not Mr. Jim Ross.

14 MR. NASH: Thank you, counsel.

15 BY MR. NASH:

16 Q. It is Mr. Zamora. By this

17 time, you were having some dealings with

18 Mr. Zamora, who had taken over the file from

19 Mr. Ross; correct?

20 A. Yes.

21 Q. And you would have reviewed

22 that wording at the time?

23 A. I would have received this, a

24 copy of this letter, yes.

25 Q. And you would have relied on

00201

1 that information and taken it at face value?

2 A. We certainly would have
3 accepted DFO's assessments in this matter.

4 Q. You will see that on the page
5 after the signature page, there is a reference
6 three paragraphs from the bottom:

7 "Based on these observations,
8 it is likely that Atlantic
9 Salmon of iBoF could be found
10 in close proximity to the
11 shoreline of Whites Point
12 from May to October. Habitat
13 Management Division HMD have
14 calculated that a horizontal
15 setback distance from the
16 shoreline of 500 metres would
17 be required to protect iBoF
18 Atlantic salmon of that size
19 and could be found at Whites
20 Point from May to October."

21 And you had made reference to a
22 500 metre setback, I think, and you were aware that
23 there was a change in the setback from 35.6 metres
24 to the 500; correct?

25 A. Yes.

1 Q. And if you then go over to
2 the next tab, which is tab 40, Exhibit C-519, it is
3 a letter from Mr. Boudreau, who at that time was a
4 colleague of Mr. Zamora's at the Habitat Management
5 Division at DFO; do you remember that?

6 A. I remember Mr. Boudreau.

7 Q. He's writing to Mr. Chris
8 Daly, manager of the Environmental Assessment
9 Branch, on June 4th, 2003. I won't go through the
10 first two paragraphs, but it says in the third
11 paragraph:

12 "DFO is presently reviewing
13 the proponent's blasting plan
14 for a 3.9 hectare test
15 quarry."

16 Now, remember they said in the
17 letter of May 29th that we just reviewed they had
18 concluded that the blasting, in their words, "the
19 proposed work is likely to cause destruction of
20 fish". That had been their conclusion.

21 In this letter, Mr. Boudreau is
22 writing to Mr. Daly saying:

23 "DFO is presently reviewing
24 the proponent's blasting plan
25 for a 3.9 hectare quarry."

1 Were you aware notwithstanding
2 what had been told to Mr. Buxton, in a letter which
3 is copied to you, that DFO was purportedly still
4 reviewing the blasting plan?

5 A. Well, given the response of
6 May 29th, and, you know, that's acknowledging
7 the -- you know, the review of the blasting plan of
8 November 18th, the year previous, you know, while
9 the... I guess in the context of Mr. Boudreau's
10 letter, the reference to "presently reviewing", you
11 know, I don't know how that relates to the fact
12 that on May 29th they appear to have formed some
13 conclusions.

14 I am sure they were still
15 considering the matter.

16 Q. That's just supposition on
17 your part?

18 A. Yes.

19 Q. You know that you got the
20 letter saying DFO has concluded that the proposed
21 work is likely to cause destruction of fish. It
22 doesn't appear that you got the letter saying they
23 are presently reviewing the proponent's blasting
24 plan to determine if approvals are required under
25 section 32.

00206

1 Q. If you go to tab 44, that is
2 a letter from Mr. Buxton dated June 11th, 2003.

3 A. Yes.

4 Q. He states in the second
5 paragraph:

6 "We have asked for a meeting
7 with Habitat Management
8 Division, HMD, Nova Scotia
9 Department of Environment and
10 Labour and the Canadian
11 Environmental Assessment
12 Agency to discuss the overall
13 status of the blasting plan.
14 The CEAA office has offered
15 to arrange a meeting at their
16 Halifax location. You will
17 be contacted in the very near
18 future."

19 Then this paragraph on page 2:

20 "You have also asked about
21 the calculations carried out
22 by HMD which led to the 500
23 metre horizontal distance
24 from the shoreline to the
25 blast location being

1 determined as required to
2 protect inner Bay of Fundy
3 Atlantic Salmon. The
4 calculations were performed
5 using a computer simulation
6 model supplied by the
7 developer of the DFO
8 Guidelines for the Use of
9 Explosives in or near
10 Canadian Fisheries Waters."

11 Who we know is Mr. Wright:

12 "The results of these
13 calculations are available
14 for your examination. Please
15 call me at 902..."

16 Et cetera. You got a copy of
17 that. So you must have been aware that the request
18 had been made and that the calculations were
19 offered up to Mr. Buxton; correct?

20 A. Yes. And, you know, I think
21 that is consistent with, you know, back in the --
22 it's consistent with the approach that DFO was
23 taking at the time, which was, you know, back on
24 May 29th, they offered the opportunity to redesign
25 the blasting plan to address the outstanding

1 issues.

2 So this would seem to be
3 consistent with that approach.

4 Q. Right. To give the
5 information that they had, apparently had, to
6 Mr. Buxton and provide him with the calculations
7 that he requested?

8 A. To work towards resolution of
9 the issue, yes.

10 Q. And in doing so, to give him
11 the calculations; correct?

12 A. Whatever.

13 Q. Well --

14 A. However that --

15 Q. "The results of these
16 calculations are available for your examination";
17 right?

18 A. Yes.

19 Q. If you go back, then, to tab
20 30 -- sorry, 41. I'm sorry, that is the wrong one.
21 43, Exhibit C-404.

22 A. Yes.

23 Q. You were aware of Derek
24 McDonald's involvement in the file by this time?

25 A. Well, I was aware -- and I

1 don't know Derek. I was aware of the involvement
2 of CEAA.

3 Q. And Derek McDonald was the
4 Halifax CEAA official who was assigned to this
5 file; correct?

6 A. I will take that as correct.

7 Q. You didn't know that at the
8 time?

9 A. I wasn't very familiar with
10 the CEAA staff. I didn't work with them.

11 Q. Okay?

12 A. No.

13 Q. He states in his email to
14 Mr. Chapman of June 10th, 2003:

15 "Although not proceeding with
16 the 3.9 hectare operation is
17 arguably the 'high road',
18 there is no clear legal
19 impediment to its operation.
20 A cynical view might be that
21 DFO wants to avoid making a
22 decision on the blasting plan
23 and the Agency is a
24 convenient scapegoat.

25 "The proponent is clearly

1 frustrated, and with good
2 reason, I think. Things are
3 dragging. I find it
4 frustrating myself and it's
5 not even my money. They are
6 seeking legal advice and in
7 my view there is a chance the
8 proponent will soon seek
9 legal recourse against DFO,
10 the province and CEAA, I'm
11 not sure, to assert its right
12 to proceed."

13 Going down to the next paragraph:

14 "Notwithstanding CEAA's view
15 on project splitting and the
16 fact that this could be
17 perceived as project
18 splitting, this one appears
19 to have gotten by us all and
20 it may be too late to make a
21 compelling argument against
22 the 3.9 operation. Maybe
23 CEAA should bite the bullet,
24 recognize the province's
25 jurisdiction and chalk it up

00211

1 as a lesson learned." [As
2 read]

3 Then Mr. Chapman responds to him
4 on an email the next day:

5 "Derek: We should
6 communicate via telephone for
7 discussions of this nature.
8 Give me a call."

9 Were you aware of any of those
10 internal deliberations within CEAA regarding this
11 matter?

12 A. Not specifically, although as
13 the project proceeded in the direction of
14 submitting project descriptions and registration
15 under the environmental assessment process -- and I
16 forget at what point I became aware of this, but it
17 became obvious that DFO or governments were
18 struggling with the notion of having, you know, a
19 larger proposed project on this, you know, 150
20 acre -- or hectare site, and proceeding with the
21 smaller project nested within that larger project
22 that was going to be subject to a more detailed
23 assessment.

24 You know, the nature of the
25 approach to that project, you know, I'm sure was

1 not intentional, but it appeared to confuse the
2 regulators' views on this and presented some
3 confusing choices as to whether, you know, moving
4 forward with blasting on a smaller site was, in
5 fact, you know, moving ahead on a larger project
6 and, by extension, that was subject to a more
7 detailed EA.

8 Q. Mr. Zamora -- if you go to
9 tab 46, Exhibit C-107, you knew Mr. Buxton's views.
10 Did you get a copy of this letter?

11 A. Let me take a moment to read
12 it.

13 Q. Why don't we read it out
14 together:

15 "With respect to the blasting
16 plan for the 3.9 hectare
17 quarry, we are still of the
18 view that since a permit is
19 in place permitting the
20 blasting on the 3.9 hectare
21 quarry, the issue of the
22 larger quarry and its process
23 is irrelevant. This is the
24 primary reason for my request
25 for a meetings."

1 And then to the bottom:

2 "With respect to the
3 calculations with respect to
4 the setback distances to
5 protect iBoF salmon, we would
6 still like a copy of the
7 calculations before meeting
8 with you. We need to find
9 out which consultants to
10 bring to the meeting so we
11 have a complete understanding
12 of all of the parameters that
13 went into the calculations."

14 Did you get a copy of that letter?

15 MR. LITTLE: Excuse me. Judge
16 Simma, could I just interject here. We are now
17 another hour in, and what we're seeing is a whole
18 bunch of documentation being read into the record
19 by my friend here to Mr. Petrie and the majority of
20 this documentation is not in Mr. Petrie's
21 affidavit.

22 There are far more appropriate
23 people to present these documents to, and we are
24 getting very concerned about the amount of time
25 that is being taken.

1 MR. NASH: Mr. Petrie's affidavits
2 are about the quarry application, the approval, the
3 ability to exercise rights under the approval, and
4 all of the circumstances surrounding this. This is
5 detail that goes to that, and it is detail that I
6 would like to present a foundation with with this
7 witness.

8 MR. LITTLE: But beyond reading
9 these into the record, Mr. Nash, Mr. Petrie is not
10 able to answer your questions on these.

11 MR. NASH: I am just asking if he
12 was aware, Mr. President, that is all. And it is
13 important to know who was aware of what and when in
14 this matter.

15 PRESIDING MEMBER: Do you have the
16 feeling that you are getting close to the end of
17 the --

18 MR. NASH: I have that feeling,
19 yes.

20 PRESIDING MEMBER: Well...

21 BY MR. NASH:

22 Q. Were you aware that there was
23 a provincial election pending on July 5th of 2003
24 or near the beginning of July?

25 A. Sorry, July which year?

1 Q. 2003.

2 A. At this point in time, I
3 forget the date of the election, but there was an
4 election happening.

5 Q. Do you remember there being a
6 lead-up to the election, to an election that was
7 expected by the end of June?

8 A. At this point in time, the
9 timing of that election has escaped me.

10 Q. If you go to tab 47, Exhibit
11 C-517, there is an email from Mr. Daly to
12 Mr. McDonald, Mr. Boudreau and a copy to Steve
13 Chapman, a number of others, and then yourself. Do
14 you see you copied there?

15 A. Yes.

16 Q. Second paragraph:

17 "I think we need to meet
18 sooner rather than later so
19 we can get our ducks in a row
20 to make an announcement by
21 the end of June."

22 Do you remember the urgency to get
23 the announcement out by the end of June and the
24 announcement of a review panel?

25 A. I think sort of the building

00216

1 concern around this project certainly presented --
2 you know, probably would have presented some
3 urgency as far as showing progress and giving the
4 public a sense of what process was about to unfold.

5 So in order to take steps to
6 engage in that process in a timely way, in that
7 sense I can understand the urgency.

8 Q. Did you understand the
9 urgency to be related to the fact that an election
10 was expected in Nova Scotia sometime around the end
11 of June?

12 A. I don't remember whether I --
13 I don't recall having that sense.

14 Q. You don't recall having the
15 sense that it was urgent to get this quarry to a
16 review panel before the election so that an
17 announcement could be made?

18 A. I guess the matters
19 concerning the administration of the environmental
20 assessment and the review panel were primarily
21 being handled through our environmental assessment
22 folks in Halifax and Mr. Daly.

23 So while I certainly, you know,
24 had some awareness of that larger process
25 unfolding, that was, you know, not within the scope

1 of my daily -- daily duties.

2 Q. Right.

3 A. So my sense of what needed to
4 be done, when and why, you know, would not be as
5 informed as someone in that section.

6 Q. You don't remember the
7 election having anything to do with it?

8 A. No.

9 Q. Is that what you're saying?

10 A. No.

11 Q. I would like to turn you for
12 a moment to tab 53, Exhibit C-98. And what I would
13 like to draw your attention to is an email from
14 Phil Zamora to Dean Stuart with a copy to Bruce
15 Hood dated August 25th, 2004, a year later?

16 MR. LITTLE: Again, excuse me,
17 Judge Simma. Mr. Petrie has not given any evidence
18 on this document, and I don't see his name anywhere
19 on this document.

20 MR. NASH: The question is
21 relating -- I am going to relate it back to the
22 question of the 500 metre setback, which is the
23 subject of the I-Blast model and that information
24 being passed on.

25 BY MR. NASH:

1 Q. My simple question is this:
2 Were you aware that the information that Mr. Zamora
3 had back in June of 2003 that the I-Blast model
4 which led to the 500 metre setback was the wrong
5 model -- were you aware of that back in 2003?

6 A. I don't remember. I don't
7 know when I became aware of that. Subsequently, in
8 the time that has passed, I understand that they
9 had to revisit that model and correct some of the
10 calculations that went into those assumptions.

11 Q. So you are aware they
12 revisited the model and reduced the setback from
13 500 metres to 100 metres?

14 A. I am aware of that, yes.

15 Q. Do you recall when you were
16 aware of that?

17 A. I believe that was spring,
18 the spring of 2004 or thereabouts.

19 Q. If you go to tab 55.

20 A. Yes.

21 Q. There is a draft letter from
22 Mr. Zamora to Mr. Buxton. You will see on the
23 second page it shows you as being copied.

24 A. This is a draft letter?

25 Q. A draft letter, that's

1 correct.

2 A. Yes, yes.

3 Q. He says -- by summary, he
4 says that the model that's been used has been
5 referred to Mr. Wright, and Mr. Wright says that it
6 is -- I am paraphrasing -- not appropriate. He
7 says: We have contacted Mr. Wright for advice on
8 the use of the I-Blast model.

9 Keeping in mind this letter is
10 dated -- draft letter is dated July 30th, 2003.
11 Mr. Wright is not comfortable with using this model
12 for the blasting plan you proposed --

13 MR. LITTLE: Again, Judge Simma,
14 there is a witness waiting out in the hall that has
15 testified to this subject matter. I don't know
16 what the relevance is to this -- is of this to
17 Mr. Petrie's evidence in his two affidavits.

18 MR. NASH: It is a letter that
19 shows him --

20 MR. LITTLE: It is a draft letter.

21 MR. NASH: It is a draft letter
22 shows him being copied.

23 MR. LITTLE: Perhaps we should see
24 the final letter, then, if there was one.

25 PRESIDING MEMBER: Can we have a

1 minute?

2 --- Tribunal members confer.

3 PRESIDING MEMBER: Am I right that
4 you are close to finishing this?

5 MR. NASH: Very close.

6 PRESIDING MEMBER: Very close?

7 MR. NASH: Very close.

8 MR. NASH: More than one-and-a
9 half questions left, but very close.

10 PRESIDING MEMBER: All right. So
11 go on.

12 MR. LITTLE: But, Judge Simma, our
13 objection stands.

14 PRESIDING MEMBER: I know. It is
15 just to try and -- I think my colleagues and I
16 agree that Mr. Nash should finish this within a
17 short time.

18 MR. NASH: Yes.

19 PRESIDING MEMBER: Then we go on
20 to the next stage. Thank you.

21 BY MR. NASH:

22 Q. Thank you, Mr. President.

23 So you didn't receive a letter
24 from Mr. Zamora in July or August of 2003 regarding
25 the revision of the I-Blast model?

1 A. I don't believe so.

2 Q. If you go to tab 58, I
3 believe you did receive this letter. It is dated
4 November 10th, 2004. It shows you as being copied?

5 A. Yes.

6 Q. And that is a similar letter
7 to the draft July 30th letter, and it states in the
8 second paragraph:

9 "In a previous letter to you
10 dated June 11, 2003 you were
11 informed that the setback
12 distance for the blasting
13 plan you submitted was
14 calculated by Habitat
15 Management Division using a
16 computer simulation model
17 supplied by the developer of
18 the Department of Fisheries
19 and Oceans guidelines for the
20 use of explosives. The
21 setback distance, 500 metre
22 horizontal distance from the
23 shoreline to the blast
24 location, was determined to
25 be required to protect inner

1 Bay of Fundy (iBoF) Atlantic
2 Salmon which are now listed
3 as endangered by the Species
4 At Risk Act. Since the
5 initial calculations were
6 made, DFO has determined that
7 the above-mentioned
8 guidelines can be used to
9 generate a lesser setback
10 distance." [As read]

11 He goes on, and on the top of the
12 next page, "this", the setback distance, "would be
13 approximately 100 metres."

14 Now, is this the first
15 notification of the fact that the setback
16 requirement for blasting at Whites Point had been
17 revised from 500 to 100 metres?

18 A. Yes. I believe this was the
19 first formal notification.

20 Q. Nobody from DFO had told you
21 that before?

22 A. I -- I can't recall.

23 Q. Go over, please, to tab 59.

24 Were you aware Mr. Buxton had a meeting with your
25 Minister in October of 2003 respectfully

1 requesting, but formally requesting, that the terms
2 and conditions of the above approval be amended to
3 reflect the terms and conditions of the nearby
4 Tiverton quarry?

5 A. I was aware that that meeting
6 occurred, yes.

7 Q. And was there a reason for
8 asking Jim Ross, with respect to the Tiverton
9 quarry, to have it be given priority?

10 A. Just again, in the case of
11 any project, particularly, you know, ones that are
12 time sensitive and we recognize -- we're sensitive
13 to the proponents or the public works need to meet
14 fiscal deadlines in order to, you know, finish the
15 necessary infrastructure at Tiverton. So I guess
16 there is two -- two perspectives on that.

17 Certainly we would endeavour to be
18 as efficient as possible in the processing of an
19 approval like that, so in the time sensitivity
20 aspect, we would ask Jim to take a look at it that
21 way.

22 But, as well, given the profile of
23 the coastal quarry issue at the time and the
24 process that we were going through --

25 Q. I am just asking about

1 Tiverton here.

2 A. Yes, I understand.

3 Q. Yes.

4 A. But in an effort to, you
5 know, highlight the need to at least apply
6 consistent consideration or thought process, if
7 we're going to think about marine mammals at one
8 site, we should think about it at another. Even if
9 the site characteristics are different, we should
10 at least check that.

11 So in that sense, we asked Jim to
12 give it some priority.

13 Q. And of course the extent of
14 the marine mammal consideration in your office
15 and -- was the 800 metre because of the structures.
16 But do you know what consideration Jim Ross or DFO
17 gave to marine mammals at the Tiverton example, or
18 are you aware of that?

19 A. Well, I can't surmise what
20 type of analysis happened behind their doors.

21 Q. Please go -- I think this
22 will be my last --

23 MR. DOUGLAS: I think Mr. Petrie
24 was not finished.

25 MR. NASH: I'm sorry, I thought he

1 was finished.

2 MR. DOUGLAS: No, I think Mr.
3 Petrie was not finished.

4 MR. NASH: I'm sorry, I didn't
5 mean to interrupt.

6 MR. DOUGLAS: He hadn't finished
7 his thought.

8 THE WITNESS: And perhaps I have
9 lost my train of thought now.

10 No, that is fine. If it comes
11 back to me, I will interject.

12 BY MR. NASH:

13 Q. All right. I believe this
14 will be the last document I will refer you to, and
15 that is a document at tab 60, Exhibit C-617. Now,
16 this is your letter date stamped December 3rd,
17 2003, some 19 months, by my calculation, after the
18 approval had been granted.

19 It was to Mr. Buxton, and it is
20 from the Minister and it was prepared by you;
21 correct?

22 A. Yes.

23 Q. You state:

24 "I am writing further to our
25 meeting on October 9, 2003

1 and your request for an
2 amendment which would enable
3 you to conduct blasting at
4 the Whites Cove site."

5 Then you cite conditions 10(h) and
6 (i), and then halfway down the page:

7 "We understand is that
8 Department of Fisheries and
9 Oceans Canada (DFO) remains
10 concerned that blasting at
11 this location may cause
12 adverse effects to marine
13 mammals, as well as
14 endangered inner Bay of Fundy
15 Atlantic Salmon."

16 And was that the information that
17 had been given to you by DFO at that point?

18 A. As of December 2003, we
19 understood that, yes, the questions regarding
20 blasting and marine mammals had not been answered
21 to DFO's satisfaction. Concerns remained.

22 Q. That was the information you
23 had from DFO?

24 A. Yes, yes.

25 MR. NASH: Thank you very much for

1 answering my questions. Those are my questions.

2 PRESIDING MEMBER: Thank you,
3 Mr. Nash. Mr. Douglas, are you going to...

4 MR. DOUGLAS: No. I am ready to
5 proceed, unless anybody needs a break.

6 PRESIDING MEMBER: No, we don't
7 need a break yet. Go ahead.

8 RE-EXAMINATION BY MR. DOUGLAS:

9 Q. Good afternoon, Mr. Petrie.

10 A. Good afternoon.

11 Q. I will be asking you some
12 questions in re-exam today.

13 At the start of cross-examination,
14 the claimants took you to a code for Nova Scotia's
15 public servants.

16 A. Yes.

17 Q. Do you recall that? Do you
18 believe that this code was maintained by your
19 office at all times?

20 A. I certainly believe this was
21 maintained by our office. Our efforts to
22 administer both the Tiverton and Whites Cove
23 approvals were in an effort, particularly in Whites
24 Cove's case, to prevent problems, and that -- I
25 stand by that.

1 Q. Okay. Let me start out by
2 establishing some basic relevant dates regarding
3 the 3.9 quarry approval. On February 27th, 2002,
4 Nova Stone submitted their application to open a
5 3.9 hectare quarry at the Whites Point location; is
6 that correct?

7 A. That's right.

8 Q. And you issued Nova Stone an
9 approval on April 30th, 2002?

10 A. That's correct.

11 Q. And what date did that
12 approval terminate?

13 A. It depends on what you mean
14 by "terminate". The approval -- sorry, what date
15 did it expire? It was for a ten-year period.

16 Q. On what date was the approval
17 rendered invalid?

18 A. Thank you. The approval was
19 basically rendered invalid on May -- I think it was
20 on May first, 2004 when Nova Stone no longer had
21 any lease access to the site. Although that fact
22 may not have been known to us precisely at that
23 time, we notified the proponent in October of 2004
24 that because they no longer had legal access to the
25 site, their approval was null and void.

1 Q. So between the issuance of
2 the approval on April 30th, 2002 and the invalidity
3 of the approval on May 1st, 2004, did Nova Stone
4 ever assign or transfer the permit?

5 A. No.

6 Q. So over the course of the
7 permit's life, which company was the province
8 dealing with?

9 A. We were consistently dealing
10 with Nova Stone Exporters, the applicant and
11 approval holder for that site.

12 Q. And so, for example, when DFO
13 was reviewing blasting plans pursuant to the
14 permit, which company were they dealing with?

15 A. Nova Stone Exporters.

16 Q. Now, the claimants have
17 characterized the application for the 3.9 hectare
18 quarry as an application to conduct a test blast.
19 Would you agree with this characterization?

20 A. I am aware that that
21 characterization was applied in subsequent
22 iterations of the blasting plan. However, in our
23 consideration of the approval or the application
24 and in issuing the approval, the lens that we
25 applied to this was that it was for a fully

1 operational 3.9 hectare quarry with the blasting
2 that would be associated in that regard.

3 Q. And when your office received
4 the application, had your office encountered the
5 issue of quarrying effects on marine mammals
6 before?

7 A. No. That was the first time
8 in my awareness that those issues had intersected.

9 Q. Okay. Your office, Nova
10 Scotia Department of Environment and Labour, they
11 consulted with DFO about the application. Why did
12 your office consult with DFO?

13 A. Basically the province
14 doesn't want to be in a position of approving a
15 facility that is going to generate adverse effects,
16 you know, whether it be in a surface watercourse or
17 in the Bay of Fundy.

18 We look at blast vibrations as
19 being another form of emission from this site, and
20 we did not have the expertise to assess the issues
21 that have been raised regarding blast vibrations on
22 marine mammals. So we sought that out.

23 Q. Now, is it normal for your
24 office to consult with other agencies regarding the
25 terms and conditions of an industrial approval?

1 A. We have a longstanding
2 referral relationship with DFO on projects under
3 provincial management that may affect habitat or
4 Fisheries Act concerns.

5 And particularly where -- I think
6 there are some examples of other quarries in Nova
7 Scotia that follow the environmental assessment
8 process had conditioned added, reflective of DFO
9 concerns.

10 Q. Okay. The claimants have
11 criticized you for including conditions 10(h) and
12 (i) in the approval. What are your thoughts on
13 this criticism?

14 A. The conditions 10(h) and (i)
15 were intended as proactive, preventive measures to
16 avoid an adverse effect on a new issue with which
17 we were unfamiliar.

18 Again, the province does not want
19 to be in a position of approving a facility that
20 may, in its operations under our management, harm
21 Fisheries Act concerns or marine mammals.

22 So we view these conditions as a
23 proactive, preventive measure in order to prevent a
24 serious adverse effect on species at risk.

25 Q. Now, is it unusual for your

1 office to add terms and conditions that reflect
2 another agency's concerns, and that is terms and
3 conditions to an industrial approval?

4 A. We would add whatever terms
5 and conditions were necessary to manage impacts.

6 I will back up. Industrial
7 approvals or any approvals, while we may have
8 guidelines that apply to those approvals, we still
9 have to apply site-specific considerations for
10 circumstances that don't fit the standard, the
11 standard mold.

12 So in this case, that is why we
13 applied these conditions, but in the case of
14 approvals, whether it be industrial approvals or
15 municipal waste water approvals, if we are --
16 effects under provincial management are emanating
17 or discharging into a marine waters or fresh
18 waters, we would add conditions as recommended by
19 DFO necessary to mitigate those concerns.

20 Q. Do you recall the claimants
21 took you to an exhibit that they referred to as a
22 standard rock quarry permit? I believe it was
23 claimants' Exhibit 29.

24 A. Yes.

25 Q. Is that right? In your view,

1 is there such a thing as a standard quarry permit?

2 A. The exhibit that we reviewed
3 was an example of a previously-issued permit. The
4 reference document in these cases are the Pit and
5 Quarry Guidelines. Approval terms and conditions
6 are drafted using the guidelines as a reference.

7 So the exhibit that was displayed
8 was not a standard, in the formal sense of the
9 word. It was an example of a previous approval
10 that had been issued.

11 Q. Now, the claimants, they led
12 you through a number of exchanges between DFO and
13 Nova Stone regarding the proposed blasting at the
14 3.9 hectare quarry site.

15 In particular, do you recall when
16 they took you to a blast design for a test blast
17 filed by Nova Stone on September 17th, 2002.

18 A. Yes.

19 Q. It is claimants' Exhibit 298
20 for the record. They also took you to a blast
21 design for test blast filed on October 8th, 2002.
22 Do you recall that?

23 A. Yes.

24 Q. That was respondent's Exhibit
25 118 for the record.

1 MR. NASH: If I could just correct
2 the record, the letter of October 8th was under the
3 letterhead of Paul G. Buxton. The letter of
4 September 17th was also under the letter of Paul G.
5 Buxton.

6 PRESIDING MEMBER: Thank you.

7 BY MR. DOUGLAS:

8 Q. And Paul Buxton was a
9 representative of which company?

10 A. Paul Buxton was our working
11 contact with Nova Stone Exporters for the 3.9
12 hectare approval.

13 Q. As you have already
14 testified, and just for the record, the application
15 made by Nova Stone was not for a test blast, but
16 was to open a quarry; is that right?

17 A. That is how it was presented
18 to us. The application itself outlined a
19 production rate and an operating schedule that were
20 consistent with a production-scale quarry
21 referencing perhaps 50 weeks a year of operations,
22 16 hour days, that kind of a schedule.

23 So, you know, perhaps in as much
24 as 2 million tonnes a year, that is what was
25 referenced in the 3.9 hectare quarry application.

1 I guess regardless of whether or
2 not, you know, subsequent planning worked out the
3 lens that we had to apply to this, if we were
4 issuing a quarry approval, we had to consider it as
5 a production quarry approval, not an experimental
6 site.

7 Q. So if I just understood your
8 testimony, the application mentioned that they
9 wanted to open a quarry for, did you say, 50 weeks
10 a year?

11 A. That, I think -- yes,
12 the operating schedule in the application cites a
13 schedule of on the order of 50 weeks a year.

14 Q. How many days a week?

15 A. I believe it was seven days a
16 week.

17 Q. Do you recall how many hours
18 a day?

19 A. On the order of 14 to 16.

20 Q. So when DFO was reviewing
21 blasting plans submitted by Nova Stone, were they
22 reviewing test blasts?

23 A. Well, that was the
24 characterization of it by the proponent. However,
25 you know -- and I think this is how the approach to

1 the project, you know, created some confusion, in
2 that, you know, we had -- we had approved a quarry,
3 not necessarily an experimental site.

4 And the lens through which
5 blasting plans had to be -- you know, would be
6 looked at was, you know, potentially on an
7 operational scale.

8 Q. Now, the claimants took you
9 to or through an exchange in some emails from an
10 individual named Jerry Conway, who they held out --
11 the claimants held out to be a DFO expert and
12 coordinator; do you recall that?

13 A. Yes.

14 Q. Do you know if Mr. Conway is
15 a scientist?

16 A. I'm not -- I'm not
17 specifically familiar with Mr. Conway's résumé.

18 Q. Were you aware that other DFO
19 scientists were reviewing the blasting plans at
20 DFO?

21 A. Certainly specialists in the
22 habitat division, such as Mr. Zamora, were
23 reviewing the plans, yes.

24 Q. Okay. So there may have been
25 other discussions in DFO relating to the effects of

1 blasting on marine mammals?

2 A. I would assume so, yes.

3 Q. And there may have been other
4 scientists in DFO expressing concerns?

5 A. I would expect that these
6 plans would be, you know, subject to the full
7 scientific resources of DFO, yes.

8 Q. Right. And pursuant to
9 conditions 10(h) and (i), did you expect to receive
10 every email or internal correspondence of DFO
11 regarding their assessment under those conditions?

12 A. No. I wouldn't have expected
13 to receive every comment or email. The process
14 that we expected to unfold was that plans would be
15 submitted, given formal review, and responses
16 provided, which -- which did unfold.

17 Q. And did DFO ever provide
18 written acceptance of the blasting plans submitted
19 by Nova Stone?

20 A. No. No, we did not receive
21 that acceptance and were unable to conclude that
22 these conditions had been satisfied.

23 Q. The claimants suggest that
24 the terms and conditions were expanded beyond what
25 was permitted by conditions 10(h) and (i) to

00238

1 account -- my understanding is to account for
2 marine life other than marine mammals.

3 Would you agree with this
4 characterization?

5 A. Well, I don't think the -- I
6 don't think the conditions were unreasonably
7 expanded by DFO. I mean, certainly the work in
8 support of condition 10(i) was focussed on -- you
9 know, was for the purpose of evaluating effects on
10 marine mammals.

11 I understand that application of
12 the guidelines can have the added effect of being
13 protective of other species, as well, but my
14 understanding and view at the time was that, you
15 know, we were working with the guidelines. We were
16 working on marine mammals.

17 Q. Perhaps if we could pull up
18 on the screen respondent's Exhibit 55, this is the
19 May 29th, 2003 letter.

20 If I can summarize this letter,
21 DFO advised Nova Stone that an endangered species
22 of Atlantic Salmon may be found in close proximity
23 to the quarry site, at the 3.9 hectare quarry site;
24 is that your understanding?

25 A. Yes.

1 Q. Now, the claimants
2 characterize this letter as requiring them to blast
3 no closer than 500 metres from the shore.

4 Would this be your interpretation
5 of this letter?

6 A. Can we scroll through the
7 letter?

8 Q. Yes.

9 A. Yes. There is the second
10 page here.

11 PRESIDING MEMBER: I think the
12 reference to the 500 metres was on the page that
13 follows.

14 MR. DOUGLAS: I think the
15 reference I am looking for is on the first page.

16 Give me one second to....

17 PRESIDING MEMBER: There is one
18 document which I remember which, on the second
19 page, there was one big paragraph and there was a
20 text on the 500 metres. It might be another
21 document.

22 MR. NASH: If I can assist,
23 Mr. President, page 1 of the addendum which is
24 attached to to that letter, the second-to-last
25 paragraph on page 1 refers to the 500 metre

1 setback.

2 BY MR. DOUGLAS:

3 Q. So thank you for pulling up
4 the reference. Now, if you go back to the letter
5 for me on the first page, you see under the body of
6 the paragraph, the last paragraph, where it states:

7 "An application for a section
8 32 authorization is attached
9 for your submission if you
10 wish to proceed with the
11 proposed work as outlined in
12 the blasting plan."

13 Is that right?

14 A. Yes.

15 Q. If you go to the second page,
16 beginning with the paragraph, "you may wish", so:

17 "You may wish to redesign the
18 blasting plan to mitigate the
19 potential destruction of
20 endangered fish and some
21 other potential harmful
22 effects to endangered marine
23 mammals that have been
24 identified by DFO scientists
25 during their review."

1 The claimant suggested to you the
2 May 29th letter required them to have a setback
3 distance of 500 metres. Would that be your
4 interpretation of this letter?

5 A. DFO was advising that 500
6 metres was their assessment of what would be
7 necessary to avoid a violation of the Fisheries
8 Act. That would be my interpretation of that
9 letter, which is, you know, somewhat different from
10 a requirement, I guess.

11 Q. It would be your
12 interpretation that DFO -- or, pardon me, Nova
13 Stone could have redesigned their blasting plan so
14 as not to require a section 32 authorization?

15 A. That was explicitly stated in
16 the letter and obviously part of this concept of
17 iterative review in order to meet those objectives.

18 Q. Now, the claimants took you
19 through some correspondence showing that DFO
20 subsequently revised the setback distance to 100
21 metres. Do you recall that?

22 A. Yes.

23 Q. And they took you to a letter
24 dated November 4th -- sorry, pardon me. It is
25 November 2004.

1 A. Yes.

2 Q. And the claimants I think
3 contend that DFO unreasonably delayed providing
4 Nova Stone with this information. Would you agree
5 with that contention?

6 A. I have no reason to think
7 that the delay was based on unreasonable
8 considerations, given that --

9 Q. Do you mean unreasonable
10 considerations?

11 A. Pardon me? It's all right.

12 Q. Maybe I misheard you, sorry.

13 A. I don't have any reason to
14 think that it was based on unreasonable
15 considerations.

16 It certainly would have taken them
17 some time to revisit their understanding of the
18 calculations, but at the same time, as we were
19 entering a larger EA process, the question of
20 whether, you know, facilitating blasting on this
21 site, as I understand it from the DFO point of
22 view, the question of entering into an
23 environmental assessment process, while at the same
24 time permitting work to proceed, which is the
25 subject of that assessment process, created, you

1 know, cause for consideration at DFO.

2 Q. Maybe we could pull up
3 claimants' Exhibit 617. It is at tab 60, if you
4 want to take a look at it.

5 A. Thank you. It is easier than
6 looking at the screen, yes. Yes.

7 Q. This is a letter you drafted
8 on behalf of your Minister, Minister Morash; is
9 that correct?

10 A. Yes.

11 Q. The letter is dated December
12 3rd, 2003?

13 A. That's right.

14 Q. If the letter could scroll
15 down to the bottom of the first page, a request was
16 made by Nova Stone to have conditions 10(h) and (i)
17 removed; is that correct?

18 A. Yes.

19 Q. And this is a response to
20 that request?

21 A. Yes.

22 Q. At the bottom, you explain,
23 and I will read into the record:

24 "The province is
25 participating in a Joint

1 Panel Review with the federal
2 government of the proposed
3 expansion of this operation,
4 and it would not be
5 appropriate to remove these
6 conditions without DFO's
7 consent."

8 Could you explain this paragraph
9 for us?

10 A. Basically, as I have
11 indicated, you know, at this point in time we were
12 entering a joint environmental assessment process
13 with the federal government. Our understanding at
14 the time was that questions and concerns on
15 blasting impacts on marine mammals were still a
16 cause for a concern at DFO.

17 So to, you know, on one hand
18 remove these protections from the approval which
19 were still, you know, a cause for concern by DFO,
20 while at the same time entering a collaborative
21 coordinated environmental assessment process with
22 them, that would seem to be, you know, inconsistent
23 with a joint process where both federal and
24 provincial issues are given consideration.

25 And, you know, at the same time,

1 again, we had not received confirmation from DFO
2 that -- you know, that these conditions had been
3 satisfied. They were put in for a reason. The
4 issues behind those reasons had not yet been, you
5 know, confirmed as answered by DFO.

6 Q. You mentioned in your
7 testimony, if I can summarize correctly, there was
8 some confusion about the fact that there was a 3.9
9 hectare quarry and a larger quarry that had been
10 proposed and reviewed to a Joint Review Panel, in
11 terms of some confusion in assessing the 3.9
12 hectare quarry.

13 Could you maybe elaborate on that
14 thought a bit more?

15 A. Yes. Well, at the time the
16 3.9 hectare quarry was applied for and approved,
17 there were, you know, certainly indications that
18 this was the first step in a larger project that
19 may some day occur.

20 However, certainly in the public,
21 in the public's eye, that was viewed as, you know,
22 commencing an undertaking, subject to an EA, before
23 an EA had been completed, notwithstanding that we
24 had a 3.9 hectare approval and, you know, we could
25 work within that.

1 But, you know, nesting -- I guess
2 it is just -- it's a bit atypical to start work on
3 a smaller project, get approval and start work on a
4 smaller project, while at the same time entering
5 into a parallel process, you know, overlapping in
6 time to complete the environmental assessment for
7 the larger project.

8 What would be typical is that, you
9 know, a quarry may start small, expand gradually
10 over the years, and once they realize they are
11 going to expand over four hectares, they would
12 register for an EA.

13 In this case, we had sort of two
14 overlapping processes underway.

15 Q. So if I understand you
16 correctly, what is more common is for a 3.9 hectare
17 quarry to open and operate in isolation, and then
18 once it has met its boundaries, to then apply for
19 an approval to expand; is that correct?

20 A. Yeah. That would be a
21 normal, you know, sequence of events, as smaller
22 quarries realize that they are getting bigger, or
23 the alternative course of events is that when a
24 large project, a known EA undertaking is being
25 contemplated, then a proponent would enter the

00247

1 environmental assessment process directly without
2 going through the Part V approval process at the
3 same time.

4 Q. Would you then characterize
5 it as unusual for a 3.9 hectare quarry application
6 and larger application which subsumes that land to
7 proceed at the same time?

8 A. In my experience -- and I
9 think it this is generally true -- that was
10 unusual.

11 Q. I would like to ask you some
12 questions about Tiverton now.

13 A. Certainly.

14 Q. There are three Tiverton
15 projects -- or, sorry -- yes, three Tiverton
16 projects; is that right?

17 A. The wharf, the harbour, and
18 the quarry.

19 Q. The Tiverton wharf, the
20 Tiverton harbour and the Tiverton quarry; is that
21 right?

22 A. Yes.

23 Q. And these are three separate
24 and distinct projects; is that right?

25 A. Yes.

1 Q. How big was the intended size
2 of the Tiverton quarry?

3 A. The document, the application
4 document submitted to us, put it at approximately
5 1.8 hectares.

6 Q. How does the size of the
7 Tiverton quarry compare to the size of the proposed
8 Whites Point quarry that is at issue in this
9 arbitration?

10 A. The Tiverton quarry -- well,
11 the proposed Whites Point quarry was on the order
12 of 100 -- approximately 150 hectares versus 1.8
13 hectares. So many, many times larger, the Whites
14 Point quarry was proposed.

15 Q. Would you say that would be
16 about 80 times larger than the Tiverton quarry?

17 A. That math sounds more or less
18 accurate.

19 Q. How about the nature of the
20 Tiverton quarry project? Could you tell us a
21 little bit about that?

22 A. The Tiverton quarry was
23 applied for and approved on the basis that it would
24 supply rock for these two projects. Specifically,
25 it was a specific purpose-driven quarry, if I could

1 frame it that way.

2 The approval was issued on that
3 basis. They requested a quarry to supply rock for
4 two projects, and then the quarry would close down
5 once those projects had been completed.

6 Accordingly, the approval was
7 given a two-year expiry date, so that it would shut
8 down at that time or once the projects were
9 completed, whichever came first.

10 That was further supported by the
11 fact that 37 residences within the 800 metre buffer
12 zone had signed consent forms allowing blasting
13 within that setback, and, again, those consents
14 were provided on the basis that the Tiverton quarry
15 was supplying rock directly for a community project
16 and wasn't going to be an open-ended quarrying site
17 supplying rock for an open-ended market, so to
18 speak, which is, you know, what was being
19 contemplated at Whites Point.

20 Q. So the quarry was intended to
21 provide aggregate to two projects; is that right?

22 A. Yes.

23 Q. Those projects were the
24 Tiverton wharf and the Tiverton harbour?

25 A. That's right.

1 Q. Now, based on your
2 understanding of these projects, would they have
3 required much aggregate?

4 A. I may be off by a few tonnes
5 in this estimate, but my estimation of the tonnage
6 required for those projects was somewhere on the
7 order of 150,000 tonnes of stone that would be
8 required from the Tiverton quarry.

9 Q. And just by way of
10 comparison, do you know how much aggregate the
11 Whites Point quarry was intended to produce?

12 A. The documents supplied to us
13 scoped it at around 2 million tonnes a year.

14 Q. So was it obvious that there
15 would only be limited blasting at the Tiverton
16 quarry site?

17 A. It was obvious and it was
18 approved on that basis. It was a finite amount of
19 rock that was needed for two finite projects.

20 Q. Now, based on your
21 understanding, were the Tiverton wharf and Tiverton
22 harbour projects required to obtain rock from the
23 Tiverton quarry?

24 A. Not based on my
25 understanding. They could have accessed rock from

1 whatever quarry might have been available and cost
2 effective in that area.

3 Q. So the Tiverton wharf and
4 harbour projects, they could have obtained rock
5 from a quarry other than the Tiverton quarry?

6 A. Yes.

7 Q. And if they decided to obtain
8 rock from a different source other than the
9 Tiverton quarry, would the Tiverton quarry be able
10 to operate?

11 A. No. Again, the approval was
12 based on the circumstances that it was supplying
13 rock for those two projects and for those two
14 projects only. As the approval required homeowners
15 to consent within the 800 metre setback, those
16 consents were also based on those community
17 projects being the recipient of the rock.

18 So the approval would -- Parker
19 Mountain Aggregates would not have been permitted
20 to quarry if rock was being obtained from somewhere
21 else.

22 Q. Parker Mountain Aggregates is
23 the proponent of the Tiverton quarry?

24 A. Yes, yes.

25 Q. So the Tiverton quarry could

1 only blast to supply rock for two specific
2 projects?

3 A. Yes.

4 Q. In your view, was the nature
5 of the Tiverton quarry different than the nature of
6 the proposed Whites Point quarry?

7 A. Well, yeah. I mean, the
8 proposed Whites Point quarry, again, it was a
9 high-production volume over an extended period of
10 time. I think the proposed quarry was scoped at
11 lasting perhaps 50 -- you know, as much as 50 years
12 on an intense production schedule, most of the
13 year, 50 weeks a year, seven days a week.

14 So, you know, the two projects
15 were very different in that respect.

16 Q. Can you tell us about the
17 location of the Tiverton quarry?

18 A. The Tiverton quarry --
19 Tiverton is a small village adjacent to the Petit
20 Passage, and the Tiverton quarry was located on the
21 top of the mountain above the village, so at an
22 elevation above sea level of approximately 60
23 metres is what we measured it at.

24 In addition, you know, recognizing
25 that Mr. Balcom's report scoped the quarry at

00253

1 approximately 160 metres from the ocean, our
2 subsequent measurements of the quarry as operated
3 put blasting on the order of, you know,
4 approximately 400 metres from the Bay of Fundy, and
5 313 from the Petit Passage.

6 So the distances were different,
7 as well.

8 Q. Was the location of the
9 Tiverton quarry different than that proposed at the
10 Whites Point quarry?

11 A. Well, other -- other
12 differences in the location, as I've mentioned, the
13 number of homes and residents that were within
14 close proximity within the 800 metre buffer zone to
15 the quarry, the proximity of those residences and
16 the blast vibrations that are required by the
17 approval at those residences imposed a natural
18 limitation on the intensity of blasting that could
19 be conducted at that site.

20 Q. Let's visit that for a
21 second. So is the Tiverton quarry subject to any
22 blasting conditions?

23 A. Certainly. They were subject
24 to requirements for blast design, air concussion
25 and ground vibration limits, preblast surveys, the

1 normal conditions.

2 Q. If I understand what you're
3 saying correctly, they were people's homes,
4 residences, within proximity to the Tiverton
5 quarry; is that right?

6 A. Yes, yes.

7 Q. How did the blasting
8 conditions functioning vis-à-vis those homes?

9 A. So the blasting conditions as
10 it relates to homes, nearby homes, the proponent
11 would have been required to conduct a preblast
12 survey of those homes to document the condition of
13 those homes before blasting occurred.

14 And I'm summarizing here, but the
15 proponent would have been required to monitor
16 ground vibration using a seismograph at the closest
17 home to the point of blast to ensure that the
18 ground vibration limits had not been exceeded in a
19 way that would damage the structures or any other
20 features of the home.

21 Q. So the blasting at the
22 Tiverton quarry, they were not permitted to
23 endanger these homes in close proximity to the
24 quarry; is that right?

25 A. That's right.

1 Q. Why don't we take a look at
2 some of the blasting records, respondent's
3 Exhibit --

4 PRESIDING MEMBER: May I just ask
5 you --

6 MR. DOUGLAS: Of course.

7 PRESIDING MEMBER: I think we are
8 getting close to our court reporter needing a
9 break. How much time will you need?

10 MR. DOUGLAS: Sure. We could take
11 a break now.

12 PRESIDING MEMBER: Does that throw
13 you out of your --

14 MR. DOUGLAS: It should be just
15 fine. I am happy to take a break now.

16 PRESIDING MEMBER: So we will have
17 a break to 3:28, sharp. Let's try to 3:28, sharp.

18 --- Recess at 3:13 p.m.

19 MR. LITTLE: Sorry, 15 minutes.

20 PRESIDING MEMBER: Fifteen
21 minutes, yes; 13 plus 15 is 28.

22 --- Laughter

23 MR. LITTLE: Just to make clear,
24 again, we do have Mr. McLean out in the hallway and
25 he is on a flight later on tonight, so we really do

00256

1 want to get his examination completed today. I am
2 not putting any pressure on Mr. Douglas, but I note
3 the direct -- sorry, the cross-exam of Mr. Petrie
4 was almost three-and-a-half hours.

5 PRESIDING MEMBER: So what kind of
6 questions are we expecting from the bench? One
7 question from the Tribunal. How much blasting on
8 your side?

9 --- Laughter

10 MR. NASH: I don't anticipate at
11 this stage any further questions unless there is
12 something arising from the Tribunal's questions.

13 PRESIDING MEMBER: What time is
14 the flight?

15 MR. LITTLE: I think it is 8:00 or
16 9:00, and I think it is out at Pearson.

17 PRESIDING MEMBER: I think we can
18 make that.

19 MR. NASH: We're going to make
20 that.

21 MR. APPLETON: Perhaps Mr. Douglas
22 could tell us how long he has left and that might
23 help us.

24 MR. DOUGLAS: Hard to say at. I
25 think, you know, I will try to be as efficient as I

00257

1 can with the time.

2 PRESIDING MEMBER: I am confident
3 we are going to work that out. So in the meantime,
4 it is 3:30 sharp. Right. Thank you.

5 --- Recess at 3:14 p.m.

6 ---Upon resuming at 3:34 p.m.

7 PRESIDING MEMBER: I think we are
8 ready to resume the re-direct. Mr. Douglas, you
9 have the floor.

10 MR. DOUGLAS: Thank you very much,
11 Mr. President.

12 BY MR. DOUGLAS:

13 Q. I believe we were talking
14 about blasting at the Tiverton quarry. Just to
15 recap, there were several homes in close proximity
16 to the Tiverton quarry; is that right?

17 A. Yes, there were 37.

18 Q. And those 37 homes and the
19 individuals in the homes, they had to provide a
20 consent to allow the quarry to proceed?

21 A. Yes. Our rules say that no
22 blasting should be done within 800 metres of the
23 home without the owner's consent.

24 Q. There is a condition in the
25 approval for the Tiverton quarry that states that

1 the blasting cannot endanger any structure, any one
2 of those residences; is that right?

3 A. That's right.

4 Q. And to measure and maintain
5 that condition, there is a measurement for a ground
6 vibration measured at the closest residence to the
7 quarry; is that right?

8 A. Yes, 12.5 millimetres a
9 second.

10 Q. Why don't we take a look at
11 some of, just quickly, the blasting records of the
12 Tiverton quarry? It is respondent Exhibit 563.

13 A. Tab?

14 Q. I am not sure it is in your
15 bundle as the claimants did not include it.

16 A. Okay.

17 Q. If you do a quick scroll of
18 this document for the Tribunal, you will recall
19 that the claimants took Mr. Petrie to a series of
20 exhibits and blasting records for the Tiverton
21 quarry.

22 What the claimants failed to omit
23 was the fax cover page attached to these blasting
24 records, and that is what I just want Mr. Petrie to
25 focus on here, so if we could look at that.

1 Mr. Petrie if you could read into
2 the record for me the second paragraph of this fax
3 cover sheet?

4 A. The second paragraph, it
5 says:

6 "The following are all of our
7 blast records from the site.
8 None of the blasts triggered
9 the seismograph. When
10 blasting for armour stone,
11 there is very small amounts
12 of explosive used to try and
13 leave the rock as large as
14 possible. This reduces the
15 vibration."

16 Q. If you could also read the
17 last paragraph into the record for me, please?

18 A. "The problem with setting the
19 seismograph trigger levels
20 too low and try and force the
21 seismograph to pick up a
22 reading is that trucks
23 passing by and even cars will
24 trigger it and the event is
25 never clear."

1 Q. What does this fax cover
2 sheet, in your view, tell us about the blasting at
3 the Tiverton quarry?

4 A. I mean, in summary, it says
5 that the blasting was of low intensity, to be, you
6 know, short about it.

7 The blasting wasn't even enough to
8 trigger the seismograph at the levels at which it
9 had been set, and it had been set at levels
10 sufficiently high so as to not pick up basically
11 vibrational noise from truck traffic.

12 Q. Now, you sent the quarry
13 application, Tiverton quarry application, to the
14 Department of Fisheries and Oceans?

15 A. Yes.

16 Q. Okay. And you provided that
17 to DFO on about March 10th, 2003?

18 A. Certainly. We initiated
19 discussions with DFO on or about that date, yes.

20 Q. And the claimants took you to
21 a conversation you had with a DFO official named
22 Peter Winchester on March 24th, 2003?

23 A. Yes.

24 Q. Had you had any conversations
25 with Mr. Winchester prior to this date?

1 A. Mr. Winchester had been
2 provided with the application prior to that date
3 and in fact was, you know, was reviewing the
4 application prior to that date.

5 Q. Did you have a phone
6 conversation with Mr. Winchester prior to that
7 date?

8 A. Yes, I believe I did, and it
9 was to clarify a misconception with the clearance
10 distance, that the proponent Parker Mountain
11 Aggregates had misstated the separation distance to
12 the water, and I wanted to make sure Mr. Winchester
13 had the same information that we were relying on,
14 which was the 160 metres.

15 Q. Did you discuss the issue at
16 Nova Stone and marine mammals with Mr. Winchester?

17 A. Certainly. I wanted to make
18 it clear why the application was being referred,
19 and the concerns regarding marine mammals that had
20 been engaged in Nova Stone just down the road. I
21 wanted to make sure that he was aware of that
22 perspective and was able to apply that lens to it,
23 if he saw the need.

24 Q. And so would Mr. Winchester
25 have been familiar in his review with the Tiverton

1 area?

2 A. I would presume so.

3 Mr. Winchester had worked in southwest Nova Scotia
4 for a number of years, and it is reasonable to
5 think he was quite familiar with the area.

6 Q. Would he have known that the
7 quarry, proposed quarry location was on top of a
8 mountain behind the village of Tiverton?

9 A. Certainly the documents
10 included in the application would have provided the
11 approximate location of the quarry, and, you know,
12 without speaking for Mr. Winchester, having worked
13 in this area for a number of years, it is very
14 likely he was familiar with the topography in
15 Tiverton and the location of the homes.

16 Q. Mm-hm. You mentioned -- so
17 he would have been aware of the residences in close
18 proximity to the quarry?

19 A. Well, I think it is likely,
20 given his presumed familiarity with the area, yes.

21 Q. And he would have been aware
22 of the consent forms filed by people of -- in those
23 homes?

24 A. That would have been part of
25 the application materials, I am assuming, that he

1 would have had access to, yes.

2 Q. And he would have been aware
3 of the short and small duration of the blasting at
4 the Tiverton quarry; is that right?

5 A. Yes. And that was part of
6 the application for the Tiverton quarry was that it
7 was only for a two-year duration.

8 Q. Mm-hm. Did DFO review the
9 blasting at Tiverton for inner Bay of Fundy
10 Atlantic Salmon?

11 A. They did subsequently, yes.

12 Q. And what was their
13 determination?

14 A. They were not concerned about
15 iBoF salmon impacts from the Tiverton quarry.

16 Q. The claimants have suggested
17 that the Tiverton quarry was approved because of
18 political pressure. Do you recall if there was
19 ever political pressure to approve the quarry?

20 A. No. As I've said, we were
21 aware of the time sensitivity around completing the
22 project, but certainly no -- no political pressure
23 had ever been brought to my attention or at least
24 brought to bear on our office.

25 Q. Is it common for your office

1 to receive phone calls from interested parties?

2 A. Very common. Parties calling
3 wanting their permits turned around quickly and
4 other parties calling with concerns about permits.
5 So, yes, people call us about applications all the
6 time.

7 Q. Maybe if we could pull up
8 claimants' Exhibit 614. Do you recall the
9 claimants took you to this exhibit?

10 A. Yes.

11 Q. Do you recall the claimants
12 suggested that the Minister of DFO was putting
13 pressure to have the Tiverton quarry approved?

14 MR. NASH: I don't believe that
15 was the characterization, Mr. President. I simply
16 had the witness read out the words written with
17 respect to Robert Thibault.

18 BY MR. DOUGLAS:

19 Q. My apologies, Mr. Nash.

20 Would you interpret this phone
21 record as being an indication that the Minister of
22 Foreign Affairs was putting pressure on your office
23 to approve the Tiverton quarry?

24 A. No.

25 Q. In your recollection, did

1 Minister Thibault ever put pressure on your office?

2 A. No. I think I would have
3 recalled that.

4 Q. This is something you would
5 remember?

6 A. The Minister of Fisheries
7 contacting our office, yes.

8 Q. Just a few more quick
9 questions, then, to summarize. Have you been to
10 the Tiverton quarry site?

11 A. Yes.

12 Q. You're familiar with the
13 proposed Whites Point quarry?

14 A. Yes, I've been to that site,
15 as well.

16 Q. Are the sizes of the two
17 quarries different?

18 A. Very much different. The
19 proposed Whites Point quarry was again on the order
20 of 150 hectares versus 1.8 hectares at the Tiverton
21 site.

22 Q. Is that location different?

23 A. Yes. The Tiverton quarry was
24 located on the top of a mountain above the village
25 of Tiverton in close proximity to homes and at a

1 distance, as operated, approximately 400 metres
2 from the Bay of Fundy.

3 Q. Did they have different
4 durations?

5 A. Certainly. The Tiverton
6 quarry was limited to a duration of two years or
7 completion of the project, whichever came first.
8 The proposed Whites Point quarry was scoped at a
9 possible 50-year duration, as I remember.

10 Q. Was their nature different?

11 A. Yes. I mean, the nature of
12 the Tiverton was to supply, you know, rock to very
13 specific projects versus the nature of the Whites
14 Point quarry, which was supplying aggregate for
15 what I will call an open-ended free market.

16 Q. Was the public opposition
17 different?

18 A. Absolutely. I mean, Tiverton
19 had public buy-in, public support from the
20 neighbours, versus the public opposition at Whites
21 Point, which was quite substantial and like nothing
22 I had ever experienced.

23 Q. The blast sizes between the
24 two quarries different?

25 A. The readings at the Tiverton

1 quarry, as we've just reviewed, indicate that the
2 blast sizes were very, very small at Tiverton
3 compared to substantially larger blasts that were
4 contemplated for an operating quarry at Whites
5 Point.

6 Q. Was their blasting frequency
7 different?

8 A. Yes. I mean, Tiverton would
9 have only had to blast the number of times required
10 to get the rock that they needed. The frequency of
11 blasting at Whites Point would have been perhaps
12 once a week for, you know, 50 weeks a year for 50
13 years.

14 Q. And were the setback
15 distances between the two quarries different?

16 A. Yeah. In the initial Whites
17 Point application, the setback was scoped as
18 perhaps as close as 35 metres to the Bay of Fundy.

19 The Tiverton quarry, as reviewed
20 by our engineer, was assessed in the application as
21 160 metres away from the ocean and subsequently
22 determined to have operated much further from the
23 ocean than that at 400 metres.

24 Q. Okay. Thank you very much,
25 Mr. Petrie. Those are my questions.

1 PRESIDING MEMBER: Thank you,
2 Mr. Douglas. Mr. Nash?

3 MR. NASH: No questions arising,
4 Mr. President.

5 PRESIDING MEMBER: That leaves us
6 to questions from the Tribunal. Professor
7 Schwartz.

8 QUESTIONS BY THE TRIBUNAL:

9 PROFESSOR SCHWARTZ: Good
10 afternoon. If this question I am asking is beyond
11 your expertise or experience, feel free to let us
12 know. But my question is this.

13 There is some dispute about
14 whether the proponent was unlawfully or
15 unreasonably denied the opportunity to get a
16 licence, and one of the benefits would have been
17 doing test blasts that could have informed the
18 later environmental assessment.

19 THE WITNESS: Mm-hm.

20 PROFESSOR SCHWARTZ: So my
21 question is: Suppose the proponent had wanted to
22 do a test blast and the Joint Review Panel said, We
23 would like a test blast, not for the purposes of
24 operating a quarry, but just to get information for
25 the purposes of the environmental assessment.

1 So the JRP process has started.
2 It's been commissioned.

3 THE WITNESS: Yes.

4 PROFESSOR SCHWARTZ: And either
5 the panel or the proponent is interested in the
6 test blast. Is that doing a test blast not to
7 operate a quarry, medium term or long term, but to
8 do a test blast for informational purposes in the
9 context of the Joint Review Panel, does that
10 require environmental approval under the
11 Environment Act?

12 MR. PETRIE: Approval under the
13 Environment Act is for quarrying. That is the
14 activity that is designated as requiring an
15 approval.

16 Blasting in and of itself for
17 other purposes, such as installing a water line
18 down the street or removing a tree stump, does not
19 require approval.

20 So that would depend. I guess if
21 the evidence and scoping of that experimental
22 blast, so to speak, were not defined as quarrying,
23 i.e., was not for the purposes of, you know,
24 producing aggregate to sell or use, I will qualify
25 this remark by saying perhaps it might be better --

1 the question might be better referred to
2 environmental assessment staff.

3 No. Sorry, I will retract that.
4 If it was not defined as quarrying, then they could
5 have conducted -- they could have proceeded, yes.

6 PROFESSOR SCHWARTZ: Thank you
7 very much.

8 PRESIDING MEMBER: Thank you.
9 This brings to an end the examination of
10 Mr. Petrie. Thank you very much for your
11 participation. You are released. And we don't
12 need a break; right? We are just going to stick
13 around and prepare the ground for the next witness.
14 So let's do that as quickly as possible.

15 There you are. I think we are all
16 set. Good afternoon, Mr. McLean.

17 MR. MCLEAN: Good afternoon.

18 PRESIDING MEMBER: Would you be so
19 kind and read out the statement that you should in
20 front of you.

21 MR. MCLEAN: Okay. Do I turn this
22 on?

23 PRESIDING MEMBER: I think it is
24 on.

25 MR. MCLEAN: It's on, okay. I

00271

1 solemnly declare upon my oath and conscience that I
2 will speak the truth the whole truth and nothing
3 but the truth.

4 AFFIRMED: MARK MCLEAN

5 PRESIDING MEMBER: Thank you,
6 Mr. McLean. May I also draw your attention to the
7 statement concerning the assurance you gave with
8 regard to your not listening to videos or reading
9 any transcript, et cetera, with regard to the
10 witness statements that were to be dealt with
11 prior.

12 MR. MCLEAN: Yes, yes.

13 PRESIDING MEMBER: Thank you. You
14 did not do it?

15 THE WITNESS: I did not, no.

16 PRESIDING MEMBER: Okay. Please
17 go ahead.

18 EXAMINATION IN-CHIEF BY MR. LITTLE:

19 Q. Good afternoon, Mr. McLean.

20 A. Good afternoon.

21 Q. Mr. McLean, you currently
22 work with the Department of Fisheries and Oceans?

23 A. That's correct.

24 Q. All right. What is your
25 current position?

1 A. I am currently the manager of
2 the fisheries protection program for the Maritime
3 region, which is formerly known as the Habitat
4 Management program.

5 Q. I understand, Mr. McLean,
6 that in addition to DFO, over the course of your
7 career you have also worked with the Nova Scotia
8 Department of Environment and Labour and the
9 Canadian Environmental Assessment Agency; is that
10 correct?

11 A. That's correct. Yes.

12 Q. All right. Mr. McLean, you
13 have provided two affidavits in this arbitration?

14 A. Yes, I have.

15 Q. And these were an affidavit
16 filed along with Canada's counter-memorial dated
17 December 1, 2011, and then a second one filed along
18 with Canada's rejoinder dated March 13, 2013?

19 A. Yes, that's correct.

20 MR. LITTLE: Thanks, Mr. McLean.

21 PRESIDING MEMBER: Thank you,
22 Mr. Little. Who is going to... Oh, yes, Mr. Nash
23 again. It is always a pleasure.

24 --- Laughter

25 CROSS-EXAMINATION BY MR. NASH:

1 Q. Good afternoon, Mr. McLean.
2 My name is Greg Nash, and I am co-counsel for the
3 claimants in this case and I have a few questions
4 for you today with respect to your evidence and
5 your affidavits.

6 A. Sure.

7 Q. Could you turn, please, to
8 tab A in the bundle in front of you, the witness
9 bundle, which is your first affidavit.

10 A. Yes.

11 Q. Which is sworn on December
12 1st, 2011.

13 A. Correct.

14 Q. If you go to paragraph 2, you
15 state that you hold a bachelor of science with a
16 major in biology from Acadia University and a
17 master of environmental studies from York
18 University, which I understand you got in 1997;
19 correct?

20 A. That's correct.

21 Q. And you joined NSDEL, Nova
22 Scotia Department of Environment and Labour, in
23 1999?

24 A. That's correct.

25 Q. Was that your first job in

1 your field after you attended university?

2 A. No. I primarily worked with
3 non-governmental organizations prior to that.

4 Q. For the two years, from 1997
5 to 1999?

6 A. Even during that time I was
7 finishing my master's thesis while working with a
8 non-governmental organization.

9 Q. You were with the Nova Scotia
10 Department of Environment and Labour from 1999, and
11 then started on a one-year exchange at DFO in 2002.
12 Do you recall that?

13 A. That's right. That's from
14 May of 2002 to April 2003.

15 Q. And that was the beginning of
16 May of 2002?

17 A. That's right.

18 Q. To April 1st of 2003?

19 A. Yes.

20 Q. And on April 1st of 2003, you
21 returned to NSDEL; correct?

22 A. That's right.

23 Q. You were there through the
24 period until the end of 2003 at NSDEL?

25 A. Yes. I began at the Canadian

1 Environmental Assessment Agency in 2004.

2 Q. Did you work with Jim Ross
3 during that one-year exchange at DFO?

4 A. I did, yes.

5 Q. Were you located at the
6 Bedford Institute?

7 A. I was.

8 Q. And the Bedford Institute is
9 in Dartmouth just out of Halifax; is that correct?

10 A. That's correct, yes.

11 Q. That's the main centre for
12 DFO staff in Nova Scotia?

13 A. That's one of the centres for
14 staff in the Maritime region. It is probably hold
15 most of the staff, but there are other locations in
16 the Maritimes region.

17 Q. Did you work with Paul
18 Boudreau in 2002 during your time at DFO?

19 A. Yes.

20 Q. Was he in the same area that
21 you were in, in Habitat Management Division?

22 A. Yes, he would have been. Jim
23 Ross would have been the section head I reported
24 to, and Paul Boudreau was the manager.

25 Q. The manager was -- was

1 Mr. Boudreau Mr. Ross's immediate superior?

2 A. That's correct. Yes.

3 Q. Did you work at all with Tim
4 Mr. Surette at DFO?

5 A. Not during that time, no.

6 Q. Did you know Tim Surette?

7 A. Not at the time. I think I
8 came across Tim Surette during the panel
9 proceedings.

10 Q. Did you work with Phil Zamora
11 during your time at DFO?

12 A. Yes, I did.

13 Q. Did you work with Brian
14 Jollymore?

15 A. Yes, I did.

16 Q. Did you work with Jerry
17 Conway?

18 A. Somewhat less, but, yes.

19 Q. Was Thomas Wheaton a person
20 that you worked with at DFO during your time there?

21 A. Not a lot. Thomas had
22 started around the same time I did with the
23 regional office for southwest Nova Scotia.

24 Q. Did you do much work in
25 southwest Nova Scotia when you were with DFO on

1 that exchange?

2 A. No. Mostly my work was with
3 offshore oil and gas at the time, so I was
4 primarily involved with oil and gas exploration
5 projects.

6 Q. If you go over to page 2 of
7 your affidavit of December 1st, you say in the
8 third line:

9 "While I was not the primary
10 person responsible for the
11 file, during this period, I
12 was involved in the
13 environmental assessment, EA,
14 of the Whites Point project."

15 Did you work in the Whites Point
16 project during that year you were with DFO?

17 A. No, not primarily.

18 Q. Did you work at all on that
19 project during that year?

20 A. I was consulted a few times
21 during that process just giving my prior knowledge
22 from Nova Scotia Environment and Labour.

23 Q. What issues were you
24 consulted on during the year you were with DFO on
25 the Whites Point project?

1 A. Primarily things surrounding
2 joint reviews, the provincial process, what would
3 trigger an environmental assessment provincially.

4 Q. And what environmental
5 assessment was being conducted on the Whites Point
6 project in 2002, to your recollection?

7 A. In 2002, there wasn't an
8 environmental assessment.

9 Q. There was no environmental
10 assessment?

11 A. No.

12 Q. And in 2003, and let's take
13 the first three or four months, March and April, up
14 to that point in 2003, was there an environmental
15 assessment being carried on with respect to the
16 Whites Point location?

17 A. No, not at that time.

18 Q. And was there any provincial
19 environmental assessment going on at the Whites
20 Point project in 2003, for the entire year?

21 A. For 2003? No, not at that
22 time, and that would have been one of the questions
23 that would have been presented to me was: What
24 type of projects would require provincial
25 environmental assessment?

1 Q. Did you actually go down to
2 the Whites Point site during 2002 or 2003 while you
3 were with DFO?

4 A. No, I did not.

5 Q. So you say in paragraph 5 of
6 your affidavit, "In each of the positions described
7 above...", and the way I read this, and correct me
8 if I'm wrong, and each of the positions in
9 paragraph 3 and paragraph 4:

10 "I was responsible for the
11 coordination of the EA
12 process and, in particular,
13 the assessment of projects
14 subject to multi-
15 jurisdictional EAs,
16 comprehensive studies and/or
17 panel reviews."

18 Do you see that?

19 A. Yes.

20 Q. I take it that wasn't
21 referring to anything to do with the Whites Point
22 project while you were with DFO 2002-2003; is that
23 correct?

24 A. No. That is a general
25 statement there.

1 Q. So what I have said is
2 correct?

3 A. Yes.

4 Q. Did you have any experience
5 in the operation and use of explosives prior to
6 going to DFO in May of 2002?

7 A. Only in the sense of
8 reviewing quarry and mining projects under the
9 environmental assessment process.

10 Q. You hadn't done any actual
11 study of the use of explosives? You hadn't taken
12 any courses?

13 A. No.

14 Q. That's correct?

15 A. That's correct.

16 Q. And you obviously hadn't
17 written any papers. I gather you weren't an expert
18 in explosives; is that correct?

19 A. That's correct, yes.

20 Q. Had you read the blasting
21 guidelines prior to going to DFO?

22 A. Yes, I would have.

23 Q. But is that all you had done
24 with them just read them; is that fair?

25 A. Again, been involved with

00281

1 mining projects, quarries, of that nature. So I
2 would have been working with DFO on issues around
3 blasting.

4 Q. And I'm speaking of the
5 period prior to going to DFO --

6 A. That's correct.

7 Q. -- from 2002 to 2003. That's
8 correct?

9 A. Yes.

10 Q. And just by way of your
11 background, did you have any experience on marine
12 mammal issues -- well, let me put it this way.

13 Were you -- did you have a special
14 expertise or interest in the subject of marine
15 mammals prior to you going to DFO in 2002?

16 A. No special expertise, no.
17 More general knowledge.

18 Q. Have you done -- written any
19 papers on that or done a thesis on that in
20 university?

21 A. No.

22 Q. No. Were you an expert on
23 the -- or at least did you have any experience on
24 the migration patterns of marine mammals in 2002?

25 A. No. These are things that we

1 rely on DFO science to provide.

2 Q. You say in paragraph 6 of
3 your affidavit:

4 "In my experience the DFO's
5 Maritimes regional office
6 becomes involved in the
7 federal EA process under ACEA
8 as the responsible authority;
9 and, two, as a department
10 providing specialist advice
11 on fish and fish habitat to
12 other departments conducting
13 an EA." [As read]

14 It was not performing that role
15 with respect to Whites Point, was it, in 2002 while
16 you were there?

17 A. No.

18 Q. And were you consulted at all
19 on marine mammal issues with respect to the Whites
20 Point site in 2002?

21 A. No, I was not.

22 Q. Were you consulted at all
23 with respect to marine mammal issues at the Whites
24 Point site in 2003?

25 A. No.

1 Q. Were you consulted at all on
2 the question of fish or fish habitat with respect
3 to the Whites Point site in either 2002 up to the
4 time you left DFO on April 1st, 2003?

5 A. No, I was not.

6 Q. When you worked on the Whites
7 Point site in 2002 and while you were with DFO in
8 2003, what were your tasks?

9 A. From what I recall, was
10 reviewed a few briefing notes that were written on
11 the issue and just provided advice with regard to
12 provincial processes related to the quarry.

13 Q. And what was your advice with
14 respect to the provincial processes for the quarry?

15 A. Just to explain that the
16 trigger for an environmental assessment for
17 quarries was the four hectare, and also for those
18 under four hectares there would be an industrial
19 approval process and what was involved in that.

20 Q. Did you know, when you were
21 at DFO in 2002 and the first part of 2003, that an
22 industrial approval had been issued with respect to
23 the 3.9 hectare site at Whites Point?

24 A. Yes.

25 Q. And were you familiar with

1 that, that approval?

2 A. I was, for the purpose of --
3 um..., when I was with the environment -- Nova
4 Scotia Environment and Labour, the application was
5 sent to me to verify whether the project was over
6 four hectares. And I think there is a record
7 showing that I responded to the regional office
8 indicating the project was over four hectares. So
9 it was redesigned to be 3.9 to be under the
10 environmental assessment threshold.

11 Q. If you go to tab 1 of that
12 bundle in front of you, Exhibit R-76, is that the
13 email you're referring to from yourself to
14 Mr. Langille?

15 A. Yes.

16 Q. The file had gone to you to
17 see whether the four -- the ten acre was within the
18 four hectare limit, and it turned out it wasn't and
19 your understanding is that they reapplied; correct?

20 A. Correct, yes.

21 Q. If you go to the last
22 paragraph of that e-mail, you say:

23 "On an unrelated note, I am
24 impressed that the company
25 has taken the time and effort

1 to examine the whale issue
2 and have offered to monitor
3 the blast levels in the bay."

4 Do you see that?

5 A. Yes.

6 Q. Did you understand -- that
7 was your opinion at the time, I gather?

8 A. That was my opinion based on
9 the reading of the application.

10 Q. Did you understand that there
11 was a desire on the part of the proponent on the
12 3.9 hectare quarry at Whites Point to conduct a
13 test blast or test blasts in order to monitor the
14 effects of blasting?

15 A. No. I was not aware of that.

16 Q. All right. Aside from
17 writing briefing notes or contributing to briefing
18 notes with respect to the provincial processes, was
19 that the extent of your involvement on the Whites
20 Point quarry while you were at DFO?

21 A. Yes, correct.

22 Q. Were you aware -- if you go
23 to tab 2 of the bundle, Exhibit R-83, there is a
24 series of communications between Mr. Langille and
25 Mr. Petrie in April of 2002 with DFO with respect

1 to Jerry Conway's marine mammal concerns?

2 A. Yes.

3 Q. Were you aware of those
4 communications at or about that time?

5 A. Not at that time, no.

6 Q. When did you first become
7 aware of those?

8 A. I first became aware of them
9 when I started as the primary assessor on the file
10 in 2005 looking through the history of the file at
11 that point.

12 Q. When you went back to NSDEL
13 on April 1st of 2003, did you have some involvement
14 with the file on behalf of the province at that
15 time?

16 A. I did, yes.

17 Q. So I gather, then, if you go
18 to tab 5, Exhibit C-298, that you would not have
19 seen this blasting plan come in under cover of
20 Mr. Buxton's letter of September 20th, 2002?

21 A. No, I would not have.

22 Q. Did you have any discussions
23 with Mr. Ross around that period of time about the
24 Whites Point blasting plan or about blasting at
25 Whites Point?

1 A. No.

2 Q. Did you have any discussions
3 with Mr. Ross at all about blasting at Whites Point
4 and the potential -- well, just about blasting
5 first of all?

6 A. With the Whites Point quarry,
7 no.

8 Q. No. Or the effect of the
9 activity on the Whites Point quarry with respect to
10 blasting; is that fair?

11 A. No, I didn't.

12 Q. So you would not, then, have
13 been aware of information that Mr. Ross was
14 receiving from a blasting expert about the
15 potential effect of blasting on the Whites Point
16 quarry on marine mammals?

17 A. No. As an EA officer, the
18 project wasn't subject to a provincial
19 environmental assessment. So this would have been
20 between the provincial -- sorry, the regional
21 office of Nova Scotia Environment and Labour and
22 DFO.

23 Q. If you would turn to tab 7,
24 which is Exhibit C-299, you will see there are two
25 emails there, one from Mr. Ross to Mr. Wright. And

1 you know that Mr. Wright is the co-author of the
2 blasting guidelines?

3 A. Yes.

4 Q. And the email back to
5 Mr. Ross from Mr. Wright sets out some mitigation
6 measures that can be taken.

7 When did you first become aware,
8 or have you seen this email before today?

9 A. I have seen it before today,
10 yes.

11 Q. And when did you first become
12 aware that certain information was going to
13 Mr. Ross from Mr. Write?

14 A. Again, when I took over the
15 file in October of 2005, I would have reviewed some
16 of the past history of the project.

17 Q. You were back at DFO by that
18 time?

19 A. That's right, yes.

20 Q. How long were you at DFO
21 during that period?

22 A. I returned in October of 2005
23 and have been there ever since.

24 Q. Do you recall concluding at
25 one point that a test blast would have been useful

1 on the Whites Point site for determining potential
2 effects of blasting?

3 A. Yes, I think during that time
4 I had several conversations with staff at DFO, but
5 also with Mr. Buxton, about the usefulness of the
6 test blast to verify models.

7 Q. You've written quite
8 extensively, if you go back to your affidavit,
9 on -- well, let's start at paragraph 13. You say:
10 "As Nova Stone's application
11 involved the use of
12 explosives in close proximity
13 to the Bay of Fundy, NSDEL
14 contacted a DFO advisor on
15 marine mammals to request
16 that DFO consider whether the
17 proposed engaged concerns
18 under DFO's jurisdiction."

19 I take it, from what you have told
20 me so far, that you actually had no involvement in
21 that; is that correct?

22 A. That's correct.

23 Q. Going on, it states:
24 "DFO expressed concern
25 regarding the potential

1 impact of blasting on marine
2 mammals, such as the North
3 Atlantic Right Whale."

4 And, again, you have no firsthand
5 knowledge of that. That is something that has
6 either been told to you or you concluded from a
7 document; that's correct?

8 A. That's correct, yes.

9 Q. "In light of this concern,
10 DFO requested that two
11 clauses be added to the
12 industrial approval that
13 would be granted to Nova
14 Stone."

15 Again, you had no involvement in
16 that process of the request for the inclusion of
17 two clauses in the approval; correct?

18 A. That's correct.

19 Q. You go on to say:
20 "NSDEL agreed and inserted
21 these two clauses into the
22 conditional industrial
23 approval that it granted to
24 Nova Stone."

25 And, again, I gather you had no

1 involvement in that, as well?

2 A. That's correct, yes.

3 Q. So how did you come to know
4 all of this? Was this as a result of reviewing
5 documents?

6 A. That's right, yes. So as I
7 mentioned before, when I started with the file in
8 2005, I would have reviewed the past history.

9 Q. So you basically had been
10 through the file. You had seen these
11 communications, drawn the conclusions that you draw
12 here from those documents, but you actually have no
13 firsthand knowledge of any of the communications
14 leading up to them; is that correct?

15 A. That's correct, yes.

16 Q. If you go to paragraph 14:
17 "One of the clauses required
18 Nova Stone to complete a
19 report in advance of any
20 blasting activity, verifying,
21 to the satisfaction of DFO,
22 that the intended charge size
23 would not have an impact on
24 marine mammals in the area."

25 And I guess the same answer would

1 hold that you have concluded that as a result of
2 simply reading a document; that's correct?

3 A. Yes, of looking at the
4 approval.

5 Q. Paragraph 15:
6 "The other clause required
7 Nova Stone to blast 'in
8 accordance with DFO's
9 Guidelines for the Use of
10 Explosives in or near
11 Canadian Fisheries Waters'.
12 DFO prepared the blasting
13 guidelines to at that assist
14 proponents and regulators in
15 preventing potentially
16 harmful effects of blasting
17 by 'provid[ing]
18 information...'"

19 And you go on to say why those
20 blasting guidelines were prepared.

21 And, again, is it fair to say that
22 you know that as a result of reading the blasting
23 guidelines?

24 A. That's correct, yes.

25 Q. So you, I gather, had no role

1 whatsoever in either authoring the guidelines or
2 amending the guidelines or reviewing -- or, sorry,
3 revising the guidelines. You simply read the
4 guidelines and assisted by providing that
5 paragraph, which is a reflection of what the
6 guidelines are about; correct?

7 A. Right. Also my knowledge of
8 the guidelines from applying them to other
9 projects.

10 Q. If you go to paragraph 16,
11 you say:

12 "These potentially harmful
13 effects include, in certain
14 conditions: death or auditory
15 damage in marine mammals;
16 damage to swimbladder..."

17 And you go on? And would you
18 agree that Mr. -- that you would defer to
19 Mr. Wright as being the expert on blasting and its
20 potential effects on fish, fish habitat and marine
21 mammals?

22 A. Yes. As the author of the
23 paper, he would be the primary person.

24 Q. You go on --

25 A. I should also add that Brian

1 Jollymore, who was involved in this project, had
2 some specific expertise in this area, as well.

3 Q. And did you have any contact
4 at all or communication with Brian Jollymore in the
5 2002 or 2003 period while you were with DFO with
6 respect to blasting on the Whites Point site, and
7 its potential effects on either marine mammals or
8 fish and fish habitat?

9 A. Not that I recall.

10 Q. Go to paragraph 17:

11 "The appropriate application
12 of DFO's Blasting Guidelines
13 requires experienced
14 fisheries staff to review,
15 and potentially amend, the
16 conclusions reached through
17 application of the formulas
18 in the Blasting Guidelines in
19 order to take into account
20 the unique characteristics of
21 the biophysical area in which
22 the blasting is to occur.
23 Thus, the review of blasting
24 near water is necessarily an
25 iterative process which

1 involves the exercise of
2 judgment by officials."

3 Is that effectively a summary of
4 what is in the blasting guidelines itself?

5 A. There's obviously a lot more
6 in the blasting guidelines, but it does talk about
7 the fact that, you know, the basic purpose is to
8 determine what the appropriate setback distance in
9 most cases would be. But then qualifies that by
10 saying, in certain circumstances, depending on the
11 fisheries resources, further setback distances may
12 be required.

13 There is a lot more information in
14 there, as well, such as the review process, time
15 lines for that. So...

16 Q. And have you worked on a vast
17 number of projects involving blasting near ocean
18 waters?

19 A. A fair number, yes.

20 Q. Had you worked on those prior
21 to December 1st, 2011?

22 A. Yes, I would have.

23 Q. If you go down to paragraph
24 19, it is under the heading "Nova Stone's
25 submission of information to satisfy the blasting

1 conditions":

2 "The initial information
3 submitted by Nova Stone on
4 September 17, 2002 with its
5 'blasting plan' was
6 inadequate to allow DFO to
7 make the determinations
8 required of it."

9 You then go on to say:

10 "In fact, despite the fact
11 that it took almost five
12 months from the date of the
13 issuance of the industrial
14 approval for the 3.9 hectare
15 quarry for Nova Stone to
16 submit the information, all
17 that it provided was a
18 one-page document."

19 Now, I gather you're simply taking
20 this from your review of the file in 2005 when you
21 went back and looked at the file; is that right?

22 A. That's correct, yes.

23 Q. And if you go to -- sorry,
24 just back to tab 5, Exhibit C-298, which is the
25 letter from Mr. Buxton to Mr. Bob Petrie. Do you

1 see that?

2 A. Yes.

3 Q. And do you see that there is
4 a blasting plan attached to that document?

5 A. There is information on
6 blasting at the site, yes.

7 Q. Wouldn't you consider that a
8 blasting plan?

9 A. If you read the guidelines,
10 the DFO would be looking for more detailed
11 information than this.

12 Q. The guidelines -- at least
13 let's talk about 2002. You don't know from
14 firsthand knowledge of what the DFO required with
15 respect to the guidelines in 2002, do you?

16 A. Sorry?

17 Q. You don't know from your own
18 knowledge what the DFO requirements were for
19 blasting, the requirements from DFO required; is
20 that right?

21 A. Not for individual projects,
22 no.

23 Q. Right. If you go to tab 7 of
24 the statutes binder, which is just to your left
25 there, the table before you, that is a copy of the

1 guidelines.

2 MR. LITTLE: Excuse me, we don't
3 have a copy of the statutes binder.

4 MR. NASH: The same statutes
5 binder we were looking at this morning with
6 Mr. Petrie. It is the thinner binder. I will just
7 wait until you have that so we can all be on the
8 same page.

9 MR. LITTLE: Thank you, Mr. Nash.

10 BY MR. NASH:

11 Q. If you would go to page 15 of
12 the blasting guidelines, which is Exhibit C-287.

13 A. Yes.

14 Q. You will see reference to --
15 it says under "Erratum", "Wright, D.G. and Hopky".
16 Those are the awe authors of the guidelines;
17 correct?

18 A. Yes.

19 Q. You see it is "Guidelines for
20 the use of explosives in or near Canadian fisheries
21 waters", and it looks like it was published in a
22 journal; correct?

23 A. That's correct, yes.

24 Q. It goes to Table 1: Setback
25 distance metres from centre of detonation of a

00299

1 confined explosive to fish habitat to achieve 100
2 kilopascals guideline criteria for various
3 substrates.

4 You will see under the first
5 column it says "rock"?

6 A. That's correct, yes.

7 Q. If you go across that line to
8 second-last column on the right-hand side and it
9 says 35.6?

10 A. Right, yes.

11 Q. That is under 50, which would
12 be the weight of the explosive charge; is that
13 correct?

14 A. That's correct, yes.

15 Q. If you go for a moment back
16 to page 11, the bottom of page 10 of the
17 guidelines, starting at the very last word on page
18 10, it says:

19 "The review of a proposal is
20 often an iterative process,
21 depending on a number of
22 factors."

23 Is that essentially where you got
24 the wording in your affidavit?

25 A. That's correct, yes.

00300

1 Q. And if you then go back to
2 the exhibit we were looking at, which was Exhibit
3 5, C-298, in the other binder that we have, the
4 original bundle binder that you had. You can put
5 the other statutes binder aside for one moment.

6 A. Which one was that again?

7 Q. I think you've got it in
8 front of you. It is a letter from Mr. Buxton to
9 Mr. Petrie.

10 A. Yes.

11 Q. And if you go to the map at
12 the last page of that, you will see that there is a
13 35.6, at the top of the page, metre section there
14 from the high water mark to the no blast zone; do
15 you see that?

16 A. That's correct.

17 Q. That, by your understanding
18 today, would have complied with the guidelines;
19 correct?

20 A. Again, without having more
21 information to make a determination, it states in
22 the blasting guidelines, depending on fisheries
23 resources in the area, further setbacks may be
24 required.

25 Q. So you would defer in that

00301

1 regard to Mr. Wright, the author of the guidelines;
2 right?

3 A. That's correct, yes, and also
4 additional information that may be required for
5 site-specific conditions.

6 Q. And you say in your affidavit
7 there was a one-page blasting plan in the file when
8 you reviewed it. Did you not see this blasting
9 plan when you reviewed the file?

10 A. Not in the information that I
11 had. It was the last page.

12 Q. Just the last page?

13 A. That's correct, yes.

14 Q. So you didn't have the first
15 page, which referred to: Test blasts; number of
16 holes, 50; max pounds delay, 85.5 pounds. You
17 didn't have that?

18 A. Not in this exhibit, but on
19 the October 15th exhibit there is a similar
20 information provided in that, that exhibit.

21 Q. Right. And 85.5 pounds, of
22 course, would be under 50 kilograms; correct?

23 A. That's correct, yes.

24 Q. All right. I gather, if we
25 go through to tab 8, Exhibit R-118, there is a

1 series of exchanges of correspondence starting at
2 tab 8, which is Exhibit R-118, a letter of October
3 8th, 2002. It may be the one you just referred to?

4 A. Yes.

5 Q. And if you go to tab 9,
6 Exhibit C-126, you see a letter from Mr. Ross to
7 Mr. Petrie?

8 A. Yes.

9 Q. And if you go through to tab
10 10, Exhibit R-80, a letter from Mr. Buxton to
11 Mr. Petrie?

12 A. Yes.

13 Q. And tab 11, a letter from
14 Mr. Ross to Mr. Petrie, that is Exhibit C-127.

15 Did you see any of that
16 correspondence at the time, at all?

17 A. Not at the time, no.

18 Q. If you go to the next tab,
19 tab 12, Exhibit C-605, it is an email from Jerry
20 Conway to Jim Ross of December 2nd, 2002. He says:

21 "Anyway, in respect to the
22 Whites Cove blasting, based
23 on the information provided
24 and the undertakings that the
25 proponent is prepared to

1 take, I have no concerns in
2 respect to marine mammal
3 issues in respect to this
4 specific proposal."

5 Do you see that?

6 A. Yes, I do.

7 Q. Was that in the file when you
8 reviewed it for the purposes of preparing your
9 affidavit?

10 A. Yes, it was.

11 Q. Did you not think it was
12 relevant to include that information?

13 A. No, mainly because Jerry
14 Conway is -- I have to explain the role of the
15 marine mammal advisor. Under a fisheries
16 management program within DFO, we have advisors for
17 each of the critical species that we would assess,
18 things like advisors for lobster, ground fish,
19 things like that.

20 So the marine mammal advisor isn't
21 necessarily an expert on marine mammals, noise,
22 blasting, those things. He would be an advisor
23 regarding things like quotas on seals, protection
24 measures under the marine mammal regulations,
25 expert. Any of the expertise related to noise

1 propagation, marine mammals would come from DFO
2 science branch.

3 Q. And are you aware that
4 Mr. Conway's expertise was of a high enough level
5 of sufficiency to require conditions (h) and (i) to
6 be put into the April 30th approval for the 3.9
7 hectare Whites Point?

8 A. Well, from the records, it
9 wasn't Jerry Conway that suggested those. That
10 would have come from Brian Jollymore.

11 Q. If I go back -- take you
12 back, then, to Exhibit C-41 at tab 3, did you
13 review this email at the time you reviewed the file
14 for the purpose of preparing your affidavit?

15 A. Yes, I did.

16 Q. You will see at the middle of
17 the page the paragraph starting:

18 "Our marine mammal
19 coordinator, Jerry Conway,
20 has expressed significant
21 concerns about possible
22 blasting impacts on marine
23 mammals in the area. Jerry
24 wanted documented proof the
25 charges to be employed would

00305

1 not have any disruptive
2 influence on the species."

3 Then Mr. Jollymore tells Mr.
4 Petrie that he would appreciate the following two
5 clauses to be added.

6 Perhaps my question wasn't clear.
7 You reviewed this email?

8 A. Yes.

9 Q. Were you aware -- you were
10 then aware that the initiative for including two
11 clauses in the approval for April 30th came from
12 Mr. Conway; correct?

13 A. Yes. That's right. So the
14 initiative would have come from him, but then would
15 have been passed on to Habitat Management Program.

16 Q. Mr. Jollymore was the conduit
17 for Mr. Conway's request; correct?

18 A. Once that had been brought to
19 the attention of Habitat Management Program, they
20 would have taken the lead in providing that
21 information to NSDEL.

22 Q. So you would agree with me
23 that on a fair review of this information, that the
24 inclusion of what became conditions 10(h) and (i)
25 in the approval came at the instance of Mr. Conway

00306

1 and that his expertise was high enough level to
2 achieve that; correct?

3 A. His awareness of marine
4 mammal issues as a marine mammal advisor for DFO
5 would have been high enough to flag that, knowing
6 that North Atlantic Right Whales were listed as an
7 endangered species since 1980.

8 So that knowledge alone would sort
9 of flag that as an issue of potential concern for
10 that species.

11 Q. So his expertise was high
12 enough to include clauses 10(h) and (i), but you're
13 saying it wasn't enough to satisfy the conditions
14 for clause 10(h) and (i). Is that what you're
15 saying?

16 A. Yes. Simply having the
17 awareness of the critical nature of the species and
18 the status of the species doesn't necessarily
19 equate to having in-depth knowledge of impacts of
20 noise propagation on those species.

21 Q. And if you go to then back to
22 Exhibit 7 -- sorry, tab 7, Exhibit C-299, which is
23 the email exchange between Mr. Wright and Mr. Ross,
24 it was Mr. Wright who was the expert on sound
25 propagation; correct?

00307

1 A. When it comes to fish.

2 Q. Right. Well, the guidelines
3 say that they also apply to marine mammals. Do you
4 recall that?

5 A. They do, yes. There is some
6 section reference to not blasting within 500 meters
7 of the -- of a marine mammal.

8 Q. And if we go back to tab 7 on
9 the statutes and guidelines binder, and the page
10 roman numeral iv, it says "Abstract". This is the
11 guidelines; correct?

12 A. Correct. Back to this,
13 sorry. Sorry, which page was that?

14 Q. iv.

15 A. Sorry I am not sure which...

16 Q. The top of the page you see
17 ii, iii, and then iv.

18 A. Are we on Exhibit 7 of the
19 guidelines?

20 Q. Tab 7.

21 A. Yes.

22 Q. Tab 7. And those are the
23 guidelines, and go four pages in.

24 A. Right, yes.

25 Q. And you will see three

00308

1 paragraphs down from the top, about a third of the
2 way down that paragraph:

3 "Guidelines are provided on
4 methods and practices for the
5 conservation and protection
6 of fish, marine mammals, and
7 fish habitat..."

8 Do you see that?

9 A. That's correct, yes.

10 Q. And that was what the
11 guidelines were there to do; correct?

12 A. That's right, yes.

13 Q. And Mr. Wright was an expert
14 on that and he was the author of these guidelines;
15 right?

16 A. That's right, yes.

17 Q. If you could go, please, to
18 tab 14, Exhibit C-256, and go to the bottom of page
19 2, please.

20 A. Yes.

21 Q. It is an email from Tim
22 Mr. Surette dated June 26th, 2002 to a number of
23 people, including Neil Bellefontaine?

24 A. Yes.

25 Q. If you go to the next page:

1 "I have been advised by the
2 Minister's office (Nadine)
3 that we are not to accept a
4 report on the effects of
5 blasting on marine mammals as
6 per section i of item 10 of
7 Nova Scotia approval issued
8 April 30th until such time as
9 the Minister's office has
10 reviewed the application."

11 Do you see that?

12 A. I do, yes.

13 Q. Did you see that when you
14 reviewed the file for the purpose of preparing your
15 affidavit?

16 A. I did, yes.

17 Q. Did you not think that would
18 be a relevant document to include in your affidavit
19 to give the whole story of what went on in this
20 file?

21 A. It would, but there is
22 additional information that isn't included with
23 this exhibit, which basically states that the
24 Minister's office was interested in knowing what
25 the decision of DFO was at the time after the

00310

1 decision was made as opposed to...

2 Q. I'm not following what you're
3 saying. It says: I have been advised by the
4 Minister's office that we are not to accept a
5 report. So you know that this email was sent;
6 correct?

7 A. That's right, yes.

8 Q. It was in the file?

9 A. It was in the file.

10 Q. And you weren't aware of it
11 at the time; correct?

12 A. At the time of the email
13 being sent?

14 Q. Right?

15 A. No, I was not.

16 Q. Were you aware of any
17 ministerial involvement on the Whites Point file at
18 the time you were at DFO?

19 A. Other than the fact that the
20 Minister would have been kept apprised of the
21 issues, given the status of the file.

22 Q. Were you aware of that at the
23 time, in April -- in 2002?

24 A. Yes.

25 Q. How did you become aware of

00311

1 that?

2 A. Because I was aware that
3 briefing notes were being sent to the Minister.

4 Q. Did you see briefing notes
5 that were being sent to the Minister about the
6 Whites Point quarry?

7 A. I recall one briefing note
8 being sent to the Minister, or at least --

9 Q. Did you participate in
10 drafting any briefing notes to the Minister?

11 A. I reviewed a briefing note
12 that was sent to the Minister -- I believe to the
13 Minister at the time, if I recall.

14 Q. Do you remember around when
15 that was?

16 A. That would have been -- I
17 can't say the date for sure.

18 Q. The period of time?

19 A. It would have been probably
20 the summer of 2002.

21 Q. Would that have been after
22 the meeting which is referred to at tab 15, Exhibit
23 R-126?

24 A. It would have been likely
25 after that period. Again, I don't know. I don't

1 recall sort of the date or the time.

2 Q. And do you know the purpose
3 at all for this meeting?

4 A. The purpose of the meeting
5 was to discuss the larger quarry proposal.

6 Q. And do you recall --
7 actually, if you could go to your affidavit at
8 paragraph 24, which is at tab A.

9 A. Yes.

10 Q. Paragraph 24:
11 "As mentioned above, the fact
12 that this project would be a
13 large quarry and marine
14 terminal was no surprise to
15 DFO. In fact, on July
16 25, 2002, several months after
17 receiving the industrial
18 approval for the 3.9 ha
19 quarry but before Nova Stone
20 had submitted a blasting
21 plan, Mr. Paul Buxton and
22 other GQP representatives..."

23 That is Global Quarry Products;
24 correct?

25 A. Yes.

1 Q. So everyone knew that Global
2 Quarry Products was involved in this at that time?

3 A. Yes.

4 Q. Yes. And you say they:
5 "... met with DFO officials
6 both from HMD and the
7 Navigable Waters Protection
8 program, to gain an
9 understanding of the
10 regulatory process."

11 Now, my question to you is: Were
12 you actually involved in anything to do with that
13 meeting?

14 A. At that time, no.

15 Q. No. So all you're doing
16 basically is saying, from a review of the file,
17 having seen Exhibit R-126, tab 15, you have
18 surmised, you have concluded, that there was this
19 meeting and those people attended; correct?

20 A. That's right.

21 Q. You don't know what was in
22 their mind at the time of attendance?

23 A. No, I do not.

24 Q. You don't know what the
25 purpose of the project was at that point in time,

00314

1 other than by reviewing the file?

2 A. Other than by reviewing the
3 file and just aware of the project at the time. I
4 would have had knowledge of the larger quarry.

5 Q. Did you prepare your
6 affidavit yourself or did someone prepare it for
7 you?

8 A. I prepared it with counsel.

9 Q. And did you -- is it fair to
10 say that for any events that were covered by your
11 affidavit in 2002 and 2003 while you were at DFO,
12 all of it is a result of reconstructing from the
13 file review you did in 2005? Is that true?

14 A. It would be from just my
15 knowledge of what was happening at DFO at the time
16 and my knowledge of the process and the review of
17 the file, yes.

18 Q. It was primarily on the basis
19 of the review of the file; correct?

20 A. Correct, yes.

21 Q. I don't see you as an
22 attendee at this meeting?

23 A. I was not, no.

24 Q. In fact, from DFO at this
25 meeting, number 1 was Brian Jollymore. Jim Ross is

00315

1 an in attendance, Thomas Wheaton, Tim Surette. Was
2 Tony Henderson with DFO?

3 A. Yes.

4 Q. So it looks like about four
5 or five, perhaps six people were there from DFO,
6 but you weren't in attendance; correct?

7 A. That's correct.

8 Q. It is really only those
9 people who were in attendance who could tell us
10 anything about what happened at that meeting;
11 correct?

12 A. With any detail, yes.

13 Q. With any detail. At
14 paragraph 27, you state, "Officials from DFO", in
15 your affidavit, I'm at:

16 "Officials from DFO, other
17 federal departments and the
18 province of Nova Scotia met
19 on December 3, 2002 to
20 discuss the rough project
21 description and how to
22 coordinate the EA processes."

23 Again, you had no involvement in
24 that meeting; that's correct?

25 A. That's correct.

1 Q. You say:
2 "My DFO colleague, Reg
3 Sweeney, attended the meeting
4 and noted that there was
5 'general agreement that due
6 to the size..."

7 And you go on. Again, that is
8 simply extracting from a document that you read as
9 a result of your review of the file; correct?

10 A. That's correct, yes.

11 Q. And, again, going over to
12 paragraph 28, you say, on page 11 at paragraph 28:

13 "Immediately after the
14 January meeting with
15 Mr. Buxton..."

16 Again, that is another meeting you
17 weren't in attendance at; that's correct?

18 A. That's correct.

19 Q. "... the proponents submitted
20 a formal application for a
21 permit under the Navigable
22 Waters Protection Act (the
23 'NWPA') entitled 'Navigable
24 Waters Protection Application
25 - Whites Point Quarry Marine

1 Terminal.' As had been
2 discussed with the
3 proponents, the request for
4 an NWPA permit triggered an
5 EA by DFO.

6 "As a result, from this point
7 on, all decisions that we
8 made at DFO had to be
9 considered in light of the
10 fact that we were now
11 involved in an EA of the
12 larger quarry and marine
13 terminal project."

14 In fact, you were not a
15 participant in any of those decisions; isn't that
16 right?

17 A. That's correct, yes.

18 Q. The choice of phraseology in
19 that sentence, was that your sentence or was that
20 drafted for you by somebody else?

21 A. Again, that was developed
22 with counsel and myself.

23 Q. And I would suggest that it
24 was developed with a view to leaving an impression
25 that you were involved with DFO on Whites Point;

00318

1 correct?

2 A. I think it was more the
3 impression of "we" as DFO department as being a
4 representative of DFO.

5 Q. So when you say the Royal
6 "we", it is the department?

7 A. Correct.

8 Q. It is not you personally?

9 A. Not in all cases, no.

10 Q. Not in this case?

11 A. That's correct, yes.

12 Q. Not in any case with respect
13 to your participation at DFO in 2002 and 2003;
14 correct?

15 A. That's right. Yes.

16 Q. Now, if you go on to
17 paragraph 30, you say:

18 "DFO reviewed that draft and
19 concluded that, like many of
20 the documents that had been
21 submitted by the proponents
22 so far, it contained
23 insufficient information for
24 DFO to make a decision as to
25 whether, in addition to the

00319

1 NWPA trigger for the marine
2 terminal, it had any
3 Fisheries Act triggers."

4 You had no involvement in that;
5 correct?

6 A. That's correct.

7 Q. So where in DFO is this
8 conclusion to be found? What document did you look
9 at? Was it a document that said that? Was it a
10 memorandum that said that, or was that just
11 something you extracted from the documents you
12 reviewed?

13 A. Well, from the basic fact
14 that DFO didn't make a decision. If they had
15 enough information, then a HADD determination would
16 be made. In fact, it wasn't until the final
17 project description that there was enough
18 information to make the determination whether or
19 not there would be any Fisheries Act authorization
20 requirements.

21 Q. So that was your conclusion,
22 but you had actually no -- you didn't interview
23 anybody to draw that conclusion. You didn't have
24 discussion with anybody. You simply reviewed
25 documents and came up with this narrative; is that

00320

1 right?

2 A. That's correct, yes.

3 Q. You describe in the following
4 paragraphs -- I don't think I now have to take you
5 through any of them, because you weren't involved,
6 you have told me, in 2003 while you were at DFO
7 with this file; that's correct?

8 A. That's correct.

9 Q. And you then said, paragraph
10 35:

11 "On April 7, 2003, one of
12 DFO's habitat officers
13 concluded that, while the
14 information contained in the
15 Project Description..."

16 I am just going to stop there.
17 You actually left the DFO on April 1st, 2003;
18 correct.

19 A. That's right.

20 Q. So you're speaking here of a
21 time when you weren't actually at DFO; correct?

22 A. That's right.

23 Q. So you have nothing to say
24 about what happened to DFO in April, May and June
25 2003; that's correct?

00321

1 A. Other than my knowledge of
2 the file.

3 Q. Other than reviewing
4 documents in the file?

5 A. Yes.

6 Q. Correct. Two years after the
7 fact; right?

8 A. Yes.

9 Q. Yes. And so if we go over to
10 paragraph 36, 37, 38 on page 14, this is more of
11 the same, in the sense that in paragraph 36 you're
12 saying on April 14, 2003 DFO notified the
13 proponents. Again, that is simply from the review
14 of a document?

15 A. That's correct. Yes.

16 Q. And the next paragraph, 37:
17 "At this point, DFO had not
18 determined whether blasting
19 on the quarry would require
20 any authorizations under the
21 Fisheries Act."

22 Of course at that point you're not
23 with DFO and you weren't involved in any way with
24 the analysis that was being conducted by DFO;
25 that's correct?

1 A. That's correct, yes.

2 Q. "However", you say in

3 paragraph 37:

4 "... at this early stage,
5 given the proximity of
6 blasting to the Bay, it was
7 prudent to leave this
8 possibility open."

9 Is that editorial or was it
10 somebody else's?

11 A. That would be mine, based on
12 just experience of working with similar projects
13 like this.

14 Q. So that was your surmising as
15 to what was actually going on as opposed to having
16 any evidence, any discussions from anybody. You
17 were -- that was an idea in your mind as to what
18 was going on; is that correct?

19 A. It is also indicated by the
20 documents. So the April 14th document, there are
21 mentions of a potential requirement for a section
22 32 authorization.

23 Q. Well, you don't say the
24 document there:

25 "However, at this early

00323

1 stage, given the proximity of
2 blasting to the Bay, it was
3 prudent..."

4 What you're trying to convey there
5 is somebody thought it was prudent to leave this
6 possibility open; correct?

7 A. Yes, that's right.

8 Q. In fact, that is your
9 after-the-fact reconstruction of what happened;
10 isn't that fair?

11 A. Based on the information that
12 was available and the events happening at the time,
13 yes.

14 Q. Did you see any document
15 which said that anyone at DFO felt it was prudent
16 to leave this possibility open?

17 A. The document would be -- on
18 April 14th, there was mention of the possibility of
19 a section 32 authorization.

20 Q. Do you have any firsthand
21 information to give to the Tribunal today about
22 what the analysis was of the blasting plan for the
23 Whites Point project by the DFO in April, May and
24 June of 2003 and its potential effect on fish, fish
25 habitat or marine mammals?

1 A. So by, you mean, "firsthand
2 knowledge", actually being involved with the file
3 at that time --

4 Q. Right.

5 A. -- and those issues? No.

6 Q. I gather you are not a lawyer
7 by training; correct?

8 A. No.

9 Q. You offer up, in paragraph 38
10 what I would take to be legal analysis. You state:

11 "Moreover, a determination as
12 to whether the quarrying
13 activity would require
14 Fisheries Act authorizations
15 was really not necessary in
16 any event because of the way
17 the proponents had made clear
18 in all of their
19 communications with DFO that
20 the quarry would not be built
21 without the marine terminal,
22 and vice versa."

23 Now, that is not your analysis
24 arising out of any -- from any firsthand experience
25 with the file; that's correct?

1 A. It would have been just
2 knowing that, being aware of the file at the time.

3 Q. Being aware in 2005 of what
4 happened back in 2003?

5 A. No, being in aware in 2002
6 because, as the environmental assessment officer
7 with Nova Scotia Environment at the time, and also
8 just being aware of it through DFO that there was a
9 proposed larger quarry with a marine terminal.

10 Q. You then offer up what I take
11 to be a legal opinion:

12 "In light of this
13 interdependence, under s.15
14 of the CEAA, the scope of the
15 project could include both
16 the quarry and the marine
17 terminal regardless of
18 whether there were Fisheries
19 Act triggers for each."

20 Was that a conclusion you arrived
21 at on your own?

22 A. It was, because I have my
23 experience with Canadian Environmental Assessment
24 Agency, and obviously one of the main things we
25 dealt with was how to scope projects and how to

1 interpret the Canadian Environmental Assessment
2 Act.

3 Q. And you understood from that
4 training you could only scope projects that were
5 within -- a part of a project that was within
6 federal jurisdiction, correct?

7 A. We would scope to the project
8 components.

9 Q. Right. And you could
10 scope -- at least DFO, when you were with DFO,
11 because you were with both NSDEL and DFO at
12 different times, but when you were with DFO, you
13 understood that a project could only be scoped to
14 the extent of federal jurisdiction; correct?

15 A. One of the common practices
16 within DFO at the time was to scope to those
17 trigger components, so looking at components of
18 projects that had a Fisheries Act authorization
19 trigger, or likely to have a Fisheries Act
20 authorization trigger.

21 Q. So if there was a likely to
22 have or if there was a Fisheries Act authorization
23 trigger, that would be something within federal
24 jurisdiction that could then be scoped into the
25 project; correct?

1 A. Correct, yes.

2 Q. In the absence of such a
3 trigger, it could not be; correct?

4 A. Again, various departments
5 had different approaches to it, but the CEAA was
6 clear in sort of saying if there were components of
7 the project that were interlinked or
8 interdependent, then those project components
9 should be scoped together.

10 Q. So long as they were within
11 federal jurisdiction, which is the only
12 jurisdiction that CEAA had; correct?

13 A. Yes.

14 Q. Right. Now, did you have any
15 discussions with Mr. Hood during April, May and
16 June of 2003 about the scoping issue?

17 A. No, I did not.

18 Q. Were you familiar with the
19 Red Hill case in April, May and June of 2003?

20 A. Not with any depth, no.

21 Q. Were you aware of it at all
22 in what it said about the ability of the federal
23 government to scope in certain aspects of an
24 environmental assessment to a project?

25 A. Yes.

1 Q. And what did you understand
2 the Red Hill case told us?

3 A. That scoping would be limited
4 to those components that were of federal
5 jurisdiction.

6 Q. Right. Were you involved in
7 the discussions in May and June of 2003? You are
8 now back at NSDEL at that point; correct?

9 A. That's correct, yes.

10 Q. Did you have responsibility
11 for the Whites Point file when you went back to
12 NSDEL?

13 A. I did, yes.

14 Q. From a provincial
15 perspective?

16 A. I did, yes. I was involved.

17 Q. Did you have involvement in
18 the discussions around the idea of a harmonized
19 process?

20 A. Yes, I was involved in those.

21 Q. Do you remember the urgency
22 with respect to which those discussions were held
23 in June of 2003?

24 A. I recall there was some
25 urgency to finalize the arrangements for a joint

1 review.

2 Q. A joint review?

3 A. Yes.

4 Q. Do you remember that there
5 was a pending election in Nova Scotia in 2003?

6 A. Yes.

7 Q. And do you remember that that
8 election was actually called for July 5th, 2003?
9 If I was to tell you that, would that be a surprise
10 to you?

11 A. No, it would not.

12 Q. Do you recall that one of the
13 reasons that there was urgency to having a joint
14 panel review said up by that date or by the end of
15 June was because there was a pending provincial
16 election? Do you recall that?

17 A. Yes. And it wouldn't be
18 surprising, considering with the change in
19 government potentially as a result of an election,
20 it would just belabour the issue and potentially
21 drag out a process. And so the -- and the purpose
22 is of expedient environmental assessment to do
23 stuff as quickly as possible.

24 Q. That sounds like a laudable
25 goal, but do you remember there being discussions

00330

1 or communications about having a JRP set up before
2 the end of June in order to take a lot of public
3 pressure off the Minister's shoulders in the summer
4 months?

5 A. I don't recall specifically,
6 but I recall seeing information on the file.

7 Q. Right. That information, you
8 have seen email exchanges with Bruce Hood and
9 others --

10 A. Yes.

11 Q. -- at a high level of
12 seniority in the DFO with respect to that matter?

13 A. Yes.

14 Q. If you could go to tab 20,
15 Exhibit C-284, please, this is an excerpt from
16 Mr. Hood's journal dated April 25th, 2003, and I
17 just want to find out if you know anything about
18 the issues raised there.

19 About two-thirds of the way down,
20 you will see:

21 "We should scope to terminal.
22 No trigger. If we include
23 the quarry in the assessment
24 it implies that we, DFO, are
25 approving the quarry after

1 the assessment."

2 And then over in the margin, "We
3 have no authority to do so." Do you see that?

4 A. I do, yes.

5 Q. Do you recall, from your own
6 perspective -- I'm not asking you to comment on
7 what Mr. Hood said or knew, but do you recall that
8 issue arising in May and June of 2003, the issue of
9 scoping by the federal government?

10 A. I would have been aware of
11 the scoping issue, but I am not sure if I had
12 detailed knowledge. There would have been two
13 issues here, Bruce Hood, as a headquarters person
14 looking at scoping issues versus regional staff,
15 which would have more in-depth knowledge of the
16 project looking at scoping issues.

17 Q. Do you recall a discussion
18 with regional staff at DFO about wanting to know
19 what the Minister wanted? Do you recall that?

20 A. Knowing the Minister --
21 federal Minister of Fisheries?

22 Q. Yes, yes.

23 A. No. I wouldn't have been
24 involved in that level of discussion being at the
25 province.

1 Q. But would you have been
2 involved with in discussions with regional
3 officials who discussed that, not with respect to
4 senior officials in Ottawa, but regional officials
5 wanting to know what the Minister of Fisheries and
6 Oceans wanted?

7 A. Again, I probably wouldn't
8 have gotten into that sort of level of detail with
9 the regional staff with regards to discussions with
10 their Minister.

11 Q. Do you remember the Whites
12 Point quarry being a hot political potato in June
13 of 2003?

14 A. Whites Point quarry was
15 certainly high in the public radar, and there was
16 certainly a lot of public interest and a lot of
17 media coverage about it, yes.

18 Q. And there was certainly a
19 political dimension to it; isn't that fair?

20 A. Given the fact that it was in
21 the Minister's riding at the time, and the public
22 were lobbying both the departments and likely the
23 politicians.

24 Q. And if you go to tab 35,
25 Exhibit R-386, an email from Bruce Hood to Richard

00333

1 Wex and Richard Nadeau, do you know who they were?

2 A. Yes.

3 Q. Who were they?

4 A. I'm not sure of their exact
5 positions, but they were senior officials within
6 DFO in Ottawa.

7 Q. And they reported to an
8 Assistant Deputy Minister or Deputy Minister?

9 A. That sounds correct, yes.

10 Q. This is from Mr. Hood to
11 Mr. Wex and Mr. Nadeau. It is:

12 "It is urgent that the letter
13 from Minister Thibault to
14 Minister Anderson referring
15 the Whites Point quarry and
16 marine terminal to a panel
17 review be signed and sent to
18 the Minister Anderson due to
19 the following. It is a
20 distinct possibility that the
21 Province of Nova Scotia will
22 be announcing an election
23 before or on June 30 and will
24 send out a media release
25 preceding this indicating

1 that the Whites Point
2 project, which is very
3 contentious, has been
4 referred to a panel review."

5 [As read]

6 Do you remember that being in the
7 air, from your perspective? You are now back at
8 the provincial government. Do you remember that
9 being in the atmosphere of the communications
10 between DFO officials and NSDEL officials?

11 A. I remember there was an
12 urgency for the referral to the panel, and again,
13 as I mentioned before, because to expediate the
14 process, waiting until after an election would
15 likely have delayed for months to several months
16 the process to get -- if there was a change in
17 government, just to get the new staff and new
18 politicians up to date on the project itself.

19 Q. The new staff?

20 A. Well, I'm sorry. Likely sort
21 of, you know, the Minister would come with their
22 own staff, but assuming the Deputy Minister and
23 these people would remain in place, but it would be
24 mostly the Minister and his staff or her staff.

25 Q. If you go to the next tab,

00335

1 tab 36, email from Richard Nadeau to Kaye Love, who
2 was Kaye Love?

3 A. I don't know.

4 Q. I won't read the whole thing,
5 but halfway down it says:

6 "The province has very
7 serious reasons for issuing a
8 press release by the end of
9 this week announcing the
10 Joint Federal-Provincial
11 Panel Review process and the
12 project is located in our
13 Minister's riding, as well as
14 in the electoral
15 circumscription of the
16 provincial Minister
17 responsible for making
18 decisions on this project,
19 and the announcement of a
20 Joint Review Panel is of the
21 nature to take a lot of
22 public pressure off the
23 Minister's shoulders for the
24 summer months." [As read]

25 Do you remember that being

00336

1 generally in the air during the period of time of
2 those discussions that you were having with federal
3 officials?

4 A. Again, my knowledge would be
5 more on the urgency to have those decisions made
6 before the election to expediate the decisions and
7 the environmental assessment process.

8 Q. So you didn't have any
9 knowledge of this idea that there was -- it was a
10 political file and we want to take public pressure
11 off the politicians?

12 A. No, not directly.

13 Q. Did you see -- go to tab 38,
14 please, Exhibit 16. Did you see this article in
15 the Halifax Chronicle Herald?

16 A. Yes.

17 Q. And were you surprised that
18 it had been disclosed during the course of an
19 election that there had been a request for a
20 referral to a panel review made by Minister
21 Thibault?

22 A. Sorry, that had been
23 disclosed?

24 Q. That it had been disclosed
25 during the course of or just before an election

00337

1 call in Nova Scotia that Minister Thibault was
2 providing to the press his information that he had
3 made a referral to the Minister of Environment for
4 an appointment of a Joint Review Panel?

5 A. I would have been aware of
6 the referral to the Joint Review Panel and the
7 press release and information that had come out
8 with that, yes.

9 Q. Did you make any connection
10 between the fact that you knew about the referral
11 and the appearance of this article as to whether or
12 not there was a political component to this
13 exercise?

14 A. Again, it wouldn't be unusual
15 for Ministers to make this sort of announcement
16 related to review process.

17 Q. Really?

18 A. Well, it would be
19 information, if there was public concern and public
20 issues around it.

21 Q. Would it be normal for a
22 letter that was sent from a Minister to another
23 Minister be disclosed or be discussed in public?

24 A. No. That would not be usual.

25 Q. That would be highly unusual,

1 would it not?

2 A. Yes, it would.

3 Q. It would be highly unusual
4 for a copy of that letter to get into the hands of
5 the opponents of the quarry and used during the
6 election campaign; correct?

7 A. Yes. Most
8 Minister-to-Minister correspondence is not usually
9 released unless there is some reason to do so.

10 Q. Do you remember attending a
11 meeting with Mr. Chapman and Mr. Buxton on August
12 28th of 2003?

13 A. I do, yes.

14 Q. Was that the only meeting you
15 had with Mr. Buxton up to that time?

16 A. From what I recall, yes.

17 Q. If you go to tab 40, Exhibit
18 C-657, it is an email from Derek McDonald to
19 Nathalie Bastien. Do you know her?

20 A. No, I don't.

21 Q. Did you know -- you didn't
22 know her at the time?

23 A. No.

24 Q. It says:

25 "In fact, DFO has since

1 revised its blasting
2 calculations and determined
3 that it does not have a
4 section 32 trigger, but it
5 still has a HADD for the
6 terminal."

7 Do you remember receiving
8 information at your end, at NSDEL, that it turned
9 out that the federal government didn't have a
10 trigger for the quarry?

11 A. No. In fact, we would have
12 been aware of the federal scoping -- or, sorry, the
13 federal FCR process, federal coordination
14 regulation process, which identified which federal
15 departments had triggers. And my understanding is
16 in September of 2003, DFO had identified potential
17 section 32 trigger.

18 Q. So you were saying that they
19 were still maintaining in September of 2003 that
20 they had a section 32 trigger?

21 A. That's right.

22 Q. Do you remember there being a
23 calculation of the setback distance from the
24 shoreline to the blasting of from the 35.6 metres
25 which we saw earlier to 500 metres? Do you

00340

1 remember that?

2 A. I don't recall that, other
3 than from reading the documents after the fact.

4 Q. Were you ever told during
5 this process that that setback calculation had been
6 based on an erroneous calculation? The setback
7 distance had been based on an erroneous calculation
8 and that upon recalculation, the setback could be
9 appropriately set at 100 metres?

10 A. I am aware of that from a
11 review of the documents.

12 Q. You were never -- you weren't
13 told that at the time. You are a provincial
14 official now?

15 A. That's correct, yes.

16 Q. You weren't told that at the
17 time?

18 A. No.

19 Q. Are you sure of that?

20 A. I don't recall sort of -- I'm
21 trying to remember, but...

22 Q. You don't have any
23 recollection of that?

24 A. I don't have any recollection
25 of having that communicated directly to me, no.

1 Q. At the meeting with
2 Mr. Chapman and Mr. Buxton on August 28th, 2003,
3 which is recounted in your notes at tab 41.

4 A. Yes.

5 Q. Just keeping in mind that
6 Mr. McDonald was with CEAA -- and Mr. Chapman was
7 with CEAA; correct?

8 A. Yes.

9 Q. And Mr. McDonald had written
10 by email on August 13 that DFO had revised its
11 calculations and determined it did not have a
12 section 32 trigger. With that in mind, do you
13 recall the issue of the setback coming up at this
14 meeting?

15 A. It did come up at the
16 meeting, the 500 metre setback distance, yes.

17 Q. If you go to page 801714,
18 which is the second page from the end?

19 A. Yes.

20 Q. In the middle of the page,
21 could you read that out, please?

22 A. "DFO has stated blasting
23 closer than 500 metres would
24 impact inner Bay of Fundy
25 salmon. Other projects

00343

1 would suggest that that kind of information should
2 be withheld from the proponent in a project,
3 because a Joint Review Panel was not even then
4 constituted; correct?

5 A. Right. But the project had
6 been referred to a panel.

7 Q. By the feds?

8 A. By the feds, yes.

9 Q. By the feds. That is all
10 that had happened. On August 7th, 2003, the
11 Minister Anderson had referred it to a Joint Review
12 Panel?

13 A. Right.

14 Q. There was no agreement in
15 place at that point between the province and the --

16 MR. LITTLE: Mr. Nash, I think
17 Mr. McLean should answer the question and provide
18 the relevant dates, not yourself, because you are
19 getting them wrong.

20 MR. NASH: Well, with respect, I
21 don't think I am.

22 BY MR. NASH:

23 Q. August 7th, 2003 was when
24 Minister Anderson referred the matter to a Joint
25 Review Panel; correct?

1 A. The Minister of Fisheries and
2 Oceans, I believe it was June 26th, 2003, referred
3 the project to a Joint Review Panel.

4 Q. Well, with respect, on June
5 26th, 2003, Minister Thibault -- tell me if you
6 have a different understanding -- Minister Thibault
7 referred the matter to Minister Anderson --

8 A. Correct.

9 Q. -- to make a decision as to
10 whether or not the matter should go to a Joint
11 Review Panel; that's correct?

12 A. That's correct.

13 Q. Minister Anderson decided on
14 August 7th, 2003 that it should; correct?

15 A. That's right.

16 Q. That was two days after the
17 provincial election; right.

18 A. That's right.

19 Q. And then it was over a year
20 before there was actually an agreement between the
21 provincial government and the federal government as
22 to the terms of the JRP; that's correct?

23 A. Right. So my understanding
24 is that during that time, DFO was looking to
25 provide that information regarding the new setback

1 distance to Mr. Buxton. CEAA was concerned about
2 doing that, because these details related to the
3 3.9 hectare quarry, which would have been within
4 the larger quarry area and had potential CEAA
5 triggers associated with it -- my understanding of
6 the delay was partially related to the fact that in
7 February of 2004, the federal government was asked
8 to hold back on finalizing the JRP agreement and
9 terms of reference until the restructuring of the
10 companies could be finalized.

11 Q. So between August 7th of 2003
12 and February 27th of 2004, if that date rings a
13 bell for you, the federal government and the
14 provincial government had not yet been able to
15 enter into an agreement to actually establish the
16 JRP; correct?

17 A. Again, because there was a
18 delay, because the proponents had asked them to --

19 Q. No, I am just talking about
20 the period August 7th, 2003 to February 27th, 2004.
21 There was no delay asked for by the proponent
22 during that period of time?

23 A. Not that I am aware of, no.

24 Q. All of this you're getting
25 simply from a review of the file; correct?

1 A. That's correct, yes.

2 Q. And there was a federal
3 election in May and June, wasn't there?

4 A. I seem to recall, yes.

5 Q. And a campaign during that
6 period of time. And do you recall seeing in your
7 review of the file that there were email
8 correspondences saying, We'll likely not get this
9 JRP formed before the election, in any event. It
10 will probably have to wait until after the
11 election. Do you remember that?

12 A. I seem to recall some
13 documents. I don't recall exactly when.

14 Q. And then in late July of
15 2004, Mr. Buxton advised CEAA that the delay they
16 had asked for was no longer required; correct? Do
17 you remember that?

18 A. The delay with regards to the
19 establishment of the JRP?

20 Q. Yes.

21 A. I don't recall the actual
22 date.

23 Q. Okay. But it wasn't until
24 November 3rd, 2004, some three months and a bit
25 later, that the JRP was actually established; isn't

00347

1 that correct?

2 A. That's my understanding, yes.
3 And then shortly afterwards, the correct setback
4 distances, as determined by Dennis Wright, were
5 provided to Paul Buxton.

6 Q. So I will come back to my
7 question. Are you aware of any policy, guideline,
8 regulation of any kind that states that during the
9 course of the period of time between when a
10 Minister has requested that a JRP be set up and the
11 JRP is actually set up, that they shouldn't be
12 providing the information to the proponent?

13 A. I am not aware of any
14 specific policy, but it makes good sense,
15 considering their concerns about the 3.9 hectare
16 quarry, which would have had an environmental
17 assessment trigger and the fact that that 3.9
18 hectare quarry was described within the larger
19 context of the Whites Point quarry.

20 Q. You're saying that it makes
21 sense to withhold fundamentally important
22 information about setbacks to a proponent in the
23 position that Mr. Buxton was representing. It
24 makes sense to withhold that information for any
25 purpose; are you saying that?

1 A. No. I'm saying for the
2 purpose of the fact that imminently there was a
3 Joint Review Panel to be established and would
4 certainly have certain controls and decisions to
5 make over the scope of the project, the scope of
6 the assessment, and so providing that information
7 to the proponent prior to that would likely be
8 premature.

9 Q. If you could go to tab 50,
10 which I believe is Exhibit R-498. And it appears
11 these pages are not numbered, but if you go about
12 three pages in, they are double-sided. I think
13 just three physical pages in, there is a reference
14 to -- well, first of all, this is a PowerPoint
15 presentation that DFO made to the JRP. That's
16 correct?

17 A. That's correct, yes.

18 Q. You were involved in
19 preparing this document?

20 A. I was, yes.

21 Q. And if we go into the page,
22 if we can have this on the screen: DFO's initial
23 involvement in the Whites Point project. You
24 prepared this slide?

25 A. I did, yes.

1 Q. You provided all of the
2 information for it?

3 A. I did, yes.

4 Q. And the summary of DFO's
5 initial involvement in the Whites Point project, is
6 that, number 1, in March 2003 DFO received the
7 project description. Do you see that?

8 A. Yes, and that is reference to
9 the final project description.

10 Q. Right. In April 2003, DFO
11 determined a Fisheries Act Authorization and
12 Navigable Waters Protection Act approval would be
13 required for the marine terminal only.

14 Do you see that?

15 A. Yes.

16 Q. DFO is a responsible
17 authority under the Canadian Environmental
18 Assessment Agency Act. Do you see that?

19 A. Yes.

20 Q. In June 2003, the Minister of
21 DFO referred the project to the Minister of
22 Environment for a review panel; correct?

23 A. That's correct, yes.

24 Q. No mention at all of a
25 section 32 trigger for the quarry; correct?

00350

1 A. No. Again, at this time, in
2 April of 2003, the primary triggers were the
3 Navigable Waters Protection Act and the section
4 35(2) trigger.

5 Q. The only triggers were the
6 Navigable Waters Protection Act and the section 35
7 HADD trigger for the marine terminal; correct?

8 A. Identified in April of 2003,
9 yes.

10 Q. Right.

11 A. But later on, then there was
12 determination that because of the 3.9 hectare
13 quarry assumed within the larger quarry, that a
14 section 32 trigger was potentially likely.

15 Q. You say that, but you don't
16 know that, because you weren't at DFO during that
17 period; correct?

18 A. That is from the review of
19 the information, the documents provided.

20 Q. You didn't think that was
21 important information to include in the
22 presentation to the JRP that there was a section 32
23 trigger for the quarry?

24 A. Again, at that time, once the
25 project had been provided to the JRP, they would

00351

1 have been responsible for scoping. So the section
2 32, although critical at that time to determine
3 sort of whether the 3.9 hectare quarry was included
4 in the larger quarry, because of the JRP scoping,
5 it wasn't a critical point afterwards.

6 Q. And you don't know how
7 critical it was to DFO prior to, because you
8 weren't at DFO at the time that that determination
9 was allegedly made; correct?

10 A. I wasn't involved in those
11 details at the time, no.

12 Q. Do you recall there being --

13 PRESIDING MEMBER: Mr. Nash, just
14 a question. Just to do planning for the remaining
15 time.

16 MR. NASH: I have one more subject
17 area.

18 PRESIDING MEMBER: And then...

19 BY MR. NASH:

20 Q. Thank you, Mr. President.

21 Do you recall there being in
22 effect at the time a policy for NSDEL employees
23 with respect to their conduct and integrity in
24 their role as public servants?

25 A. I am familiar that most civil

1 servants have conduct policies.

2 Q. And in 2002-2003, both the
3 federal government and provincial government had
4 policies which required their representatives,
5 their civil servants, to be open and honest?

6 A. That's correct, yes.

7 Q. Transparent?

8 A. Yes.

9 Q. Fair?

10 A. Correct, yes.

11 Q. Allow proponents due process?

12 A. Yes, within the process as
13 described.

14 Q. Non-partisan?

15 A. Yes.

16 Q. Apolitical?

17 A. Correct.

18 Q. Not serving political masters
19 for political ends; correct?

20 A. That's correct, yes.

21 Q. Thank you very much. Those
22 are my questions.

23 PRESIDING MEMBER: Okay. Thank
24 you, Mr. Nash. Okay, we will have a ten-minute
25 break, which means we start at -- continue at 5:20.

00353

1 And, Mr. McLean, you have to stay away from the
2 people, and I am sure somebody will get you a
3 coffee.

4 THE WITNESS: Water is fine,
5 thanks.

6 PRESIDING MEMBER: It would be
7 interesting. Maybe Mr. Little said that your plane
8 leaves between 8:00 and 9:00.

9 THE WITNESS: Yes. It is at --
10 it's just shortly after 9:00, I believe. I don't
11 have the exact time...

12 --- (Off record discussion re scheduling)

13 --- Recess at 5:10 p.m.

14 --- Upon resuming at 5:24 p.m.

15 PRESIDING MEMBER: I think, in
16 order not to lose time, let us continue the
17 exercise and, Mr. Little, you have the floor.

18 MR. LITTLE: Thank you, Judge
19 Simma.

20 RE-EXAMINATION BY MR. LITTLE:

21 Q. Mr. McLean, when you took
22 over the file for the Whites Point EA in 2005, who
23 did you take it over from?

24 A. Phil Zamora was the lead for
25 DFO at the time.

1 Q. And when you take over a
2 file, do you just read correspondence, or do you do
3 other things to familiarize yourself with the file?

4 A. No. I would have been
5 sitting down with primarily Phil Zamora, but others
6 on the file, to review sort of what steps they had
7 taken prior to my taking over the file.

8 Q. And who were those people
9 that you had talked to?

10 A. Phil Zamora, Brian Jollymore,
11 primarily.

12 Q. Anyone else?

13 A. I'm not sure if Jim Ross was
14 there at the time when I returned. I think he had
15 retired at that time. So those were the two sort
16 of primary people I would have talked to.

17 Q. You would have discussed the
18 history of the file with them?

19 A. That's correct, yes.

20 Q. And of course you were
21 involved in the file in 2002 when you were at
22 NSDEL; correct?

23 A. That's right.

24 Q. Mr. McLean, there was talk of
25 a test blast being the purpose of the 3.9 hectare

1 quarry in your cross-examination. Did Nova Stone
2 need to get a 3.9 hectare quarry approved in order
3 for it to conduct a test blast for the purposes of
4 the EA of the Whites Point project?

5 A. No. The purpose of the
6 industrial approval for the 3.9 hectare quarry was
7 for the purposes of developing a quarry. If you're
8 doing a test blast and not physically quarrying
9 rock, you would not need an industrial approval
10 from Nova Scotia Environment and Labour.

11 Q. So what might you do?

12 A. It would be prudent, given
13 the fact that DFO has guidelines of blasting around
14 water to contact DFO, ensure that a section 32
15 authorization wouldn't be required, and then,
16 unless there was any sort of local bylaws or other
17 restrictions, they could probably proceed with the
18 test blast depending on the size of it.

19 Q. I am wondering if you could
20 turn to tab 5, which, Chris, is Exhibit R-116.
21 This is a letter from Paul Buxton to Bob Petrie.
22 Now, you testified that, in your view, DFO would
23 have needed more information than what is provided
24 here in order to address the blasting conditions.

25 In your experience, why is this?

1 A. Well, there's a couple of
2 reasons. One, if you look primarily at condition
3 10(i), it was a condition to ensure that the blast
4 design and size would not have an adverse effect on
5 marine mammals.

6 From this basic blasting
7 information, DFO wouldn't be able to determine sort
8 of what information was required to, you know,
9 basically collect enough information to determine
10 that the project would not have an impact on marine
11 mammals.

12 Q. So would this be -- would
13 this qualify as a report, in your view?

14 A. No. This is, at best, a sort
15 of a basic blasting plan which provides information
16 such as the number of holes, the delays, the amount
17 of charges provided.

18 Q. Now, Mr. Nash also raised the
19 issue of Mr. Conway being the reason for the
20 request to include the blasting conditions in the
21 3.9 hectare quarry permit.

22 Now, in your view, does this have
23 any relevance to the scientific review of such a
24 proposal within DFO?

25 A. No. Within DFO, we get made

00357

1 aware of projects by various means, through the
2 province, through proponents, just through public
3 concern. And so they come in through the
4 department through various means, fisheries
5 management, through our fisheries officers in
6 different regions.

7 So there is many ways to sort of
8 raise awareness of a project. Really, it becomes
9 the key groups that would be responsible for
10 reviewing it, and the Habitat Management Program
11 would be one of those that would be, you know,
12 responsible for leading the review of projects
13 which had potential impacts on fish and fish
14 habitat.

15 Q. And then we won't flash it up
16 on the screen, but we also saw an email from Jerry
17 Conway in December of 2002 with respect to his
18 views on the blasting proposal.

19 Now, in your view, would that have
20 had any relevance to the review by science staff of
21 the blasting proposal being put forward by Nova
22 Stone?

23 A. No. Again, it is one piece
24 of the information. There is many different DFO
25 scientists that would review the information at the

1 time.

2 So there was -- I can give you an
3 example of one. Don Bowen at one point said there
4 was no issues, and his expertise would have been
5 related to seals. And so, yes, we would have
6 crossed that off the concern, but there still would
7 have been other concerns from different sectors of
8 DFO science.

9 There is no one individual that
10 would actually provide the unequivocal answer. It
11 would be a collection of information from various
12 sources.

13 Q. And from your knowledge of
14 the file, were there other concerns at this point
15 in time?

16 A. Yes, there were.

17 Q. And can you explain some of
18 them.

19 A. Some of the concerns, which
20 came primarily from Norm Cochrane, who is with DFO
21 science, and his expertise relates to noise
22 propagation in the marine environment, he had
23 concerns with the proposal related to what he
24 called sort of beaming, which is the fact that the
25 delays between the different explosives were very

1 close and, therefore, it could have amplitude
2 effect.

3 There was also concern, the fact
4 that as represented by the documents, this was an
5 initial blast. It was questioned whether or not
6 this represented a typical blast that would occur
7 at the 3.9 hectare quarry.

8 Q. And would that kind of
9 information, then, have been helpful for the
10 purposes of what was to be reviewed?

11 A. Right. If we're looking at
12 concerns around blasting impacts on fish and marine
13 mammals, you would certainly want to be looking at,
14 you know, a typical blast or the worst-case
15 scenario blast, and it wasn't clear from the
16 information provided whether or not this initial
17 blast represented something that would be typically
18 done at the 3.9 hectare quarry.

19 Q. I want to ask you to look at
20 paragraph 33 of your affidavit.

21 Now, in paragraph 33 of your
22 affidavit, you provide that, "I participated in a
23 March 31, 2003 meeting". And this is with respect
24 to the Whites Point EA proposal.

25 Do you recall that meeting?

1 A. Yes. I do, yes.

2 Q. Now, this is getting quite
3 close to the time that you flipped back to NSDEL;
4 is that correct?

5 A. That's right. And that is
6 the reason I was at this meeting. I was still
7 technically with Fisheries and Oceans, but as I was
8 returning to Nova Scotia Environment and Labour and
9 would be taking over some of the lead role in
10 relation to this file, I felt it important for me
11 to attend the file and see where the project was at
12 that particular point in time.

13 Q. How about we turn to Exhibit
14 R-144? Those are the notes of that meeting. I
15 think -- I am not sure if it is in the bundle, so
16 take a look up on the screen.

17 A. Okay.

18 Q. Are these your notes?

19 A. Yes, they are.

20 Q. Okay.

21 MR. NASH: Excuse me,
22 Mr. President, I asked no questions about the March
23 31st, 2003 meeting. These are not questions
24 arising from cross-examination.

25 MR. LITTLE: Well, Mr. Nash asked

1 questions with regard to Mr. McLean's involvement
2 in the file, and I think they were designed to show
3 Mr. McLean basically had no involvement in the file
4 during this time, and these notes certainly show
5 that he did.

6 PRESIDING MEMBER: Proceed.

7 BY MR. LITTLE:

8 Q. Can you tell us a little bit
9 about this meeting, Mr. McLean?

10 A. So this was a meeting of
11 federal regulators that would have potential
12 involvement with a review of the Whites Point
13 quarry. So there is people from Environment
14 Canada, the Canadian Environment Assessment Agency,
15 Industry Canada, Natural Resources Canada, and DFO.

16 Q. Can you give us a little bit
17 of context of where this is vis-à-vis, you know,
18 project descriptions coming in for the Whites Point
19 project?

20 A. So my understanding is that
21 the final project description had been submitted, I
22 believe, on March 24th, 2003. And so this would
23 have been a review of that project description and
24 determination of which federal departments would
25 have involvement with the federal environmental

1 assessment under CEAA for the Whites Point quarry.

2 Q. Thank you. Can you turn to
3 paragraph 37, please, of your affidavit. Actually,
4 36. Now, here you refer to a letter that went to
5 the proponents on April 14th, 2003.

6 A. Yes.

7 Q. Maybe we can take a look at
8 that letter. It is at Exhibit R-54. Now, this
9 letter talks about some initial thinking and
10 decisions made on the Whites Point project that
11 were communicated to the proponent.

12 Can we go to the very bottom of
13 the letter? One more. Okay. It is from
14 Mr. Zamora to Mr. Buxton, but I see at the very
15 bottom -- move it up a little bit, please, Chris.
16 There you go. I see an M. McLean. Is that you?

17 A. That is me, yes.

18 Q. Were you involved in the
19 preparation of this letter?

20 A. No, I wasn't.

21 Q. But you were kept in the loop
22 on it?

23 A. That's right, yes. There
24 would have been discussions with Phil Zamora sort
25 of what was happening with triggers around the

1 larger Whites Point quarry.

2 Q. And at this time, you were
3 with NSDEL?

4 A. That's correct, yes.

5 Q. At paragraph 40 of your
6 affidavit --

7 A. Yes.

8 Q. -- you talk about May 2003
9 and some work being done within the department, and
10 then in 41 you refer to a May 29th letter --

11 A. Yes.

12 Q. -- that DFO provided to the
13 proponent. And we have seen this one before?

14 A. Yes.

15 Q. Can we look at Exhibit R-55,
16 please, Chris. This is the letter that finds there
17 was a trigger with respect to the 3.9 hectare
18 quarry?

19 A. Yes, that's correct.

20 Q. Can we go to the very bottom
21 of the letter? It is not the last page. It is, I
22 think, page 2, because there is an addendum at the
23 end. All right.

24 Mr. McLean, I see you are cc'd on
25 this one?

1 A. Yes, I am.

2 Q. Did you provide input on this
3 letter?

4 A. I don't recall providing
5 specific input on this letter, no.

6 Q. But, again, you were kept in
7 the loop?

8 A. That's right. I would have
9 had conversations. I was dealing very closely with
10 Phil Zamora at that time.

11 Q. Can we go up just a little
12 bit on page 2. No, up a little bit higher.

13 Can you explain what this letter
14 is communicating, please, to the proponent?

15 A. Right. So this is basically
16 saying the 3.9 hectare quarry has a -- sorry,
17 section 2 authorization due to the blasting and as
18 a result --

19 Q. Sorry. Did you say section
20 2?

21 A. Sorry, section 32.

22 Q. Okay, thank you.

23 A. Section 32 authorization
24 under the Fisheries Act, and, as a result of the
25 larger quarry going through an environmental

1 assessment, DFO cannot issue a section 32
2 authorization in relation to the smaller quarry, as
3 it is being sort of subsumed or within the
4 boundaries and included in the project description
5 of the larger Whites Point quarry.

6 Q. Now, you said that there was
7 a section 32 authorization for this quarry within
8 the quarry.

9 A. Correct.

10 Q. Did that trigger eventually
11 get determined to apply to the larger quarry?

12 A. Yes. As I mentioned earlier,
13 in the federal coordination regulation process that
14 was led by CEAA, Canadian Environmental Assessment
15 Agency and Derek McDonald at the time, I believe it
16 was in September of 2003 -- sorry, 2002, that Phil
17 Zamora had clarified that there was a section 32
18 trigger associated with the 3.9 hectare quarry.

19 Q. Maybe we will take a look at
20 Exhibit R-552, because I think I know the document
21 that you are referring to. If we can -- this is an
22 email actually dated June 27th, 2003.

23 Can we go to the second page? Can
24 you -- is this what you're referring to?

25 A. Yes. So if you go to the

1 bottom of that table, there is a note saying that
2 the table reflects the outcome of the federal
3 coordination process which is what's used to make a
4 determination what federal departments would be
5 involved with a CEAA assessment.

6 It notes, though, subsequent to
7 that, DFO determined that it a Fisheries Act
8 section 32 trigger, which is the trigger of killing
9 fish by means other than fishing, which is a CEAA
10 trigger, in relation to the blasting plan for a
11 provincially approved 3.9 hectare quarry contained
12 within the proposed 380 acre main quarry site, and
13 it basically goes on to say, since the 3.9 hectare
14 quarry will ultimately be part of the main quarry
15 DFO determined that it also has a Fisheries Act
16 section 32 trigger for the main quarry.

17 MR. NASH: Mr. President, can we
18 get the date of that document, please, on the
19 record.

20 PRESIDING MEMBER: Yes. Okay,
21 yes.

22 MR. LITTLE: June 27, 2003.

23 MR. NASH: And the date of the
24 note that is attached?

25 MR. LITTLE: I imagine it is dated

00367

1 the same date.

2 MR. NASH: Is it dated the same
3 date or is there any date on it?

4 MR. LITTLE: It is an attachment,
5 so I don't think I see any date on it.

6 MR. NASH: All right. Thank you.

7 BY MR. LITTLE:

8 Q. Now, if we could look at
9 R-526, please, Chris. Now, earlier we had looked
10 at an email from Mr. Derek McDonald from, I believe
11 it was, August of 2003, saying that there was no
12 trigger, or DFO had determined there was no trigger
13 on the quarry. Was that statement correct?

14 A. No, it wasn't. Early in the
15 review process, there was still the potential
16 likelihood for a section 32 trigger, and that is
17 reflected in both the letters of April 14th and May
18 29th. So it was still considered by DFO as a
19 potential trigger.

20 Q. If we could scroll down in
21 this letter, please, this is dated September --
22 sorry, can you go back up -- September 17, 2003.

23 And can you tell us what Phil
24 Zamora is explaining here with respect to the 3.9
25 hectare quarry?

1 A. Right. So he's basically --
2 MR. NASH: Well, excuse me, I
3 really hesitate to interrupt, but all this is is an
4 interpretation of a document that Mr. McLean had no
5 participation in writing, apparently. He had left
6 DFO by this point, and he's simply giving an
7 explanation that is an editorial explanation that
8 anyone could give.

9 I would suggest that he's got no
10 direct evidence to give on this letter that would
11 be helpful to the Tribunal.

12 --- Tribunal members confer

13 PRESIDING MEMBER: What is the
14 question?

15 MR. LITTLE: There was talk
16 earlier about whether or not there was a section 32
17 trigger for the quarry. An email from Derek
18 McDonald was put forth about a month-and-a-half
19 prior to this letter. Mr. McLean has reviewed the
20 file and is obviously familiar with the document
21 and can provide testimony on it.

22 PRESIDING MEMBER: Proceed.

23 BY MR. LITTLE:

24 Q. So could we have the letter
25 go back up, please.

1 A. So DFO is stating here that
2 it considered in the final agreement -- JRP
3 agreement, it's referring to -- that the 3.9
4 hectare quarry associated with the project be
5 included in the scope of the project, and provides
6 the rationale for this.

7 Being the 3.9 is located within
8 the quarry, DFO has determined that blasting would
9 be a section 32 trigger, and the environmental
10 effects of the 3.9 hectare quarry are expected to
11 be the same as for the larger Whites Point quarry.

12 Q. This was all in respect of
13 discussions for getting the Whites Point Joint
14 Review Panel up and running?

15 A. That's right, yes.

16 Q. The proponents, as we know,
17 have described this 3.9 hectare quarry as being for
18 a test blast. Now, you had discussions with
19 Mr. Nash about why setback information was not
20 provided to Nova Stone after the Joint Review Panel
21 was called.

22 Was the fact that test blasting
23 was being described as one of the reasons for the
24 3.9 hectare quarry relevant to this -- to this fact
25 that the information was withheld?

1 A. No. The reason the
2 information was withheld is because, from all of
3 the information that was put forward to DFO, that
4 this was a quarry that would be operated under the
5 terms and conditions of the Nova Scotia Environment
6 and Labour approval.

7 Q. And did you have any
8 discussions with or did DFO officials have any
9 discussions with CEAA officials during the summer
10 of 2003 on this issue?

11 A. With regard to?

12 Q. With regard to the setback
13 information.

14 A. Yes. I think they were --
15 there were indications DFO was looking to provide
16 the information to the proponent regarding the
17 changes in the setback distance, that CEAA was
18 still concerned about not providing that
19 information until the establishment of the JRP.

20 Q. Mr. McLean, you were involved
21 in the project pretty much from start to end,
22 albeit with different departments. Do you feel
23 that both DFO, the agency, and NSDEL lived up to
24 its internal policies on ethics in carrying out the
25 EA of the Whites Point project?

1 A. I do. I mean, it is -- given
2 the complexity of this file, that we had a large
3 quarry, a smaller quarry inside that, there were
4 several decision factors. Those circumstances
5 certainly made the file complex and difficult often
6 to get information from the proponent related to
7 some of the information requests.

8 But all within those decisions,
9 you know, from my understanding and my discussions
10 with officials at DFO and CEAA and NSDEL, that
11 everyone sort of upheld the process that was in
12 front of the proponents at the time.

13 MR. LITTLE: Thank you. Those are
14 my questions, Mr. McLean.

15 PRESIDING MEMBER: Thank you,
16 Mr. Little. Mr. Nash?

17 FURTHER CROSS-EXAMINATION BY MR. NASH:

18 Q. Just two questions,
19 Mr. President. Are you aware of any DFO officials
20 saying to Mr. Buxton that the proponent was free to
21 go ahead with the blast at any time?

22 A. With regard to the 3.9
23 hectare quarry?

24 Q. Yes.

25 A. To my knowledge, there were

1 concerns with blasting during periods when species
2 of concern were present.

3 Q. Are you aware of any DFO
4 official saying to Mr. Buxton that he was free to
5 go ahead with the blast at any time?

6 A. No. There would have been
7 restrictions on blasting, as presented to the
8 proponent, particularly in times when inner Bay of
9 Fundy salmon were present or North Atlantic Right
10 Whales, and those were the restrictions that were
11 presented to the proponent.

12 Q. I am not speaking about the
13 timing of the blast. I am speaking about the
14 timing of any statement. At any time, did a DFO
15 official state to Mr. Buxton that the proponent was
16 free to go ahead with a blast of any kind on that
17 property?

18 A. I recall having discussions,
19 during the period leading up to the panel review,
20 that a test blast would provide some advantages to
21 verification of blasting models.

22 Q. And that would have been in
23 2007?

24 A. It would have been as early
25 as 2005.

1 Q. 2005?

2 A. Yes.

3 Q. That a test blast would be
4 useful to gather data?

5 A. That's right.

6 MR. LITTLE: Excuse me, Judge
7 Simma. We're getting into a time period that I had
8 no questions on in my re-direct.

9 MR. NASH: It was a subject area
10 that my friend raised in the re-direct examination,
11 the question of test blast and whether they could
12 have gone ahead with a test blast.

13 MR. LITTLE: But we are in 2007,
14 2005 now, and, pursuant to Mr. Appleton's standards
15 of re-cross-examination, you are venturing far
16 outside of it.

17 MR. NASH: Well, let's just leave
18 it to 2002, 2003 and 2004.

19 BY MR. NASH:

20 Q. Are you aware of any DFO
21 official saying to Mr. Buxton during that time
22 period that he was free to go ahead with the test
23 blast?

24 A. Again, my understanding
25 during that time, test blasting wasn't something

1 that was proposed. There was discussion of initial
2 blasting.

3 Q. Is the answer to my question
4 that you were not aware of any DFO official saying
5 to Mr. Buxton, Go ahead with the test blast?

6 A. I am not aware of any DFO
7 official saying they can go ahead and do blasting
8 on the 3.9 hectare quarry, if that is the question.

9 Q. Or on the large quarry?

10 A. That's correct, yes.

11 Q. If you go back to the note
12 that Mr. Little put to you at Exhibit R-144, which
13 is actually at tab 18 in the bundle of documents in
14 front of you, these were the notes of March 31st,
15 '03.

16 These are your notes of the
17 meeting; correct?

18 A. They are, yes.

19 Q. It says, "NWPA determination
20 made. HADD still not determined", and that was for
21 the wharf; correct?

22 A. That's right. Yes.

23 Q. And then it says, "DFO
24 determined it would be a comp study"; correct?

25 A. That's right, yes.

1 Q. Mr. Zamora said that?

2 A. I don't recall sort of -- I
3 would assume Mr. Zamora was the DFO representative
4 at the time, yes.

5 Q. And down below, "HADD
6 decision within days", again that was for the
7 wharf? That is about four lines from the bottom.

8 A. Yes.

9 Q. And over to the bottom of the
10 next page, "Bob", who was Bob?

11 A. Who was...

12 Q. Would that have been Bob
13 Petrie or somebody speaking on his behalf?

14 A. It could very well have been.

15 Q. He says -- apparently Bob is
16 quoted as saying: Not all opposed. Those that are
17 are well networked.

18 What that was saying was not
19 everyone around Digby Neck was opposed to the
20 quarry, but the ones that were were well networked;
21 correct?

22 A. Yes.

23 Q. Thank you. Those are my
24 questions.

25 QUESTIONS BY THE TRIBUNAL:

1 PRESIDING MEMBER: Thank you,
2 Mr. Nash. Do we have questions from colleagues? I
3 have one question.

4 PRESIDING MEMBER: And it relates
5 to the email in document -- in 12, so in file 12.
6 This is the email which Mr. Ross sent to three
7 people; namely, Don Bowan, Jerry Conway and Robert
8 Stephenson:

9 "Hi, folks: I would like to
10 have your comments on the
11 blasting plan by tomorrow."

12 Then the answer came from one of
13 the three gentlemen, namely Jerry Conway, and he
14 said:

15 "I have no concerns in
16 respect to marine mammal
17 issues in respect to the
18 specific proposal."

19 Now, we have heard in the
20 conversation between Mr. Little that the -- you
21 said that within DFO science, there were concerns,
22 and you mentioned, I think, one of the three, and
23 if I remember correctly it had to do with a problem
24 with acoustics.

25 THE WITNESS: Yes.

00377

1 PRESIDING MEMBER: But acoustics
2 impact on marine mammals, that's how I read it.

3 THE WITNESS: It is more the --
4 not the acoustic impacts on marine mammals, but the
5 transmission of those acoustics.

6 PRESIDING MEMBER: The
7 transmission?

8 THE WITNESS: Yes. So, I mean,
9 there is -- a couple of parts of the equation would
10 be determining how far that sound would travel.

11 PRESIDING MEMBER: Okay.

12 THE WITNESS: And that obviously
13 is a critical point in determining sort of what the
14 impact would be.

15 PRESIDING MEMBER: But my question
16 is: Did any of the other DFO science people, who
17 apparently had concerns, communicate these concerns
18 in the way that Jeff Conway communicated his lack
19 of a concern?

20 THE WITNESS: Yes. If there is --
21 there is an email showing, for example, Robert
22 Stephenson, who has worked at St. Andrew's
23 biological station, had concerns --

24 PRESIDING MEMBER: Is that in the
25 file?

1 THE WITNESS: I'm not sure if
2 it's -- it is a -- um..., I'm not sure if it is an
3 exhibit.

4 MR. LITTLE: It is. And I can try
5 and find it for you.

6 THE WITNESS: And, again,
7 referring to those specifics there, then there is
8 additional information from -- as I mentioned,
9 Norman Cochrane was the DFO science dealing with
10 noise propagation.

11 PRESIDING MEMBER: If that
12 document could be pointed out, I think we would all
13 be interested in that, because the only exchange
14 that was mentioned within the week was this Jeff
15 Conway: No concern with regard to marine mammals.

16 THE WITNESS: I think the date on
17 the Robert Stephenson one is, I think, December
18 11th or December 12 of 2002.

19 MR. PULKOWSKI: Mr. President --
20 you have found it?

21 MR. LITTLE: R-121 is from Robert
22 Stephenson, and R-125 sets out Norm Cochrane's
23 concerns with respect, in particular, to beaming
24 and the comments about whether this is an initial
25 blast or not.

1 PRESIDING MEMBER: We don't have
2 to go into these documents. We can study them
3 after.

4 MR. LITTLE: There is one more.
5 There is R-120, which is another Norm Cochrane.

6 PRESIDING MEMBER: Thank you very
7 much. Thank you. That was all I -- the only
8 question I had.

9 Any follow-ups from
10 colleagues? It doesn't seem to be the case. So if
11 you are in a terrible hurry, you could run, but I
12 think it is too early to run, because we only have
13 a couple of housekeeping matters to discuss.

14 The first one would be -- if you
15 want to be released, because I am always very
16 nervous to get to the airport. Probably Barry
17 Appleton is one of these types who arrives at the
18 last moment.

19 --- Laughter

20 PRESIDING MEMBER: So if you want
21 to leave, you are fine to leave, and I wish you a
22 safe flight.

23 THE WITNESS: Okay, thank you very
24 much.

25 PRESIDING MEMBER: All right.

1 --- Mr. McLean stands down.

2 PRESIDING MEMBER: That leaves us
3 with two housekeeping or organizational issues.
4 First, Dirk, if you could state, where do we stand
5 with regard to time consumption?

6 MR. PULKOWSKI: I am happy to do
7 that. Given the consents that were expressed
8 today, we have now proceeded to the more detailed
9 count that we announced we would be able to do, if
10 requested.

11 So the PCA has kept a running
12 total of the time utilized by both sides in the
13 course of the hearing, and specifically for the
14 purpose of witness examination. Perhaps before
15 giving you the figures, let me just briefly clarify
16 the parameters that we used.

17 I would recall section 3.3 of
18 procedural order number 18 which clarifies, nothing
19 unusual there, that the time used for introducing
20 and re-directing a witness would be deducted from
21 the account of the party presenting the witness,
22 whereas the time for cross-examination, re-cross,
23 if necessary, is deducted from the opposing party.

24 Time spent in relation to Tribunal
25 questions will not be counted to either parties'

1 time account.

2 Now, there is an additional
3 consideration here, which had to do with the length
4 of the opening statements. I think it was agreed
5 in the pre-meeting with the Tribunal that each
6 party would be allocated 90 minutes for its opening
7 statements, and that any time in excess of those 90
8 minutes would then be deducted from the time that
9 would be available for cross-examination.

10 On that basis, there is a
11 contingent of 30 minutes to be deducted from the
12 investor's time and an amount of four minutes to be
13 deducted from Canada's cross-examination or
14 re-examination time.

15 Including those 30 minutes and
16 four minutes, the investors would have used an
17 amount of 510 minutes and the respondent would have
18 used an amount of 694 minutes, and that includes
19 the re-direct examination of Mr. McLean.

20 PRESIDING MEMBER: While we let
21 that sink in...

22 --- Laughter

23 PRESIDING MEMBER: -- me think
24 whether I understood all of this, let me mention a
25 second housekeeping issue, namely, the question of

1 the so-called hot tubbing. I know what that means.

2 --- Laughter

3 PRESIDING MEMBER: I give it the
4 correct meaning of any other. But I think we have
5 come to the conclusion that we cannot really
6 indicate whether we consider hot tubbing necessary
7 before we have heard particularly from Mr. Smith;
8 that is the witness, Canada's witnesses.

9 So, unfortunately, we are not able
10 to tell you now whether Wednesday afternoon will be
11 spent in a hot tub or in any other way.

12 Is there any remark on the part of
13 the parties with regard to the time issue?

14 MR. NASH: Do we have a
15 calculation of how many minutes we have left for
16 each side? Is that available?

17 MR. PULKOWSKI: I am happy to give
18 you the total, and I will leave you to make the
19 relevant subtraction.

20 On the basis of the schedule that
21 was distributed in advance of the hearing, this
22 certain number of minutes were allocated to the
23 investors in addition to those available to the
24 respondent based on the number of witnesses, and
25 that would amount to 1,170 minutes for the

00383

1 investors versus 990 minutes for the respondent, so
2 a 180-minute difference.

3 MR. NASH: Thank you. That is
4 very helpful. Thank you.

5 PRESIDING MEMBER: Mr. Little, any
6 questions?

7 MR. LITTLE: No questions other
8 than just wondering when we would be commencing on
9 Monday.

10 PRESIDING MEMBER: 9:30?

11 MR. LITTLE: That sounds great
12 with us.

13 PRESIDING MEMBER: Okay, so we are
14 going to meet again on Monday at 9:30, and the
15 Tribunal wishes you a happy weekend, safe flights
16 if you need to fly.

17 MR. APPLETON: Just before we go
18 off the record, just to go back to the secretary,
19 please, I just want to confirm, so there is no
20 misunderstanding, that is the time for the witness
21 portion of the hearing? That is not the closing
22 times, which have already been allocated and set?

23 MR. PULKOWSKI: That is correct.
24 The numbers I indicated do not include the time
25 already spent on opening statements, so those 90

00384

1 minutes. They only include the extra time in
2 excess of those 90 minutes and does not include the
3 budget for the three hours allocated to each side
4 for closing.

5 PRESIDING MEMBER: So everything
6 is clear? Thank you. The meeting is closed.
7 Thank you.

8 --- Whereupon the hearing adjourned at 5:59 p.m.,
9 to be resumed on Monday, October 28, 2013 at
10 9:30 a.m.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25