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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

7 - and -
8 GOVERNMENT OF CANADA

Respondent

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 Wednesday, October 30, 2013 at 9:32 a.m.

VOLUME 7

COUNSEL:

14 Barry Appleton For the Claimants
15 Gregory Nash
16 Frank S Borowicz, Q.C.
17 Kyle Dickson-Smith
18 Dr. Alan Alexandroff
19 Chris Elrich
20 Scott Little For the Respondent
21 Shane Spelliscy
22 Jean-François Hebert
23 Stephen Kurelek
24 Reuben East
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1 Toronto, Ontario

2 --- Upon resuming on Wednesday, October 30, 2013
3 at 9:32 a.m.

4 PRESIDING ARBITRATOR: I think
5 we're all set. Good morning. This is the seventh
6 and second-last hearing day in this case, and I
7 think we are ready to hear Mr. Smith. So if he
8 could be called, then, Mr. Nash, he will be all
9 yours.

10 MR. NASH: After the introduction.

11 PRESIDING ARBITRATOR: Oh, after
12 the direct, yes. So, Mr. Smith.

13 Good morning, Mr. Smith.

14 THE WITNESS: Good morning, sir.

15 PRESIDING ARBITRATOR: I have seen
16 you around, but I didn't realize that it was you.

17 --- Laughter

18 PRESIDING ARBITRATOR: That you
19 were Mr. Smith.

20 MR. SMITH: Mr. Smith is actually
21 taller than the guy you saw walking around.

22 --- Laughter

23 PRESIDING ARBITRATOR: Mr. Smith,
24 you should have in front of you a statement. If
25 you could please read that out.

1 MR. SMITH: I solemnly declare
2 upon my honour and conscience that I will speak the
3 truth, the whole truth and nothing but the truth,
4 and that my statement will be in accordance with my
5 sincere belief.

6 AFFIRMED: LAWRENCE E. SMITH, Q.C.

7 PRESIDING ARBITRATOR: Thank you
8 very much. Please go ahead.

9 EXAMINATION IN-CHIEF BY MR. KURELEK:

10 Q. Good morning, Mr. Smith. I
11 just have a few opening questions for you just to
12 remind the Tribunal of your role here. Can you
13 tell us first of all how long you have been
14 practising as a lawyer?

15 A. I have been practising for
16 approximately 30 years.

17 Q. Can you briefly describe the
18 nature of your legal practice?

19 A. My legal practice has been
20 focussed in the regulatory and environment area.
21 What I would emphasize, I suppose, for the purposes
22 of this proceeding, is that I've done a fair bit of
23 project approval work, principally in the energy
24 area.

25 The project approval work would

1 engage a range of issues. They would be financial,
2 economic, and of course environmental, including
3 interaction with the federal and provincial
4 authorities and all of the processes that they have
5 for approving major projects.

6 Q. So before we get into the
7 details of some of the projects you have worked on,
8 can you tell us how long you have practiced in this
9 particular field of law.

10 A. Throughout my career, at
11 different times I have done it more intensively
12 than others.

13 During the period in question, I
14 would say roughly 95 to -- that is, 1995 to about
15 2010, I was very intensively involved in project
16 approvals in the Canadian Maritime provinces.

17 Q. Okay.

18 A. They are more fully detailed
19 in my first report, if that is helpful.

20 Q. And that's where I'm going
21 next. Can you briefly describe some of the actual
22 environmental assessments you have worked on.

23 A. I will do a quick flyby, if
24 that is acceptable.

25 In my original report, under

1 related professional background, starting at page
2 2, I listed the Sable Offshore Energy Project '96
3 through '98, and the Maritimes & Northeast Pipeline
4 project '96 to '98.

5 That was a multi-jurisdictional
6 joint panel. It satisfied the regulatory
7 requirements of the Nova Scotia government, the
8 CEAA, the Canada -- sorry, Nova Scotia Offshore
9 Petroleum Board and the National Energy Board, and
10 it involved an offshore project with initially
11 three producing platforms and then an initial
12 processing facility on the Thebaud platform
13 offshore, a pipeline to shore, which was a raw gas
14 pipeline.

15 Onshore was a one of the bigger
16 gas processing plants in Canada. There then was a
17 large diameter natural gas pipeline which
18 ultimately went all the way to Boston. In fact, it
19 was referred to as a bullet line at the time.

20 There was also a gas liquids line
21 that went from the landfall at Goldboro, Nova
22 Scotia up to Cape Breton, where it went to a
23 fractionator.

24 So it was a large project that
25 underwent hearings, and it was this project that

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1 Mr. Fournier was the chairman of.

2 We then -- when I say "we", the
3 Maritimes & Northeast Pipeline I continued to
4 represent -- there was a lateral pipeline project.
5 There were several of them, 1999, and then again --
6 I guess they were all in 1999, but they were at
7 different points.

8 A lateral pipeline project is a
9 reflection of the fact there was no gas market in
10 Canada -- or, sorry, in the Maritimes at the time,
11 and so these pipelines, which were substantial
12 pipelines, were then built out to markets, in Point
13 Tupper's case in Cape Breton, in Halifax's case
14 obviously in Halifax, and then Saint John, New
15 Brunswick the pipeline was built over to Saint John
16 itself.

17 I was involved in the Deep Panuke
18 offshore gas development. That was an offshore gas
19 development near Sable Island, but on a different
20 geological formation, and that was also the
21 pipeline to shore.

22 There was not a requirement for a
23 new gas pipeline onshore, however, because there
24 was ample capacity on the mainline for Maritimes.

25 I also did the Millennium West

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1 pipeline project 1999 to 2001. That was a pipeline
2 to Lake Erie, and then across Lake Erie into the
3 United States.

4 Subsequently, 2004 to 2005, I did
5 the Bear Head LNG project that was discussed a
6 little bit yesterday.

7 Later still, 2006, I worked on the
8 environmental regulatory approvals for the Kitimat
9 LNG project, and the 2007 I did the Brunswick --
10 that is Emera Brunswick -- pipeline project, which
11 was to connect the LNG facilities at Canaport to
12 the Maritimes & Northeast US pipeline, and then on
13 to the deep New England market.

14 Then more recently, 2009, I
15 represented the Aboriginal Pipeline Group in --
16 they were one of the owners who were participating
17 in, again, a multi-jurisdictional joint panel to
18 secure approval of a gas processing development in
19 the MacKenzie Delta. That would include drilling
20 wells, and the same as Sable, but onshore.

21 It included a major gas processing
22 plant up in the Delta area, and then a gas liquids
23 line to Norman Wells and a major natural gas
24 transmission line to connect to facilities in
25 Alberta.

1 I have been involved in all of
2 these projects for proponents, so I am not just in
3 the hearing for an intervenor group. I've always
4 taken the perspective, because of my role, that we
5 needed to get these projects done on time and to
6 try and mitigate the risks of project development.

7 I've been involved in judicial
8 reviews arising out of most of those projects, as
9 well.

10 Q. One final question. You have
11 submitted two expert reports in this arbitration.
12 Do you have any corrections to make to either of
13 them here today?

14 A. I have no further
15 corrections. There was one mistake that I made in
16 the first report and I corrected that on page 28 of
17 my rejoinder. I don't think there is any need to
18 turn it up, because the correction is there.

19 Q. Thank you.

20 PRESIDING ARBITRATOR: Thank you,
21 Mr. Kurelek. Mr. Nash.

22 CROSS-EXAMINATION BY MR. NASH:

23 Q. Thank you, Mr. President.
24 Mr. Smith, by now I think you will know who I am.

25 A. I do.

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1 Q. My name is Greg Nash and I am
2 co-counsel for the claimants in this case.

3 A. Good morning, sir.

4 Q. Good morning to you.

5 From both your description just
6 now and in your report, your curriculum vitae,
7 you're a very experienced practitioner in energy
8 law-related matters in Canada?

9 A. And I would emphasize
10 practitioner, yes, sir.

11 Q. And you have regularly
12 practiced before the National Energy Board;
13 correct?

14 A. Amongst others.

15 Q. The Ontario Energy Board?

16 A. To some degree.

17 Q. The Manitoba Energy and
18 Utilities Board?

19 A. I have appeared before the
20 Manitoba Public Utilities Board.

21 Q. And also before US regulatory
22 agencies; is that right?

23 A. I've been involved with US
24 regulatory agencies. Actual appearances is another
25 thing, but I have certainly had dealings with them.

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1 Q. And you have been with the
2 law firm of Bennett Jones since 1984; correct?

3 A. They haven't been able to get
4 rid of me yet.

5 Q. And you were part of the
6 management team at Bennett Jones at one time. You
7 have been chair of the Ottawa office involved in
8 the executive committee for a number of years;
9 correct?

10 A. I was, and I was
11 vice-chairman for a number of years, as well.

12 Q. And have you presented papers
13 at conferences on energy law-related matters?

14 A. Yes, sir, as more fully
15 detailed in my résumé, which is I think appendix
16 one to my initial report.

17 Q. Have you published articles
18 on energy law-related matters?

19 A. There is a reasonably lengthy
20 list in that appendix. I could go through it if
21 you want, but I would say there were articles that
22 I have participated in. There have been speeches
23 which sometimes are published as part of the
24 proceedings. Those speeches would have dealt with
25 project approvals, and, you know, speaking to

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1 issues like CEAA and related issues.

2 Q. Have you written any
3 annotated guides to any Canadian environmental
4 legislation?

5 A. No, sir.

6 Q. Have you published any papers
7 on administrative or constitutional law?

8 A. I don't believe so, but I
9 would say that in the context of a number of those
10 presentations, we would have touched on those
11 matters to the extent they were germane.

12 Q. Would you consider yourself
13 an expert in administrative and constitutional law?

14 A. I would -- I have appeared at
15 the appellate level frequently in the area of
16 administrative law, including the Supreme Court of
17 Canada, and we've -- I guess I'm struggling with
18 the term "expert".

19 I am certainly a very experienced
20 practitioner in the administrative law area, and we
21 have enjoyed some success at the appellate level
22 with, you know, new precepts in administrative and
23 regulatory law.

24 So from the standpoint of a
25 recognized academic, I am not that.

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1 Q. Right.

2 A. Whether the work that a
3 lawyer does when gowned before an appellate
4 tribunal is scholarly, I leave that to you.

5 Q. All right. Have you had any
6 faculty appointments at any universities?

7 A. No, not faculty appointments.
8 I have presented the occasional lecture.

9 Q. Have you been retained by
10 governments to provide counsel on energy
11 law-related matters?

12 A. I have been consulted by some
13 governments on -- you said energy-related matters?

14 Q. Yes.

15 A. Yes, I have definitely been
16 consulted by governments, including the Nova Scotia
17 government, but I wouldn't say that I had a
18 consulting arrangement. It was probably more as,
19 you know, you might say public, a matter of public
20 service.

21 Q. Have you written any
22 textbooks on energy law-related matters?

23 A. I participated in, along with
24 one of my partners, Matthew Bender, analysis of
25 energy regulation in Canada, with a particular

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1 focus on the National Energy Board and NAFTA.

2 Q. Have you been counsel to any
3 environmental assessment review panels?

4 A. And I take the distinction I
5 believe Mr. Rankin had indicated that he had
6 participated in one. I think that was an EARPGO
7 review, but I could be wrong.

8 I would not have been counsel to a
9 panel, but I was involved in a number -- as I have
10 identified --

11 Q. Yes.

12 A. -- a number of panel reviews
13 and screenings and comprehensive studies, but
14 always for the proponent itself.

15 The other point I might make about
16 my prior experience was that I served as counsel
17 for the National Energy Board for three years.

18 Q. Back in the '80s?

19 A. Back in the '80s.

20 Q. From 1981 to '84?

21 A. That's right.

22 Q. Right.

23 A. So in the context of project
24 approvals then -- and they wouldn't have involved
25 CEAA, per se, but they did involve federal

1 environmental regulation and provincial -- I was
2 the counsel to the board in the prosecution of
3 those cases.

4 Q. Have you been a member of any
5 environmental assessment review panel?

6 A. No, sir. Mr. Connolly has
7 done a number of them. I have not.

8 Q. And your two reports, your
9 first report is dated December 7th, 2011; correct?

10 A. I accept that.

11 Q. Your second report, your
12 rejoinder report, is March 21st of this year?

13 A. Sounds right.

14 Q. I see you've got -- do you
15 have copies of your reports in front of you?

16 A. I have copies of my report
17 here, yes.

18 Q. If you could turn to your
19 first report at page 2, and I would ask that you
20 turn as well to tab 34 in the binder of documents
21 before you.

22 A. Just give me a moment, if you
23 would. Page 2 of my --

24 Q. Of your first report.

25 A. And the thick binder?

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1 Q. The thick binder, yes.

2 A. All right.

3 Q. And that is Exhibit C-992,
4 which I would ask to be put up on the screen?

5 A. Which tab of the thick
6 binder?

7 Q. Tab 34.

8 A. Thirty-four?

9 Q. Yes.

10 A. I have it. It is a map?

11 Q. It is a map and it is up on
12 the screen, on both screens.

13 A. Thank you.

14 Q. And we have a laser pointer,
15 if that might be of use. I am going to ask you to
16 point out some things on this map and it may be of
17 use, if you can, to point to that screen over to
18 your left as to where the locations are of certain
19 things. All you have to do is press the little
20 button there.

21 A. I think it is better if I do
22 that where it is less likely to hit anyone over
23 here.

24 --- Laughter

25 Q. I think that would be --

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1 A. The people to my left should
2 take care.

3 --- Laughter

4 Q. Yes. Stand back, counsel for
5 Canada.

6 --- Laughter

7 Q. You have mentioned that you
8 were involved in the Sable Gas project?

9 A. Yes, I was.

10 Q. And were you lead counsel for
11 the proponents in that?

12 A. I was.

13 Q. And the Sable Gas project was
14 the subject of a Joint Review Panel; correct?

15 A. Yes, sir.

16 Q. And you were also involved in
17 the project called the Maritimes & Northeast
18 Pipeline project; correct?

19 A. Correct.

20 Q. And were both of those
21 projects combined for the Joint Review Panel?

22 A. For the Joint Review Panel.

23 Q. Could you just, if you can,
24 if it is shown on that map, point to where the
25 Sable offshore process was?

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1 A. I will, but let me -- if you
2 see the laser is working here, but it doesn't seem
3 to work on the map. Do you want me to try --

4 MR. APPLETON: We have another
5 one. It is a military-grade laser.

6 --- Laughter

7 MR. APPLETON: Seriously.

8 MR. NASH: Don't use it near the
9 White House.

10 MR. APPLETON: Mr. Smith, if I
11 might. Be careful with this.

12 THE WITNESS: I will try to resist
13 my Star Wars analogies.

14 --- Laughter

15 THE WITNESS: So I have the light
16 saber. Here we go.

17 BY MR. NASH:

18 Q. Okay, there you go.

19 A. Sable is out here. There are
20 three producing platforms in this area. There was
21 contingently other locations where there would be
22 wells drilled and platforms built.

23 This has, you know, some analogy
24 to the idea of a small quarry within a big quarry.

25 The issue arises whether you could

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1 have approved one of these field developments
2 without considering all of them. There was from
3 there --

4 Q. Just for the record, when you
5 point to something on that map, for the record,
6 could you point to where -- could you say for the
7 record where it is?

8 A. I will try to verbalize it.
9 I should have thought of that.

10 Q. That's okay.

11 A. Somewhat to the right -- I'm
12 not as nautical as I probably should be. Somewhere
13 to the right is where those producing fields were,
14 and they all joined to a central platform which was
15 called Thebaud, from Thebaud to shore.

16 And you should know that the
17 pipeline never touched Sable Island. You weren't
18 allowed to land on Sable Island, actually.

19 Q. And what was offshore?

20 A. Gas; gas and liquids.

21 Q. Gas, but in terms of the
22 building of the platform, what did that involve?

23 A. Oh, that involved --
24 throughout this process you should assume that
25 there was ocean dumping. There was blasting in

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1 different areas. There were pipeline lays. They
2 were pile driving for the footing of the platforms.

3 There was seismic activity...
4 blasting. Now, those are typically air blasts that
5 are done in an array dragged behind a boat used to
6 determine the most prospective areas to actually
7 drill. So that's what was occurring out in this
8 area.

9 And while we're out here, I will
10 tell you that just over to the left of Sable,
11 roughly, was where Deep Panuke was to be developed.

12 It was being developed in a
13 different geological horizon, which was a reef;
14 whereas Sable was in, as they put it, the sands.
15 The pipe then would --

16 Q. What was the ocean depth at
17 Sable island and Deep Panuke, approximately, if you
18 remember offhand? It is not --

19 A. We're not into the abyssal
20 sea, which is the continental margin, which is
21 further to the right and straight down.

22 It was actually fairly close to an
23 interesting canyon, which was called "the gully",
24 which had environmental significance due to a
25 hydraulic curtain effect.

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1 it went into Country Harbour and Goldboro, Nova
2 Scotia, which is somewhere in here.

3 And then from there, there was a
4 big onshore gas processing plant and a slugcatcher,
5 and then from there the Maritimes & Northeast
6 Pipeline started, which went across the isthmus to
7 New Brunswick, then over toward Fredericton, and
8 then down towards Saint John, and then ultimately
9 down towards Boston.

10 And there was also from Goldboro a
11 natural gas liquids line that went up to Cape
12 Breton where there was a fractionator, and that
13 would produce the -- separate out the propanes,
14 butanes, isobutanes.

15 One of the attractions of the
16 Sable prospect was that it was very liquids rich
17 and so had an added economic feature associated
18 with it.

19 Q. What was the diameter of the
20 pipeline that was resting on the ocean floor
21 between Sable Island and the coast of Nova Scotia,
22 approximately?

23 A. While I try to remember that,
24 I will tell you the Sable -- the Maritimes &
25 Northeast Pipeline was a 30-inch all the way

1 through to the US border.

2 I believe it was a 24-inch, and
3 some of the reasons you do that is it was a -- when
4 you were onshore the 30-inch pipeline, the
5 anticipation would be other fields would develop.
6 So you would somewhat oversize the pipeline to
7 match what our forecast future requirements. So
8 this comes into things like cumulative effects.

9 The offshore pipe, though, was
10 much more specific to the Sable development itself.
11 There were additional fields which were expected to
12 be developed, some of which were in the plan before
13 the regulators, but, again, the anticipation was
14 that there would be more activity out there.

15 I believe it was a 24-inch, but I
16 stand to be corrected. It was a large diameter
17 pipeline. The liquids line up to Cape Breton was,
18 I believe, a 10-inch line.

19 Q. And the agencies involved in
20 consideration of the Sable Gas project included the
21 National Energy Board, Government of Nova Scotia,
22 several departments of Government of Canada,
23 including DFO, Transport Canada and Environment; is
24 that right?

25 A. Yes. Let me explain it this

1 way. The panel itself was formally constituted so
2 that it would satisfy the regulatory requirements
3 of the CNSOPB. So the Canada-Nova Scotia Offshore
4 Petroleum Board had jurisdiction over the offshore
5 facilities, the drilling platforms, pipeline to
6 shore.

7 There was overlapping jurisdiction
8 with the National Energy Board to the extent of the
9 offshore pipeline to the Thebaud platform.

10 Onshore, and to the extent you
11 were in a provincial harbour, you got into issues
12 about overlapping provincial jurisdiction, and
13 there were asserted provincial claims with respect
14 to some of the offshore facilities, as well.

15 Nova Scotia was formerly part of
16 this, the same as you see in the Whites Point
17 situation, but it did not include New Brunswick.
18 Participating there, that is in the process, in the
19 hearings, certainly were Environment Canada and
20 DFO. I recall DFO empanelled six witnesses. They
21 were offered as experts. That was the role they
22 played.

23 In Environment Canada's case, they
24 empanelled 11. They wanted to empanel 18, but we
25 didn't have enough mics, and so they made do with

1 11, but to give you the sense that it was extensive
2 and rigorous.

3 There were a lot of -- there was a
4 lot of expert evidence provided by the government
5 officials, but their role, as I say, was more as
6 provision of expert advice.

7 Coming away from the environmental
8 assessment, the various regulatory bodies were then
9 enabled to continue to process the regulatory
10 applications to implement the project. There would
11 be a myriad of permits, local permits, approvals,
12 that kind of thing.

13 And we ran into issues like the
14 one about you can't carry out your project in whole
15 or in part, because, as they were trying to develop
16 the project, they were coming up with different
17 landing sites, different sites like Sheet Harbour,
18 where they needed to secure the land to lay down
19 equipment that would be shipped offshore to
20 construct.

21 And we found that we were not able
22 to proceed to get approvals, provincial or federal,
23 in respect of those activities until the entire
24 environmental assessment was complete.

25 Q. Do you recall offhand how

1 many kilometres, approximately, the pipeline was on
2 land for Sable and Maritimes, those two projects?

3 A. I should know that. It was
4 several hundreds of kilometres. It extended from,
5 as you saw, landfall at Goldboro all the way
6 through to Fredericton, and then down from
7 Fredericton to St. Stephen, New Brunswick, and then
8 on to Boston. And that was a brand new pipeline in
9 the United States, as well.

10 Q. And the JRP hearings were
11 high-profile hearings that lasted approximately 56
12 days; correct?

13 A. They were actually -- I may
14 have -- I should add that that includes the scoping
15 meetings. There were four scoping meetings.

16 Q. Just while we had the map up
17 there, could we go back to the map. You were
18 mentioning Deep Panuke?

19 A. Yes.

20 Q. That was another offshore
21 drilling project, was it?

22 A. Yes, and much smaller scale.
23 I think what you saw with the subsequent
24 development -- that is, oil and gas developments in
25 this region -- the rest of them were kind of

1 add-on. You know, once you had the backbone
2 development, then they were -- that was actually
3 something that encouraged development in the area,
4 kind of the cumulative effect, I guess, of having
5 had the initial project.

6 So Panuke was looking seriously at
7 connecting into the Sable offshore pipeline, but if
8 they couldn't do that, they would build their own.

9 It was a smaller-scale
10 development, just a couple of wells and a platform
11 offshore, as I had indicated, somewhere to the
12 west, I think, of Sable, but, you know, relatively
13 close by, a parallel line almost into shore, and it
14 would then have connected to the Maritimes &
15 Northeast Pipeline on the other side of the Sable
16 Gas processing plant.

17 That project, I should emphasize,
18 faltered. We went through the scoping hearings,
19 but the application was withdrawn because the
20 economics had deteriorated, as they had done
21 additional exploration work. They didn't have the
22 certainty they needed for that scale of
23 development. So it was then down-scaled, and then
24 resurfaced some years later as the Panuke project,
25 which actually just started flowing within the last

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1 month.

2 Q. And the Panuke project was
3 tracked as a comprehensive study; is that correct?

4 A. Deep Panuke, which is the one
5 I was involved with, was a comp study, yes. Yes,
6 it was.

7 Q. Right.

8 A. And, again, there was nothing
9 much onshore. So it is a little bit like the
10 laterals where, when you did the lateral projects,
11 they were just discrete pipelines, smaller ones,
12 into specific markets in the Canadian Maritimes.

13 Q. You were also involved in the
14 Bear Head project; correct?

15 A. I was.

16 Q. And the Bear Head involved an
17 LNG plant onshore and the marine terminal in the
18 water; correct?

19 A. Yes, sir.

20 Q. There was a regasification
21 facility onshore. Where was Bear Head located?

22 A. Bear Head is in the Strait of
23 Canso, which is one of the most -- one of the
24 busiest harbour areas in that part of the world.

25 There was formerly a Gulf refinery

1 on that site. I believe that's correct, but the
2 entire area was industrially zoned, and it was what
3 we called a brownfield site, not a greenfield site
4 where you never had any industrial development
5 before.

6 So it was a very, very different
7 setting than Goldboro was or, for that matter,
8 Whites Point.

9 It is right in here. There was
10 the same type of a loading facility. I mean, it is
11 different because of the nature of the commodity,
12 but you had a wharf, a docking facility, loading
13 booms and pipes that would unload the LNG into
14 tanks.

15 The tanks onshore at Bear Head
16 were 180,000 cubic metre tanks, which is a little
17 bigger than at Canaport in Saint John and a little
18 bigger than what you see elsewhere.

19 So that's a brief description of
20 the project. It was designed, I think, for about a
21 Bcf a day output, and it could have been expanded
22 to about a Bcf and a half, if memory serves.

23 Q. And the wharf for Bear Head,
24 which was, as I understand it, about 2004-2005 --
25 is that when that was ongoing, in that range?

00030

1 A. I will just check it.

2 Q. Yes.

3 A. I am getting all of my dates
4 mixed up. 2004-2005, you're right.

5 Q. And the only part of that
6 project that was scoped for the federal assessment,
7 for a CEAA assessment, was the wharf; correct?

8 A. Let me try and describe it in
9 my words, because I might get it wrong.

10 Q. Sure.

11 A. The thing -- this is a fair
12 point. Canaport was -- Canaport is an LNG facility
13 which is in Saint John, New Brunswick. It was
14 being reviewed at roughly the same time, as a
15 matter of fact exactly the same time, as Bear Head.

16 And Canaport was scoped as a
17 comprehensive study, and when we initially started
18 on Bear Head, that looked to be the case, as well.

19 However, it fit within exemptions
20 under the Comprehensive Study List, and for that
21 reason it was scoped differently and so it
22 proceeded as a screening.

23 Q. Are you talking about "it"
24 being the --

25 A. Bear Head.

00031

1 Q. The Bear Head LNG facility?

2 A. Yes.

3 Q. Yes.

4 A. So the project -- again, this
5 is the point, that location matters. It is a
6 little bit like the real estate nostrum that:
7 Location, location, location.

8 And in the case of this very busy
9 port area with lots of other heavy industry around
10 it, on the site of a former refinery or something
11 of that kind, this was a brownfield site. It had
12 been industrially zoned after a planning process
13 that involved public consultation.

14 That fit within the exemption that
15 exists in the Comprehensive Study Regulations for a
16 marine terminal. And so the way that that section
17 read, without turning it up -- although we can if
18 you want -- what it says is that if the marine
19 terminal is located in an area where there had
20 been -- if it was historically used for that
21 purpose or it had been zoned involving public
22 consultation, then it was -- if you think of the
23 common sense of the Comprehensive Study List, those
24 are for more -- those are for projects that are
25 likely or more likely to have significant adverse

00033

1 the second bullet of the lower email reflects the
2 exemption to which I referred for the marine
3 terminal. Yes, I have read that, sir.

4 Q. So the originating email is
5 from Mr. Hood to Mr. Sweeney and Mr. Potter, with a
6 copy to Richard Nadeau, who is Mr. Hood's
7 superior -- you recall that from the evidence he
8 gave earlier this week -- and Cathy Gee who was an
9 expert biologist whose name also came up in the
10 context of Mr. Hood's notes during his evidence;
11 Laurie Wood and Stuart Dean.

12 And he says to Reg and Ted:

13 "There is no requirement for
14 DFO approvals of the
15 land-based LNG plant and
16 therefore no CEAA trigger for
17 DFO to conduct an assessment
18 of this portion of the
19 proposal. Based on the above
20 and our present practice of
21 project scoping to DFO
22 legislative authority, our
23 recommendation is that you
24 restrict the scope of project
25 to the marine infrastructure

1 portion of the proposal and
2 that a screening level
3 assessment of this portion be
4 conducted."

5 And that was your understanding
6 when you wrote your opinion, that the present
7 practice in 2003 of the Department of Fisheries and
8 Oceans was to scope a project to DFO legislative
9 authority?

10 A. First off, as you were
11 leading me through this, you mentioned some of
12 these individuals, and I just stipulate that I
13 frankly don't really know what they were doing.

14 Q. Fair enough.

15 A. And who they were reporting
16 to at the time.

17 Q. Sure.

18 A. The no requirement for DFO
19 approvals, there was an investigation on site, and
20 that is consistent with my experience. In the case
21 of Canaport, there was an investigation on site,
22 and it was determined in the case of Canaport there
23 was a stream.

24 And so that had confirmed what was
25 initially thought to be the comp study, as well,

1 and the scope of the project including terrestrial
2 and marine facilities and activities.

3 In this case, I see what the words
4 say.

5 Q. Yes.

6 A. But, you know, again, my
7 experience was that you couldn't count on the
8 narrower scoping in all cases.

9 If there was something which was
10 integral and there were thought to be, at the same
11 time, significant adverse effects, then they were
12 more likely to include everything in the scope of
13 the project.

14 And, generally, as a project
15 proponent, candidly, we would prefer to just get it
16 all out on the table, have it done in a
17 coordinated, harmonized process, with both levels
18 of government participating, because my job as a
19 proponent's counsel was to get that project done by
20 a certain time, and that was critical to them being
21 able to meet their critical path. They had
22 commercial arrangements that were reliant upon that
23 kind of timing.

24 And so my experience was that the
25 practice of the scoping varied in accordance with

1 the circumstances, and in the circumstances of Bear
2 Head, as I have indicated, the site, the on-land
3 portion was an industrial area. It was disturbed
4 land, brownfield. It was not something which was
5 of concern in terms of significant environmental
6 effects, which is part of the reason why it was
7 exempted under the Comprehensive Study Regulations.

8 Q. Do you have any doubt that it
9 was the practice in 2003 of DFO to scope to DFO
10 legislative authority, as Mr. Hood says here to his
11 colleagues?

12 A. I would be -- you know, again
13 my experience has been that -- and I wouldn't focus
14 just on DFO, because, again, as proponent's
15 counsel, I had to get through the environmental
16 assessment process in a timely way.

17 Q. And Mr. Hood is just
18 referring to DFO and their practices.

19 A. Yes. And so we were aware of
20 the case law that was raging on through this
21 period. And it was in no one's interest to get
22 tied up in appeals, because as was indicated,
23 MiningWatch took till 2010 to resolve.

24 MiningWatch started in 2004. In
25 my view -- and we were aware of MiningWatch during

1 this period. This is 2004-2005. But we were aware
2 of Sunpine and we were aware of TrueNorth, and they
3 weren't settled yet either.

4 And so issues about whether you
5 took a narrow scope or whether you took a broader
6 scope were still active issues and active risks,
7 and for me to mitigate them, we would generally
8 favour a process which was less risky.

9 What we definitely saw during this
10 same period was projects like MiningWatch, they
11 were scoped more broadly, 2004. We're talking
12 about Bear Head, same time frame.

13 MiningWatch was the Red Chris mine
14 was scoped broadly, then they revised it, if I
15 recall, scoped to trigger, so to speak, and ended
16 up in court, and then off you go and you can't
17 build anything.

18 Q. So my question remains. Do
19 you have any doubt at this time, and I am speaking
20 of 2003 that it was DFO's practice at that time to
21 scope a project to DFO's legislative authority, as
22 Mr. Hood expresses to his colleagues?

23 A. Well, that's what Mr. Hood
24 says, but, you know, it is not just DFO that was
25 doing scoping. CEAA was involved in scoping, as

1 well, and there would be other responsible
2 authorities depending on the project.

3 Q. I am just talking about DFO
4 now.

5 A. Right, but -- well, I am
6 hesitant to say that I know what their internal
7 policy was. I do see the words.

8 I don't resist the fact that there
9 was a tendency to -- they certainly would focus
10 more sharply on their direct link triggers, but if
11 you had related projects, for sure those were taken
12 into account in the way that the responsible
13 authorities approached scoping.

14 Q. Mr. Sweeney responds Mr. Hood
15 later that day. He states:

16 "This will make it almost the
17 same as the Nova Scotia Power
18 wharf and coal loading
19 facility which we are doing a
20 joint review of with the
21 province at almost the same
22 location. Phil Zamora's
23 file. DFO are conducting a
24 screening of the wharf and
25 the province are doing the

00039

1 land-based review.

2 "I suggest a similar
3 arrangement with the province
4 if they are still willing."

5 My question to you is: Were you
6 aware that the Department of Fisheries at about
7 this time, in December of 2003, were conducting a
8 coordinated review of other projects, but not at
9 the JRP level, only at the screening level?

10 A. I'm sorry, I am trying to
11 link that to the Reg Sweeney email.

12 Q. Reg Sweeney is saying DFO are
13 conducting a screening of the wharf in this other
14 Nova Scotia Power case, and the province is doing a
15 land-based review.

16 A. Right.

17 Q. So it is a screening track,
18 not a JRP track.

19 A. May I just ask you to pause
20 for a second.

21 Q. Yes, sure.

22 A. That's where I got lost,
23 because then you segued into something that said
24 they weren't doing panels.

25 Q. No, no. I didn't mean to

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1 suggest that. And if I misstated that, I
2 apologize.

3 It's possible to harmonize on a
4 track other than a JRP track; correct?

5 A. Yes, it is.

6 Q. You can harmonize at a
7 comprehensive level, a comprehensive study level;
8 correct?

9 A. Yes. I would put it this
10 way. You can harmonize with a small H by
11 administratively trying to coordinate on a smaller
12 project typically, including screenings.

13 Q. Right.

14 A. You can use a formal capital
15 H harmonization agreement. There wasn't one with
16 Nova Scotia specifically as there were, and came to
17 be, with other provinces, though there was an
18 umbrella harmonization accord which existed
19 nationally.

20 But, again, it was sort of higher
21 principles.

22 Q. Yes.

23 A. Or you could formally
24 integrate the environmental assessment function
25 through a Joint Review Panel. You could do it

1 federally, only, for all of the federal
2 authorities, of which there are many, or you could
3 do it multi-jurisdictionally for the -- you know,
4 where you were engaging federal and provincial
5 jurisdiction.

6 And, in fact, the Act provides
7 that you can even do it internationally.

8 Q. So the province could do a
9 basic screening of a land-based part of a project,
10 and the DFO could do a basic screening of a wharf
11 that was going to be built in relation to that
12 project, and they could agree to do a small H
13 harmonization, in your case, essentially to
14 coordinate the two so the two would go ahead to
15 together.

16 The proponent would have
17 essentially one process, but not at the JRP level;
18 at the lowest level of track, the basic screening.
19 Correct?

20 A. They can, but the important
21 thing is it depends on the project. It depends on
22 the facts.

23 You know, the point I raised in my
24 report, I think it was paragraph 127, is that I
25 have had direct involvement with LNG projects that

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1 have been screened --

2 Q. Yes?

3 A. -- that have gone to comp
4 studies, and that have gone to panels. I have been
5 involved in pipeline projects, large-diameter
6 lengthy pipeline projects, which have been
7 screened, which have gone to comp studies, which
8 have gone to joint panels.

9 It depends on the facts.

10 Q. And --

11 A. One of the big facts is
12 location.

13 Q. Indeed, Deep Panuke was
14 subjected to a harmonized comprehensive study
15 review; correct?

16 A. The answer is it was.

17 Q. Yes.

18 A. However, in the MOU -- and
19 this is important -- we had gotten to scoping
20 meetings. In fact, I recall one right around or
21 just after Christmas in Guysborough County where we
22 had done the scoping meetings starting to go
23 through scope of assessment and those types of
24 issues.

25 And in the MOU, which is in the

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1 record here, it specifically recites the fact that
2 the project could be bumped up to a higher level
3 review.

4 Q. My --

5 A. One of the issues in the
6 scoping meeting was the consistency with the local
7 community, the planning, public concern. But it
8 did start down the road of a comp study to start.
9 But the MOU specifically -- which I thought was
10 unusual, that the comp study actually recited that
11 fact in the MOU itself.

12 Q. So the ultimate point is you
13 can have small H harmonization at a basic screening
14 level, harmonization --

15 A. Depends on the facts.

16 Q. -- between the two
17 jurisdictions. You can have small H harmonization
18 at the comprehensive study level between the two
19 jurisdictions, or you can have a full-blown capital
20 H harmonization through a JRP; correct?

21 A. Yes, sir.

22 Q. Do you recall in the
23 MiningWatch case DFO defended scoping to the
24 trigger all the way to the Supreme Court of Canada?

25 A. They did. You know, again,

1 just from the perspective of, you know, people that
2 do this stuff a lot, and this includes people in
3 the -- I was the head of the regulatory environment
4 department at the time. We were actively involved
5 in a number of oil sands projects in Alberta and
6 related projects.

7 The controversy which I discussed
8 briefly in the -- I think it is appendix 5 to my
9 first report -- describes the unsettled law in that
10 area. And the reason I am going on about this is
11 that we, candidly, thought it was fixed after
12 TrueNorth and Sunpine.

13 TrueNorth and Sunpine, from the
14 standpoint of a practitioner, said that the RA can
15 exercise its discretion, and whatever it scopes is
16 fine with us. That's, you know, in layman's terms
17 the instruction we took from those decisions.

18 But it took a while to get even
19 that level of assurance. And so I think everybody
20 were ordering their affairs accordingly, that when
21 they were, you know, moving out with their own
22 projects, they were relying on that case law.

23 MiningWatch, however, was still
24 active. I mean, we called it the Red Chris case at
25 the time. And they had, as I say, scoped broadly

1 initially. It was then reduced to a component of
2 what had been the proponent's project, described
3 project.

4 And MiningWatch, which wasn't even
5 an intervenor in the hearing, had come in and
6 gotten standing for the appeal, and then we were
7 back into uncertainty again. And, lo and behold,
8 the position that was being consistently advocated
9 by the activist groups and, you know, the Ecology
10 Action, Sierra Legal Defence Fund and Eco Justice
11 groups, that position ended up finding favour with
12 the Supreme Court of Canada.

13 And so what DFO might have been
14 doing at that time and what they defended on the
15 way up through court was simply doing the same
16 thing we were doing, which was reading the law.
17 But it was contested. It was unsettled, and that's
18 the reason why -- and I think this is very
19 important.

20 When Whites Point was referred to
21 a joint panel, you may recall the exchange with
22 Mr. Rankin the other day, it really brought back to
23 mind the fact that the Horizon Oil Sands project
24 and I think it was the Shell Jackpine project were
25 referred to joint panels on the same day.

1 And I think there was a conscious
2 -- there certainly was an awareness on the part of
3 the government officials that there were appeal
4 risks. And so what they tried to do was, where
5 they could, it seemed, take projects that were
6 likely to attract that kind of attention, run those
7 kinds of appeal risks, and they ran them all up as
8 Joint Review Panels.

9 Q. So the answer to my question,
10 which is this: DFO defended the practice of
11 scoping to the trigger all the way to the Supreme
12 Court of Canada in 2010; correct?

13 A. I think that they had
14 understood the Sunpine and TrueNorth appeal
15 decisions as that's what they did and so they --
16 having based their decisions on that case law, they
17 were defending what they had done as having been
18 done in accordance with law.

19 Q. So DFO's practice was to
20 scope to the trigger, scope to its legislative
21 authority, and it defended that practice all the
22 way to the Supreme Court of Canada; correct?

23 A. In the case of Red Chris,
24 which was in British Columbia --

25 Q. Yes.

00047

1 A. -- the answer is yes.

2 Q. For the purpose of your two
3 reports, what factual assumptions did you make
4 about the potential for significant adverse
5 environmental effects after taking into account
6 mitigation measures?

7 A. What assumptions did I make?

8 Q. What assumptions did you make
9 as to what the possibility or probability was of
10 significant adverse environmental effects in
11 association with this project or the two components
12 of the project?

13 A. Maybe if I could explain how
14 I approached the assignment, that would help to
15 inform you, because I wasn't --

16 Q. If you could get to you
17 factual assumptions at the end of that explanation,
18 that would be good, because that is my question.

19 A. The factual -- I had to read
20 my way into the file, that is my point.

21 Q. Yes?

22 A. So my factual assumptions
23 were given to me. They were in the report. They
24 were, you know, on the record as it existed when I
25 started.

00048

1 Q. So just so I understand, the
2 factual assumptions of your report were given to
3 you?

4 A. Well, that's -- that's why I
5 wanted to explain this, okay.

6 Q. Okay. Sure.

7 A. I was asked, you know, what
8 was my experience with major project development in
9 the Maritimes during the period in question.

10 And I was aware of the Bilcon
11 project, but I wasn't closely familiar with it. So
12 I was asked: Was this fair and reasonably done in
13 accordance with my experience?

14 So I looked at what was available
15 at the time, which was the report. I then looked
16 at --

17 Q. The report being Mr. Estrin's
18 report?

19 A. No, no. This was prior to
20 Mr. Estrin.

21 Q. Yes?

22 A. It was the Joint Review
23 Panel.

24 Q. You looked at the Joint
25 Review Panel report?

1 A. I did.

2 Q. Yes.

3 A. And I looked at the
4 Minister's -- the GIC response, the Minister's
5 letter, so that was the formal record.

6 And at that point, I didn't delve
7 into the transcripts or any of the evidence,
8 because, again, this was my very initial response.

9 I was aware -- I was given what
10 was the nature of the complaint just so I knew what
11 I was supposed to be looking at. And it was at
12 some point after that that then Mr. Estrin's report
13 was filed, and then I was asked to respond, as
14 well, to Mr. Estrin's report.

15 So in my first report, I spent
16 about ten pages explaining why I thought it was a
17 fair and reasonable process within the experience
18 that I had had, and I spent about 140 pages
19 responding to Mr. Estrin's report.

20 So if that helps you with the
21 factual assumptions or premises of my report,
22 that's kind of how it came together.

23 Q. Okay?

24 A. I then subsequently --

25 Q. Yes?

1 A. -- got into the transcripts
2 and the EIS and the EIS guidelines, and so I, you
3 know, certainly became aware of what the facts
4 were.

5 Q. You will recall that
6 Mr. Thibault wrote a letter dated June 26th, 2003
7 to Minister Anderson? Do you recall that?

8 A. I will take your word for it.

9 Q. You don't recall that?

10 A. Well, I think I do, but there
11 were a lot of letters between the Ministers on a
12 lot of projects.

13 Q. And that Minister Anderson
14 referred the assessment to a Joint Review Panel on
15 August 7th, 2003; correct?

16 A. Yes, sir.

17 Q. For the purpose of writing
18 your report, what assumption did you make as to
19 whether there was evidence, or not, of significant
20 adverse environmental effects occurring at that
21 time, as of June 26th, 2003, and August 7th, 2003?

22 A. So I had read the report.

23 Q. You read the JRP report?

24 A. I had read the JRP report.

25 Q. But that is much later. That

00051

1 is a 2007 report. I'm going back to 2003, the time
2 of the referral.

3 A. Right. So your question is:
4 What was I aware of that existed at that time upon
5 which the Minister might have exercised his
6 statutory duties?

7 Q. That's what I'm asking.

8 A. And so the facts that I was
9 aware of are the same ones that you and others in
10 the room would be aware of, the documents which
11 were on the record. And what I was aware of was
12 concerns expressed in the public about things like
13 effect on fisheries.

14 Q. I am just talking about
15 scientific evidence now, not the concerns at this
16 stage, but what scientific evidence was available
17 to the government as of June 26th, 2003 to form the
18 basis of the conclusion that there could be
19 significant adverse environmental effects which
20 could not be mitigated?

21 A. Scientific evidence?

22 Q. Yes.

23 A. Which is what I was just
24 starting to tell you.

25 Q. You were talking about

00052

1 concerns, public concerns. I want to go to the
2 science.

3 A. Well, let's go to the
4 science, but don't lose sight of the
5 socio-economic, the location, land use, which is a
6 very significant component under the Nova Scotia
7 legislation.

8 Q. I understand that. I am just
9 asking --

10 A. Let's go --

11 Q. -- the question: What was
12 your assumption about the scientific that was
13 available to the federal government as of June
14 2003?

15 A. Right. The -- what I looked
16 at were the memos back and forth with the officials
17 and the briefing notes that were provided to the
18 Minister.

19 The fisheries department, for
20 example, would be well aware of the nature of the
21 fishery in that area -- that is science, and I am
22 really speaking about the science -- and the fact
23 that the lobster fishery was amongst the most
24 lucrative in North America. It was of real
25 concern.

1 There was the issues that had been
2 identified about the potential for organisms
3 through the discharge of ballast. There was the
4 issue of navigation, for example, large Panamax or
5 Post-Panamax tankers which are in an exposed area
6 coming into the proposed harbour where there was
7 fishing gear and lobster gear, and so forth.

8 That's science in terms of a
9 physical fact. That is what I am really trying to
10 relate.

11 There was -- so the people who had
12 responsibility for that area were addressing or
13 were aware of these concerns, and they also were
14 addressing other what I would call project-related
15 activities, like what would be potential
16 interference with whales and marine mammals.

17 And that would include, but not
18 limited to, the blasting and to, you know, the
19 impact of the tanker movements back and forth in
20 proximity to where whales were thought to be
21 located.

22 Q. What factual assumption did
23 you make as to the science available to DFO with
24 respect to the potential for significant adverse
25 environmental effects on a matter involving DFO's

00054

1 jurisdiction, fish, Fisheries and Oceans, emanating
2 from activity on the land, including blasting?

3 A. Emanating from activity on
4 the land only?

5 Q. On the land only.

6 A. Well, the -- and this is
7 prior to the August 7th letter that you are
8 referring to?

9 Q. Yes. Well, let's take it in
10 two stages, prior to June 26th, 2003, and then
11 prior to August 7th, 2003.

12 A. Okay, thanks. I was aware
13 of -- one of the things that really caught my
14 attention was the Thomas Wheaton enforcement action
15 that was -- I forget the exhibit number, but it was
16 May 28th, 2008 (sic), where there was a -- I don't
17 know -- it hasn't been discussed thus far, but it
18 was -- there was a storm or something of that kind,
19 a heavy rainfall event, which caused a large
20 siltation plume off the Whites Point site.

21 Q. Off the Whites Point Road.

22 A. And site. And what happened
23 was it was a run-off effect which brought a
24 tremendous amount of sediment, apparently, in a
25 very large plume in the water offshore, which had,

1 in his enforcement letter, identified impacts on
2 areas within the direct science jurisdiction of the
3 Department of Fisheries.

4 And Mr. Wheaton directed that
5 certain activities and works be put in place
6 onshore to attenuate the impact on fish and
7 fisheries as a result of the run-off event.

8 And in the letter -- I've got
9 the -- I'm sorry, I don't know if I've got the
10 exhibit number, but in the letter that Mr. Wheaton
11 details all of those science effects directly from
12 the site of the Whites Point quarry.

13 And in attendance at the meeting
14 that he related to were Mr. Kern, Mr. Buxton and I
15 think Mr. Lowe, and they were all identified as
16 Nova Stone, although in the note Mr. Wheaton noted
17 that Global Quarry Products was the operating arm
18 of Nova Stone.

19 But, again, the enforcement action
20 was to do work on site, onshore, you know, on the
21 land, because of the deleterious effect it was
22 having on the direct physical, you know, habitat
23 and fish and so forth within DFO jurisdiction. And
24 that work apparently was done.

25 Q. Did you assume for --

1 MR. SPELLISCY: Just to help the
2 Tribunal there, since I am sure they are wondering,
3 the exhibit number is R-59 that Mr. Smith is
4 referring to. And I note in the transcript
5 actually that the date --

6 PRESIDING ARBITRATOR: It was in
7 2008?

8 MR. SPELLISCY: I note in the
9 transcript it said 2008. The date of this is 2003.

10 THE WITNESS: I'm sorry if I
11 misspoke. The reason it was significant to me was,
12 you know, this was Nova Stone. This is the same
13 group, Global Quarry Products, who are carrying out
14 the larger project.

15 And there was a problem. You
16 know, I'm not trying to suggest that they did
17 something wrong or not. It happened. It's a fact.
18 And it was land-based. It was the environment
19 having an effect on the land, and it caused
20 problems directly within the area of the DFO
21 jurisdiction.

22 The DFO dealt with it and, from
23 what I could tell, Nova Stone complied.

24 BY MR. NASH:

25 Q. What was your assumption --

1 A. That was a month before the
2 Thibault letter to Anderson, which I think was in
3 June, late June.

4 Q. June 26th.

5 A. And then subsequent to that
6 was Anderson striking the joint panel.

7 Q. What was your assumption with
8 respect to what evidence, scientific evidence, was
9 available to the Department of Fisheries and Oceans
10 with respect to potential section 32 or section 35
11 triggers for activity on land?

12 A. What was apparent to me in
13 reading the materials was they were trying to get
14 their arms around what is the project so that they
15 could determine what were the effects and what
16 would be their regulatory jurisdiction.

17 And as they would have done, for
18 example, with Bear Head where they initially said,
19 well, on the face of it it looks like it is a CSR,
20 but, you know, we need to know more about it. So
21 we gave them more information, and they then
22 clarified that, in fact, you know, we fit within an
23 exemption.

24 In the case of -- you know, I
25 could give you a bunch of other examples of the

1 same sort of thing. But in the case of this
2 project, there were issues with project definition.
3 There were a number of iterations, which is common
4 in my experience --

5 Q. Yes.

6 A. -- of the project
7 description, and then what they did is something
8 that sometimes the responsible authorities do,
9 which is they say, We need some time to get out and
10 look at the site and determine what's what. You
11 know, is there a fish-bearing stream, for example?

12 I mean, I mentioned the one in
13 Canaport. There wasn't one in Bear Head, but I
14 will tell you they went and looked. And it wasn't
15 clear that that would be the conclusion, but it was
16 verified.

17 So what I am trying to say is that
18 they had, you know, some hard facts. They had
19 others which they were investigating, which is what
20 they do, and, you know, it can take a little while
21 for all of that to occur.

22 Q. Could you turn, please, to
23 tab 11 -- sorry, tab 12 of the binder in front of
24 you, Exhibit R-149?

25 A. Yes, sir.

00059

1 Q. It is an email from Larry
2 Marshall to Peter Amiro and Rod Bradford, with a cc
3 to Phil Zamora. Its subject is --

4 A. Diadromous fish.

5 Q. -- diadromous fish in
6 vicinity of Digby Neck quarry. It states:

7 "Phil stopped by this
8 afternoon and indicated that
9 he had talked to each of you
10 re the above topic. He is
11 now requesting a few words in
12 writing re probability of
13 occurrence and probable
14 months of any diadromous fish
15 in the vicinity of the
16 proposed quarry. Peter,
17 would please provide for
18 salmon, Rod for the rest.
19 Phil's time line now is
20 apparently tight. He would
21 appreciate something early
22 next week, 26th, 27th."

23 Were you aware of that email when
24 you wrote your report?

25 A. When I wrote the report?

1 Q. Either report.

2 A. That is not really what I
3 was -- I wrote my report in December of 2011.

4 Q. Yes.

5 A. I may well have seen this.
6 This is the kind of exchange that I was talking
7 about is when I looked at it --

8 Q. Do you recall seeing it or
9 not? That is really my question.

10 A. I think I saw it as part of a
11 great number of others.

12 Q. The next document is at tab
13 13, Exhibit C-129, which is Mr. Zamora's letter to
14 Mr. Buxton, and you will see there that it states
15 in the first paragraph:

16 "DFO has concluded the
17 proposed work is likely to
18 cause destruction of fish."

19 Are you with me?

20 A. I'm sorry.

21 Q. Tab 13.

22 A. I am on tab 13.

23 Q. Page 1.

24 A. May 29th letter?

25 Q. May 29th letter.

00061

1 A. Yes.

2 Q. From Mr. Zamora to

3 Mr. Buxton.

4 A. Oh, the very first paragraph?

5 Q. Very first paragraph, "DFO

6 has concluded".

7 A. Well, the letter I've got

8 says:

9 "The Department of Fisheries

10 has reviewed the document

11 Whites Point Quarry Blasting

12 Plan."

13 Q. Yes. Then it says at the

14 last sentence --

15 A. I'm sorry.

16 Q. Part-way through there, it

17 says:

18 "DFO has concluded the

19 proposed work is likely to

20 cause destruction of fish,

21 contrary to section 32 of the

22 Fisheries Act, which states:

23 'No person shall destroy fish

24 by any means other than

25 fishing except as authorized

1 by the Minister.'" "

2 And you will recall -- you have
3 been at this hearing for the entire time; correct?

4 A. Yes, I have.

5 Q. Continuously?

6 A. I have.

7 Q. And you will recall that over
8 on page 1 of the addendum, which is the third page
9 in the document, there is a reference in the second
10 to last paragraph that:

11 "HMD have calculated that a
12 horizontal setback distance
13 from the shoreline of 500
14 metres would be required to
15 protect iBoF Atlantic Salmon
16 of the size that could be
17 funds at Whites Point from
18 May to October."

19 Do you see that?

20 A. Yes, sir. I do.

21 Q. When you wrote your report,
22 what evidence did you assume was available to
23 arrive at that conclusion regarding the 500 metre
24 setback?

25 A. I was aware of this letter.

1 Q. Yes.

2 A. And I have to say that when I
3 wrote the report, I didn't proceed from the
4 assumption that the DFO officials were proceeding
5 in bad faith.

6 And so did I go through a
7 back-engineering of every single exchange of emails
8 to try and determine whether or not they had a
9 reasonable basis for saying what they said in the
10 email at the time and how it supported the letter?
11 When I prepared my initial report, I have to say I
12 hadn't gone through, you know, that kind of an
13 exercise.

14 What I was aware of and what I
15 based my report on was the fact that they were
16 asking the relevant questions. They were taking
17 into consideration the relative details and that
18 they were acting on a -- you know, I don't want
19 this to sound too much like, you know, the catch
20 phrases, but a precautionary basis, because when I
21 have had these sorts of situations with government
22 officials, that's what I would expect.

23 They would generally act in a
24 precautionary way, and then would say, So we need
25 to just have a look at this.

1 Q. So did you make an assumption
2 of any kind, with respect to the statement in the
3 first paragraph of the first page of that letter,
4 that there was scientific evidence upon which to
5 base the stated conclusion that the proposed work
6 is likely to cause destruction of fish?

7 Did you assume that the scientific
8 evidence was there to support that statement?

9 A. Yes, sir, I did.

10 Q. If you go then to the next
11 tab, tab 14, Exhibit C-519, it is a letter from
12 Mr. Boudreau, who is superior to Mr. Ross and to
13 Mr. Zamora, dated June 4th, 2003, to Mr. Daly, who
14 we have heard was at the Environmental Assessment
15 Branch with NSDEL.

16 And you will see that he states:

17 "I am writing to update you
18 on Fisheries and Oceans
19 Canada, DFO, review of the
20 proposed Whites Point Quarry
21 and Marine Terminal.

22 "DFO has determined that due
23 to the need for a Navigable
24 Waters Protection Act Section
25 5(1) approval, the terminal

1 portion of the project will
2 require an environmental
3 assessment pursuant to the
4 CEAA. The type of assessment
5 required on the terminal is a
6 comprehensive study."

7 Going down then to the next
8 paragraph:

9 "DFO is presently reviewing
10 the proponent's blasting plan
11 for a 3.9 hectare test quarry
12 and conducting discussions
13 and field work of the overall
14 155 hectare quarry site to
15 determine if approvals are
16 required under the Fisheries
17 Act, section 35 and section
18 32, either of which would
19 necessitate an environmental
20 assessment under CEAA."

21 Did you review that at the time
22 you wrote your first report?

23 A. Yes, sir, yes.

24 Q. Did you draw any difference
25 between the first letter we looked at, the letter

1 of May 29th to Mr. Buxton, where it stated that the
2 DFO has concluded that the blasting onshore will
3 likely cause destruction of fish contrary to
4 section 32, and this letter which is saying, We're
5 still presently studying it to determine?

6 A. And, I'm sorry, I have lost
7 your question.

8 Q. Did you draw -- did you
9 notice the difference between what was being said
10 in the first letter of May 29th and the words "has
11 concluded", and what was here in this letter dated
12 June 4th, conducting field -- conducting
13 discussions of field work to determine whether
14 section 35 and 32 would be engaged?

15 A. I think when I was reviewing
16 the material, the net effect of what I took from
17 both sets of letters was -- and I wasn't restricted
18 to just these two. It would have been all of
19 them -- was the fact that they were doing
20 additional field work. I have had that experience
21 myself. Sometimes it can be a little frustrating,
22 because it can take a while. But they were doing
23 what they were supposed to do.

24 And the way I understood it was --
25 what I took from the Zamora approach was that they

1 were acting in a precautionary way because they had
2 reason to believe -- they hadn't proven it, because
3 we're not at the end of the environmental
4 assessment. We're still trying to determine what
5 it is needs to be looked at.

6 So what I took from the exchange
7 of correspondence and emails, and so on, was
8 exactly that, that they were trying to get all of
9 the facts on the table in order to determine, you
10 know: What kind of an assessment do we need to
11 provide for here, and what do we need to look at?

12 Q. Do you know today whether
13 they were actually doing discussions and conducting
14 field work on the site or with respect to this
15 project during that period of May 29th to June
16 26th, 2003?

17 A. Well, for sure Mr. Wheaton
18 was on the site.

19 Q. Between May 29th and June
20 23rd -- sorry, 26th. Do you know --

21 A. His letter -- okay, so let me
22 try it this way. His letter was -- I don't want to
23 overstate this thing about Wheaton. Wheaton was on
24 the site, because there had been a run-off problem
25 and a sediment discharge, and the date of his

00068

1 letter was May 28th.

2 So it must have been at some point
3 prior to that, but my understanding was, it was
4 very close to that, because it was -- they were
5 trying to repair a bad situation.

6 Q. Do you know what field work
7 was being done --

8 A. But prior to that, I
9 understood that they were planning to do field
10 surveys and that they couldn't get on the site or
11 they wouldn't be able to determine fish-bearing
12 streams, that kind of thing, because it was winter.

13 Q. Do you know what field work
14 was being done, if any, on the site to determine
15 whether there were section 35 and/or section 32
16 triggers with respect to activity on land affecting
17 fish and fish habitat?

18 A. I understood there was field
19 work being done. Exactly when it was being done, I
20 can't tell you.

21 Q. And you understood that it
22 was being done during this period, or do you not?
23 Did you not understand that?

24 A. I had -- my sense of it was
25 that it was prior to this date, but in that time

1 frame.

2 Q. Have you seen any scientific
3 evidence which records what field work was being
4 done and what discussions were being held with
5 respect to the operation of a section 35 trigger
6 and a section 32 trigger as a result of activity on
7 the land?

8 A. You had two parts to your
9 question. The first one is I understood there was
10 field work being done.

11 Q. You understood that from the
12 documents?

13 A. Yes, sir.

14 Q. Yes.

15 A. However, then the second part
16 of your question was discussions.

17 Q. Yes.

18 A. And there were discussions
19 ongoing throughout the period because, again, when
20 you're at this stage in things, you are reacting to
21 the possibility or the likelihood that there is
22 such a condition, but you don't know for sure. I
23 mean, when you're at this stage, you're not
24 post-assessment. Like, the assessment is what
25 proves this out.

1 Q. What I suggest you're doing
2 is sort of speculating back to that period as to
3 what you think, by way of reconstruction, Fisheries
4 was actually doing.

5 What I am more focussed on is:
6 What did you know about what they were actually
7 doing?

8 A. What I would characterize as
9 having known they were doing --

10 Q. Yes?

11 A. -- because I saw it here, was
12 they were doing field work.

13 Q. And you take that from the
14 documents?

15 A. And I take that from the
16 documents.

17 Q. The documents on the record?

18 A. Correct. So we can all read
19 them. And they were discussing the potential for
20 different things throughout the period, as well.

21 Q. You said that you reviewed
22 briefing notes before you wrote your report. If
23 you would go to tab 37, please?

24 A. Yes, sir.

25 Q. That is a briefing memorandum

00071

1 for the Minister?

2 A. The last tab? Oh, no, not
3 last.

4 Q. It is date stamped June 23rd,
5 2003. Do you see that?

6 A. I see that.

7 Q. And it is a memorandum for
8 the Minister in advance of a meeting he was to have
9 with Cheryl Denton on June 26th, 2003. Do you see
10 that?

11 A. I do.

12 Q. And you will see at the
13 second bullet, it says:

14 "DFO has advised the
15 proponent that blasting as
16 proposed for a 3.9 hectare
17 test quarry will require
18 Fisheries Act section 32
19 authorization. DFO is
20 conducting discussions and
21 field work with respect to
22 the overall 155 hectare
23 quarry to determine if it
24 requires authorization to
25 under the Fisheries Act

1 section 35(2) or section 32.
2 Authorization under either of
3 these sections of the
4 Fisheries Act will
5 necessitate a CEAA
6 assessment."

7 That is reflective of that earlier
8 letter of June 4th we saw. It appears that at
9 least on the face of the document, without any
10 particulars, a very general statement that DFO's
11 conducting field work and discussions. Do you see
12 that?

13 A. Yes, I'm sorry, I do. I will
14 tell you why I was hesitating. The date stamp is
15 the 23rd of June, but it refers to a June 26th
16 meeting.

17 Q. Yes, that's correct.

18 A. And --

19 Q. Yes?

20 A. And what this was, as I
21 understand it, is an update. And whether they were
22 still doing field work in late June or not, I don't
23 know, but I think that as I understood this
24 briefing was this was kind of the latest that was
25 available on the project.

00073

1 Q. So that is as of June 23rd:
2 We're still conducting field work and discussions
3 to determine if there are section 35 and section 32
4 triggers for the land portion.

5 You would agree with me?

6 A. I think what I'm trying to
7 point out is that there it is a bit of a timing
8 issue. We're referring here to a June 26th
9 meeting.

10 Q. It is in advance of a June
11 26th meeting which is coming up. This is a
12 briefing note, it appears, for the Minister who is
13 going to be attending a meeting?

14 A. Okay.

15 Q. And senior officials are
16 briefing the Minister --

17 A. All right.

18 Q. -- on the status of the
19 matter at Whites Point.

20 A. Right.

21 Q. If you go then back to tab
22 19, keeping in mind that as of June 23rd it's being
23 reported they are conducting field studies and
24 having discussions, if you go to tab 19 you will
25 see there is a further briefing note memorandum for

1 the Minister.

2 Now, it is date stamped on the
3 front page June 20th, 2003, but if you go to the
4 second page of --

5 A. June 25th, I noticed that
6 one, too.

7 Q. -- Exhibit R-072, as of June
8 25th, which is two days after that earlier briefing
9 note, where they have said DFO is still conducting
10 field studies and carrying on discussions, if you
11 go to the third bullet of this document, it says:

12 "DFO believes that the
13 project as proposed, is
14 likely to cause environmental
15 effects over a large area of
16 this rich and diverse marine
17 and terrestrial environment
18 as well as on fisheries and
19 tourism..."

20 So there's been a shift from
21 having field work and discussions occurring as of
22 June 23rd to a simple statement that they believe.

23 Now, my question to you is: What
24 assumption did you make as to what scientific
25 evidence DFO had as of June 25th --

1 A. Right.

2 Q. -- to form the basis for a
3 conclusion that activity on land could cause
4 significant adverse environmental effects after
5 mitigation?

6 A. Right. If you go back to the
7 tab 38 and you look at the analysis and DFO
8 comment, as you put it, this is a briefing for
9 somebody to be prepared for a meeting with this
10 Denton person.

11 Q. I am just asking what your
12 assumptions were about this the scientific
13 evidence.

14 A. When I read it, it said to me
15 they were updating people because they were coming
16 up to making decisions. Candidly, I hadn't
17 featured on the fact that this was in preparation
18 for a meeting with somebody, but fair enough.

19 But what they say there, what's in
20 their minds is, when I look under analysis and DFO
21 comment, they really are taking stock of what's
22 going on.

23 The project, this is on page 2 of
24 that document.

25 Q. Yes.

00076

1 A. There's been --

2 Q. What bullet are you on?

3 A. I'm sorry. Under the
4 subheading at the bottom "Analysis and DFO
5 Comment".

6 Q. Yes.

7 A. Then what they do is they are
8 reflecting on: Here's the sense of things drawing
9 together all of the bits and pieces that are active
10 on this file. So they talk a bit about the
11 controversy, province anxious to have federal
12 involvement and assessment of both the terminal and
13 the quarry.

14 Q. Yes.

15 A. But then they say, DFO has
16 determined the marine terminal will require a CEA
17 assessment. But then they say:

18 "DFO believes the project
19 likely to cause environmental
20 effects over a large area of
21 both the land and marine
22 environments."

23 Q. That is what they say, yes.

24 Yes.

25 A. And so and then they say so,

1 accordingly, DFO considered all of the options,
2 including referring it to a panel.

3 Q. Yes.

4 A. And then reporting on the
5 status of things with the Province of Nova Scotia.
6 So to me that observation, that analysis, is
7 reflected in the statement here that the project as
8 proposed is likely to cause environmental effects
9 over a large area of this rich and diverse marine
10 and terrestrial environment.

11 So it is both terrestrial and
12 marine.

13 Q. What assumption did you make
14 as to the objective scientific evidence that was
15 available to DFO as of June 26th, 2003 with respect
16 to the potential for activity on land, including
17 blasting, to cause harm or destruction to fish?

18 A. I thought they had lots
19 because, as I have indicated I mean, they had a
20 serious siltation plume in May, late May of this
21 same year, so this is a month before, and that it
22 had a problem. It was identified in the Wheaton
23 letter about what effect it would have offshore.

24 They had all of the other
25 information with respect to tanker movements in and

1 out. Lobster fish --

2 Q. I am talking about activity
3 on land. You said the siltation plume?

4 A. Which was from land.

5 Q. Yes, that is from land?

6 A. Right.

7 Q. That is not with respect to
8 the operation of a quarry or from blasting or
9 anything to that effect. That was an event.

10 A. I understand but --

11 Q. Aside from that, what did
12 understand they had by way of scientific objective
13 evidence?

14 A. That, you know, they are the
15 stewards of the fishery resource, DFO is.

16 Q. I understand that.

17 A. And so they concerned
18 themselves with what the potential impacts of the
19 project are, broadly. That includes blasting, but
20 it is certainly not limited to it, as you heard
21 Mr. Chapman and others say the other day.

22 Q. Aside from the siltation
23 plume, which had occurred in May, are you aware of
24 any other evidence, scientific objective evidence,
25 to the effect that would found the basis for a

1 conclusion that activity on land, including
2 blasting, from the operation of a quarry would
3 cause destruction or -- destruction of fish or
4 destruction of fish habitat?

5 A. Or an effect on HAAD.

6 Q. Yes.

7 A. Yes. I have indicated that
8 in the -- in my review of the correspondence, they
9 were looking into the relevant facts and
10 considerations, including effects --

11 Q. I see the documents, too,
12 Mr. Smith.

13 A. Right.

14 Q. We all see the documents, but
15 I am asking you what evidence you have that they
16 had a scientific basis for a conclusion that
17 activity on land, including blasting, could cause
18 destruction of fish or fish habitat?

19 A. I said the siltation plume
20 was a very clear one, which corroborated the
21 concerns that are reflected in the correspondence
22 that I saw.

23 MR. SPELLISCY: Sorry, can I just
24 interject? Mr. Smith started to indicate about
25 documents. Mr. Nash cut him off and said, Well,

1 what evidence are you aware of?

2 It seems to me if Mr. Smith wants
3 to refer to the documents that are in the record
4 that he's referring to the evidence. I'm not sure
5 what -- maybe I am just confused as to what the
6 question is, and I do admit I am struggling with
7 it, as to what you are trying to get at, but when
8 he starts to talk about the documents in the
9 record, the documents that he has seen from
10 Fisheries, I am not sure why you would cut him off
11 as to suggest that that is not evidence that he can
12 rely on for his assumption.

13 Maybe you could clarify what you
14 are looking for.

15 BY MR. NASH:

16 Q. I am looking for your
17 evidence as to whether you are aware of any studies
18 that have actually been done, any blasting studies,
19 any field work that was being done with respect to
20 the operation of a quarry, including blasting on
21 the land, and its potential effect on fish and fish
22 habitat?

23 A. I am aware of the fact that
24 there were -- that the DFO officials indicated what
25 they were doing with respect to the project onshore

00081

1 and offshore. That's reflected in the
2 correspondence. So those are the facts or the
3 factual assumptions that underpin my analysis.

4 Q. Okay.

5 A. That includes the blasting,
6 which is also detailed in the same written
7 materials.

8 Q. Were you aware when you wrote
9 your first report that the 500 metre setback figure
10 was, in fact, based on a blasting model that
11 applied to blasting in water as opposed to on land?
12 The simple question is: Were you aware of that?

13 A. Was I aware of it?

14 Q. At the time when you wrote
15 your first report.

16 A. I was aware of it. It was a
17 fact. But --

18 Q. And those --

19 A. -- it wasn't that
20 significant.

21 Q. It wasn't significant to you?

22 A. It wasn't that significant,
23 no.

24 Q. That a 500 metre setback
25 which the proponent had been advised of --

1 A. No.

2 Q. -- was a mistake?

3 A. No. The reason it wasn't so
4 significant is, when you look at, you know, what is
5 the appropriate manner of environmental assessment
6 of a project like this, which is clearly
7 interdependent for the reasons -- I won't repeat
8 them, but I put them in my report -- if there were
9 no mammals offshore, it would still be something
10 that would be highly likely to be elevated to a
11 hearing, given the potential significant adverse
12 effects on fisheries, on fishers, on people, like
13 urchin industry, with the public concern involved.

14 The blasting is a factor, but it's
15 not the critical factor in my experience. We have
16 blasting in every single project I worked on.

17 Q. So you're saying that with
18 respect to a potential for a trigger, legislative
19 authority for the DFO to do an assessment of the
20 quarry, that the conclusion that a 500 metre
21 setback is based on a mistake is not important?

22 A. It's not that critical.
23 First off, let me respond. I guess I am having
24 difficulty with the question, and let me explain
25 why.

1 The ability to scope the entire
2 project is not contingent on there being a trigger
3 on the quarry.

4 It's the related project
5 provisions of the statute. Again, I fully detailed
6 them in my report.

7 Q. Yes. Yes.

8 A. But you don't have to have
9 it. Now, it turns out they claim that there was a
10 reasonable basis on which to assume they had one,
11 but, in my opinion, they didn't need one. And it
12 was a clearly integrated project.

13 The purpose that we have been
14 talking about all week is either a test or a
15 prebuild of the rest of the quarry. They were
16 going to go for environmental controls, to build,
17 you know, roads to help to carry out the larger
18 undertaking.

19 The way I look at this is that
20 subset of the quarry, if that had been developed
21 ahead of the rest of the quarry, in my judgment and
22 experience, there was a very real risk of an appeal
23 by the Sierra Legal Defence Fund or Sierra Club who
24 was involved in this -- the lawyer, for example,
25 that was discussed yesterday, Lisa Mitchell, I

00084

1 think --

2 Q. Mitchell, yes?

3 A. -- Ecology Action, who are
4 people that I was dealing with in these cases all
5 the time.

6 And when the evidence is as clear
7 as it is that you can't commercialize this
8 undertaking and that you are only going to ship it
9 out by boat, you're just taking on an unreasonable
10 appeal risk.

11 Q. Let's just turn back, then,
12 to tab 37 again, to get back to the question I
13 actually asked.

14 A. I'm sorry, tab 37?

15 Q. Tab 37.

16 A. Yes, sir.

17 Q. It is the memorandum for the
18 Minister stamped dated June 23rd:

19 "DFO is conducting
20 discussions and field work
21 with respect to the overall
22 155 hectare quarry to
23 determine if it requires
24 authorization under the
25 Fisheries Act."

00085

1 A. I'm sorry.
2 Q. Section 35, section 32?
3 A. What page are you on?
4 Q. I am on the first page of tab
5 37.
6 A. Tab 37.
7 PROFESSOR MCRAE: I think it is
8 38.
9 THE WITNESS: I think it is 38.
10 MR. NASH: It is 38, my fault.
11 Thank you to Professor McRae.
12 THE WITNESS: What page are you
13 on?
14 BY MR. NASH:
15 Q. I am on the first page,
16 second bullet.
17 A. Second bullet. There is 155
18 hectare, okay.
19 Q. DFO -- and they have said:
20 "DFO has advised the
21 proponent that blasting as
22 proposed for a 3.9 hectare
23 test quarry will require
24 Fisheries Act authorization."
25 We now know that that

1 authorization and that letter of May 29th from
2 Mr. Zamora to Mr. Buxton was based on a
3 miscalculation, but we will go on:

4 "DFO is conducting
5 discussions and field work
6 with respect to the overall
7 155 hectare quarry to
8 determine if it requires
9 authorizations under the
10 Fisheries Act, section 35 and
11 section 32. Authorizations
12 under either of these
13 sections of the Fisheries Act
14 will necessitate a CEAA
15 assessment."

16 So they are doing studies, they
17 say, to determine whether there is a trigger and
18 they require authorizations. And, if they do, that
19 will necessitate a CEAA assessment. Now --

20 A. Okay. I see that.

21 Q. Yes.

22 A. And I understand why the DFO
23 would try and investigate to determine whether they
24 had a regulatory responsibility.

25 Q. Right.

1 A. A trigger.

2 Q. And in that context, is it
3 not important to you that the government, by a
4 period of time either in June or at the latest July
5 29th, had discovered that the model they were using
6 to arrive at a 500 metre setback, which is what
7 gave rise to the delivery of that May 29th letter
8 saying you need an authorization under section 32
9 for your blasting, was based on a mistake and that
10 an appropriate setback would be 100 metres; and, in
11 that case, they could operate the quarry without
12 significant adverse environmental effects, with
13 respect to the blasting, causing damage to
14 destruction of fish and fish habitat?

15 A. To repeat the question, and I
16 don't want to be unfair to you, Mr. Nash, but the
17 point I made and you said is it not important --

18 Q. Yes?

19 A. -- from my perspective, in my
20 opinion, we were involved here with the larger
21 quarry development, Global Quarry Products.
22 Mr. Buxton, in fairness to him, was wearing two
23 hats, and he was carrying out the bigger project.

24 That's the way that the federal
25 officials clearly on the face of the record saw it.

1 And so the fact that there was a mistake made --
2 which was subsequently corrected, but a mistake
3 made on the setbacks, made no difference at all to
4 the environmental assessment, because there were
5 other bases upon which it was fully justifiable to
6 go to a joint panel and made a lot of sense.

7 So that's why this blasting
8 controversy, in my respectful opinion, is greatly
9 overblown.

10 Q. Isn't the whole question of a
11 section 32 authorization with respect to the quarry
12 based upon whether blasting will cause death to
13 fish or destruction of fish habitat?

14 A. I think I understand your
15 question. I mean, it is a factor. Blasting is a
16 factor, but it's not the only factor.

17 Q. This will be a good time for
18 a break.

19 PRESIDING ARBITRATOR: Yes, thank
20 you. So we are going to have a break until 11:30.

21 MR. LITTLE: Excuse me, Judge
22 Simma. I know we're running up against the time
23 limit for cross-examination, I think, as well. By
24 our calculation, we're around 40 minutes left for
25 the claimants, but maybe if we could get a count or

1 an update before the after-break session begins so
2 we can see that.

3 PRESIDING ARBITRATOR: Dirk, would
4 you be capable of saying right away?

5 MR. PULKOWSKI: Right. I go up to
6 39 minutes of remaining time for the claimant.

7 MR. LITTLE: Thank you very much.

8 MR. NASH: Yes.

9 PRESIDING ARBITRATOR: Mr. Smith,
10 you are not supposed to --

11 THE WITNESS: Yes. I promise.

12 --- Recess at 11:13 a.m.

13 --- Upon resuming at 11:33 a.m.

14 PRESIDING ARBITRATOR: So we will
15 reopen the hearing, and the examination. Mr. Nash,
16 please continue.

17 BY MR. NASH:

18 Q. Thank you, Mr. President.

19 Mr. Smith, could I take you to tab
20 28 in the binder in front of you, please. It is
21 the Red Hill decision, and it is Exhibit C-764.

22 A. Tab 28?

23 Q. Tab 28. Yes. And if you
24 would go to page 28 of tab 28.

25 A. Page?

1 Q. Page 28. And if you go to
2 paragraph 157, have you got that in front of you?

3 A. Just if you would give me one
4 second. And it is 157?

5 Q. Yes, 157. I see you have
6 your own copy there.

7 A. I just found it. Thank you.

8 Q. "In *Oldman, supra*, the
9 Supreme Court also cautioned
10 that it is not helpful when
11 dealing with the respective
12 levels of constitutional
13 authority to characterize a
14 project as a provincial or
15 local project. While local
16 projects generally fall
17 within provincial
18 responsibility, federal
19 participation is required if
20 the project impinges on an
21 area of federal jurisdiction.
22 This was the case in respect
23 of the Oldman River dam.
24 However, as stated at page 71
25 of the decision, the federal

1 government may not use 'the
2 pretext of some narrow ground
3 of federal jurisdiction, to
4 conduct a far ranging inquiry
5 into matters that are
6 exclusively within provincial
7 jurisdiction'."

8 Do you accept that as a correct
9 statement of the law?

10 A. The answer is I see what it
11 says here and I will explain my hesitation.

12 Oldman, as you probably know, was
13 a court case that dealt with the earlier EARPGO,
14 which were guideline orders promulgated by the
15 federal government which were found subsequently to
16 have the force of law. That was one of the major
17 consequences of the Supreme Court ruling that is
18 referred to here.

19 It didn't deal with CEAA and
20 didn't deal with the CEAA legislation, including
21 matters such as scoping-related projects.

22 Q. This decision of course does
23 deal with CEAA.

24 A. Well, you have directed me to
25 the Oldman proposition, and it doesn't stand for

1 that. Let me continue. So I think you have to
2 exercise some real caution with Oldman.

3 The other thing I would say about
4 Red Hill is that this decision was appealed by the
5 Minister of Environment, I believe, but it was
6 appealed. It went to the Federal Court of Appeal.
7 Mr. Justice Richard, as he then was, indicated in
8 that appeal that -- there were very short reasons,
9 and they have been referred to on the record here,
10 and Red Hill, in my mind, stands for the
11 proposition that only a project is subject to CEAA.

12 And in the case of Red Hill the
13 conclusion was that the project had already been
14 approved and, therefore, the carrying out of that
15 project does not trigger fresh environmental
16 assessment responsibilities.

17 So the statement of law that
18 Oldman represents, I've qualified, and the
19 statement of law that Red Hill represents is as I
20 have just indicated.

21 Q. So you would agree, then,
22 with the general statement as stated by the Supreme
23 Court of Canada that the federal government may not
24 use "the pretext of some narrow ground of federal
25 jurisdiction to conduct a far ranging inquiry into

1 matters that are exclusively within provincial
2 jurisdiction." Do you agree with that?

3 A. Again, I think you have to be
4 careful about the context. They were dealing with
5 EARPGO, which was not as comprehensive a scheme of
6 legislation, and I don't think you can draw
7 specific conclusions that are applicable to these
8 circumstances from that very broad statement of
9 law.

10 Q. Did the federal government
11 appeal the constitutional portion of the decision
12 in Red Hill?

13 A. The decision was whether or
14 not CEAA applied, and the conclusion was that it
15 did not. So the decision, the Federal Court of
16 Appeal decision, what it stands for is that.

17 Did they appeal the
18 constitutionality? I have to say I don't know
19 sitting here. I can find out if you want, but I
20 don't know.

21 Q. You will agree with me that
22 this decision here, Red Hill, was dealing with
23 CEAA, and the court here, in this decision, was
24 applying the principle as set out in Oldman to the
25 CEAA facts of that case, Red Hill; correct?

1 A. Yes. I think what you asked
2 me, and I am just going back to the question is:
3 Is this still, you know, an accurate reflection of
4 state of law?

5 And what I'm saying is, no, not in
6 the context of Whites Point quarry, because it was
7 dealing with EARPGO in a very different, what I
8 would call, statutory context.

9 It was the Environmental
10 Assessment Review Process Guidelines Order, which
11 was a predecessor to CEAA, but it didn't deal with,
12 for example, related project language which appears
13 in the CEAA.

14 Q. Could you go, please, to
15 paragraph 174 at page 31 of the Red Hill decision.

16 A. Yes, sir, I have it.

17 Q. Paragraph 174, the court
18 states:

19 "This is not to say that
20 scientific certainty is
21 required as to the existence
22 of a deleterious effect on
23 migratory bird populations in
24 order for a referral to panel
25 review to be properly

1 grounded. However, there must
2 be a valid basis on which to
3 conclude that a real
4 possibility exists that a
5 panel would be able to
6 conclude that, in this case,
7 there would be a significant
8 adverse effect on migratory
9 bird preservation. That
10 necessary condition to engage
11 the process was absent. The
12 necessary relevant
13 information was noted to
14 likely be unavailable for a
15 long time and might never be
16 available."

17 Would you agree with that
18 statement of the law?

19 A. I would agree, with this
20 caveat, again, relevant to the current
21 circumstances.

22 The real possibility -- take a
23 step back. They were dealing in this particular
24 case with just the Migratory Birds Convention, and
25 so that was the sole basis upon which they were

1 suggesting there should be a review panel.

2 That is probably valid to that set
3 of facts. I'm not disputing that.

4 What I am saying is that the --
5 there were a breadth of reasons why the federal
6 government believed that the Whites Point quarry
7 should be referred to a review panel, a range of
8 significant adverse environmental effects, and of
9 course the public concerns as well, which were not
10 restricted to any one particular item.

11 So that's the one caveat I would
12 register as --

13 Q. Regardless of the facts,
14 would you not agree that the test is that there
15 must be a valid basis on which to conclude that a
16 real possibility exists that a panel would be able
17 to conclude that there would be a significant
18 adverse effect, in our case, as a result of
19 activities either on land or in the water?

20 A. I would say that in the
21 context of this case, it would read: A real
22 possibility exists that the panel would be able to
23 conclude that in this case there would be a --
24 there would be a significant adverse effect or
25 effects upon areas of federal jurisdiction.

1 Q. That would be your statement
2 of the law?

3 A. Yes, sir.

4 Q. Okay.

5 A. And that goes not to the
6 assessment so much as to the regulatory authority
7 that they are acting out.

8 So if you consider, for example,
9 that there is the potential for serious run-off in
10 the operation of the quarry and that that may have
11 effects on the fisheries, for example, then would
12 the federal government be justified in taking
13 regulatory action to correct, even if that meant
14 construction of preventive berms and that sort of
15 thing on shore? The answer is yes.

16 Q. And they would have to be
17 convinced that there would be significant adverse
18 environmental effects which could not be
19 sufficiently mitigated; correct?

20 A. At the end of the day and
21 the -- and, you know, the normal practice is that
22 all the mitigation is requested of the proponent
23 and is supposed to be presented in the course of
24 the proceeding, first in the EIS, an information
25 requests, and at the hearing and so on, yes.

1 Q. And at the front end, though,
2 at the front end, the Minister has to have
3 concluded that there is a real possibility that
4 there will be significant adverse environmental
5 effects which cannot be mitigated as a result of,
6 in this case, activity on land; is that fair?

7 A. I think you have to be
8 practical about this.

9 The conclusion the panel has to
10 reach is whether or not there is a likelihood of
11 significant adverse environmental effects net of
12 mitigation.

13 And at this stage, you don't have
14 to arrive at that conclusion, because that's the
15 process that you're about to engage.

16 So prior to that, there has to be
17 a reasonable basis for the people who are stewards
18 of the fisheries, for example, or whatever the head
19 of federal responsibility is, to say that, No, we
20 should have a look at this.

21 Q. Would you agree that
22 government officials at every level in Canada have
23 a responsibility and a duty to exercise their
24 decision-making authority and their discretion in
25 good faith?

1 A. I wondered if you would ask
2 me that question.

3 Q. Your wondering is over.

4 --- Laughter

5 A. I will answer it this way. I
6 certainly have heard what you have quoted from and
7 I am now aware of what those responsibilities are.
8 And I would simply say I can't get into their
9 various codes of conduct.

10 We have our own as lawyers, but my
11 experience is that the DFO and the CEAA folks,
12 these aren't -- it is not like Whites Point was the
13 only file they were handling, and they did their
14 best, from what I can see. It was -- in any
15 process I've been involved in, there would be
16 points that I disagree with, but, yes, they have a
17 duty of good faith and I think, from what I have
18 seen, it looks like it operated the way it
19 typically does.

20 Q. So you would agree that
21 officials have a duty to exercise their
22 decision-making and their discretion fairly,
23 reasonably and in good faith?

24 A. I think so, yes.

25 Q. If you go to tab 33, please,

1 the Federal Code of Conduct that we have referred
2 to in the context of the evidence given by other
3 witnesses.

4 A. I have to say I haven't
5 really reviewed this other than sitting here in the
6 room, but if you have a general question on it --

7 Q. Let's go to it, page 2. And
8 this is Exhibit C-995. At the top of page 2, "The
9 Role of Federal Public Servants":

10 "Federal public servants have
11 a fundamental role to play in
12 serving Canadians, their
13 communities and the public
14 interest under the direction
15 of the elected government and
16 in accordance with the law.
17 As professionals whose work
18 is essential to Canada's
19 well-being and the enduring
20 strength of the Canadian
21 democracy, public servants
22 uphold the public trust."

23 You would agree with that?

24 A. Yes, I do.

25 Q. "Federal public servants have

00101

1 a fundamental role to play in
2 serving Canadians, their
3 communities and the public
4 interest under the direction
5 of the elected government and
6 in accordance with the law.
7 As professionals whose work
8 is essential to Canada's
9 well-being and the enduring
10 strength of the Canadian
11 democracy, public servants
12 uphold the public trust."

13 You would agree with that?

14 A. I do. And, you know, again,
15 in the context of the present case, the obligation
16 of fairness would be to everybody who is affected.
17 You know, that includes in the post-decision mode,
18 if somebody is allowed to make further
19 representations, everybody should.

20 So what I'm saying is, yes, I
21 agree with these general propositions. I don't
22 have any direct familiarity with them, and I didn't
23 refer to them in my --

24 Q. That's right. You didn't.

25 A. -- in my report.

1 Q. "The Role of Ministers":
2 "Ministers are also
3 responsible for preserving
4 public trust and confidence
5 in the integrity of public
6 sector organizations and for
7 upholding the tradition and
8 practice of a professional
9 non-partisan federal public
10 sector. Furthermore,
11 ministers play a critical
12 role in supporting public
13 servants' responsibility to
14 provide professional and
15 frank advice."

16 You would agree with that
17 statement of principle?

18 A. I see those words and I have
19 no reason to disagree.

20 Q. Over to the next page, under
21 "Objectives", "This Code" meaning this code:

22 "... outlines the values and
23 expected behaviours that
24 guide public servants in all
25 activities related to their

00103

1 professional duties. By
2 committing to these values
3 and adhering to the expected
4 behaviours, public servants
5 strengthen the ethical
6 culture of the public sector
7 and contribute to public
8 confidence in the integrity
9 of all public institutions."

10 You would agree with that?

11 A. I do, and did you want to
12 relate this to the current process?

13 Q. I am just speaking generally
14 now. You don't have any disagreement with that
15 duty on the part of --

16 A. No, I don't.

17 Q. -- government officials?

18 A. I can read these passages
19 along with you. I think they apply, you know, to
20 all of the people who had an interest in these
21 projects and in the other projects I've been
22 involved with.

23 Q. And under "Respect for
24 People":

25 "Treating all people with

1 respect, dignity and fairness
2 is fundamental to our
3 relationship with the
4 Canadian public and
5 contributes to a safe and
6 healthy work environment that
7 promotes engagement, openness
8 and transparency."

9 You would agree with that?

10 A. Yes, I have no reason to
11 disagree with that.

12 Q. And that would be
13 transparency for all participants; correct?

14 A. Yes.

15 Q. Including proponents;
16 correct?

17 A. Pardon me?

18 Q. Including the proponents?

19 A. Absolutely. I always
20 represent proponents.

21 Q. Yes. Under page 4,
22 "Integrity":

23 "Integrity is the cornerstone
24 of good governance and
25 democracy. By upholding the

1 highest ethical standards,
2 public servants conserve and
3 enhance public confidence in
4 the honesty, fairness and
5 impartiality of the federal
6 public sector."

7 You would agree with that?

8 A. I do.

9 Q. And it would be wrong for
10 public servants to become impartial in the work
11 they do and the decisions they make; correct?

12 A. Or to undermine the fair and
13 reasonable process by which we deal with project
14 developments of this kind.

15 Q. Right. Under "Expected
16 Behaviours", "Federal public servants..." I am on
17 page 4:

18 "Federal public servants are
19 expected to conduct
20 themselves in accordance with
21 the values of the public
22 sector and these expected
23 behaviours.

24 "1. Respect for democracy.

25 "Public servants shall uphold

1 the Canadian parliamentary
2 democracy and its
3 institutions by:
4 "1.1 Respecting the rule of
5 law and carrying out their
6 duties in accordance with
7 legislation, policies and
8 directives in a non-partisan
9 and impartial manner."

10 A. Yes. I agree with that, and
11 I believe I addressed exactly that in my evidence.

12 Q. And under 1.3:
13 "Providing decision makers
14 with all the information,
15 analysis and advice they
16 need, always striving to be
17 open, candid and impartial."

18 You would agree with that?

19 A. Yes, sir.

20 Q. And you would agree that it
21 would be wrong to feed the Minister with what the
22 Minister wants; correct?

23 A. I'm not sure I understand the
24 question --

25 Q. It says --

1 A. -- feed the Minister with
2 what he wants.

3 Q. -- "Providing decision makers
4 with all the information,
5 analysis and advice they
6 need, always striving to be
7 open, candid and impartial."

8 And you would agree that it would
9 be inappropriate for public servants to provide the
10 information that they think the Minister wants to
11 receive; correct?

12 A. They -- I'm sorry, it was the
13 grammatical aspect of that that I was hesitating
14 about.

15 For sure they should be providing
16 all the information and analysis that the Minister
17 requires. The Minister may want a certain amount
18 or kind of information, and there is nothing wrong
19 with him wanting to receive that, you know,
20 briefing on a particular area.

21 I just want to be careful what I'm
22 agreeing to as a general proposition.

23 Q. As a general proposition --

24 A. I don't have a problem with
25 1.3.

1 Q. As a general proposition,
2 public servants should be providing to their
3 political superiors or the Ministers that they are
4 reporting to, providing information to, all of the
5 relevant information available with respect to the
6 issue at hand; is that fair?

7 A. All of the relevant
8 information germane to the issue at hand I agree
9 with, yes, sir.

10 Q. And then under number 2 on
11 page 5:

12 "Public servants shall
13 respect human dignity and the
14 value of every person by:

15 "2.1 Treating every person
16 with respect and fairness."

17 That's a fair statement; correct?

18 A. I see that, yes.

19 Q. Do you agree with it?

20 A. Sure. I agree that these are
21 the -- this is the Code of Conduct governing
22 federal officials, and if I can help time-wise, I
23 generally agree that these would be the kind of
24 conduct and behaviours that we, as members of the
25 public, would come to expect.

00109

1

Q. And under number 3,

2

"Integrity":

3

" Public servants shall serve

4

the public interest by:

5

"3.1 Acting at all times with

6

integrity and in a manner

7

that will bear the closest

8

public scrutiny, an

9

obligation that may not be

10

fully satisfied by simply

11

acting within the law."

12

And you would agree with that?

13

A. Yes, sir, I would.

14

Q. And under 3.2:

15

"Never using their official

16

roles to inappropriately

17

obtain an advantage for

18

themselves or to advantage or

19

disadvantage others."

20

A. Yes.

21

Q. And you will agree with that?

22

A. That's what we would expect,

23

yes.

24

Q. Would you take these

25

principles as enunciated in the Code to be

00110

1 summarized by the idea, the notion, that officials
2 in exercising their decision-making powers, their
3 authority, and exercising discretion should in all
4 things act fairly, reasonably and in good faith?

5 A. Yes, sir.

6 MR. NASH: Those are my questions.
7 Thank you very much, Mr. Smith.

8 THE WITNESS: Thank you, Mr. Nash.

9 PRESIDING ARBITRATOR: That gets
10 us to the re-direct, Mr. Kurelek.

11 MR. SPELLISCY: I will be doing
12 it. Just give me one second with my colleagues.

13 PRESIDING ARBITRATOR: Certainly.

14 Okay, Mr. Spelliscy, you have the
15 floor.

16 MR. SPELLISCY: Thank you, Judge
17 Simma. And by my count, we have about four hours
18 of time left, so, Mr. Smith, I would suggest you
19 settle in.

20 --- Laughter

21 RE-EXAMINATION BY MR. SPELLISCY:

22 Q. Mr. Pulkowski has kindly
23 warned me -- will warn me when there is ten minutes
24 left, so let's get comfortable.

25 Seriously, I only have a few

00111

1 questions for you, because of course you weren't
2 even asked about the Joint Review Panel or the EIS
3 guidelines, which was the bulk of your report, so
4 I've only got a few questions to ask you on
5 cross -- on my re-examination here.

6 In your cross-examination, you
7 were asked about DFO's decision to defend its
8 scoping decision in the Red Chris case all the way
9 to the Supreme Court, and in that context you
10 mentioned Sunpine and TrueNorth decisions.

11 Now, those were -- were those
12 Court of Appeal decisions or were they lower court
13 decisions?

14 A. They were -- I'm going to --
15 I don't know why all of a sudden I'm hesitating. I
16 would have said right away they were Court of
17 Appeal decisions.

18 But they -- the point I was really
19 trying to make was it was the ongoing controversy
20 that was represented by those cases. And when each
21 came to the end of their time, they stood for the
22 proposition that the responsible authority had the
23 discretion to scope as it saw fit, which could be
24 narrow or could be broad.

25 We as practitioners were

1 struggling with this issue all the way through,
2 because it was heavily litigated. So that's what I
3 meant. And what the Minister did in appealing
4 those scoping decisions in the -- or, sorry,
5 participating in the appeals on MiningWatch was, in
6 fairness, they were defending the decisions that
7 they had taken in the context of the Red Chris
8 case.

9 I don't know that it is -- you
10 know, appeals are fact-specific. You're dealing
11 with the case before you.

12 Q. So the Sunpine and TrueNorth
13 decisions, then, you said that they were giving --
14 they basically gave DFO the discretion to scope
15 narrowly or broadly, you said, so they didn't
16 require DFO to scope in one way or the other. Is
17 that your understanding of those cases?

18 A. Yes, that is what I said.
19 One of them is -- Sunpine is Friends of the West
20 Country, and TrueNorth is Prairie Acid Rain.

21 Q. Now, in your view and in your
22 opinion, compared with these cases, Sunpine and
23 TrueNorth, was the Red Hill decision that
24 claimants' counsel took you to just a few minutes
25 ago -- would the Red Hill decision be considered

00113

1 the definitive decision on how to scope a project
2 under CEAA?

3 A. No. That's my point. Red
4 Hill, Court of Appeal, the Minister appealed the
5 case and they decided the dispute, the factual
6 dispute, on the basis of the fact that they did
7 not -- they were not projects within the meaning of
8 CEAA. Therefore, federal jurisdiction did not
9 engage.

10 It would therefore be unnecessary
11 to provide a constitutional opinion, because it
12 simply didn't arise.

13 Q. Now, in terms of the
14 discretion that you have said DFO had and how it
15 was being used, you were asked by claimants'
16 counsel questions about what was DFO's practice at
17 the time and whether it was to scope to its
18 triggers.

19 You referred to Sunpine and
20 Horizon Oil Sands project which you testified were
21 referred to a Joint Review Panel on the same day as
22 the Whites Point project.

23 Do you know whether it was the DFO
24 Minister that referred those projects to a review
25 panel on the same day?

1 A. I think you misspoke. You
2 said Sunpine and Horizon. It was actually
3 Jackpine.

4 Q. Jackpine and Horizon.

5 A. Shell's Jackpine. Those are
6 both oil sands projects.

7 I think it was DFO, but I would
8 have to go back and check. I can do that now, if
9 you want but, subject to check, that is what I
10 recall. I can also confirm, by the way, that
11 Prairie Acid Rain was the Court of Appeal and
12 that -- and that Sunpine was the Trial Division.

13 Q. And to be clear, when you
14 said Prairie Acid Rain that is also known as the
15 TrueNorth --

16 A. Yes. I'm sorry, I confused
17 it.

18 Q. Now, with respect to the
19 Jackpine and the Horizon oil sands projects, can
20 you tell us, on those projects, whether those
21 projects were scoped to the triggers or were the
22 projects all scoped in?

23 A. Well, that's the point. The
24 reason I said it was that the federal government
25 decided that they should go to a panel, a joint

1 panel, with the Alberta government in both cases,
2 the same as they had done on the same day with Nova
3 Scotia, was to ensure that there was one-stop
4 shopping, as I say in my report, that the entire
5 project would be vetted in public, and that the
6 federal government would use that record upon which
7 to exercise only its regulatory authority.

8 Q. Now, we had a number of
9 questions about your assumptions in your reports
10 regarding the science, and Mr. Nash took you to a
11 May 29th letter that took what you called a
12 precautionary approach in concluding the blasting
13 would require section 32 authorization.

14 I want to ask you, in your
15 experience as a proponent's counsel, after
16 receiving a letter like the one that Mr. Buxton
17 received from Mr. Zamora on May 29th, as a
18 proponent's counsel would you expect DFO to
19 continue with its scientific evaluation of the
20 possible effects of what you were proposing to do,
21 or would you have expected them to just have
22 reached a definitive conclusion on May 29th?

23 A. The way environmental
24 assessment works is that you are constantly
25 providing updates so that the panel is possessed of

1 the best information possible upon which to make a
2 decision as to whether there was a likelihood --
3 that's important -- a likelihood of environmental
4 effects and that they were significant or adverse.

5 So it doesn't stop. And if they
6 discover something along the way that wasn't
7 anticipated, they will adjust the process and their
8 regulatory requirements accordingly.

9 It does happen where further
10 information -- I mean, you have to understand that
11 when you put out your project description, it is
12 not the final detailed design. I mean, this is a
13 frustrating point for proponents: How much detail
14 do you have to have?

15 But the panels always need -- and
16 not just panels. The regulators always need enough
17 information on which to make these or arrive at
18 these conclusions, likelihood, significance and
19 adversity.

20 And so sometimes proponents are
21 forced to, frankly, do work they hadn't already
22 done or wouldn't have otherwise done, and when they
23 do, they discover things that they hadn't
24 anticipated.

25 That has happened to me in a case

00117

1 with -- where we were building a pipeline, didn't
2 think there was an issue. Somebody did a core
3 sample, and we discovered we had what's called
4 acid-generating rock.

5 And acid-generating rock is when
6 it is exposed to the air. You know, for geological
7 time it's been covered or it's been sealed over.
8 It's kind of like rust on metal. But when it is
9 exposed to the air, it actually oozes acid. It's
10 not something I had ever run into before.

11 When we discovered that, all of a
12 sudden our environmental assessment process had to
13 adapt to deal with that and bring on that new
14 information.

15 So that's what you would expect.
16 As you uncover things or matters develop, or if
17 there's a refinement to a design, you've got to
18 change it.

19 That's why, as a proponent's
20 counsel, when I look at the design of a project and
21 there may be a couple of different ways of doing
22 it -- so we might drill underneath a river instead
23 of just laying the pipe along the bottom, or we
24 might construct in the winter or I need to preserve
25 that option -- I will often put all of those design

1 alternatives in front of the panel or the regulator
2 so that the environmental effects can be determined
3 about all of them so that we don't run into a
4 situation where we find that we have to do a
5 directional drill, but it wasn't environmentally
6 scoped.

7 We had a problem with that on the
8 Saint John lateral, where in fact we ended up
9 having to go back and do a fresh environmental
10 assessment for a directional drill. That's not a
11 good thing for a proponent, because you've already
12 mobilized all of your crews.

13 I'm sorry to go on. There are
14 many examples of the fact that this is an ongoing
15 process and, you know, further information does
16 come to pass.

17 By the way, while I was sitting
18 here, I just wanted to correct the record. Both
19 Sunpine and TrueNorth -- I don't know what I was
20 thinking -- were definitely Court of Appeal
21 decisions, and also there were trial decisions.

22 The reason I was thrown off was
23 the Friends of the West Country is in this binder
24 that Mr. Nash had given me and it only had the
25 Trial Division case there. So in my case law,

1 appendix 5, you will see reference to the Court of
2 Appeal decisions for both.

3 Q. Thank you for that
4 clarification. And just to be clear, then the Red
5 Hill decision that Mr. Nash took you to, that was a
6 trial level decision; correct?

7 A. The decision Mr. Nash took me
8 to was the trial decision. The decision to which I
9 referred was the Court of Appeal decision, which
10 was Mr. Justice Richard. If I recall, the timing
11 of those was -- they were in 2001, if memory serves
12 me. I can just check it very quickly here.

13 And the Court of Appeal decision
14 was November 14th, 2001. April 2001 was the trial
15 division decision.

16 Q. Now, one last question.
17 Again, as your experience as a proponent's counsel,
18 you had some questions about transparency with
19 respect to proponents, and you were asked questions
20 about what should be shared with proponents and
21 when.

22 As a proponent's counsel, would
23 you expect to receive every email or every concern
24 or every thought from a scientist in the government
25 department in response to something you had

1 submitted, or would you expect to receive a
2 coordinated response from the government department
3 once they had come to some sort of more formal
4 conclusion?

5 A. As a proponent's counsel, you
6 would only rely on what was officially transmitted
7 to you as the position of the responsible
8 authority.

9 You are certainly aware of the
10 fact that there is, you know, back and forth within
11 the departments. I think that is a good thing.

12 You're not always happy with what
13 they communicate to you, but, but it's got to --
14 the phrase I used, I guess, when I was hearing all
15 this, was: If it's not on letterhead, it is not
16 really a final position.

17 MR. SPELLISCY: Thank you,
18 Mr. Smith. Those are my questions.

19 THE WITNESS: Thank you, sir.

20 PRESIDING ARBITRATOR: Thank you,
21 Mr. Spelliscy.

22 MR. NASH: No questions arising.

23 PRESIDING ARBITRATOR: So I will
24 ask my colleagues. No questions?

25 QUESTIONS BY THE TRIBUNAL:

1 referred to it as a corporate shell game, and let's
2 not assume that it was deliberate or, you know,
3 done, you know, in an inappropriate way. But let's
4 assume that it was done inadvertently, and it sort
5 of created I think what was referred to in one of
6 the affidavits as a "trap".

7 The problem is the regulator is
8 looking at this and they have the proponent coming
9 in to all sort of meetings. So I'm a proponent's
10 lawyer. I'm looking at a successive iteration of
11 project descriptions, all of which describe the
12 broad quarry development, and the activities that
13 were being proposed in respect of the smaller
14 quarry were all related to the broader quarry, you
15 know, construction of the environmental controls,
16 the building of the road, test blast.

17 All of those things related to the
18 broader proposal. And at that point in time, you
19 know, back in 2001 to 2004, there are all of these
20 court cases going on, and this project is under a
21 microscope by all sorts of opponents.

22 So what I would have expected as
23 proponent's counsel is there be some real
24 hesitation about allowing this to go ahead
25 separately, and I think that was being -- the

1 vibes, so to speak, were pretty clear that they
2 were uncomfortable with this.

3 So would I feel that I was hard
4 done by? Well, no, I wouldn't. I might be
5 disappointed. If I really wanted to do the test
6 blast, I would have gone to -- I would have gone
7 ahead with the -- with asking the joint panel about
8 it. That's the way to legitimate it, to get around
9 the problem. And they chose not to do that.

10 So, you know, I mean, I thought
11 that was a little curious, but to me, that's why I
12 keep saying, you know, the blasting to me is a bit
13 of a sideshow. You know, it's not the blasting
14 isn't important. It is very important in
15 quarrying. It's an ongoing activity. It is not
16 just once when you build the project, and then
17 there is no more.

18 But in terms of why did this go to
19 a joint panel and why was the entire project, you
20 know, taken in the way that the proponent described
21 it, you know, to me as a proponent it is pretty
22 clear. I mean, that's one project, and I'm not
23 surprised that they treated it that way and I'm not
24 surprised that every attempt to try and segment it
25 or split it was met with resistance, because those

1 were the court cases that were very active at the
2 time.

3 PROFESSOR MCRAE: One of the
4 things you said just then was that the proponent
5 should perhaps have gone to the panel and asked
6 for -- to deal with the blasting question.

7 And throughout I think your
8 reports, there are a number -- I don't know the
9 specific references, but there are a number of
10 references to things where you said, well, the
11 proponent didn't provide the information, the
12 proponent had the opportunity and didn't do it.

13 One question that has arisen from
14 time to time in the hearings is whether or not it
15 would have made sense for the proponent to have had
16 legal assistance.

17 You having been legal counsel for
18 a number of projects, what do you think would have
19 been done differently if the proponent in this case
20 had had legal representation in its dealings with
21 the panel?

22 THE WITNESS: Well, I find it a
23 little amusing that, you know, the proponent now
24 has all sorts of legal talent assisting him on what
25 he could have done or ought to have done in that

1 particular Joint Panel Review.

2 Let me deal with the matter of
3 legal representation broadly. You may remember
4 that I put the little excerpt from what Chairman
5 Fournier said at the end of the Sable hearing about
6 it was a well-structured process and it was orderly
7 and thorough.

8 The reason he did that was because
9 there was criticism -- and there often is in this
10 context -- about making these public hearings too
11 formal, so that regular people aren't intimidated
12 in coming forth and speaking with their own voice.

13 I mean, the purpose of public
14 hearings is to allow, you know, regular folks to
15 come out and say what they think. And the NEB
16 process was very complex and it was very
17 structured, and it had lots of lawyers, as they
18 usually do.

19 And what Fournier was reacting to
20 was, you know, even though we had the rules of
21 procedural fairness and sort of the structured
22 approach and a rigorous approach, it worked pretty
23 well, and we really did hear the genuine voice of
24 the people affected. That is the reason he said
25 that.

1 We are, as lawyers, often
2 encouraged, when we're in the public hearings, to
3 maintain a low profile, particularly scoping
4 hearings. So in the Sable scoping hearings, we
5 were asked not to -- I mean, it was a request. It
6 wasn't -- you know, we weren't told, You cannot.

7 But, for example, I didn't speak
8 at any of the four scoping meetings in the Sable
9 case, but I was there. And that was so that,
10 again, when you're in the community setting -- it
11 is more of a community hall -- people feel
12 unconstrained. There's something about us lawyers,
13 you know, that puts people off.

14 --- Laughter

15 THE WITNESS: And with good
16 reason. And so that's the sense in which I'm sure
17 he would have said it here, you know, that we now
18 have all of these people coming into the hearing,
19 and, you know, it would discourage having lawyers
20 speak for you.

21 If you read what he actually said,
22 that is what he said. They certainly didn't say
23 you shouldn't have lawyers. I mean, the way that
24 I've done all of those projects in the Maritimes in
25 the same time frame, you know, screenings and all

1 the rest of them, I would be involved. You're
2 involved at the design stage of the process. It's
3 very important to comment on the terms of
4 reference. It is very, very important to comment
5 on the draft environmental impact statement
6 guidelines, and it's very important to be active at
7 the scoping meetings, because this stuff can get
8 away on you if you're not careful.

9 And, you know, that's where there
10 was a tremendous amount of emphasis on community
11 core values, the land use, the planning, the
12 socio-cultural effects. All of that stuff was
13 manifest on the face of the terms of reference, was
14 very, very clear and detailed in the environmental
15 impact statement guidelines.

16 But that's where lawyers should
17 have been, you know, coaching Mr. Buxton. And the
18 evidence that became -- I guess was crystallized
19 here was he didn't really bring in AMEC until after
20 he had filed his environmental impact statement.

21 And that's where Mr. Wittkugel and
22 others got involved having to answer all of the
23 information requests.

24 That's very unusual. You know,
25 the CEAA process and the joint panel process,

1 particularly during that period, you always on any
2 significant investment, whether it went to a CSR or
3 whether it went to a screening, or whether it went
4 to a panel -- they all could go to a panel -- yeah,
5 you would -- you'd get advice from people with
6 direct experience in those processes. And there
7 were lots of them going on in the Maritimes at that
8 time.

9 PROFESSOR MCRAE: Thank you. Can
10 I turn, although you weren't asked this in
11 cross-examination, it is certainly something on
12 reading your reports that I think raises some
13 questions, and that is this community core values.

14 I know you have said you can
15 understand it if you look at the environmental
16 impact statement, but the language is the language
17 of the panel, really, isn't it?

18 THE WITNESS: Yes, sir.

19 PROFESSOR MCRAE: When you read
20 the panel's report, isn't this language that one
21 doesn't normally find in Joint Review Panels? They
22 articulate their concerns about socio-economic
23 issues in a quite different way.

24 Was this unique when you read this
25 panel report and said, This is the first time I

1 have seen these concerns being articulated this
2 way, or did you see it as commonplace?

3 THE WITNESS: If you don't mind me
4 giving sort of a broad response to that, sir.

5 PROFESSOR MCRAE: I assume you
6 will.

7 --- Laughter

8 THE WITNESS: As long as that is
9 all right.

10 PROFESSOR MCRAE: That is quite
11 all right.

12 THE WITNESS: I said in the report
13 that what I call the handle, the phrase "community
14 core values", was not one, you know, that I had
15 seen before, but what were they referring to?

16 The term "core values" does appear
17 in a variety of places. And what I had tried to
18 encourage the Tribunal -- in fact, I think I said
19 it in exactly these words -- was, you know, rather
20 than my repeating every single bit of it in my
21 report, the panel -- with great respect, I would
22 strongly encourage the Tribunal to go and look at
23 the final impact guidelines, the EIS guidelines,
24 and look at the 10.3.8.

25 Actually, it is probably easier to

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1 do this graphically, but page 49 of those final EIS
2 guidelines is entitled, "Social and Cultural
3 Patterns".

4 To begin with, what does valued --
5 they said values and beliefs don't belong in an EA.
6 Well, that's a stretch.

7 The term "VEC" is valued
8 environmental components. How are you supposed to
9 determine significance or adverse nature of an
10 effect unless you line it up against what the
11 values are?

12 And this is inherent in the
13 literature. Paragraph 77 with Dr. Connelly, it was
14 referred to I think by Mr. Rankin or Mr. Estrin the
15 other day, and I really commend you to go there.
16 And there is a Beanlands and Duinker reference, a
17 footnote, where they talk about this holistic
18 approach as the guideline for environmental
19 assessment, as the benchmark for environmental
20 assessment.

21 And they define in that exhibit,
22 which is R-21 -- it is just two pages or three
23 pages to it -- that you know, here, the definition
24 of valued ecosystem component and a holistic
25 analysis is reflected in the EIS guidelines. And

1 the EIS guidelines said, and this is a quote:

2 "The culture and way of life
3 of the people using the
4 region affected by the
5 project are themselves
6 considered valued
7 components."

8 Well, that's not the acoustic
9 effects on a seal. It is not the factor or the
10 risk of a collision with a whale. But it is the
11 intersection of this project with the people and
12 their way of life.

13 And where CEAA is admittedly more
14 heavily weighted towards the science side, when you
15 read the terms of reference for this panel, they
16 cut and paste words and phrases right out of the
17 Nova Scotia legislation and right out of the Nova
18 Scotia guidelines.

19 So this issue about, in the terms
20 of reference, if you look at the location -- you
21 know, we have spent a lot of time focussing on the
22 typo that Mr. Rankin had, that the socio-economic
23 effects was left out. I would say the ones that
24 are even more important that were also left out
25 there were under Part III, terms of reference, E,

1 "the location of the proposed undertaking and the
2 nature and sensitivity of the surrounding area".

3 That's specific. That is word for
4 word out of the environmental assessment
5 regulations from the Nova Scotia legislation.

6 The next one, "the planned or
7 existing land use in the area of the undertaking",
8 like, that's a planning concept. That's
9 consistency or inconsistency with the fabric of the
10 community.

11 And as you heard Mr. Rankin
12 talking about, you know, planning committees and
13 zoning, they go to public committees before they
14 come up with their policies and rules.

15 And what the panel did in chapter
16 3 is the panel identified four sets of provincial
17 policies which this project, it believed,
18 contravened. They were the Vision 2000 plan that
19 was the result of multi-municipalities over a
20 period of time. We can go to the chapter 3 where
21 they discuss that, if you like.

22 But there was another one. There
23 were four separate sets of policies where these
24 were all grassroots, you know, policies and plans
25 that grew up at the time.

1 The other one is other
2 undertakings in the area, or steps taken by the
3 proponent to address environmental concerns
4 expressed by the public.

5 And then when you look at what
6 they did, they were comprehensive, very, very
7 detailed about this human environment.

8 So it wasn't just biophysical. It
9 wasn't just physical. It was human.

10 So social and cultural patterns is
11 probably the clearest example of that. What is
12 culture? But those are the -- "culture", the
13 phrase is in the Nova Scotia legislation.

14 So the panel had to consider it
15 and they set up a framework. So they said in
16 9.3.8, they said, Here's all of these details.
17 This is the stuff we want you to assemble a
18 baseline, and in 10.3.8, this is how we want you to
19 assess it and give us your results.

20 So, in my opinion, they were
21 clearly on notice, but leave that aside. This was
22 reflecting, principally, the jurisdiction that was
23 imposed on them, in the joint Review Panel
24 agreement and the terms of reference, from the Nova
25 Scotia side of the ledger.

1 You have to remember, when you
2 look at these panels, that they are all going to be
3 different, because if they are joint with a
4 provincial jurisdiction, they have to reflect the
5 legislative requirements of each province and they
6 are different. They have different emphasis.

7 So words like "rejection", for
8 example, you don't see that all the time in joint
9 panel agreements, you know, that you would approve,
10 or approve with mitigation measures recommended, or
11 reject. That's taken right out of the Nova Scotia
12 Act.

13 So that's why -- I mean, they are
14 unique. They are different, but when I looked at
15 it, absolutely, it caught my attention, too. When
16 I really went back into it, you know, I said, you
17 know, this is -- this is pretty squarely within
18 what was provided for in the Nova Scotia
19 legislation.

20 PROFESSOR MCRAE: Sorry. I
21 understand your point that the language, or it
22 might be novel, what the panel chose was, in your
23 view, a response to the particular requirements of
24 its mandate and the Nova Scotia legislation and the
25 environmental assessment guidelines.

1 The other thing that some comment
2 has made of is the fact that when dealing with
3 mitigating elements, the panel referred to these,
4 to some extent, in its assessment, but simply ruled
5 them out as factors that might be considered if the
6 government decided to reject its recommendation.

7 So we don't see measures in which
8 some of the things which, when you look at the
9 assessment of the various factors, particularly --
10 not necessarily the socio-economic, but some of the
11 physical factors. When you look at blasting and
12 seawater and groundwater and so on, where they do
13 refer sometimes to mitigating measures, which the
14 panel generally finds not to be effective, they
15 don't come back to this in terms of their
16 recommendations.

17 Now, again, that seems to make
18 this report stand apart from at least some, perhaps
19 many, other reports of joint review panels, and is
20 this a response to the mandate in effect?

21 Is this simply the way in which
22 the panel perceived its mandate? How does one
23 explain this when one looks at this report, and
24 then compares it with other?

25 THE WITNESS: Well, let's compare

1 it with the Kemess. The Kemess project, Mr. Rankin
2 talked about it, was using the lake as an
3 impoundment area for tailings.

4 You heard Mr. Chapman yesterday,
5 you know, describe the fact that Mr. Buxton wrote
6 to the Minister, the Minister of Environment,
7 taking issue with the Kemess decision because it
8 rejected the project on the basis of public values.
9 They weren't just aboriginal. They were public,
10 and Mr. Buxton knew it.

11 His complaint in that letter was
12 that the government -- or, sorry, the panel had
13 applied a holistic standard which he claimed was
14 ill-defined and for the first time.

15 That was a month before the
16 decision in the Whites Point case. So it was
17 clearly understood, and the irony is that the word
18 "holistic" appears in the Environmental Impact
19 Statement Guidelines for Whites Point quarry.

20 So, you know, they were very, very
21 similar, and one of them was just rejected
22 outright.

23 Now, in fairness, Kemess was in
24 British Columbia, so their terms of reference will
25 be a little bit different, because they will

1 reflect the British Columbia side of the ledger.
2 And so we look in Nova Scotia, and this is the
3 point I was making, is when you look at the Nova
4 Scotia Environment Act -- and I can give you the
5 specific section, if you like, but it is in the
6 materials -- the Minister's powers are, under the
7 Nova Scotia legislation, to approve, or approve --
8 I think it is section 40 -- approve with
9 conditions, which is basically, you know,
10 mitigation measures, additional ones, or to reject.

11 And that was then reflected in the
12 terms of reference. And so the panel literally
13 complied with what they were directed.

14 Now, does that mean they didn't
15 consider mitigation? Obviously not. They said
16 they did. But consider the FEISE -- you asked the
17 question about, Where do you want to have
18 experienced people looking at, you know,
19 environmental impact statement guidelines?

20 When they are drafted and people
21 are commenting on them, and then you see things
22 being said in scoping meetings, you better take
23 them seriously, because that is going to govern
24 your review.

25 And the word "mitigate", for

1 example, appears. I actually looked this up.
2 Mitigate -- "mitigation" appears 52 times,
3 "mitigating" appears I think it is twice, and
4 "mitigate" appears 12 or 13. So it is 67 times in
5 74 pages.

6 What the panel does is they
7 delegate to the proponent: You assemble all of
8 this material. And they said: So you assemble and
9 give us all of this proposed mitigation so we can
10 consider whether it does the job.

11 So that was done, and then of
12 course the information request and the hearing.

13 So mitigation was appropriate and
14 I thought pretty rigorously done. And, you know,
15 in the circumstances, they didn't think it could be
16 mitigated. The wording they used was reject.
17 Reject, you know, they recommend the rejection of
18 the project, and I have explained to you why I
19 believe that is solidly founded in the Nova Scotia
20 legislation, though you don't see those same words
21 on the federal side, but that doesn't make it
22 illegal. In fact, it is quite legal.

23 PROFESSOR MCRAE: Thank you.

24 PRESIDING ARBITRATOR: Brian, have
25 you...

1 PROFESSOR SCHWARTZ: Just so you
2 don't take it personally, I also asked Mr. Estrin
3 if he could keep his answers as compact as
4 possible.

5 THE WITNESS: And I will do the
6 same.

7 PROFESSOR SCHWARTZ: Okay. With
8 respect, just for the sake of symmetry, I had asked
9 several of the witnesses on the other side whether
10 they thought there were legal duties, statutory or
11 public administrative law, in terms of engagement
12 after the Joint Review Panel reports.

13 They suggested that there was some
14 sort of duty on the part of Canada and Nova Scotia
15 to engage with the proponent, if not a meeting,
16 some opportunity for written submissions, and on
17 top of that some sort of duty to give reasons.

18 Do you have any -- is your
19 response to that in your material already, or did
20 you want to quickly comment on that?

21 THE WITNESS: The response to
22 their responses to you is not in the materials, but
23 I think the simplest way to look at this is there
24 was a right to one hearing, to a hearing. There
25 wasn't a right to two hearings, okay?

1 And the reason I say that is it
2 would be extraordinary in an open, public and
3 transparent process that only the proponent gets to
4 make submissions.

5 If I as a proponent didn't like
6 something in a certificate, for example, a
7 mitigation measure, and I wanted to write and get
8 the government not to reflect it in their final
9 decision, it would be unfair, unreasonable and
10 probably potentially appealable that the -- all of
11 the other participants in the hearing had a right
12 to comment, as well. I mean, it is like an ex
13 parte communication.

14 So fairness would require that if
15 one party can make a representation, written or
16 oral, the other parties would have to, too. But
17 then it starts to take on the proportions of a
18 second hearing. But more fundamentally, the
19 decision taken by the Ministers, in my opinion, are
20 of a policy or legislative nature, and as you would
21 well know, sir, those are -- they don't typically
22 attract a duty of fairness.

23 It is more -- the case law I agree
24 is Baker. It depends on the circumstances.

25 But decisions which, like GIC,

1 Governor-in-Council cabinet approvals, are
2 generally viewed to be of a policy or legislative
3 nature, and there isn't a duty of fairness that
4 arises in respect of those.

5 PROFESSOR SCHWARTZ: Yes. It is
6 certainly not my role to argue with any points at
7 this stage. I just don't necessarily agree with
8 the legislative policy.

9 THE WITNESS: Well, no, and the
10 proponent -- this is the thing. You know, we have
11 a process. I mean, if we -- if you and I had this
12 dispute in the context of a project, we would -- so
13 how do I remedy that situation as a Canadian
14 proponent? Well, I go to court, as so many people
15 do in environmental assessment in Canada, and,
16 again, that wasn't done here.

17 PROFESSOR SCHWARTZ: The words
18 "referendum" and "zoning" have come up.

19 Could it be argued that those are
20 matters of political choice and that's different
21 from a matter of impact?

22 THE WITNESS: I'm sorry, I'm not
23 sure what --

24 PROFESSOR SCHWARTZ: Well, choice
25 is, whether it is scientifically based or not, this

1 is what I want. Impact would be: This is a way
2 that affects what I'm doing or how I'm feeling.

3 I ask because during the hearings,
4 as you know, the referendum concept was suggested.
5 You mentioned zoning. I'm just asking you whether
6 there is a difference between exercising political
7 choice and assessment of impact.

8 THE WITNESS: Okay. First off,
9 let me deal with the referendum aspect. You
10 wouldn't have needed to have a hearing if it was a
11 referendum. You know, there was a full, thorough,
12 rigorous hearing fully detailed. So that would be
13 my primary response to that one.

14 On the issue of the zoning, what I
15 was referring to was things like planning. And the
16 point that I want to make is that in the Nova
17 Scotia legislation, you really have to go to the
18 Environmental Assessment Regulations where they
19 describe these things.

20 So the definition -- I'm not
21 laying my hands on it readily, but the definition
22 of "adverse effect" refers to human impacts, and
23 they include an impact on the enjoyment of life or
24 property. And they go -- and I already recited
25 that the -- some of the terms of reference were

1 lifted directly out of the Nova Scotia legislation,
2 both the factors to be considered, and so forth.

3 And they are fully detailed in my
4 report, but they included -- and to be very, very
5 clear, this goes to, you know, land use. So when
6 I'm talking about zoning, I'm talking about land
7 use and the policies governing land use.

8 So you know, F, in the terms of
9 reference, planned or existing land use in the area
10 of the undertaking, word for word cut and paste out
11 of the Nova Scotia legislation.

12 So it was appropriate to include
13 it here, and it was therefore incumbent upon the
14 panel to consider it and to assess it, and so on.

15 Location of the proposed
16 undertaking and the nature and sensitivity of the
17 surrounding area. These were, again, considered on
18 a physical, on a biophysical and on a human basis.

19 And so that's -- that's my
20 response to the zoning.

21 The planning policies, consistency
22 with government policies, was fully detailed. As I
23 said, there were four that they considered in their
24 decision, and they are laid out in chapter 3 of the
25 decision.

1 And you can see where these were
2 the result of extensive public consultation, which
3 led to the plans. They included, but were not
4 limited to, the Vision 2000, but this is detailed
5 in pages 93 through -- well, 93 to 100 of the
6 decision.

7 The four were the Vision 2000 --
8 it is a lengthier name, there was a minerals policy
9 for Nova Scotia, there was the opportunities for
10 sustainable prosperity, the Nova Scotia Strategy
11 for Sustainable Coastal Tourism Development, and
12 the Environmental Goals and Sustainable Prosperity
13 Act.

14 So consistency or inconsistency of
15 industrialization of that area would be a relevant
16 and important consideration.

17 PROFESSOR SCHWARTZ: Thank you
18 very much.

19 THE WITNESS: Thank you, sir.

20 PRESIDING ARBITRATOR: Finally, a
21 couple of questions. First of all, this is not
22 really a question, but just since I am a ship
23 lover, I have heard several times in these two
24 weeks that tankers would be used to bring the
25 aggregates to, and carry away.

1 I think we all agree it would not
2 be tankers. It would be called bulk carriers?

3 THE WITNESS: Bulk carriers, yes.

4 PRESIDING ARBITRATOR: That is
5 just to show off my knowledge.

6 --- Laughter

7 PRESIDING ARBITRATOR: And then
8 comes a couple of questions.

9 You have been talking, in reply to
10 a question by Professor McRae on the substance of
11 the panel report. My question is: Do you see any
12 problem with the process, with the panel process?

13 For instance, there was a
14 complaint, there was a point made by proponents,
15 that their experts were only given a very limited
16 amount of time, 19 minutes or something. That is
17 an extremely short amount of time that they were
18 heard.

19 So would you have any observations
20 on the process which the panel followed, or would
21 all of that be fine as far as you are concerned?

22 THE WITNESS: It looked fine to
23 me. It was a little different. Mr. Fournier
24 appears to have, frankly, structured it along the
25 lines of Sable, but it wasn't as formal, I think,

1 reflecting its circumstances.

2 The 19 I think were the witnesses,
3 the number of witnesses that had been brought by
4 the proponent to the hearing and available to
5 answer questions.

6 And whether the panel had
7 questions for them or not, maybe members of the
8 public did, but that's the purpose of the hearing,
9 and if they don't have any questions, well, good
10 for them. They were able to satisfy people's
11 curiosity on the basis of the written materials.

12 So I don't attach too much
13 significance to that. I have had that situation
14 happen myself where you bring people in. I mean,
15 it is a little bit like my own cross-examination.
16 I was ready to deal with a number of different
17 areas and I don't get asked a number. Well...

18 PRESIDING ARBITRATOR: Yes. We
19 had that impression, that you were ready to deal
20 with the panel process in a very thorough way, but
21 you were not asked, and maybe you are not too
22 surprised that a few questions come from our end of
23 the --

24 THE WITNESS: No. I'm sure they
25 genuinely believed that. It was pretty fair. They

1 gave them a lot of time to prepare their EIS. It
2 took longer than they had expected. And, you know,
3 in fairness to Bilcon, you get an avalanche of
4 information requests. They are very detailed.

5 This is the -- every proponent
6 suffers under that. They were not unique, trust
7 me.

8 The Deep Panuke was a relatively
9 straightforward project, and I think we had, when
10 you got into all of the sub-parts, a couple of
11 thousand information requests, same types of
12 issues.

13 They gave five rounds of
14 information requests. Again, that's not unknown at
15 all. And then the hearing, generally you should
16 have sharpened the focus by the time you've gotten
17 to the hearing.

18 What he did at the end, if you
19 look at the last day of the transcript, is he said,
20 Okay, we're going to end the hearing, we're going
21 to adjourn the hearing. In fact, Professor Grant
22 interjected and said, We're not going to end the
23 hearing. We are going to adjourn the hearing. We
24 are going to give you two weeks to complete the
25 record.

1 So he didn't close the record off
2 until two weeks later, and then what he did was --
3 but then they said, We have 90 days to write up our
4 decision.

5 That is -- that's a fairly typical
6 process. I mean, they all work a little
7 differently.

8 PRESIDING ARBITRATOR: Final
9 question, which is divided into two sub-questions.
10 I hope this is a correct metaphor, but I think
11 throughout this hearing or throughout the case
12 there has been an elephant in the room -- this is
13 to metaphor -- namely the: Why not going to court?
14 And that has two sub-aspects, as far as I'm
15 concerned.

16 First, a more abstract question.
17 At what stage of the EA process would you -- could
18 the proponent have taken a claim to the court,
19 following the, let's say, already scoping issue or
20 the selection of panel members? I don't know.

21 I have no idea about the
22 justiciability of these various steps, but so far I
23 think the question is clear. At what stages could
24 they have, as early as possible, later on have
25 taken the matter to the court?

1 And the other sub-question is more
2 specific. You said you are a proponent's expert.
3 You're a proponent's lawyer. At what stage would
4 you have taken the matter before the courts?

5 THE WITNESS: I can tell you I
6 wouldn't have taken the decision to put this into a
7 joint panel to court.

8 In fact, I said in my evidence I
9 think it was -- the best thing they could do was
10 had eliminated all the segmentation risks, all of
11 the potential litigation over scope of project.

12 Mr. Rankin agrees, and I agree
13 with him, that the amount of detail you have to put
14 out in a comprehensive study and a joint panel is
15 not that different. The process can take a little
16 longer, but there is finality.

17 The problem at that time was, if
18 you got to the end of a comprehensive study and
19 they decided that this needed to be looked at
20 further, it should have an oral hearing -- which,
21 you know, is fully justified on the record -- then
22 you could be thrown into the oral hearing later.

23 That happened in a pipeline
24 project in Vancouver Island, from the United States
25 up to Vancouver Island. They started down the

1 path. It's called the GSX project. I discuss it
2 in my materials.

3 And so part-way along, here they
4 go, but then all of a sudden there is a huge outcry
5 and there are effects, and so it was bounced up to
6 a full-blown review.

7 Where do you appeal? You can
8 appeal at any point. What I've been looking for
9 was the -- in the MacKenzie Valley project, the
10 development up in the MacKenzie Delta, which was
11 the oil development, and then the pipeline came
12 down the MacKenzie Delta to the 60th parallel. On
13 the other side of the border is Alberta.

14 And there is a pipeline system
15 which is owned and operated by NOVA Gas
16 Transmission south of that border, but they had to
17 build some pipeline up to join with the MacKenzie
18 Valley pipeline, okay?

19 So in the middle of that joint
20 panel review, Mr. Justice Phelan of the Federal
21 Court Trial Division said that the scope was not
22 fair and it should include the NOVA piece, as well,
23 as part of the overall environmental assessment,
24 and so they did that as the Joint Review Panel was
25 going along.

1 So they moved on to other matters
2 that were north of 60 and came back and dealt with
3 them.

4 So you can do it -- depending on
5 what the issue is, you can do it at any point. You
6 can do it at the end.

7 But my point in raising it simply
8 was I was asked what's a fair and reasonable -- was
9 this a fair and reasonable process, all things
10 considered, in my experience.

11 And my experience is that, if you
12 have a problem, there are different administrative
13 and judicial ways to address them.

14 And, curiously, they didn't choose
15 to do that to remedy any of their situations then.
16 If you try to appeal a scoping decision two or
17 three years later, a court in Canada is going to
18 tell you you're too late.

19 And that happened very
20 recently. The Innu of Equanitshit is a decision of
21 the Federal Court relating to that Lower Churchill
22 project that I discuss in my materials, and it
23 related to the generating facility, and then a
24 cable, a transmission facility, to Newfoundland.

25 And the Inuit or the Eskimos in

1 that part of the world -- and they -- they took an
2 appeal on whether they had made a mistake in
3 scoping and that they should have been all one
4 project considered together.

5 And what happened was their case
6 was initiated about two-and-a-half years after the
7 decision was taken, and the court said, no, that's
8 too late.

9 PRESIDING ARBITRATOR: So do I
10 understand you correctly that you would -- if you
11 had been on the proponent's side and of course
12 followed very closely and attentively everything
13 that happened that we have heard, you would not
14 have seen a necessity to go to court at any of the
15 stages, because everything was fine?

16 THE WITNESS: I'm sorry. What I
17 said -- I'm sorry to confuse you, sir.

18 PRESIDING ARBITRATOR: Correct it
19 then.

20 THE WITNESS: What I said was I
21 would have -- I frankly would have asked for a
22 Joint Review Panel. I might well have been more
23 active in commenting on the terms of reference or
24 on the guidelines. In fact, I would have.

25 I'm not sure how successful I

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1 would be, because I had to deal with the Nova
2 Scotia legislation, but those are the things I
3 would have done. I wouldn't have appealed that.

4 The fact that they couldn't
5 proceed with blasting on the segment of the big
6 quarry, in my mind --

7 PRESIDING ARBITRATOR: All right.

8 THE WITNESS: -- that wouldn't
9 have worked.

10 PRESIDING ARBITRATOR: We're kind
11 of running out of time. Now arbitrator Bryan
12 Schwartz has asked you about this stage after the
13 panel report was issued and up to the Minister's
14 decision.

15 THE WITNESS: Yes, sir.

16 PRESIDING ARBITRATOR: So on the
17 one hand we have heard from Mr. Rankin, I think,
18 that natural justice required more than just being
19 able to write a couple of letters to the Minister.
20 On the other hand, yesterday Mr. Chapman said that
21 in the practice, in practice, the executive prefers
22 not to have any contact, not even --

23 THE WITNESS: Sir, I think what he
24 said was they receive letters routinely and they
25 will reply to them, but they discourage

1 face-to-face meetings, is my recollection of what
2 he said.

3 PRESIDING ARBITRATOR: And your
4 view would be?

5 THE WITNESS: Well, that is my --
6 I agree with Mr. Chapman.

7 The thing is that they did, in
8 this case, send letters to the Ministers. But the
9 truth is, if they could, then everyone should be
10 able to.

11 If that's not enough and there had
12 to be some kind of an audience or a hearing, then
13 presumably not just one party can go to that, but
14 others would have to be entitled to, and that was
15 my point.

16 The statutory scheme requires a
17 public hearing, not two public hearings.

18 PRESIDING ARBITRATOR: Oh, okay.
19 You made that point. May I ask if --

20 PROFESSOR MCRAE: I just wanted
21 to, for the record, make one correction to what
22 Mr. Smith said. Just in case any Innu are reading
23 our transcript, the Innu are not Inuit.

24 THE WITNESS: I'm sorry, I didn't
25 know that.

1 PRESIDING ARBITRATOR: Any --

2 MR. APPLETON: Arbitrator McRae, I
3 am the Chair of the Inuit Art Foundation. I was
4 going to raise that myself. Thank you very much on
5 the behalf the Inuit.

6 PROFESSOR MCRAE: I actually did
7 it on behalf of the Innu.

8 THE WITNESS: I apologize to both.

9 PRESIDING ARBITRATOR: Is there
10 anything else that the claimant want to raise?

11 MR. NASH: No questions arising.

12 PRESIDING ARBITRATOR: Respondent?

13 MR. SPELLISCY: No questions from
14 us.

15 PRESIDING ARBITRATOR: Thank you
16 very much. I think that brings an end to the
17 witness examination of you, Mr. Smith.

18 THE WITNESS: Thank you, sir.

19 PRESIDING ARBITRATOR: And brings
20 to an end, I hope, this morning's program.

21 Actually, now the remaining
22 question is: What does the Tribunal intend to do
23 about the possibility of expert conferencing?

24 I have to tell you that we have
25 not yet reached an agreement -- I mean agreement --

1 we have not really debated that thoroughly.

2 So we need to do that over lunch
3 and we will tell you, let's say, at two o'clock, at
4 the latest, which is in an hour. We're sorry about
5 that, but it is just the decision-making process
6 takes some time.

7 MR. NASH: Mr. --

8 PRESIDING ARBITRATOR: So we will
9 have -- yes, Mr. Nash?

10 MR. NASH: I didn't mean to
11 interrupt. I thought you were finished.

12 PRESIDING ARBITRATOR: No, no, go
13 ahead.

14 MR. NASH: I can tell the Tribunal
15 that Professor Rankin has come today from Ottawa.

16 PRESIDING ARBITRATOR: Yes, yes.

17 MR. NASH: In order to be here.
18 Mr. Estrin is available, if required.

19 PRESIDING ARBITRATOR: Yes, I
20 think we have seen that all of the people are
21 available, but still I think we need to make up our
22 mind whether that can usefully, let's say,
23 contribute to our state of mind.

24 So please be patient. At two
25 o'clock, we will tell you whether the afternoon is

1 free or whether we're going to have an expert
2 conferencing.

3 I think if, if, we were in favour
4 of, how much time would we need? One hour for us
5 to prepare for?

6 MR. PULKOWSKI: Sorry. I think
7 the original schedule circulated by the Tribunal
8 indicated that expert conferencing, if it were to
9 take place, would not exceed one hour so as to
10 allow enough time for examination.

11 PRESIDING ARBITRATOR: What I
12 meant was would we need some extra time to prepare
13 for it, or would we do that over lunch? I think
14 probably we will do it over lunch.

15 So that means, if there were
16 expert conferencing, would the parties -- would you
17 be prepared to have it start right, like, at two?

18 MR. NASH: Yes.

19 MR. LITTLE: Yes, that's fine.
20 Fine for Canada. Just one statement and a
21 question.

22 Mr. Connelly is obviously here.
23 He wasn't subject to cross-examination, but
24 Mr. Connelly is one of Canada's experts, and he is
25 here with us and would be available for such a

1 panel.

2 Secondly, is Mr. Smith's
3 cross-examination complete and can he eat lunch
4 with us?

5 PRESIDING ARBITRATOR: Yes.
6 Sorry, I did forget to mention. Of course, more
7 than complete, so to say, Mr. Smith. Thank you
8 very much. You are released.

9 Anything else?

10 MR. APPLETON: Oh, yes,
11 Mr. President. I would like to speak specifically
12 to the point made by Mr. Little.

13 First of all, I would like to
14 point out, with respect to the suggestion that
15 Mr. Connelly join the experts' conference -- should
16 we excuse Mr. Smith or shall we...

17 PRESIDING ARBITRATOR: Yes,
18 Mr. Smith. You will have first grab at the lunch
19 out there.

20 --- Laughter

21 PRESIDING ARBITRATOR: Thank you
22 very much again.

23 THE WITNESS: Thank you.

24 MR. APPLETON: Now to address this
25 point. First of all, I would like to point out

1 that it is clear from the record that Mr. Connelly
2 is an interested party with respect to the matters
3 that are at issue here. He's not an independent
4 expert, unlike the other persons that are here.

5 He was the president of CEAA He
6 made the decision, with respect -- he signed the
7 documents with respect to the appointment of the
8 members of the Joint Review Panel.

9 I also point out that on the list
10 of the experts for the expert conferencing
11 session -- I have to get the right term here --
12 that the list had three names. It had
13 Mr. Rankin -- sorry, Professor Rankin, it had
14 Mr. Estrin and Mr. Smith.

15 And so there was no notice of any
16 form that there was Mr. Connelly. Otherwise, you
17 would have heard, I'm sure, some objection from us
18 earlier.

19 We do not believe it would be
20 appropriate, if such an expert meeting was to take
21 place, for Mr. Connelly to be part of that process.
22 We wanted to make that objection as clear as
23 possible.

24 This is the first we have heard
25 about this, and we wanted to deal with it

1 immediately, because we think it would be most
2 inappropriate, given his direct involvement in the
3 matters at issue, which makes him a different type
4 of person, so to speak, for this type of approach.

5 PRESIDING ARBITRATOR: Mr. Little?

6 MR. LITTLE: That is the first we
7 have heard about this with respect to my friend's
8 views on Mr. Connelly. He could have perhaps
9 raised it earlier, and it may well be because of
10 the fact that Mr. Connelly proffered no opinion on
11 the brief involvement that he had in the Whites
12 Point environmental assessment.

13 I also note that I believe it is
14 in the Tribunal's jurisdiction or authority to call
15 whomever it wishes to speak to it at the hearing.
16 And we also find that given that both sides have
17 proffered evidence from two expert witnesses,
18 simply having two of the claimants' and one of
19 Canada's up before you in a session is
20 fundamentally unfair.

21 PRESIDING ARBITRATOR: I think the
22 Tribunal will take this into due consideration and
23 we will see you again at two o'clock. Thank you.
24 We will see you again, or at least "you" in a...

25 MR. APPLETON: We will come back

1 at two.

2 --- Luncheon recess at 1:00 p.m.

3 --- Upon resuming at 2:05 p.m.

4 PRESIDING ARBITRATOR: Good
5 afternoon. Thanks for your patience.

6 Firstly, the point, the expert
7 conferencing, the Tribunal has decided that it
8 won't need the expert conferencing sessions.

9 I think everything is on the
10 table, and we don't see whether we could really
11 gain much from a one hour of expert conferencing.
12 So I think that is fine. Thanks to the experts,
13 and that's it.

14 The second issue is I announced
15 yesterday that we would deal with housekeeping
16 issues today in order to just save tomorrow's
17 precious time for the substance, and so let me tell
18 you the following.

19 First, there is going to be a
20 video recording, which you will receive. It will
21 be provided to lead counsel on November 8. And,
22 Dirk, if I forget something on each point, just
23 add. So video recordings, all of your video
24 recordings, will reach you -- will reach lead
25 counsel on November 8. That's the first point.

1 The second point is the
2 transcript, and here the issue of corrections to
3 the transcript. By "corrections", the Tribunal
4 understands only corrections; that is, no
5 additions, no changes, just let's say obvious
6 corrections.

7 And the Tribunal would ask the
8 parties to consult about the corrections. That
9 probably would take the form of you kind of
10 exchanging your corrected versions, and, if
11 necessary -- and then come up with an agreed
12 version of corrections for the Tribunal.

13 So write the Tribunal with an
14 agreed version of the corrections, a list of
15 corrections, so, in other words, a list of agreed
16 corrections. And if there were any problems
17 remaining, that list would probably say so.

18 The deadline for these corrections
19 would be 22nd November. That is two weeks after
20 you receive the video-audio recording. So November
21 22nd would be the deadline for the corrected
22 transcripts.

23 After we get the transcript back
24 and the list, the court reporter would enter the
25 changes and circulate the final version within two

1 or three -- or one or two business days, one or two
2 business days.

3 Then that gets us to the stage of
4 the annotated versions in lieu of the post-hearing
5 briefs, and the deadline for these annotated
6 versions would be December 20th. That is four
7 weeks after the -- you will receive the final
8 transcripts. So the deadline for the annotated
9 versions of the transcript would be 20th of
10 December.

11 But, again, let me clarify that
12 there can be no changes in the text of the
13 transcripts. My guess is that you are going to
14 watch each other's changes carefully, anyway. So
15 if there were a problem, that would pop up. You
16 would probably have to solve it, if necessary.

17 Are there any questions? I will
18 just repeat the dates. So video-audio recording
19 reaching you by November 8, corrections to the
20 transcripts made, the deadline of November 22nd,
21 and the annotated versions of the transcript to the
22 Tribunal by December 20th.

23 Are there any questions remaining
24 on these matters?

25 MR. PULKOWSKI: I might just add,

1 Mr. President, that I have just confirmed with the
2 court reporter that the parties can receive an MS
3 Word version of the transcript of that particular
4 Thursday, tomorrow's closing statements, so as to
5 make it easier to add to the footnotes to
6 testimony, legal authorities and documents.

7 PRESIDING ARBITRATOR: Mr. Little.

8 MR. LITTLE: Yes. May we just
9 have a question on the annotated version?

10 We have a couple of questions
11 about what that entails, and I guess the picture we
12 had in our mind was that if there is a factual --
13 if there is an assertion made by someone in
14 tomorrow's closing, what you would see would be a
15 footnote pointing to either expert reports, or
16 pleadings, or documents that provide the foundation
17 for that assertion. And is it limited to
18 that? That is what we would like clarity on.

19 PRESIDING ARBITRATOR: Limited to
20 that, in the sense of not containing what?

21 MR. LITTLE: Argumentation. You
22 know, is it just a reference to whatever is on the
23 record?

24 PRESIDING ARBITRATOR: I think it
25 would be just the reference. Otherwise, we would

1 get German-type footnotes or US law footnotes
2 adding a lot. No, no, I think just references.

3 MR. LITTLE: Okay, that is what we
4 envisioned, but we just wanted to be sure.

5 PRESIDING ARBITRATOR: Yes. Any
6 other questions?

7 MR. APPLETON: Might as well ask a
8 very basic question. I assume endnotes would be
9 fine, because otherwise it's going to affect how
10 the transcript would go.

11 So I assume that if it is in a
12 footnote, it could go by way of an endnote, as long
13 as it is noted -- this is the first time anyone has
14 ever done this, that we're aware of, so we just
15 have some very simple questions.

16 I don't want to waste any other
17 time, but I assume that that would be fine. Any
18 way we would like to note would be fine in that
19 respect in that respect; correct?

20 PRESIDING ARBITRATOR: I think
21 endnotes would be fine. Academics hate them. We
22 are not here as academics, so we love them.

23 --- Laughter

24 MR. APPLETON: Very good. One
25 thing that might be helpful with respect to the

1 transcript is whether we could have the use of some
2 titles. So if they are moving to a section, would
3 that be possible?

4 So for an obvious section that
5 everyone will have, everyone will have a section
6 that talks about the international law. I would
7 imagine everyone will have a section that talks
8 about Article 1105, 1102 and 1103.

9 PRESIDING ARBITRATOR: So it would
10 not be, let's say, Article 1105 does not mean
11 that --

12 MR. APPLETON: No, a very minor
13 descriptive, so you can see where you are on the
14 page. If you don't want it, that's fine. It also
15 means the parties could just read them into the
16 transcript, which is another way.

17 It is more a question of what you
18 would like. We don't want anybody to do anything
19 that you would think would be outside the bounds
20 you want. Since this is the first, we want to make
21 sure we do it the right way.

22 PRESIDING ARBITRATOR: I think
23 Mr. Little has --

24 MR. LITTLE: If I may, I think
25 annotations are annotations, and once we're getting

1 into inserting headings, you're getting into the
2 realm of potentially making argumentation, et
3 cetera. So I think it would be if someone wants to
4 read it into the record, fine, but --

5 PRESIDING ARBITRATOR: I think we
6 have the --

7 MR. LITTLE: Pardon me?

8 PRESIDING ARBITRATOR: So the
9 indexes will be there at the end, right? I mean,
10 they are called indexes, this very dense stuff that
11 you have at the end?

12 MR. KURELEK: They are --

13 MR. APPLETON: An index will only
14 work, Mr. President, if you use an endnote, that is
15 why, because otherwise your pages will change from
16 the transcript. That's why -- and it would be
17 different for each party. That is why I was
18 suggesting that you use an endnote so that
19 basically the references for the location don't
20 change, particularly. So that is why I was trying
21 to think about that.

22 We're in your hands. We will do
23 whatever you like. I don't really want to belabour
24 this. I am sure you could leave it to the parties
25 to figure out what to do here.

1 MR. PULKOWSKI: Mr. Appleton, just
2 to add to the page change, it is of course true
3 that if you add a footnote, there will be some text
4 running to another page, but, on the other hand,
5 every page does have a header which contains the
6 page number of the transcript.

7 It would then be the case that
8 page 7 would potentially be on page 9 of the actual
9 document, but it would still be possible to trace a
10 particular reference.

11 So perhaps it is really up to the
12 parties to see what works best on that.

13 MR. APPLETON: It is difficult. I
14 want to make your job easier, rather than more
15 difficult. We would like you to spend your time
16 focussing on decisions about what is going on, not
17 what page of the transcript you're actually looking
18 at. It is a beautiful transcript.

19 PRESIDING ARBITRATOR: What we
20 don't want up here is engage in correspondences
21 because there is a disagreement about these
22 technicalities. I think by now I have about five
23 binders.

24 MR. APPLETON: We will have no
25 titles, if that makes it simpler. If I want a

1 title, I will add it in before I say something. No
2 problem. I can handle that. You will have it
3 right on the transcript.

4 MR. LITTLE: I think, just so I
5 understand, Mr. Appleton, you're not --
6 Mr. Appleton isn't proposing to insert titles after
7 the fact in the transcript. He would be reading it
8 into the record; is that correct?

9 MR. APPLETON: If I decide tonight
10 that I think we want to have a title, I will read
11 it into the transcript.

12 PRESIDING ARBITRATOR: Maybe I'm
13 having a senior moment, but what do you mean you'll
14 read the title into the transcript? There is not
15 going to be anything read into the transcript, is
16 there? The transcript is there.

17 MR. APPLETON: It will be part of
18 my oral statement. I might say "section A."

19 PRESIDING ARBITRATOR: Oh, you
20 mean by tomorrow?

21 MR. APPLETON: Yes, yes, tomorrow.
22 If I would like to have the transcript looking this
23 way, I might say "section A", or perhaps I will
24 decide, to hell with it, there is no point in
25 worrying about it, and we don't need to spend any

1 more time on this.

2 PRESIDING ARBITRATOR: Okay. This
3 is up to you how you want to style the performance
4 tomorrow. It is in your hands, okay.

5 End note versus footnote, or maybe
6 the references could be put into the text just in
7 square brackets, because if it is only references,
8 no text, it would not really break up the flow of
9 the text on you, will it?

10 Footnotes would change the page
11 location, right, that's true, and so would
12 brackets. But I think let's keep it to endnotes.

13 MR. APPLETON: Thank you.

14 PRESIDING ARBITRATOR: Okay. So
15 we are going to see each other -- oh, yes.

16 PROFESSOR SCHWARTZ: This is just
17 a loose suggestion from one member of the panel.
18 You're entirely free to organize the material the
19 way you want tomorrow, and I am not reading from
20 prepared text, so please don't close-read this as
21 some sort of intimation of what our thinking is.

22 Actually, we have a lot to think
23 about, which is why I am going to suggest a
24 schematic that might help us, but, again, entirely
25 up to you whether you find it helpful.

1 You could view this matter as
2 having three stages. There's the commissioning of
3 the joint panel, there is the conduct of the joint
4 panel, and there is the eventual final decision by
5 government.

6 So it might be helpful to us if
7 you can think of addressing each of those stages.
8 And we're also interested, I believe, in the
9 interaction between those stages.

10 So, for example, stage 1, are we
11 going to commission a joint panel? It might be
12 argued that if the joint panel process is done
13 right, however its origin, that renders moot or
14 overbears whether the commission was done right in
15 the first place.

16 It might be argued on the other
17 hand there is some carry-forward; there is some
18 legal or factual carry-forward. If something was
19 done in wrong at stage 1, maybe it somehow carries
20 forward to stage 2 and stage 3.

21 Similarly, what is the
22 relationship between stage 2 and stage 3? You
23 might say, for example, well, stage 2 has been done
24 right, which would have rendered the government
25 decision inevitable, or is there some causal link

1 between something that's arguably done wrong at
2 stage 2 and the final decision?

3 We have had a tremendous amount of
4 evidence and argument. It's been very thorough and
5 we think been very ably done. So organizing this,
6 we're very interested in the details, but trying to
7 get a handle on it schematically might be helpful
8 to us.

9 I have to emphasize that is just a
10 thought about how we might conceptually organize
11 it. If there is a different way you want to do it,
12 there are some points you want to emphasize and
13 others not, again, that is entirely within your
14 discretion. Thank you.

15 PRESIDING ARBITRATOR: I think
16 that was so clear that we don't need to discuss it,
17 right, because it is up to you, anyway, whether you
18 want to follow this, one, two, Stage 1, 2, 3
19 approach, or put it into any other way.

20 Okay, I think, am I right, that
21 there is no further points at the moment?

22 So we are going to see each other
23 tomorrow at 9:00 sharp, because tomorrow we have to
24 be very disciplined in order to really complete
25 things at a reasonable time. Thank you very much.

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1 I don't wish you a nice evening. It would be
2 sarcastic.

3 --- Laughter

4 PRESIDING ARBITRATOR: I am not
5 sarcastic by nature. So do well. Bye-bye.

6 --- (Off record discussion)

7 --- Whereupon the hearing adjourned at 2:21 p.m.,
8 to be resumed on Thursday, October 31, 2013 at
9 9:00 a.m.

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