
 IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN
 OF THE NORTH AMERICAN FREE TRADE AGREEMENT
 AND THE UNCITRAL ARBITRATION RULES (1976)

Case No. UNCT/14/2

ELI LILLY AND COMPANY
 Claimant
 vs.
 GOVERNMENT OF CANADA
 Respondent

MINUTES OF ARBITRATION
 Washington, D.C.

Wednesday, 1 June 2016

(Pages 652-951)

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25 Mr. Andy Reddon
Professor Norman Siebrasse
Mr. Philip Thomas

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A P P E A R A N C E S

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6 MR. ADRIAN JOHNSTON
7 MS. KRISTA ZEMAN
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1 THE PRESIDENT: Good morning. Day 3.

2 As usual, we have the questions are there

3 any matters of organizational, procedural or

4 household nature you would like to raise?

5 MS. CHEEK: No matters from the Claimant,

6 thank you.

7 MR. SPELLISCY: No matters from the

8 Respondent.

9 MS. WAGNER: Mr. President, just before

10 we begin, there were times in the questioning

11 yesterday that Professor Siebrasse felt quite

12 constrained from responding to questions, and I

13 wonder if we just might emphasize that he is entitled

14 to respond to questions in full as long as his answer

15 is, in fact, responsive.

16 THE PRESIDENT: There was one occasion

17 where I said he could do that in redirect, and you

18 also saw I gave him reasonable leeway in other

19 responses. Nonetheless, if there are areas where he

20 feels he has not been able to express them fully, I

21 will give him obviously the possibility to do so.

22 I think later on he was able to explain,

23 but, Professor Siebrasse, let us ask you the question

24 rather than ask counsel how you feel.

25 Have you had the opportunity to answer

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09:01

1 all the questions as you would like to have answered

2 them fully yesterday?

3 PROFESSOR SIEBRASSE: Well, there were a

4 number of questions where the question was of the

5 form "Do you agree these words are on the page?" To

6 that extent yes. To the extent they had some

7 implication or meaning, I didn't feel that I always

8 had the opportunity to fully express how I understood

9 them.

10 THE PRESIDENT: But the problem is a

11 number of those questions were questions of

12 foundation leading up to another question, so it was

13 not just that one. That's a litigation technique we

14 have to live with. But there may be other questions

15 where you say "I really wanted to and have not had

16 the opportunity to express my full opinion on that

17 subject matter", and if you have those -- it's a very

18 dangerous question for counsel, I know, "Do you have

19 any other thoughts?" That's the open question

20 everybody fears. Nonetheless, I would like to give

21 you the full opportunity to express your thoughts.

22 Let's first finish with the

23 cross-examination, and then on redirect maybe there

24 are points that we can pick up. I don't want to

25 leave you here as an expert witness with the feeling

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09:02

1 "Oh my God, I have not been able to tell the whole

2 story as I see it as expert."

3 PROFESSOR SIEBRASSE: I understand.

4 THE PRESIDENT: Ms. Wagner, does that

5 alleviate also your concerns?

6 MS. WAGNER: Yes. Thank you very much.

7 THE PRESIDENT: Mr. Johnston, please, you

8 can proceed.

9 **CROSS-EXAMINATION ON BEHALF OF THE RESPONDENT,**

10 **continued**

11 MR. JOHNSTON: Thank you. Good morning.

12 Professor Siebrasse, would you agree that

13 each patentability requirement serves certain

14 functions to uphold the patent bargain?

15 PROFESSOR SIEBRASSE: Yes.

16 MR. JOHNSTON: And I know you say that

17 there has been a dramatic change in the law of

18 utility, but I want to put that aside for the moment

19 and to look at the situation under prior law, as you

20 understand it.

21 Would you agree that, under prior law,

22 preventing premature patenting was a function served

23 by the utility requirement?

24 PROFESSOR SIEBRASSE: Yes.

25 MR. JOHNSTON: And by "premature"

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09:03

1 patenting, you mean patenting before enough is known
2 about the invention?
3 PROFESSOR SIEBRASSE: Well, I wouldn't
4 say that.
5 MR. JOHNSTON: What do you mean by
6 "premature" patent?
7 PROFESSOR SIEBRASSE: Patenting that is
8 speculative.
9 MR. JOHNSTON: Now, do you consider that
10 this objective of preventing speculative patenting is
11 a legitimate objective in the patent system?
12 PROFESSOR SIEBRASSE: Yes.
13 MR. JOHNSTON: Would you agree that a
14 line has to be drawn somewhere to decide what is too
15 far upstream in the development process?
16 PROFESSOR SIEBRASSE: Yes.
17 MR. JOHNSTON: A line at which we say
18 this is speculative and this is not?
19 PROFESSOR SIEBRASSE: Yes.
20 MR. JOHNSTON: Would you agree that there
21 is no absolute ideal place to draw that line of
22 patentability between speculation and invention?
23 PROFESSOR SIEBRASSE: Well, theoretically
24 it's not entirely clear. There are competing
25 considerations on how far upstream. Then there are a

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09:04

1 variety of practical considerations that narrow down
2 the appropriate range substantially.
3 MR. JOHNSTON: An advantage of allowing
4 patenting further upstream might be that you give
5 incentives for someone to patent and then develop
6 further their patented invention.
7 PROFESSOR SIEBRASSE: Well, as a matter
8 of theory that's an argument for patenting further
9 upstream earlier in the development process.
10 MR. JOHNSTON: Yes.
11 PROFESSOR SIEBRASSE: I heard you say
12 "downstream".
13 MR. JOHNSTON: Sorry, further upstream.
14 An argument for requiring patenting to be further
15 downstream, what would be an argument for that?
16 PROFESSOR SIEBRASSE: Well, the argument
17 that's usually given is that, if you allow patenting
18 too far upstream, you're blocking off others from
19 exploiting -- from exploiting that same area. I
20 wasn't asked here to give an opinion on theoretical
21 matters specifically so I'll say that's the standard
22 view on that debate.
23 MR. JOHNSTON: You've said that a
24 longstanding objective of the utility requirement is
25 to prevent speculative patenting?

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09:05

1 PROFESSOR SIEBRASSE: Yes.
2 MR. JOHNSTON: And that you consider that
3 to be a legitimate objective.
4 PROFESSOR SIEBRASSE: Well, a good
5 example is given by the Wandscheer case, which was
6 the Supreme Court of Canada case decided in the '30s,
7 where, say, a snow blower invention where the
8 invention -- it's familiar to all Canadians anyway
9 but it's a snow blower that has a rotating chute that
10 allows you to blow -- throw the snow in every
11 direction. The patentee had this idea of a snow
12 blower chute but the actual implementation, the
13 claimed invention didn't actually work. He put a 90
14 degree angle in it and that didn't work. Then
15 somebody else subsequently came up with a similar
16 design that actually worked, that has a parabolic
17 bend that worked. Then the first inventor who
18 actually had a patent said, well, you can't -- you're
19 infringing my invention and the court said no, you
20 patented too far upstream and in effect we can't let
21 you block somebody else who actually invented this.
22 MR. JOHNSTON: That was the Supreme Court
23 of Canada's decision in Wandscheer?
24 PROFESSOR SIEBRASSE: That's right.
25 MR. JOHNSTON: That was in 1948, I

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09:07

1 believe.
2 PROFESSOR SIEBRASSE: Yes, somewhere
3 around that time.
4 MR. JOHNSTON: If you could please turn
5 up tab 4, this is C-206, this is your paper "Must the
6 factual basis for a sound prediction be disclosed in
7 the patent?" If you'd turn to page 12, please,
8 you're discussing this issue here at the top of
9 page 12.
10 "A line must be drawn between utility and
11 mere speculation. Because research is incremental,
12 the line between speculation and sound prediction is
13 to some degree arbitrary, like the line between
14 prediction and demonstrated utility. That means the
15 line between speculation and utility is important.
16 We must draw a line somewhere -- and yet difficult
17 because there is no natural line in the real world."
18 Then in the second half of the paragraph
19 you write, "In the context of the distinction between
20 speculation and utility, a degree of arbitrariness is
21 inevitable. There is a good policy reason for
22 drawing a line that refuses to grant a patent for
23 mere speculation, but reality does not admit of clear
24 lines on this question. Arbitrariness is an
25 inescapable but unfortunate consequence of the need

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1 to impose clear legal lines on a fuzzy reality." 664
 2 That's the view you expressed in your 09:08
 3 paper?
 4 PROFESSOR SIEBRASSE: Yes.
 5 MR. JOHNSTON: And it sounds consistent
 6 with the testimony you've given here today?
 7 PROFESSOR SIEBRASSE: Yes.
 8 MR. JOHNSTON: Please turn up tab 6,
 9 R-004. This is the Supreme Court's decision in AZT.
 10 There's been a lot of talk about AZT so far in this
 11 proceeding but, just by way of background, in that
 12 case the pharmaceutical company, which was
 13 GlaxoSmithKline, had obtained a patent for the use of
 14 the compound to treat HIV Aids. So it was a new use
 15 patent. Is that right?
 16 PROFESSOR SIEBRASSE: Yes.
 17 MR. JOHNSTON: So that meant they had not
 18 actually invented the compound per se; the invention
 19 was the new use --
 20 PROFESSOR SIEBRASSE: Yes.
 21 MR. JOHNSTON: -- of that compound.
 22 Please turn to page 22. We see a section
 23 here Glaxo/Wellcome's After-the-Fact Validation
 24 Theory. Paragraph 78 sets out Glaxo's argument,
 25 which was that, because AZT turned out to have both

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1 treatment and limited prophylactic properties, its 665
 2 prediction must necessarily have been sound and the 09:10
 3 patent upheld on that basis. Then at paragraph 80,
 4 the Supreme Court rejects this argument on the basis
 5 that utility must either be demonstrated or at least
 6 soundly predicted when the patent is filed. Is that
 7 right?
 8 PROFESSOR SIEBRASSE: Yes.
 9 MR. JOHNSTON: Could you please turn back
 10 one page to paragraph 52 -- oh, more pages,
 11 paragraph 52. Midway through paragraph 52 the court
 12 states, "Glaxo/Wellcome claimed a hitherto
 13 unrecognized utility but if it had not established
 14 such utility by tests or sound prediction at the time
 15 it applied for its patent, then it was offering
 16 nothing to the public but wishful thinking in
 17 exchange for locking up potentially valuable research
 18 turf for (then) 17 years."
 19 Would you say having read this that the
 20 court in AZT was concerned with the problem of
 21 patenting too far upstream?
 22 PROFESSOR SIEBRASSE: Yes.
 23 MR. JOHNSTON: And that the court
 24 understood -- sorry. And would you say that the
 25 court's statement that utility must be demonstrated

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1 or soundly predicted at the time of filing is 666
 2 rationally connected to the objective of patenting 09:11
 3 too far upstream?
 4 PROFESSOR SIEBRASSE: I would say it's
 5 rationally connected, yes.
 6 MR. JOHNSTON: If you could please turn
 7 to page 15, this section is entitled on page 15,
 8 Inventorship. Is that right?
 9 PROFESSOR SIEBRASSE: Yes.
 10 MR. JOHNSTON: And the paragraph that we
 11 just read regarding requirement for utility to be
 12 established by a test or sound prediction, that falls
 13 under a subheading "Proof of utility", but it's all
 14 within the context of a broader section entitled
 15 "Inventorship." Is that right? That's starting at
 16 paragraph 45.
 17 PROFESSOR SIEBRASSE: Yes.
 18 MR. JOHNSTON: There's a subsection at
 19 paragraph 51, "Proof of utility"?
 20 PROFESSOR SIEBRASSE: Yes, that's
 21 correct.
 22 MR. JOHNSTON: Within that subsection,
 23 "Proof of utility," if you'd please turn to
 24 paragraph 54, it's on the next page, there is a quote
 25 from the 1930 Supreme Court of Canada decision in

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1 Rice v Christiani. It states at paragraph 54: "It 667
 2 is not enough for a man to say that an idea floated 09:13
 3 through his brain. He must at least have reduced it
 4 to a definite and practical shape before he can be
 5 said to have invented a process."
 6 Then immediately following in
 7 paragraph 55 the court states, "In the present case,
 8 if the utility of AZT for the treatment of HIV/AIDS
 9 was unpredictable at the time of the patent
 10 application, then the inventors had not made an
 11 invention and had offered nothing to the public in
 12 exchange for a 17-year monopoly except wishful
 13 thinking."
 14 The earlier quote that I read, the first
 15 quote in paragraph 54, that it is not enough for a
 16 man to say that an idea floated through his brain, is
 17 that the same language that was quoted by the Supreme
 18 Court of Canada in that 1948 Wandscheer case?
 19 PROFESSOR SIEBRASSE: Yes.
 20 MR. JOHNSTON: You say that Wandscheer
 21 was an early decision illustrating the purpose of the
 22 utility requirement in preventing patenting too far
 23 upstream?
 24 PROFESSOR SIEBRASSE: Yes.
 25 MR. JOHNSTON: Please turn up tab 212.

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1 Exhibit R-497. It's your paper Form and Function in
2 the Law of Utility. Please turn to page 37. In that
3 first full paragraph you write, "Thus Wandscheer is
4 explicitly a case refusing to grant a patent
5 prematurely. This exactly reflects the standard
6 justification for the requirement of actual utility
7 set out in Brenner v Manson and Wellcome/AZT, as
8 discussed above; the similarity of the language is
9 striking. Indeed, we have seen that the concern with
10 granting a patent prematurely is that it might lock
11 up valuable research turf, thereby impeding
12 subsequent innovators from independently improving on
13 that speculation and developing it to the point where
14 it delivers a real benefit to the public. That is
15 exactly what happened in Wandscheer. The patentee
16 was asserting a patent for an invention that had
17 never been used in the form disclosed against a
18 defendant, Sicard, who had developed a practical
19 machine by independent work and ingenuity."
20 That was the view you expressed in your
21 Form and Function paper?
22 PROFESSOR SIEBRASSE: Yes.
23 MR. JOHNSTON: If you could please turn
24 up -- is it possible to pull up the transcript from
25 yesterday? Page 535. This is your testimony from

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1 direct examination yesterday, and you stated --
2 MS. WAGNER: Mr. President, would it be
3 possible for the witness to have hard copy of the
4 transcript in front of him?
5 MR. JOHNSTON: We just received it last
6 night. We did not print a hard copy.
7 THE PRESIDENT: Here comes one.
8 MR. JOHNSTON: In this passage, you said
9 in direct examination that for inventorship it is
10 necessary to have reduced the invention to a definite
11 and practical shape.
12 PROFESSOR SIEBRASSE: Yes.
13 MR. JOHNSTON: On the same page here,
14 actually lower down at line 23 and following, you've
15 said yesterday in direct examination that "the date
16 of being reduced to definite and practical form is
17 when it's written down in a manner that allows some
18 third party to implement it and not when it was
19 tested. So definite and practical shape, on the one
20 hand, means more than an idea floating through
21 someone's brain, but less than testing."
22 PROFESSOR SIEBRASSE: Yes.
23 MR. JOHNSTON: Now, in the context of a
24 new use patent like atomoxetine reduction to definite
25 and practical shape, on your view, requires writing

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09:18

1 down the invention, meaning writing down the old
2 compound and its new use.
3 PROFESSOR SIEBRASSE: Effectively, yes --
4 I mean, I must say that I haven't thought precisely
5 about what it would be in that context.
6 MR. JOHNSTON: It's possible that, before
7 writing down that new use, an applicant may have done
8 testing to suggest that the old compound was indeed
9 useful for that claimed use, and they could be very
10 certain, in fact, that the old compound would work
11 for that new use. That's a possibility?
12 PROFESSOR SIEBRASSE: Yes.
13 MR. JOHNSTON: Would you agree that it's
14 also possible that someone -- that I, after this
15 hearing -- could go and write down a new use for an
16 old compound, atomoxetine for the treatment of any
17 other disease, I could write that in a patent, I
18 could write down the old compound disclosed in a
19 previous patent, and I could write down a new use, a
20 new treatment that it could be used for. I could put
21 that in the patent. And I could do that without
22 having any idea whether atomoxetine would actually
23 work for that new use.
24 PROFESSOR SIEBRASSE: Well, in principle
25 it's possible. I'm not aware of any cases in which

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09:20

1 it's actually happened. And I would say at this
2 point, you know, again we've been reading a lot of
3 passages and I'm not -- you know, there are a number
4 of things I might have said about these cases had I
5 been asked more than simply are the words on the
6 page, but...
7 MR. JOHNSTON: But in this context you've
8 said in direct examination that what it is to reduce
9 to a definite and practical form is to write it down
10 in a manner that allows some third party to implement
11 it and has not anything to do with testing. So the
12 scenario --
13 PROFESSOR SIEBRASSE: But I --
14 THE PRESIDENT: Wait a minute. One at a
15 time. You finish the question and then you give the
16 answer.
17 MR. JOHNSTON: My question is, in the
18 context of a new use patent like atomoxetine, does
19 reduction to definite and practical shape require
20 anything more, in your view, than simply stating
21 atomoxetine, disclosing this -- writing down this
22 previously disclosed compound, and stating a new use
23 in the patent?
24 PROFESSOR SIEBRASSE: That seems to
25 follow, yes.

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1 MR. JOHNSTON: Something more is
2 required?
3 PROFESSOR SIEBRASSE: No, that that would
4 satisfy the definite and practical shape requirement.
5 MR. JOHNSTON: Even if it was completely
6 a wild guess?
7 PROFESSOR SIEBRASSE: Well, as I say, I'm
8 not aware of any actual cases or patents in which
9 that's true.
10 MR. JOHNSTON: But the fact that it was a
11 wild guess would not change your assessment of
12 whether it had been reduced to a definite and
13 practical shape?
14 PROFESSOR SIEBRASSE: Well, it certainly
15 seems counter-intuitive that that should be allowed,
16 and I'm not aware of any cases in which the court has
17 been faced with that question. It certainly wasn't
18 the case in AZT, and it certainly wasn't the case in
19 the patents at hand.
20 MR. JOHNSTON: So, Professor Siebrasse,
21 you take it that, or your position is that, the
22 Supreme Court's 2002 decision, AZT, in which it
23 states that utility must be established by
24 demonstration or sound prediction at the filing date,
25 you say this was a dramatic change in Canadian law?

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09:21

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1 PROFESSOR SIEBRASSE: Yes. It
2 essentially changed the law that was set out in
3 *Christiani v Rice*.
4 MR. JOHNSTON: Now, the AZT decision was
5 released on December 5, 2002. Is that right?
6 PROFESSOR SIEBRASSE: Yes.
7 MR. JOHNSTON: And you read that decision
8 soon after it was released, I imagine?
9 PROFESSOR SIEBRASSE: I would imagine. I
10 can't recall specifically when I read it.
11 MR. JOHNSTON: There was another patent
12 law case released by the Supreme Court of Canada the
13 very same day known as the Harvard Mouse case.
14 PROFESSOR SIEBRASSE: Yes.
15 MR. JOHNSTON: You're familiar with that
16 case?
17 PROFESSOR SIEBRASSE: Yes.
18 MR. JOHNSTON: And it dealt with the
19 patenting of higher life forms?
20 PROFESSOR SIEBRASSE: Yes.
21 MR. JOHNSTON: You published several
22 papers in the years following 2002 which discussed in
23 some detail Harvard Mouse and the issue of patenting
24 higher life forms. Is that right?
25 PROFESSOR SIEBRASSE: Yes. That's why I

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09:22

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1 wasn't writing on utility.
2 MR. JOHNSTON: Now, you didn't publish
3 any papers on the court's approach to evidence of
4 utility in AZT?
5 PROFESSOR SIEBRASSE: No, because I was
6 busy writing papers on patentable subject matter.
7 MR. JOHNSTON: You have, since 2012,
8 published three papers dealing with aspects of the
9 alleged promise utility doctrine. Is that right?
10 PROFESSOR SIEBRASSE: Yes.
11 MR. JOHNSTON: Two of these papers
12 address the false promise of the promise standard,
13 the doctrine of false promise. Is that right?
14 PROFESSOR SIEBRASSE: Yes.
15 MR. JOHNSTON: And the other one
16 addresses the disclosure requirement for sound
17 prediction?
18 PROFESSOR SIEBRASSE: Yes.
19 MR. JOHNSTON: You have not written a
20 paper since 2002 addressing the post-filing evidence
21 rule set out in AZT?
22 PROFESSOR SIEBRASSE: That's correct.
23 MR. JOHNSTON: In fact, in your other
24 papers addressing the promise utility doctrine, there
25 is not even a critique of the post-filing evidence

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09:23

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1 rule in AZT?
2 PROFESSOR SIEBRASSE: That's correct.
3 Well, I mean, I believe you. I can't recall having
4 made a critique of it.
5 MR. JOHNSTON: In fact, if you could
6 please turn up tab 21, R-497, 15 at the bottom.
7 PROFESSOR SIEBRASSE: Yes.
8 MR. JOHNSTON: Sorry, it's actually 15 in
9 the middle, there's a sentence there which says,
10 "Thus the utility requirement as defined in
11 Wellcome/AZT and the leading cases from other
12 jurisdictions discussed in this section is
13 functionally distinct from the promise doctrine."
14 PROFESSOR SIEBRASSE: Yes.
15 MR. JOHNSTON: "I will show below that
16 the function of preventing premature patents is and
17 long has been served by the actual utility
18 requirement."
19 PROFESSOR SIEBRASSE: Yes.
20 MR. JOHNSTON: If you could please turn
21 to Tab 16, R-476, these are your blog excerpts at
22 page 48. Professor Siebrasse, would you say that the
23 rule in AZT draws the line for speculative patenting
24 at a reasonable place?
25 PROFESSOR SIEBRASSE: I'm not sure that

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09:24

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09:26

1 AZT itself really draws a line. It sets out tests.
 2 It sets out the sound prediction test. It holds that
 3 that particular compound satisfied the utility
 4 requirement on the basis of sound prediction, but I
 5 wouldn't say that it said "This is the line and no
 6 lower." I mean it set out a methodology and said on
 7 the facts utility is established.
 8 MR. JOHNSTON: AZT was crystal clear that
 9 at the date of filing you had to have demonstrated or
 10 soundly predicted utility of your invention.
 11 PROFESSOR SIEBRASSE: Yes.
 12 MR. JOHNSTON: And if I could take you on
 13 this page in the middle, here you're discussing AZT
 14 in the second to last paragraph and you're discussing
 15 the approach to post-published evidence in the UK --
 16 THE PRESIDENT: Mr. Johnson, which page
 17 are you now?
 18 MR. JOHNSTON: I'm sorry. This is
 19 page 48. The paragraph on the screen.
 20 You're discussing the Supreme Court's
 21 clear holding in AZT, referring to the requirement to
 22 establish utility by demonstration or sound
 23 prediction at the filing?
 24 PROFESSOR SIEBRASSE: Yes.
 25 MR. JOHNSTON: And you're comparing with

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09:27

1 approaches in the UK, Europe and the Federal Circuit
 2 where you say there has been the use of
 3 post-published evidence. You write, "And I must say
 4 that the policy reasons for permitting the use of
 5 post-published evidence are not clear to me..."
 6 PROFESSOR SIEBRASSE: Yes, well, that's
 7 just saying it's not that it's not clear to me; it's
 8 not clear from those decisions what thoughts were in
 9 the head of the court.
 10 MR. JOHNSTON: Please turn --
 11 PROFESSOR SIEBRASSE: I mean I'm not
 12 saying the reasons for permitting the use of
 13 post-publishing is clear to me one way or the other.
 14 I think that's what I was saying there. The court
 15 didn't say what the reasons were.
 16 MR. JOHNSTON: In the last paragraph,
 17 again you're still comparing the different approaches
 18 and you're noting in particular that the approach in
 19 Canada now not only requiring evidence to be there at
 20 the date of filing but you're also referring to the
 21 disclosure requirement for sound prediction on top of
 22 that. Then in the next sentence you write, "A middle
 23 ground between these two extremes is that the
 24 evidence must exist at the relevant date, even though
 25 it is not all disclosed in the specification."

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1 PROFESSOR SIEBRASSE: Yes.
 2 MR. JOHNSTON: Am I right in reading that
 3 sentence to say that there are two extremes? One of
 4 them is consideration of post-published evidence; the
 5 other would be limiting your consideration to what is
 6 disclosed in the patent, and that you characterize as
 7 a middle ground between these two extremes evidence
 8 that exists at the relevant date, even though it is
 9 not disclosed in the specification?
 10 PROFESSOR SIEBRASSE: Could you repeat
 11 your question?
 12 MR. JOHNSTON: My question is, if I've
 13 fairly captured what you're saying here, am I right
 14 in reading this sentence to say there are two
 15 extremes. One of them is consideration of
 16 post-published evidence; the other would be limiting
 17 consideration to what is actually disclosed in the
 18 patent, and that you characterize as a middle ground
 19 between these two extremes limiting your
 20 consideration to evidence that exists at the relevant
 21 date, even though it is not disclosed in the
 22 specification. That's what you're characterizing as
 23 a middle between two extremes.
 24 PROFESSOR SIEBRASSE: Well, I will point
 25 out that I say the law as recently developed in the

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1 Federal courts, and it is a middle ground, but I'm
 2 not saying the middle ground is, therefore, the
 3 correct answer.
 4 MR. JOHNSTON: Professor Siebrasse, it's
 5 alluded to in this last paragraph, "There is a rule
 6 today in Canadian law that the factual basis and line
 7 of reasoning supporting a sound prediction must be
 8 disclosed in the patent."
 9 PROFESSOR SIEBRASSE: Yes, so long --
 10 now, and it's understood that so long as the line of
 11 reasoning wouldn't be common general knowledge.
 12 MR. JOHNSTON: So if the factual basis or
 13 the line of reasoning would be common general
 14 knowledge, that need not be disclosed in the patent
 15 to support a sound prediction?
 16 PROFESSOR SIEBRASSE: Yes. That's now
 17 been established.
 18 MR. JOHNSTON: Right. And, if I've
 19 understood your position correctly from your writing,
 20 you have always understood this to be implicit in the
 21 Raloxifene rule. Is that right?
 22 PROFESSOR SIEBRASSE: What to be
 23 implicit?
 24 MR. JOHNSTON: Sorry. You understand
 25 that -- your position is that the Raloxifene case

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1 established the heightened disclosure requirement for
2 sound prediction. Is that your position?
3 PROFESSOR SIEBRASSE: Yeah -- well, the
4 Raloxifene case interpreted AZT, the language in AZT,
5 it was dicta, it's not 100 percent clear. So
6 Raloxifene was certainly the first one to actually
7 apply it, whether you want to say it was actually
8 established in Raloxifene or established in AZT, but
9 certainly Raloxifene was the first to interpret AZT
10 that way and then became established, yes.
11 MR. JOHNSTON: And under that rule, as
12 articulated in Raloxifene, you have always understood
13 that rule to be that it does not require disclosing
14 in the patent what would be within the common general
15 knowledge of the skilled reader.
16 PROFESSOR SIEBRASSE: No, I hadn't always
17 understood that rule that way, so I'd actually
18 understood the rule, just from the title of my
19 article, factual basis, I'd understood that it was
20 only the factual basis that had to be disclosed.
21 That's what Raloxifene said. And then later case law
22 said well, it's not just the factual basis, it's the
23 sound prediction, and that's not -- you know, given
24 the reading in Raloxifene, that's kind of a
25 reasonable extension. But it actually wasn't what

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1 I'd initially understood. And then for a little
2 while it was thought that the entire sound line of
3 reasoning had to be disclosed in the patent whether
4 or not it was common general knowledge. And then
5 there was a subsequent case that said it's the
6 factual basis and the sound line of reasoning but the
7 sound line of reasoning doesn't have to be disclosed
8 if it was common general knowledge. So that's the
9 current state of the law, but it wasn't always my
10 understanding of Raloxifene.
11 MR. JOHNSTON: On the current state of
12 the law, the line of reasoning, or whatever is within
13 the common general knowledge need not be disclosed in
14 the patent.
15 PROFESSOR SIEBRASSE: Yes.
16 MR. JOHNSTON: Please turn to Tab 4,
17 C-206. This is your Factual Basis paper at page 7 at
18 the bottom. This is where you kind of get into this
19 issue, and so you say: "For convenience this article
20 will refer to the requirement to disclose the factual
21 basis for the prediction, but it may well be that the
22 Raloxifene doctrine requires disclosure of the line
23 of reasoning as well. On the other hand, as a matter
24 of logic it would seem that the Raloxifene doctrine
25 does not require disclosure in the specification of

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1 information which is part of the common general
2 knowledge of the skilled person, even if it is an
3 essential part of the factual basis for the
4 prediction or the sound line of reasoning." And you
5 do acknowledge there's some case law suggesting
6 otherwise after.
7 I take your point to be that because a
8 patent is always understood to be read through the
9 eyes of a skilled reader, whatever knowledge the
10 skilled reader brings to the table need not be
11 duplicated, essentially, in the patent. Is that
12 correct?
13 PROFESSOR SIEBRASSE: That was my logic,
14 so this statement is consistent with my recollection
15 which was that clearly said factual basis wasn't
16 clear about the line of reasoning and the logic is,
17 as you've just stated, that it's read through the
18 eyes of a skilled person, therefore knowledge they
19 would have doesn't have to be in there, and that
20 position was ultimately held to be law, yes.
21 MR. JOHNSTON: And, as a practical
22 matter, in court, how does the court come to know
23 what is within the common general knowledge?
24 PROFESSOR SIEBRASSE: Through the
25 testimony of expert witnesses.

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1 MR. JOHNSTON: In your first Expert
2 Report you said that the requirement to -- let's look
3 at your language, your first Expert Report, page 19,
4 paragraph 64. You're discussing the disclosure
5 requirement for sound prediction, and you write,
6 "This requirement was established by the Raloxifene
7 case..."
8 PROFESSOR SIEBRASSE: Yes.
9 MR. JOHNSTON: Now, on page 24 at
10 paragraph 84 you state, "The changes in the law
11 regarding post-filing evidence and the enhanced
12 disclosure requirement for utility based on sound
13 prediction both had their origin in the 2002 Supreme
14 Court of Canada decision in Wellcome/AZT, although it
15 would become some time before these concepts were
16 linked with the promise of the patent and applied
17 together to constrain a patentee's ability to show
18 utility of his invention."
19 PROFESSOR SIEBRASSE: Yes.
20 MR. JOHNSTON: So I take it, from reading
21 these two paragraphs together, you're saying that the
22 rule was established by Raloxifene but that it had
23 its origin in AZT?
24 PROFESSOR SIEBRASSE: Well, if we
25 actually look at the -- I don't know if we need to

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1 look at the paragraph in AZT but the paragraph
 2 says -- expressly says it's obiter. It says it
 3 wasn't raised by the parties.
 4 MR. JOHNSTON: So let's look at --
 5 THE PRESIDENT: Had you finished your
 6 answer?
 7 PROFESSOR SIEBRASSE: I had not.
 8 THE PRESIDENT: Please finish your
 9 answer.
 10 PROFESSOR SIEBRASSE: It said it was not
 11 raised by the party. It made some statements that
 12 certainly could be interpreted as supporting this
 13 disclosure rule, but the statements themselves were
 14 ambiguous and the passage was quite brief and dicta.
 15 So subsequently it was not initially interpreted as
 16 requiring any extra disclosure requirements in the
 17 first two cases subsequent that were applying AZT.
 18 The Raloxifene case wasn't the first to deal with
 19 sound prediction but it was the first to deal with
 20 sound prediction, look at the third branch of the
 21 test and say this requires disclosure.
 22 Whether the court in AZT -- it's quite
 23 difficult to say what the court in AZT, what was
 24 going through Justice Binnie's mind when he wrote
 25 that, but those words are amenable to that

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1 interpretation, although they're amenable to other
 2 interpretations as well.
 3 MR. JOHNSTON: Please turn up tab 6.
 4 This is the AZT decision, R-004, page 20.
 5 Here the court states, "The doctrine of
 6 sound prediction has three components." In that
 7 paragraph it says first, there must be a factual
 8 basis; second, there must be a sound line of
 9 reasoning; and third, there must be proper
 10 disclosure. Are those the three elements of the
 11 doctrine of sound prediction that the court
 12 identifies?
 13 PROFESSOR SIEBRASSE: Yes.
 14 MR. JOHNSTON: On this third component
 15 toward the end of that paragraph, the court writes,
 16 "In this sort of case, however, the sound prediction
 17 is to some extent the *quid pro quo* the applicant
 18 offers in exchange for the patent monopoly. Precise
 19 disclosure requirements in this regard do not arise
 20 for decision in this case because both the underlying
 21 facts (the test data) and the line of reasoning (the
 22 chain terminator effect) were in fact disclosed, and
 23 disclosure in this respect did not become an issue
 24 between the parties. I therefore say no more about
 25 it."

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1 I take it this is the passage you're
 2 speaking of when you say this matter was not finally
 3 decided by the Supreme Court in AZT?
 4 PROFESSOR SIEBRASSE: Yes.
 5 MR. JOHNSTON: This is just a
 6 demonstrative showing three paragraphs from AZT all
 7 together. Professor Siebrasse, this is just for ease
 8 of viewing the different parts of the decision
 9 together.
 10 MS. WAGNER: Mr. President, I wonder if
 11 we might have a copy of this demonstrative for the
 12 witness? It's difficult to tell where those
 13 paragraphs come from. The first two are not clear.
 14 I think the witness needs something to put this in
 15 context.
 16 PROFESSOR SIEBRASSE: I'm happy with
 17 that.
 18 THE PRESIDENT: First of all, Professor
 19 Siebrasse, do you recognize the first two paragraphs?
 20 Can you locate them from the AZT decision? Do you
 21 have the AZT in front of you?
 22 PROFESSOR SIEBRASSE: Yes.
 23 THE PRESIDENT: So you can locate them
 24 and you can then put them in context?
 25 PROFESSOR SIEBRASSE: Yes.

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1 THE PRESIDENT: Please take your time to
 2 do so, and, Mr. Johnston, then you may proceed.
 3 PROFESSOR SIEBRASSE: Yes.
 4 MR. JOHNSTON: The first passage is in
 5 paragraph 3 of the judgment, the introductory
 6 section. The court states, "It was sufficient that
 7 at that time the Glaxo/Wellcome scientists disclosed
 8 in the patent a rational basis for making a sound
 9 prediction that AZT would prove useful in the
 10 treatment and prophylaxis of AIDS, which it did."
 11 So the court there was saying it was
 12 sufficient that Glaxo disclosed in the patent a
 13 rational basis. Is that what you take from that
 14 sentence?
 15 PROFESSOR SIEBRASSE: Yes.
 16 MR. JOHNSTON: And the second quote is
 17 from paragraph 70 --
 18 PROFESSOR SIEBRASSE: Well, I shouldn't
 19 say disclosed in the patent in the sense of requiring
 20 the prediction of utility. That's not how that
 21 particular phrase was understood in the prior case
 22 law. So, in particular, the well-known
 23 Olin Mathieson case that was adopted in Monsanto used
 24 a similar phrase, and it doesn't mean excluding
 25 evidence from outside the patent.

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1 MR. JOHNSTON: If we look at the second
2 quote, this was from paragraph 70, we were already
3 looking at it before, the court says, "In this case
4 both the underlying facts and the line of reasoning,
5 the chain terminator effect were, in fact,
6 disclosed."
7 And in paragraph 75 the courts states,
8 just five paragraphs later, "The trial judge has
9 found that the inventors possessed and disclosed in
10 the patent both the factual data on which to base a
11 prediction, and a line of reasoning (chain terminator
12 effect) to enable them to make a sound prediction at
13 the time they applied for the patent."
14 PROFESSOR SIEBRASSE: Can I respond to
15 that? Everything you have said is factually true,
16 but this slide is misleading.
17 THE PRESIDENT: Could you expound on
18 that, please?
19 PROFESSOR SIEBRASSE: If we look at the
20 decision itself, Mr. Johnston has said "only five
21 paragraphs later." If we look at the decision -- so
22 it's paragraph 70 they talk about the underlying
23 facts and the line of reasoning were, in fact,
24 disclosed. Paragraph 73 itemizes the specific facts
25 found by the trial judge, and then 75 says "these

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1 conclusions." 75 is not referring to 70. It is
2 referring to the immediately above paragraphs in 73
3 where the Judge or the Supreme Court itemizes the
4 factual basis, and those itemized bases were not all
5 in the patent. And, moreover, on the point that the
6 disclosure in this respect did not become an issue
7 between the parties, I have read the pleadings, the
8 fact of the submissions in that case, and it's not
9 that they agreed that the factual basis had been
10 disclosed. In fact, Wellcome in that case was
11 explicitly relying on facts that were not in the
12 patent. It wasn't an issue because it was just never
13 an issue. The disclosure requirement was never an
14 issue between the parties. And the factual basis
15 itemized by the trial judge and summarized by the
16 Supreme Court was not all in the patent. Some
17 elements were, some were not.
18 In fact, one of the items that wasn't in
19 the patent was some testing done by Martha Sinclair,
20 who is actually named as an inventor the testing was
21 so important, and that testing was not in the patent.
22 MR. JOHNSTON: You recognize certainly
23 the plain language of paragraph 70 and 75. The
24 Supreme Court of Canada is saying that the factual
25 data on which to base a prediction was disclosed in

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1 the patent. That's what the Supreme Court of Canada
2 said.
3 PROFESSOR SIEBRASSE: Well, the question
4 is -- well, they said that but I'm telling you that
5 the bases itemized, stated by the trial judge, who
6 actually stated his conclusion in light of all these
7 factors and all the evidence adduced at trial -- I
8 mean that's what he said, I find X, and they itemized
9 these -- these are not in the patent. And I mean
10 that's what they're saying these conclusions support
11 a sound prediction, it's these itemized conclusions,
12 and I've detailed in my report that they are not in
13 the patent.
14 This was obiter of that statement. They
15 expressly started off saying it was obiter, precise
16 disclosure requirements in this case do not arise, I
17 therefore say no more about it. We're looking at one
18 sentence here and you're telling me it must have been
19 in there because of that one sentence, when I have
20 read the trial decision and I've read these items
21 here and these items are not all in the patent.
22 MR. JOHNSTON: Please look at your second
23 Expert Report at page 32, paragraph 73. Here you
24 write, "Certainly the patent did disclose" -- we're
25 talking about the patent in AZT here -- "certainly

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1 the patent did disclose, or at least reference, some
2 important elements of the factual basis for the
3 prediction of utility, and it is possible that the
4 information that was disclosed in the patent could
5 have formed a sufficient basis for a sound prediction
6 by a person skilled in the art. However, absent an
7 express finding by the trial judge, this is simply
8 speculation."
9 Does that capture your position on this
10 issue?
11 PROFESSOR SIEBRASSE: Yes, but the
12 Supreme Court lists the items. I mean it's possible
13 that the Supreme Court might have said, these items
14 that are in the disclosure, you know, the trial judge
15 was wrong, the trial judge considered all this stuff
16 that wasn't in the disclosure, these things were in
17 the disclosure, that's enough -- they might have said
18 that but they didn't. They listed the items that
19 formed the factual basis for the sound prediction and
20 those items they listed were not in the patent, so we
21 know that the basis for the sound prediction was not
22 disclosed in the patent.
23 MR. JOHNSTON: So the Supreme Court of
24 Canada says -- this is the case really restating the
25 test for sound prediction in Canadian law.

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1 PROFESSOR SIEBRASSE: Well, it doesn't
2 really restate the test. It says this didn't arise,
3 there is a third branch, this didn't arise, I say no
4 more about it.
5 MR. JOHNSTON: The court says the
6 doctrine of sound prediction was received in Canadian
7 law from Monsanto.
8 PROFESSOR SIEBRASSE: Well, where does it
9 say that? Yes, it was given serious shape and
10 substance by Justice Graham in Olin Mathieson, and
11 was explicitly received into our law in Monsanto in
12 paragraph 60-61, yes.
13 MR. JOHNSTON: And at paragraph 70 the
14 court says the doctrine of sound prediction has three
15 components -- and we went through them before --
16 factual basis, line of reasoning, proper disclosure.
17 And that's at paragraph 70.
18 Then the court says twice, in
19 Paragraph 70 and paragraph 75, immediately after
20 stating the three elements of sound prediction, that
21 in this case the factual basis and line of reasoning
22 were disclosed in the patent.
23 PROFESSOR SIEBRASSE: Well, I've already
24 stated that the statement in 70 was in the context of
25 an obiter remark. 75 was the court holding these

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1 conclusions. 70 says I say no more about it, this is
2 obiter, doesn't arise.
3 What did arise was whether or not there
4 was, in fact, a sound prediction. 75 does not refer
5 to that passage. It refers to 73. And, moreover,
6 Olin Mathieson, which isn't in my binder, explicitly
7 considered items that were not in the patent, and in
8 Olin Mathieson this idea that you have to have the
9 sound prediction was clearly -- there was no evidence
10 in the patent at all in Olin Mathieson and, yet, they
11 upheld a finding of sound prediction based on
12 evidence that was not in the patent.
13 And that's what the Supreme Court has
14 done in this case. They upheld the finding of sound
15 prediction and upheld the validity of the patent
16 based on evidence that was not in the patent.
17 MR. JOHNSTON: If we could pull up again
18 some testimony from the transcript yesterday,
19 page 523, line 6 --
20 THE PRESIDENT: Do you have a hard copy?
21 PROFESSOR SIEBRASSE: I can see it on the
22 screen.
23 MS. WAGNER: Mr. President, it would be
24 better if he can have a hard copy.
25 THE PRESIDENT: I just asked him, and he

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1 said he didn't want it. So why are you asking?
2 MS. WAGNER: I think it's easier to
3 reference in this form.
4 PROFESSOR SIEBRASSE: Yes.
5 MR. JOHNSTON: You state here, "And, in
6 fact, prior sound prediction cases like
7 Olin Mathieson and Ciba-Geigy admitted evidence from
8 outside the patent."
9 Olin Mathieson was an English case. Is
10 that right?
11 PROFESSOR SIEBRASSE: It was accepted
12 into Canadian law in Monsanto.
13 MR. JOHNSTON: And Ciba-Geigy is a
14 Federal Court of Appeal case?
15 PROFESSOR SIEBRASSE: A Canadian case,
16 that's right.
17 MR. JOHNSTON: The case you do not
18 reference here is, in fact, the Monsanto case.
19 PROFESSOR SIEBRASSE: No.
20 MR. JOHNSTON: And Monsanto is, in fact,
21 the only Supreme Court of Canada decision prior to
22 AZT affirming the doctrine of sound prediction in
23 Canadian law?
24 PROFESSOR SIEBRASSE: Well, Monsanto, the
25 evidence -- the reason I don't reference Monsanto is

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1 the sound line of reasoning was not disclosed in the
2 patent. The sound line of reasoning was in the form
3 of affidavits given by experts, and it's not clear --
4 at least it's not clear to me -- whether or not those
5 affidavits would have been common general knowledge
6 or not. So it's possible -- if the information in
7 those affidavits from the experts that said the
8 factual basis, the three tested examples, was
9 sufficient to make this prediction, if that was all
10 common general knowledge, then it wouldn't be a
11 counter example to this rule. If it wasn't, it would
12 have been, we don't know, so I didn't cite it, but I
13 will say Monsanto, the mere fact that they didn't
14 have the inquiry is important, because in modern law,
15 there would have been an inquiry.
16 Okay, we've got affidavit evidence from
17 these experts, is the information in here common
18 general knowledge or not? And there's no mention of
19 that. The sound basis was definitely not in the
20 patent, may have been common general knowledge, may
21 not -- the court doesn't make anything of it one way
22 or the other.
23 But the bottom line is I didn't cite
24 Monsanto because it wasn't a case -- and I'm not
25 saying that there's always evidence considered from

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1 outside the patent. Sometimes the evidence in the
2 patent is enough. So the factual basis that you can
3 establish sound prediction on evidence within the
4 patent doesn't mean that you always have to do that.
5 MR. JOHNSTON: Actually, we had wanted to
6 go to Monsanto. We neglected to put that in your
7 binder.
8 PROFESSOR SIEBRASSE: I think I have it.
9 MR. JOHNSTON: It is in Professor
10 Siebrasse's binder, but we haven't distributed it.
11 If we can do that now.
12 If you could please turn up tab 44, this
13 is the Supreme Court of Canada's Monsanto decision.
14 By way of some context, the issue in Monsanto is that
15 the Patent Appeal Board had refused a patent
16 application. That patent had claimed two classes of
17 compounds and had disclosed in the patent only three
18 examples from those classes of compounds. The Patent
19 Appeal Board had refused that application, and the
20 Supreme Court reverses that decision saying that the
21 patent ought to have been issued under the doctrine
22 of sound prediction.
23 PROFESSOR SIEBRASSE: Yes.
24 MR. JOHNSTON: Is that a fair summary of
25 the case?

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1 PROFESSOR SIEBRASSE: Yes.
2 MR. JOHNSTON: If you look at page 2,
3 paragraph 3, here the court is referring to the
4 patent examiner's reason for refusing the patent.
5 I'm drawing attention to it just to establish that in
6 the middle of that block quote there's a reference to
7 specific disclosure of the preparation of three
8 species only. This is just to say that there were
9 three examples of the compounds disclosed in the
10 patent.
11 PROFESSOR SIEBRASSE: That's correct.
12 MR. JOHNSTON: And you would understand
13 those three examples to have constituted, in this
14 case, the factual basis for the sound prediction?
15 PROFESSOR SIEBRASSE: Yes.
16 MR. JOHNSTON: As you mentioned, the
17 patent examiner and the Patent Appeal Board also had
18 before them affidavits from two experts, which you
19 were referring to before, and I just --
20 PROFESSOR SIEBRASSE: I thought it was
21 three, but maybe it's two. In any event -- I don't
22 think it really matters whether it was two or three.
23 MR. JOHNSTON: I think it's two, but it
24 doesn't matter. The court in paragraph 7
25 characterizes these expert affidavits, and it says,

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1 "The Patent Appeal Board had before it elaborate
2 affidavits from persons skilled in the art..."
3 I'd like to turn to look more at these
4 affidavits, and to do that I'd like to go to the
5 Federal Court of Appeal decision in Monsanto because
6 it reproduces in full parts of the Board's decision.
7 So that's at Tab 43. This is R-197. This is the
8 Federal Court of Appeal decision in Monsanto, and at
9 page 7 the court is reproducing in full the Board's
10 reason.
11 So what's on page 7 is not the reasons --
12 it's reproduced in the Federal Court of Appeal's
13 reasons, but these are the reasons of the Board. At
14 the very bottom of page 7, "He [the patentee] has
15 submitted affidavits from undoubted experts in this
16 field to show that in their view both that skilled
17 chemists would have received adequate direction from
18 the specification so that they could have prepared
19 all the compounds covered by the claim, and further
20 to suggest that it would have been equally apparent
21 to them what utility the compounds would have
22 possessed."
23 You see that's what the Board stated --
24 PROFESSOR SIEBRASSE: Yes.
25 MR. JOHNSTON: -- regarding the

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1 affidavits. So the Supreme Court has characterized
2 these affidavits as coming from persons skilled in
3 the art and the Board's reasons characterize the
4 affidavits as swearing that the unexpected utility of
5 the tested members definitely -- sorry. That to
6 suggest that it would have been -- rather, that these
7 affidavits establish that skilled chemists would have
8 received adequate direction to suggest that it would
9 have been equally apparent to them what utility the
10 compounds would have possessed.
11 PROFESSOR SIEBRASSE: Yes, so it's fair
12 to say that this passage indicates that, in fact, the
13 sound line of reasoning would have been common
14 general knowledge and so would not have had to have
15 been disclosed either under -- even under current
16 Canadian law. Again, the fact that a factual basis
17 was disclosed and the sound line of reasoning was
18 common general knowledge does not mean that they
19 could not have admitted evidence from outside the
20 patent had it been necessary. That's why I didn't
21 cite Monsanto on this. It just doesn't help us one
22 way or the other. It's consistent with the old law,
23 it's consistent with the new law.
24 MR. JOHNSTON: But in Monsanto the court
25 did not admit any evidence that would not still be

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1 admissible under Canadian law to justify a sound
2 prediction.
3 PROFESSOR SIEBRASSE: Well, yes, that's
4 right.
5 MR. JOHNSTON: Professor Siebrasse, are
6 you aware of any Canadian case in which a sound
7 prediction of utility was upheld in the absence of
8 any disclosure of a factual basis for the prediction
9 in the patent?
10 PROFESSOR SIEBRASSE: Not whether --
11 well, I mean I'm not aware of any. I'm not going to
12 swear there aren't any without going through them,
13 but no -- well, I should say Olin Mathieson itself,
14 but that's an English case, although the Supreme
15 Court in Monsanto did say I agree fully with Justice
16 Graham's remarks and I agree entirely and this is a
17 remarkably similar case, and so on. And in that case
18 there was no evidence at all in the patent.
19 MR. JOHNSTON: Professor Siebrasse,
20 please turn to your first Expert Report, page 25,
21 paragraph 89.
22 PROFESSOR SIEBRASSE: Yes.
23 MR. JOHNSTON: You write here, "The
24 application of the promise utility doctrine to the
25 patents at issue in this complaint resulted in

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1 invalidation of the patents. It is clear that the
2 two patents at issue would have been valid under
3 Canadian law when the patents were filed and
4 granted."
5 PROFESSOR SIEBRASSE: Yes.
6 MR. JOHNSTON: As you noted yesterday in
7 cross-examination, you have not read the full record
8 that was before the court in the olanzapine
9 proceeding?
10 PROFESSOR SIEBRASSE: Correct.
11 MR. JOHNSTON: I take it that that would
12 also be true for the atomoxetine proceeding?
13 PROFESSOR SIEBRASSE: Correct.
14 MR. JOHNSTON: You support your opinion
15 regarding the validity of these patents under prior
16 law with nine paragraphs of analysis for olanzapine
17 and six paragraphs of analysis for atomoxetine?
18 PROFESSOR SIEBRASSE: Yes.
19 MR. JOHNSTON: Am I right that your
20 analysis focuses exclusively on the court's treatment
21 of the utility requirement in those cases?
22 PROFESSOR SIEBRASSE: Yes. Well, I
23 should double-check that. I believe so. Well,
24 that's not quite right. I do summarize the findings
25 of the court holding that the other bases were met.

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1 MR. JOHNSTON: So you take the court's
2 findings on those other challenges to validity
3 essentially at face value? You accept those to be --
4 PROFESSOR SIEBRASSE: Essentially, yes.
5 MR. JOHNSTON: You accept those findings
6 to be correct?
7 PROFESSOR SIEBRASSE: Well, I wasn't
8 asked whether or not they were correct. I haven't
9 really analyzed whether or not they're correct. I
10 don't think I was asked whether they're correct.
11 MR. JOHNSTON: Well, you've provided your
12 opinion that it is clear that the two patents at
13 issue would have been valid under Canadian law when
14 the patents were filed and granted, and validity is
15 not simply a question of the utility requirement. Is
16 that right?
17 PROFESSOR SIEBRASSE: So in that sense I
18 did take the Court of Appeal's -- or the court's
19 decision at face value, yes, but I have to admit that
20 I haven't actually analyzed their analyses -- I've
21 read the decisions but I haven't analyzed them in the
22 same kind of detail as the utility requirement.
23 MR. JOHNSTON: You do not consider that
24 the courts may have approached these issues, these
25 other grounds -- their analysis on these other

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1 grounds differently had they, in fact, been applying
2 what you called a prior law under the utility
3 requirement?
4 PROFESSOR SIEBRASSE: I don't think so.
5 I mean I don't know why they would have done that.
6 MR. JOHNSTON: Please turn up tab 3,
7 C-205, page 37, footnote 163. It's actually the
8 footnote above, the tail end of 162. You're
9 referring to the olanzapine case?
10 PROFESSOR SIEBRASSE: Yes.
11 MR. JOHNSTON: You state, "This is a
12 selection patent case in which it is difficult to
13 disentangle the unexpected additional advantages
14 necessary to support a selection patent from the
15 heightened utility requirement derived from the
16 promise of the patent."
17 PROFESSOR SIEBRASSE: Yes. I mean, I've
18 worked more diligently on disentangling the two
19 between the time I wrote the article and the time I
20 wrote this report.
21 MR. JOHNSTON: Prior to the olanzapine
22 infringement proceedings, there had been two previous
23 PM(NOC) proceedings concerning olanzapine, and in one
24 of those proceedings Justice Hughes was the presiding
25 judge, and he actually found that the olanzapine

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1 patent had insufficient disclosure in that
2 proceeding, correct?
3 PROFESSOR SIEBRASSE: I don't want to
4 doubt you, but if I'm going to agree with you I need
5 to have my memory jogged a little bit.
6 MR. JOHNSTON: I don't have that decision
7 in your binder, but I do have a document you've
8 written regarding that decision. So if you'd please
9 turn up tab 16, R-476, page 57.
10 PROFESSOR SIEBRASSE: Yes, I see.
11 MR. JOHNSTON: You're discussing in this
12 blog post the olanzapine decision, and you state at
13 the top of page 57: "Note that in its decision
14 remitting this case to Justice O'Reilly, the Federal
15 Court of Appeal had based the requirement of a
16 special advantage on the promise of the patent, while
17 Justice Hughes in his NOC decision treated it as a
18 matter of sufficiency. How this requirement should
19 be classified is an interesting question in its own
20 right, but in the end Justice Hughes held the patent
21 invalid for substantially the same reason as Justice
22 O'Reilly."
23 PROFESSOR SIEBRASSE: Yes. I mean I
24 wrote that.
25 MR. JOHNSTON: Please turn to page 54 in

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1 the same tab. In the last paragraph you write, "I
2 should emphasize that I am not arguing that the
3 olanzapine patent should be held to be valid. The
4 principle that a patent may not be granted for a
5 speculative invention is sound, and it may be that
6 Lilly patented too soon."
7 Professor Siebrasse, you've given your
8 opinion that it is clear that, under prior law,
9 Claimant's patents would have been invalidated, but
10 you have noted in these statements that substantially
11 the same analysis which led to the invalidation in
12 Justice O'Reilly decision was the analysis followed
13 by Justice Hughes under the different ground of
14 validity. In fact, you have stated in this blog post
15 that you, in fact, are not arguing that the
16 olanzapine patent should be held to be valid?
17 PROFESSOR SIEBRASSE: Okay. So there are
18 a bunch of things there. One is my opinion is that
19 it would have been held valid under prior law.
20 That's not a should. It's not a policy question.
21 It's would have been. And the most fundamental basis
22 for that is that it was actually commercially sold
23 and had regulatory approval. And, under prior law,
24 commercial success and certainly regulatory approval
25 would have established utility. The infringement in

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1 the olanzapine case which was conceded would have
2 established utility. So, on that basis alone, it
3 would clearly have been held valid under prior law.
4 Now, with respect to the blog posts, I
5 should say that I have a lot of pride in my posts,
6 but they're a, I would say, considered first response
7 to these cases. I publish about 100 posts a year. I
8 read the case. I think about them. I try and be
9 careful. But not necessarily everything in here is
10 gold.
11 Now, with that said, I'm not arguing it
12 should be held to be valid. That's not about whether
13 or not it would have been held valid under prior law.
14 It's about -- well, it's about the whole result. The
15 post isn't just about that. Should it have been held
16 to be valid? You've raised this point on post-filing
17 evidence, what's the policy on post-filing evidence.
18 You've given me policies that persuaded the court in
19 AZT to actually change the law. Those policies
20 weren't foolish, but there is another side. There's
21 a whole raft of policy considerations on the other
22 side, and I haven't fully explored those policy
23 considerations on post-filing evidence.
24 In any event -- I mean I should emphasize
25 I'm not arguing it should be held to be valid. This

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1 is a blog post that's not about whether or not it
2 should be held to be valid. That's my point. I'm
3 not saying anything about that. This isn't saying,
4 hey, it's not valid. It's just not the point of the
5 post.
6 MR. JOHNSTON: If I could just take one
7 moment.
8 I don't have any further questions,
9 Professor Van Den Berg.
10 THE PRESIDENT: Thank you. Ms. Wagner,
11 please proceed with the redirect.
12 MS. WAGNER: Mr. President, could we beg
13 your indulgence for a short break before we begin our
14 redirect?
15 THE PRESIDENT: All right. Ten minutes
16 break.
17 *(Recess taken)*
18 THE PRESIDENT: Let's resume.
19 Ms. Wagner, please proceed with the redirect.
20 **REDIRECT EXAMINATION ON BEHALF OF THE CLAIMANT**
21 MS. WAGNER: Good morning, Professor
22 Siebrasse. Let's start with a few questions from the
23 time that arose today, and then we'll go back to some
24 of the testimony that arose yesterday.
25 You were asked today about your factual

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1 basis article which is at Tab 4 of the
2 cross-examination binder, and there was a statement
3 that you were taken to about arbitrariness. In that
4 context of the factual basis article, were you
5 referring to the type of arbitrariness that you
6 testified about in the context of the promise of the
7 patent?
8 PROFESSOR SIEBRASSE: Could I have a
9 pinpoint to that?
10 MS. WAGNER: Sure. It was the top of
11 page 12, tab 4, C-206.
12 PROFESSOR SIEBRASSE: There are two
13 things about this. Like the line between prediction
14 and demonstrated utility, I'll say that under prior
15 law that line didn't matter. It is fuzzy, but it
16 didn't matter because nothing turned on it under
17 modern law. There's a sharp distinction in the type
18 of evidence that can be admitted. But arbitrary in
19 this context, I meant there isn't a theoretically
20 perfect place to draw the line.
21 But it is possible to define the line in
22 a matter that is predictable and reliable and
23 objective, I would say, whereas in the context of the
24 promise doctrine my view is that it's inherently
25 arbitrary because the disclosure is being put to

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1 purposes for which it was not intended and, in fact,
2 disclosure must serve the function of disclosure,
3 it's now being used to define the invention, that
4 tension is inherent, and so it's fundamentally
5 arbitrary. Even as I said yesterday, when we have
6 the best efforts to have an objective approach, it's
7 still arbitrary.
8 MS. WAGNER: Professor Siebrasse, there
9 was a line of questioning regarding the AZT case, and
10 a link was drawn to the Wandscheer case. My question
11 was, in Wandscheer, was there an issue as to whether
12 you had to have soundly predicted or demonstrated the
13 utility of the invention by testing?
14 PROFESSOR SIEBRASSE: No.
15 MS. WAGNER: And why is that?
16 PROFESSOR SIEBRASSE: Well, in
17 Wandscheer, it has to be the invention as claimed and
18 disclosed that has to be useful, not some
19 subsequently improved version. And the invention as
20 claimed and disclosed was not useful. I'm not
21 sure --
22 MS. WAGNER: Was the inquiry whether
23 there was a sound prediction or demonstration of that
24 utility at the date of filing? Was that the inquiry
25 in Wandscheer?

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1 PROFESSOR SIEBRASSE: Well, Wandscheer
2 itself didn't distinguish between demonstrated
3 utility or sound prediction. The question was
4 whether or not the claimed invention was useful, and
5 the answer was no.
6 MS. WAGNER: You were asked quite a few
7 questions about AZT and policy considerations. What
8 is, in your view, the significance of the AZT
9 decision in the context of the overall promise
10 utility doctrine?
11 PROFESSOR SIEBRASSE: In the context of
12 the overall --
13 MS. WAGNER: The promise utility
14 doctrine, as you've described in your reports. How
15 does AZT play into that?
16 PROFESSOR SIEBRASSE: Well, the most
17 fundamental change coming out of AZT was refusing to
18 admit -- I shouldn't say refusing to admit
19 post-filing evidence. What the court held is that
20 the utility had to be established at the date of
21 filing or -- at the date of filing it's now
22 understood. And prior to that, it was enough that
23 the invention is, in fact, useful. And I think I'd
24 probably characterize that as the basic dispute
25 between Mr. Dimock and myself where my view is under

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1 prior law, the invention has to be useful. It has to
2 be new, useful and non-obvious. But it's enough that
3 it is, in fact, useful. The snow blower in
4 Wandscheer was not useful. The invention as in AZT
5 was useful. Whereas Mr. Dimock's view, as
6 I understand it, is that it's not enough that the
7 invention was, in fact, useful, but that it must have
8 been tested to be useful.
9 And AZT citing Christiani v Rice,
10 Christiani v Rice actually through this distinction,
11 when it said "definite and practical shape".
12 Christiani v Rice also quoted extensively from Fada
13 Radio, also cited in AZT. In Fada Radio quoted in
14 Christiani the Supreme Court of Canada -- the
15 invention had been written down in January, I believe
16 it was, and it had been tested in May. The Supreme
17 Court of Canada held the invention was not complete
18 until it was tested in May. The Privy Council
19 applying Canadian law held that the Supreme Court was
20 wrong and it was enough that the invention was
21 written down in a shape that would allow somebody
22 else to implement it.
23 So in Christiani, the definite and
24 practical shape test, on the one hand it's true it
25 distinguishes from something that is simply floated

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1 through somebody's brain, but *Christiani v Rice*
2 itself also distinguished that from the requirement
3 of testing. So that's the most basic change that AZT
4 did in reversing that established law as to whether
5 this -- now, I say whether post-filing evidence was
6 useful, but it's not really a matter of whether
7 post-filing evidence was admissible. It's a
8 substantive matter of is it enough that the invention
9 is, in fact, useful, or does it have to be known to
10 be useful, and this question of post-filing evidence
11 is really just a reflection of the substantive
12 inquiry.

13 So that's the most fundamental change
14 coming out of AZT, but also it, in paragraph 70, did
15 open this question of disclosure that had not
16 previously been controversial.

17 The other general point of AZT is that by
18 holding that after-the-fact evidence -- so, again, in
19 AZT the trial judge in the Court of Appeal said AZT
20 for treating HIV/AIDS, of course it's useful, it's
21 actually being used for that purpose, and that was
22 exactly the kind of evidence we'd always had on
23 utility and that's why it had never been possible to
24 assert that a commercially valuable product lacked
25 utility. The court would say how can you say it

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1 lacked utility? You're infringing.
2 So AZT, all of a sudden after that, it
3 became possible to say the commercially successful
4 product lacks utility, and this made utility
5 challenges much more important generally, and so led
6 to these further developments.

7 MS. WAGNER: You were taken to your blog
8 posts quite frequently at Tab 16, and in particular
9 today I think the last line of inquiry regarded
10 page 54. This blog post is a couple of pages long,
11 and if you go back to page 52, you have the title of
12 the blog post.

13 What was the overall point of the blog
14 posts? We've been taken to isolated passages in all
15 these blog posts, but, as an example in this one,
16 what was the overall point of the blog post?

17 PROFESSOR SIEBRASSE: I'll have to take a
18 minute to look at it.

19 MS. WAGNER: Just referencing the title.

20 PROFESSOR SIEBRASSE: Well, the title
21 obviously, the general thrust as reflected in the
22 title, was the ad hoc nature of the utility
23 determination indicating that, as I say at the very
24 end, it would be to everyone's benefit to have clear
25 and stable rules that would allow pharmaceutical

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1 companies to know rather than guess when they have
2 done sufficient research to apply for a patent with
3 some assurance that it would be valid. So the
4 general point of this post is that current Canadian
5 law doesn't allow that, and olanzapine, in
6 particular, illustrates that.

7 MS. WAGNER: Taking you back to some of
8 the testimony that was given yesterday, there were a
9 number of decisions that were reviewed with you, and
10 we'll discuss those in some greater detail, but
11 coming to what we discussed today with AZT and the
12 change that you've described, in any of the cases
13 that you discussed yesterday, had the issue arisen
14 whether utility had been demonstrated or predicted at
15 the date of filing? Was that an issue in any of
16 those pre-2002 cases that were discussed yesterday?
17 Essentially was the post-filing
18 evidence --

19 PROFESSOR SIEBRASSE: The question was
20 always -- prior to AZT the question was always is the
21 invention useful in fact.

22 MS. WAGNER: And that would be true of
23 all of the cases that were discussed yesterday that
24 are in that pre AZT --

25 PROFESSOR SIEBRASSE: Well, I can't

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1 remember exactly which ones were discussed yesterday,
2 but it was true of all the cases so it must have been
3 true of all the ones we discussed.

4 MS. WAGNER: And in any of those cases,
5 would the additional disclosure rule that was
6 discussed in your testimony today have been applied
7 in any -- was it applied in any of those cases
8 discussed yesterday, the pre-2002 or older cases?
9 PROFESSOR SIEBRASSE: Prior to Raloxifene
10 in 2008 an additional disclosure requirement for
11 sound prediction was never applied in a sound
12 prediction case in the sense that there were some
13 cases, such as Monsanto, in which the evidence in the
14 patent plus common general knowledge were sufficient
15 to allow sound prediction, but there were no cases
16 that refused to consider evidence from outside the
17 patent in the context of sound prediction, and many
18 which did consider it, and in particular
19 Olin Mathieson, which clearly was entirely based on
20 evidence outside the patent, there was really no
21 evidence in the patent at all.

22 MS. WAGNER: Yesterday you were asked
23 about some writings of commentators, and one of the
24 writings you were asked about is at Tab 9. I'll ask
25 you to pull that up. It's Fox, R-163. You were

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1 taken to a particular passage of that excerpt, but
2 I'd just like to give you an opportunity to review
3 the excerpt as a whole and I would ask you if there's
4 any other aspects of that Fox excerpt that you'd like
5 to address with the Tribunal that may be relevant to
6 the broader issues.

7 THE PRESIDENT: Are you saying as of
8 page 152? Or you want the whole passage?

9 MS. WAGNER: The excerpt as a whole as it
10 relates to the utility issues.

11 THE PRESIDENT: But the promise starts at
12 152 and those were the questions asked yesterday,
13 unless you would like the good Professor to read the
14 whole thing, which may take a while.

15 MS. WAGNER: I would like the Professor
16 to share with us whether there's any aspects of that
17 excerpt that he'd like to bring to the attention of
18 the Tribunal other than what was discussed yesterday.
19 I'm sure he's somewhat familiar with the excerpt and
20 may not need to take too much time.

21 THE PRESIDENT: It starts on page 148.
22 There were detailed questions about page 152.

23 PROFESSOR SIEBRASSE: So on 153 in
24 particular, on the section on promised utility, the
25 first full paragraph more or less in the middle of

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1 the paragraph reads, "If the ordinary workman would
2 so read the specification as promising a certain
3 result and that result is performed by following the
4 specification, the specification is sufficient and
5 the patent cannot be held void on the ground of
6 inutility."

7 So the point here is that this promised
8 results that's being discussed by Dr. Fox, the
9 promised results must be true, in fact, and it's
10 enough under the -- and this is particularly with
11 reference to Hatmaker and Alsop's patents. The law
12 of England as stated in those cases was that it's
13 enough that the promised results are true. So a
14 patent would never be held void for failure to meet
15 the promises of the patent if, in fact, it held that
16 the promises were true. And there was never any
17 suggestion -- and, in fact, this passage is directly
18 to the contrary -- there was never any suggestion
19 that the results could not be proven to be true at
20 the date of filing. The issue was they had to be
21 true in fact.

22 So this shows that this whole section on
23 promised results, it's talking about the law of
24 England, and it is, in any event, clearly not the law
25 of Canada today, where it is entirely possible that a

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1 patent -- if the ordinary workman -- and we'll accept
2 the promise of the patent analysis -- could perform
3 the patent and follow it and the result follows, the
4 specification in Canada today may nonetheless be held
5 invalid for lack of utility because an ordinary
6 workman would not have been able to prove that as the
7 filing date.

8 So this passage is inconsistent with the
9 AZT rule, as similarly if we look at 157, 158 in
10 particular, commercial success is not the test of
11 utility. This is the paragraph on 158. Commercial
12 success is not the test of utility. That is to say
13 it's not necessary that a patent be commercially
14 successful to be useful. The bar is lower than that.
15 So that's consistent with current, and always,
16 Canadian law. But commercial success is at least
17 strong evidence of utility, and that's not true in
18 Canada today because commercial success is considered
19 irrelevant to the question.

20 I will just point out page 160, the very
21 last phrase, where Dr. Fox says the utility is to be
22 judged at the date of making the invention and in
23 light of the knowledge existing at that time. But
24 this reference to utility is judged at the date of
25 the invention isn't saying you have to have all your

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1 evidence available as of that date. If we read a
2 little further, the quote -- it begins at the very
3 last line of 160 -- "I cannot think that an inventor,
4 having patented something which he says will work ...
5 can be allowed to say it is true my invention will
6 not so work, but will work when altered by a
7 subsequently discovered material or device."

8 So what this is saying is that utility is
9 judged as of the date simply means it's the device
10 disclosed and claimed that has to be useful, not a
11 subsequent improvement.

12 MS. WAGNER: If you could also look at
13 page 154, there was testimony given about the
14 relevance of advantages in the context of utility.
15 There's also a statement in here about advantages in
16 the Fox text. Could you expound on that?

17 PROFESSOR SIEBRASSE: The passage on 154,
18 statement of advantages.

19 Well, there was an English law, a
20 distinction between statements that are construed to
21 be promises and statements that are construed to be
22 merely advantages, but that distinction is also true,
23 at least in principle, in Canadian law today in the
24 sense that at least in principle statements that are
25 considered to be mere advantages are not considered

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1 promises and so don't have to be met. I think that's
2 all I have to say. Well, I should add -- well, no,
3 that's true in principle. It's perhaps not that
4 often applied but true in principle under modern
5 Canadian law.

6 MS. WAGNER: Thank you. You had
7 mentioned that in this text, when references were
8 made to utilities or the utility having to have been
9 met, that was considered as of the basis of what
10 evidence? What was the relevant evidence in this
11 context?

12 PROFESSOR SIEBRASSE: All the evidence.
13 All the evidence available to the court at the date
14 of challenge.

15 MS. WAGNER: At Tab 10 there's another
16 commentator exhibit given, which is the Hayhurst
17 passage, and that's R-164. With respect to this
18 exhibit, Counsel for Canada had acknowledged that
19 Mr. Hayhurst had cited two cases, but you did not
20 have an opportunity to comment on those cases and
21 whether they applied a promise of the patent
22 analysis. And the two cases were Raleigh v Miller
23 and Hoechst v Gilbert.

24 THE PRESIDENT: Page 74, correct.
25 MS. WAGNER: Yes.

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1 THE PRESIDENT: You were taken to
2 page 73, and the case is appearing at page 74.

3 MS. WAGNER: The question, Professor
4 Siebrasse, is whether you feel that either of those
5 two cases would exemplify the current promise
6 doctrine.

7 THE PRESIDENT: There are two questions.
8 One, first, could you please comment on them, and the
9 second question is whether they fit into your idea or
10 concept about the promise utility doctrine. Maybe
11 you take them one at a time.

12 MS. WAGNER: Thank you?

13 PROFESSOR SIEBRASSE: I think I've only
14 just found the actual statement. So, as I recall, it
15 was the statement "If you make false promises you may
16 get an invalid patent," And that's footnote 12 which
17 refers to Raleigh v Miller and Hoechst v Gilbert.

18 So that's true in the sense of promises
19 made -- if we interpret the promises made in the
20 claims or also willfully misleading promises. Again,
21 I don't like to say promises made in the claim but
22 Hoechst v Gilbert was a case of inoperable species,
23 so the patentee had claimed a large genus, some of
24 the species in that genus were wholly inoperable, and
25 for that reason the patent was held invalid, but that

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1 was not a case in which the patent was held to a
2 higher standard of utility, because the inoperable
3 species were wholly inoperable. They had no utility
4 at all. So that patent failed on a scintilla
5 standard.

6 The false promise that Mr. Hayhurst here
7 is evidently talking about is, in effect, the promise
8 that all the embodiments falling within the claim
9 would be useful, but that's simply useful at a
10 scintilla standard.

11 Raleigh v Miller was an English decision
12 that dealt with the promise of the patent -- it's not
13 really the promise of the patent because the English
14 version was even different from the modern Canadian
15 version, what was called the false suggestion
16 doctrine, but here I'll point out that if you make
17 false promises you may get an invalid patent. Well,
18 that's certainly always been true in the sense that
19 false statements that are willfully misleading may
20 result in invalidity under what's now section 53.
21 And that's always been true.

22 Now, Raleigh v Miller itself actually was
23 a case that restrained the false suggestion doctrine
24 in the UK by holding -- or not holding originally but
25 pointing out that the promise has to be material and

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1 actually upheld the promise with particular -- or
2 upheld the validity of the patent with particular
3 reference to the statutory provisions in the UK at
4 the time, which provide that a patent is invalid if
5 it was granted on the basis of false suggestion and
6 there's no corresponding provision in Canada.

7 MS. WAGNER: Thank you.

8 I just want to discuss the Consolboard
9 decision that came up in your testimony yesterday.
10 The question I have for you is that counsel for
11 Canada gave you a hypothetical regarding Consolboard
12 and he said that saying if you did accept that it
13 established a bifurcated standard, is it possible
14 that one half of the standard was applied in prior
15 law and now the other half is being applied in
16 current law. Can we take that away from a
17 hypothetical and into a concrete question?

18 In your opinion at any time in Canadian
19 law has Consolboard been interpreted and applied as a
20 bifurcated standard? At any time in Canadian law?

21 PROFESSOR SIEBRASSE: Well, since 2005 it
22 has been applied as a bifurcated standard.

23 MS. WAGNER: Thank you. I do have
24 another question on Consolboard.

25 PROFESSOR SIEBRASSE: Yes. Since 2005.

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1 Not before that.

2 MS. WAGNER: Tab 2, C-118. The operative

3 passage is at page 52 of Consolboard. I think we're

4 missing a page. I think it's 525. Apologies.

5 You had explained in your testimony

6 yesterday that the passage cites to a Halsbury's

7 reference, and that Halsbury's reference cites three

8 lines of authority. You said there was one line on

9 simple operability, one line on rejection of

10 comparative utility, and one line on false

11 suggestion.

12 PROFESSOR SIEBRASSE: Yes.

13 MS. WAGNER: You explained the lines of

14 authority relating to operability and to comparative

15 utility, but I do not think you had the opportunity

16 to specifically address the third line of cases, the

17 false suggestion cases. I'd just ask your opinion on

18 that line of cases and whether that line of authority

19 has appeared in Canadian law at any point in time.

20 PROFESSOR SIEBRASSE: That line of

21 authority -- and I believe in particular the two

22 cases cited in Halsbury were Hatmaker and Alsop's

23 patent, which were the two leading UK cases on this

24 false suggestion, as it was normally put. One thing

25 I'll point out is those cases were cited in Halsbury

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1 but those cases were not good law in the UK at the

2 time of Consolboard so this -- I've forgotten the

3 exact date when the Third Edition was published, I

4 believe it was 1969 -- my report states it -- but

5 that false suggestion line of cases disappeared from

6 UK law as a result of the Patent Act of 1977. This

7 was quoted in 1982, so the first point is that false

8 suggestion line of cases was not good law in the UK

9 at the time it was cited in Consolboard.

10 Moreover, there was no prior case in

11 Canadian law, and no subsequent case in my opinion

12 until 2005, which applied that false suggestion

13 doctrine to create an elevated standard for utility.

14 MS. WAGNER: And, Professor Siebrasse,

15 you had I think mentioned there were distinctions in

16 any event between that UK false suggestion doctrine

17 and what you have said is applied today in Canadian

18 law. Can you elaborate on those distinctions?

19 PROFESSOR SIEBRASSE: Yes. First there's

20 the actual statutory basis is distinct. The false

21 suggestion doctrine arose in UK law because, under UK

22 law, until 1977 the grant of a patent was a

23 discretionary exercise of the Crown Prerogative, and

24 it was granted on the basis of all the

25 representations made, so if you promised to hire four

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1 apprentices of whom two were of English birth, and

2 the old patents might be like that, and you hired

3 three apprentices, only one English one, the court

4 would say well, that's invalid, even though, if the

5 Crown had granted the patent for only three

6 apprentices, the courts would have held it valid.

7 So the point was in English law the grant

8 of a patent was discretionary and was considered to

9 be granted explicitly in the petition on the basis of

10 all the representations made herein, and the Crown in

11 principle could say yes or no. And that was

12 ultimately codified around, you know, the early 1900s

13 in a specific provision saying the patent may be

14 revoked on the basis of a false suggestion.

15 In Canadian law originally under the pre

16 Confederation provinces, again it was a discretionary

17 exercise of the prerogative that had a false

18 suggestion requirement statute that was equivalent to

19 the UK one. That disappeared with the Canadian Act

20 of Confederation, which was based on the U.S. model,

21 where the grant of a patent is as of right and the

22 false suggestion was removed.

23 So the first distinction is the statutory

24 basis. In the UK this was based on a false

25 suggestion provision that was based on the

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1 fundamental basis of the Act. We have no equivalent

2 provision, the closest being section 53, material

3 misrepresentation made for the purpose of misleading.

4 Another important distinction in the way

5 it was applied is that under the UK false suggestion

6 law, the suggestion, the representation, had to

7 actually be false, so it was assessed at the time of

8 trial. The question was did you actually hire four

9 apprentices, not did you hire them at the time of

10 filing or anything like that. It had to actually be

11 false. Whereas under the current modern Canadian law

12 that's not necessary in that the representation or

13 the promise -- even an elevated promise -- may be

14 entirely true and, yet, could not be proven to be

15 true on the basis of evidence available at trial.

16 The other difference is that, in UK law,

17 there was a materiality requirement, so the false

18 representation had to be material to the grant, which

19 is to say the courts would look at this and said

20 well, the Crown, in granting this patent, was looking

21 at all these representations. Is this representation

22 important enough that it might plausibly have

23 affected the Crown's decision whether or not to grant

24 the patent, and if it wasn't material then there

25 would be no -- then it wasn't -- it didn't have to be

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1 met. And this was based on the notion of the
2 discretionary grant of the prerogative, that it had
3 to be something that would have affected the Crown's
4 decision.
5 In Canadian law, in the current promise
6 utility doctrine, we don't see any materiality
7 requirement. The inquiry is simply is there an
8 explicit promise. Well, now we say is there an
9 explicit promise. There's no requirement that the
10 promise be material. And this is important because
11 the UK law it was, well, could this have affected the
12 Crown's decision to grant the patent.
13 In Canadian law grant of a patent is not
14 discretionary. If it is in fact useful, has a
15 scintilla of utility, then the Crown must, by law,
16 grant the patent and so a misrepresentation, even --
17 well, a representation of an elevated standard of
18 utility really could never be useful -- material
19 under Canadian law. But in any event, we don't have
20 that requirement, so it's different in those
21 respects.
22 MS. WAGNER: Thank you.
23 To go back to some of the cases that were
24 discussed yesterday, in your Second Report you had
25 defined the current promise standard as the court's

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1 applying an elevated promise of utility that's
2 derived from the disclosure.
3 PROFESSOR SIEBRASSE: Yes.
4 MS. WAGNER: You were asked questions
5 about the Unifloc case, a 1943 case at tab 42, C-255,
6 and page 184 you were asked about specifically.
7 There was a discussion yesterday about the statement
8 in the disclosure that it was an efficient
9 flocculating gel. In your opinion of that case, did
10 the court look to the disclosure to determine what
11 level or standard of utility the patentee would be
12 held to?
13 PROFESSOR SIEBRASSE: No. The
14 question -- the utility attack, as I believe I
15 explained yesterday, was based on the argument that
16 there was an erroneous -- well, the court did look to
17 the disclosure in the sense that the utility attack
18 was based on the statement that the flocculating gel
19 was made of cellulose and, in fact, it was made of
20 starch (or maybe the other way around) and that
21 argument was rejected on the basis that it doesn't
22 matter. If there was some misleading statement, you
23 follow the directions, you get the results, that's
24 enough. The standard of utility -- there's no
25 reference to the standard of utility based on the

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1 disclosure. Standard of utility, as I read it,
2 really wasn't an issue.
3 MS. WAGNER: Thank you. Another case
4 that was discussed was the Corning Glassware case at
5 Tab 13 of the materials, R-375. Counsel for Canada
6 had specifically noted that this case was one that
7 was cited in your false promise article and, again,
8 in this case in your opinion, did the court hold the
9 patentee to an elevated standard of utility based on
10 a promise derived from the disclosure?
11 PROFESSOR SIEBRASSE: No, clearly not.
12 The argument was uncontested that the waveguide, or
13 the fiber optic cable as we call it today, with the
14 specified level of impurities were not
15 commercially -- well, so many levels. It was not
16 commercially viable for long distance transmission.
17 That was the argument. And the court rejected that
18 argument on the evidence that, even though it might
19 not have been commercially valuable (the bottom of
20 19) that isn't the test. Page 19, the end of the
21 large paragraph. There was some evidence as to
22 inutility for telecommunications or other commercial
23 purposes, but there was no evidence to indicate that
24 the level described as a maximum would render them
25 useless for any purpose, commercial or otherwise, so

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1 that was applying a low standard to an invention
2 which did not meet the higher standard.
3 MS. WAGNER: Another case you were asked
4 about was at Tab 18, the Feherguard case, R-488.
5 It's a 1995 case. Specifically with respect to that
6 case, you were taken to paragraph 19. There was a
7 statement, "The patent as a whole must be considered
8 when assessing utility."
9 In your view, what did that statement
10 mean in the context of that case?
11 PROFESSOR SIEBRASSE: In the context of
12 this case, what had happened is the invention was a
13 telescoping roller for retracting swimming pool
14 covers, and claim 1 claimed the two telescoping
15 pieces, and the evidence established that, for this
16 roller to work, it had to be held together with
17 screws. And the patentee actually argued, well, you
18 can look to the disclosure and the disclosure tells
19 you it has to be held together with screws. And it
20 was quite similar to an earlier Supreme Court of
21 Canada case we haven't talked much about,
22 Metalliflex, where the invention was an expandable
23 watch band, and the claim had not specified that the
24 little pieces had to be held together. The Supreme
25 Court of Canada said well, you can look to the

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1 disclosure to understand the obvious, that it has to
2 be held together.
3 So the patentee was saying this case is
4 like Metalliflex. The claims don't say screws, you
5 can look to the disclosure and see we need screws.
6 Now, this is not in any way holding the invention to
7 a higher standard. I mean the evidence was clear
8 that, without the screws, it was just wholly
9 inoperable, and so that's what the court is
10 recognizing there, saying yes, Metalliflex, the law
11 is out there, you can look to the disclosure, but in
12 this case it doesn't help you, and the specific
13 reason why in this case it doesn't help you is that
14 there was another claim, claim 16, that claimed the
15 same device with screws. And the court said well,
16 look, you claimed it with screws in 16, you've
17 claimed it without screws in claim 1, that's a
18 principle of so-called claim differentiation, claim 1
19 has to be construed as not having screws, therefore
20 it might have said screws in the disclosure, but the
21 real point of that is you can't look to the
22 disclosure to change the scope of the claims.
23 MS. WAGNER: Thank you. You were also
24 asked about the Wellcome v Apotex case, and the Court
25 of Appeal decision is Tab 16, R-401. The trial

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1 division decision is C-041, and I'll have to
2 reference the tab but in any event it's fine, if you
3 want to turn it up, to go to Tab 15. The trial
4 division decision was actually Tab 1 of the
5 cross-examination materials.
6 Again, Professor Siebrasse, I'd ask you,
7 in that case, is it your opinion that the court held
8 the patentee to an elevated standard beyond the basic
9 purpose of the claimed invention based on a promise
10 derived from the disclosure?
11 PROFESSOR SIEBRASSE: No. In that case,
12 as I believe I explained yesterday, the claim was to
13 compounds that were useful in the production of
14 certain end products. Basically what happened is
15 there were these valuable end products known to be
16 valuable. They discovered a better way of making
17 them -- or at least that was apparently the
18 commercial value of it -- and the claim was to these
19 intermediates.
20 As a matter of Canadian law, for a claim
21 to be -- the intermediates to be useful, the end
22 products have to be useful, so Apotex had argued
23 well, that means therapeutic utility, and the court
24 said no, it doesn't, and the court looked to the
25 disclosure to see what the invention was actually

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1 good for, and the end compounds weren't good for
2 therapeutic utility; it was therapeutic utility or
3 antibacterial properties or potentiating properties.
4 So there are two points.
5 One is that the court didn't apply any
6 elevated standard. The court then went on to say it
7 is good for these purposes, so they didn't apply an
8 elevated standard; they merely identified what the
9 claims were good for or what the end products were
10 good for. This is particularly evident because there
11 were in the specification in parts quoted by the
12 court a number of references to advantages, I believe
13 one was the intermediates have a yield far superior
14 to existing processes, so that's a good example where
15 today, if the court had looked at that and said well,
16 you've said a yield far superior to existing
17 processes, today the person attacking the patent
18 would say well, that's a promise; we'd have a debate
19 over whether or not it was, in fact, a promise; what
20 does "superior" actually mean in the context; and
21 once that was established, then the patentee, if it
22 were established to be a promise, would have to
23 establish that, in fact, their invention gave yields
24 far superior to existing products, and we don't see
25 any of that in the patent. It was enough that the

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1 invention worked for the identified purposes.
2 MS. WAGNER: Thank you.
3 There were some questions asked
4 yesterday, particularly in the context of the Unifloc
5 decision that we've already discussed, which was at
6 Tab 42, C-25, and there was some discussion about
7 utility in the claims and utility in the disclosure.
8 My question to you is, in prior law and in your view,
9 would you need to look at the disclosure if the
10 utility of an invention is apparent or is actually
11 claimed? Is it necessary to look at the disclosure
12 to find a utility in that circumstance, in either of
13 those two circumstances?
14 PROFESSOR SIEBRASSE: It's not necessary
15 to look to the disclosure if the utility would be
16 obvious to a person skilled in the art, and
17 Consolboard stated that it's not necessary to state
18 any utility at all. And the underlying point is that
19 an invention has to be useful, but for a chemical
20 compound, for example, to be useful, people have to
21 know what it's good for, because if the thing cures
22 cancer but nobody who uses it knows that it's not
23 useful, so it's necessary that a skilled person would
24 know what it's useful for. If they wouldn't know for
25 other reasons, it may be necessary to look to the

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1 disclosure.
2 MS. WAGNER: In another line of
3 questioning yesterday, counsel for Canada had said
4 that the law on selection patents in Canada can be
5 traced to the IG Farbenindustrie case -- that's
6 probably not the right pronunciation -- and that it
7 was longstanding. Historically, has the law always
8 required a selection patent to show that it had
9 advantages over the genus for the selection to be
10 considered useful?
11 PROFESSOR SIEBRASSE: Not for it to be
12 considered useful. I believe it's
13 in IG Farbenindustrie, possibly Olin Mathieson, but
14 the court makes the point the selection patent, we
15 have typically a patent on a prior genus, a large
16 number of compounds. If that genus patent is valid,
17 all the compounds in the genus must be useful, or
18 else the genus patent itself is invalid. So a
19 selection patent, at least traditionally -- not today
20 in Canadian utility because it will normally be held
21 to the promise under the utility branch, but
22 traditionally the selection patent would necessarily
23 be useful because the genus was useful. And so the
24 elevated requirements were a matter of obviousness,
25 so we say Chlorpromazine or the prior compound treats

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1 schizophrenia but with side effects, you select one
2 out, it treats schizophrenia but with side effects --
3 well, that's useful because it treats schizophrenia
4 but it's obvious because any compound you would have
5 picked out of that genus would treat schizophrenia
6 with side effects so you've done nothing, you've
7 added nothing inventive to the art.
8 If it treats schizophrenia without side
9 effects or has some other surprising advantage, that
10 satisfies the obviousness requirement, but a
11 selection patent traditionally would always be useful
12 because the genus was useful.
13 MS. WAGNER: Thank you.
14 Do the advantages that are required for
15 the selection to be inventive always relate to
16 utility?
17 PROFESSOR SIEBRASSE: Well, if you use
18 utility in the term of patentable utility, I mean,
19 there's no particular relationship between the two,
20 the species has to have surprising or unexpected
21 properties as compared to the genus. So those
22 properties may relate to the usefulness or what we
23 colloquially call the usefulness. I'm not using it
24 as a matter of a term of art, so it may be reduced
25 side effects where you may say well, that's the

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1 usefulness, but in principle it could be any
2 surprising advantage, so maybe the genus is --
3 patents, all the known examples, are very difficult
4 to synthesize or they're very difficult to
5 manufacture and we discover one that's new, it can't
6 actually be disclosed in the genus patent, or be
7 anticipated, but we discover one that was very easy
8 to synthesize so as a result much cheaper, and that
9 kind of advantage could satisfy the requirement for a
10 special and substantial advantage, at least in
11 principle.
12 MS. WAGNER: Counsel for Canada yesterday
13 had suggested that Canada, at least now, treats
14 advantages in the case of selection patents as a
15 matter of utility versus obviousness. In your
16 opinion, and as per the evidence you gave in your
17 report, is it your opinion that in the olanzapine
18 decision the court construed or read a promise of
19 utility that was the same as the advantages that
20 would be required to conclude it was not obvious?
21 PROFESSOR SIEBRASSE: No, and this is, I
22 think, most evident in the Court of Appeal decision
23 in olanzapine No. 1. I'm not sure which tab that is,
24 but I know it's in my book.
25 MS. WAGNER: I believe it's tab 29.

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1 R-15.
2 PROFESSOR SIEBRASSE: At paragraph 13 in
3 particular, the court says "In the reasons for
4 judgment the trial judge identified the '113 patent's
5 [the patent at issue] stated advantages over both the
6 '687 patent [the genus patent] and other
7 anti-psychotic drugs," so he determined the declared
8 advantages over the genus, the '687 patent, included
9 lower level incidence of liver enzyme, lower ESP --
10 that's a side effect -- so various absence of side
11 effects or improved side effects.
12 The next paragraph, regarding the other
13 anti-psychotic drugs, the stated advantages were to
14 be higher efficacy at low doses and so on. The first
15 set of stated advantages would go to the requirements
16 for a selection patent. It has to have surprising
17 advantages over the genus. The second set of
18 advantages are not advantages that are required for a
19 valid selection. You may have a new class of
20 antipsychotics and have lots of side effects, and you
21 pick a selection out of that that surprisingly has
22 fewer side effects -- and this is unusual and
23 non-obvious -- but it's still not actually as good as
24 existing drugs. Well, that's still a valid selection
25 because it's surprising over the genus and, as the

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1 Supreme Court said in Consolboard, you don't have to
2 be better than what goes before. It's enough to
3 offer a useful choice. So the first set of
4 advantages are required for obviousness ; the second
5 set were, as I understood it, as I read the
6 decisions -- and subsequently the basis for which the
7 patent was held not to satisfy the promised utility
8 was on the basis of these other advantages that are
9 additional to what would be required to support a
10 valid selection patent.
11 MS. WAGNER: Thank you.
12 You were taken to Tab 30 yesterday,
13 R-016, and at least I was somewhat confused because
14 there was a statement that this was the first
15 instance decision, which I think was just confusing
16 language, because I believe it's the second decision
17 that was issued by the trial judge in these
18 proceedings, so the 2011 decision, the decision after
19 remand from the Court of Appeal.
20 I believe this was the tab where you did
21 not have the entire decision in the tab originally,
22 and you were directed in particular to paragraphs 260
23 and 261. I'm just confirming, Professor Siebrasse,
24 that you do have the full copy of the case in the
25 exhibit now?

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1 PROFESSOR SIEBRASSE: Yes.
2 MS. WAGNER: So you referred to those
3 paragraphs, and if you go back to the beginning of
4 that section of the judgment, which was just above
5 paragraph 215, there is a heading as to what the
6 trial judge is considering in that section of the
7 judgment.
8 PROFESSOR SIEBRASSE: Yes.
9 MS. WAGNER: Is there any significance,
10 in your view, to the fact that the passages that were
11 reviewed with you yesterday, 260 and 261, were
12 contained within this section of the trial judge's
13 analysis? How did the trial judge analyze the issue
14 in regards to those paragraphs that you were taken to
15 yesterday? In what context was he analyzing this
16 issue?
17 PROFESSOR SIEBRASSE: As I read
18 paragraph 219, the evidence shows that the inventors
19 could not draw a prima facie reasonable inference
20 from the information available at the date of filing,
21 I take it April 1991, to the promise of the '113
22 patent that olanzapine could treat schizophrenia
23 patients significantly better and with fewer side
24 effects than other known anti-psychotic drugs. So
25 this appears to be an explanation of why it fails to

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1 meet the promise of the patent rather than -- the
2 promise of the patent being the broader class of
3 advantages over other anti-psychotics, which is more
4 than is required to support a valid selection.
5 MS. WAGNER: In Canadian law today, what
6 is it that you need to do to show a sound prediction?
7 PROFESSOR SIEBRASSE: Well, there has to
8 be a factual basis for the prediction and a sound
9 line of reasoning linking the factual basis to the
10 promised utility or scintilla utility if the
11 scintilla standard is applied, but normally to a
12 promised utility.
13 MS. WAGNER: And today is post-filing
14 evidence available in that context?
15 PROFESSOR SIEBRASSE: No, never.
16 MS. WAGNER: At the outset of your
17 testimony yesterday, you were asked if counsel have
18 cited your writings on this topic. My question to
19 you is have the Canadian courts cited your writings
20 on this topic?
21 PROFESSOR SIEBRASSE: My writings on this
22 topic?
23 MS. WAGNER: The promise utility
24 doctrine.
25 PROFESSOR SIEBRASSE: I'd have to look at

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1 my CV. I think so but... yes, I see that my Factual
2 basis article was cited by Justice Gauthier in
3 concurring reasons in the Plavix decision, and also
4 the same article cited by Justice Rennie in his --
5 well, I have the cite in front of me. AstraZeneca.
6 I believe that's a Nexium decision. Yes, I believe
7 that's right.
8 MS. WAGNER: And the rest of the
9 citations you have under this section, I take it
10 those are times when the Canadian courts have cited
11 to your writings in other context?
12 PROFESSOR SIEBRASSE: Yes.
13 MS. WAGNER: Thank you. That is all my
14 questions for redirect.
15 THE PRESIDENT: Any application for
16 recross?
17 MR. SPELLISCY: None.
18 THE PRESIDENT: Thank you.
19 There are various questions from the
20 Tribunal, Professor Siebrasse. We start with Sir
21 Daniel.
22 **QUESTIONS BY THE ARBITRAL TRIBUNAL**
23 SIR DANIEL BETHLEHEM: Professor
24 Siebrasse, you're going to have to forgive me because
25 I'm not a patent lawyer by design so I've got a

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1 number of very general questions I'd like to put to
2 you to sort of zoom out to 15,000 foot arising from
3 not only your testimony over the last number of hours
4 but also arising out of your presentation of
5 yesterday. I should say just for clarification that
6 our President has seen the questions, and he's
7 content for me to put them in this general form.
8 We've heard a lot about very close detail
9 of Canadian law and I'd like to try and sort of
10 situate this in context for my own thinking. We've
11 heard about differences and similarities between
12 Canadian patent law and the patent law in other
13 jurisdictions. To what extent is patent law
14 harmonized internationally? I should say, before you
15 get to the question, if any of those questions are
16 too general insofar as they don't admit of a coherent
17 answer, please say, and, if any of the questions take
18 you outside your comfort zone as an expert, please
19 also say.
20 I'm just trying to get a sense of the
21 extent to which patent law is harmonized
22 internationally?
23 PROFESSOR SIEBRASSE: Well, it's a little
24 bit outside my expertise in the sense that I'm
25 generally familiar with UK, EPO and US patent law.

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1 I'm not --
2 THE PRESIDENT: Sorry, I have to tell you
3 we have also next week the round of the various
4 jurisdictions and there this will be more
5 specifically addressed, but if you are familiar with
6 it, to the extent you feel competent to give an
7 opinion on it, please proceed.
8 PROFESSOR SIEBRASSE: The requirements
9 are harmonized at a general level and really the
10 degree to which they diverge depends how deeply you
11 go down into them. For example, Canada has what's
12 called an absolute novelty requirement -- sorry,
13 Europe has an absolute novelty requirement, so if
14 your invention is disclosed anywhere in the world by
15 anyone prior to your filing date or your priority
16 date it's invalid. Canada and the U.S. have a grace
17 period so if I go to a conference and present my
18 invention publicly I have one year to file. So at
19 that level there are distinctions.
20 I could, I suppose, address more specific
21 doctrines. Obviousness is quite harmonized in the
22 basic principles, which are that an invention is
23 inventive if it would not be obvious to a person
24 having ordinary skill in the art, and that's the
25 basic rule, as I understand it -- well, certainly in

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1 Canada and also, as I understand it, in the UK and
2 the U.S. The details of the way that is implemented
3 might --
4 SIR DANIEL BETHLEHEM: Would I be correct
5 in understanding that there are, as it were, common
6 themes and principles but there are going to be
7 differences across jurisdictions?
8 PROFESSOR SIEBRASSE: Well, there
9 certainly are differences across jurisdictions and
10 how significant the differences are will be -- for
11 example, right now the law relating to patentable
12 subject matter is under development because we've
13 basically got new emerging technologies, and is
14 software patentable, is business methods patentable,
15 and the courts -- U.S., Europe and Canada -- well,
16 they're not grossly different but they're quite
17 different. In the areas where the law is longer
18 standing I think there tends to be less difference.
19 SIR DANIEL BETHLEHEM: In your view, as
20 an expert in Canadian patent law, is it possible to
21 say or would you say that Canadian patent law is
22 broadly in step with the developments of the law in
23 the United States and in Europe? Is it a first
24 mover? Is it a follower? Is it an outlier?
25 PROFESSOR SIEBRASSE: Well, I would

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1 certainly say with respect to utility it's an
2 outlier. As a matter generally speaking, Canadian
3 courts are quite open to -- well, not Canadian
4 courts. I'll say the Supreme Court of Canada tends
5 to be quite open to influences from other
6 jurisdictions -- the UK but the U.S., Australia as
7 well. In any jurisdiction where there's sound --
8 good reasoning the courts are open to considering
9 that as persuasive and will occasionally adopt it
10 into Canadian law.
11 I would say, are they a follower?
12 Probably more often a follower than a leader. But to
13 some extent it just depends on what gets cited to
14 them on a particular issue.
15 SIR DANIEL BETHLEHEM: The point you've
16 just made is that, at least with respect to utility,
17 you've suggested that Canadian law is an outlier.
18 PROFESSOR SIEBRASSE: As I understand the
19 law of the other jurisdictions, yes.
20 SIR DANIEL BETHLEHEM: You haven't or you
21 can't bring to our attention any developments, for
22 example, in Europe or in the United States in which
23 patent law has developed on the utility issue in line
24 with the developments in Canadian law since the
25 2002/2008 period?

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1 PROFESSOR SIEBRASSE: No.
 2 SIR DANIEL BETHLEHEM: Have there been --
 3 this is a very general question, apologies for
 4 which -- have there been other notable developments
 5 in patent law, whether in Canada or internationally
 6 insofar as you're aware, in consequence of judicial
 7 decisions?
 8 PROFESSOR SIEBRASSE: Yes. The most
 9 important is patentable subject matter. Can you
 10 patent higher life forms, can you patent software,
 11 can you patent business methods, and I am recalling
 12 yesterday's cross-examination -- well, in any event,
 13 what's significant there is that these are wholly new
 14 areas of technology, so nobody really knew if higher
 15 life forms were patentable because, prior to the
 16 '70s, or Harvard Mouse really, nobody had actually
 17 developed a higher life form that was actually
 18 man-made, new, inventive and so on. So that area of
 19 law, patentable subject matter, is currently quite
 20 unsettled with respect to those areas.
 21 But there's quite a difference, in my
 22 view, between the developments in Canada, where we
 23 had very settled law, that commercial success was
 24 evidence of utility and infringement was evidence of
 25 utility that was completely uniform for 75 years

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11:34

1 anywhere with no variation, and it wasn't that the
 2 issue was new, whereas patentable subject matter, the
 3 issue itself is new and that's why the law has
 4 developed.
 5 SIR DANIEL BETHLEHEM: So it's not
 6 unusual, I understand from what you've just said, to
 7 see patent law develop through judicial decisions?
 8 PROFESSOR SIEBRASSE: That's right.
 9 SIR DANIEL BETHLEHEM: In jurisdictions
 10 that do not have the same common law tradition as
 11 Canada, the United States, perhaps the UK, how has
 12 patent law developed?
 13 PROFESSOR SIEBRASSE: We're getting a
 14 little far afield. My understanding -- the
 15 jurisdiction I'd be most familiar with is the
 16 European Patent Office on that, which operates under
 17 the European Patent Convention interpreting the
 18 European Patent Convention, and my understanding is
 19 they're not in principle a common law body and all
 20 the appeal boards apply the Convention directly.
 21 Nonetheless, there are decisions that are
 22 influential and are, in fact, cited by subsequent
 23 appeal boards.
 24 SIR DANIEL BETHLEHEM: That would be by
 25 way of administrative decision, if I can put it in

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1 those terms, rather than by judicial decision?
 2 PROFESSOR SIEBRASSE: Yes. The European
 3 Patent Office is equivalent to the Canadian IP
 4 office. It's equivalent to the Patent Appeal Board
 5 except it has more business because Europe is bigger,
 6 so they do have a number of decisions at
 7 administrative level, yes, rather than judicial
 8 level.
 9 SIR DANIEL BETHLEHEM: Thank you. I have
 10 just one last question and this may not be something
 11 you can answer. If not, please don't. Your evidence
 12 has been that, on the utility doctrine, that Canadian
 13 law is an outlier, this development has been a
 14 significant change in the law between 2002/2008. Are
 15 you aware of the views expressed by other states
 16 through their courts, through their representations,
 17 which have taken issue with this development in
 18 Canadian law? Dueling jurisprudence suggesting that
 19 Canadian law in AZT or in Raloxifene, for example,
 20 should not be followed?
 21 PROFESSOR SIEBRASSE: No. Canadian
 22 courts are quite open to other jurisdictions. I'm
 23 not sure the U.S. Federal Circuit pays much attention
 24 to us.
 25 SIR DANIEL BETHLEHEM: Thank you very

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1 much.
 2 MR. BORN: Just a couple of questions.
 3 Going back to the notion of the development of the
 4 common law, particularly patent law by Canadian
 5 courts, your testimony is that the promise utility
 6 doctrine makes Canada an outlier vis-à-vis other
 7 jurisdictions?
 8 PROFESSOR SIEBRASSE: Well, I'm not sure
 9 that I was testifying with respect to other
 10 jurisdictions. I mean, that's my understanding, yes,
 11 but I'm not an expert on the law of the other
 12 jurisdictions.
 13 MR. BORN: Right. And I think your
 14 testimony was actually more focused on Canadian law
 15 and the development of Canadian law?
 16 PROFESSOR SIEBRASSE: Yes.
 17 MR. BORN: If I understood, to keep using
 18 the outlier analogy, the development of the promise
 19 utility doctrine made current Canadian law a bit of
 20 an outlier with respect to previous, pre-2002,
 21 Canadian law?
 22 PROFESSOR SIEBRASSE: Yes.
 23 MR. BORN: Can you think of other areas
 24 of Canadian patent law where there were similar, if I
 25 can put it this way, leaps or unexpected developments

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1 in patent law by virtue of Canadian court decisions?
 2 PROFESSOR SIEBRASSE: Well, patent law
 3 has developed in Canada through judicial decisions
 4 such as, for example, sound prediction. I'm not
 5 sure -- what I can't think of is other instances
 6 where the law was settled and then changed
 7 dramatically. What I can think of are instances
 8 where -- you know, selection patents have been around
 9 for a while now, but they weren't around forever.
 10 The original inventions were mechanical. Blast
 11 furnaces. Then really at the beginning of the 20th
 12 century we saw the rise of the chemical industry. We
 13 saw more chemical inventions. Issues arose with
 14 respect to chemical inventions. Selection patents
 15 play a very important role in chemical inventions
 16 because the first compound you find in a class is
 17 rarely the best, and so it's important to explore the
 18 class and so, as chemical industry arose, patents
 19 that style became more important so ultimately there
 20 were judicial decisions establishing the validity. I
 21 suppose in some sense it was unexpected in the sense
 22 that there wasn't clear law before, and I don't know
 23 how well you could have predicted it and then we had
 24 clear law, but the difference is there wasn't clear
 25 law before we had a new technology; then the law was

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1 settled, as opposed to clear law; no particular
 2 change in the technology, and then reversal.
 3 I can't think of -- I don't want to swear
 4 that there are none but I can't think of any
 5 instances like that.
 6 MR. BORN: Can you help me just a little
 7 bit on the promise of the patent rule as it currently
 8 stands in Canadian law? If you had to articulate the
 9 rationale for the current rule, what would it be?
 10 PROFESSOR SIEBRASSE: Well, the rationale
 11 is very difficult to articulate because the courts
 12 have actually rarely given a rationale.
 13 I can tell you definitely what the
 14 rationale was in UK law, which I tried to explain
 15 earlier, which is that the patent was a discretionary
 16 grant by the Crown so the Crown could look at it and
 17 say -- for example, as I understand it this was
 18 actually exercised at some point in the 19th century
 19 in the context of excise tax on salt. Somebody came
 20 up with a new invention, a different method of curing
 21 meats or something like that, that didn't require
 22 salt and the Crown said wow, that's a great
 23 invention, no patent because we get a lot of money
 24 from the salt tax. So that was the last active
 25 exercise of the discretion.

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1 So it was totally possible in English
 2 law, in practice until the 19th century and in
 3 principle until 1977, that the Crown could say yes,
 4 that is a new, useful, non-obvious invention -- too
 5 bad, no patent. And the basis for the false
 6 suggestion requirement in the UK was that the court
 7 can't know what the Crown considered. The court can
 8 say yes, this patent once granted is valid, it
 9 satisfies the requirements, but it was -- the Crown
 10 could, if they wanted, demand more. They were
 11 entitled to demand more than the standard, and the
 12 court would say well, if you granted it on the basis
 13 of what actually happened we'd hold it valid, but
 14 maybe you were asking for more, so we don't want to
 15 second-guess the Crown in the exercise of its
 16 discretion.
 17 Now that can't be the rationale in Canada
 18 because since Confederation the basis of the grant
 19 has never been discretionary, so the Crown cannot say
 20 yes, new, useful invention -- sorry, too bad.
 21 So the rationale has not been very
 22 clearly articulated. The courts have just said yes,
 23 citing normally Consolboard since 2005. Some
 24 Canadian courts have traced it back to some UK cases.
 25 There's a relatively recent Cyanamid case that's

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1 sometimes cited. Some Canadian courts have traced it
 2 back to Hatmaker. As I've explained, to the extent
 3 that's the rationale, well, it's not a proper
 4 rationale in Canada.
 5 Other courts have simply said well, you
 6 should be held to your promises, provided that is a
 7 rationale, and the problem for that is that to the
 8 extent that that's a basis for saying your patent is
 9 invalid it's captured in section 53, which says
 10 you've made a material misrepresentation willfully
 11 for the purpose of misleading; your patent is
 12 invalid. To the extent the promise doctrine reflects
 13 the notion you should be held to your promises, it's
 14 really substituting the court's view for that of
 15 the --
 16 MR. BORN: I guess one might say that
 17 section 53, if you will, goes more to willful
 18 misrepresentations and that the promise doctrine is
 19 more contractual in a sense. You'll be held to your
 20 promises even if you weren't misrepresenting
 21 willfully if you just didn't fulfill your part of the
 22 bargain.
 23 PROFESSOR SIEBRASSE: That's right. So
 24 the false suggestion doctrine in the UK was
 25 contractual in a sense because there the bargain

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1 between the Crown was not you've got a new useful
2 invention, we're going to give it to you. It was a
3 specific contract. So some of the very old ones were
4 things like you will hire four apprentices, of whom
5 two will be of English birth. They might have said
6 four apprentices of whom one is English birth. And
7 the court would say well, we'll uphold that but you
8 said two, that was the specific bargain, and
9 contrasted -- oh, yes, and the misrepresentations
10 are -- the point about the misrepresentations -- so
11 the Canadian bargain is different, it has to be new,
12 useful and non-obvious. It's not a specific bargain;
13 it's a bargain that's stated in the Act. Anyone who
14 comes forward with new, useful and non-obvious is
15 entitled to the patent.
16 The willful misleading recognizes that if
17 patentees make representations, and they're not
18 necessarily representations solely in the patent,
19 although they may be in the patent but if they make
20 representations in the course of getting their patent
21 that were willfully misleading, you know, there's
22 something wrong with that, we shouldn't allow the
23 patent to be granted on that basis, but it's quite a
24 stringent standard because it has the intent
25 requirement and material requirement which is quite

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1 elevated. And the reason for that is precisely that
2 the courts don't want to run into the problem of
3 having essentially stray statements invalidate a
4 patent even if they're misstatements, so the bar is
5 raised quite high to avoid the problem we're seeing
6 with the promise doctrine.
7 Does that answer your question?
8 MR. BORN: I think it brings me to my
9 real question, which I hope is coherent, that
10 assuming that the rationale for the promise of the
11 patent rule is that patent holders will be held to
12 their bargain, held to their promise, how does that
13 rationale fit with the separate rule against
14 post-filing evidence?
15 PROFESSOR SIEBRASSE: Okay. So the rules
16 as a practical matter -- are you asking conceptually
17 or practically?
18 MR. BORN: Yes, conceptually. And if the
19 question is unclear then --
20 PROFESSOR SIEBRASSE: No, I mean it's
21 clear. I just have to -- it's clear but maybe not
22 easy.
23 So the requirement -- to the extent that
24 you have to be held to your bargain, as I've
25 discussed, that was the rationale in the UK for the

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1 false suggestion promise, and if you actually
2 delivered on your bargain, the patent would never be
3 held invalid. So if we combine that rationale with
4 the exclusion of post-filing evidence, we'll say the
5 exclusion of post-filing evidence undermines that
6 rationale because you may actually have delivered
7 and, yet, your patent will be held invalid.
8 MR. BORN: Thank you.
9 THE PRESIDENT: Professor Siebrasse,
10 could you please go to your First Report,
11 paragraph 20? In paragraph 20 you state in the
12 beginning, "The fundamental characteristic of the
13 mere scintilla branch of the utility requirement is
14 that the standard of utility is measured objectively
15 against the requirement set out by the Act."
16 Then you say "The requisite standard
17 under the Act is low."
18 If you go, then, to paragraph 42, there
19 you state, "The central aspect of the promise
20 doctrine is that it constitutes an elevated standard
21 of utility above that which is required under the
22 Act."
23 I assume you are referring to the
24 Patent Act?
25 PROFESSOR SIEBRASSE: Yes.

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1 THE PRESIDENT: And where do we find the
2 requirement you refer to here?
3 PROFESSOR SIEBRASSE: Yes, it's only in
4 the word "useful." You know, I've come to understand
5 that my use of the term "objective" is maybe --
6 THE PRESIDENT: That was not my question.
7 My question is simply when you state "this requisite
8 standard under the Act is low", where do I see that
9 the requisite standard under the Act is low or, for
10 that matter, high? Where do I read that in the Act?
11 PROFESSOR SIEBRASSE: Yes. So the word
12 is only "useful," and the point I was trying to make
13 here is that the standard invoked by the word
14 "useful" does not vary from one patent to another, so
15 if you have the same kind of invention then you'll be
16 held to the same standard of utility as a matter of
17 the traditional requirement.
18 When I said objective stated by the Act,
19 I didn't mean that it was written out in the Act as,
20 for example, the obvious requirement is now written
21 out in the Act. I meant that it doesn't vary from
22 one patent to the other so long as the invention is
23 the same.
24 THE PRESIDENT: Have you read the Expert
25 Report of Mr. Dimock?

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1 PROFESSOR SIEBRASSE: Yes.
 2 THE PRESIDENT: Could it be shown to you,
 3 the First Report? It's in the bundle. Could you go
 4 to Tab 17, please? Could you go to paragraph 37,
 5 page 10, internal page?
 6 There Mr. Dimock describes in paragraph
 7 38 the pre-1993 compulsory licensing scheme?
 8 PROFESSOR SIEBRASSE: Yes.
 9 THE PRESIDENT: And in paragraph 39 he
 10 then states the reason of that scheme (that existed
 11 pre-1999) was, according to him, that there was
 12 relatively little pharmaceutical litigation under the
 13 compulsory licensing regime. Do you agree with that
 14 conclusion, or that statement?
 15 PROFESSOR SIEBRASSE: Yes. So there was
 16 pharmaceutical litigation even under the compulsory
 17 licensing regime, but the abolition of the regime has
 18 contributed to the increase, no doubt.
 19 THE PRESIDENT: Another question is this,
 20 and I don't know how to compare it, with my limited
 21 knowledge of English.
 22 You have been taken to a number of cases
 23 in the past, and we went back to I think 1899 or some
 24 sort, where there's a good common law contradiction.
 25 Could it be that there were concepts

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1 which became actually a little bit outdated and went
 2 to the attic and then in 2002 were dusted off and
 3 came back to life under what you called the promise
 4 utility doctrine?
 5 Because what you say is it was a sea
 6 change, it was all new, but wasn't that not -- and
 7 I'm asking you this as a question, not as a position
 8 that I take on this at this point in time -- wasn't
 9 it something that already existed, was practiced, for
 10 example, Fox in 1969, although you have a different
 11 view on what he writes?
 12 Was it not referred to a number of times
 13 and then it became a little bit outdated, like you
 14 find something and you put it in the attic, and then
 15 you dust it off again and it becomes again in use?
 16 Would that not be a way of viewing this matter?
 17 PROFESSOR SIEBRASSE: Well, I would say
 18 it was fair to say that the commentators were
 19 cognizant of these Hatmaker case and the UK false
 20 suggestion line of cases.
 21 I'm not sure that -- I mean we've been
 22 cited to articles that were dated from the '70s. I'm
 23 not sure that this awareness -- well, I don't know to
 24 the extent that it ebbed and flowed, but they were
 25 aware of the concept, although in my opinion it had

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1 never been applied in Canadian law prior to 2005 , but
 2 the commentators were aware of the concept.
 3 THE PRESIDENT: The question is was it
 4 completely new or not in 2005?
 5 PROFESSOR SIEBRASSE: Well, in my view it
 6 was completely new in Canadian patent law, yes.
 7 THE PRESIDENT: Now my last question, and
 8 this is very difficult for law professors to answer,
 9 me included. Obviously you are not the only IP
 10 professor in Canada. You have colleagues, peer
 11 review. What is the mainstream thinking?
 12 Do they agree with you, or do they have
 13 their own views and actually agree with what
 14 Mr. Dimock is telling us?
 15 PROFESSOR SIEBRASSE: Well, I will say
 16 that the Canadian patent academic circle is very
 17 small. Most Canadian academics who teach IP law
 18 focus on copyright and trademark. There is Mr. Gold,
 19 of course, who has written on this particular issue,
 20 and he, as I understand -- well, he takes the
 21 contrary view. I mean, I'd be happy to go through
 22 the errors in his article. But in terms of a
 23 mainstream or consensus view, there just aren't
 24 enough patent academics to really say there's a
 25 consensus one way or the other.

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1 THE PRESIDENT: What I understand from
 2 you is you say you can count them on one hand, the
 3 number of patent academics?
 4 PROFESSOR SIEBRASSE: Well, you don't
 5 even need all the fingers.
 6 THE PRESIDENT: All right. So it takes
 7 two to disagree. Is that correct?
 8 PROFESSOR SIEBRASSE: Yes.
 9 THE PRESIDENT: Thank you.
 10 MR. BORN: I have a question arising out
 11 of the President's questions, and it's this notion
 12 that the promise of the patent doctrine was
 13 completely new. One might say, oh, it's not
 14 completely new, go look at Mr. Fox and look at
 15 Consolboard, and you see these words that, depending
 16 on how you read the word "or", look a little bit like
 17 the promise of the patent doctrine.
 18 In what sense do you mean that the
 19 promise of the patent doctrine is completely new?
 20 PROFESSOR SIEBRASSE: In the sense it was
 21 never applied in Canadian law before 2005.
 22 MR. BORN: But someone might say, in
 23 response to that, that it was still a rule of
 24 Canadian law. How would you respond to that?
 25 PROFESSOR SIEBRASSE: So my response to

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1 that would be, well, it's not a rule of Canadian law
 2 because the rationale for Hatmaker and Alsop's
 3 patents were fundamentally inconsistent with the
 4 basis of the grant in Canadian law. They were based
 5 on the discretionary nature of the grant in UK law
 6 and this isn't -- I mean, I explain this in my
 7 article, but it's nothing -- you would only need to
 8 read the cases. This would have been well
 9 understood, certainly by the English courts at that
 10 time, and it's inconsistent with the basis of the
 11 grant in Canadian law.
 12 My view would be if somebody had actually
 13 tried to litigate this and the matter had been
 14 properly argued, the courts should have held it not
 15 to be a part of Canadian law.
 16 MR. BORN: And I guess you would say that
 17 the proof of that is in the pudding. Nobody did try
 18 to litigate it.
 19 PROFESSOR SIEBRASSE: Yes. Nobody tried,
 20 and I will point out that ultimately, of course,
 21 somebody did try, but the way it arose was through a
 22 series of procedural decisions and it got affirmed in
 23 context where it wasn't really the central issue, and
 24 before it really got applied in the first case.
 25 THE PRESIDENT: Any follow-up questions?

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1 Ms. Wagner?
 2 MS. WAGNER: No, none, thank you.
 3 THE PRESIDENT: Mr. Johnston, any
 4 follow-up questions on matters arising from the
 5 Tribunal questions?
 6 MR. JOHNSTON: None.
 7 THE PRESIDENT: Professor Siebrasse,
 8 thank you for testifying. You are now excused as an
 9 expert and released.
 10 PROFESSOR SIEBRASSE: Thank you.
 11 I can see what you're thinking,
 12 Ms. Cheek. You want five minutes for Mr. Wilson, to
 13 change over?
 14 MS. CHEEK: Yes, we'd appreciate that.
 15 We can take a curt five minutes.
 16 THE PRESIDENT: Five minutes' break.
 17 *(Recess taken)*
 18 MURRAY WILSON
 19 MS. CHEEK: Mr. President, Mr. Rick
 20 Dearden will be handling the examination of
 21 Mr. Wilson.
 22 THE PRESIDENT: Thank you.
 23 Good afternoon, Mr. Wilson. Could you
 24 please state your full name for the record?
 25 MR. WILSON: My name is Murray Wilson.

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1 THE PRESIDENT: You appear as an expert
 2 witness for the Claimant?
 3 MR. WILSON: Yes.
 4 THE PRESIDENT: If any question is
 5 unclear to you, either because of language or for any
 6 other reason, please do seek a clarification because,
 7 if you don't do so, the Tribunal will assume that
 8 you've understood the question and that your answer
 9 corresponds to the question.
 10 MR. WILSON: Okay.
 11 THE PRESIDENT: Mr. Wilson, you will
 12 appreciate that testifying, be it before a court or
 13 an arbitral tribunal, is a very serious matter. In
 14 that connection, the Tribunal expects you to give the
 15 statement which is in front of you.
 16 MR. WILSON: Yes.
 17 THE PRESIDENT: Could you please read it
 18 out?
 19 MR. WILSON: I solemnly declare upon my
 20 honor and conscience that my statement will be in
 21 accordance with my sincere belief.
 22 THE PRESIDENT: Thank you. Could you
 23 please go to your First Report, which is dated
 24 September 25, 2014, at page 14, and confirm for the
 25 record that the signature appearing above your name

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1 is your signature?
 2 MR. WILSON: Yes, it is.
 3 THE PRESIDENT: Could you please go to
 4 your Reply Expert Report, which is dated September 9,
 5 2015, and go to page 15, and confirm for the record
 6 that the signature appearing above your name is your
 7 signature?
 8 MR. WILSON: Yes, it is.
 9 THE PRESIDENT: Do you have any
 10 correction to make to either report?
 11 MR. WILSON: No.
 12 THE PRESIDENT: Thank you. Mr. Dearden,
 13 please proceed with the direct examination, basically
 14 inviting I think the expert to give the presentation.
 15 MR. DEARDEN: Yes. Thank you,
 16 Mr. President.
 17 Mr. Wilson could you deliver your
 18 presentation, please?
 19 PRESENTATION BY MR. WILSON
 20 MR. WILSON: Yes. Thank you for giving
 21 me this opportunity to address you.
 22 As I stated, my name is Murray Wilson.
 23 As you can see from the first slide, during my
 24 37 years in the patent office I carried out a number
 25 of duties, beginning in 1971 as a patent examiner.

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1 MR. DEARDEN: It's tab 1.
 2 THE PRESIDENT: Thank you. I was about
 3 to see where I could find the hard copy. Please
 4 start again with 1971.
 5 MR. WILSON: In 1971 I began as a patent
 6 examiner and I was continuously in the Patent Office
 7 until 2008 when I retired in the position of acting
 8 chairman of the Patent Appeal Board.
 9 I've been asked to provide testimony with
 10 respect to the four major topics that I identified in
 11 my two reports which we've discussed earlier, the
 12 first topic being the patent examination process at
 13 the Patent Office, the second being the purpose of
 14 the Manual Of Patent Office Practice, which is more
 15 commonly called MOPOP, and my review of Eli Lilly's
 16 olanzapine and atomoxetine patents under the
 17 traditional utility requirements, and the utility
 18 requirements which were outlined in MOPOP in the
 19 1990s as compared to the utility requirements in the
 20 2000s.
 21 The patent examination process in the
 22 Patent Office is a substantive review. All
 23 applications which ultimately issue to patent must be
 24 examined by a patent examiner. Examiners are skilled
 25 and well-trained. The minimum educational

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1 requirement for an examiner is either a degree in
 2 Engineering or an Honors degree in one of the
 3 sciences, Chemistry, Physics or Biotechnology, and
 4 many examiners have much higher education than that.
 5 In examining an application, the examiner
 6 reads the application and studies it, notes any
 7 defects, and communicates these noted defects to the
 8 applicant by way of a technical report which allows
 9 the applicant to try to overcome these deficiencies.
 10 Examiners are expected to identify all known defects
 11 in the first report and subsequent office actions,
 12 and the applicant may overcome these defects either
 13 by filing additional evidence or arguing and
 14 reasoning.
 15 If, after several exchanges of office
 16 actions and responses, the defects haven't all been
 17 overcome, then the application can be referred to the
 18 Patent Appeal Board, who makes a recommendation to
 19 the Commissioner about the final disposal of the
 20 application.
 21 The Manual Of Patent Office Practice is a
 22 very important reference tool for examiners as they
 23 do their work. They don't have the option of either
 24 following what MOPOP says or ignoring it; they have
 25 to -- they're expected to follow what MOPOP says, so

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1 it's tantamount to a rule book for examiners.
 2 MOPOP was created by the Patent Office,
 3 taking the requirements of the Patent Act, the
 4 requirements of the Patent Rules and relative
 5 jurisprudence, and explaining all of this material in
 6 practical terms to tell examiners how to do their
 7 work, how to examine patent applications.
 8 It's there to ensure consistency among
 9 examiners by making sure that all examiners have
 10 exactly the same explanation of what they're supposed
 11 to be doing. It's also used by patent agents as a
 12 guide. Patent agents rely on this to know what type
 13 of material they have to include in their patent
 14 application and what steps will be taken as the
 15 application goes through the Patent Office
 16 processing.
 17 The traditional utility requirement was a
 18 very simple and easy test to satisfy, and the same
 19 test was applied to all applications in all fields of
 20 technology. A well-trained examiner determined if
 21 the asserted utility was credible, and the only time
 22 there was a question about utility is if the examiner
 23 had reason to doubt that the invention actually
 24 worked.
 25 An example of an invention that doesn't

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1 work is a perpetual motion machine. An examiner
 2 would realize quite quickly that the claimed
 3 invention violates fundamental laws of physics, so
 4 would object on the basis of lack of utility.
 5 So the traditional utility requirement,
 6 there was only a single utility required; there was
 7 no particular amount of utility, it was just utility,
 8 and MOPOP set out in fairly clear terms the low
 9 threshold for establishing utility.
 10 For example, in the 1990 version of
 11 MOPOP, you can see in 12.02.01, it says: "section 2
 12 of the Act requires utility as an essential feature
 13 of invention. If an invention is totally useless,
 14 the purposes and objects of the grant would fail...."
 15 12.03 states, "Utility, as related to
 16 inventions, means industrial value."
 17 MOPOP was amended several times in the
 18 1990s, in the 1996 and 1998 versions of MOPOP.
 19 Section 2 of the Act requires utility as an essential
 20 feature of invention. Utility, as related to
 21 inventions, means industrial value, so there was no
 22 change to the traditional utility requirements.
 23 I took a review of Lilly's olanzapine
 24 '113 patent and the file wrapper. During the
 25 prosecution of that application the examiner issued

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1 one office action but did not raise any questions
2 about the utility of the invention. After my review,
3 I believe that the olanzapine application met MOPOP's
4 requirements for the utility that existed at the time
5 the application was examined.
6 I also reviewed the atomoxetine '735
7 patent and the file wrapper, and again the examiner
8 didn't raise any questions about the utility of the
9 invention. Again, in my opinion, the atomoxetine
10 application met MOPOP's requirements for utility
11 which existed at that time.
12 In the 2000s there was substantial change
13 to the utility requirements, and MOPOP was amended to
14 reflect those changes. MOPOP chapters addressing
15 utility were amended in 2005, 2009 and 2010. These
16 amendments reflected a substantial change in the
17 utility requirement.
18 In 2009 MOPOP introduced a new
19 requirement that promises of particular advantages
20 are now considered to be the utility of the
21 invention. So 12.08.01 says, "... Where, however,
22 the inventors promise that their invention will
23 provide particular advantages ... it is this utility
24 that the invention must in fact have."
25 Also in the 2009 MOPOP there was a new

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1 requirement that where several uses are promised, the
2 applicant must establish utility for each of them.
3 Again in the 2009 MOPOP there was an
4 introduction of a new requirement that the applicant
5 cannot rely on evidence that didn't exist as of the
6 date of filing.
7 The 2010 version of MOPOP introduced a
8 new requirement that the factual basis and sound line
9 of reasoning for predicted utility must be in the
10 patent application.
11 So those new utility requirements in the
12 2009/2010 MOPOPs are listed here. The first one,
13 construing statements in the disclosure as promises,
14 was new. Under the traditional utility requirements,
15 examiners didn't comb through applications in search
16 of promises and they didn't consider statements of
17 advantages as the utility of an invention.
18 No. 2, an applicant has to establish
19 multiple promises if multiple promises are
20 identified. This is new because, under the
21 traditional requirements, only a single utility was
22 needed.
23 No. 3, post-filing evidence of utility
24 cannot be submitted. This is new. Under the
25 traditional requirement the applicant could use any

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1 evidence to confirm that the invention was useful,
2 including post-filing evidence, if the utility had
3 been questioned by the examiner.
4 No. 4, the factual basis and sound line
5 of reasoning for predicted utility must be included
6 in the patent application as filed. Under the
7 traditional utility requirements, evidence in support
8 of predicted utility did not have to be included in
9 the patent application.
10 In conclusion, the amendments to MOPOP in
11 the 2000s reflected a substantial change in the
12 utility requirements that did not exist when Lilly's
13 olanzapine and atomoxetine patent applications were
14 filed and examined.
15 Thank you.
16 THE PRESIDENT: Thank you.
17 **DIRECT EXAMINATION**
18 MR. DEARDEN: Thank you, Mr. Wilson. I
19 just have two questions in direct.
20 Mr. Wilson, the binder you have on the
21 table should have at Tab 5 Dr. Gillen's second
22 statement?
23 MR. WILSON: Yes.
24 MR. DEARDEN: Can you turn to
25 paragraph 8, sir?

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1 MR. WILSON: Yes.
2 MR. DEARDEN: Dr. Gillen states at
3 paragraph 8, "In the specific context of evident
4 utility, I would agree with Mr. Wilson's statement
5 that 'utility was not questioned unless an examiner
6 had doubts that an invention would work'. In this
7 regard I note that Mr. Wilson's background as an
8 examiner at the Patent Office is in the mechanical
9 arts."
10 So Mr. Wilson, what was your experience
11 with pharmaceutical patents in patent applications
12 during your career at the Patent Office?
13 MR. WILSON: In 1981 I was promoted to
14 the position of senior patent examiner, and at that
15 time I transferred from a mechanical examining
16 section to a chemical examining section. As senior
17 examiner, one of my duties was to act as section
18 chief when the section chief was absent from the
19 office. The section chief was responsible for
20 reviewing the work of all the examiners in that
21 section, so for lengthy periods of time when the
22 section chief was either on holidays or on sick leave
23 my job was to review all of the work, office actions
24 and allowed applications of approximately 12 chemical
25 patent examiners.

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1 Subsequent to that, I moved to a position
2 as assistant to the Commissioner of Patents. One of
3 the Commissioner's main duties was to issue
4 Commissioner's decisions in conflict awards and one
5 of my jobs was to make sure that when the
6 Commissioner's decisions in conflict awards came to
7 his office, that they covered all of the material.
8 They didn't leave anything undecided. And many of
9 the Commissioner's decisions were with respect to
10 chemical applications, and virtually all of the
11 conflict awards were with respect to chemical
12 applications.
13 MR. DEARDEN: What's a conflict award?
14 MR. WILSON: A conflict occurs when --
15 well, first off, it's not in the Patent Act anymore.
16 The Canadian patent system, up until 1989, was a
17 first-to-invent system, and applicants -- if there
18 were two applications on file at the same time that
19 could claim the same invention, the office had a
20 process called "Conflict" by which they determined
21 which applicant was the first inventor.
22 Subsequent to that, I had a job as the
23 trainer of new examiners. The office hired examiners
24 in all fields of technology, including chemistry, so
25 I did the formal classroom training of new examiners,

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1 and that required learning some of the techniques of
2 examination which are typical of various fields of
3 technology, including chemistry.
4 Then I moved to the Patent Appeal Board,
5 and the Patent Appeal Board handles applications that
6 have been rejected by examiners in all fields of
7 technology, and so I spent a good deal of time
8 reviewing the prosecution of applications, some of
9 which were from the chemical area, and I also was
10 delegated the powers of the Commissioner of Patents
11 to investigate allegations that a patentee is abusing
12 its patent rights. And in one situation I had to
13 investigate -- we received an allegation that Merck &
14 Co was abusing its patent rights of a patent entitled
15 Amino Acid Derivatives, and I held two or three days
16 of hearing and called witnesses, and ultimately
17 issued a decision on that allegation which then was
18 appealed to the Federal Court, and the Federal Court
19 upheld my decision.
20 MR. DEARDEN: Still with Dr. Gillen's
21 second statement at Tab 5, can you turn to
22 paragraph 17 of his second statement?
23 MR. WILSON: Yes.
24 MR. DEARDEN: I'll read it in the record.
25 "I also disagree with Mr. Wilson with respect to his

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1 position on post-filing evidence for sound prediction
2 cases. As discussed in my first statement, an
3 invention must be complete at the time it is filed.
4 Subsection 38.2(2) of the Patent Act, which prohibits
5 amendments to the description to add matter quote
6 'not reasonably to be inferred' from the
7 specification as originally filed exists for this
8 reason. If you need to alter the description of your
9 invention, chances are that you have not finished
10 inventing. The Patent Act is not for protecting
11 research ideas or plans. It's designed to protect
12 actual inventions."
13 What post-filing evidence are you
14 referring to with respect to new matter in the
15 paragraph that he disagrees with?
16 MR. WILSON: Well, I certainly wasn't
17 saying you could amend the application in a certain
18 matter. That's just not permitted. What I was
19 referring to is the possibility of an applicant
20 submitting evidence by way of an amendment letter, so
21 the evidence would be in the amendment letter for the
22 examiner to consider but would not be in the patent
23 application itself. It would not amend the patent
24 application.
25 MR. DEARDEN: Thank you, Mr. Wilson.

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1 THE PRESIDENT: I think we should break
2 for lunch now. We will resume at 1:30.
3 Mr. Wilson, you are under testimony. It
4 means that you are not allowed to discuss this case
5 with anyone whilst you are under testimony.
6 MR. WILSON: Yes. Okay.
7 *(Recess taken)*
8 THE PRESIDENT: Ms. Zeman, please proceed
9 with the cross-examination.
10 **CROSS-EXAMINATION ON BEHALF OF THE RESPONDENT**
11 MS. ZEMAN: Good afternoon, Mr. Wilson.
12 MR. WILSON: Good afternoon.
13 MS. ZEMAN: My name is Krista Zeman, and
14 I am counsel for Canada in this arbitration. I will
15 have a few questions for you this afternoon to make
16 sure that I understand your evidence that you filed
17 in this proceeding. If you have any questions about
18 the questions that I'm asking you, if they're unclear
19 to you, by all means let me know and I will do my
20 best to rephrase.
21 MR. WILSON: Certainly.
22 MS. ZEMAN: I'd like to start by talking
23 a bit about your background. In your direct
24 presentation this morning you explained to us that
25 you have some experience with chemical inventions

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1 from your time at the Patent Office. Is that right?
 2 MR. WILSON: Yes.
 3 MS. ZEMAN: You hold a Bachelor's degree
 4 in Mechanical Engineering. Is that right?
 5 MR. WILSON: Yes.
 6 MS. ZEMAN: In your statements you
 7 explained that examiners are assigned applications
 8 that relate to their field of expertise. Is that
 9 right?
 10 MR. WILSON: Yes.
 11 MS. ZEMAN: And that examiners have
 12 significant expertise in the field in which they
 13 examine. Is that right?
 14 MR. WILSON: Yes.
 15 MS. ZEMAN: You're not an expert in
 16 chemistry. Is that right?
 17 MR. WILSON: Yes.
 18 MS. ZEMAN: In 1992, you became a member
 19 of the Patent Appeal Board. Is that correct?
 20 MR. WILSON: Yes.
 21 MS. ZEMAN: And, at the Patent Appeal
 22 Board, you would review the prosecution of rejected
 23 patent applications?
 24 MR. WILSON: Yes.
 25 MS. ZEMAN: And at that point would it be

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1 accurate to say that you were no longer working
 2 directly with examiners?
 3 MR. WILSON: Yes.
 4 MS. ZEMAN: And the Patent Appeal Board
 5 would make roughly ten to 20 recommendations on
 6 average each year? Does that sound like an accurate
 7 ballpark?
 8 MR. WILSON: Yes, I think so.
 9 MS. ZEMAN: Just so I have the timeline
 10 clear, Dr. Gillen, who we'll hear from a bit later
 11 this week, joined you on the Patent Appeal Board in
 12 2002. Is that right?
 13 MR. WILSON: I don't know exactly.
 14 MS. ZEMAN: About right?
 15 MR. WILSON: Approximately.
 16 MS. ZEMAN: Early 2000s, we'll say. And
 17 he became chair of the Board in 2003?
 18 MR. WILSON: Quite possibly, yes.
 19 MS. ZEMAN: Then you became acting chair
 20 of the Board in 2006 when he left. Is that right?
 21 MR. WILSON: Yes.
 22 MS. ZEMAN: And then you were acting
 23 chair until you retired in 2008. Is that right?
 24 MR. WILSON: Yes.
 25 MS. ZEMAN: I'd like to make sure that I

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1 understand the scope of the opinion that you've
 2 offered in this arbitration. In your first Statement
 3 at paragraph 12 -- Report, rather, my apologies, you
 4 set out the instructions that you were given, and in
 5 subpoints (iii) and (iv) --
 6 MR. DEARDEN: Sorry, Mr. President,
 7 sorry, Counsel, perhaps you could tell him where his
 8 statement is in the binder that's in front of him?
 9 MS. ZEMAN: I believe it's in your direct
 10 examination binder, in your First Report.
 11 THE PRESIDENT: Mr. Wilson, you are able
 12 to find your statements?
 13 MR. WILSON: I hope so.
 14 THE PRESIDENT: I think in the yellow
 15 binder --
 16 MR. WILSON: I've found it.
 17 MS. ZEMAN: Paragraph 12. In
 18 subparagraphs (iii) and (iv) there you were asked to
 19 explain the guidance in MOPOP about utility at the
 20 time both the Zyprexa and Strattera patents were
 21 granted. Is that right?
 22 MR. WILSON: Yes.
 23 MS. ZEMAN: Am I correct in understanding
 24 that you reproduced in your report, instead, the
 25 MOPOP that was around when the patents were examined?

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1 For example, we can go to paragraph 33. Is that
 2 accurate?
 3 MR. WILSON: I'm not sure of the exact
 4 dates. There's always a time lag between examination
 5 and allowance and issue. I'm not sure of the exact
 6 sequence of which happened when.
 7 MS. ZEMAN: But would you agree that it
 8 would be more appropriate to review the MOPOP that
 9 was relevant when each patent application was
 10 examined rather than granted?
 11 MR. WILSON: Yes.
 12 MS. ZEMAN: Because that would be the
 13 MOPOP that the examiners would be looking at when
 14 they were examining. Is that right?
 15 MR. WILSON: Yes.
 16 MS. ZEMAN: So in paragraph 33 you state
 17 here that Chapter 9 of the 1996 MOPOP, which is the
 18 description chapter, was the relevant one when the
 19 olanzapine patent was examined. Is that right?
 20 MR. WILSON: Yes.
 21 MS. ZEMAN: And after this section that
 22 you've reproduced there's a footnote there, footnote
 23 7, which cites to Exhibit C-55 of the Manual Of
 24 Patent Office Practice from October 1996. Is that
 25 right?

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1 MR. WILSON: Yes.
2 MS. ZEMAN: In your other binder at Tab 5
3 is that Exhibit C-55 -- I'm mistaken. Tab 2, not tab
4 5. This is Exhibit C-55, and you'll see from the
5 cover this is the October 1996 version of MOPOP. Is
6 that right? Are you there?
7 MR. WILSON: Yes.
8 MS. ZEMAN: If you turn one page over,
9 you'll see the Chapter 9 Description chapter. This
10 is the chapter you reviewed for olanzapine?
11 MR. WILSON: Yes.
12 MS. ZEMAN: If we flip a few pages into
13 this document, you should come to the end of
14 Chapter 9 and the beginning of Chapter 16.
15 MR. WILSON: Yes.
16 MS. ZEMAN: This is the Utility and
17 Non-Statutory Subject Matter chapter of the 1996
18 MOPOP, is that right?
19 MR. WILSON: Yes.
20 MS. ZEMAN: So this would have been the
21 one that you reviewed for olanzapine?
22 MR. WILSON: Yes.
23 MS. ZEMAN: Maybe you can help me
24 understand why at paragraph 32 of your statement,
25 your First Report there, you refer to the 1990

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1 version of MOPOP as being the relevant one when the
2 olanzapine patent was examined.
3 MR. WILSON: I don't know. I know there
4 was very little change between 1990 and 1996 and 1998
5 with respect to utility.
6 MS. ZEMAN: So it was just an oversight?
7 MR. WILSON: Could be.
8 MS. ZEMAN: You were also asked to review
9 the file wrappers for olanzapine and atomoxetine. Is
10 that right?
11 MR. WILSON: Yes.
12 MS. ZEMAN: And, in reviewing the file
13 wrappers, you did not do a full examination of the
14 applications as an examiner would, did you?
15 MR. WILSON: No.
16 MS. ZEMAN: On page 14 of your Second
17 Report -- it should be in the same binder there as
18 your first.
19 MR. WILSON: What paragraph?
20 MS. ZEMAN: On page 14 you have a heading
21 there that states, "Validity of Claimant's patents."
22 Do you see that?
23 MR. WILSON: Yes.
24 MS. ZEMAN: Would you agree that you are
25 not offering here an opinion with respect to the

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1 patent's validity?
2 MR. WILSON: Yes. I was commenting
3 exclusively on utility.
4 MS. ZEMAN: This morning in your
5 presentation in slide 6, which is also in your first
6 binder there I believe at Tab 1, you stated that, "a
7 well trained examiner determined if the asserted
8 utility was credible." Is that right?
9 MR. WILSON: Yes.
10 MS. ZEMAN: You'd agree that accepting a
11 credible assertion is not the same thing as testing
12 its validity on the evidence?
13 MR. WILSON: Can you repeat that, please?
14 MS. ZEMAN: Yes. You'd agree that
15 accepting a credible assertion with respect to
16 utility, as you said in your slide, is not the same
17 as testing its validity on the evidence?
18 MR. WILSON: Yes.
19 MS. ZEMAN: And you'd agree that the
20 courts are the ultimate arbiters of patent validity?
21 MR. WILSON: Yes.
22 MS. ZEMAN: So your opinion here is that
23 those patents were properly issued by the
24 Patent Office. Is that correct?
25 MR. WILSON: With respect to utility,

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1 yes, certainly.
2 MS. ZEMAN: And when a patent is granted
3 by the Patent Office, it is presumed valid. Is that
4 right?
5 MR. WILSON: I believe that's what the
6 Patent Act says, yes.
7 MS. ZEMAN: And, just so I make sure that
8 I understand, since 1989 (the new Act, as
9 I understand it) when your patent is granted, you
10 obtain a monopoly for 20 years. Is that right?
11 MR. WILSON: 20 years from the date of
12 filing of the application.
13 MS. ZEMAN: So your monopoly begins
14 running from the date you filed your application?
15 MR. WILSON: Yes.
16 MS. ZEMAN: And not from the date of the
17 patent grant?
18 MR. WILSON: No.
19 MS. ZEMAN: And not from the date of
20 commercialization of your product?
21 MR. WILSON: No.
22 MS. ZEMAN: At Tab 1 of the binder that
23 should be on your right-hand side, I believe, is the
24 1990 version of the Utility and Subject Matter
25 chapter. This is Exhibit C-54 for the record. On

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1 the second page or so, do you see the foreword?
 2 MR. WILSON: Yes.
 3 MS. ZEMAN: In the fourth paragraph it
 4 says, "This manual is to be considered solely as a
 5 guide, and should not be quoted as an authority.
 6 Authority must be found in the Patent Act, the
 7 Patent Rules, and in decisions of the courts
 8 interpreting them."
 9 You see that?
 10 MR. WILSON: Yes.
 11 MS. ZEMAN: So it's saying that MOPOP is
 12 solely a guide?
 13 MR. WILSON: Yes.
 14 MS. ZEMAN: You'd agree that MOPOP itself
 15 does not impose requirements?
 16 MR. WILSON: No, it doesn't.
 17 MS. ZEMAN: In your presentation this
 18 morning at slides 10 and 11, which I believe is in
 19 your binder if you'd like to take a look and you've
 20 also made similar statements in your reports, you
 21 stated that Lilly fulfilled MOPOP's requirements for
 22 utility with respect to both olanzapine and
 23 atomoxetine. Are you not here saying that MOPOP
 24 imposed requirements?
 25 MR. WILSON: The requirements are on the

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1 examiner for MOPOP. The examiners are required to
 2 follow what MOPOP says.
 3 MS. ZEMAN: And when --
 4 MR. WILSON: So those are requirements.
 5 MS. ZEMAN: The requirements on the
 6 examiners?
 7 MR. WILSON: Yes.
 8 MS. ZEMAN: In your First Report at
 9 paragraph 16 you explained that "Only patent
 10 applications which meet all of the requirements of
 11 the patent legislation are allowed to issue into
 12 patents since granted patents are presumed to be
 13 valid under the Patent Act." Is that right?
 14 MR. WILSON: Yes.
 15 MS. ZEMAN: So only patent applications
 16 which meet the requirements of the legislation, not
 17 of MOPOP, are allowed to issue. Is that right?
 18 MR. WILSON: Yes, but MOPOP is drafted
 19 taking into account the requirements of the Act and
 20 then passing those on to the examiner as requirements
 21 for the examiner to follow.
 22 MS. ZEMAN: Let's spend a bit of time
 23 talking about MOPOP. MOPOP is a day-to-day reference
 24 tool for examiners. Is that right?
 25 MR. WILSON: Yes.

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1 MS. ZEMAN: You referred to it this
 2 morning as a "rule book". Is that right?
 3 MR. WILSON: Essentially it is a rule
 4 book, yes.
 5 MS. ZEMAN: Would you say that MOPOP is
 6 comprehensive?
 7 MR. WILSON: I'm not sure what you mean
 8 by "comprehensive."
 9 MS. ZEMAN: The Patent Office examines
 10 patent applications relating to a variety of fields
 11 of technology. Is that right?
 12 MR. WILSON: Yes.
 13 MS. ZEMAN: And MOPOP sets out the
 14 governing principles that apply to all of them?
 15 MR. WILSON: Yes.
 16 MS. ZEMAN: It does not cover every kind
 17 of situation an examiner might encounter, does it?
 18 MR. WILSON: Well, it doesn't cover
 19 situations that haven't arisen yet, for sure.
 20 MS. ZEMAN: But is it your view that it
 21 covers all situations that have arisen in the past?
 22 MR. WILSON: I couldn't possibly answer
 23 that question.
 24 MS. ZEMAN: As a reference tool, would
 25 you agree that it provides high-level guidance?

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1 MR. WILSON: What do you mean by "high
 2 level"?
 3 MS. ZEMAN: High-level principles and not
 4 specific case-by-case instructions.
 5 MR. WILSON: It doesn't provide
 6 instructions on how to examine each specific
 7 application, no, but it gives principles of how to
 8 examine all applications.
 9 MS. ZEMAN: And it is your opinion that
 10 the MOPOP is a reflection of the current state of the
 11 law. Is that right?
 12 MR. WILSON: You mean right now or
 13 generally speaking? Because I don't know what it
 14 says now. I don't work in the Patent Office anymore.
 15 MS. ZEMAN: Generally speaking.
 16 MR. WILSON: Generally speaking? Yes, it
 17 is.
 18 MS. ZEMAN: And it is revised to reflect
 19 amendments to the Patent Act and court decisions that
 20 impact examination and administrative procedures. Is
 21 that right?
 22 MR. WILSON: Yes.
 23 MS. ZEMAN: In your First Report at
 24 paragraph 30, you refer to the 1979 Supreme Court of
 25 Canada case Monsanto v Canada (Commissioner of

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1 Patents). Is that right?
 2 MR. WILSON: Yes.
 3 MS. ZEMAN: That was an important case?
 4 MR. WILSON: Yes. Certainly it's cited
 5 quite frequently.
 6 MS. ZEMAN: And it was a case that
 7 impacted examination with respect to sound
 8 predictions of utility. Is that right?
 9 MR. WILSON: Yes.
 10 MS. ZEMAN: At Tab 1 of your binder is
 11 the Utility and Non-Statutory Subject Matter chapter
 12 of the 1990 version of MOPOP. It is Exhibit C-54.
 13 Section 12.04 is entitled "Jurisprudence." You see
 14 that?
 15 MR. WILSON: Yes.
 16 MS. ZEMAN: It lists decisions that are
 17 "of importance in considering the subject matter of
 18 this chapter." You see where it says that?
 19 MR. WILSON: Yes.
 20 MS. ZEMAN: Monsanto is not in the list,
 21 is it?
 22 MR. WILSON: Well, I'll check and see.
 23 (Pause) No.
 24 MS. ZEMAN: But examiners were relying on
 25 it?

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1 MR. WILSON: I guess so.
 2 MS. ZEMAN: Monsanto was a case about
 3 sound predictions of utility. Is that right?
 4 MR. WILSON: Yes.
 5 MS. ZEMAN: Section 12.02.01 of this
 6 chapter is entitled "An Invention must be useful."
 7 MR. WILSON: Yes.
 8 MS. ZEMAN: The words "sound prediction"
 9 or "predicted utility" do not appear here, do they?
 10 MR. WILSON: No.
 11 MS. ZEMAN: Section 12.02.02 states that
 12 "Utility must be disclosed," or that's its title.
 13 MR. WILSON: Yes.
 14 MS. ZEMAN: The words "sound prediction"
 15 or "predicted utility" do not appear here either, do
 16 they?
 17 MR. WILSON: No.
 18 MS. ZEMAN: But you agree that examiners
 19 were accepting sound predictions of utility in 1990,
 20 right?
 21 MR. WILSON: I'm pretty sure they were,
 22 yes.
 23 MS. ZEMAN: If I count the pages here, I
 24 count about five pages. Five and a bit. Would you
 25 agree with that count?

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1 MR. WILSON: Sure.
 2 MS. ZEMAN: And this version includes
 3 both English and French translations. Is that right?
 4 MR. WILSON: Yes.
 5 MS. ZEMAN: So MOPOP is not a
 6 comprehensive guide, is it?
 7 MR. WILSON: I don't know why you say
 8 that. I mean it's five pages long.
 9 MS. ZEMAN: Sure.
 10 MR. WILSON: Utility was so basic, it
 11 didn't need pages to describe it. Utility was "not
 12 totally useless". You can describe it in three or
 13 four words, not five pages.
 14 MS. ZEMAN: You explained that Monsanto
 15 was an important case that impacted examination. Is
 16 that right?
 17 MR. WILSON: Yes.
 18 MS. ZEMAN: And you also stated that
 19 MOPOP is an up-to-date reflection of the
 20 jurisprudence?
 21 MR. WILSON: Yes.
 22 MS. ZEMAN: But MOPOP is not listed here
 23 in this chapter?
 24 MR. WILSON: Monsanto is not listed.
 25 MS. ZEMAN: Monsanto, yes. What did I

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1 say? MOPOP?
 2 MR. WILSON: Utility was "not totally
 3 useless." That was the standard.
 4 MS. ZEMAN: So when examiners were
 5 accepting sound predictions of utility in 1990, and
 6 there was no description of that in MOPOP, all they
 7 were --
 8 MR. WILSON: There is a description of
 9 utility which was "not totally useless".
 10 MS. ZEMAN: In your presentation this
 11 morning at slide 13 you reproduced a portion of the
 12 2009 Utility chapter. At paragraph 47 of your First
 13 Report you state, "Since MOPOP needs to reflect
 14 developments in the law, I was not surprised to see
 15 the 2009 and 2010 MOPOPs required significant changes
 16 to the utility doctrine in light of the court
 17 decisions on the promise utility doctrine." Is that
 18 right?
 19 MR. WILSON: Yes.
 20 MS. ZEMAN: And the section from the 2009
 21 MOPOP that you reproduced on slide 13 establishes the
 22 promise standard. Is that right?
 23 MR. WILSON: Establishes --
 24 MS. ZEMAN: The promise standard of
 25 utility?

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1 MR. WILSON: Yes, it's talking about
2 promises, yes.
3 MS. ZEMAN: So this is one of the
4 significant changes to the utility requirement, in
5 your view. Is that right?
6 MR. WILSON: Yes.
7 MS. ZEMAN: And this is because of court
8 decisions on promise utility. Is that right?
9 MR. WILSON: Yes.
10 MS. ZEMAN: So this section here -- or
11 this segment here -- is from section 12.08.01 and it
12 says, "Where, however, the inventors promise that
13 their invention will provide particular advantages,
14 (eg will do something better or more efficiently or
15 will be useful for a previously unrecognized purpose)
16 it is this utility that the invention must in fact
17 have." This is the promise standard?
18 MR. WILSON: I'm not sure of the exact
19 definition of the promise standard, but it mentions
20 promises in there.
21 MS. ZEMAN: Sure. So this chapter is at
22 Tab 5 of your binder. Now we're ready to go there.
23 This is Exhibit C-59, and it is the 2009
24 Subject-Matter and Utility chapter of MOPOP.
25 Page 12-23 is section 12.08.01 of that chapter.

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1 MR. WILSON: Yes.
2 MS. ZEMAN: And the paragraph that you've
3 identified is the fourth paragraph there and the
4 fifth in your slide. Is that right?
5 MR. WILSON: Yes.
6 MS. ZEMAN: In this section I see a
7 single case mentioned in the text, the Supreme Court
8 of Canada's decision in Consolboard. Do you see any
9 others?
10 MR. WILSON: I see a couple of -- a
11 number of footnotes which refer to other court cases.
12 MS. ZEMAN: But in the text itself do you
13 see any cases other than Consolboard?
14 MR. WILSON: No.
15 MS. ZEMAN: You'll see, as you mentioned,
16 there are four footnotes there, or end notes, rather.
17 They're end notes 45-48. Is that right?
18 MR. WILSON: Yes.
19 MS. ZEMAN: So let's take a look at those
20 footnotes. They're on page 12-34. You'll see note
21 45 cites to Consolboard.
22 MR. WILSON: Yes.
23 MS. ZEMAN: Consolboard was decided in
24 1981.
25 MR. WILSON: Yes, it was.

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1 MS. ZEMAN: And footnote 46 also cites to
2 Consolboard?
3 MR. WILSON: Yes.
4 MS. ZEMAN: Citing to Unifloc from 1943,
5 is that right?
6 MR. WILSON: Uh-huh.
7 MS. ZEMAN: Note 47 cites to Northern
8 Electric from 1940?
9 MR. WILSON: Yes.
10 MS. ZEMAN: And Wandscheer from 1944?
11 MR. WILSON: Yes.
12 MS. ZEMAN: And note 48 cites to
13 Feherguard referring to Consolboard.
14 MR. WILSON: Yes.
15 MS. ZEMAN: And Feherguard, if we look up
16 at note 43, is a 1995 case. Is that right?
17 MR. WILSON: Yes.
18 MS. ZEMAN: You agree that those are the
19 only references in this section?
20 MR. WILSON: Yes.
21 MS. ZEMAN: Not a single case cited that
22 is newer than 1995?
23 MR. WILSON: Yes.
24 MS. ZEMAN: Instead three of the four
25 notes reference Consolboard. Isn't that right?

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1 MR. WILSON: Yes.
2 MS. ZEMAN: So MOPOP did not view this as
3 a new proposition, did it?
4 MR. WILSON: Well, I think you have to
5 maybe look a little bit deeper into this section
6 because all of those cases are not about sound
7 prediction or anything else. They're all about
8 operability. The Northern Electric and Feherguard
9 and the other cases all deal with devices that were
10 completely useless. They did not work.
11 MS. ZEMAN: So in identifying the
12 paragraph that you did in your presentation in this
13 section, what you're saying is that MOPOP views the
14 promise standard as part of operability?
15 MR. WILSON: I beg your pardon? No, it's
16 part of utility.
17 MS. ZEMAN: But the paragraph that you've
18 identified as setting out the promise standard or
19 requiring promises in patents is under the heading of
20 "Operability" in MOPOP. Isn't that right?
21 MR. WILSON: Yes. It's a very confusing
22 section, because it heads in one direction and then
23 another. The Patent Office has taken Consolboard and
24 has used it as a citation in many different areas
25 over the years. The first time I found it being

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1 cited, it was under "Disclosure." So it changes
2 around, and it seems to now fit under -- because it
3 uses the word "promise," it fits under the promise
4 doctrine and, if something else comes up, maybe the
5 Patent Office will start using it as a citation for
6 something else. I don't know. But it does move
7 depending on what the Patent Office wants it to say.
8 MS. ZEMAN: Let's take a look at some of
9 those earlier versions and their relationship with
10 Consolboard. At Tab 4 of your binder is the 2005
11 version of the Utility chapter. This is Exhibit
12 C-58. At page 12-6, section 12.03.02, you'll see in
13 the middle of the paragraph MOPOP states, "The
14 subject matter will be considered to lack utility if
15 the invention does not work, either in the sense that
16 it will not operate at all or, more broadly, that it
17 will not do what the specification promises that it
18 will do." That's Consolboard?
19 MR. WILSON: Yes.
20 MS. ZEMAN: We can check the end note to
21 be sure, or you're content saying that's Consolboard?
22 MR. WILSON: I'm content with that.
23 MS. ZEMAN: So let's go back one more
24 version and one more tab in your binder. This is at
25 Tab 3. This is the 1998 version of the Subject

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1 Matter and Utility chapter. It is Exhibit C-57. In
2 section 16.02.01, it states, "If an invention lacks
3 utility for its described purpose it will result in
4 an invalid patent should it be granted." You see
5 that?
6 MR. WILSON: Yes.
7 MS. ZEMAN: Another way of looking at
8 that would be, if the invention does not do what the
9 specification promises it will do, it will result in
10 an invalid patent should it be granted.
11 Do you agree?
12 MR. WILSON: Those two sentences are not
13 synonymous.
14 MS. ZEMAN: But they're similar?
15 MR. WILSON: Well, sort of, yeah.
16 MS. ZEMAN: You'll note that there are no
17 end notes in this version?
18 MR. WILSON: Uh-huh.
19 MS. ZEMAN: The relevant cases were
20 listed in a separate section at the end. Let's take
21 a look at that list. Section 16.10. Under the
22 heading "use/utility," do you see Consolboard listed
23 there?
24 MR. WILSON: No.
25 MS. ZEMAN: No?

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1 MR. WILSON: Oh, yes, I do.
2 MS. ZEMAN: So Consolboard is listed
3 there?
4 MR. WILSON: I fooled you!
5 MS. ZEMAN: Okay. So let's go back one
6 more version in 1996. This is at Tab 2. This is
7 again the 1996 version of the Utility chapter, and it
8 is Exhibit C-55, and section 16.02.01 again states --
9 halfway through the exhibit there -- "If an invention
10 lacks utility for its described purpose, it will
11 result in an invalid patent should it be granted."
12 Is that right?
13 MR. WILSON: Yes.
14 MS. ZEMAN: And, again, we have no end
15 notes here?
16 MR. WILSON: Right.
17 MS. ZEMAN: And in section 16.10,
18 Jurisprudence, it may come as no surprise that once
19 again, under the heading "use/utility," Consolboard
20 appears?
21 MR. WILSON: Yes.
22 MS. ZEMAN: In your Second Report at
23 paragraph 15, in the third sentence, you note that
24 there are several steps involved in the process of
25 amending MOPOP, including internal quality review.

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1 Is that right?
2 MR. WILSON: Yes.
3 MS. ZEMAN: And part of that internal
4 quality review involves seeking comments from
5 examiners. Is that right?
6 MR. WILSON: I don't know exactly what it
7 involves. I assume examiners comment on it at some
8 point in time.
9 MS. ZEMAN: You assume, but you don't
10 know for sure?
11 MR. WILSON: I don't know for sure.
12 MS. ZEMAN: Let's stay in your Second
13 Report. At paragraph 37 you state that "changes in
14 the MOPOP affect Patent Office practice." Is that
15 right?
16 MR. WILSON: Yes.
17 MS. ZEMAN: You point to a final action
18 from February 2011 to support this point. Is that
19 right?
20 MR. WILSON: Can you state that again?
21 MS. ZEMAN: Sure. You point to a final
22 action from 2011, this one to Bayer, to support this
23 point that changes in the MOPOP affect Patent Office
24 practice. Is that right?
25 MR. WILSON: Well, I point out this to

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1 show that examiners actually cite MOPOP as an
2 authority when they are trying to get an applicant to
3 do something.
4 MS. ZEMAN: I see that, as one of the
5 propositions stated in the first paragraph there in
6 37, this final action "demonstrates both that
7 examiners rely on the MOPOP in rejecting patent
8 applications" -- that's the point that you just
9 raised -- and second, "that changes in the MOPOP
10 affect Patent Office practice." Is that accurate?
11 MR. WILSON: Yes.
12 MS. ZEMAN: Just so I'm clear, your
13 opinion is that the changes to the 2009 Utility
14 chapter were driven by changes in the law from
15 decisions of the courts made in developing the
16 promise utility doctrine?
17 MR. WILSON: Yes.
18 MS. ZEMAN: So you have a block quotation
19 in paragraph 37 here from the final action. It says,
20 and I'll quote -- bear with me, I'll read the whole
21 thing -- "The claims are now identified as
22 noncompliant with section 2 of the Patent Act.
23 The claims were previously considered
24 defective from noncompliance with section 84 of the
25 Patent Rules, on the basis that the lack of proper

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1 disclosure of a sound prediction implied a lack of
2 proper support for the claims.
3 Following current Office practice, this
4 objection is now presented as noncompliant with
5 section 2 of the Patent Act (lack of utility).
6 Reference in this regard is made to section 17.03.04
7 of the Manual Of Patent Office Practice which came
8 into force in January 2009."
9 So, based on what is produced here,
10 before this final action the examiner considered the
11 claims defective for noncompliance with rule 84. Is
12 that accurate?
13 MR. WILSON: That certainly seems to be
14 what the examiner is stating, yes.
15 MS. ZEMAN: And the examiner is stating
16 that the basis for the objection is the lack of
17 proper disclosure of a sound prediction. Is that
18 right?
19 MR. WILSON: Yes.
20 MS. ZEMAN: And that, after the 2009
21 MOPOP, this objection was presented as an objection
22 under section 2. Is that right?
23 MR. WILSON: That certainly seems to be
24 what it's saying, yes.
25 MS. ZEMAN: Let's take a look at the

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1 final action you're quoting from. This will be at
2 Tab 9 of your binder. This is Exhibit C-414. The
3 section you're quoting from is on page 3. If you can
4 keep your report beside you, I see that you have
5 reproduced this subheading (A) in your report in the
6 first paragraph and the second paragraph, but there
7 is one sentence left in this section. Do you see
8 that?
9 MR. WILSON: Yes.
10 MS. ZEMAN: It says, "It should be noted
11 that no substantive change has been made to the basis
12 of the argument." Is that right?
13 MR. WILSON: Yes.
14 MS. ZEMAN: But you do not reproduce this
15 sentence in your report?
16 MR. WILSON: Yes.
17 MS. ZEMAN: You did not think it was
18 important or relevant?
19 MR. WILSON: I would expect an examiner
20 who's bringing up a completely new rejection in a
21 final action to say I'm not bringing up a new
22 rejection in a final action. That's what I would
23 expect. Examiners are supposed to have discussed
24 this thoroughly in previous and pre-final actions
25 before that, and just to bring it up now is

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1 something -- the applicant is going to think it's
2 something completely new so just throw in a sentence
3 saying what's not new. Whether it's new or not, I
4 don't know, but I would certainly expect an examiner
5 to throw in a sentence like that in a final action.
6 MS. ZEMAN: So the basis for the
7 objection was not different; just the manner in which
8 it was presented?
9 MR. WILSON: Probably, although I'm not
10 certain of that. I mean it's a different rejection
11 because instead of "under section 84 of the Rules",
12 it's now "under section 2 of the Act" sounds
13 different to me, but...
14 MS. ZEMAN: But the underlying basis for
15 the objection stays the same?
16 MR. WILSON: Well, that's what the
17 examiner says, yes.
18 MS. ZEMAN: That concludes my
19 cross-examination.
20 THE PRESIDENT: Any questions for
21 redirect?
22 MR. DEARDEN: No, sir.
23 THE PRESIDENT: A question from Mr. Born.
24
25

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02:10

1 **QUESTIONS BY THE ARBITRAL TRIBUNAL**

2 MR. BORN: Just one question. You've

3 been referred to the Consolboard decision a number of

4 times, and there was a discussion about the extent to

5 which it might have been reflected in either the

6 MOPOP or agency practice. So far as you can recall,

7 was the promise of the patent rule or doctrine

8 something that was taken into account in agency

9 practice prior to 2002?

10 MR. WILSON: I don't believe so, no, not

11 to establish utility. Utility was very simple.

12 Couldn't be completely useless. It was such a low

13 bar that examiners almost didn't think about it when

14 they were examining. Once in a while I'd run across

15 an application which didn't work and then all of a

16 sudden the bells would go off. But generally

17 speaking, they never -- they hardly ever even thought

18 about utility.

19 MR. BORN: You probably will have

20 recalled from either your cross-examination or from

21 other aspects of the case that there's language in

22 Consolboard that subsequently gets picked up in the

23 MOPOP elaborating on that standard, if I can put it

24 that way.

25 MR. WILSON: Yes.

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1 MR. BORN: And the Consolboard decision

2 being interpreted to require that, where a patent

3 makes a promise, then utility requires not just

4 operability or a mere scintilla of evidence of

5 utility, but that that promise be fulfilled.

6 Did patent examiners not, after the

7 Consolboard decision was rendered and circulated no

8 doubt in the Office, give effect to that aspect of

9 the decision?

10 MR. WILSON: Well, over the years, as I

11 think I mentioned, the Office's interpretation of

12 Consolboard has changed. It's been used in various

13 chapters of MOPOP. Initially it was used in the

14 Disclosure chapter to amplify what needed to be

15 disclosed in the application, that it needed to be

16 something which would enable a person skilled in the

17 field of technology to make use of the invention, so

18 it had to have a good disclosure, but it wasn't

19 generally recognized as being a case that dealt with

20 utility until much later.

21 MR. BORN: I think the thrust of at least

22 some of the cross-examination, though, was that

23 Consolboard was cited as a relevant precedent,

24 relevant judicial authority with regard to utility.

25 My question therefore -- and perhaps you've already

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1 answered this -- my question, therefore, was did in

2 agency practice the examiners give effect to the

3 language or portion of the Consolboard decision

4 suggesting that a patent that made a promise needed

5 to fulfill that promise to satisfy the utility

6 standard?

7 MR. WILSON: I think the short answer is

8 no.

9 MR. BORN: Thank you.

10 THE PRESIDENT: To follow up on the

11 question of Mr. Born, you have been taken to the

12 MOPOP version December 2009. I don't know which tab

13 it is because I work from my own documents. If you

14 go to Tab 5, to the end notes at page 34, you

15 remember that you have been asked questions about

16 footnotes 45, 46 and 47?

17 MR. WILSON: Yes.

18 THE PRESIDENT: These were decisions of

19 Consolboard, 1981, and Northern Electric, 1940.

20 MR. WILSON: Yes.

21 THE PRESIDENT: And Feherguard, if you

22 look at footnote 43, is 1995. These were all

23 decisions that were not quoted in previous

24 jurisprudence overviews at the MOPOP. Or am I

25 incorrect?

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1 MR. WILSON: Northern Electric has been

2 cited many times in previous versions. I'm not sure

3 about the other citations.

4 THE PRESIDENT: I ask you that because in

5 your statement you state about the process of

6 amending MOPOP, paragraph 23 of your first statement,

7 if you take that in front of you.

8 MR. WILSON: Yes.

9 THE PRESIDENT: You say that MOPOP was

10 first published in 1979?

11 MR. WILSON: Yes.

12 THE PRESIDENT: "MOPOP has been revised

13 to reflect amendments to the Patent Act and court

14 decisions that impact examination and administrative

15 procedures." Then comes the sentence: "The process

16 of amending MOPOP often involves significant

17 discussions and review by Department of Justice

18 lawyers and consultation with the patent profession

19 before new court decisions are incorporated in the

20 Manual." Are these new court decisions?

21 MR. WILSON: They're new to MOPOP. If

22 you're incorporating something from 1940, obviously

23 it isn't a new court decision. It's new to MOPOP, I

24 guess. I'm not actually sure how specific citations

25 are chosen to support various procedures that are

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1 outlined.
2 THE PRESIDENT: Maybe judicial
3 archeology.
4 MR. WILSON: Maybe.
5 THE PRESIDENT: Any follow-up questions?
6 MR. DEARDEN: No, Mr. President. Thank
7 you.
8 MS. ZEMAN: None from Respondent.
9 THE PRESIDENT: Thank you for testifying,
10 Mr. Wilson. You are now released as a witness and
11 excused. Five minutes.
12 *(Recess taken)*
13 ANDREW REDDON
14 THE PRESIDENT: Good afternoon,
15 Mr. Reddon.
16 MR. REDDON: Good afternoon.
17 THE PRESIDENT: You appear as an expert
18 witness for the Claimant?
19 MR. REDDON: I do.
20 THE PRESIDENT: If any question is
21 unclear to you, either because of language or for any
22 other reason, please do seek a clarification because,
23 barring that, the Tribunal will assume that you've
24 understood the question and that your answer
25 corresponds to the question.

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1 MR. REDDON: Yes.
2 THE PRESIDENT: You appreciate,
3 Mr. Reddon, that testifying, be it before a court or
4 an arbitral tribunal, is a very serious matter. In
5 that respect the Tribunal expects you to give the
6 statement which is in front of you.
7 MR. REDDON: Thank you. I solemnly
8 declare upon my honor and conscience that my
9 statements will be in accordance with my sincere
10 belief.
11 THE PRESIDENT: Thank you, Mr. Reddon.
12 Could you please go to your Expert Report and go to
13 page 14? The Expert Report is dated September 11,
14 2015. Could you confirm for the record that the
15 signature appearing above your name is your
16 signature?
17 MR. REDDON: It is.
18 THE PRESIDENT: Is there any correction
19 you wish to make to the Expert Report?
20 MR. REDDON: No.
21 THE PRESIDENT: Thank you. Ms. Cheek,
22 you are doing the direct examination?
23 MS. CHEEK: Ms. Wagner will direct
24 Mr. Reddon.
25 THE PRESIDENT: Ms. Wagner, please

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1 proceed.
2 MS. WAGNER: I would invite you to begin
3 your presentation.
4 MR. REDDON: Thank you.
5 PRESENTATION BY MR. REDDON
6 Members of the panel, my name is
7 Andrew Reddon. I'm a patent lawyer from Toronto,
8 Canada. I obtained my Bachelor's degree in Chemical
9 Engineering in 1985 from Western University and my
10 Law degree in 1988 from Queens University. I joined
11 McCarthy Tétrault in Toronto as soon as I graduated
12 from law school, and I've practiced my entire career
13 there as a litigator.
14 I became a partner in 1997 and I have
15 been for some time the national chair of our IP
16 litigation practice in Canada. As I said in my slide
17 I've never previously been retained by Lilly, nor
18 have I ever had any substantial contact with any
19 Lilly entities in my career before I was retained in
20 this case.
21 My practice today is primarily, I would
22 say exclusively, in intellectual property litigation,
23 and that has been true since about the year 2000. My
24 focus is primarily on patent litigation. Perhaps
25 20 percent of my practice is patent litigation in the

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1 non-pharmaceutical space and approximately 80 percent
2 is in the pharmaceutical space. In the
3 non-pharmaceutical space I act and have acted mostly
4 for alleged infringers. In the pharmaceutical cases
5 I've done I've acted mostly I think virtually always
6 for the patentee or asserter of a patent.
7 The 80 percent of the cases that I've
8 done in the pharmaceutical area have really been
9 divided into the two categories mentioned at the
10 bottom of the slide. The first are infringement
11 lawsuits, which are conventional trials in front
12 usually of a Federal Court judge with live witnesses.
13 The other portion, large portion of the
14 pharmaceutical patent litigation that I've done and
15 that takes place in Canada are called these PM(NOC)
16 proceedings, and these are more summary proceedings,
17 although on very fulsome records, again in front of a
18 single judge of the Federal Court of Canada.
19 Just to briefly make some description
20 about the practical real-world nature of PM(NOC)
21 cases in Canada, it's important in my view to
22 appreciate that, although the procedures are slightly
23 different, the issues are the same between NOC cases
24 and infringement cases, the substantive legal
25 approach to the problems or the issues presented by

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1 parties is the same by the court, and, in fact, the
2 approach of the parties is largely the same in NOC
3 cases as it is in conventional infringement lawsuits.
4 NOC cases are precedent setting for all
5 patent cases in Canada, every bit as much as a
6 judgment rendered in a conventional trial. When a
7 new rule of law is created in an NOC case in Canada,
8 it applies to all patent litigation that takes place
9 thereafter. When the Court of Appeal articulates a
10 rule of law, or the Supreme Court of Canada
11 articulates a new rule of law, in an NOC case or on
12 appeal from an NOC case, it is the patent law of
13 Canada regardless of the fact that it came from the
14 NOC context.
15 I was asked primarily, members of the
16 Panel, to give an opinion in my report, and I do so
17 today from the point of view of a patent litigator.
18 I spend my time, a lot of time every day, every year,
19 day in, day out, year in, year out, trying to keep up
20 with what the state of the law is, what my clients
21 think and understand the state of the law to be, and
22 what the court understands or regards the state of
23 the law to be. It's what I do, as I said, day in,
24 day out. And I'm giving my opinions to you today
25 from the point of view of a practitioner, somebody

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1 who does that mostly in the trial courts a lot, and
2 works hard at it, and I think keeps abreast pretty
3 well of the developments.
4 So from that point of view I want to
5 start out by talking to you about the patents and the
6 property that is a patent.
7 In Canada patents obviously confer
8 valuable rights upon the date that they are issued.
9 These rights include the right to exclude others from
10 working the invention; obviously the right to license
11 the invention or to permit others to do so; and other
12 statutory and contractual rights that come and arise
13 when the patent issues.
14 It issues with a presumption of validity
15 under the Canadian Patent Act, and in that respect
16 parties rely, the market relies, on the issuance and
17 existence of patents because they are fundamental in
18 some areas of commerce in Canada.
19 Patent rights are not considered to be
20 conditional from the date of issuance despite the
21 fact that patents can be revoked in certain
22 circumstances.
23 I have to say the first and only time --
24 first and only time -- I've ever heard a patent
25 practitioner in Canada call a patent right

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1 "conditional" was in Mr. Dimock's report in this
2 arbitration. It's not a concept that I've
3 encountered or heard a judge describe or heard a
4 fellow practitioner use. Patents are regarded as
5 being issued and not in any way as being a
6 conditional grant, as Mr. Dimock said in his report.
7 As I said, patents can be revoked. When
8 a patent is declared invalid by a court, it is
9 treated as if it were void ab initio. That is from
10 the outset. But it's important to understand that,
11 notwithstanding that Latin phrase, the effect of a
12 declaration of invalidity is that the patentee can no
13 longer sue for past infringements -- anyone -- even
14 during the time when the patent was extant. So it is
15 rolled back to the date of grant for the purpose of
16 precluding the patentee from suing, but there are
17 many other rights associated with the patent that are
18 not erased by a declaration of invalidity. So if a
19 license has been granted the licensee still has to
20 pay the fees, subject to an unusual or different term
21 in the contract.
22 You probably don't know, and it hasn't
23 been touched upon, but when a patent issues the
24 disclosure is important because it gives to the
25 public the knowledge that the patentee has acquired

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1 during expensive and prolonged research, and the
2 public, contrary to a suggestion I think in Canada's
3 opening, is entitled to use the invention for
4 research purposes during the term of the patent. And
5 it's really important that the disclosure is given to
6 the public to enable the public to carry on and
7 further develop the technology in the public
8 interest, even during the life of the patent.
9 So, for example, parties who use Lilly's
10 disclosure under the patents took it, developed on
11 it, worked with it under the safe harbor provision
12 that says you're allowed to infringe a patent during
13 its term for research purposes, they don't have to
14 give back what they've developed or what benefit
15 they've taken from Lilly's disclosure. So the fact
16 that the patent has been declared void ab initio
17 doesn't mean the people who took and used the
18 disclosure have to give back what benefit they took
19 from it. It doesn't mean a party who stayed out of
20 the market because of the existence of the patent can
21 come forward and sue and say look, your patent was
22 invalid and I stayed out of the market and now I want
23 to claim damages. It doesn't mean the price
24 regulator in Canada, who would have regulated Lilly's
25 price below what otherwise the market might bear

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1 because of the existence of the patent -- and that's
2 what triggers their jurisdiction -- it doesn't mean
3 that Lilly can come back and say okay, now that the
4 patent has gone we want the price differential.
5 There are a lot of things the revocation of a patent
6 does not do.
7 The point I guess I'm trying to make is
8 there are many legal, commercial and business
9 irregularities that still exist and are not erased by
10 the revocation of a patent, so we don't unwind
11 everything.
12 The real effect and intent of the
13 judicial statement that a patent is void ab initio is
14 really only this: You can't sue for damages on it
15 anymore, and all the other bundle of rights and
16 commercial realities that existed under the patent
17 are not erased or unwound by the declaration.
18 As you've heard, and as I will briefly
19 present in this overview, there are three practice
20 points that radically affected patent litigators in
21 Canada in the years that you've heard discussed in
22 the evidence so far. The first was the post-filing
23 evidence of utility being rendered irrelevant by the
24 judgment of the Supreme Court in AZT. The second is
25 the emergence of the practice, now well-established,

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1 of the Federal Court deriving something that is now
2 called "promises of utility" from the patent
3 disclosure, and I emphasize "disclosure" for reasons
4 that I'll come to, and the third is the emergence of
5 the sound prediction of promised utility having to be
6 based solely on data and reasoning that is set out in
7 the text of the patent itself.
8 So those are the three really important
9 and really significant and really surprising, from a
10 practitioner's point of view, developments in the
11 Canadian patent law that I'm here to talk about.
12 Let me start with the prior utility
13 requirement. I heard the previous witness say "can't
14 be completely useless." I do want to ask you to keep
15 in mind the Patent Act simply says "useful." There's
16 no debate, I think, based on my reading of the
17 Federal Court decisions, that the two drugs which
18 were the subject of the patents that were revoked
19 here are useful. The question historically has been
20 does the invention do something, and the tests for
21 what that something had to be was a mere scintilla.
22 As you've heard it is a very low
23 standard, and that's what certainly practicing
24 lawyers, and I believe patentees in Canada, thought
25 the standard was until relatively recently.

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1 So the three steps which changed all that
2 are, first, the irrelevance of post-filing evidence.
3 The prior practice is clear. Post-filing evidence
4 was commonly used to establish usefulness. As a
5 practical matter the commercial success of the
6 invention was often relied upon to establish that it
7 had a mere scintilla of utility, and, frankly, the
8 defendant's desire to copy the invention effectively
9 established that it was something useful and worthy
10 of being copied. The Fox article, about which you've
11 heard, it's R-163 at page 15, explicitly says so.
12 These two pieces of evidence are admissible to
13 establish utility before the law changed in Canada.
14 As a result, utility challenges were very
15 rare, and that I think is clear and uncontroversial.
16 It was not the winning basis to attack a patent that
17 was in the market curing people and that you wanted
18 to copy, to stand up in court and say "But it's
19 useless." That was the reality.
20 The first change, then, was this decision
21 to declare irrelevant post-filing evidence. So the
22 new situation arose after AZT, and AZT was widely
23 recognized among patent practitioners and lawyers and
24 litigators and among patentees in Canada to have
25 changed the law. It's very clear that AZT held that

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1 reliance on post-filing evidence, which proves
2 utility in fact, proves that the patentee invented
3 something very useful and gave the public something
4 worthy of a monopoly, would no longer be permitted to
5 be led in a Canadian court because it was irrelevant.
6 AZT said the proof has to be limited to and can only
7 be established using evidence from before the
8 Canadian filing date.
9 In doing so, in AZT, as Professor
10 Siebrasse explained, the Supreme Court of Canada
11 overruled existing law; overruled the Federal Court
12 of Appeal's decision in AZT -- not anymore, they
13 said; overruled Ciba-Geigy, and in very important
14 language. The Supreme Court of Canada said: To the
15 extent it stands for the other proposition, it should
16 no longer be followed.
17 And when the Supreme Court says to a
18 lawyer "That case should no longer be followed",
19 that's the Supreme Court of Canada telling a trial
20 lawyer "We're changing the law here," and in my
21 opinion and in my experience that's exactly and only
22 what AZT did.
23 So after AZT it was clear that
24 post-filing evidence would no longer be admissible,
25 and there are subsequent cases, one of which was

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1 referred to during the Claimant's opening, Lilly's
2 opening, a decision of I think Madam Justice
3 Tremblay-Lamer, where she specifically found and gave
4 Apotex a procedural break in a case because the law
5 had changed since Apotex took the previous step that
6 it wanted to change. So there have been
7 adjudications by the Federal Court in Canada that AZT
8 changed the law, and I disagree with Mr. Dimock's
9 assertion to the contrary.
10 Step 2, find the promise of the patent.
11 As I've indicated, the prior practice was to look for
12 a mere scintilla. There was no practice in Canada of
13 construing promises of utility from the disclosure,
14 and, again, I'm emphasizing from the disclosure for
15 reasons that I'll come to.
16 But the practice was to decide what is
17 the claimed invention. What is the claimed
18 invention, and does it have utility. The phrase
19 "claimed invention" is in many of the cases but
20 there's another phrase in the cases that's very
21 important and has not been touched upon. Even in
22 that initial quote from Consolboard, about which so
23 much has been said, you will have noted it says
24 "where there's a promise in the specification" -- and
25 I agree with and won't repeat all of Professor

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1 Siebrasse's opinions about why it doesn't say what
2 Canada says it says, so take that as read, if you
3 would, please -- but let me deal with the sentence in
4 Consolboard where it says promise "in the
5 specification."
6 Consolboard also said something really
7 important about the word "specification."
8 Consolboard, at page 520, said the specification
9 means the description "and the claims". "And the
10 claims." And in Free World Trust the Supreme Court
11 of Canada, this is grade 1 patent law in Canada --
12 MR. SPELLISCY: I'm sorry to interrupt
13 the Professor, I don't mean to here, but I think we
14 are beyond the scope of his Expert Report. There had
15 been an agreement between the parties that these
16 presentations were to be summaries of the Expert
17 Report.
18 Maybe I'm wrong, maybe he can point us to
19 where this was, but this was supposed to be limited
20 to a summary of his Expert Reports.
21 MR. REDDON: I tried to draw a
22 distinction clearly in my Report that the change was
23 towards construing promises from the disclosure as
24 opposed to the claims.
25 THE PRESIDENT: Overruled. You can

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1 continue.
2 MR. REDDON: Thank you.
3 So in Consolboard at page 520 these
4 important words "in the specification", "for promises
5 made in the specification", is defined. The Supreme
6 Court of Canada says and the Patent Act says
7 specification means the description and the claims,
8 and in Free World Trust -- I don't have the cite but
9 it's the leading case, I started to say Grade 1
10 patent law in Canada -- Free World Trust says the
11 claims are paramount. When you're construing a
12 patent, yes, you can go to the disclosure to
13 understand the claims but the claims are paramount,
14 and that is what gives both the public and the
15 patentee certainty.
16 So I am telling you, and it's my opinion
17 and my experience, that that tag line in Consolboard,
18 which had never been adopted as the law of Canada,
19 where it said a "promise in the specification," was
20 clearly understood and I believe to this day clearly
21 means at least that it has to be in the claims. And,
22 in my opinion, that's how people understood it, and
23 that's why this was such a non-issue until the
24 practice arose of plucking promises out of the
25 disclosure.

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1 So no Canadian patent before the three
2 changes I'm talking about today had ever been
3 invalidated for failure to meet a promise derived
4 from the disclosure, and, whatever Consolboard means,
5 if it never happened. Patentees knew it and
6 certainly patent lawyers like me knew it and relied
7 on it.
8 The situation now is very different.
9 Courts now derive, and sometimes using considerable
10 lengths and expert evidence imply, promises into the
11 disclosure of patents, and once you've implied
12 a promise into the disclosure of a patent, I think
13 you know already but I'm going to come to the
14 implications of that for the other parts of the
15 change, but it's now done without reference to the
16 utility of the claimed invention. And that's really
17 important, and I've given an illustration in the next
18 slide.
19 If the claimed invention, the words of
20 the claim, that which is paramount in the
21 specification said, for example, "use of Latanoprost
22 to treat glaucoma" -- and this is a variation of the
23 discussion in my report about the Latanoprost case --
24 if the claims say "use of latanoprost to treat
25 glaucoma" and there's a statement in the disclosure

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1 "latanoprost has minimal side effects", under the
 2 former practice the utility of the claimed invention
 3 would be considered and the utility would be treating
 4 glaucoma.
 5 What is now the practice -- very
 6 different -- is to go into the disclosure and say,
 7 oh, well, the promise of the patent is treating
 8 glaucoma with minimal side effects, and that, of
 9 course, gives the challenger more leeway to say well,
 10 you didn't have all the data in the can for that when
 11 you filed your glaucoma patent, and it's what really
 12 gives rise to the unfairness.
 13 So generic challengers look for
 14 statements that are difficult to support in the
 15 disclosure section of the patent. They take them
 16 divorced from what the claim says, or at least they
 17 don't limit their implication of promises to the
 18 claimed invention, and this, as I say in the last
 19 bullet, is the radical change in patent litigation in
 20 Canada that I have seen in my career since these
 21 three cases were decided.
 22 The combined effect of those two changes
 23 has been dramatic. Courts now find or imply promises
 24 from disclosures instead of claims. Those promises
 25 are held up as the "promised utility" of the patent,

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1 instead of the claimed invention. Claims are
 2 paramount. That's the important part of the
 3 specification. Then AZT is applied to require that
 4 the promised utility has to be proven or soundly
 5 predicted at the filing date, and the conclusion and
 6 the result is what you see before you in the
 7 statistics about the dramatic emergence of revocation
 8 of factually useful patents in Canada upon judicial
 9 findings that they're not useful.
 10 All of that was difficult but step 3 came
 11 along in Raloxifene. Prior to AZT no Canadian court
 12 had ever articulated any disclosure requirement
 13 related to predicting utility. The phrase from AZT
 14 of course is "factual basis or line of reasoning." No
 15 Canadian court before AZT had said that those things
 16 had to be set out in the disclosure of a Canadian
 17 patent.
 18 In fact as I have said in the next
 19 bullet, in Monsanto the Supreme Court itself relied
 20 on affidavit evidence extrinsic to the patent to
 21 justify a prediction of utility, and all of that
 22 based upon their affirmation in Monsanto of the
 23 Olin Mathieson case from England, which Professor
 24 Siebrasse talked about this morning. Crystal clear.
 25 In Olin Mathieson, the data for the

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1 prediction was not in the patent. It was from test
 2 results that were extrinsic to the patent and put
 3 into evidence in the case, and in Monsanto the
 4 Supreme Court said that's okay. It affirmed
 5 Olin Mathieson as the law of Canada.
 6 So that was the status quo before this
 7 third change was layered onto the first two.
 8 So the added disclosure requirement was
 9 not decided in AZT. In 2005 --
 10 THE PRESIDENT: Mr. Reddon, you are
 11 already over the 20 minutes. I'll give you two
 12 minutes more.
 13 MR. REDDON: Thank you. The disclosure
 14 requirement in AZT was new, in my opinion and on the
 15 authorities, and it was surprising. At page 18 of my
 16 presentation I've excerpted from the note the case
 17 alert that we sent to our clients at the time. "This
 18 is a watershed decision ... This decision now
 19 requires, for the first time, that all data and
 20 studies that constitute the factual basis ... should
 21 be disclosed clearly in the patent specification
 22 itself", and those three changes together were fatal
 23 to the validity on the basis that they were useless
 24 of many Canadian patents that are, in fact, useful,
 25 and those changes were surprising, dramatic and

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1 unforeseen by practitioners and, in my view, unknown
 2 to the court until they were proclaimed.
 3 Thank you.
 4 MS. WAGNER: Mr. Reddon, I have a few
 5 questions for you on direct examination.
 6 **DIRECT EXAMINATION ON BEHALF OF THE CLAIMANT**
 7 MS. WAGNER: I'm going to be referring to
 8 the second expert report of Ronald Dimock, and that's
 9 at Tab 4 of the direct examination binder.
 10 At paragraph 12 of Mr. Dimock's Second
 11 Report he states that "A statement of utility
 12 included in a patent specification does not typically
 13 appear by accident. Rather, there's often
 14 significant motivation for the patentee and its
 15 counsel to make and emphasize such promises of
 16 utility."
 17 What's your opinion on that statement?
 18 MR. REDDON: So this statement about what
 19 Mr. Dimock thinks motivates patentees, without data
 20 or other support, is inconsistent with my experience
 21 and it is my opinion that it is not correct.
 22 The disclosure part of a patent is the
 23 teaching part. It's the part where the patentee
 24 who's come up with something new and useful and
 25 important tells the public what their work was, what

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1 they've done, and in my experience patentees take the
2 disclosure seriously. It would not be right for the
3 discoverer of a new compound who discovers, let's
4 say, latanoprost to treat glaucoma, to leave out the
5 observation that in our study there were no side
6 effects. That's important. That's the teaching
7 part.

8 But the disclosure is not written with a
9 view, the way the claims are, to defining the
10 monopoly, and it's not written with a view to
11 arguments or game playing. This is the patentee
12 saying what they discovered, and what's important,
13 and it's not written, in my experience, on the basis
14 that later it may or may not be used as a trip wire.
15 It's the teaching, and patentees teach what they have
16 disclosed, in fact, never suspecting that what they
17 say might later be used as a trip wire, even though
18 they didn't claim that aspect of the invention. So
19 they write their disclosures fulsomely because that's
20 the teaching part of the patent, not, in my
21 experience, for the reasons or motives that
22 Mr. Dimock suggests.

23 More importantly, it clearly wasn't the
24 reason why the statements in these two patents were
25 included. So if you think about atomoxetine,

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1 Mr. Justice Barnes interpreted the promise of that
2 patent to be use of atomoxetine in ADHD for the
3 longer term, or in the longer term. That "in the
4 longer term" found adjudicated promise didn't advance
5 any aspect of patentability for Lilly. It's simply
6 not correct that in the longer term -- sorry, it
7 wasn't in the specification. It was implied in the
8 specification based on expert argument. But, even if
9 it were, it couldn't have been there to advance any
10 patentability position of Lilly's because it's
11 irrelevant to the patentability of that patent.

12 Similarly in olanzapine. And Professor
13 Siebrasse touched on this, but I need to reiterate it
14 because it's contrary to what Mr. Dimock has said
15 here. In olanzapine, the promise that
16 Justice O'Reilly implied, found, was marked
17 superiority compared to all other known
18 antipsychotics. Now, the patentability requirement,
19 if any, for a selection patent is compared to the
20 other members of the genus, so that promise cannot
21 have been in the patent to advance or to meet any
22 patentability requirement; it's simply not aligned
23 with the legal requirements for a selection patent
24 even as Justice O'Reilly articulated them.

25 So not only is it inconsistent with my

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1 experience with clients; it's inconsistent with what
2 actually was done in the patents in the case before
3 you. The promises for which these patents were
4 invalidated did not advance Lilly's patent position,
5 did not establish patentability of either of the
6 inventions.

7 MS. WAGNER: Thank you.

8 At paragraph 15 of his Second Report,
9 Mr. Dimock refers to a litigation strategy he calls
10 "reading up" the invention, and he said this applies
11 where counsel for the patent holder argue that the
12 advantages of the invention stated in the disclosure
13 should be read into the claims in order to defend an
14 attack on obviousness.

15 Then it's followed by at paragraph 17 his
16 statement that "some patent holders bemoan the
17 logical consequence that the same passage s emphasized
18 to show their invention was non-obvious are then also
19 treated as promises of utility that must either be
20 demonstrated or soundly predicted at the time of the
21 patent application."

22 Can you provide your reaction to this
23 proposition?

24 MR. REDDON: So it's not logical, as
25 Mr. Dimock asserts, that the invention -- the

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1 inventive step -- would necessarily be the same as
2 the promise of the utility. They're two radically
3 different things. One is the flash, the ingenuity,
4 the Eureka moment; the other is what is it good for.
5 And to say that the two should be assessed on the
6 same standard, or be present at the same date, or any
7 of the propositions that are implicit in the
8 suggestion you can't read up the invention for one
9 purpose and read it down for another, the statement
10 that it's logical that you should treat the promise
11 and the invention the same way is not logical. It's
12 illogical and inconsistent with the very different
13 nature of the two things, inventiveness versus
14 utility, No. 1.

15 No. 2, Mr. Dimock in paragraph 16 says
16 well, Reddon did it himself in the Allergan case, as
17 if there were something unfair in this, and it's not
18 so.

19 What happened in the Allergan case was I
20 argued on behalf of Allergan that there was a big
21 invention here, and I did read up the invention
22 because it was an important invention, and the Chief
23 Justice who tried the case so found.

24 I then said but there's no promise here
25 that is unmet, and there aren't actually any big

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1 promises in this patent at all, so no trip wires
 2 here. And the Chief Justice agreed.
 3 There was nothing unfair about that. It
 4 was a big invention, and there were no promises in
 5 the patent to which Allergan should have been held.
 6 So this idea that there's an unfairness or an
 7 impropriety in reading up the invention and reading
 8 down the promises is just neither logical nor fair,
 9 in my opinion, and I think in the opinion of at least
 10 the Allergan court who accepted the argument.
 11 The third thing I want to say about it is
 12 this whole rhetoric about reading up and reading
 13 down, calculated to create an impression of
 14 unfairness or imbalance when there is none, is new.
 15 This reading up/reading down argument emerged in
 16 Canadian patent law as a byproduct of the change in
 17 the law. So the fact that reading up/reading down
 18 has appeared in the law -- and Justice O'Reilly has
 19 referred to it a couple of times, he may even have
 20 done so in olanzapine -- the emergence of the whole
 21 debate tells you that the law changed because it's a
 22 byproduct of a change in the law.
 23 MS. WAGNER: Thank you.
 24 Turning, now, to paragraph 79 of
 25 Mr. Dimock's Second Report, here in this paragraph he

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1 refers to a statement that how a judge will interpret
 2 the patent disclosure to find promises of utility is
 3 difficult to predict or assess. At paragraph 80 he
 4 goes on to say that the blame for your apparent
 5 concern lies with counsel and not the court. What's
 6 your reaction to that assertion?
 7 MR. REDDON: Two, the first maybe not as
 8 important as the second.
 9 It's very true, of course, that counsel
 10 frame the arguments and decide what evidence to
 11 present, but I think it's not correct or fair to, if
 12 I can use the word, "blame" counsel for the decisions
 13 of the court in which they decide to adopt a certain
 14 approach that one counsel or the other has urged.
 15 Our courts are very rigorous and scrupulous and the
 16 decisions are theirs. So blaming counsel for the
 17 court's decision to adopt a whole new approach really
 18 isn't fair or correct. It's not correct and it's not
 19 fair to the court.
 20 The more important point is -- and this
 21 statement is under the heading "Courts have not
 22 changed the way they construe the patent," and I take
 23 it to mean in reference to the promise -- I
 24 completely disagree. Courts have changed the way in
 25 which they construe the patents, and there are two

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1 important examples, one from Mr. Dimock's own
 2 practice, that I just want to briefly share with you.
 3 The first is in the record, the Mobil Oil
 4 case. In Mobil Oil there was an allegation that the
 5 patent lacked utility because it promised an adhesion
 6 between two layers of film of 250 grams per square
 7 meter. Not only did the defendant's product not have
 8 the 250 but they were able to show that the
 9 plaintiff's product within the claims of the patent
 10 didn't deliver the 250 which the defendant said was
 11 the promise. The disclosure in the patent said --
 12 there was a table which showed measured strengths of
 13 these films and sure enough, there it was. 250. So
 14 the defendant said Aha! Promise of the patent, 250,
 15 that's the commercial film, your films don't need it,
 16 our films don't need it, and there are films within
 17 the claims that don't need it, you have breached the
 18 promise of utility.
 19 And the court rejected it because, the
 20 court said, it's not in the claims. If the patentee
 21 had wanted to say that his claimed invention was
 22 250 grams per square meter he would have put it in
 23 the claims, and the court rejected 250 as a promise
 24 of the patent even though it was in the
 25 description -- not in the specification, the

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1 description -- but not in the claims.
 2 And a similar result in Proctor & Gamble
 3 in a case in which Mr. Dimock was counsel. In
 4 Proctor & Gamble the claims said "a distributing
 5 agent" for putting sheets in a dryer to soften
 6 fabrics. In the specification it said "reduces
 7 staining of the clothes." Mr. Dimock argued, and
 8 there was evidence that again embodiments within the
 9 claims didn't reduce staining, so Mr. Dimock argued
 10 that look, the promise of the patent is reduction of
 11 staining, it's right there in the description,
 12 there's proof that embodiments don't reduce staining ;
 13 therefore, the patent fails to deliver on the promise
 14 and it's invalid. Rejected. Rejected, because it
 15 wasn't in the claims. The court construed the claims
 16 and said the function of the SMS is as a distributing
 17 agent. There's no promise, even though it was in the
 18 specification, to reduce staining. So the challenge
 19 to the validity of the patent on the basis of breach
 20 of the promise was rejected because it wasn't in the
 21 claims.
 22 Again, I disagree with Mr. Dimock's
 23 assertion that there's been no real change. There's
 24 been a radical change in moving away from that which
 25 was the law to the current situation where you get to

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1 pluck stuff out of the disclosure and read it into
2 the claims as promises.
3 MS. WAGNER: Now turning to paragraph 145
4 of Mr. Dimock's Second Report, in this paragraph
5 Mr. Dimock asserts he had included a description of
6 the PM(NOC) regime in Canada because of the important
7 role the regulations play in providing the historical
8 context required to understand how the legislative
9 regime has changed and why certain issues have gained
10 in notoriety of late. What's your reaction to this
11 paragraph in the report?
12 MR. REDDON: So I'm inferring that the
13 issues that have gained notoriety are the revocation
14 of useful patents under the banner of unuseful.
15 I think what Mr. Dimock is trying to say
16 here is that these notorious cases have become more
17 frequent because of the enactment of these NOC
18 regulations or this NOC regime, so it's to explain
19 the sudden post Raloxifene, post AZT bubble in
20 revocations of useful patents as if they were not
21 useful.
22 I think the way to show you that that's
23 incorrect is to look at the situation only in the
24 time frame when those regulations were in place. So
25 filter out what happened before they came into effect

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1 in 1999 and look at only the cases during the period
2 when the regulations were in force, and what I can
3 give you is my own opinion and experience based upon
4 my cases, which is this.
5 Before the Raloxifene decision, I
6 received notices of allegation on behalf of clients
7 and engaged in litigation under the NOC regulations
8 which follow upon a notice of allegation in 37 cases.
9 With one minor exception that isn't relevant, zero of
10 those cases made allegations that engaged any of the
11 rules that Lilly is complaining about here. Zero out
12 of 37.
13 After Raloxifene I received notices of
14 allegation that gave rise to cases in 36 different
15 cases. Half of those, 18, involved promise utility
16 doctrine allegations. So we went from before
17 Raloxifene from zero out of 37 to after Raloxifene
18 half, 18 out of 36, and it's just not right to say
19 that that change, that dramatic change in the rate of
20 invalidation, or the rate of allegations at any rate,
21 stems from the regulations. It arises from the
22 dramatic change of law, so I disagree with
23 Mr. Dimock's assertion.
24 MS. WAGNER: Thank you. Those are my
25 questions on direct.

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1 THE PRESIDENT: Thank you. Mr. Johnston,
2 are you conducting the cross-examination?
3 MR. JOHNSTON: Yes.
4 THE PRESIDENT: Please proceed.
5 MR. SPELLISCY: I'm sorry. I have a
6 procedural question. We've just heard about these
7 notices of allegation. Can Claimant's counsel
8 confirm, are these on the record?
9 MS. WAGNER: The notices of allegation
10 are not on the record.
11 MR. SPELLISCY: So, to confirm, we just
12 had testimony about evidence that's not on the
13 record?
14 MS. WAGNER: The testimony is based on
15 his practical experience. If it would assist the
16 Tribunal, Mr. Reddon is an expert that has been
17 presented for his practical experience, and is very
18 responsive to the many statements in Mr. Dimock's
19 report about his practical experience in cases that
20 he has litigated.
21 THE PRESIDENT: He's testifying as an
22 expert witness, not as a fact witness.
23 MR. SPELLISCY: True, but he's testified
24 as to essentially an exact number of notices of
25 allegations which we're not going to have any

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1 opportunity to cross on because we've never seen
2 them.
3 THE PRESIDENT: We understand that. We
4 will appreciate that and value that within the
5 context of an expert witness rather than a fact
6 witness. Please proceed.
7 **CROSS-EXAMINATION ON BEHALF OF THE RESPONDENT.**
8 MR. JOHNSTON: Thank you very much. Good
9 afternoon, Mr. Reddon.
10 MR. REDDON: Good afternoon.
11 MR. JOHNSTON: I'll be asking you some
12 questions regarding your expert report and your
13 direct testimony that you've just provided. Please,
14 if I'm unclear in my questions, let me know so that I
15 can restate them more clearly for you.
16 You were called to the Bar in 1990. Is
17 that correct?
18 MR. REDDON: Correct.
19 MR. JOHNSTON: If I could just pause,
20 Claimant's counsel has provided to us a copy of
21 Mr. Reddon's CV which was not included with his
22 original Expert Report, and I just wanted to confirm
23 that that's also been provided to the Tribunal at
24 this point.
25 MS. WAGNER: We will verify that, and

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1 certainly can provide a copy forthwith of the CV that
2 was requested.
3 THE PRESIDENT: I don't have it in my
4 copy.
5 MS. WAGNER: Apologies for that
6 oversight, and we will provide one as soon as
7 possible.
8 THE PRESIDENT: Mr. Johnston, do you need
9 it now for purposes of examination?
10 MR. JOHNSTON: I think we should be fine
11 without.
12 THE PRESIDENT: Please proceed.
13 MR. JOHNSTON: Mr. Reddon, you were
14 called to the Bar in 1990. Is that correct?
15 MR. REDDON: Correct.
16 MR. JOHNSTON: And you've covered in your
17 presentation details of your immediately joining
18 McCarthy Tétrault, and that you became a partner
19 there in 1997. When did you become the chair of the
20 firm's national IP litigation group?
21 MR. REDDON: I can't be sure. I was
22 co-chair with a partner of mine probably in the early
23 2000s. He left the firm in the late 2000s and I
24 became the chair, and have been since then.
25 MR. JOHNSTON: You have stated, both in

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1 your expert report and again here in your direct
2 testimony, that in the past 16 years you have
3 practiced almost entirely in the area of patent
4 litigation, which takes us back to 2000, as you said
5 in your direct testimony.
6 I take it that, prior to the year 2000,
7 patent litigation was not the focus of your practice?
8 MR. REDDON: Depends what you mean by
9 "focus." Because I was an engineer I joined the
10 firm --
11 THE PRESIDENT: Mr. Reddon, you know as
12 well as anybody else, being a litigator, we must
13 speak one at a time.
14 MR. REDDON: I apologize.
15 THE PRESIDENT: No, no. It is
16 understandable, but I have to police the process.
17 You first.
18 MR. JOHNSTON: If you could please turn
19 up tab 26 in the Cross binder, this is R-481, we have
20 run a search on Westlaw, a database of case law in
21 Canada, and run a search for your last name in the
22 area of intellectual property. In this search, the
23 first patent cases which are produced by the search,
24 which has about 140 hits, the first patent case that
25 we identified where you're listed as counsel of

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1 record appears in the year 2000. So does that sound
2 about right?
3 MR. REDDON: I wasn't able to reproduce
4 this search. I don't think I've done 140 cases. I
5 think there's some -- I've done a lot of cases but I
6 think there's some duplicates here. I can't vouch
7 for its accuracy. Neither do I know whether it shows
8 my first reported case being in the year 2000.
9 I know that in 1989 I worked with my
10 former partner, Ian Binnie, whose name you'll
11 recognize from Supreme Court Canada judgments on
12 patent law, on the Bounce case that Mr. Dimock was
13 opposing us on, so it wasn't a focus -- I mean, I
14 joined the firm as an engineer with an Engineering
15 degree and there was a presumption I'd be an
16 intellectual property lawyer. I did a lot of work in
17 IP early on. It was not -- like on a percentage
18 basis, it wasn't in the 80s or 70s, or 60s even, in
19 the early decade or so, but right from Day 1 I was an
20 IP lawyer at McCarthys.
21 MR. JOHNSTON: So in your view in a
22 Westlaw search your name ought to appear as counsel
23 of record in a patent case prior to the year 2000?
24 MR. REDDON: I don't give you that
25 opinion, nor do I think it follows from anything I

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1 said.
2 MR. JOHNSTON: I'm curious, did you
3 appear in court in the 1990s in a patent case?
4 MR. REDDON: I would think probably not.
5 MR. JOHNSTON: So this Westlaw search, if
6 it, in fact, did show that you are not listed as
7 counsel of record prior to the year 2000, that sounds
8 like a plausible search result?
9 MR. REDDON: If it shows that, I would
10 not be surprised that I did not show as counsel of
11 record in a case before 2000. I was on cases but it
12 was not a focus of my practice in the 50, 60,
13 70 percent range, which it has been for the last many
14 years.
15 MR. JOHNSTON: Mr. Reddon, in this
16 proceeding the parties have exchanged a number of
17 written submissions. One of Claimant's submissions
18 is a response to the amicus submissions that were
19 filed in this case, and one of those amicus
20 submissions was from the CGPA. As you know, CGPA
21 stands for Canadian Generic Pharmaceutical
22 Association. You're familiar with this organization?
23 MR. REDDON: I've heard the acronym.
24 I've seen them try to intervene in cases before. I'm
25 not familiar with the Association.

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1 MR. JOHNSTON: The CGPA is the primary
2 industry association for the generic pharmaceutical
3 industry in Canada, is it not?
4 MR. REDDON: I'll take your word for it.
5 I don't know their relative importance compared to
6 other trade groups. I'm not familiar with the
7 organization that well. I know the former CDMA was
8 fairly prominent in that space as well.
9 MR. JOHNSTON: You're the chair of
10 McCarthy Tétrault's national IP litigation group?
11 MR. REDDON: I am.
12 MR. JOHNSTON: And McCarthy Tétrault is a
13 leading Canadian litigation firm?
14 MR. REDDON: I'll take that from you as a
15 compliment. I think it's true, yes.
16 MR. JOHNSTON: The CGPA, you're aware, is
17 a regular intervener in Canadian courts on behalf of
18 generic pharmaceutical associations?
19 MR. REDDON: Yes.
20 MR. JOHNSTON: So you're familiar with
21 the CGPA?
22 MR. REDDON: I know the acronym. I've
23 seen the evidence they file to get leave to intervene
24 in cases and how they describe themselves, and I've
25 had cases where they've intervened including the

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1 Supreme Court of Canada.
2 MR. JOHNSTON: Cases where you've been
3 acting?
4 MR. REDDON: Yes.
5 MR. JOHNSTON: Claimant wrote in response
6 to the submission of the CGPA, "CGPA's members derive
7 financial benefit from the promise utility doctrine."
8 Would you agree with that assessment?
9 MR. REDDON: I've seen evidence that its
10 members include Apotex. I don't know if it includes
11 Teva. I think when they want to copy an invention
12 and the patent is invalidated on the basis of this
13 doctrine, that they make money. If that's your
14 question, it's definitely true.
15 MR. JOHNSTON: Would you agree with the
16 statement "Brand pharmaceutical companies would
17 financially benefit if the promise utility doctrine
18 did not exist"?
19 MR. REDDON: I think if they're allowed
20 to keep -- not have their patents revoked under the
21 doctrine, they would make more money.
22 MR. JOHNSTON: So, if the law in Canada
23 looked like what Claimant describes as "prior" law,
24 brand pharmaceutical companies would financially
25 benefit from that?

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1 MR. REDDON: Again, assuming a given
2 company would have to have a patent that was liable
3 to be revoked the way Lilly's were under the new
4 rules, and such a company with such a patent exposed
5 to the new rules would be better off financially if
6 we were still under the old rules.
7 MR. JOHNSTON: So as a general
8 proposition --
9 MR. REDDON: But it depends -- sorry, I
10 apologize. But it depends on whether they have such
11 a patent and whether a court is going to say here's a
12 promise that trips you up and now it's invalid. I
13 just think it depends on the company and the patents
14 in question.
15 MR. JOHNSTON: So it depends on the
16 context? It depends on the case? You would not
17 accept as a general proposition that brand
18 pharmaceutical companies would be financially better
19 off if the promise utility doctrine did not exist?
20 MR. REDDON: The ones with patents that
21 would be revoked under that doctrine will make more
22 money if the doctrine -- would make more money if the
23 doctrine didn't exist. They would keep their
24 patents. So I guess it's a qualified yes, depending
25 on what their patent portfolio is and whether it's

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1 liable to these changes in the law or not.
2 MR. JOHNSTON: And it's not your view
3 that every brand pharmaceutical company would be
4 liable to such invalidations?
5 MR. REDDON: I haven't a view either way
6 on that. I'd have to look at their portfolios and
7 see whether they have patents which are susceptible
8 to this kind of attack.
9 MR. JOHNSTON: That's really a
10 case-by-case assessment turning on the facts of the
11 patent and the facts of the case?
12 MR. REDDON: I think it depends on what
13 their patent portfolios are, yes.
14 MR. JOHNSTON: So this is a case-by-case
15 assessment turning on the facts of the patent and the
16 facts of the case?
17 MR. REDDON: I'm not sure what you mean
18 by "case." They have patents that haven't yet been
19 attacked, so there aren't cases to analyze. There's
20 a portfolio of patents, and I don't know what each
21 company has or the extent to which any of them are
22 vulnerable to this new rule.
23 MR. JOHNSTON: You've said you're the
24 chair of McCarthy Tétrault's national intellectual
25 property group. Your firm has a substantial

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1 pharmaceutical patent litigation practice.
 2 MR. REDDON: It does.
 3 MR. JOHNSTON: And this is a moment where
 4 it would have been useful to turn to the CV, but as
 5 long as I don't misstate anything in it I don't think
 6 we will have a problem.
 7 MS. WAGNER: Mr. President, we do have
 8 some copies of the CV available at this time, if that
 9 would be useful.
 10 THE PRESIDENT: You may distribute.
 11 (Distributed)
 12 MR. JOHNSTON: On page 2 of your CV under
 13 "Professional experience" you write, "Recent and
 14 current cases include acting as lead counsel in
 15 significant cases for Merck." Is Merck a brand
 16 pharmaceutical company?
 17 MR. REDDON: I think you'd have to ask
 18 them that. They certainly have a lot of patents and
 19 have a lot of innovative products. I have heard, not
 20 from Merck, in the trade that they are embarking upon
 21 some non-branded projects, but certainly all the
 22 cases I've done for Merck have been in their capacity
 23 as patentee, not as infringer.
 24 MR. JOHNSTON: And Abbott, AbbVie,
 25 Schering-Plough, Allergan, Sanofi Aventis,

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1 Bristol-Myers Squibb -- would you similarly
 2 characterize these clients that you represent as
 3 pharmaceutical companies and that they are patent
 4 holders in the cases in which you represent them?
 5 MR. REDDON: Yes, they're pharmaceutical
 6 companies. Yes, most of them, to the extent I've
 7 represented them, have been in retainers where
 8 they're the patent holder. I think exclusively, yes.
 9 MR. JOHNSTON: Exclusively?
 10 MR. REDDON: I'm trying to not tread on
 11 to any privilege matters, but there may be a case or
 12 two where I represented a major pharmaceutical
 13 company as a defendant, but none that are reported or
 14 that I'm at liberty to discuss.
 15 MR. JOHNSTON: None of these companies
 16 are generic pharmaceutical companies?
 17 MR. REDDON: I told you about Merck.
 18 Same answer. Abbott. Again, the trade press would
 19 say that Abbott has become or is becoming more of a
 20 generic company than it was in the past. I don't
 21 think any of the others would be put into that
 22 category.
 23 MR. JOHNSTON: You've said in direct
 24 testimony that you virtually always act for the
 25 patentee in pharmaceutical patent litigation.

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1 MR. REDDON: I did.
 2 MR. JOHNSTON: And you would virtually
 3 always, then, be opposite a generic pharmaceutical
 4 company in the litigation?
 5 MR. REDDON: No. For example, I had a
 6 very large and protracted trial on behalf of AbbVie
 7 against Janssen Ortho. It was a litigation between
 8 two branded companies. Janssen Ortho was not a
 9 generic company.
 10 MR. JOHNSTON: The Westlaw case list that
 11 I referred to at Tab 26, again in a review of this
 12 case list, our search -- recognizing you say you were
 13 not able to reproduce this search -- this search
 14 which we ran produced roughly 140 hits. 135 of those
 15 were pharmaceutical litigation. Does that proportion
 16 surprise you, 135 out of 140?
 17 MR. REDDON: My estimate was 120 -- I'm
 18 sorry, was 80 percent. Your count suggests something
 19 higher than that. It may be because of duplications
 20 which I think are present in your search. But the
 21 80 percent I've given is a very rough estimate. It's
 22 a very high percentage.
 23 MR. JOHNSTON: Of those 135
 24 pharmaceutical cases that we identified, there's only
 25 one case in which we were able to identify you as

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1 acting for a generic pharmaceutical company, which is
 2 entry No. 101 on page 16, the Apotex Fermentation v
 3 Novopharm case.
 4 MR. REDDON: Right.
 5 MR. JOHNSTON: So that's a case between
 6 two generic pharmaceutical companies. There's no
 7 brand involved there.
 8 MR. REDDON: I acted for Novopharm.
 9 Again, they were both taking the position that they
 10 were innovators in that case, and it was not a patent
 11 case. It was an appropriation of trade secret case
 12 and a contempt case against the president of
 13 Novopharm, so I represented Novopharm and its
 14 president and it wasn't a patent case at all.
 15 MR. JOHNSTON: The clients that you've
 16 mentioned, Merck, Abbott, Schering-Plough, Allergan,
 17 Sanofi Aventis, Bristol-Myers Squibb, do they tend to
 18 participate in any industry associations in Canada?
 19 Are they members of any industry associations that
 20 you're aware of?
 21 MR. REDDON: There is an industry
 22 association that used to be called RX&D. It's now
 23 called -- maybe you can help me with the acronym.
 24 I --
 25 MR. JOHNSTON: IMC?

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1 MR. REDDON: Yes. Innovative Medicines
2 Canada. I'm not involved particularly in their
3 interactions with their trade group, and I'm not that
4 familiar with it.
5 MR. JOHNSTON: They are an industry
6 association that both intervenes in Canadian courts
7 on occasion and also engages in advocacy activities
8 regarding Canadian patent policy?
9 MR. REDDON: The former I have personal
10 knowledge of and experience with. I don't know the
11 extent of their lobbying, if I can call it that. I'm
12 sure they do. They are a trade organization.
13 MR. JOHNSTON: So these main clients of
14 yours are part of that association?
15 MR. REDDON: I don't know if that's true
16 for all of them. I know that Merck and Abbott are.
17 I don't know about AbbVie. I don't know about
18 Schering-Plough. I don't know if Allergan is.
19 Sanofi Aventis and Bristol Myers, I'm not sure
20 whether they're members or not. I don't want to
21 speculate but I believe they're likely to be.
22 MR. JOHNSTON: My understanding is that
23 most large patent-holding pharmaceutical companies
24 are members of IMC. Is that consistent with your
25 understanding?

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1 MR. REDDON: I don't know. I know
2 Allergan is definitely not. I'm not sure that AbbVie
3 is. AbbVie might be.
4 MR. JOHNSTON: You're aware that that
5 organization, IMC, sought to make an amicus
6 submission in this case but was denied leave?
7 MR. REDDON: The lawyers for Lilly told
8 me that, yes.
9 MR. JOHNSTON: If you'd please turn to
10 page 1 of your Expert Report, where you address your
11 mandate at paragraph 2, you state, "I have been asked
12 to respond to the following practice-related points
13 made in the report of Ronald Dimock in these
14 proceedings." The first point, "Canada's requirement
15 of utility has not changed in law or in practice."
16 The first change that you identify in
17 your report is the Supreme Court of Canada's 2002
18 decision in AZT. You say "excluding post-filing
19 evidence to establish utility." Is that correct?
20 MR. REDDON: You want me to read my
21 report and tell you if that's the first one?
22 MR. JOHNSTON: I just want you to confirm
23 that the first change that you discuss in your Expert
24 Report is the 2002 Supreme Court of Canada decision
25 in AZT.

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1 MR. REDDON: I don't think it matters but
2 it's not true. The first one is in paragraph 3(i),
3 and it's the new practice of looking for promises in
4 the disclosure instead of the claims.
5 MR. JOHNSTON: And, in your view, that
6 precedes the 2002 decision in AZT?
7 MR. REDDON: That -- no, I didn't say
8 that. I thought you wanted to know -- you said the
9 first one in my report, so I went through my report
10 and that's the first one I dealt with.
11 MR. JOHNSTON: I'm sorry, I was speaking
12 in terms of the timeline.
13 MR. REDDON: Chronology?
14 MR. JOHNSTON: The chronology. The first
15 change is the 2002 decision in AZT?
16 MR. REDDON: The AZT decision was in
17 2002, correct.
18 MR. JOHNSTON: Your expert report is 14
19 pages long.
20 MR. REDDON: I don't know. I'll check.
21 Yes.
22 MR. JOHNSTON: And, in that report, you
23 cite only two cases from before the year 2002. Those
24 are the cases of Consolboard and Monsanto. So you
25 cite two cases before 2002.

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1 MR. REDDON: True.
2 MR. JOHNSTON: Today you've also made
3 reference to a case of Mobil Oil and
4 Proctor & Gamble. You did not reference these cases
5 anywhere in your Expert Report?
6 MR. REDDON: No. I took those from
7 Mr. Dimock's responding report to mine.
8 MR. JOHNSTON: Mr. Dimock had cited Mobil
9 Oil in his first Expert Report?
10 MR. REDDON: He did.
11 MR. JOHNSTON: You did not address this
12 in your expert report?
13 MR. REDDON: Correct.
14 MR. JOHNSTON: So these two authorities
15 that you cite, Monsanto and Consolboard, this is the
16 authority that you rely upon for the basis of your
17 comparison of the law pre and post AZT?
18 MR. REDDON: No, not at all.
19 MR. JOHNSTON: You rely also on your
20 practice experience?
21 MR. REDDON: And my knowledge of the
22 cases acquired during all of those experiences, yes.
23 MR. JOHNSTON: You said the focus of your
24 practice was not in patent law before the year 2000.
25 Is that correct?

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1 MR. REDDON: That's true. I came on the
2 scene in 2000 in large measure. I had done patent
3 cases before, but that's when it became the focus of
4 my practice.
5 MR. JOHNSTON: And your familiarity with
6 all of these old authorities, this is not something
7 at all that you have put into your 14-page expert
8 report in this matter?
9 MR. REDDON: I don't agree. The opinion
10 I've given was asked to be from a practical
11 perspective, and that depends essentially and
12 profoundly on my knowledge of all those cases. I've
13 already confirmed for you that I didn't cite them. I
14 wasn't asked to write an academic treatise about the
15 law; I was asked to describe the practical realities,
16 and that's what I tried to do.
17 MR. JOHNSTON: Your Expert Report also
18 did not address whatsoever the specifics of the
19 olanzapine or atomoxetine patents. Is that correct?
20 MR. REDDON: Are you asking me to check
21 it and make sure?
22 MR. JOHNSTON: If you don't recall in
23 your 14-page Expert Report that you address those
24 cases, please do check.
25 MR. REDDON: I didn't discuss the

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1 olanzapine patent or the atomoxetine patent.
2 MR. JOHNSTON: Thank you. But your
3 Expert Report is based on your point of view as a
4 patent litigator who, as you've said in your direct
5 testimony today, virtually always acts for the patent
6 holder in pharmaceutical litigation.
7 MR. REDDON: Untrue. Quite untrue. My
8 opinion is my opinion to the Tribunal about my
9 experience. It comes from knowing the cases and from
10 being in court and from interacting with judges and
11 clients, in which interactions it's 80 percent
12 patentee and 20 percent non-patentee. That's the
13 correct statement. It is not a point of view; it is
14 a firmly held opinion based on a lot of experience.
15 MR. JOHNSTON: I'd like to take you to
16 page 6 of your report at paragraph 12. It's at the
17 top of page 6. You write, "Due to Raloxifene the
18 patentee can only rely on evidence that was included
19 in the patent for sound prediction."
20 That's your understanding of the state of
21 Canadian law today?
22 MR. REDDON: Yes, as regards evidence in
23 the technical sense. Certainly the cases after
24 Raloxifene have moderated the exclusion a little bit
25 to permit common general knowledge, but in terms of

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1 hard evidence from the patentee, him or herself, if
2 they want to put it forward, it has to have been in
3 the patent.
4 MR. JOHNSTON: Please turn up tab 18.
5 I'm afraid this is a slightly disorganized tab, which
6 is entirely my fault. If you'd turn to the very last
7 article included in this tab, this is an article
8 published by your law firm on June 8, 2015. You're
9 listed as an author on this article?
10 MR. REDDON: I see it -- well, my name is
11 there at the end. I don't think it would be fair to
12 claim authorship. I didn't write it.
13 MR. JOHNSTON: Could you please turn to
14 your CV on page 2, under "Publications," your first
15 listed publication. That is the same article that I
16 have just pointed to in Tab 18. Is that correct?
17 MR. REDDON: Yes, it is. It is.
18 MR. JOHNSTON: So would it be fair to say
19 you do claim authorship of this?
20 MR. REDDON: I don't claim authorship of
21 it. I didn't write it.
22 MR. JOHNSTON: This appears in your CV of
23 list of publications.
24 MR. REDDON: I was asked -- yes, it does.
25 MR. JOHNSTON: And there's a list of

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1 authors and the first name appearing in your CV is
2 your name.
3 MR. REDDON: In the CV, that is true.
4 MR. JOHNSTON: In this article in the
5 second paragraph, the first sentence states,
6 "Significantly, on the issue of sound prediction, the
7 Federal Court of Appeal held that the elements of
8 sound prediction need not be disclosed in a patent if
9 they would be self-evident to the skilled person."
10 MR. REDDON: Correct.
11 MR. JOHNSTON: And this article was
12 published on June 8, 2015?
13 MR. REDDON: Correct.
14 MR. JOHNSTON: Your Expert Report in this
15 matter you signed on September 11, 2015?
16 MR. REDDON: Correct.
17 MR. JOHNSTON: In your Expert Report you
18 did not include this qualification represented in the
19 article for which you are listed as an author several
20 months earlier, that it is not necessary, in fact,
21 for what is in the common general knowledge to be
22 disclosed in the patent.
23 MR. REDDON: Right. So the article went
24 out from our firm and I approved it and I agree with
25 its contents. I didn't write it and don't claim

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1 authorship of it but it's correct. The report I
 2 signed in September refers to the provision of
 3 evidence, and when you asked me I made very clear to
 4 you that we're talking about evidence from the
 5 patentee about what he or she did in the course of
 6 the invention. It's absolutely true that in June of
 7 2015 Justice O'Reilly decided another Allergan case
 8 that we did and said that stuff that's obvious to the
 9 skilled person doesn't have to be in, but that's not
 10 the kind of evidence that I was talking about, as I
 11 told you before we got to this article in
 12 paragraph 12 at the top of page 6.
 13 I think I told you as well that I thought
 14 it had been moderated since to allow common general
 15 knowledge, which is really a reference to what
 16 Justice O'Reilly decided in our Allergan case.
 17 MR. JOHNSTON: Please turn up page 5 of
 18 your Expert Report, paragraph 10. You write, "Prior
 19 to Raloxifene I had never considered that there was
 20 any need to establish that an inventor had met a
 21 heightened obligation to disclose facts supporting a
 22 prediction in the patent." That's the opinion you
 23 provided in your expert report?
 24 MR. REDDON: Yeah. I don't want to
 25 quibble, but that's telling the Tribunal what my

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1 experience and understanding was. It isn't written
 2 as an opinion but that is my opinion.
 3 MR. JOHNSTON: That you never considered
 4 that there was any need to establish that an inventor
 5 had met a heightened obligation to disclose facts
 6 supporting a prediction in the patent?
 7 MR. REDDON: That's correct.
 8 THE PRESIDENT: Can you clarify what it
 9 then is? Is it an expert opinion, or is it more your
 10 memoires?
 11 MR. REDDON: Fair enough. I think in
 12 paragraph 10 I wasn't purporting to speak for
 13 everybody, so, Mr. President, that one paragraph
 14 really is relating to the Tribunal my experience and
 15 my understanding of the law.
 16 THE PRESIDENT: Fair enough.
 17 MR. REDDON: But as an expert at the
 18 time.
 19 MR. JOHNSTON: And you state in
 20 paragraph 10 that after Raloxifene you gave
 21 presentations to clients and prospective clients
 22 during which you advised that, since 2009, the courts
 23 had imposed a heightened disclosure obligation.
 24 MR. REDDON: I do say that, and it's
 25 true.

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1 MR. JOHNSTON: You cite in footnote 13 an
 2 article published by your firm regarding the
 3 Raloxifene decision, and if we could turn it up at
 4 Tab 3, C-485.
 5 MR. REDDON: I have it, yes.
 6 MR. JOHNSTON: On the second page in the
 7 McCarthy Tétrault notes -- this is an article writing
 8 about the Raloxifene decision -- the McCarthy
 9 Tétrault notes state, "This is a watershed decision
 10 that is particularly relevant to the filing of patent
 11 applications henceforth. This decision now requires,
 12 for the first time, that all data and studies that
 13 constitute the factual basis upon which the
 14 prediction is made should be disclosed clearly in the
 15 patent specification itself."
 16 That was the comment on this case
 17 provided by your law firm.
 18 MR. REDDON: You've read it correctly,
 19 yes.
 20 MR. JOHNSTON: Please turn up tab 27.
 21 This is R-494. This is an on-line publication by
 22 Gowlings, which is Claimant's law firm in this
 23 matter.
 24 This is dated May 4, 2009. If you turn
 25 to page 5 of the document, in the middle of the page

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1 there's a reference to Eli Lilly v Apotex, appeal of
 2 55.2 proceeding, 2009 FCA 97, Raloxifene. So this is
 3 the same Raloxifene decision that your law firm was
 4 commenting on, was it not?
 5 MR. REDDON: It seems to be, yes.
 6 MR. JOHNSTON: In the second paragraph of
 7 this publication by Gowlings, the article states "The
 8 court reiterated the test articulated the test by the
 9 Supreme Court in AZT, namely that when an invention
 10 had not yet been reduced to practice, the disclosure
 11 must give both the underlying facts and the sound
 12 line of reasoning to justify the prediction."
 13 MR. REDDON: That's not what AZT said,
 14 but it's written on the page here, yes.
 15 MR. JOHNSTON: You disagree with the
 16 characterization given about AZT by Claimant's law
 17 firm in 2009?
 18 MR. REDDON: I don't know what you mean
 19 by "Claimant's law firm."
 20 MR. JOHNSTON: Gowlings.
 21 MR. REDDON: Oh. I don't know who wrote
 22 it. I disagree with it. That's not what AZT said.
 23 AZT said the question of disclosure was being left
 24 open for another case where it was relevant.
 25 MR. JOHNSTON: Please turn up tab 31,

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1 R-191. This is a newsletter published by Smart &
2 Biggar in February 2003, so three months after the
3 Supreme Court of Canada's decision in AZT. You are
4 familiar with Smart & Biggar?
5 MR. REDDON: I know the firm, yes.
6 MR. JOHNSTON: Is this a well-regarded
7 intellectual property firm in Canada?
8 MR. REDDON: I think it depends what you
9 retain or you want them for. I think they prosecute
10 a lot of patents. They do some pharmaceutical
11 litigation.
12 MR. JOHNSTON: Please turn to page 2.
13 There's an article here entitled "Supreme Court of
14 Canada reaffirms the doctrine of sound prediction in
15 Canadian patent law." If you look at the end of
16 page 3 the author of this article is John Bochnovic,
17 Ottawa. Do you know him?
18 MR. REDDON: No.
19 MR. JOHNSTON: You're not familiar with
20 his name?
21 MR. REDDON: I may have seen his name
22 before. I've never had a case with him. I don't
23 know him.
24 MR. JOHNSTON: You do not regard John
25 Bochnovic as a prominent Canadian practitioner of

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1 patent law?
2 MR. REDDON: Again, in the field of
3 solicitor's work, prosecuting patents, advising
4 clients about patents licensing, maybe. I've never
5 come across him in any of the litigation cases that
6 I've done, ever, that I can recall. I'm not
7 criticising. He may be well known, just not to me.
8 MR. JOHNSTON: On page 3 in the left-hand
9 column the article is reproduced as a three part
10 test. It says, "The court identified a
11 three-component requirement of the doctrine: 1.
12 There must be a factual basis for the prediction; 2.
13 The inventor must have at the date of the patent
14 application an articulable and 'sound' line of
15 reasoning from which the desired result can be
16 inferred from the factual basis; and 3. There must
17 be proper disclosure of the foregoing."
18 Is it fair to say that this summation of
19 the AZT decision indicates that there must be proper
20 disclosure of the factual basis and the sound line of
21 reasoning underpinning a sound prediction?
22 MR. REDDON: I don't think the words "of
23 the foregoing" were in the judgment.
24 MR. JOHNSTON: In this article --
25 MR. REDDON: I don't agree --

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1 THE PRESIDENT: Hold on. First finish
2 the question, and then your answer.
3 MR. JOHNSTON: You agree that the article
4 states "The court identified a three-component
5 requirement of the doctrine". Do you agree?
6 MR. REDDON: Justice Binnie said "and of
7 course there must be proper disclosure" without
8 elaborating what that meant, and he said the
9 disclosure requirements would be decided in another
10 case because in this case everything was in the
11 patent already and it didn't arise for determination
12 what, short of everything, might be required.
13 MR. JOHNSTON: That was not my question,
14 Mr. Reddon. My question was -- I'll just check the
15 transcript -- do you agree that this article states
16 that the court identified a three-component
17 requirement?
18 MR. REDDON: That is what's typewritten
19 on the page.
20 MR. JOHNSTON: The first element is there
21 must be a factual basis for the prediction.
22 MR. REDDON: Typewritten.
23 MR. JOHNSTON: The second element is that
24 there must be a sound line of reasoning.
25 MR. REDDON: Typewritten.

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1 MR. JOHNSTON: And the third element is
2 there must be proper disclosure of the foregoing.
3 MR. REDDON: Typewritten.
4 MR. JOHNSTON: Reading this Article -- I
5 am talking about this article and not the decision
6 itself -- in context, "the foregoing" must refer to 1
7 and 2 in this three-part list, wouldn't you agree?
8 MR. REDDON: So if you leave out the
9 words "in context" which you threw in there, because
10 yes, if you read it isolated by itself, that would be
11 a reasonable interpretation, as long as you're not
12 allowed to look at the actual judgment.
13 MR. JOHNSTON: Please turn up tab 7.
14 This is the judgment in AZT. Please go to
15 paragraph 70. This is where the court is setting out
16 the three-part task that was identified in that Smart
17 & Biggar article written shortly thereafter. The
18 court says, part 1, there must be a factual basis;
19 part 2, there must be a sound line of reasoning; part
20 3, there must be proper disclosure. The court goes
21 on to say: "It is generally not necessary for an
22 inventor to provide a theory of why the invention
23 works. Practical readers merely want to know that it
24 does work and how to work it. In this sort of case,
25 however, the sound prediction is to some extent the

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1 *quid pro quo* the applicant offers in exchange for the
 2 patent monopoly. Precise disclosure requirements in
 3 this regard do not arise for decision in this case
 4 because both the underlying facts (the test data) and
 5 the line of reasoning (the chain terminator effect)
 6 were, in fact, disclosed, and disclosure in this
 7 respect did not become an issue between the parties.
 8 I therefore say no more about it."
 9 MR. REDDON: Right so -- right. So the
 10 universe of whatever might be required to be
 11 disclosed, when we get to the issue in a case that
 12 matters, is disclosed here, so the maximum that we
 13 could ever say might have to be disclosed is here, so
 14 it doesn't matter what the requirement is and I will
 15 say no more about it.
 16 This is not a holding that everything in
 17 the AZT patent necessarily has to be disclosed. This
 18 is a holding that the AZT patent hits any standard we
 19 might later articulate because it has everything, and
 20 we'll get back to you in a case where it matters
 21 about what you have to disclose.
 22 MR. JOHNSTON: Please turn to
 23 paragraph 75. The court states, "These conclusions
 24 support a finding of sound prediction. The trial
 25 judge has found that the inventors possessed and

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1 disclosed in the patent both the factual data on
 2 which to base a prediction and a line of reasoning
 3 (chain terminator effect) to enable them to make a
 4 sound prediction at the time they applied for the
 5 patent."
 6 Now, Smart & Biggar interpreted this to
 7 mean there must be proper disclosure of the
 8 foregoing. You did not consider this? You never
 9 considered that this language in the AZT decision
 10 could reflect a requirement to disclose the basis of
 11 the sound prediction in the patent?
 12 MR. REDDON: I never considered that this
 13 passage means what Mr. Bochnovic thought. Of course,
 14 I considered the AZT decision in my practice. I
 15 concluded that, as I've said to the Tribunal today,
 16 that it wasn't saying anything like what you've
 17 suggested. And as you know, and as Professor
 18 Siebrasse said this morning, this is a reference back
 19 to all the facts in paragraph 73 which were not in
 20 the patent.
 21 Moreover, Justice Binnie says in AZT that
 22 you need to lead evidence about what was known.
 23 That's inconsistent with the suggestion -- I don't
 24 have the paragraph but I can find it, it's in AZT --
 25 that the parties need to lead evidence about what was

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1 known. That's inconsistent with the determination
 2 that you can only consider that which is in the
 3 application for the patent, so it's really incorrect
 4 for Smart & Biggar to have added those words "of the
 5 foregoing" in their blog -- it wasn't an article --
 6 and when I said in my report I never considered that
 7 this was required, of course I considered AZT and it
 8 never was my opinion that it would be read this way,
 9 and I don't think it's proper to read it this way.
 10 It's not what the case says.
 11 MR. JOHNSTON: Please turn to page 4,
 12 paragraph 8 of your Expert Report. This addresses
 13 another aspect of the AZT decision. You say, "Stated
 14 otherwise, the 2002 decision in AZT established that
 15 post-filing evidence could not be used to show that
 16 the utility requirement was met as of the date the
 17 patent was filed; this was itself a major change in
 18 the law."
 19 That's the opinion you provided in your
 20 Expert Report?
 21 MR. REDDON: It is.
 22 MR. JOHNSTON: Now, you've described this
 23 decision and this aspect of the decision today in
 24 your presentation as really important, really
 25 significant, really surprising, radical change. Are

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1 these all words that you would use to describe the
 2 requirement as stated in AZT, that utility must be
 3 established by a demonstration or sound prediction
 4 prior to filing?
 5 MR. REDDON: I used them deliberately and
 6 in a considered way because that's exactly how they
 7 landed on the practitioners at the time, of which I
 8 was one.
 9 MR. JOHNSTON: Now, this 2002 AZT
 10 decision, it was the first pharmaceutical patent case
 11 to reach the Supreme Court for some time. There had
 12 not been many pharmaceutical patent cases at the
 13 Supreme Court in the preceding years. Isn't that
 14 right?
 15 MR. REDDON: Yes. I can't think of any
 16 in the few years before AZT.
 17 MR. JOHNSTON: And at this time you were
 18 doing a significant amount of pharmaceutical patent
 19 litigation work?
 20 MR. REDDON: I was.
 21 MR. JOHNSTON: This would have been a
 22 case of high interest to your clients at the time?
 23 MR. REDDON: Yes.
 24 MR. JOHNSTON: And you say that you
 25 advised your clients contemporaneously with the

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1 alleged changes in Canada's utility requirement.
 2 You've said this in your Expert Report.
 3 MR. REDDON: Can you show me where?
 4 MR. JOHNSTON: Certainly. Page 2,
 5 paragraph 3. "I have observed and responded to the
 6 shift firsthand in my practice and have advised
 7 clients contemporaneously with its occurrence. The
 8 shift relates primarily to:" Then you identify these
 9 three branches, the second of which is the
 10 post-filing evidence rule in AZT that we're now
 11 talking about.
 12 MR. REDDON: Right. Just to be clear,
 13 what I'm saying there is in the course of my work
 14 with clients, in prosecuting or defending their
 15 cases, I gave them solicitor and client legal advice
 16 about these changes, and I don't waive any privilege
 17 in that advice, nor could I. It's not mine to waive.
 18 I hope you didn't think, and I didn't
 19 suggest or mean to suggest, that I was out on a
 20 speaking circuit or anything because that wasn't my
 21 practice.
 22 MR. JOHNSTON: You do rely in your Expert
 23 Report on a publication by your firm regarding the
 24 Raloxifene decision that we have looked at today.
 25 MR. REDDON: I do.

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1 MR. JOHNSTON: But you did not include in
 2 your Expert Report any equivalent publication by your
 3 firm regarding the AZT decision?
 4 MR. REDDON: True.
 5 MR. JOHNSTON: Please turn back to
 6 Tab 31. This is the Smart & Biggar article
 7 discussing the AZT decision. Again, the title of
 8 this article is "Supreme Court of Canada reaffirms
 9 the doctrine of sound prediction in Canadian patent
 10 law."
 11 MR. REDDON: I see the title.
 12 MR. JOHNSTON: On page 3, under the
 13 section we were reading before, under the heading
 14 "Bare speculation will not amount to sound
 15 prediction," the article states, "The court
 16 reaffirmed a longstanding position that sound
 17 prediction will not successfully support a patent
 18 claim if either the prediction at the date of the
 19 application was not sound or, irrespective of the
 20 soundness of the prediction, there is evidence of
 21 lack of utility in respect of some of the areas
 22 covered by the claim."
 23 You see this here in the article?
 24 MR. REDDON: I see it.
 25 MR. JOHNSTON: You do not agree with that

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1 assessment?
 2 MR. REDDON: Well, I mean, we've talked
 3 about the cases that admit -- obviously the words
 4 that we're going to have a disagreement about are "at
 5 the time," and it has to be understood that "at the
 6 time," until AZT, meant yes, that which you invented
 7 and had in hand reduced to definite and practical
 8 shape before you filed -- at the time -- has to work,
 9 but that evidence subsequently that that very thing
 10 which you had reduced to definite and practical shape
 11 before you filed (not something that you changed
 12 later) does in fact work. So to the extent that I
 13 know you're suggesting that "at the time" means you
 14 had to have testing evidence in hand, I disagree with
 15 it. I don't really think that that's the considered
 16 intent of this writing, which is not an article. And
 17 you know all the cases I've heard discussed in this
 18 Tribunal, all the cases that are to the contrary.
 19 That's a long answer but the short answer
 20 is I disagree with it the way I think that you read
 21 it. Because it's not right.
 22 MR. JOHNSTON: In the other column under
 23 "After-the-fact validation" the article states "The
 24 court confirmed that bare speculation, even if it
 25 afterwards turns out to be correct, will not amount

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1 to sound prediction. It rejected the suggestion,
 2 arising from earlier Canadian Federal Court of Appeal
 3 decisions, that mere speculation which later turned
 4 out to be true would be considered a sound
 5 prediction."
 6 MR. REDDON: It overturned existing law
 7 from the Court of Appeal, but the Federal Court of
 8 Appeal didn't say in the decision overturned that
 9 mere speculation was okay. So this is not really
 10 accurate. It's a very short snippet and I don't
 11 agree with what it says about the Federal Court of
 12 Appeal judgment either.
 13 MR. JOHNSTON: So you disagree with the
 14 characterization that the court was confirming that
 15 bare speculation after-the-fact proven would not be
 16 sufficient, and you disagree with the
 17 characterization that these earlier Federal Court of
 18 Appeal decisions merely suggested that after-the-fact
 19 validation would be sufficient.
 20 MR. REDDON: No, and -- no, to your first
 21 question and, to your second question, I'm sorry, I
 22 didn't understand it.
 23 MR. JOHNSTON: Let me re-state. You
 24 disagree with the characterization here that what the
 25 Court of Appeal in AZT was doing was confirming that

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1 bare speculation, even if it afterwards turns out to
2 be correct, will not amount to sound prediction?
3 MR. REDDON: The suggestion I disagree
4 with there is what I said no to already. I think the
5 Supreme Court did say mere speculation is not enough
6 to found an invention.
7 MR. JOHNSTON: The Supreme Court of
8 Canada is bound to interpret and apply the
9 constitution and the statutes in Canada. Is that
10 correct?
11 MR. REDDON: It seems like a trite
12 proposition. I don't actually think it says that in
13 the Supreme Court Act. I don't want there to be a
14 transcript of me saying the Supreme Court of Canada
15 is bound to do anything because they feel like they
16 have a pretty broad jurisdiction, but they certainly
17 are duty bound to apply the constitution.
18 MR. JOHNSTON: The Supreme Court is --
19 MR. REDDON: The laws of Canada? Was
20 that your question?
21 THE PRESIDENT: Let him finish the answer
22 to your question whether the Supreme Court of Canada
23 is bound by the constitution and the laws.
24 MR. REDDON: Yeah, I think it's a trite
25 proposition. They are. I don't know if that's

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1 written down anywhere. I'm not a constitutional
2 scholar.
3 MR. JOHNSTON: In AZT it was the
4 interpretation of the Patent Act that was at issue.
5 MR. REDDON: I actually don't think
6 they're bound to uphold all the laws. They need to
7 strike down laws that violate certain provisions of
8 the constitution.
9 THE PRESIDENT: You're still answering
10 the previous question?
11 MR. REDDON: Yeah. I'm still just trying
12 to replay my constitutional knowledge. I think
13 they're bound not to enforce laws that violate the
14 constitution but for patent purposes, where it
15 actually matters, I think they apply the law and are
16 bound to do so.
17 MR. JOHNSTON: They're supposed to apply
18 the Patent Act barring any unconstitutionality?
19 MR. REDDON: Yes.
20 MR. JOHNSTON: They're supposed to
21 ascertain what was Parliament's intention and to
22 apply the law?
23 MR. REDDON: To your first question, in
24 construing the Patent Act one of the principles of
25 construction is to identify Parliament's intention.

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1 What was your second question?
2 MR. JOHNSTON: They're supposed to
3 ascertain Parliament's intention and apply the law.
4 I think you answered it already.
5 MR. REDDON: Parliament's intention in
6 terms of interpreting the words of the Patent Act is
7 one of the factors and things they're required to
8 look at in construing a statute, yes, I guess, but
9 not as generally as you put it. Apply the law? Yes.
10 MR. JOHNSTON: Please turn to Tab 7, back
11 to the AZT decision, R-004, page 16.
12 THE PRESIDENT: Would this be an
13 appropriate moment to break?
14 MR. JOHNSTON: Yes.
15 THE PRESIDENT: Mr. Reddon, you know what
16 that means. You are under testimony.
17 MR. REDDON: Yes.
18 THE PRESIDENT: Ten minutes' break.
19 *(Recess taken)*
20 THE PRESIDENT: Mr. Johnston, please
21 continue.
22 MR. JOHNSTON: Mr. Reddon, we had just
23 turned up tab 7, R-004, the AZT decision. Please
24 turn to page 16, paragraph 46.
25 The court writes in the last two

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1 sentences of that paragraph -- and actually here I
2 should say I want to go through several passages of
3 the decision to lay the foundation for some questions
4 that I hoped to ask you about the case, so I am going
5 to go through those passages and ask that you follow
6 along with me.
7 The court states at paragraph 46,
8 "Utility is an essential part of the definition of an
9 invention (Patent Act section 2). A policy of patent
10 first and litigate later unfairly puts the onus of
11 proof on the attackers to prove invalidity without
12 the patent owners ever being put in a position to
13 establish validity. Unless the inventor is in a
14 position to establish utility as of the time the
15 patent is applied for, on the basis of either
16 demonstration or sound prediction, the Commissioner
17 'by law' is required to refuse the patent
18 (Patent Act, section 40)."
19 In Paragraph 52, in a section titled
20 "Proof of utility", the court at paragraph 51 again
21 references the section 2, definition of "useful" in
22 the Patent Act.
23 It then states --
24 MR. REDDON: Sorry, where?
25 MR. JOHNSTON: In paragraph 51 there's a

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1 reference to section 2.
 2 MR. REDDON: Thank you.
 3 MR. JOHNSTON: Then in paragraph 52, the
 4 court writes in the third sentence, "Glaxo/Wellcome
 5 claimed a hitherto unrecognized utility but if it had
 6 not established such utility by tests or sound
 7 prediction at the time it applied for its patent,
 8 then it was offering nothing to the public but
 9 wishful thinking in exchange for locking up
 10 potentially valuable research turf for (then)
 11 17 years." The court then cites the Proctor & Gamble
 12 v Bristol-Myers Canada case of 1979, and the quote
 13 that it reproduces is, "By definition, an 'invention'
 14 includes a 'new and useful process'. A 'new' process
 15 is not an invention unless it is 'useful' in some
 16 practical sense. Knowing a new process without
 17 knowing its utility is not, in my view, knowledge of
 18 an 'invention'.
 19 The last passage I'd like to go to is at
 20 page 22, Paragraph 80. The court writes in the
 21 section entitled "Glaxo/Wellcome's after-the-fact
 22 validation theory", "In my view, with respect,
 23 Glaxo/Wellcome's proposition is consistent neither
 24 with the Act (which does not postpone the requirement
 25 of utility to the vagaries of when such proof might

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1 actually be demanded) nor with patent policy (which
 2 does not encourage the stockpiling of useless or
 3 misleading patent disclosures)."
 4 In these passages the Supreme Court
 5 referenced the statutory provisions of the
 6 Patent Act?
 7 MR. REDDON: So in Paragraph 46 there's
 8 references to sections 2 and 40. Paragraph 51 has a
 9 reference to section 2. I could be missing it but I
 10 don't see reference to the Act in paragraph 52. In
 11 paragraph 80 there's no reference to any provision in
 12 the Act but there is the word "Act."
 13 MR. JOHNSTON: In paragraph 52 the court
 14 cites to the 1979 Proctor & Gamble decision and that
 15 quote includes the definition of an invention under
 16 the Act. Is that correct?
 17 MR. REDDON: It does cite to
 18 Proctor & Gamble which does quote a definition for
 19 "invention."
 20 MR. JOHNSTON: So the Supreme Court in
 21 AZT on the face of these passages was engaged in the
 22 interpretation of the Patent Act.
 23 MR. REDDON: I think they were
 24 articulating a policy. Yes, you've given me places
 25 where they've mentioned provisions of the Act, but

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1 it's reasonably clear, from reading the case as a
 2 whole, including paragraph 80, that they're
 3 articulating what they think is a good policy.
 4 MR. JOHNSTON: Your reading of the AZT
 5 judgment is not that the Supreme Court of Canada was
 6 fairly interpreting the Patent Act; it is that they
 7 were engaged in policy making?
 8 MR. REDDON: I didn't say that. You
 9 slipped in a couple of words in your question that
 10 weren't in my answer.
 11 MR. JOHNSTON: I think I gave a compound
 12 question, so let me break it down to be clear.
 13 Is it your view that the Supreme Court of
 14 Canada was not engaged in a good-faith interpretation
 15 of the Patent Act in the AZT decision?
 16 MR. REDDON: So, two questions you put
 17 together. Of course I'm not suggesting that the
 18 Supreme Court of Canada was acting in anything but
 19 good faith, No. 1. No. 2, their conclusion is not
 20 driven by statutory interpretation; their conclusion
 21 is driven by their references to the policy that you
 22 already read out.
 23 MR. JOHNSTON: Justice Binnie wrote this
 24 decision for the Supreme Court.
 25 MR. REDDON: He did.

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1 MR. JOHNSTON: He was one of the most
 2 highly esteemed jurists in Canada.
 3 MR. REDDON: He was a very well known --
 4 yes, of course.
 5 MR. JOHNSTON: You think he's a fair
 6 judge?
 7 MR. REDDON: I don't have any opinions to
 8 the contrary. He's my former partner. I think he's
 9 a great judge. What do you mean by "fair"?
 10 MR. JOHNSTON: If you could turn up tab
 11 18, R-482, this is the Expertise -- page 1.
 12 MR. REDDON: I have page 1 of Tab 18.
 13 MR. JOHNSTON: This is Expertise detail
 14 from your law firm's IP litigation group, and under
 15 "History as intellectual property litigators" it
 16 states "McCarthy Tétrault has a legacy in IP
 17 Litigation with Harold Fox, Donald Sim, Immanuel
 18 Goldsmith and Ian Binnie amongst our alumni."
 19 Ian Binnie, in fact, practiced IP law at
 20 your law firm?
 21 MR. REDDON: True.
 22 MR. JOHNSTON: His judgment in AZT was a
 23 unanimous decision of the Supreme Court?
 24 MR. REDDON: It was.
 25 MR. JOHNSTON: All nine judges of the

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1 Supreme Court joined with him in that decision?
 2 MR. REDDON: They did.
 3 MR. JOHNSTON: There was not even a
 4 concurring opinion expressing a single word of doubt
 5 with the decision rendered by Justice Binnie?
 6 MR. REDDON: Correct.
 7 MR. SPELLISCY: No judge expressed any
 8 concern that the decision was a departure from the
 9 text of the Patent Act?
 10 MR. REDDON: No judge said any such thing
 11 in AZT.
 12 MR. JOHNSTON: No judge expressed any
 13 concern that the decision was a departure from the
 14 purposes of the Patent Act?
 15 MR. REDDON: Correct.
 16 MR. JOHNSTON: No concern was expressed
 17 that the court was intruding on Parliament's
 18 legislative domain?
 19 MR. REDDON: Correct.
 20 MR. JOHNSTON: No reservation was
 21 expressed by any judge of the Supreme Court of Canada
 22 that the decision would disrupt settled law?
 23 MR. REDDON: No concern was expressed.
 24 They said that's what they were doing, overturning
 25 the Court of Appeal, and the decisions -- you know,

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1 instructing lower courts no longer to follow
 2 Ciba-Geigy, but they didn't express a concern about
 3 it. They just did it.
 4 MR. JOHNSTON: Please turn back to Tab 7.
 5 This is the judgment again, R-004, at paragraph 84.
 6 Here in this passage the Supreme Court is discussing
 7 the reasons of the Federal Court of Appeal, and the
 8 Federal Court of Appeal's reliance on the Ciba-Geigy
 9 case which you mentioned in your opening statement,
 10 and the court writes, if you follow down to the
 11 bottom, the large paragraph: "Moreover, on the facts
 12 of Ciba-Geigy itself, Thurlow CJ says, as quoted
 13 above, that [e]ven at the time it was made it was
 14 not improbable" -- the court inserts the inverse of
 15 that, i.e. it is probable -- "that it [the invention]
 16 would have been considered well founded" -- and the
 17 court inserts "i.e. a sound prediction."
 18 So the court there is reproducing the
 19 quote from Ciba-Geigy above and adding in
 20 interpretation of the meaning of Ciba-Geigy. You see
 21 this passage here?
 22 MR. REDDON: I see the passage. That was
 23 two questions. You gave your interpretation of it,
 24 then you asked whether I saw it. I see it. I don't
 25 agree necessarily with your interpretation.

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1 MR. JOHNSTON: The Supreme Court of
 2 Canada does not state here, or rather what the
 3 Supreme Court of Canada is stating here is that on
 4 the facts of Ciba-Geigy it was probable that the
 5 invention would have been considered well-founded,
 6 i.e. a sound prediction at the time the patent was
 7 filed. Is that what the Supreme Court of Canada is
 8 stating about Ciba-Geigy there?
 9 MR. REDDON: Well, Justice Binnie is
 10 quoting from Ciba-Geigy, taking out the double
 11 negatives, and making the point that the Chief
 12 Justice in Ciba-Geigy, although he propounded and
 13 spoke the rule that subsequent evidence is
 14 admissible, didn't need to do that on the facts of
 15 that case. So he's basically saying the laws
 16 articulated in Ciba-Geigy may be obiter -- may be
 17 obiter -- because it may be that it was valid anyway.
 18 MR. JOHNSTON: In your Expert Report at
 19 page 2, paragraph 4, you state: "However, it is
 20 only" --
 21 MR. REDDON: Can you give me the page?
 22 MR. JOHNSTON: Sorry. Your Expert
 23 Report, page 2, paragraph 4. You state, "However, it
 24 is only in recent years that the courts have scoured
 25 the patent disclosure to find promises of utility,

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1 even where unstated, that the patentee must
 2 demonstrate or soundly predict to work."
 3 Now, is "scouring the patent" a legal
 4 term in Canadian law?
 5 MR. REDDON: That's a term that I am only
 6 aware of appearing in three judgments of the Federal
 7 Court. It's commonly used in argument by counsel to
 8 refer to exactly the kind of reading of patents that
 9 I'm talking about here. It's not what you -- I don't
 10 know what you mean by "legal" term but it's not at
 11 all infrequently used, and it's been used by three
 12 judges of the court that I'm aware of to describe
 13 undue searching through the disclosure of a patent to
 14 achieve a certain result.
 15 MR. JOHNSTON: And in those three
 16 instances that you recall, was it being invoked by
 17 the court in the sense that the court was saying we
 18 are not supposed to scour the patent for passages to
 19 construe as promises?
 20 MR. REDDON: I can't -- I can't answer
 21 that question from memory. I just know that it's a
 22 commonly used expression.
 23 MR. JOHNSTON: Did the court in any of
 24 those instances embark on a section of its judgment
 25 entitled "Scouring the patent"?

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1 MR. REDDON: Never. And the three
2 instances that I can recall weren't in this exact
3 context either.
4 MR. JOHNSTON: In the immediately
5 following paragraph of your Expert Report,
6 paragraph 5, you note that, "Under the new approach,
7 counsel for generic companies scour patents for
8 statements which appear difficult to support
9 (especially by evidence available at the date of
10 filing the patent), and assert that those statements
11 are promises. If counsel for the generic company,
12 with the assistance of expert reports, can convince
13 the court to accept that there is some promise, the
14 patent may be held invalid..."
15 So in paragraph 5 of your Expert
16 Report -- well, in paragraph 4 of your Expert Report
17 you say that it's the courts that have scoured the
18 patent and in paragraph 5 of your Expert Report you
19 say it is the generic companies that scour the
20 patents and attempt to convince the court. So who is
21 scouring the patents, Mr. Reddon?
22 MR. REDDON: As I said in my opening
23 statement, the way all litigation works, the lawyers
24 put the case together, they present it to the court,
25 they lead the court through the approach that they

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1 want, and the court adopts the approach that is most
2 attractive to it, and if only metaphorically when the
3 court adopts the approach of the generic, which is
4 based on scouring, the court's adopting that
5 approach.
6 I said in my opening, and it's true, that
7 the lawyers of course lead, but our Federal Court is
8 very rigorous and I believe that, when they adopt an
9 approach that's based on scouring, they are owning
10 that approach and taking it as their own. So if it
11 was misleading or something in my report to attribute
12 it to the court, I'm happy to talk about this more,
13 but I think it's quite clear that lawyers drive it at
14 first instance; then the courts either adopt it or
15 reject it, say I'm not going to engage in the
16 scouring; and then they give their opinions which, in
17 my view, are adopting the lead of the lawyer on the
18 side that they propose to rule for.
19 I don't know if that helps you or not,
20 but that's what I meant to convey in my report and I
21 think it's an accurate depiction of how cases get
22 tried and decided in Canada.
23 MR. JOHNSTON: When a generic company
24 engages in this kind of practice, that is a key
25 consideration that your client will have to respond

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1 to in the litigation. It becomes a key issue in the
2 litigation.
3 MR. REDDON: It very often does.
4 MR. JOHNSTON: And when this becomes a
5 key issue in the litigation, your client will equally
6 have to look at the disclosure, retain expert
7 evidence on how that disclosure should be read, and
8 try to convince the court of its interpretation of
9 what the disclosure says.
10 MR. REDDON: Right. That whole dance is
11 new since 2005 but yes, that's what it has now
12 become.
13 MR. JOHNSTON: A common issue in patent
14 litigation that you would face, as well as any of the
15 utility issues, could be whether the invention was
16 obvious or anticipated. Is that right?
17 MR. REDDON: Can you just repeat the
18 preamble?
19 MR. JOHNSTON: A common issue in patent
20 litigation that you face is whether an invention was
21 obvious or anticipated.
22 MR. REDDON: Common.
23 MR. JOHNSTON: And, to answer these
24 questions, the court may need to identify the
25 inventive concept of the invention?

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1 MR. REDDON: Not for anticipation. Yes,
2 for obviousness.
3 MR. JOHNSTON: That's a common issue that
4 would arise in the context of an obviousness
5 challenge?
6 MR. REDDON: It's a mandatory part of the
7 three-step test.
8 MR. JOHNSTON: And when that issue
9 arises, both --
10 MR. REDDON: Sorry. I hate to interrupt.
11 I apologize. It's a four-step test.
12 MR. JOHNSTON: When that issue arises,
13 both sides, the brand and the generic firm, will
14 introduce expert evidence on how a skilled reader
15 would understand the inventive concept. Is that
16 right?
17 MR. REDDON: Commonly but not always.
18 MR. JOHNSTON: Your view is that the
19 court ought to be assisted by expert evidence in
20 interpreting the inventive concept of the invention.
21 MR. REDDON: The law from the Supreme
22 Court of Canada in Whirlpool and in Free World Trust
23 mandates that the court read the patent, the
24 specification including primarily the claims, but
25 also the disclosure through, the eyes of a skilled

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1 person. And to that end, unless the court has the
2 expertise itself, which is not the case in the
3 Federal Court of Canada because we do not have
4 technical expert judges, it is necessary in most
5 cases for the court -- it's not my view that they
6 should, as you said in your question, it is necessary
7 for the court -- to consider expert evidence to
8 understand the words in the patent.
9 MR. JOHNSTON: In this process of
10 identifying the inventive concept, is it the case
11 that there may be advantages of the invention stated
12 in the disclosure that may be relevant to determining
13 what the inventive concept is?
14 MR. REDDON: It may be so, yes.
15 MR. JOHNSTON: And that the existence of
16 these advantages may, in fact, be what distinguishes
17 an obvious invention from a non-obvious invention?
18 MR. REDDON: Yes. I would put it
19 slightly differently. The flash, the inventive step,
20 the Eureka moment that gets you to those advantages,
21 may be inventive or not, depending on the case, and
22 it's that step that has to be judged against the
23 obviousness standard.
24 MR. JOHNSTON: Would you agree that there
25 have been pharmaceutical cases where generic

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1 pharmaceutical companies have argued that the
2 advantages of an invention stated in the disclosure
3 should not be considered in construing the inventive
4 concept.
5 MR. REDDON: There have been.
6 MR. JOHNSTON: They have argued that you
7 ought only to look to the claims when construing the
8 inventive concept.
9 MR. REDDON: There have been cases where
10 that was argued, yes.
11 MR. JOHNSTON: And, in those cases, the
12 brand pharmaceutical company has responded that
13 advantages stated in the disclosure can and should be
14 considered as part of the inventive concept?
15 MR. REDDON: There are cases where the
16 brand, the patent holder, has argued that the
17 achievement of those advantages is part of the
18 inventive step, the inventive concept.
19 MR. JOHNSTON: Please turn up tab 19.
20 R-485. This is a brief submitted by your law firm
21 with you as lead counsel indicated in the matter of
22 Allergan v Sandoz. If I could ask you to turn up
23 page 5, paragraph 20, you argued to the court that,
24 "The law is clear that the inventive concept need not
25 be readily discernible from the claims alone.

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1 Rather, the inventive concept in the claims is to be
2 understood based on a review of the patent as a
3 whole." Is that right?
4 MR. REDDON: That's definitely what was
5 written and it's definitely what is true and what we
6 argued, emphasis on "in the claims".
7 MR. JOHNSTON: If I could take you to
8 paragraphs 30 and 31, this provides a bit more
9 context for what the issue was here. Dr. Fechtner --
10 am I right he was an expert retained by your firm in
11 this matter?
12 MR. REDDON: He was.
13 MR. JOHNSTON: He offered in his opinion
14 that a person skilled in the art would construe the
15 claims of the '764 patent to include the improved
16 side effect profile as part of the inventive concept.
17 Then in the next paragraph we see
18 Sandoz's primary expert -- so the generic firm's
19 primary expert on this point -- "did not include the
20 improved side effect profile as part of the inventive
21 concept..."
22 MR. REDDON: I'm sorry. You can't leave
23 off the last words of the sentence.
24 MR. JOHNSTON: "inventive concept of the
25 claims."

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1 MR. REDDON: Yes.
2 MR. JOHNSTON: "Dr. Jampel explained
3 during cross-examination that if the inventive
4 concept was not explicitly mentioned in the claims he
5 did not include it as part of the inventive concept.
6 As explained above, Dr. Jampel's approach is wrong
7 and renders his opinion on this issue irrelevant."
8 So in reading these passages, is this, in
9 fact, an example of a case in which you represented a
10 brand pharmaceutical company that wished to identify
11 an advantage in the disclosure as part of the
12 inventive concept, and in which the generic
13 pharmaceutical company argued that there should be no
14 regard to the disclosure in construing the inventive
15 concept.
16 MR. REDDON: So this is the case that I
17 spoke about in my presentation, the so-called
18 Allergan case, in which we definitely submitted to
19 the court that the invention described in the
20 disclosure was a big deal, an important and large
21 invention, and the debate then was whether or not the
22 claims being silent, being just the bare composition,
23 should be construed to include that as part of the
24 inventive concept of the claims, and that was a
25 debate in that case and the court held that the

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1 claims properly construed included the invention
2 described in the disclosure, on the basis that that's
3 what we argued and that's what the court accepted,
4 and the Supreme Court had said in the Sanofi case
5 earlier that in the case of a bare -- where the claim
6 is just to a bare composition, you have to look to
7 the disclosure to ascertain the inventive concept.
8 So that's what happened in that case.
9 MR. JOHNSTON: For clarity, if you could
10 please answer, perhaps I'll just read back the
11 question which I asked so that I can be clear on your
12 answer.
13 In reading these passages, is this in
14 fact an example of a case in which you represented a
15 brand pharmaceutical company that wished to identify
16 an advantage in the disclosure as part of the
17 inventive concept, and in which the generic
18 pharmaceutical company argued there should be no
19 regard to the disclosure in construing the inventive
20 promise?
21 MR. REDDON: Yes, I acted for brand.
22 Yes, the generic argued that there should be no
23 reference to the disclosure. So that's your first
24 and third question.
25 Your second question is whether I argued

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1 that an advantage in the disclosure should be what?
2 MR. JOHNSTON: Should be understood as
3 part of the inventive concept.
4 MR. REDDON: Yes.
5 MR. JOHNSTON: Now, sometimes both the
6 utility and obviousness issues will be at play in a
7 single patent case, so obviousness and the promise of
8 the patent may be at issue in a single case. Is that
9 correct?
10 MR. REDDON: Correct.
11 MR. JOHNSTON: And in these types of
12 cases, in your experience, have brand pharmaceutical
13 companies argued that the advantages from the
14 disclosure should be considered as part of the
15 inventive concept but they should not be considered
16 promises of utility?
17 MR. REDDON: I need to go back to the
18 answer I had already gave you, which is that the
19 argument is really that the achievement of that
20 advantage is the invention, but subject to that --
21 like the inventive leap to get there is the
22 invention, but subject to that refinement of your
23 language I would otherwise say yes to your question.
24 MR. JOHNSTON: Please turn up tab 2,
25 C-353, page 24, paragraph 59. This is the Alcon v

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1 Cobalt Federal Court decision in 2014. It provides
2 an example of what we're talking about. I'll read
3 two passages before I ask you a question about the
4 decision. In paragraph 59 the court states, "In
5 essence, Alcon argues that for the purposes of
6 obviousness, the inventive concept includes the
7 teaching that the excluded excipients do not enhance
8 the physical stability of the solution, but for the
9 purposes of utility, there is no such promise of
10 non-enhancement."
11 The court deals with this argument
12 further at paragraph 63 on page 26. It states in the
13 last sentence, "I find it incongruous in the context
14 of this patent to argue that the inventive concept is
15 something different from the promise made in the
16 patent and, therefore, accept the position of cobalt
17 on this point."
18 This is the type of reasoning which you
19 described in your direct testimony as illogical?
20 MR. REDDON: No. Mr. Dimock's statement
21 was illogical. This reasoning, for one reason, is
22 not illogical. It's because of Justice Gleason's
23 reference in the third last line of Paragraph 63 in
24 the context of this patent. What I said when I was
25 saying that Mr. Dimock's assertion was not logical is

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1 that the step to get to the invention, as opposed to
2 the utility, are separate different things. And what
3 I said, and say again, is in Allergan we persuaded
4 the court that there was a big important invention,
5 but in the context of the Allergan patent there was
6 no promise of any particular result that couldn't be
7 demonstrated at the date of filing.
8 Then this case comes along and Justice
9 Gleason says in the context of this patent you can't
10 argue that there's no promise, so it's not a question
11 of law to look at the first case where there's one
12 patent and one resultant second case where there's a
13 different patent and a different result, and say that
14 there's a logic or illogic. The patents are
15 different. The patent in front of Justice Gleason
16 had a promise, or was implied to have a promise, and
17 the Chief Justice didn't find such a promise in the
18 Allergan case that we did, nor did Justice O'Reilly
19 in the pair of Lumigan cases he decided after this
20 one -- sorry, after the Allergan one. So I don't
21 think the illogic in Mr. Dimock's proposition is the
22 same as the difference between the outcome in
23 Allergan and the outcome that Justice Gleason arrived
24 at here. It's apples and oranges.
25 MR. JOHNSTON: You consider Justice

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1 Gleason's comment here to be illogical proposition?
 2 MR. REDDON: Well, I haven't studied the
 3 patent, and I don't know why Justice Gleason thought
 4 it was incongruous in the context of that patent not
 5 to find a promise.
 6 MR. JOHNSTON: But your general
 7 proposition, your general view, is that, under
 8 Canadian law, a brand pharmaceutical company should
 9 be able to have the benefit of advantages stated in
 10 the disclosure to overcome non-obviousness but that
 11 it should not be held to those advantages under
 12 utility requirement?
 13 MR. REDDON: Let me be clear about
 14 timing. We're talking about under the new rules,
 15 because this was never a conversation that even
 16 existed before the change in the law. So are we only
 17 talking about presently under the new regime?
 18 MR. JOHNSTON: Under current Canadian
 19 law.
 20 MR. REDDON: Okay. It's not a question
 21 of having the benefit of anything. The court has to
 22 construe the inventive concept to find out what the
 23 leap was, and under the new regime has to imply --
 24 decide whether there's a promise present. And what
 25 is illogical and what Justice Gleason did not do here

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1 is say the two have to be the same, or that there's
 2 an unfairness in a patent that has a large invention
 3 and a small promise. That is not what Justice
 4 Gleason is doing here. That's what's illogical.
 5 It's all, of course, new since the change in the law.
 6 MR. JOHNSTON: I don't have any further
 7 questions.
 8 THE PRESIDENT: Thank you. Ms. Wagner?
 9 MS. WAGNER: I have no redirect.
 10 **QUESTIONS BY THE ARBITRAL TRIBUNAL**
 11 THE PRESIDENT: Mr. Reddon, you have
 12 testified on the basis of your practice, and you have
 13 testified that there was what you call a sea change
 14 as of 2002 in your practice. Could you explain
 15 actually the reasons, as you see them, for what you
 16 call a sea change? Were there policy reasons or
 17 other reasons involved?
 18 MR. REDDON: If I can just clarify the
 19 question --
 20 THE PRESIDENT: I'll ask the question
 21 again.
 22 MR. REDDON: I only want to ask you,
 23 Mr. President, is it important that you said 2002,
 24 because it was three changes at different times.
 25 THE PRESIDENT: But it started in 2002, I

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1 understand. That's your point of departure? Or you
 2 started in another year?
 3 MR. REDDON: I think in 2005.
 4 THE PRESIDENT: Let's then take 2005.
 5 MR. REDDON: Which was step 2, and then
 6 it really went off the rails in 2008, but ...
 7 THE PRESIDENT: Let's take 2005. You
 8 call it a sea change, correct?
 9 MR. REDDON: I know I heard Professor
 10 Siebrasse say that. I'm not sure I used that word.
 11 I know it was a big, radical change.
 12 THE PRESIDENT: Okay, big, radical
 13 change. What is, according to you, the reasons for
 14 this big, radical change? Is it policy reasons?
 15 Other reasons?
 16 MR. REDDON: I think -- my opinion, based
 17 upon being there and reading the cases, is that the
 18 change in 2002 in the AZT case was motivated by
 19 policy, and I think there's a real debate about
 20 whether it was a good or bad policy but there's no
 21 debate it was a change.
 22 THE PRESIDENT: Which policy was that?
 23 MR. REDDON: It was the one that my
 24 friend -- that counsel for Canada asked me about,
 25 where Justice Binnie said that the court wanted to

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1 constrain the availability of patents higher
 2 upstream, I think was the discussion, about when in
 3 the invention process the Supreme Court wanted to
 4 allow people to apply for patents.
 5 THE PRESIDENT: And that policy didn't
 6 exist before?
 7 MR. REDDON: I think the policy -- it
 8 didn't exist in the law. I think academics would
 9 have debated and economists and legislators would
 10 have debated, but there was no implementation of that
 11 policy in the law until that time.
 12 THE PRESIDENT: In the case law, you
 13 mean?
 14 MR. REDDON: Or in the statute law.
 15 THE PRESIDENT: Which statute was
 16 changed?
 17 MR. REDDON: No statute was changed.
 18 THE PRESIDENT: So it was a change in
 19 case law?
 20 MR. REDDON: Correct. The one in 2005 I
 21 can't think of a policy basis for it, and the one in
 22 2008, the same answer.
 23 THE PRESIDENT: So you have no answer
 24 actually for the change in 2005 and 2008?
 25 MR. REDDON: I can't explain what

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1 motivated the court in terms of policy.
2 THE PRESIDENT: But there was a change,
3 according to you?
4 MR. REDDON: Definitely.
5 THE PRESIDENT: Is it also your -- you
6 are young in the practice, if I may call it that way,
7 in the sense that you started somewhere around 2000,
8 with this IP practice?
9 MR. REDDON: I started almost full-time
10 patent litigation in 2000 or so.
11 THE PRESIDENT: So comparing what,
12 according to you, is pre-- or prior -- law, as they
13 call it, you have little to base yourself on as far
14 as practice is concerned, because it is two years
15 basically?
16 MR. REDDON: In terms of being there as
17 the decisions came out, true. I don't have many
18 peers who were there in 1949 when Dr. Fox came out,
19 but I don't entirely agree, Mr. President, that my
20 practice experience doesn't make me fully aware of
21 and familiar with and comfortable with the case law
22 as it stood in 2000. I had a very, very high level
23 understanding, a very detailed, very high functional
24 understanding of that within a year of two of
25 becoming so immersed as I have been in patent law.

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1 So the historical law I knew early in the 2000s as
2 well as I know it today.
3 THE PRESIDENT: Okay. Thank you.
4 MR. BORN: I'd like to follow up on the
5 Chairman's questions.
6 I'm not a Canadian patent lawyer, not a
7 Canadian lawyer at all, so if my questions are
8 ill-informed, bear with me.
9 We've been shown -- and I think you were
10 in the room for at least part of this -- various
11 sections from the Consolboard decision, from the Fox
12 treatise, from Henderson's head notes. There are in
13 each of those passages that look a lot like what I
14 take to be the promise of the patent doctrine or
15 rule. I'm struggling with, I'm trying to understand,
16 why that is said not, in fact, to have been of any
17 importance or relevance. I'm not saying it wasn't.
18 I take the Claimant's case to be that those
19 statements can't be taken at face value, or for
20 various reasons didn't have real relevance or
21 materiality, and it would be helpful for me, at
22 least, if you could address that from the
23 practitioner's standpoint?
24 MR. REDDON: Yes. So unlike what the
25 Supreme Court and the law professors and all of the

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1 people smarter than me do by way of analysis, the
2 trial lawyer, the practitioner, has to take those
3 kinds of statements and live with them, as if a judge
4 is some day going to apply them, even though it had
5 never happened. And the reason I think it didn't
6 happen, from a practitioner's point of view, is the
7 second half of that Consolboard statement, after the
8 "or", properly understood as it was understood
9 because of the word "specification" and its meaning
10 in Canadian patent law -- and I just want to make an
11 aside -- that was true in Fox and in Hayhurst and in
12 all the articles that you've seen. It's not the
13 promise of the patent. It's the promise of the
14 specification, which means claims in light of the
15 disclosure with the claims being paramount.
16 As a practitioner you have to contend
17 with the words after the "or" and be ready to deal
18 with them if it ever is applied, and what
19 practitioners thought was that you needed to show
20 some promise in the claims. Use of latanoprost to
21 treat glaucoma has to treat glaucoma. Use of SMS to
22 distribute fabric softener in the dryer -- you can't
23 go to the spec and pull out a promise that it won't
24 stain.
25 I think the reason it didn't come up is

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1 because at its highest practitioners who felt they
2 had to contend with the words after the "or" knew it
3 was really a reference to promises in the claims.
4 In my report, and I think I'm very clear,
5 it's not so much suddenly we're going to take
6 promises. It's we're going to stop looking in the
7 claims for promises and start pulling them out of the
8 disclosure or -- and I say this with the greatest
9 respect to the court -- sometimes out of thin air on
10 the basis of expert opinion.
11 So the practitioners weren't really in
12 the academic world of the second half of the
13 Consolboard statement because it really did point us
14 to the claims, and the courts and filers to the
15 claims, and there weren't many promises in the claims
16 that were problematic.
17 I don't know if that's helpful but it
18 really arose when we changed from the claims to the
19 disclosure, and that's the way practitioners see it
20 and I think it was, in fact, on the ground the way I
21 see it.
22 MR. BORN: No, it is helpful. Thank you.
23 SIR DANIEL BETHLEHEM: I've also got a
24 couple of questions which just follow on from those
25 of our President.

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1 The words you used I think which you came
2 back to were to say that there was a radical change
3 that had been effected, and in response to the
4 question from our President, who referred to 2002,
5 you said in fact there were three points of change,
6 2002, 2005, 2008.
7 Is the radical departure, the radical
8 effect that you identify, a consequence, in your
9 view, of the aggregation of all of those three
10 developments, or does the radical departure arise at
11 any particular point in time?
12 MR. REDDON: My opinion, based on my
13 experience and what I know of other practices and
14 cases, is that it really -- if I can use the word --
15 started to bite in 2005, but my personal experience
16 with it really only saw the cases start to hit after
17 Raloxifene in 2008. That's when my practice went
18 from zero of these cases to half.
19 So I think giving opinion about everybody
20 else's practice as I've seen it through the cases and
21 just my experience, I think the problem really began
22 in '05 at its worst. I've tried to distinguish
23 between my own experience and the opinions I'm giving
24 you about the profession at large but, in my own
25 experience, it really bit, if I can use that

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1 expression, in 2008.
2 SIR DANIEL BETHLEHEM: From what you've
3 just said, it sounds as if you're saying to us that
4 it was a common law process which began with AZT in
5 2002, but you began to see significant effects on
6 your practice in 2005 and then subsequently after
7 Raloxifene in 2008.
8 MR. REDDON: To be fair, I don't
9 necessarily agree with the idea it was a common law
10 evolution. These decisions weren't based on the
11 evolution of the common law; these were declarations
12 of new rules. But aside from that, on which we could
13 agree or disagree, the chronology that you've stated
14 is, indeed, my experience, yes.
15 SIR DANIEL BETHLEHEM: In your choice of
16 the word "radical" effect and in your response to the
17 President's question around 2002 where you said it
18 was, in your view, influenced by a policy
19 appreciation, are you intending to convey to us that
20 you thought that, whether taken individually or
21 together, that these developments amounted to an
22 egregious departure from previous legal principle, or
23 are you conveying that it was a reasoned development
24 of the law but one which nonetheless brought about a
25 change?

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1 MR. REDDON: I don't feel qualified to
2 label anything here "egregious." I chose the word
3 "radical" carefully because it was big, and it
4 completely changed the practice in these cases.
5 Whether it's reasoned or not -- I think you asked
6 whether it was reasoned -- there is reasoning to
7 support it. There is very good policy reasoning
8 against it. I wasn't retained and I haven't prepared
9 an opinion about which is right -- I have an opinion
10 but it is not in my Report and it's not one that I'm
11 necessarily here to share, but it was a change. A
12 big change. And unpredicted.
13 Beyond that, if you're asking whether
14 I agree with the reasoning offered, I'm happy to
15 answer that. I'll say I don't but...
16 SIR DANIEL BETHLEHEM: One last question.
17 You said "unpredicted." You also in your testimony I
18 think came back to the point about the function of
19 the court to be responsive to the arguments that were
20 put forward by counsel. So in these cases presumably
21 someone predicted in the sense that they put the
22 arguments before the court and wanted to pull the
23 court in a particular direction, so it was not the
24 court -- I think you also used the word -- sort of
25 inventing, taking out of thin air. Is that correct?

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1 These arguments were to be put to the court.
2 MR. REDDON: Factually and historically
3 the arguments were put to the court in every case
4 where the big changes were made by Apotex, a litigant
5 who was trying to make this into the law of Canada,
6 to my personal observation.
7 I apologize, but can I go back to your
8 previous question about reasoning? I don't think
9 there was any reasoned basis for the change about
10 disclosure, the Raloxifene change. That was just an
11 assertion. So the first two reasons were offered
12 with which I don't agree, but for the new rule in
13 Raloxifene it was just asserted by Justice Hughes and
14 affirmed in the Court of Appeal, in my opinion.
15 SIR DANIEL BETHLEHEM: Do I remember
16 correctly -- I'm just not remembering correctly -- in
17 your response to the question from our President, you
18 declined to characterize the 2008 Raloxifene change
19 as "policy driven."
20 MR. REDDON: Yes. I think I can't
21 conceive of a policy behind it, nor is one
22 articulated.
23 SIR DANIEL BETHLEHEM: Thank you very
24 much.
25 THE PRESIDENT: If the policy was,

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1 according to you, to restrain the upstream patents,
2 as you referred to them --
3 MR. REDDON: The 2002 change?
4 THE PRESIDENT: 2002, exactly -- did they
5 succeed in it?
6 MR. REDDON: I don't have data to answer
7 that question. I'm sorry.
8 THE PRESIDENT: If you say the policy was
9 to restrain upstream patents, does that mean that the
10 mainstream or midstream, however you would describe
11 the patents, remained unaffected?
12 MR. REDDON: I don't think there's any
13 basis to conclude that. The articulated policy to
14 effectively require inventors to wait longer before
15 they file, to file further downstream, I don't think
16 is a good policy. I don't have any reason to think
17 it has succeeded or failed.
18 THE PRESIDENT: Let's put it differently.
19 Perhaps in your practice, trying to target the
20 upstream patent filings, the side effect is that you
21 also affect the mainstream?
22 MR. REDDON: That has been the effect.
23 THE PRESIDENT: That is what I understood
24 your testimony was. Okay. Any follow-up questions
25 by the Claimant?

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1 MS. WAGNER: No follow-up, thank you.
2 MR. JOHNSTON: No follow-up.
3 THE PRESIDENT: Thank you, Mr. Reddon,
4 for testifying as an expert witness. You are now
5 released and excused.
6 Five minutes changeover for the next
7 witness. Expert, I should say.
8 *(Recess taken)*
9 MICHAEL GILLEN
10 THE PRESIDENT: Good afternoon. Would
11 you please state your full name for the record?
12 DR. GILLEN: Yes. Michael Gillen.
13 THE PRESIDENT: Dr. Gillen, you appear as
14 a fact witness for the Respondent. If any question
15 is unclear to you, either because of language or for
16 any other reason, please do seek a clarification
17 because, if you don't do so, the Tribunal will assume
18 that you've understood the question and that your
19 answer corresponds to the question.
20 DR. GILLEN: Okay.
21 THE PRESIDENT: Dr. Gillen, you will
22 appreciate that testifying, be it before a court or
23 an arbitral tribunal, is a very serious matter. In
24 that connection, the Tribunal expects you to give the
25 declaration, the text of which is in front of you.

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1 DR. GILLEN: Yes. I solemnly declare
2 upon my honor and conscience that I shall speak the
3 truth, the whole truth, and nothing but the truth.
4 THE PRESIDENT: Thank you. I assume you
5 have your two witness statements in front of you?
6 DR. GILLEN: Yes, I do.
7 THE PRESIDENT: Could you go to your
8 first witness statement dated January 26, 2015?
9 DR. GILLEN: Yes.
10 THE PRESIDENT: If you go to page 22,
11 please confirm for the record that the signature
12 appearing above your name is your signature.
13 DR. GILLEN: Yes, that is my signature.
14 THE PRESIDENT: Could you please go to
15 the second statement, that is December 7, 2015,
16 page 12. Above your name, is that your signature?
17 DR. GILLEN: Yes, it is.
18 THE PRESIDENT: Dr. Gillen, is there any
19 correction you wish to make to your statements?
20 DR. GILLEN: Not at this time, no.
21 THE PRESIDENT: Thank you. Ms. Zeman,
22 please proceed with the direct.
23 **DIRECT EXAMINATION**
24 MS. ZEMAN: Good afternoon, Dr. Gillen.
25 DR. GILLEN: Good afternoon.

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1 MS. ZEMAN: Please proceed with your
2 presentation.
3 PRESENTATION BY DR. GILLEN
4 DR. GILLEN: I've been asked to make a
5 short presentation on some of the topics that are in
6 my witness statement but, before I do, I'd just like
7 to, for the Tribunal and others here in the room,
8 give a little bit about my background.
9 I'm a retired public servant from Canada,
10 having spent more than 25 years in the Canadian
11 Patent Office. I have a Ph.D. in Bioorganic
12 Chemistry from McGill University, Montreal, Canada.
13 After graduation I worked for a number of years in a
14 small biotech start-up company as a chemist and with
15 the National Research Council of Canada for five
16 years as a molecular biologist doing cancer research.
17 In 1988 I came to CIPO, as it's called
18 today. It wasn't CIPO in those days but the Patent
19 Office. For two years I underwent patent examiner
20 training, both classroom training as well as
21 on-the-job training with a senior patent examiner.
22 I was promoted to what's called the
23 Working Level in 1990, and two years later I was
24 promoted to senior patent examiner. From 1992 until
25 2002 I worked as a senior patent examiner within the

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1 chemical division of CIPO. During that time I had an
 2 opportunity to train a number of newer examiners as
 3 an on-the-job trainer.
 4 In 2002 I went to the Patent Appeal
 5 Board, so I left the patent branch of CIPO. I became
 6 a member of the Patent Appeal Board and the following
 7 year became the chair of that Board, and I held that
 8 position until 2006. The Patent Appeal Board at CIPO
 9 hears cases that have come from patent branches where
 10 examiners have refused a patent application for
 11 whatever reason, or rejected, rather.
 12 The Patent Appeal Board will hold
 13 hearings and make recommendations to the Commissioner
 14 as to whether those refusals should be upheld or not.
 15 One of the duties of the chair of the
 16 Patent Appeal Board is to sit as a member of the
 17 Patent Issues Working Group. This is a group of
 18 senior people within CIPO, within the patent branches
 19 of CIPO, and one of their duties is to oversee the
 20 improvements to and additions to MOPOP, the Manual Of
 21 Patent Office Practice.
 22 In 2006 I returned to patent branch as
 23 the division chief of the newly created biotechnology
 24 division, which was carved away from the chemical
 25 division because of the size of the chemical division

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1 at the time, and I held that position until I retired
 2 in 2014.
 3 There's five topics that I would like to
 4 address today that are found in my witness statement:
 5 The role of the Patent Office and the courts, the
 6 Manual Of Patent Office Practice, or MOPOP as we call
 7 it at CIPO, the nature of utility practice at the
 8 Canadian Patent Office in Canada, the olanzapine and
 9 atomoxetine patents (the subject of this hearing) and
 10 a little bit about the Patent Cooperation Treaty.
 11 First the role of the Patent Office. The
 12 Patent Office responsibility is mostly as an
 13 administrative body. Patent applications are filed;
 14 they are processed; and examiners who have some
 15 training in science or engineering examine those
 16 applications.
 17 The examination is for compliance with
 18 the Patent Act and the Patent Rules, so inventions
 19 must be new, they must be non-obvious, they must be
 20 useful, there must be patentable subject matter and
 21 so forth.
 22 Examiners do not draft patent
 23 applications; they rely on what the applicant has put
 24 in the application to carry out their examination.
 25 They, of course, also look at the prior art to

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1 determine if the invention is new and non-obvious,
 2 and they also rely upon their own skill and knowledge
 3 in the field in which they have training to carry out
 4 their examination duties.
 5 Examiners do not carry out experiments,
 6 and certainly in the biotechnology and chemical areas
 7 don't request samples. The Patent Office is not
 8 equipped to handle samples, nor to test samples, nor
 9 to carry out any kinds of experiments, so examiners
 10 depend upon what the applicant has said in their
 11 application and take those statements mostly at face
 12 value -- it would depend, of course -- but for the
 13 most part they rely on what the applicant has told
 14 them in the patent application.
 15 When an application complies with the Act
 16 and Rules, a patent is granted.
 17 The Office faces a number of systemic
 18 pressures and those pressures are not unique to CIPO.
 19 All patent offices face them. There are large
 20 numbers of applications and there never seems to be
 21 enough patent examiners. Examiners have literally
 22 hundreds of applications that they have to work on.
 23 When I joined the Office in the late '80s and into
 24 the early '90s there were about a hundred examiners
 25 at CIPO. CIPO has done its best to keep up with the

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1 increasing number of filings over the years. Today
 2 there are about 430 examiners working at CIPO.
 3 Nonetheless the examiner workloads are
 4 still quite high. When I joined the Office I had
 5 1500 applications to work on. Today examiners
 6 typically have several hundred applications to work
 7 on. Nonetheless, because of the number of
 8 applications and the number of examiners, examiners
 9 work under time constraints. They have goals and
 10 they have a limited amount of time in which they are
 11 to examine an application. Typically that's anywhere
 12 from four and a half to seven and a half hours
 13 depending on the subject matter of the application.
 14 On the other hand, it's a little
 15 different in the courts. The courts will often hear
 16 third-party challenges to a patent's validity after
 17 it has been granted by the Patent Office. These
 18 challenges are, for the most part, party-driven. The
 19 courts have more time and resources than does the
 20 Patent Office or does a patent examiner to look at
 21 these applications. They have the benefit of
 22 competing expert and fact evidence. Witnesses can
 23 come forward on both sides of a question before the
 24 court. The court operates very often in an
 25 adversarial context, which is quite different from

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1 what happens in the Patent Office. Whereas the
 2 Patent Office has to apply the Act and Rules as
 3 they've been interpreted by the courts, the courts
 4 will also do that but, in addition, the court will
 5 also be able to interpret the Act and Rules, and so
 6 we get interpretation of the Act and Rules from the
 7 courts that the Patent Office doesn't do.
 8 The second topic I want to address is the
 9 Manual of Patent Office Practice, or MOPOP. This is
 10 a high level overview of Patent Office practice. It
 11 is a reference tool. It is a guide. It's widely
 12 used by examiners and patent professionals but
 13 understood not to be a comprehensive statement of
 14 patent law in Canada. It is updated in response to
 15 changes in the law, to changes to interpretation of
 16 the law, the jurisprudence coming from the courts, as
 17 well as from stakeholders who have a desire from time
 18 to time to see the MOPOP be updated, or usually
 19 beefed up to have much more information than it might
 20 have today.
 21 Between revisions examiners rely on
 22 training sessions, practice notices, internal
 23 memos -- these kinds of things -- for an
 24 understanding of how the Office is interpreting the
 25 state of the law.

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1 Utility practice.
 2 Utility must be established at the time
 3 of filing. An invention must be complete when the
 4 patent application is filed.
 5 Utility is what the applicant will assert
 6 it to be in the application. That is how we, as
 7 examiners, approach the notion of utility.
 8 Applications are examined on the basis of the
 9 language employed by the applicant, including what
 10 the applicant says the invention will do.
 11 We often talk about a scintilla of
 12 utility, or something more, a particular utility. If
 13 an applicant does not attribute a particular utility
 14 to his invention, then a scintilla of utility is
 15 enough. If a particular utility is specified in the
 16 patent application, then this is the utility that the
 17 invention must have.
 18 A particular utility is often associated
 19 with selection patents or patent applications, as was
 20 the case with olanzapine, and for inventions that are
 21 directed to the new use of old compounds, as was the
 22 case with atomoxetine. The advantages of a selection
 23 over a genus (enhanced utility) or the specified new
 24 use of a known compound, form the basis of these
 25 types of inventions.

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1 I said a moment ago that an invention
 2 must be complete at the time of filing. It has to be
 3 new and non-obvious and it has to be useful. There's
 4 a couple of ways in which you can look at utility.
 5 One is that the utility has been demonstrated, and
 6 the other is that the utility of the invention is
 7 based on a sound prediction. Where an invention has
 8 been made and tested and does what the applicant says
 9 it will do, the utility is said to be demonstrated,
 10 and an examiner will detect that from reading the
 11 specification and there will normally be statements
 12 or assertions to that effect, that the invention has
 13 been tested and it does do what the applicant says it
 14 will do.
 15 Where an invention has not been fully
 16 tested at the time of filing -- and this is often the
 17 case with pharmaceutical or biotechnology
 18 inventions -- then the utility can be based on a
 19 sound prediction, and we have the notion of sound
 20 prediction from the Supreme Court in Canada from 1979
 21 in what's called the Monsanto case.
 22 For a prediction to be sound a patent
 23 specification must disclose a factual basis and a
 24 sound line of reasoning. We have those terms from
 25 the Apotex decision of the Supreme Court in 2002.

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1 But I would like to say that, prior to the Apotex
 2 decision, this same kind of information was what
 3 examiners looked for in a patent application where
 4 the utility was based on a sound prediction. Apotex
 5 gave us some terminology but it was the same kinds of
 6 information -- experiments done, results obtained and
 7 the applicant's reasoning as to how those experiments
 8 and results could soundly predict the utility of the
 9 invention -- those kinds of things in patent
 10 specifications were what examiners normally looked
 11 for.
 12 Post-filing evidence.
 13 Post-filing evidence of demonstrated
 14 utility that predates the filing date of an
 15 application can be submitted to the Patent Office to
 16 convince an examiner of the credibility of the
 17 demonstrated utility. This is a rare thing.
 18 Normally the examiner will look at assertions made in
 19 the patent application, and it will be clear that the
 20 invention has been tested and found to do what the
 21 applicant says it will do. But, if there's any doubt
 22 about that, the examiner could ask that the applicant
 23 supply some evidence results and whatnot where the
 24 utility was, in fact, demonstrated.
 25 This evidence is not added to the patent

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1 application, because it would be considered new
 2 matter; it is merely to help the examiner understand
 3 that, indeed, the utility has been demonstrated.
 4 Post-filing evidence that predates the
 5 filing date of an application where the utility is
 6 based on sound prediction is not acceptable to the
 7 office. Such evidence would be considered as new
 8 matter.
 9 Evidence to support the soundness of the
 10 predicted utility must be disclosed in the
 11 application at the time of filing. Now, that's not
 12 to say that, if an examiner questions the soundness
 13 of a prediction or even demonstrated utility, that an
 14 applicant cannot respond to an office action and show
 15 the examiner where in the application the soundness
 16 is or where in the application the demonstrated
 17 utility is mentioned. That's okay. You can do that.
 18 But you can't add anything to the application that
 19 isn't already there at the time of filing.
 20 I've been asked to look at the olanzapine
 21 and atomoxetine patents. After reviewing the files,
 22 I would have concluded that the utility was
 23 demonstrated. I looked at the patent specifications.
 24 I saw reference to studies, treatment in patients,
 25 clinical situations, and language such as "the

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1 compound ...shows marked superiority", "is
 2 effective". These kinds of positive statements would
 3 lead me, as an examiner, to conclude that, indeed,
 4 these inventions -- the utility of these inventions
 5 had been demonstrated, the compounds were made, and
 6 that, in fact, they were tested. Assumptions are
 7 applied in favor of the applicant during examination.
 8 As I said, the Patent Office is not in a position to
 9 test compounds or carry out experiments.
 10 Olanzapine is a selection from a known
 11 genus. The examiner would have looked for some
 12 disclosure of a special property for that compound
 13 relative to the genus. That's what makes a selection
 14 different from the genus. It has an unexpected
 15 property. And that property would have to be
 16 disclosed in the application. For atomoxetine, a
 17 known compound, the examiner would have looked for
 18 evidence of the new use of the compound in the
 19 application.
 20 Since these applications were granted by
 21 the office and no office actions were issued with any
 22 issues relating to utility, utility, I would
 23 conclude, was not an issue for the examiner at the
 24 time. And when I read through the applications, it
 25 wasn't an issue for me looking through the

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1 specifications.
 2 The Federal Court would not have applied
 3 the same assumptions as the Office. The Federal
 4 Court, as I said a few moments ago, has more time,
 5 more resources than does the Patent Office. The
 6 court can examine evidence not found in the patent
 7 specification. It can ask the applicant, or the
 8 patentee as the case may be, to provide evidence of
 9 the demonstrated utility or evidence to support the
 10 sound prediction, and the court can come to a
 11 different conclusion than did the patent examiner.
 12 Of course if utility cannot be
 13 demonstrated, as far as the court is concerned, then
 14 the court would look to see if the utility was, in
 15 fact, soundly predicted.
 16 Finally, just a few words about the
 17 Patent Cooperation Treaty.
 18 Canada became one of the contracting
 19 states in the Patent Cooperation Treaty in 1990.
 20 When we became a member of the PCT, this did not
 21 change our examination practice. We were receiving
 22 applications filed directly in Canada, and we also
 23 started to receive applications filed under the PCT.
 24 The PCT does not impose substantive patentability
 25 requirements. Instead, contracting states must

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1 comply with the PCT's form and contents requirements,
 2 so when you're filing a PCT application, there are
 3 generic categories of information that must be
 4 included -- a title, an abstract, the pages have to
 5 be a certain size, a certain font, this kind of
 6 thing.
 7 It's very formal in nature, and the form
 8 and content requirements do not go into the substance
 9 of the invention. In fact, PCT applications that are
 10 filed in Canada to obtain an international filing
 11 date are first looked at by non-technical clerical
 12 staff in the Patent Office to determine if they meet
 13 the form and contents requirements of the PCT.
 14 Once the application then becomes an
 15 international application and enters the national
 16 phase, it is examined like any other Canadian patent
 17 application. The substantive requirements for
 18 patentability are then assessed by a patent examiner.
 19 An application can meet the form and content
 20 requirements of the PCT but later on in the national
 21 phase be found not to meet the substantive
 22 requirements for patentability under Canadian law.
 23 That concludes my summary. I also have a
 24 slide here which I won't discuss but, just for the
 25 Tribunal's benefit, it's just to point out some of

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1 the divergences between the statement that I made and
2 the statement that Mr. Wilson provided to the
3 Tribunal.
4 Thank you.
5 THE PRESIDENT: Ms. Zeman, do you have
6 further questions?
7 MS. ZEMAN: We have no further questions.
8 MS. CHEEK: Mr. Dearden will be examining
9 Dr. Gillen.
10 THE PRESIDENT: Mr. Dearden, please
11 proceed with the cross-examination.
12 **CROSS-EXAMINATION ON BEHALF OF THE CLAIMANT**
13 MR. DEARDEN: Good afternoon.
14 DR. GILLEN: Good afternoon.
15 MR. DEARDEN: What's the weather like in
16 Ottawa?
17 DR. GILLEN: Not as warm as here.
18 THE PRESIDENT: Are you going to use the
19 180 estimated minutes?
20 MR. DEARDEN: No, but unfortunately I
21 can't tell you I'm going to be done by 6 pm.
22 THE PRESIDENT: That was actually
23 implicit in my question. Thank you. Please take
24 your time.
25 MR. DEARDEN: If you could find volume 1,

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1 Dr. Gillen and turn to Tab 1, C-410. That's an
2 extract of the CIPO website and you'll see in the
3 middle of the page, sir, that there's a statement,
4 "The Manual Of Patent Office Practice is maintained
5 to ensure that it reflects the latest development in
6 Canadian patent laws and practices."
7 Do you agree with that statement?
8 DR. GILLEN: I do not agree with the
9 statement. I see the statement. I think it's --
10 this is from the CIPO website from 2015 or '16. I'm
11 not sure. Certainly when I was working at the
12 Patent Office, it was our understanding that MOPOP
13 was only up-to-date on the day it was actually
14 published. That if jurisprudence came out the next
15 day or the next week or the next year, or the law
16 changed, that until the MOPOP was changed to reflect
17 that, the MOPOP would be out of date. I think the
18 Office makes every attempt to keep it up-to-date,
19 more so now, 2016, than it did 10 or 15 years ago.
20 But I wouldn't say that this is an accurate
21 statement. I think it's more wishful thinking on the
22 part of CIPO -- unless something has changed since I
23 left.
24 MR. DEARDEN: Let me put it another way,
25 sir. AZT decision comes out in 2002. That's what

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1 you were referring to as the Apotex decision.
2 DR. GILLEN: Yes.
3 MR. DEARDEN: We're calling it AZT. That
4 would be a late development in the Canadian patent
5 law, right? I'm giving you an example. AZT comes
6 out in 2002. You were there with CIPO at the
7 Patent Office. I take it there was many a meeting
8 about that particular decision?
9 DR. GILLEN: I suspect there was. I had
10 moved off to the Patent Appeal Board at the time,
11 2002, so I wasn't part of any meetings that would
12 have occurred within patent branch at that time. I
13 can't recall going to meetings, but I'm sure there
14 were meetings and I'm sure it was discussed within
15 the Office.
16 MR. DEARDEN: So would the goal of the
17 Office be to get something into MOPOP as fast as they
18 could to get the message out to the users of the
19 Office, like patent agents, about what the Office's
20 interpretation of AZT was?
21 DR. GILLEN: That would be the goal of
22 CIPO at the time, and it's the goal of CIPO today to
23 do that when those kinds of cases come up. It's not
24 always done as fast as we would like, and in fact, in
25 2002, that was a time when CIPO had started to hire

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1 patent examiners in large groups, groups of anywhere
2 from 10 to 15 examiners, and it was a time when most
3 of the people who -- at least around in the division
4 that I had come from, the chemical division -- were
5 either training new examiners, or they were in
6 training.
7 So there wasn't a lot of resources
8 available at that time to update MOPOP as quickly as
9 stakeholders and certainly the Office would have
10 liked. Efforts were made to do that, but it wasn't
11 always as quickly as we would have hoped.
12 MR. DEARDEN: Can you look at your second
13 statement, Dr. Gillen? I have it at Tab 30 of the
14 fourth binder. Paragraph 23. I'm looking at the
15 last sentence, sir. "Certain institutional goals
16 such as updating the MOPOP also fell somewhat behind
17 during this period," which is what you just
18 referenced, right?
19 DR. GILLEN: Yes.
20 MR. DEARDEN: "However, between MOPOP
21 updates the Patent Office was constantly putting
22 together training materials and holding briefing
23 meetings to discuss new developments in the law."
24 See that?
25 DR. GILLEN: Yes.

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1 MR. DEARDEN: What were the "new
2 developments in the law" that were being discussed?
3 DR. GILLEN: I'm sure the AZT decision
4 would have been one of those developments. As I
5 said, I wasn't working in the branch at the time, but
6 more than anything at that time CIPO was struggling
7 with computer-related inventions and business method
8 applications inventions, and there was a push
9 primarily from the electrical division within CIPO to
10 look at ways in which patentable subject matter in
11 those areas could be assessed. So a lot of the
12 effort at the time in the early 2000s at CIPO was
13 into how should we assess patentable subject matter,
14 and so the Office came up with things like form and
15 substance and contribution and inventive concept,
16 some things which, years later, actually CIPO was
17 told that that wasn't the proper approach to take.
18 So a lot of what was done with respect to
19 meetings and discussions in the early 2000s related
20 more to patentable subject matter.
21 MR. DEARDEN: You mentioned the AZT
22 decision. What was the new development arising out
23 of the AZT decision?
24 DR. GILLEN: Well, the AZT decision gave
25 us terminology. It gave us words like "sound line"

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1 and "factual basis." As I said in my statement and
2 in my presentation today, those were the kinds of
3 things that patent examiners were looking at prior to
4 the AZT decision.
5 MR. DEARDEN: Sir, I put it to you that
6 the Supreme Court of Canada gave you more than
7 terminology. They gave you a three-part test,
8 correct?
9 DR. GILLEN: There were three parts, yes.
10 MR. DEARDEN: It's a three-part test,
11 correct?
12 DR. GILLEN: Correct.
13 MR. DEARDEN: So that's more than
14 terminology?
15 DR. GILLEN: Well, it's a three-part test
16 but the terms -- as I said in my statement, examiners
17 were looking for the same kinds of information
18 disclosed in patent applications before AZT.
19 MR. DEARDEN: But you never saw that
20 three-part test in AZT before the AZT decision. Is
21 that fair?
22 DR. GILLEN: That's fair.
23 MR. DEARDEN: Still in your paragraph 23,
24 the last sentence, you say "between MOPOP updates".
25 So what MOPOP updates are you referring to? Like

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1 between 2000 and 2005, or 2005/2009 or 2009/2010?
2 DR. GILLEN: I would say I was referring
3 to in general. Not to any particular updates, but
4 generally at that time.
5 MR. DEARDEN: At what time?
6 DR. GILLEN: In the 2000s.
7 MR. DEARDEN: Well, those were the MOPOP
8 updates. You had one in 2005, you had one in 2009,
9 you had another one in 2010.
10 DR. GILLEN: Yes, that's correct.
11 MR. DEARDEN: So is that the "between
12 MOPOP updates" time periods?
13 DR. GILLEN: There was also a MOPOP
14 update, I believe, in 1996, and there was one in
15 1998.
16 MR. DEARDEN: One in 1990, too.
17 DR. GILLEN: And one in 1990.
18 MR. DEARDEN: But I'm talking about what
19 you're referring to in paragraph 23.
20 DR. GILLEN: Yes, I would say that is
21 more accurate, the 2000s.
22 MR. DEARDEN: Paragraph 24.
23 "Importantly, the fact that MOPOP was not updated
24 more regularly did not mean that the Office was
25 ignoring developments in the law. To the contrary,

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1 as I mentioned above, the AZT decision is a good
2 example. The case gave the words "factual basis" and
3 "sound line of reasoning" to previous inquiries that
4 had been made, and the Patent Office responded by
5 adopting that terminology in its assessment of
6 applications."
7 So do you have anything to add as to what
8 the development in the law was by AZT decision that
9 you're using as a good example in that paragraph?
10 DR. GILLEN: I'm sorry. Would you ask
11 that question again?
12 MR. DEARDEN: Yes. What was the
13 development in the law of the AZT decision that you
14 use as a good example in paragraph 24?
15 DR. GILLEN: Well, the AZT decision gave
16 us a three-part test and the terminology that we
17 would use in assessing whether or not a prediction
18 was sound. It didn't actually change, as I said,
19 what the examiners looked for in a patent
20 application; it gave us language that we could use
21 when we would discuss sound prediction or the absence
22 of sound prediction in an examiner's report.
23 MR. DEARDEN: Just so I'm clear,
24 Dr. Gillen, the Patent Office, and you when you were
25 there, you follow the law, correct? You don't create

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1 it?
2 DR. GILLEN: The Office is to follow the
3 law, yes, not to create the law.
4 MR. DEARDEN: Right. So if the
5 Patent Act is amended, you have to follow the
6 amendments to the Patent Act?
7 DR. GILLEN: That's correct.
8 MR. DEARDEN: If the Supreme Court of
9 Canada changes the law, you have to follow that
10 change in the law?
11 DR. GILLEN: That's correct.
12 MR. DEARDEN: You don't create tests for
13 utility, for instance. You follow what you're told
14 by Parliament and the courts, correct?
15 DR. GILLEN: That's correct.
16 MR. DEARDEN: And in the 2002 time
17 period -- I know your slides said in the '90s you had
18 about 100 examiners, in 2014 you had 400 examiners.
19 About how many examiners were in the office in 2002
20 when the AZT decision came out?
21 DR. GILLEN: About --
22 MR. DEARDEN: I know you're not supposed
23 to speculate because that's an awful term, but
24 speculate. How many examiners in 2002? Couple
25 hundred?

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1 DR. GILLEN: I'm going to speculate, and
2 I'm going to say yes, about a couple hundred. The
3 serious -- the big hirings in the Patent Office began
4 around the year 2000 when we were given approval to
5 hire. So I would say that yes, by 2002, 2003, there
6 were probably about 200 examiners working at CIPO.
7 MR. DEARDEN: And in your paragraph 24,
8 what are the previous inquiries that had been made
9 that you're referring to there? See that last
10 sentence?
11 DR. GILLEN: What I'm referring to there
12 is the same kinds of information that an examiner
13 would have looked for in assessing sound prediction
14 in a patent application. The kinds of things that
15 might have been raised in an examiner's action.
16 MR. DEARDEN: I'm not understanding.
17 Who's making these previous inquiries?
18 DR. GILLEN: Well, if there's a doubt as
19 to whether the prediction is demonstrated or, rather,
20 the utility is demonstrated or the prediction is
21 sound, it is the patent examiner, through an office
22 action, who would raise an objection to a particular
23 claim.
24 MR. DEARDEN: But you're saying the
25 Patent Office, which would be the patent examiner,

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1 responded. So I'm taking it that whoever made these
2 previous inquiries you're referring to is not coming
3 out of the Patent Office, it's coming into the
4 Patent Office. So who's making those inquiries?
5 DR. GILLEN: The patent examiner would be
6 making those inquiries of the applicant.
7 MR. DEARDEN: And what were those
8 previous inquiries asking about?
9 DR. GILLEN: Well, for example, if you're
10 talking about utility, the examiner -- if the
11 examiner didn't feel that the utility was soundly
12 predicted, for example, then the examiner would write
13 an office action objecting to a claim for lack of
14 utility, because there was no either demonstration or
15 sound prediction in the application for the utility
16 that the applicant was claiming. So the examiner
17 would draft what's called an office action, which is
18 a letter to the applicant. It would refer to
19 sections of the Act, and it would indicate that the
20 application was noncompliant with the Act or the
21 rules for whatever reason.
22 MR. DEARDEN: Then in that sentence
23 you're footnoting office actions in 2003 and 2004.
24 See that in footnote 35?
25 DR. GILLEN: Yes.

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1 MR. DEARDEN: And both of those office
2 actions cited the AZT Supreme Court of Canada
3 decision in 2002, correct?
4 DR. GILLEN: I don't have those in front
5 of me, but --
6 MR. DEARDEN: Actually, you do.
7 DR. GILLEN: I do somewhere.
8 MR. DEARDEN: You've actually got your
9 hand on -- it's tab 7 and 8.
10 DR. GILLEN: In the first binder?
11 MR. DEARDEN: Yes. But you know what,
12 I'm coming back to that later, so trust me, they do.
13 DR. GILLEN: Okay.
14 MR. DEARDEN: Actually, I'm coming to it
15 right now.
16 DR. GILLEN: Tab 7.
17 MR. DEARDEN: Tab 7. The way these are
18 set out is the patent applications are the first
19 pages, and after you see the end of the patent
20 application you'll find the office action. So what
21 you should have in Tab 7 after you get through about
22 16 pages is an October 23, 2003 office action,
23 correct?
24 DR. GILLEN: Yes, I see that.
25 MR. DEARDEN: And the first one here,

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1 2003, six paragraphs -- so the second paragraph from
2 the bottom on that first page claims 1-20 do not
3 comply with section 84 of the Patent Rules. See
4 that?
5 DR. GILLEN: Yes, I do.
6 MR. DEARDEN: What's noncompliance with
7 section 84 of the Patent Rules?
8 DR. GILLEN: The section that examiners
9 would normally use to argue that a claim was broader
10 in scope than what had been disclosed in the
11 application.
12 MR. DEARDEN: If you'll turn to Tab 14, I
13 have the rule 84 there. C-51. Look at the back of
14 the second page.
15 DR. GILLEN: Yes. Section 84, yes.
16 MR. DEARDEN: That says the claim shall
17 be clear and concise and shall be fully supported by
18 the description independently of any document
19 referred to in the description.
20 DR. GILLEN: That's correct.
21 MR. DEARDEN: Going back to Tab 7, so
22 this office action in 2003, after the examiner
23 informs the applicant that there's noncompliance with
24 rule 84, we have this sentence, "The description
25 fails to provide a sound line of reasoning for the

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1 utility claimed. The factual support described does
2 not lead to the conclusion that the subject matter of
3 those claims would have the predicted utility." And
4 then the AZT decision of the Supreme Court of Canada
5 in 2002 is cited as the basis for that finding.
6 DR. GILLEN: Yes.
7 MR. DEARDEN: The next office action
8 issued in 2004 is identical wording except for the
9 first sentence. So if you look at Tab 8 and again go
10 to the end of the patent. So probably another 25
11 pages in you'll find an October 7, 2004 office
12 action. You see that?
13 DR. GILLEN: Yes.
14 MR. DEARDEN: You go to page 5 of that
15 office action in 2004.
16 DR. GILLEN: Yes.
17 MR. DEARDEN: At the bottom of the page
18 the first sentence reads, "Claim 6 does not comply
19 with section 2 of the Patent Act. The description
20 fails to provide a sound line of reasoning for the
21 utility of olanzapine for treating inflammation. The
22 factual support described does not lead to the
23 conclusion that the subject matter of these claims
24 would have the predicted utility." And, again, the
25 AZT decision is cited as authority for the examiner

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1 making that finding, correct?
2 DR. GILLEN: Yes, I see that.
3 MR. DEARDEN: So what was the reason for
4 the change of noncompliance with rule 84 to section 2
5 of the Patent Act?
6 DR. GILLEN: At the time there was
7 discussions within the Patent Office as to how to
8 deal with claims that were broader in scope than what
9 was disclosed in the application. So traditionally
10 the Patent Office would have used rule 84 to argue
11 that a claim is broader in scope. With claims you
12 can make amendments. With the description or the
13 other parts of the specification, for the most part
14 you cannot. But with a claim, you can make a change.
15 So typically if a claim is broader in
16 scope, rule 84 was used to alert the applicant to
17 that fact and to ask the applicant to amend the
18 claim, to make the claim more narrow such that it was
19 the same scope as the description or the disclosure.
20 There was also some discussion about
21 claims that were so broad in scope that maybe another
22 way in which you could approach the claim was to say
23 okay, we'll use rule 84, the claim is too broad. We
24 might also be able to use section 2, that if the
25 claim was so broad, then some of the subject matter

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1 covered by the scope of that claim would not be --
2 either have a demonstrated utility or a utility that
3 was soundly predicted in the application.
4 So there was discussions at that time in
5 the office about what section of the rules, or the
6 act, should be used when dealing with claims of broad
7 scope. And it may be that that discussion is still
8 going on to this day. I don't know. The underlying
9 fact with both of these applications was that there's
10 a claim of broad scope. It's not a change in the
11 law. It's what section of the act or the rules
12 should be used in making the objection to the scope
13 of the claim.
14 MR. DEARDEN: So it was a change of
15 practice in deciding to switch from rule 84 to
16 section 2?
17 DR. GILLEN: It was a change in practice
18 in the sense that, yes, we would use rule 84 or we
19 would use rule 2 or we could use both of those. So
20 I'm not so sure it was actually a change in the
21 practice or whether it was just a development in the
22 practice. The underlying issue hadn't changed. In
23 fact, there was a time when examiners were also using
24 rule 84 and rule 2 at the same time. And the
25 discussion at the time was what should we be doing

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1 with respect to claims of broad scope. Should we be
 2 using rule 84, section 2 -- and some examiners were
 3 using section 27(3) of the Patent Act, which deals
 4 with the description, arguing that if the claim was
 5 too broad, there might also be a problem with the
 6 description because it didn't match the scope of the
 7 claim. And so I think when I was in the office, what
 8 I think had been decided was that in a first office
 9 action an examiner, if the claim was broad in scope,
 10 would use rule 84. If the applicant responded to the
 11 office action and argued that no, the claim was not
 12 too broad, then in fact what was claimed was what the
 13 applicant intended as their invention, then the
 14 examiner could look to the specification and say,
 15 okay, well, maybe if that's truly your invention,
 16 then you have a problem with the description because
 17 it doesn't describe all of that material under
 18 subsection 27(3). Or some of the material that's
 19 claimed doesn't have a utility that's either
 20 demonstrated or soundly predicted.
 21 MR. DEARDEN: So, sir, in the office
 22 action at Tab 7, which is R-383. Office action at
 23 Tab 8 -- or, rather the office action in Tab 7 is
 24 R-382. Office action at Tab 8 is R-383. The
 25 language that's used is identical except for the

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1 first sentence. Okay? That is "The description
 2 fails to provide a sound line of reasoning for the
 3 utility of olanzapine for treating inflammation. The
 4 factual support described does not lead to the
 5 conclusion that the subject matter of these claims
 6 would have the predicted utility." And then the AZT
 7 case is cited.
 8 So the language that talks about factual
 9 support described and line of reasoning and the
 10 Apotex versus Wellcome citation is identical, so that
 11 was worked on by somebody in the office to give the
 12 examiners that kind of language to put in objections,
 13 correct?
 14 DR. GILLEN: Well, I think what would
 15 have happened -- I can't speak for these particular
 16 examiners, but sometimes examiners will put something
 17 in a report that isn't correct. Reports are checked
 18 by section heads, but not every report and not every
 19 objection. So it may have been that an examiner
 20 thought, well, the way to go with claims of broad
 21 scope is to use rule 84, and if the issue is not only
 22 broad scope for subject matter but also for the
 23 utility of that subject matter, to cite the AZT
 24 decision. So that may have been why you have two
 25 office actions that look the same except there's a

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1 different section of the Act or rules that's referred
 2 to. But the underlying issue is the claim is too
 3 broad, and the utility of some of the subject matter
 4 that's covered by the scope of that claim is not
 5 soundly predicted.
 6 MR. DEARDEN: Sir, I might have asked a
 7 confusing question, so I apologize. Both of those
 8 paragraphs in those two office actions issued after
 9 AZT are using identical wording -- other than the
 10 first sentence and the drug they're referring to --
 11 by saying "The description fails to provide a sound
 12 line of reasoning for the utility" claimed. "The
 13 factual support described does not lead to the
 14 conclusion that the subject matter of these claims
 15 would have the predicted utility," cite Apotex versus
 16 Wellcome foundation 2002 SCC. The office had -- what
 17 do you call them, PERMs? Like standard wording that
 18 should be used?
 19 DR. GILLEN: Yes, there are PERMs, yes.
 20 MR. DEARDEN: And that's one of them,
 21 isn't it?
 22 DR. GILLEN: I think that is one of them.
 23 I don't know.
 24 MR. DEARDEN: Mr. President, this would
 25 be a convenient time to break. Thanks.

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1 THE PRESIDENT: Dr. Gillen, you are under
 2 testimony. It means you are not allowed to discuss
 3 this case with anyone.
 4 DR. GILLEN: Yes, I understand.
 5 THE PRESIDENT: Thank you. We'll see
 6 each other tomorrow at 9:00. Thank you.
 7 (Hearing adjourned at 6:04 p.m.)
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<p>DR. GILLEN: [63] 917/11 917/19 917/25 918/5 918/8 918/12 918/16 918/19 918/24 919/3 932/13 932/16 933/7 934/1 934/8 934/20 935/18 935/24 936/2 936/23 937/8 937/11 937/14 937/21 938/1 938/5 938/9 938/12 938/16 938/19 939/9 939/14 940/1 940/6 940/10 940/14 940/20 940/25 941/10 941/17 942/4 942/8 942/24</p>	<p>943/3 943/6 943/9 943/12 943/15 943/23 944/4 944/7 944/14 944/19 945/5 945/12 945/15 946/1 946/5 947/16 949/13 950/18 950/21 951/3 MR. BORN: [19] 751/1 751/12 751/16 751/22 753/5 755/15 757/7 757/17 758/7 763/9 763/21 764/15 808/1 808/18 808/25 809/20 810/8 909/3 911/21 MR. DEARDEN: [66] 767/14</p>	<p>767/25 774/17 774/23 775/1 776/12 777/19 777/23 778/24 782/5 807/21 812/5 932/12 932/14 932/19 932/24 933/23 934/2 934/15 935/11 935/19 935/25 936/20 937/4 937/9 937/12 937/18 937/22 938/4 938/6 938/10 938/15 938/17 938/21 939/11 939/22 940/3 940/7 940/11 940/15 940/21 941/6 941/15 941/23 942/6 942/21 942/25 943/5 943/7</p>
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<p>MR. DEARDEN:... [17] 943/10 943/13 943/16 943/24 944/5 944/11 944/15 944/20 945/6 945/13 945/16 946/2 947/13 948/20 950/5 950/19 950/23</p> <p>MR. JOHNSTON: [293] 659/10 659/15 659/24 660/4 660/8 660/12 660/16 660/19 661/2 661/9 661/12 661/22 662/1 662/21 662/24 663/3 664/4 664/7 664/16</p>	<p>664/20 665/8 665/22 666/5 666/9 666/17 666/21 667/19 667/24 668/22 669/4 669/7 669/12 669/22 670/5 670/12 671/6 671/16 671/25 672/4 672/9 672/19 673/3 673/6 673/10 673/14 673/17 673/20 674/1 674/6 674/10 674/14 674/18 674/22 675/4 675/7 675/14 675/19 676/7 676/11 676/17 676/24 677/9 677/15 678/1 678/11 679/3 679/11</p>	<p>679/17 679/23 680/10 681/10 681/15 682/20 682/25 683/8 683/19 684/3 685/2 685/13 686/4 687/3 687/15 687/25 689/21 690/21 691/22 692/4 692/12 693/16 694/4 694/12 694/16 694/19 696/4 696/8 696/23 697/1 697/11 697/15 697/22 698/24 699/23 700/4 700/18 700/22 701/5 701/10 701/13 701/18 701/25 702/4 702/10 702/22 703/5 703/10</p>
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<p>MR. JOHNSTON:... [178] 703/20 704/5 704/10 704/24 707/5 765/5 842/2 843/7 843/10 843/18 844/9 844/12 844/15 844/24 845/17 846/20 847/1 847/4 847/14 847/25 848/8 848/11 848/15 848/19 849/1 849/4 849/14 849/21 850/6 850/14 851/1 851/8 851/13 851/22 852/2 852/11 852/23 853/8 853/14 853/22 854/1</p>	854/9 854/22 855/4 855/14 855/24 856/4 856/12 856/21 857/3 857/8 857/21 858/4 858/10 858/13 858/17 858/21 859/1 859/7 859/10 859/13 859/18 859/22 860/4 860/16 860/21 861/1 861/14 862/3 862/12 862/17 862/21 862/24 863/3 863/10 863/13 863/16 864/16 865/2 865/18 865/25 866/5 866/19 867/5 867/14 867/19 867/24 868/5 868/11	868/18 868/23 869/7 869/23 870/2 870/12 870/19 870/22 870/25 871/3 871/12 872/21 874/10 874/21 875/8 875/16 875/20 875/23 876/3 876/21 876/25 877/4 877/11 877/24 878/21 879/12 879/22 880/6 880/17 881/2 881/16 881/19 882/1 882/9 882/13 882/21 883/24 884/2 885/12 885/19 886/3 886/10 886/22 886/25 887/4 887/9 887/12 887/21
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<p>MR. JOHNSTON:... [41] 887/24 888/2 888/11 888/15 888/19 889/3 889/25 890/17 890/21 891/14 891/22 892/3 893/22 894/3 894/12 894/18 894/22 895/2 895/7 895/11 895/17 896/8 896/14 896/23 897/5 897/10 897/18 898/6 898/12 898/23 899/1 900/8 901/1 901/4 901/10 901/23 903/24 904/5 904/17 905/5 917/1</p>	<p>MR. REDDON: [210] 812/15 812/18 812/25 813/6 813/16 813/19 814/3 825/20 826/1 830/12 831/17 834/23 837/6 840/11 843/9 843/17 844/14 844/20 845/7 845/13 846/2 846/23 847/3 847/8 847/22 848/3 848/10 848/13 848/18 848/21 849/3 849/8 849/18 849/25 850/8 850/19 851/4 851/11 851/16 852/1 852/16 853/4 853/9</p>	<p>853/16 853/25 854/4 854/16 855/3 855/7 855/20 855/25 856/8 856/14 856/25 857/6 857/19 857/25 858/6 858/12 858/15 858/19 858/25 859/5 859/9 859/12 859/17 859/20 859/25 860/8 860/19 860/24 861/6 861/21 862/9 862/16 862/19 862/23 863/2 863/9 863/12 863/15 863/22 864/23 865/6 865/10 865/16 865/23 866/4 866/17 867/4 867/12</p>
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<p>MR. REDDON:.... [119] 867/17 867/20 868/4 868/7 868/17 868/20 869/1 869/21 869/24 870/5 870/17 870/21 870/24 871/2 871/7 872/8 873/11 874/20 875/4 875/14 875/19 875/22 876/2 876/11 876/24 877/3 877/10 877/23 878/1 879/5 879/19 880/2 880/10 880/18 880/23 881/4 881/10 881/18 881/22 882/4 882/16</p>	883/23 884/1 885/6 885/16 885/22 886/7 886/15 886/24 887/2 887/6 887/11 887/20 887/23 888/1 888/5 888/9 888/14 888/18 888/22 889/21 890/8 890/20 891/4 891/19 891/25 892/21 894/2 894/9 894/16 894/21 894/25 895/5 895/9 895/16 895/20 896/13 896/17 897/4 897/8 897/14 898/3 898/11 898/21 898/25 899/15 900/20 901/3 901/9	901/16 902/19 904/1 904/12 904/19 905/17 905/21 906/2 906/4 906/8 906/15 906/22 907/6 907/13 907/16 907/19 907/24 908/3 908/8 908/15 909/23 912/11 913/7 913/25 915/1 915/19 916/2 916/5 916/11 916/21 MR. SPELLISCY: [7] 657/6 743/16 825/11 842/4 842/10 842/22 888/6 MR. WILSON: [171] 765/24 766/2 766/9
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<p>MR. WILSON:..... [31] 802/12 802/15 802/20 803/1 803/5 803/10 803/15 803/19 803/24 804/10 804/16 805/12 805/18 805/22 806/8 806/12 806/15 806/18 807/8 807/15 808/9 808/24 809/9 810/6 810/16 810/19 810/25 811/7 811/10 811/20 812/3 MS. CHEEK: [5] 657/4 765/13 765/18 813/22 932/7 MS. WAGNER: [67] 657/8</p>	<p>659/5 669/1 686/9 693/22 694/1 707/11 707/20 708/9 709/7 709/14 709/21 710/5 710/12 713/6 713/18 714/6 714/21 715/3 715/21 716/8 716/14 719/11 720/5 720/14 720/24 721/2 721/11 723/6 723/22 724/1 724/12 725/13 728/21 729/3 730/2 731/2 732/22 735/1 736/1 737/12 738/11 738/24 740/10 741/1 741/8 742/4 742/12 742/15</p>	<p>742/22 743/7 743/12 765/1 814/1 831/3 831/6 834/6 836/22 840/2 841/23 842/8 842/13 843/24 844/4 852/6 905/8 916/25 MS. ZEMAN: [148] 779/10 779/12 779/21 780/2 780/5 780/10 780/14 780/17 780/20 780/24 781/3 781/8 781/13 781/15 781/18 781/21 781/24 782/8 782/16 782/22 783/6 783/11 783/15 783/20 784/1 784/7 784/11</p>
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<p>MS. ZEMAN:... [121] 784/15 784/19 784/22 785/5 785/7 785/11 785/15 785/19 785/23 786/3 786/9 786/13 786/18 786/21 787/1 787/6 787/12 787/15 787/18 787/21 788/2 788/10 788/13 788/16 789/2 789/4 789/7 789/14 789/21 789/25 790/4 790/8 790/12 790/15 790/19 790/23 791/2 791/8 791/14 791/17 791/22</p>	<p>792/2 792/5 792/9 792/15 792/19 792/23 793/1 793/4 793/7 793/10 793/13 793/17 793/22 794/1 794/4 794/8 794/13 794/17 794/21 794/24 795/3 795/9 795/19 795/23 796/2 796/6 796/9 796/20 797/1 797/5 797/11 797/14 797/18 797/22 797/25 798/3 798/6 798/9 798/11 798/14 798/17 798/20 798/23 799/1 799/10 799/16 800/7 800/19</p>	<p>800/22 801/6 801/13 801/15 801/18 801/24 802/1 802/4 802/13 802/16 802/21 803/2 803/8 803/11 803/16 803/20 804/3 804/11 804/17 805/14 805/19 805/24 806/9 806/13 806/16 807/5 807/13 807/17 812/7 918/23 918/25 932/6 PROFESSOR SIEBRASSE: [197] 658/2 659/2 659/14 659/23 660/2 660/6 660/11 660/15 660/18 660/22 661/6</p>
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<p>A</p> <p>always... [15] 714/20 718/15 722/18 722/21 736/7 737/11 737/15 783/4 815/5 853/24 854/3 861/5 895/17 934/24 935/11</p> <p>am [14] 678/2 678/13 701/19 705/2 748/11 779/14 782/23 810/24 826/16 848/11 871/5 883/4 891/5 898/10</p> <p>ambiguous [1] 684/14</p> <p>amenable [2] 684/25 685/1</p> <p>amend [3] 778/17 778/23</p>	<p>946/17</p> <p>amended [4] 771/17 772/13 772/15 940/5</p> <p>amending [3] 802/25 811/6 811/16</p> <p>amendment [2] 778/20 778/21</p> <p>amendments [7] 772/16 774/10 778/5 791/19 811/13 940/6 946/12</p> <p>AMERICAN [1] 652/3</p> <p>amicus [3] 847/18 847/19 857/5</p> <p>Amino [1] 777/15</p> <p>among [3] 770/8 822/23</p>	<p>822/24</p> <p>amongst [1] 887/18</p> <p>amount [6] 771/7 875/18 877/14 878/25 880/2 923/10</p> <p>amounted [1] 913/21</p> <p>amplify [1] 809/14</p> <p>analogy [1] 751/18</p> <p>analyses [1] 702/20</p> <p>analysis [10] 701/16 701/17 701/20 702/25 705/11 705/12 718/2 720/22 741/13 910/1</p> <p>analyze [2] 741/13 851/19</p> <p>analyzed [3]</p>
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<p>A</p> <p>anything [18] 671/11 671/20 695/21 707/3 727/10 776/8 799/7 846/25 852/5 873/16 876/20 880/15 886/18 904/21 914/2 928/18 936/6 939/7</p> <p>anyway [2] 662/8 890/17</p> <p>anywhere [6] 745/14 749/1 859/5 881/1 923/11 935/1</p> <p>apologies [4] 724/4 748/3 782/3 844/5</p> <p>apologize [5] 845/14 850/10 895/11 915/7 950/7</p>	<p>Apotex [14] 732/24 733/22 824/4 824/5 849/10 855/2 867/1 915/4 926/25 927/1 927/4 934/1 949/10 950/15</p> <p>apparent [4] 698/20 699/9 735/10 837/4</p> <p>apparently [1] 733/17</p> <p>appeal [42] 694/14 696/15 696/19 697/17 698/1 698/5 698/8 704/15 712/19 732/25 738/22 740/19 749/20 749/23 750/4 768/8 769/18 777/4 777/5 780/19</p>	<p>780/21 781/4 781/11 816/9 816/12 863/7 867/1 879/2 879/7 879/8 879/12 879/18 879/25 888/25 889/7 915/14 920/4 920/6 920/8 920/12 920/16 934/10</p> <p>Appeal's [4] 698/12 702/18 823/12 889/8</p> <p>appealed [1] 777/18</p> <p>appear [9] 766/1 793/9 793/15 812/17 831/13 846/22 847/3 892/8 917/13</p> <p>appeared [2] 724/19 836/18</p>
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745/22 746/5	799/6 801/12	837/16 837/25
746/6 746/9	801/16 802/24	838/16 840/13
746/10 747/3	804/2 804/21	841/24 842/2
747/8 747/11	806/23 811/19	842/8 842/10
748/13 749/21	811/20 811/25	845/23 847/6
749/21 749/22	811/25 812/10	851/7 851/13
750/14 750/22	813/22 815/10	851/21 852/20
752/7 753/4	815/11 815/15	853/3 853/13
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758/23 762/9	815/23 816/4	855/19 856/5
765/8 768/24	817/8 817/17	856/12 856/14
769/10 772/20	817/19 818/4	856/16 856/24
773/1 773/12	818/16 818/17	858/24 860/20
773/19 777/2	820/5 820/8	863/19 868/3
778/9 778/13	820/9 820/17	874/25 878/4
779/3 779/4	820/19 821/8	878/18 880/17
779/5 780/7	821/19 822/2	880/25 881/15
782/11 784/6	822/12 823/25	882/16 891/18
785/24 786/20	825/14 826/11	892/11 893/9
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<p>B</p> <p>bound... [5] 880/17 880/23 881/6 881/13 881/16</p> <p>Box [1] 653/7</p> <p>Brad [1] 655/21</p> <p>brain [4] 667/3 667/16 669/21 712/1</p> <p>branch [8] 684/20 692/3 736/21 758/13 920/5 920/22 934/12 936/5</p> <p>branches [3] 876/9 920/9 920/18</p> <p>brand [14] 849/16 849/24 850/17 851/3 852/15 855/7 895/13 897/12</p>	<p>897/16 899/10 900/15 900/21 901/12 904/8</p> <p>branded [2] 852/21 854/8</p> <p>breach [1] 839/19</p> <p>breached [1] 838/17</p> <p>break [9] 707/13 707/16 765/16 779/1 824/4 882/13 882/18 886/12 950/25</p> <p>Brenner [1] 668/7</p> <p>brief [2] 684/14 897/20</p> <p>briefing [1] 935/22</p> <p>briefly [3] 815/19 820/18 838/2</p>	<p>bring [3] 716/17 747/21 806/25</p> <p>bringing [2] 806/20 806/21</p> <p>brings [2] 682/10 757/8</p> <p>Bristol [4] 853/1 855/17 856/19 884/12</p> <p>Bristol-Myers [3] 853/1 855/17 884/12</p> <p>broad [13] 880/16 946/21 946/23 946/25 947/6 947/10 948/1 948/5 948/9 948/12 949/20 949/22 950/3</p> <p>broader [7] 666/14 716/6 742/2 944/9</p>
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730/13 737/23	753/19 761/3	753/13 754/7
817/25 856/11	776/6 805/7	763/2 765/11
905/13 905/16	816/13 829/10	765/15 767/23
906/8 908/6	840/25 860/1	769/17 771/11
908/13 921/6	908/17 908/18	774/24 777/21
950/17	912/1 914/18	783/1 784/23
called [19]	919/17 933/14	786/13 794/12
703/2 722/15	936/14 940/20	800/20 803/20
732/18 745/12	can [96]	806/3 808/6
761/3 768/15	658/24 659/8	808/23 817/21
776/20 777/16	667/4 686/20	818/7 818/12
815/15 821/2	686/23 686/24	819/20 820/3
843/16 844/14	688/14 693/21	823/6 825/18
855/22 855/23	693/24 696/2	825/25 826/12
899/17 919/17	696/11 708/18	828/10 834/22
919/22 926/21	712/25 719/5	837/12 841/2
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calling [1]	731/18 731/25	844/1 855/23
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<p>C</p> <p>can... [22]</p> <p>890/21 892/2 892/12 894/17 897/13 900/11 905/18 912/14 912/25 915/7 923/22 926/4 926/18 927/15 928/17 930/6 930/7 930/10 931/19 935/12 946/12 946/14</p> <p>can't [32]</p> <p>662/18 662/20 673/10 675/3 714/25 732/21 738/5 747/21 752/5 753/3 753/4 754/7 754/17 820/14 821/13 835/8 844/21 846/6 875/15 891/20</p>	<p>891/20 898/22 903/9 907/21 907/25 909/19 910/22 915/20 928/18 932/21 934/13 949/15</p> <p>CANADA</p> <p>[119] 652/12 654/17 655/14 662/6 666/25 667/18 673/12 677/19 683/14 689/24 690/1 691/24 694/21 711/14 711/17 717/25 718/4 718/18 720/18 723/6 723/11 730/5 731/21 731/25 736/3 736/4 738/12 738/13 745/11 745/16 746/1 746/15 747/4</p>	<p>748/5 748/22 749/11 751/6 752/3 754/17 755/4 762/10 779/14 791/25 791/25 814/8 814/16 815/15 815/18 815/21 816/5 816/7 816/10 816/13 817/7 817/18 817/25 819/24 820/21 821/24 822/13 822/24 823/10 823/14 823/19 824/7 824/12 825/2 825/11 825/11 826/6 826/10 826/18 828/20 829/8 830/5 840/6 845/21 846/11 848/3 849/1 849/22</p>
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<p>C</p> <hr/> <p>CANADA...</p> <p>[38] 855/18 856/2 857/24 868/7 868/14 877/8 880/8 880/9 880/14 880/19 880/22 884/12 886/5 886/14 886/18 887/2 888/21 890/2 890/3 890/7 893/22 895/22 896/3 906/24 915/5 919/9 919/12 919/15 921/8 924/14 926/20 930/18 930/22 931/10 937/6 940/9 943/2 945/4</p> <p>Canada's [8] 662/23 696/13</p>	<p>797/8 819/2 857/14 857/17 868/3 876/1</p> <p>Canadian</p> <p>[102] 672/25 679/6 691/25 692/6 694/12 694/15 694/23 699/16 700/1 700/6 701/3 702/13 711/19 714/4 718/16 719/23 720/5 722/14 723/18 723/20 724/19 725/11 725/17 726/15 726/19 727/11 728/5 728/13 728/19 733/20 736/20 742/5 742/19 743/10 744/9 744/12 746/20 746/21 747/2</p>	<p>747/3 747/10 747/17 747/24 750/3 750/12 750/18 750/19 750/21 751/4 751/14 751/15 751/19 751/21 751/24 752/1 753/8 754/24 755/1 756/11 762/1 762/6 762/16 762/17 763/21 763/24 764/1 764/4 764/11 764/15 776/16 817/15 821/11 823/5 823/8 827/1 829/11 829/15 829/16 830/24 836/16 847/21 848/13 848/17 856/6 856/8 861/21 868/15</p>
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<p>C</p> <p>Canadian... [15] 868/25 877/9 879/2 891/4 904/8 904/18 909/6 909/7 910/10 919/10 921/8 931/16 931/22 933/6 934/4</p> <p>Canadians [1] 662/8</p> <p>cancer [2] 735/22 919/16</p> <p>cannot [9] 717/5 719/3 754/19 773/5 773/24 833/20 928/14 930/12 946/14</p> <p>capacity [1] 852/22</p> <p>capture [1] 691/9</p>	<p>captured [2] 678/13 755/9</p> <p>career [4] 775/12 814/12 814/19 828/20</p> <p>careful [1] 706/9</p> <p>carefully [1] 914/3</p> <p>Carlisle [1] 653/22</p> <p>carried [1] 767/24</p> <p>carry [6] 819/6 921/24 922/3 922/5 922/9 929/9</p> <p>carved [1] 920/24</p> <p>case [192] 652/6 662/5 662/6 664/12 667/7 667/18 668/4 672/18</p>	<p>672/18 673/12 673/13 673/16 679/25 680/4 680/21 681/5 682/5 683/7 684/18 685/16 685/20 687/21 687/23 688/3 689/8 689/10 690/16 691/24 692/21 693/14 694/9 694/14 694/15 694/17 694/18 695/24 696/25 697/14 700/6 700/14 700/17 700/17 703/9 703/12 704/14 706/1 706/8 709/9 709/10 715/12 721/2 721/22 722/1 722/23 725/10 725/11</p>
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<p>C</p> <p>case-by-case.. . [2] 851/10 851/14</p> <p>cases [110] 670/25 671/4 672/8 672/16 675/11 684/17 694/6 701/21 706/7 714/12 714/16 714/23 715/2 715/4 715/7 715/8 715/13 715/15 717/12 720/19 720/20 720/22 721/5 724/16 724/17 724/18 724/22 724/23 724/25 725/1 725/5 725/8 728/23 754/24 760/22 761/20 764/8 778/2</p>	<p>797/11 797/13 799/6 799/9 801/19 815/4 815/7 815/21 815/23 815/24 816/3 816/4 816/5 823/25 824/19 824/20 828/21 840/16 841/1 841/4 841/8 841/10 841/14 841/15 842/19 845/23 846/4 846/5 847/11 847/24 848/24 848/25 849/2 851/19 852/14 852/15 852/22 853/4 854/24 858/23 858/24 858/25 859/4 859/22 860/3 860/12 860/24 861/9</p>	<p>861/23 869/5 875/12 876/15 878/3 878/17 878/18 893/21 896/5 896/25 897/9 897/11 897/15 901/12 903/19 906/17 912/14 912/16 912/18 912/20 914/4 914/20 920/9 934/23</p> <p>categories [2] 815/9 931/3</p> <p>category [1] 853/22</p> <p>CDMA [1] 848/7</p> <p>cellulose [1] 729/19</p> <p>central [2] 758/19 764/23</p> <p>century [3] 752/12 753/18</p>
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<p>C</p> <p>century... [1] 754/2</p> <p>certain [14] 659/13 670/10 717/2 733/14 778/17 807/10 817/21 837/13 840/9 881/7 891/14 931/5 931/5 935/15</p> <p>certainly [33] 672/14 672/17 672/18 680/6 680/9 684/12 689/22 690/24 690/25 705/24 722/18 745/25 746/9 747/1 764/9 778/16 779/21 787/1 792/4 805/13 805/23 807/4 821/23 827/6</p>	<p>844/1 852/18 852/21 861/23 876/4 880/16 922/6 933/11 935/9</p> <p>certainty [1] 826/15</p> <p>CGPA [6] 847/20 847/20 848/1 848/16 848/21 849/6</p> <p>CGPA's [1] 849/6</p> <p>chain [5] 685/22 688/5 688/11 872/5 873/3</p> <p>chair [11] 781/17 781/19 781/23 814/15 844/19 844/22 844/24 848/9 851/24 920/7 920/15</p>	<p>chairman [1] 768/8</p> <p>Chairman's [1] 909/5</p> <p>CHAJON [1] 654/6</p> <p>challenge [3] 720/14 839/18 895/5</p> <p>challenger [1] 828/9</p> <p>challengers [1] 828/13</p> <p>challenges [5] 702/2 713/5 822/14 923/16 923/18</p> <p>chances [1] 778/9</p> <p>change [68] 659/17 672/11 672/25 706/19 710/17 712/3 712/13 714/12</p>
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697/21 702/10	846/4 846/24	913/8 914/1
703/4 703/5	848/5 849/10	914/15 915/8
704/3 704/6	851/20 852/5	915/12 916/6
707/8 720/1	852/5 853/20	916/12 916/15
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<p>E</p> <p>either... [18] 793/15 800/15 808/5 808/20 812/21 834/5 834/19 851/5 877/18 879/12 883/15 892/3 893/14 917/15 935/5 942/14 947/2 948/19</p> <p>elaborate [2] 698/1 725/18</p> <p>elaborating [2] 808/23 870/8</p> <p>Electric [4] 798/8 799/8 810/19 811/1</p> <p>electrical [1] 936/9</p> <p>element [3] 870/20 870/23 871/1</p> <p>elements [5]</p>	<p>685/10 689/17 691/2 692/20 863/7</p> <p>elevated [11] 725/13 727/13 728/17 729/1 730/9 733/8 734/6 734/8 736/24 757/1 758/20</p> <p>elevated requirements [1] 736/24</p> <p>ELEVEN [1] 652/3</p> <p>Elgin [1] 654/16</p> <p>ELI [3] 652/8 768/15 867/1</p> <p>else [8] 662/15 662/21 711/22 736/18 799/7 800/4 800/6 845/12</p>	<p>else's [1] 912/20</p> <p>embark [1] 891/24</p> <p>embarking [1] 852/20</p> <p>embodiments [3] 722/8 839/8 839/12</p> <p>emerged [1] 836/15</p> <p>emergence [4] 820/25 821/4 829/7 836/20</p> <p>emerging [1] 746/13</p> <p>emphasis [1] 898/6</p> <p>emphasize [5] 657/13 705/2 706/24 821/3 831/15</p> <p>emphasized [1] 834/17</p>
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<p>E</p> <p>enough... [5] 865/11 865/16 880/5 922/21 925/15</p> <p>ensure [2] 770/8 933/5</p> <p>enters [1] 931/15</p> <p>entire [3] 681/2 740/21 814/12</p> <p>entirely [8] 660/24 700/16 715/19 717/25 727/14 845/3 862/6 908/19</p> <p>entities [1] 814/19</p> <p>entitled [12] 657/13 666/7 666/14 754/11 756/15 777/14 792/13 793/6</p>	<p>819/3 868/13 884/21 891/25</p> <p>entry [1] 855/2</p> <p>enzyme [1] 739/9</p> <p>EPO [1] 744/25</p> <p>equally [3] 698/20 699/9 894/5</p> <p>equipped [1] 922/8</p> <p>equivalent [5] 726/18 727/1 750/3 750/4 877/2</p> <p>erased [3] 818/18 820/9 820/17</p> <p>erroneous [1] 729/16</p> <p>errors [1] 762/22</p>	<p>ESP [1] 739/9</p> <p>especially [1] 892/9</p> <p>essence [1] 902/5</p> <p>essential [4] 682/3 771/12 771/19 883/8</p> <p>essentially [9] 673/2 682/11 702/3 702/4 714/17 757/3 790/3 842/24 860/11</p> <p>Essex [1] 653/15</p> <p>establish [17] 676/22 696/3 697/5 699/7 734/23 773/2 773/18 808/11 822/4 822/6 822/13 834/5 857/19 864/20</p>
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<p>E</p> <p>establish... [3] 865/4 883/13 883/14</p> <p>established [26] 665/13 666/12 672/23 676/7 679/17 680/1 680/8 680/8 680/10 683/6 683/22 705/25 706/2 710/20 712/4 723/13 731/15 734/21 734/22 820/25 822/9 823/7 874/14 875/3 884/6 925/2</p> <p>establishes [2] 795/21 795/23</p> <p>establishing [2] 752/20</p>	<p>771/9</p> <p>esteemed [1] 887/2</p> <p>estimate [2] 854/17 854/21</p> <p>estimated [1] 932/19</p> <p>Eureka [2] 835/4 896/20</p> <p>Europe [6] 677/1 745/13 746/15 746/23 747/22 750/5</p> <p>European [4] 749/16 749/17 749/18 750/2</p> <p>Evans [1] 655/20</p> <p>even [35] 672/5 674/25 677/24 678/8 678/21 682/2 699/15 709/5 722/14 726/4</p>	<p>727/13 728/16 730/18 755/20 757/4 760/16 763/5 808/17 818/13 819/8 824/21 832/17 833/8 833/24 836/19 838/24 839/17 846/18 878/24 880/1 888/3 891/1 904/15 910/4 928/13</p> <p>event [7] 697/21 706/24 717/24 725/16 728/19 733/2 748/12</p> <p>ever [9] 808/17 814/18 817/24 827/2 829/12 869/6 872/13 883/12 910/18</p>
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E	683/11 687/25	757/14 758/4
every [10]	690/7 693/9	758/5 769/13
662/10 790/16	693/12 693/16	773/5 773/23
816/5 816/18	694/7 694/25	774/1 774/2
816/18 851/3	695/16 695/25	774/7 778/1
915/3 933/18	696/1 696/3	778/13 778/20
949/18 949/18	699/19 699/25	778/21 779/16
everybody [3]	700/18 706/17	786/12 786/17
658/20 865/13	706/17 706/23	809/4 820/22
912/19	708/18 710/19	820/23 822/2
everyone's [1]	712/5 712/7	822/3 822/12
713/24	712/10 712/18	822/21 823/1
everything [7]	712/22 714/18	823/7 823/24
688/15 706/9	715/13 715/16	827/10 829/20
820/11 870/10	715/20 715/21	830/3 837/10
870/12 872/16	718/17 719/1	839/8 842/12
872/19	720/10 720/10	848/23 849/9
evidence [126]	720/12 720/13	857/19 861/18
674/3 674/20	727/15 730/18	861/22 862/1
674/25 676/15	730/21 730/23	864/3 864/4
677/3 677/5	731/15 732/7	864/10 873/22
677/19 677/24	738/16 741/18	873/25 874/15
678/4 678/7	742/14 748/24	876/10 877/20
678/16 678/20	748/24 750/11	878/9 878/14

<p>E</p> <p>evidence... [18] 890/13 892/9 894/7 895/14 895/19 896/7 923/22 927/12 927/13 927/23 927/25 928/4 928/7 928/9 929/18 930/6 930/8 930/9</p> <p>evident [4] 734/10 738/22 775/3 863/9</p> <p>evidently [1] 722/7</p> <p>evolution [2] 913/10 913/11</p> <p>exact [6] 725/3 783/3 783/5 796/18 842/24 892/2</p> <p>exactly [11]</p>	<p>668/5 668/15 712/22 715/1 770/10 781/13 803/6 823/21 875/6 891/8 916/4</p> <p>examination [45] 658/23 659/9 669/1 669/9 669/15 671/8 701/7 707/20 708/2 733/5 748/12 765/20 767/13 768/12 768/21 774/17 777/2 779/9 779/10 782/10 783/4 785/13 791/20 792/7 794/15 807/19 808/20 809/22 811/14 813/22 831/5 831/6 831/9</p>	<p>842/2 843/7 844/9 899/3 918/23 921/17 921/24 922/4 929/7 930/21 932/11 932/12</p> <p>examine [7] 770/7 780/13 791/6 791/8 921/15 923/11 930/6</p> <p>examined [9] 768/24 772/5 774/14 782/25 783/10 783/19 785/2 925/8 931/16</p> <p>examiner [61] 697/17 767/25 768/6 768/24 769/1 769/5 770/20 770/22 771/1 771/25 772/7 774/3</p>
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<p>E</p> <p>examiner...</p> <p>[49] 775/5 775/8 775/14 775/17 778/22 785/14 786/7 789/1 789/20 789/21 790/17 805/10 805/14 805/15 806/19 807/4 807/17 919/19 919/21 919/24 919/25 923/3 923/20 926/10 927/16 927/18 927/22 928/2 928/12 928/15 929/3 929/11 929/17 929/23 930/11 931/18 941/12 941/21 941/25 942/5 942/10 942/11 942/12</p>	<p>942/16 944/22 945/25 948/9 948/14 949/19</p> <p>examiner's [3] 697/4 939/22 941/15</p> <p>examiners</p> <p>[68] 768/24 769/4 769/10 769/22 770/1 770/6 770/9 770/9 773/15 775/20 775/25 776/23 776/23 776/25 777/6 780/7 780/11 781/2 783/13 789/1 789/6 789/24 792/24 793/18 795/4 803/5 803/7 804/1 804/7 806/23 808/13 809/6 810/2</p>	<p>920/2 920/10 921/14 921/22 922/5 922/9 922/21 922/21 922/24 923/2 923/5 923/8 923/8 924/12 924/21 925/7 927/3 927/10 935/1 935/2 935/5 937/3 937/16 939/19 940/18 940/18 940/19 940/24 941/6 944/8 947/23 948/2 949/12 949/16 949/16</p> <p>examines [1] 790/9</p> <p>examining [6] 769/5 775/15 775/16 783/14 808/14 932/8</p>
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<p>E</p> <p>example [28] 662/5 695/11 713/15 734/14 735/20 745/11 746/11 747/22 750/19 752/4 753/17 759/20 761/10 770/25 771/10 783/1 819/9 827/21 854/5 899/9 900/14 902/2 934/5 939/2 939/9 939/14 942/9 942/12</p> <p>examples [6] 695/8 696/18 697/9 697/13 738/3 838/1</p> <p>except [5] 667/12 750/5 945/8 948/25 949/25</p>	<p>exception [1] 841/9</p> <p>excerpt [6] 716/1 716/3 716/4 716/9 716/17 716/19</p> <p>excerpted [1] 830/16</p> <p>excerpts [1] 675/21</p> <p>exchange [5] 665/17 667/12 685/18 872/1 884/9</p> <p>exchanged [1] 847/16</p> <p>exchanges [1] 769/15</p> <p>excipients [1] 902/7</p> <p>excise [1] 753/19</p> <p>exclude [1] 817/9</p>	<p>excluded [1] 902/7</p> <p>excluding [2] 687/24 857/18</p> <p>exclusion [3] 758/4 758/5 861/24</p> <p>exclusively [5] 701/20 786/3 814/22 853/8 853/9</p> <p>excused [3] 765/8 812/11 917/5</p> <p>exemplify [1] 721/5</p> <p>exercise [4] 725/23 726/17 753/25 754/15</p> <p>exercised [1] 753/18</p> <p>exhibit [15] 668/1 720/16 720/18 740/25</p>
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<p>E</p> <p>exhibit... [11] 783/23 784/3 784/4 787/25 792/12 796/23 800/11 801/1 802/8 802/9 806/2</p> <p>exist [9] 677/24 773/5 774/12 820/9 849/18 850/19 850/23 907/6 907/8</p> <p>existed [6] 760/10 761/9 772/4 772/11 820/16 904/16</p> <p>existence [4] 817/17 819/20 820/1 896/15</p> <p>existing [7] 718/23 734/14 734/16 734/24</p>	<p>739/24 823/11 879/6</p> <p>exists [3] 678/8 678/20 778/7</p> <p>expandable [1] 731/22</p> <p>expect [3] 806/19 806/23 807/4</p> <p>expected [2] 769/10 769/25</p> <p>expects [3] 766/14 813/5 917/24</p> <p>expensive [1] 819/1</p> <p>experience [28] 775/10 779/25 823/21 826/17 831/20 832/1 832/13 832/21 834/1 841/3 842/15</p>	<p>842/17 842/19 852/13 856/10 859/20 861/9 861/14 865/1 865/14 901/12 908/20 912/13 912/15 912/21 912/23 912/25 913/14</p> <p>experiences [1] 859/22</p> <p>experiments [5] 922/5 922/9 927/6 927/7 929/9</p> <p>expert [73] 658/25 659/2 682/25 683/1 683/3 690/23 697/25 700/20 744/18 746/20 751/11 759/24 765/9 766/1 767/4 767/14</p>
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<p>E</p> <p>expert... [57] 780/15 812/17 813/12 813/13 813/19 825/14 825/16 825/20 827/10 831/8 833/8 842/16 842/22 843/5 843/12 843/22 845/1 857/10 857/23 858/18 859/5 859/9 859/12 860/7 860/17 860/23 861/3 863/14 863/17 864/18 864/23 865/9 865/17 874/12 874/20 876/2 876/22 877/2 890/18 890/22 892/5 892/12 892/15 892/16</p>	<p>892/18 894/6 895/14 895/19 896/4 896/7 898/10 898/18 898/19 911/10 917/4 917/7 923/22</p> <p>expertise [6] 744/24 780/8 780/12 887/11 887/13 896/2</p> <p>experts [5] 695/3 695/7 695/17 697/18 698/15</p> <p>explain [7] 657/22 753/14 764/6 782/19 840/18 905/14 907/25</p> <p>explained [12] 724/5 724/13 729/15 733/12 755/2 779/24</p>	<p>780/7 789/9 794/14 823/10 899/2 899/6</p> <p>explaining [1] 770/5</p> <p>explanation [2] 741/25 770/10</p> <p>explicit [2] 728/8 728/9</p> <p>explicitly [7] 668/4 689/11 692/11 693/6 726/9 822/11 899/4</p> <p>exploiting [2] 661/19 661/19</p> <p>explore [1] 752/17</p> <p>explored [1] 706/22</p> <p>exposed [1] 850/4</p> <p>expound [2]</p>
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<p>E</p> <p>expound... [2] 688/17 719/16</p> <p>express [6] 657/20 658/8 658/16 658/21 691/7 889/2</p> <p>expressed [8] 664/2 668/20 750/15 888/7 888/12 888/16 888/21 888/23</p> <p>expressing [1] 888/4</p> <p>expression [2] 891/22 913/1</p> <p>expressly [2] 684/2 690/15</p> <p>extant [1] 818/14</p> <p>extension [1] 680/25</p> <p>extensively [1] 711/12</p>	<p>extent [19] 658/6 658/6 685/17 744/13 744/21 745/6 747/13 755/2 755/8 755/12 757/23 761/24 808/4 823/15 851/21 853/6 856/11 871/25 878/12</p> <p>extra [1] 684/16</p> <p>extract [1] 933/2</p> <p>extremes [6] 677/23 678/3 678/7 678/15 678/19 678/23</p> <p>extrinsic [2] 829/20 830/2</p> <p>eyes [3] 682/9 682/18 895/25</p>	<p>F</p> <p>fabric [1] 910/22</p> <p>fabrics [1] 839/6</p> <p>face [8] 702/3 702/19 885/21 894/14 894/20 909/19 922/11 922/19</p> <p>faced [1] 672/17</p> <p>faces [1] 922/17</p> <p>facie [1] 741/19</p> <p>fact [79] 657/15 664/23 670/10 672/10 674/23 675/5 685/22 688/5 688/23 689/8 689/10 689/18 693/4 694/6</p>
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F	879/18 884/21	663/6 679/6
fact... [65]	887/19 896/16	679/12 680/19
694/18 694/20	899/9 900/14	680/20 680/22
695/13 699/12	909/16 911/20	681/6 681/17
699/16 703/1	912/5 917/14	681/20 682/3
705/14 705/15	923/22 927/24	682/15 685/7
709/1 710/23	929/6 930/15	688/10 689/4
711/3 711/7	931/9 934/24	689/9 689/14
712/9 712/18	938/23 946/17	689/24 691/2
714/21 717/9	947/9 947/23	691/19 692/16
717/15 717/17	948/12	692/21 695/8
717/21 728/14	factors [2]	696/2 697/14
729/19 734/19	690/7 882/7	699/16 700/8
734/23 741/10	facts [18]	707/25 708/4
749/22 772/24	676/7 685/21	742/8 742/9
796/16 816/1	688/4 688/23	743/1 773/8
816/13 817/21	688/24 689/11	774/4 829/14
819/15 823/2	851/10 851/11	830/20 866/13
829/18 830/24	851/15 851/16	869/12 869/16
832/16 836/17	864/21 865/5	869/20 870/21
842/22 843/5	867/11 872/4	871/18 873/1
847/6 863/20	873/19 889/11	926/23 937/1
872/6 878/12	890/4 890/14	939/2 945/1
878/23 879/15	factual [50]	945/22 949/4

F	862/18 865/11	726/17 726/22
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factually [3] 688/15 829/8 915/2	887/5 887/9 913/8 937/21 937/22	727/7 727/11 727/17 730/7 754/5 755/24 758/1 761/19
Fada [2] 711/12 711/13	fairly [4] 678/13 771/8 848/8 886/6	familiar [14] 662/8 673/15 716/19 744/25 745/5 749/15 847/22 847/25 848/6 848/20 856/4 868/4 868/19 908/21
Fada Radio [1] 711/13	faith [2] 886/14 886/19	familiarity [1] 860/5
fail [1] 771/14	falling [1] 722/8	far [16] 660/15 660/25 661/18 662/20 664/10 665/21 666/3 667/22 734/13 734/16 734/24 749/14 808/6 820/22
failed [2] 722/4 916/17	falls [1] 666/12	
fails [6] 741/25 839/13 944/25 945/20 949/2 950/11	false [30] 674/12 674/13 721/15 722/6 722/15 722/17 722/19 722/23 723/5 724/10 724/17 724/24 725/5 725/7 725/12 725/16 725/20 726/14	
failure [2] 717/14 827/3		
fair [17] 696/24 699/11 761/18 836/8 837/11 837/18 837/19 862/11		

<p>F</p> <p>far... [2] 908/13 930/13</p> <p>Farbenindustrie [2] 736/5 736/13</p> <p>fast [2] 934/17 934/24</p> <p>fatal [1] 830/22</p> <p>fault [1] 862/6</p> <p>favor [1] 929/7</p> <p>FCA [1] 867/2</p> <p>fears [1] 658/20</p> <p>feature [2] 771/12 771/20</p> <p>February [2] 803/18 868/2</p> <p>February 2003 [1] 868/2</p> <p>February 2011 [1] 803/18</p>	<p>Fechtner [1] 898/9</p> <p>Federal [29] 677/1 679/1 694/14 698/5 698/8 698/12 704/14 750/23 777/18 777/18 815/12 815/18 821/1 821/17 823/11 824/7 863/7 879/2 879/7 879/11 879/17 889/7 889/8 891/6 893/7 896/3 902/1 930/2 930/3</p> <p>feel [7] 657/24 658/7 721/4 745/6 880/15 914/1 942/11</p> <p>feeling [1] 658/25</p>	<p>feels [1] 657/20</p> <p>fees [1] 818/20</p> <p>Feherguard [5] 731/4 798/13 798/15 799/8 810/21</p> <p>fell [1] 935/16</p> <p>fellow [1] 818/4</p> <p>felt [2] 657/11 911/1</p> <p>Fermentation [1] 855/2</p> <p>few [8] 707/22 710/6 779/15 784/12 831/4 875/16 930/4 930/16</p> <p>fewer [2] 739/22 741/23</p> <p>fiber [1] 730/13</p>
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<p>F</p> <p>field [6] 698/16 780/8 780/12 809/17 869/2 922/3</p> <p>fields [5] 770/19 776/24 777/2 777/6 790/10</p> <p>fifth [1] 797/4</p> <p>file [9] 745/18 771/24 772/7 776/18 785/9 785/12 848/23 916/15 916/15</p> <p>filed [20] 665/6 701/3 702/14 774/6 774/14 778/3 778/7 779/16 787/14 828/11 847/19 874/17 878/8 878/11 890/7 921/13</p>	<p>925/4 930/22 930/23 931/10</p> <p>filers [1] 911/14</p> <p>files [1] 928/21</p> <p>filing [63] 666/1 672/24 674/20 674/25 676/9 676/23 677/20 683/11 706/16 706/17 706/23 709/24 710/19 710/21 710/21 712/5 712/7 712/10 714/15 714/17 717/20 718/7 727/10 741/20 742/13 745/15 757/14 758/4 758/5 769/13 773/6 773/23 774/2 778/1</p>	<p>778/13 787/12 820/22 822/2 822/3 822/21 823/1 823/8 823/24 829/5 857/18 866/10 874/15 875/4 876/10 892/10 903/7 925/3 926/2 926/16 927/12 927/13 927/14 928/4 928/5 928/11 928/19 931/2 931/10</p> <p>filings [2] 916/20 923/1</p> <p>film [2] 838/6 838/15</p> <p>films [4] 838/13 838/15 838/16 838/16</p> <p>filter [1] 840/25</p>
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<p>F</p> <p>final [11] 769/19 803/17 803/21 804/6 804/19 805/10 806/1 806/21 806/22 806/24 807/5</p> <p>finally [2] 686/2 930/16</p> <p>financial [1] 849/7</p> <p>financially [4] 849/17 849/24 850/5 850/18</p> <p>find [19] 690/8 735/12 752/16 759/1 761/14 768/3 782/12 824/10 828/23 837/2 873/24 890/25 902/13 903/17 904/5 904/22</p>	<p>932/25 943/20 945/11</p> <p>finding [6] 691/7 693/11 693/14 872/24 945/5 946/1</p> <p>findings [4] 701/24 702/2 702/5 829/9</p> <p>fine [2] 733/2 844/10</p> <p>fingers [1] 763/5</p> <p>finish [5] 658/22 671/15 684/8 870/1 880/21</p> <p>finished [2] 684/5 778/9</p> <p>firm [21] 844/23 845/10 846/14 848/13 851/25 862/8 863/24 866/2</p>	<p>866/17 866/22 867/3 867/17 867/19 868/5 868/7 876/23 877/3 887/20 895/13 897/20 898/10</p> <p>firm's [3] 844/20 887/14 898/18</p> <p>firmly [1] 861/14</p> <p>first [102] 658/22 662/17 667/14 668/3 680/6 680/9 683/1 683/3 684/17 684/18 684/19 685/7 686/13 686/18 686/19 687/4 700/20 706/6 716/25 721/8 725/7 725/19</p>
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<p>F</p> <p>first... [80]</p> <p>726/23 739/14</p> <p>740/3 740/14</p> <p>746/23 752/16</p> <p>758/10 760/3</p> <p>764/24 766/23</p> <p>767/23 768/12</p> <p>769/11 773/12</p> <p>776/15 776/17</p> <p>776/21 778/2</p> <p>782/2 782/10</p> <p>784/25 785/18</p> <p>786/5 789/8</p> <p>791/23 795/12</p> <p>799/25 804/5</p> <p>806/6 811/6</p> <p>811/10 815/10</p> <p>817/23 817/24</p> <p>820/22 822/2</p> <p>822/20 830/7</p> <p>830/19 837/7</p> <p>838/3 845/17</p> <p>845/23 845/24</p>	<p>846/8 857/14</p> <p>857/16 857/21</p> <p>857/23 858/2</p> <p>858/9 858/10</p> <p>858/14 859/9</p> <p>862/14 863/1</p> <p>863/5 866/12</p> <p>870/1 870/20</p> <p>875/10 879/20</p> <p>881/23 883/10</p> <p>893/14 900/23</p> <p>903/11 915/11</p> <p>918/8 921/11</p> <p>931/11 943/10</p> <p>943/18 943/25</p> <p>944/2 945/9</p> <p>945/18 948/8</p> <p>949/1 950/10</p> <p>first-to-invent</p> <p>[1] 776/17</p> <p>firsthand [1]</p> <p>876/6</p> <p>fit [3] 721/9</p> <p>757/13 800/2</p>	<p>fits [1] 800/3</p> <p>five [13] 688/8</p> <p>688/20 765/12</p> <p>765/15 765/16</p> <p>793/24 793/24</p> <p>794/8 794/13</p> <p>812/11 917/6</p> <p>919/15 921/3</p> <p>flash [2] 835/3</p> <p>896/19</p> <p>flip [1] 784/12</p> <p>floated [3]</p> <p>667/2 667/16</p> <p>711/25</p> <p>floating [1]</p> <p>669/20</p> <p>flocculating</p> <p>[2] 729/9</p> <p>729/18</p> <p>Floor [1]</p> <p>653/6</p> <p>flowed [1]</p> <p>761/24</p> <p>focus [8]</p>
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<p>F</p> <p>focus... [8] 762/18 814/24 845/7 845/9 846/13 847/12 859/23 860/3</p> <p>focused [1] 751/14</p> <p>focuses [1] 701/20</p> <p>follow [24] 671/25 718/3 729/23 764/25 765/4 769/25 789/2 789/21 810/10 812/5 841/8 883/5 889/1 889/10 909/4 911/24 916/24 917/1 917/2 939/25 940/2 940/5 940/9 940/13</p> <p>follow-up [6]</p>	<p>764/25 765/4 812/5 916/24 917/1 917/2</p> <p>followed [5] 705/12 750/20 823/16 823/18 834/15</p> <p>follower [3] 746/24 747/11 747/12</p> <p>following [9] 667/6 669/14 673/22 717/3 769/24 805/3 857/12 892/5 920/6</p> <p>follows [2] 718/3 846/25</p> <p>font [1] 931/5</p> <p>fooled [1] 802/4</p> <p>foolish [1] 706/20</p> <p>foot [1] 744/2</p>	<p>footnote [9] 703/7 703/8 721/16 783/22 783/22 798/1 810/22 866/1 942/24</p> <p>footnotes [4] 797/11 797/16 797/20 810/16</p> <p>footnoting [1] 942/23</p> <p>force [2] 805/8 841/2</p> <p>foregoing [6] 869/17 869/23 871/2 871/6 873/8 874/5</p> <p>FOREIGN [1] 655/11</p> <p>forever [1] 752/9</p> <p>foreword [1] 788/1</p> <p>forgive [1]</p>
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<p>F</p> <p>forgive... [1] 743/24</p> <p>forgotten [1] 725/2</p> <p>form [16] 658/5 668/1 668/17 668/21 669/16 671/9 694/3 695/2 744/7 748/17 925/24 931/1 931/7 931/13 931/19 936/14</p> <p>formal [2] 776/25 931/7</p> <p>formed [2] 691/5 691/19</p> <p>former [5] 828/2 846/10 848/7 856/9 887/8</p> <p>forms [4] 673/19 673/24</p>	<p>748/10 748/15</p> <p>forth [1] 921/21</p> <p>forthwith [1] 844/1</p> <p>forward [5] 756/14 819/21 862/2 914/20 923/23</p> <p>found [17] 688/9 688/25 703/25 721/14 782/16 788/6 799/25 824/3 833/4 833/16 835/23 872/25 880/6 921/4 927/20 930/6 931/21</p> <p>foundation [3] 658/12 883/3 950/16</p> <p>founded [2] 889/16 890/5</p>	<p>four [10] 725/25 727/8 756/4 756/6 768/10 794/13 797/16 798/24 895/11 923/12</p> <p>four-step [1] 895/11</p> <p>fourth [3] 788/3 797/3 935/14</p> <p>Fox [12] 715/25 716/4 717/8 718/21 719/16 761/10 763/14 822/10 887/17 908/18 909/11 910/11</p> <p>frame [2] 837/10 840/24</p> <p>frankly [1] 822/7</p> <p>FREE [5] 652/3 825/10</p>
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<p>F</p> <p>FREE... [3] 826/8 826/10 895/22</p> <p>French [1] 794/3</p> <p>frequent [1] 840/17</p> <p>frequently [2] 713/8 792/5</p> <p>friend [1] 906/24</p> <p>front [13] 669/4 686/21 743/5 766/15 782/8 811/7 813/6 815/11 815/17 903/15 917/25 918/5 943/4</p> <p>fulfill [2] 755/21 810/5</p> <p>fulfilled [2] 788/21 809/5</p>	<p>full [13] 657/14 658/16 658/21 668/3 698/6 698/9 701/7 716/25 740/24 765/24 785/13 908/9 917/11</p> <p>full-time [1] 908/9</p> <p>fully [8] 657/20 658/2 658/8 700/15 706/22 908/20 926/15 944/17</p> <p>fulsome [1] 815/17</p> <p>fulsomely [1] 832/19</p> <p>function [7] 659/22 668/1 668/21 675/16 709/2 839/16 914/18</p>	<p>functional [1] 908/23</p> <p>functionally [1] 675/13</p> <p>functions [1] 659/14</p> <p>fundamental [7] 705/21 710/17 712/13 727/1 758/12 771/3 817/17</p> <p>fundamentally [2] 709/4 764/3</p> <p>furnaces [1] 752/11</p> <p>further [15] 661/4 661/6 661/8 661/13 661/14 698/19 707/8 713/6 719/2 819/7 902/12 905/6 916/15 932/6</p>
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F	657/18 723/11	682/1 682/23
further... [1] 932/7	734/23 738/16	695/5 695/10
fuzzy [2] 664/1 708/15	823/3 824/3	695/18 695/20
G	841/14 865/20	699/14 699/18
gained [2] 840/9 840/13	876/15 886/11	712/17 713/21
Gamble [6] 839/2 839/4	889/23 901/18	714/4 715/14
859/4 884/11	927/5 936/24	744/1 744/7
885/14 885/18	936/25 937/6	744/16 745/9
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GARY [1] 653/11	939/15 939/20	850/17 861/25
gary.born [1] 653/13	Geigy [13] 694/7 694/13	863/21 864/14
Gastrell [1] 653/19	823/13 889/2	904/6 904/7
Gauthier [1] 743/2	889/8 889/12	938/3
gave [20]	889/19 889/20	generally [11] 713/5 744/25
	890/4 890/8	747/2 791/13
	890/10 890/12	791/15 791/16
	890/16	808/16 809/19
	gel [2] 729/9	871/21 882/9
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	general [31] 679/11 679/13	generic [22] 828/13 847/21
	680/14 681/4	848/2 848/18
	681/8 681/13	853/16 853/20

<p>G</p> <p>generic... [16] 854/3 854/9 855/1 855/6 892/7 892/11 892/19 893/3 893/23 895/13 896/25 898/18 899/12 900/17 900/22 931/3</p> <p>genus [22] 721/23 721/24 736/9 736/15 736/16 736/17 736/18 736/23 737/5 737/12 737/21 738/2 738/6 739/6 739/8 739/17 739/25 833/20 925/23 929/11 929/13 929/14</p> <p>get [19] 681/18 721/16</p>	722/17 729/23 744/15 744/20 753/23 804/2 839/25 848/23 872/11 872/20 893/21 901/21 903/1 924/6 934/17 934/18 943/21 <p>gets [3] 747/13 808/22 896/20</p> <p>getting [2] 749/13 756/20</p> <p>Gilbert [3] 720/23 721/17 721/22</p> <p>GILLEN [15] 656/15 775/2 781/10 917/9 917/12 917/13 917/21 918/18 918/24 919/3 932/9 933/1</p>	935/13 939/24 951/1 <p>Gillen's [2] 774/21 777/20</p> <p>Gillen..... 919 [1] 656/16</p> <p>GINA [1] 654/7</p> <p>give [25] 657/21 658/20 661/4 661/20 671/15 716/2 745/6 756/2 766/14 767/14 809/8 810/2 813/5 816/16 819/14 819/18 830/11 841/3 846/24 867/11 890/21 893/16 917/24 919/8 949/11</p> <p>given [21]</p>
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<p>G</p> <p>given... [21] 661/17 662/5 664/6 680/23 692/9 695/3 705/7 706/18 714/8 719/13 720/16 753/12 782/4 819/5 827/17 850/1 854/21 860/10 867/16 885/24 941/4</p> <p>gives [5] 791/7 818/24 826/14 828/9 828/12</p> <p>giving [5] 767/20 816/24 912/19 912/23 934/5</p> <p>Glassware [1] 730/4</p> <p>glaucoma [8]</p>	<p>827/22 827/25 828/4 828/8 828/11 832/4 910/21 910/21</p> <p>Glaxo [7] 664/23 665/12 687/7 687/12 884/4 884/21 884/23</p> <p>Glaxo's [1] 664/24</p> <p>Glaxo/Wellco me [3] 665/12 687/7 884/4</p> <p>Glaxo/Wellco me's [3] 664/23 884/21 884/23</p> <p>GlaxoSmithKli ne [1] 664/13</p> <p>Gleason [6] 903/9 903/15 903/23 904/3 904/25 905/4</p>	<p>Gleason's [2] 902/22 904/1</p> <p>go [44] 670/15 696/6 698/4 707/23 713/11 728/23 733/3 739/15 741/3 745/11 745/17 758/10 758/18 760/3 760/4 762/21 763/14 766/23 767/3 767/5 783/1 796/22 800/23 802/5 808/16 810/14 813/12 813/12 826/12 828/6 871/14 883/2 883/5 884/19 901/17 910/23 915/7 918/7 918/10 918/14 931/8 945/9 945/14</p>
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<p>G</p> <p>go... [1] 949/20</p> <p>goal [3] 934/16 934/21 934/22</p> <p>goals [2] 923/9 935/15</p> <p>God [1] 659/1</p> <p>goes [5] 740/2 755/17 770/15 837/4 871/20</p> <p>going [26] 684/24 700/11 700/12 704/4 743/24 746/6 751/3 756/2 807/1 827/13 831/7 842/25 850/11 878/4 883/4 893/15 910/4 911/5 911/6 932/18 932/21 934/13</p>	<p>941/1 941/2 944/21 947/8</p> <p>gold [2] 706/10 762/18</p> <p>Goldsmith [1] 887/18</p> <p>gone [1] 820/4</p> <p>good [42] 657/1 659/11 662/4 663/21 707/21 716/13 725/1 725/8 734/1 734/1 734/7 734/9 734/10 734/14 735/21 739/23 747/8 760/24 765/23 777/7 779/11 779/12 809/18 812/14 812/16 835/4 843/8 843/10 886/3 886/14</p>	<p>886/19 906/20 914/7 916/16 917/10 918/24 918/25 932/13 932/14 939/1 939/9 939/14</p> <p>good-faith [1] 886/14</p> <p>GORE [1] 654/8</p> <p>got [9] 695/16 743/25 746/13 756/1 764/22 764/24 864/11 911/23 943/8</p> <p>governing [1] 790/14</p> <p>GOVERNMENT [1] 652/12</p> <p>GOWLING [1] 654/15</p> <p>Gowlings [3] 866/22 867/7 867/20</p>
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<p>G</p> <p>grace [1] 745/16</p> <p>grade [2] 825/11 826/9</p> <p>graduated [1] 814/11</p> <p>graduation [1] 919/13</p> <p>Graham [1] 692/10</p> <p>Graham's [1] 700/16</p> <p>grams [2] 838/6 838/22</p> <p>grant [20] 663/22 668/4 725/22 726/7 726/21 727/18 727/23 728/2 728/12 728/13 728/16 753/16 754/18 764/4 764/5 764/11</p>	<p>771/14 787/17 818/6 818/15</p> <p>granted [22] 701/4 702/14 705/4 723/5 725/24 726/5 726/9 754/8 754/12 756/23 782/21 783/10 787/2 787/9 789/12 801/4 801/10 802/11 818/19 922/16 923/17 929/20</p> <p>granting [2] 668/10 727/20</p> <p>great [2] 753/22 887/9</p> <p>greater [1] 714/10</p> <p>greatest [1] 911/8</p> <p>grossly [1] 746/16</p>	<p>ground [8] 677/23 678/7 678/18 679/1 679/2 705/13 717/5 911/20</p> <p>grounds [2] 702/25 703/1</p> <p>group [7] 844/20 848/10 851/25 856/3 887/14 920/17 920/17</p> <p>groups [3] 848/6 935/1 935/1</p> <p>guess [11] 672/6 672/11 714/1 754/15 755/16 764/16 793/1 811/24 820/7 850/24 882/8</p> <p>guidance [2] 782/19 790/25</p>
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<p>G</p> <p>guide [5]</p> <p>770/12 788/5 788/12 794/6 924/11</p>	<p>703/1 703/22 704/1 704/15 705/23 709/12 710/20 711/15 711/16 712/15 712/22 712/23 714/13 714/14 717/20 720/6 720/18 720/19 721/23 722/3 724/5 724/15 725/15 726/5 726/17 727/6 727/10 727/18 728/2 728/24 730/6 731/12 731/16 731/23 731/24 733/22 734/15 736/3 736/8 738/13 748/16 748/23 752/23 752/25 753/8 761/25 764/12 764/13</p>	<p>770/23 774/2 775/6 776/19 776/22 777/12 809/18 814/18 821/21 822/7 824/5 825/14 826/18 827/2 829/12 829/15 829/16 838/21 840/5 842/12 848/25 854/5 859/8 860/2 864/14 864/19 864/20 865/5 865/23 867/10 868/22 875/11 878/7 878/10 878/14 882/22 884/5 900/4 901/18 903/16 908/22 910/4 911/2 912/3 920/1 923/4 929/5 934/9</p>
<p>H</p> <p>had [140]</p> <p>657/25 658/6 658/8 658/15 662/11 662/18 664/13 664/17 665/13 667/10 667/11 668/16 668/18 671/4 672/12 676/9 680/20 681/3 683/13 683/22 684/5 684/7 689/9 696/5 696/15 696/16 696/17 696/19 697/17 698/1 699/14 699/20</p>	<p>703/1 703/22 704/1 704/15 705/23 709/12 710/20 711/15 711/16 712/15 712/22 712/23 714/13 714/14 717/20 720/6 720/18 720/19 721/23 722/3 724/5 724/15 725/15 726/5 726/17 727/6 727/10 727/18 728/2 728/24 730/6 731/12 731/16 731/23 731/24 733/22 734/15 736/3 736/8 738/13 748/16 748/23 752/23 752/25 753/8 761/25 764/12 764/13</p>	<p>770/23 774/2 775/6 776/19 776/22 777/12 809/18 814/18 821/21 822/7 824/5 825/14 826/18 827/2 829/12 829/15 829/16 838/21 840/5 842/12 848/25 854/5 859/8 860/2 864/14 864/19 864/20 865/5 865/23 867/10 868/22 875/11 878/7 878/10 878/14 882/22 884/5 900/4 901/18 903/16 908/22 910/4 911/2 912/3 920/1 923/4 929/5 934/9</p>

<p>H</p> <p>had... [12] 934/25 935/4 938/8 938/8 938/9 939/4 940/17 940/18 941/8 944/10 948/8 950/16</p> <p>hadn't [2] 680/16 947/22</p> <p>HALE [1] 653/12</p> <p>half [10] 663/18 723/14 723/15 841/15 841/18 910/7 911/12 912/18 923/12 923/12</p> <p>halfway [1] 802/9</p> <p>Halsbury [2] 724/22 724/25</p> <p>Halsbury's [2] 724/6 724/7</p>	<p>hand [11] 669/20 672/19 681/23 711/24 763/2 787/23 869/8 878/7 878/14 923/14 943/9</p> <p>handle [1] 922/8</p> <p>handles [1] 777/5</p> <p>handling [1] 765/20</p> <p>HANOTIAU [1] 653/6</p> <p>happen [1] 910/6</p> <p>happened [12] 668/15 671/1 731/12 733/14 754/13 783/6 827/5 835/19 840/25 900/8 910/5 949/15</p>	<p>happens [1] 924/1</p> <p>happy [4] 686/16 762/21 893/12 914/14</p> <p>harbor [1] 819/11</p> <p>hard [7] 669/3 669/6 693/20 693/24 768/3 817/2 862/1</p> <p>hardly [1] 808/17</p> <p>harmonized [4] 744/14 744/21 745/9 745/21</p> <p>Harold [1] 887/17</p> <p>Harvard [3] 673/13 673/23 748/16</p> <p>has [124] 657/20 659/17</p>
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has... [122]	756/11 756/24	896/1 896/22
660/14 662/9	760/17 762/19	897/12 897/16
662/16 671/11	773/18 799/23	904/21 904/23
672/16 675/17	799/24 806/11	905/2 910/2
677/2 685/6	809/12 811/1	910/21 916/17
688/8 688/20	811/12 814/23	916/22 921/23
692/14 693/13	818/19 818/19	922/10 922/13
698/14 699/1	818/25 819/16	922/25 923/17
709/17 709/18	820/4 821/19	924/2 926/2
711/1 711/1	823/6 824/21	926/3 926/5
719/10 722/25	824/23 826/21	926/7 926/12
723/19 723/22	828/1 828/23	926/15 927/20
724/19 728/14	829/4 833/14	928/3 929/14
731/19 732/1	836/18 836/18	930/4 933/22
732/19 735/19	837/14 840/9	hasn't [1]
736/7 737/9	842/16 842/20	818/22
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<p>I</p> <p>inventive... [23] 897/14 897/18 897/18 897/24 898/1 898/16 898/20 898/24 899/3 899/5 899/12 899/14 899/24 900/7 900/17 900/19 901/3 901/15 901/21 902/6 902/14 904/22 936/15</p> <p>inventiveness [1] 835/13</p> <p>inventor [9] 662/17 689/20 719/3 776/21 864/20 865/4 869/13 871/22 883/13</p> <p>inventors [7] 667/10 688/9</p>	<p>741/18 772/22 796/12 872/25 916/14</p> <p>inventorship [3] 666/8 666/15 669/9</p> <p>inverse [1] 889/14</p> <p>investigate [2] 777/11 777/13</p> <p>invite [1] 814/2</p> <p>inviting [1] 767/14</p> <p>invoked [2] 759/13 891/16</p> <p>involved [5] 802/24 841/15 855/7 856/2 905/17</p> <p>involves [3] 803/4 803/7 811/16</p>	<p>IP [12] 750/3 762/9 762/17 814/15 844/20 846/17 846/20 848/10 887/14 887/16 887/19 908/8</p> <p>irregularities [1] 820/9</p> <p>irrelevance [1] 822/2</p> <p>irrelevant [6] 718/19 820/23 822/21 823/5 833/11 899/7</p> <p>irrespective [1] 877/19</p> <p>is [860]</p> <p>isn't [17] 693/6 706/15 707/3 708/19 718/25 730/20 764/6 798/25 799/20 811/23</p>
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715/25 717/9	770/1 770/8	837/18 837/18
717/12 717/23	770/11 776/15	838/20 839/11
718/13 719/9	778/11 782/9	839/14 840/18
720/3 722/12	788/11 792/4	841/18 848/15
724/4 728/20	794/8 796/1	849/14 850/12
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735/14 735/17	805/24 807/1	851/2 854/21
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<p>J</p> <p>just... [27] 862/16 869/7 870/14 876/12 881/11 882/22 889/3 891/21 894/17 899/22 900/6 900/10 905/18 910/10 911/24 912/21 913/3 915/10 915/13 915/16 919/6 930/16 931/24 931/25 935/17 939/23 947/21</p> <p>JUSTICE [41] 655/10 684/24 692/10 700/15 703/24 704/14 704/17 704/20 704/21 705/12 705/13 743/2 743/4 811/17</p>	<p>824/2 833/1 833/16 833/24 835/23 836/2 836/18 864/7 864/16 870/6 873/21 886/23 888/5 890/9 890/12 902/22 903/8 903/15 903/17 903/18 903/23 903/25 904/3 904/25 905/3 906/25 915/13</p> <p>Justice O'Reilly [1] 833/16</p> <p>justification [1] 668/6</p> <p>justify [3] 700/1 829/21 867/12</p>	<p>K</p> <p>K1A [1] 655/13</p> <p>K1P [1] 654/17</p> <p>KCMG [1] 653/15</p> <p>keep [8] 751/17 806/4 816/19 821/14 849/20 850/23 922/25 933/18</p> <p>keeps [1] 817/2</p> <p>key [3] 893/24 894/1 894/5</p> <p>kind [14] 680/24 681/18 702/22 712/22 738/9 759/15 790/16 851/8 864/10 891/8 893/24 927/2 931/5 949/12</p>
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680/23 682/22	856/17 856/17	681/13 682/2
683/25 691/14	856/18 857/1	682/9 682/18
691/21 695/12	857/1 858/8	682/23 695/5
703/5 714/1	858/20 867/18	695/10 695/18
726/12 735/21	867/21 868/5	695/20 699/14
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910/20	668/2 672/25	723/19 723/20
late [4] 840/10	673/2 673/12	724/19 725/1
844/23 922/23	678/25 679/6	725/6 725/8
934/4	680/21 681/9	725/11 725/18
later [16]	681/12 682/5	725/21 725/22
657/22 680/21	682/20 683/10	726/7 726/15
688/8 688/21	687/22 691/25	727/6 727/11
781/10 809/20	692/7 692/11	727/16 728/5
832/14 832/17	694/12 694/23	728/11 728/13
872/19 878/12	695/14 699/16	728/15 728/19
879/3 883/10	699/22 699/23	732/10 733/20
919/23 931/20	700/1 701/3	735/8 736/4

L	752/25 753/1	846/12 849/22
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736/7 742/5	754/2 760/24	857/15 859/17
744/9 744/12	762/1 762/6	859/24 860/15
744/12 744/13	762/8 762/17	861/21 862/8
744/21 744/25	763/21 763/24	865/15 866/17
746/11 746/17	764/1 764/4	866/22 867/3
746/20 746/21	764/5 764/11	867/16 867/19
746/22 747/10	764/15 791/11	868/15 869/1
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747/23 747/24	814/10 814/12	879/6 881/15
748/5 748/19	816/7 816/10	881/22 882/3
748/23 749/3	816/11 816/12	882/9 887/14
749/7 749/10	816/20 816/21	887/19 887/20
749/12 749/19	816/23 821/11	888/22 891/4
750/13 750/14	822/13 822/25	895/21 897/20
750/18 750/19	823/11 823/20	897/24 903/11
751/4 751/4	824/4 824/8	904/8 904/16
751/11 751/14	825/11 826/10	904/19 905/5
751/15 751/19	826/18 830/5	907/8 907/11
751/21 751/24	836/16 836/17	907/12 907/14
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<p>M</p> <p>Mobil [4] 838/3 838/4 859/3 859/8</p> <p>model [1] 726/20</p> <p>moderated [2] 861/24 864/14</p> <p>modern [5] 695/14 708/17 720/4 722/14 727/11</p> <p>molecular [1] 919/16</p> <p>moment [7] 659/18 707/7 835/4 852/3 882/13 896/20 926/1</p> <p>moments [1] 930/4</p> <p>money [5] 753/23 849/13 849/21 850/22</p>	<p>850/22</p> <p>monopoly [7] 667/12 685/18 787/10 787/13 823/4 832/10 872/2</p> <p>Monsanto [31] 687/23 692/7 692/11 694/12 694/18 694/20 694/24 694/25 695/13 695/24 696/6 696/13 696/14 698/5 698/8 699/21 699/24 700/15 715/13 791/25 792/20 793/2 794/14 794/24 794/25 829/19 829/22 830/3 858/24 859/15 926/21</p> <p>months [2]</p>	<p>863/20 868/2</p> <p>MONTPLAISIR [1] 655/7</p> <p>Montreal [1] 919/12</p> <p>MOPOP [84] 768/15 768/18 769/24 769/25 770/2 771/8 771/11 771/17 771/18 772/13 772/14 772/18 772/25 773/3 773/7 774/10 782/19 782/25 783/8 783/13 783/17 784/5 784/18 785/1 788/11 788/14 788/23 789/1 789/2 789/17 789/18 789/23 789/23 790/5 790/13 791/10</p>
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<p>M</p> <p>MOPOP... [48] 792/12 794/5 794/19 794/22 795/1 795/6 795/13 795/21 796/24 799/2 799/13 799/20 800/13 802/25 803/14 803/23 804/1 804/7 804/9 805/21 808/6 808/23 809/13 810/12 810/24 811/6 811/9 811/12 811/16 811/21 811/23 920/20 921/6 924/9 924/18 933/12 933/16 933/17 934/17 935/8 935/16 935/20 937/24 937/25</p>	<p>938/7 938/12 938/13 938/23</p> <p>MOPOP's [3] 772/3 772/10 788/21</p> <p>MOPOPs [2] 773/12 795/15</p> <p>more [64] 665/10 669/20 671/5 671/20 672/1 685/24 690/17 692/4 693/1 698/3 703/18 713/5 716/25 742/3 745/4 745/20 747/12 750/5 751/14 752/13 752/19 754/10 754/11 754/14 755/17 755/19 768/14 783/8 796/14 800/16 800/23 800/24</p>	<p>802/6 815/16 828/9 830/12 832/23 837/20 840/16 843/15 849/21 850/21 850/22 853/19 865/9 872/8 872/15 893/12 898/8 919/10 923/19 924/19 925/12 930/4 930/5 933/19 933/21 936/6 936/20 937/6 937/13 938/21 938/24 946/18</p> <p>moreover [5] 689/5 693/5 725/10 873/21 889/11</p> <p>morning [10] 657/1 659/11 707/21 779/24 786/4 788/18</p>
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<p>M</p> <p>morning... [4] 790/2 795/11 829/24 873/18</p> <p>most [17] 705/21 710/16 712/3 712/13 738/22 748/8 749/15 762/17 853/6 856/23 887/1 893/1 896/4 922/13 923/18 935/2 946/13</p> <p>mostly [5] 815/3 815/5 817/1 921/12 922/11</p> <p>motion [1] 771/1</p> <p>motivated [2] 906/18 908/1</p> <p>motivates [1] 831/19</p>	<p>motivation [1] 831/14</p> <p>motives [1] 832/21</p> <p>Mouse [3] 673/13 673/23 748/16</p> <p>move [1] 800/6</p> <p>moved [3] 776/1 777/4 934/10</p> <p>mover [1] 746/24</p> <p>moving [1] 839/24</p> <p>MR [28] 653/11 654/5 654/6 654/6 654/7 654/8 654/9 654/14 654/19 654/20 654/22 654/23 655/5 655/5</p>	<p>655/6 655/8 655/17 655/18 655/19 655/20 655/21 656/8 656/12 656/16 765/23 767/19 814/5 830/10</p> <p>Mr. [99] 657/9 659/7 669/2 676/16 686/10 687/2 688/20 693/23 707/12 710/25 711/5 720/19 722/6 759/25 760/6 762/14 762/18 763/14 765/3 765/12 765/19 765/19 765/21 766/11 767/12 767/16 767/17 774/18 774/20 775/4 775/7 775/10 777/25</p>
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<p>M</p> <p>Mr.... [66]</p> <p>778/25 779/3</p> <p>779/11 782/6</p> <p>782/11 807/23</p> <p>810/11 812/6</p> <p>812/10 812/15</p> <p>813/3 813/11</p> <p>813/24 818/1</p> <p>818/6 824/8</p> <p>831/4 831/10</p> <p>831/19 832/22</p> <p>833/1 833/14</p> <p>834/9 834/25</p> <p>835/15 836/25</p> <p>838/1 839/3</p> <p>839/7 839/9</p> <p>839/22 840/4</p> <p>840/5 840/15</p> <p>841/23 842/1</p> <p>842/16 842/18</p> <p>843/9 843/21</p> <p>844/8 844/13</p> <p>845/11 846/12</p>	<p>847/15 852/7</p> <p>859/7 859/8</p> <p>865/13 870/14</p> <p>873/13 882/15</p> <p>882/20 882/22</p> <p>892/21 902/20</p> <p>902/25 903/21</p> <p>905/11 905/23</p> <p>908/19 917/3</p> <p>932/2 932/8</p> <p>932/10 950/24</p> <p>Mr. Bochnovic [1] 873/13</p> <p>Mr. Born [2]</p> <p>807/23 810/11</p> <p>Mr. Dearden [3] 767/12</p> <p>932/8 932/10</p> <p>Mr. Dimock [18] 710/25</p> <p>759/25 760/6</p> <p>762/14 818/6</p> <p>831/19 832/22</p> <p>833/14 834/9</p>	<p>834/25 835/15</p> <p>839/3 839/7</p> <p>839/9 840/5</p> <p>840/15 846/12</p> <p>859/8</p> <p>Mr. Dimock's [14] 711/5</p> <p>818/1 824/8</p> <p>831/10 836/25</p> <p>838/1 839/22</p> <p>840/4 841/23</p> <p>842/18 859/7</p> <p>902/20 902/25</p> <p>903/21</p> <p>Mr. Fox [1]</p> <p>763/14</p> <p>Mr. Gold [1]</p> <p>762/18</p> <p>Mr. Hayhurst [2] 720/19</p> <p>722/6</p> <p>Mr. Johnson [1] 676/16</p> <p>Mr. Johnston [7] 659/7</p>
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<p>M</p> <p>Mr. Johnston... [6] 687/2 688/20 765/3 842/1 844/8 882/20</p> <p>Mr. Justice [1] 833/1</p> <p>Mr. President [14] 657/9 669/2 686/10 693/23 707/12 765/19 767/16 782/6 812/6 852/7 865/13 905/23 908/19 950/24</p> <p>Mr. Reddon [16] 812/15 813/3 813/11 813/24 831/4 842/16 843/9 844/13 845/11</p>	<p>847/15 870/14 882/15 882/22 892/21 905/11 917/3</p> <p>Mr. Reddon's [1] 843/21</p> <p>Mr. Rick [1] 765/19</p> <p>Mr. Wilson [14] 765/12 765/21 766/11 767/17 774/18 774/20 775/10 777/25 778/25 779/3 779/11 782/11 812/10 932/2</p> <p>Mr. Wilson's [2] 775/4 775/7</p> <p>Ms [14] 653/19 653/22 653/22 654/5 654/7 654/8</p>	<p>654/9 654/10 654/14 654/20 655/6 655/7 655/7 655/8</p> <p>Ms. [12] 659/4 707/10 707/19 765/1 765/12 779/8 813/21 813/23 813/25 905/8 918/21 932/5</p> <p>Ms. Cheek [2] 765/12 813/21</p> <p>Ms. Wagner [7] 659/4 707/10 707/19 765/1 813/23 813/25 905/8</p> <p>Ms. Zeman [3] 779/8 918/21 932/5</p> <p>much [15] 659/6 713/5 716/20 731/21</p>
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<p>M</p> <p>much... [11] 738/8 750/23 751/1 769/4 809/20 816/5 824/23 843/8 911/5 915/24 924/19</p> <p>multiple [2] 773/19 773/19</p> <p>MURRAY [4] 656/7 765/18 765/25 767/22</p> <p>must [63] 663/5 663/10 663/16 665/2 665/5 665/25 667/3 670/4 672/23 677/3 677/24 679/7 685/7 685/8 685/9 690/18 709/2 711/7 715/2 717/9</p>	728/15 731/7 736/17 768/23 772/24 773/2 773/9 774/5 778/3 788/6 793/6 793/12 796/16 834/19 845/12 867/11 869/12 869/13 869/16 869/19 870/7 870/21 870/24 871/2 871/6 871/18 871/19 871/20 873/7 875/2 891/1 921/19 921/19 921/19 921/20 925/2 925/3 925/17 926/2 926/23 928/10 930/25 931/3 <p>my [175] 658/16 659/1</p>	662/19 671/17 678/12 680/18 681/9 682/13 682/14 690/12 693/6 704/5 705/18 706/5 707/2 708/24 709/10 710/25 719/5 725/4 725/11 735/8 738/24 742/18 742/21 743/1 743/1 743/13 744/10 744/24 745/17 748/21 749/14 749/18 751/10 757/8 759/5 759/6 759/7 760/20 761/25 762/5 762/7 763/25 764/6 764/12 765/25 766/19 766/20 766/21
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<p>N</p> <p>named [1] 689/20</p> <p>namely [1] 867/9</p> <p>narrow [2] 661/1 946/18</p> <p>NATALIE [1] 654/8</p> <p>national [7] 814/15 844/20 848/10 851/24 919/15 931/15 931/20</p> <p>natural [1] 663/17</p> <p>nature [7] 657/4 713/22 764/5 815/20 835/13 921/7 931/7</p> <p>necessarily [9] 665/2 706/9 736/22</p>	<p>756/18 835/1 872/17 889/25 913/9 914/11</p> <p>necessary [14] 669/10 699/20 703/14 718/13 727/12 735/11 735/14 735/17 735/23 735/25 863/20 871/21 896/4 896/6</p> <p>need [29] 663/25 679/14 681/13 682/10 683/25 704/4 716/20 732/5 735/9 742/6 763/5 764/7 778/8 794/11 833/13 838/15 838/16 838/17 844/8 863/8 864/20 865/4</p>	<p>873/22 873/25 881/6 890/14 894/24 897/24 901/17</p> <p>needed [5] 773/22 809/14 809/15 810/4 910/19</p> <p>needs [2] 686/14 795/13</p> <p>negatives [1] 890/11</p> <p>neglected [1] 696/6</p> <p>neither [3] 836/8 846/7 884/23</p> <p>never [33] 668/17 689/12 689/13 712/23 715/11 717/14 717/16 717/18 728/18 742/15 754/19 758/2</p>
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<p>N</p> <p>never... [21] 762/1 763/21 808/17 814/17 826/18 827/5 832/16 843/1 864/19 865/3 868/22 869/4 873/8 873/12 874/6 874/8 892/1 904/15 910/5 922/20 937/19</p> <p>new [90] 664/14 664/19 669/24 670/2 670/7 670/11 670/15 670/19 670/20 670/23 671/18 671/22 699/23 711/2 738/5 739/19 746/13 748/13 748/18 749/2</p>	749/3 752/25 753/20 754/4 754/20 756/1 756/11 756/14 761/6 762/4 762/6 763/13 763/14 763/19 772/18 772/25 773/4 773/8 773/11 773/14 773/20 773/24 776/23 776/25 778/14 787/8 799/3 806/20 806/21 807/2 807/3 807/3 811/19 811/20 811/21 811/23 811/23 816/7 816/11 822/22 830/14 831/24 832/3 836/14 837/17 850/3 850/5 851/22	858/3 884/16 892/6 894/11 904/14 904/17 904/23 905/5 913/12 915/12 921/19 922/1 925/21 925/23 926/3 928/1 928/7 929/18 935/5 935/23 936/1 936/22 <p>newer [2] 798/22 920/2</p> <p>newly [1] 920/23</p> <p>newsletter [1] 868/1</p> <p>Nexium [1] 743/6</p> <p>next [12] 666/24 677/22 739/12 745/3 827/17 829/18 898/17 917/6</p>
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next... [4]	727/1 727/25	818/12 821/16
933/14 933/15	728/9 729/13	823/4 823/16
933/15 945/7	729/24 730/11	823/18 823/24
night [1]	730/23 733/11	824/12 827/1
669/6	733/24 737/19	829/11 829/14
NIKHIL [1]	738/21 742/15	832/5 835/24
654/8	748/1 749/1	836/1 836/4
nine [2]	750/21 753/1	839/17 839/23
701/16 887/25	753/23 754/5	845/15 845/15
no [135] 652/6	757/20 760/18	854/5 855/6
657/5 657/7	765/2 767/11	858/7 859/6
660/21 662/19	771/7 771/21	859/18 868/18
663/17 672/3	781/1 785/15	872/8 872/15
674/5 676/5	787/18 787/21	879/20 879/20
680/16 685/24	788/16 791/7	880/4 885/11
690/17 692/3	792/23 793/10	888/7 888/10
693/1 693/9	793/17 795/6	888/12 888/16
694/19 695/18	797/14 799/15	888/20 888/23
700/13 700/18	801/16 801/24	889/1 899/13
709/14 710/5	801/25 802/14	900/18 900/22
715/15 715/20	802/18 806/11	902/9 902/20
720/2 722/3	807/22 808/10	903/6 903/10
723/6 725/10	809/7 810/8	905/9 906/20

<p>N</p> <p>no... [12] 907/10 907/17 907/23 911/22 917/1 917/2 918/20 929/21 932/7 932/20 942/14 948/11</p> <p>No. [9] 738/23 773/18 773/23 774/4 835/14 835/15 855/2 886/19 886/19</p> <p>No. 1 [3] 738/23 835/14 886/19</p> <p>No. 101 [1] 855/2</p> <p>No. 2 [3] 773/18 835/15 886/19</p> <p>No. 3 [1] 773/23</p> <p>No. 4 [1]</p>	<p>774/4</p> <p>nobody [5] 735/22 748/14 748/16 764/17 764/19</p> <p>NOC [15] 703/23 704/17 815/15 815/20 815/23 816/2 816/4 816/7 816/11 816/12 816/14 840/6 840/17 840/18 841/7</p> <p>non [20] 711/2 739/23 754/4 756/12 756/14 784/17 792/11 815/1 815/3 826/23 834/18 852/21 861/12 896/17 902/10 904/10 921/19 922/1</p>	<p>926/3 931/11</p> <p>non-branded [1] 852/21</p> <p>non-enhancement [1] 902/10</p> <p>non-issue [1] 826/23</p> <p>non-obvious [10] 711/2 739/23 754/4 756/12 756/14 834/18 896/17 921/19 922/1 926/3</p> <p>non-obviousness [1] 904/10</p> <p>non-patentee [1] 861/12</p> <p>non-pharmaceutical [2] 815/1 815/3</p> <p>Non-Statutory [2] 784/17</p>
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	party-driven [1] 923/18	

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<p>R</p> <p>reader [4] 680/15 682/9 682/10 895/14</p> <p>readers [1] 871/23</p> <p>readily [1] 897/25</p> <p>reading [24] 671/2 678/2 678/14 680/24 683/20 821/16 834/10 836/7 836/7 836/12 836/12 836/15 836/15 836/17 836/17 871/4 877/13 886/1 886/4 891/8 899/8 900/13 906/17 926/10</p> <p>reads [3] 717/1 769/6 945/18</p>	<p>ready [2] 796/22 910/17</p> <p>reaffirmed [1] 877/16</p> <p>reaffirms [2] 868/14 877/8</p> <p>real [9] 663/17 668/14 732/21 757/9 815/20 820/12 839/23 906/19 909/20</p> <p>real-world [1] 815/20</p> <p>realities [2] 820/16 860/15</p> <p>reality [3] 663/23 664/1 822/19</p> <p>realize [1] 771/2</p> <p>really [49] 658/15 676/1 691/24 692/2 697/22 702/9</p>	<p>712/6 712/11 715/20 722/13 728/18 730/2 745/9 748/14 748/16 752/11 755/14 762/24 764/23 764/24 815/8 819/5 820/14 821/8 821/9 821/9 825/6 827/16 828/11 837/17 851/9 864/15 865/14 874/3 874/24 874/24 874/25 878/15 879/9 901/19 906/6 911/3 911/11 911/13 911/18 912/14 912/16 912/21 912/25</p> <p>reason [22] 663/21 694/25</p>
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<p>R</p> <p>reason... [20] 697/4 698/10 704/21 721/25 732/13 757/1 760/10 766/6 770/23 778/8 812/22 832/24 902/21 910/5 910/25 916/16 917/16 920/11 942/21 946/3</p> <p>reasonable [5] 657/18 675/24 680/25 741/19 871/11</p> <p>reasonably [2] 778/6 886/1</p> <p>reasoned [4] 913/23 914/5 914/6 915/9</p> <p>reasoning [49] 679/7 679/11 679/13 681/3</p>	681/6 681/7 681/12 681/23 682/4 682/16 685/9 685/21 688/4 688/11 688/23 692/16 692/21 695/1 695/2 699/13 699/17 742/9 747/8 769/14 773/9 774/5 821/6 829/14 867/12 869/15 869/21 870/24 871/19 872/5 873/2 902/18 902/21 914/6 914/7 914/14 915/8 926/24 927/7 939/3 944/25 945/20 949/2 949/9 950/12 <p>reasons [22]</p>	677/4 677/12 677/15 698/11 698/13 698/13 699/3 735/25 739/3 743/3 821/3 824/15 832/21 889/7 905/15 905/16 905/17 906/13 906/14 906/15 909/20 915/11 <p>recall [9] 673/10 675/3 721/14 808/6 860/22 869/6 891/16 892/2 934/13</p> <p>recalled [1] 808/20</p> <p>recalling [1] 748/11</p> <p>receive [1] 930/23</p> <p>received [8]</p>
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<p>R</p> <p>received... [8] 669/5 692/6 692/11 698/17 699/8 777/13 841/6 841/13</p> <p>receiving [1] 930/21</p> <p>recent [3] 754/25 852/13 890/24</p> <p>recently [2] 678/25 821/25</p> <p>Recess [6] 707/17 765/17 779/7 812/12 882/19 917/8</p> <p>recognize [3] 686/19 689/22 846/11</p> <p>recognized [2] 809/19 822/23</p> <p>recognizes [1] 756/16</p>	<p>recognizing [2] 732/10 854/12</p> <p>recollection [1] 682/14</p> <p>recommendati on [1] 769/18</p> <p>recommendati ons [2] 781/5 920/13</p> <p>record [17] 701/7 765/24 766/25 767/5 777/24 787/25 813/14 838/3 842/8 842/10 842/13 846/1 846/23 847/7 847/11 917/11 918/11</p> <p>records [1] 815/17</p> <p>recross [1] 743/16</p>	<p>Reddon [23] 654/22 656/11 812/13 812/15 813/3 813/11 813/24 814/5 814/7 830/10 831/4 835/16 842/16 843/9 844/13 845/11 847/15 870/14 882/15 882/22 892/21 905/11 917/3</p> <p>Reddon's [1] 843/21</p> <p>Reddon.....814 [1] 656/12</p> <p>redirect [9] 657/17 658/23 707/11 707/14 707/19 707/20 743/14 807/21 905/9</p>
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<p>R</p> <p>reduce [4] 671/8 839/9 839/12 839/18</p> <p>reduced [8] 667/3 669/10 669/16 672/12 737/24 867/10 878/7 878/10</p> <p>reduces [1] 839/6</p> <p>reduction [3] 669/24 671/19 839/10</p> <p>refer [9] 681/20 693/4 759/2 784/25 791/24 797/11 871/6 891/8 942/18</p> <p>reference [33] 691/1 694/3 694/18 694/25 697/6 717/11</p>	<p>718/24 723/3 724/7 724/7 729/25 733/2 769/22 789/23 790/24 798/25 805/6 827/15 837/23 859/3 859/4 864/15 867/1 873/18 884/1 885/9 885/10 885/11 900/23 902/23 911/3 924/11 928/24</p> <p>referenced [2] 885/5 935/18</p> <p>references [6] 720/7 734/12 798/19 883/21 885/8 886/21</p> <p>referencing [1] 713/19</p> <p>referred [12] 741/2 761/12</p>	<p>769/17 790/1 808/3 824/1 836/19 854/11 912/4 916/2 944/19 950/1</p> <p>referring [21] 676/21 677/20 689/1 689/2 697/3 697/19 703/9 708/5 758/23 778/14 778/19 798/13 831/7 934/1 937/25 938/2 938/19 941/9 941/11 942/2 950/10</p> <p>refers [5] 693/5 721/17 834/9 837/1 864/2</p> <p>refinement [1] 901/22</p> <p>reflect [6]</p>
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<p>R</p> <p>reflect... [6] 772/14 791/18 795/13 811/13 873/10 933/16</p> <p>reflected [4] 713/21 772/16 774/11 808/5</p> <p>reflection [3] 712/11 791/10 794/19</p> <p>reflects [3] 668/5 755/12 933/5</p> <p>refusals [1] 920/14</p> <p>refuse [1] 883/17</p> <p>refused [4] 696/15 696/19 715/16 920/10</p> <p>refuses [1] 663/22</p> <p>refusing [4]</p>	<p>668/4 697/4 710/17 710/18</p> <p>regard [8] 685/19 775/7 805/6 809/24 868/24 872/3 899/14 900/19</p> <p>regarded [3] 713/9 818/4 868/6</p> <p>regarding [13] 666/11 683/11 698/25 701/15 704/8 709/9 723/11 739/12 843/12 856/8 866/2 876/23 877/3</p> <p>regardless [1] 816/13</p> <p>regards [3] 741/14 816/22 861/22</p> <p>regime [8]</p>	<p>760/13 760/17 760/17 840/6 840/9 840/18 904/17 904/23</p> <p>regular [1] 848/17</p> <p>regularly [1] 938/24</p> <p>regulated [1] 819/24</p> <p>regulations [6] 840/7 840/18 840/24 841/2 841/7 841/21</p> <p>regulator [1] 819/24</p> <p>regulatory [2] 705/23 705/24</p> <p>reiterate [1] 833/13</p> <p>reiterated [1] 867/8</p> <p>reject [1] 893/15</p>
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<p>R</p> <p>rejected [11] 729/21 730/17 777/6 780/22 838/19 838/23 839/14 839/14 839/20 879/1 920/11</p> <p>rejecting [1] 804/7</p> <p>rejection [4] 724/9 806/20 806/22 807/10</p> <p>rejects [1] 665/4</p> <p>relate [3] 737/15 737/22 780/8</p> <p>related [6] 771/15 771/20 829/13 857/12 936/7 936/19</p> <p>relates [2] 716/10 876/8</p>	<p>relating [5] 724/14 746/11 790/10 865/14 929/22</p> <p>relationship [2] 737/19 800/9</p> <p>relative [3] 770/4 848/5 929/13</p> <p>relatively [3] 754/25 760/12 821/25</p> <p>released [6] 673/5 673/8 673/12 765/9 812/10 917/5</p> <p>relevance [3] 719/14 909/17 909/20</p> <p>relevant [16] 677/24 678/8 678/20 716/5 720/10 783/9</p>	<p>783/18 785/1 801/19 806/18 809/23 809/24 841/9 866/10 867/24 896/12</p> <p>reliable [1] 708/22</p> <p>reliance [2] 823/1 889/8</p> <p>relied [3] 822/6 827/6 829/19</p> <p>relies [1] 817/16</p> <p>rely [12] 770/12 773/5 804/7 817/16 859/16 859/19 861/18 876/22 921/23 922/2 922/13 924/21</p> <p>relying [2] 689/11 792/24</p> <p>remained [1]</p>
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R	820/23 888/5	782/10 782/24
remained... [1] 916/11	renders [1] 899/7	784/25 785/17
remand [1] 740/19	Rennie [1] 743/4	789/8 791/23
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remarkably [1] 700/17	824/25 894/17	803/13 806/4
remarks [1] 700/16	rephrase [1] 779/20	806/5 806/15
remember [3] 715/1 810/15	replay [1] 881/12	813/12 813/13
915/15	Reply [1] 767/4	813/19 816/16
remembering [1] 915/16	report [92] 683/2 683/3	818/1 818/6
remitting [1] 704/14	690/12 690/23	825/14 825/17
removed [1] 726/22	700/20 703/20	825/22 827/23
render [1] 730/24	725/4 728/24	831/8 831/11
rendered [4] 809/7 816/6	738/17 758/10	834/8 836/25
	759/25 760/3	840/4 840/11
	766/23 767/4	842/19 843/12
	767/10 769/8	843/22 845/1
	769/11 782/3	857/10 857/13
		857/17 857/21
		857/24 858/9
		858/9 858/18
		858/22 859/5
		859/7 859/9
		859/12 860/8
		860/17 860/23

<p>R</p> <p>report... [26] 861/3 861/16 863/14 863/17 864/1 864/18 864/23 874/6 874/12 874/20 876/2 876/23 877/2 890/18 890/23 892/5 892/16 892/16 892/18 893/11 893/20 911/4 914/10 939/22 949/17 949/18</p> <p>reported [2] 846/8 853/13</p> <p>REPORTERS [1] 653/21</p> <p>Reporting [1] 653/23</p> <p>reports [6] 710/14 768/11 788/20 825/20</p>	<p>892/12 949/17</p> <p>represent [2] 853/2 853/4</p> <p>representatio n [5] 727/6 727/12 727/18 727/21 728/17</p> <p>representatio ns [7] 725/25 726/10 727/21 750/16 756/17 756/18 756/20</p> <p>represented [6] 853/7 853/12 855/13 863/18 899/9 900/14</p> <p>reproduce [3] 806/14 846/3 854/13</p> <p>reproduced [7] 698/12 782/24 783/22 795/11 795/21</p>	<p>806/5 869/9</p> <p>reproduces [2] 698/6 884/13</p> <p>reproducing [2] 698/9 889/18</p> <p>request [1] 922/7</p> <p>requested [1] 844/2</p> <p>require [7] 671/19 680/13 681/25 753/21 809/2 829/3 916/14</p> <p>required [19] 672/2 736/8 737/14 738/20 739/18 740/4 740/9 742/4 758/21 771/6 777/1 789/1 795/15 840/8</p>
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<p>R</p> <p>required... [5] 870/12 872/10 874/7 882/7 883/17</p> <p>requirement [74] 659/13 659/23 661/24 666/11 667/22 668/6 672/4 674/16 675/10 675/18 676/4 676/21 677/21 680/1 681/20 683/2 683/5 683/6 683/12 689/13 701/21 702/15 702/22 703/3 703/15 704/15 704/18 712/2 715/10 726/18 727/17 728/7 728/9 728/20 737/10</p>	<p>738/9 745/12 745/13 754/6 756/25 756/25 757/23 758/13 758/15 759/2 759/17 759/20 769/1 770/17 771/5 772/17 772/19 773/1 773/4 773/8 773/25 796/4 821/13 829/12 830/8 830/14 833/18 833/22 857/14 869/11 870/5 870/17 872/14 873/10 874/16 875/2 876/1 884/24 904/12</p> <p>requirements [41] 684/16 685/19 690/16 736/24 739/15</p>	<p>745/8 754/9 768/17 768/18 768/19 770/3 770/4 771/22 772/4 772/10 772/13 773/11 773/14 773/21 774/7 774/12 788/15 788/21 788/24 788/25 789/4 789/5 789/10 789/16 789/19 789/20 833/23 870/9 872/2 930/25 931/1 931/8 931/13 931/17 931/20 931/22</p> <p>requires [8] 669/25 681/22 684/21 771/12 771/19 809/3 830/19 866/11</p> <p>requiring [5]</p>
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<p>R</p> <p>requiring... [5] 661/14 677/19 684/16 687/19 799/19</p> <p>requisite [3] 758/16 759/7 759/9</p> <p>research [11] 663/11 665/17 668/11 714/2 778/11 819/1 819/4 819/13 884/10 919/15 919/16</p> <p>reservation [1] 888/20</p> <p>resources [3] 923/19 930/5 935/7</p> <p>respect [30] 685/23 689/6 706/4 720/17 731/5 747/1</p>	<p>747/16 748/20 751/9 751/20 752/14 768/10 776/9 776/11 777/25 778/14 785/5 785/25 786/15 786/25 788/22 792/7 813/5 817/15 872/7 877/21 884/22 911/9 936/18 948/1</p> <p>respects [1] 728/21</p> <p>respond [6] 657/14 688/14 763/24 857/12 893/25 928/14</p> <p>responded [5] 876/5 897/12 939/4 942/1 948/10</p> <p>Respondent [8] 652/13</p>	<p>655/3 657/8 659/9 779/10 812/8 843/7 917/14</p> <p>responding [2] 657/12 859/7</p> <p>response [9] 706/6 763/23 763/25 847/18 849/5 912/3 913/16 915/17 924/14</p> <p>responses [2] 657/19 769/16</p> <p>responsibility [1] 921/12</p> <p>responsible [1] 775/19</p> <p>responsive [3] 657/15 842/18 914/19</p> <p>rest [1] 743/8</p> <p>restate [2]</p>
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<p>R</p> <p>restate... [2] 692/2 843/15</p> <p>restating [1] 691/24</p> <p>restrain [2] 916/1 916/9</p> <p>restrained [1] 722/23</p> <p>result [18] 706/14 717/3 717/3 718/3 722/20 725/6 738/8 801/3 801/9 802/11 822/14 829/6 839/2 847/8 869/15 891/14 903/6 903/13</p> <p>resultant [1] 903/12</p> <p>resulted [1] 700/25</p> <p>results [10]</p>	<p>717/8 717/9 717/13 717/19 717/23 729/23 830/2 927/6 927/8 927/23</p> <p>resume [2] 707/18 779/2</p> <p>retain [2] 868/9 894/6</p> <p>retained [4] 814/17 814/19 898/10 914/8</p> <p>retainers [1] 853/7</p> <p>retired [4] 768/7 781/23 919/9 921/1</p> <p>retracting [1] 731/13</p> <p>returned [1] 920/22</p> <p>reversal [1] 753/2</p> <p>reverses [1]</p>	<p>696/20</p> <p>reversing [1] 712/4</p> <p>review [15] 716/2 762/11 768/15 768/22 771/23 772/2 775/23 780/22 783/8 785/8 802/25 803/4 811/17 854/11 898/2</p> <p>reviewed [5] 714/9 741/11 772/6 784/10 784/21</p> <p>reviewing [4] 775/20 777/8 785/12 928/21</p> <p>revised [2] 791/18 811/12</p> <p>revisions [1] 924/21</p> <p>revocation [4]</p>
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R	665/7 666/8	789/17 789/24
revocation...	666/15 673/5	790/2 790/11
[4] 820/5	673/24 674/9	791/11 791/12
820/10 829/7	674/13 678/2	791/21 792/1
840/13	678/13 679/18	792/8 793/3
revocations	679/21 694/10	793/20 794/3
[1] 840/20	694/16 700/4	794/16 795/18
revoked [7]	701/19 701/24	795/22 796/5
726/14 817/21	702/16 704/20	796/8 797/4
818/7 821/18	707/15 726/21	797/17 798/5
849/20 850/3	736/6 743/7	798/16 798/25
850/21	746/11 749/8	799/20 802/12
rhetoric [1]	751/13 755/23	802/16 803/1
836/12	763/6 780/1	803/5 803/15
Rice [6] 667/1	780/4 780/9	803/19 803/24
673/3 711/9	780/13 780/16	805/18 805/22
711/10 711/12	781/12 781/14	806/12 817/9
712/1	781/20 781/23	817/10 817/25
RICHARD [1]	782/21 783/14	832/2 839/11
654/14	783/19 783/25	841/18 846/2
Rick [1]	784/6 784/18	846/19 855/4
765/19	785/10 786/8	863/23 872/9
right [108]	787/4 787/10	872/9 875/14
662/24 664/15	787/23 789/13	876/12 878/21

<p>R</p> <p>right... [10] 894/10 894/16 895/16 898/3 898/10 914/9 934/5 935/18 940/4 943/15</p> <p>right-hand [1] 787/23</p> <p>rights [8] 777/12 777/14 817/8 817/9 817/12 817/19 818/17 820/15</p> <p>rigorous [2] 837/15 893/8</p> <p>rise [3] 752/12 828/12 841/14</p> <p>Robert [1] 654/21</p> <p>role [4] 752/15 840/7 921/5 921/11</p> <p>rolled [1]</p>	<p>818/15</p> <p>roller [2] 731/13 731/16</p> <p>Ron [1] 655/19</p> <p>Ronald [2] 831/8 857/13</p> <p>room [2] 909/10 919/7</p> <p>rotating [1] 662/9</p> <p>rough [1] 854/21</p> <p>roughly [2] 781/5 854/14</p> <p>round [1] 745/3</p> <p>rule [49] 674/21 675/1 675/23 679/5 679/21 680/11 680/13 680/17 680/18 683/22 684/13 695/11</p>	<p>715/5 718/9 745/25 753/7 753/9 757/11 757/13 763/23 764/1 770/1 790/2 790/3 805/11 808/7 816/7 816/10 816/11 851/22 876/10 890/13 893/18 909/15 915/12 944/13 944/24 946/4 946/10 946/16 946/23 947/15 947/18 947/19 947/24 947/24 948/2 948/10 949/21</p> <p>rules [24] 652/4 713/25 757/15 770/4 788/7 804/25 807/11 841/11</p>
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<p>R</p> <p>rules... [16] 850/4 850/5 850/6 904/14 913/12 921/18 922/16 924/2 924/5 924/6 942/21 944/3 944/7 947/5 947/11 950/1</p> <p>run [4] 757/2 808/14 845/20 845/21</p> <p>running [1] 787/14</p> <p>RX [1] 855/22</p> <p>Ryan [1] 655/20</p>	<p>662/18 662/19 667/5 669/8 669/15 671/4 671/8 676/5 676/6 680/21 680/22 681/5 682/15 683/2 684/10 688/15 688/20 690/2 690/4 690/8 691/13 691/17 694/1 695/7 706/11 709/5 711/11 712/19 723/12 724/8 725/17 727/19 731/25 732/15 732/20 733/24 734/15 734/16 736/3 740/1 749/6 753/22 754/22 755/5 756/5 756/8 759/18 786/16</p>	<p>814/16 816/23 818/6 818/7 823/6 823/13 823/14 824/23 825/6 825/8 826/19 827/21 829/15 829/18 830/4 833/14 834/10 835/24 838/10 838/11 838/14 838/20 839/4 839/6 839/16 845/4 847/1 851/23 853/23 858/8 859/23 861/4 864/8 867/13 867/22 867/23 870/6 870/8 873/15 873/18 874/6 876/2 880/4 888/10 888/24 892/22 893/6 896/6</p>
<p>S</p> <p>safe [1] 819/11</p> <p>said [118] 657/17 661/23</p>		

<p>S</p> <p>said... [20] 900/4 902/24 903/3 905/23 906/25 909/16 912/5 913/3 913/17 914/17 922/10 926/1 926/9 929/8 930/4 936/5 937/1 937/16 939/18 940/17 salt [3] 753/19 753/22 753/24 same [45] 661/19 667/17 669/13 673/13 702/22 704/21 705/1 705/11 732/15 738/19 743/4 749/10 759/15 759/16 759/23 770/10 770/18 776/18</p>	<p>776/19 785/17 786/11 786/16 807/15 815/23 816/1 816/2 834/17 835/1 835/6 835/6 835/11 853/18 862/15 867/3 903/22 905/1 907/22 927/2 927/5 930/3 937/17 941/12 946/19 947/24 949/25 samples [3] 922/7 922/8 922/8 Sandoz [1] 897/22 Sandoz's [1] 898/18 Sanjay [1] 655/17 Sanofi [4]</p>	<p>852/25 855/17 856/19 900/4 satisfied [1] 676/3 satisfies [2] 737/10 754/9 satisfy [5] 672/4 738/9 740/7 770/18 810/5 saw [7] 657/18 752/12 752/13 889/24 912/16 928/24 937/19 say [160] 658/15 659/16 660/4 660/17 661/11 661/21 662/7 665/19 665/24 666/4 667/2 667/16 667/20 670/4 671/1 672/7</p>
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say... [144]		
672/25 675/22	734/6 734/18	828/6 828/9
676/5 677/2	736/25 737/25	828/18 832/4
677/3 677/15	744/5 744/14	832/17 835/5
678/3 678/14	744/17 744/19	836/11 837/4
678/25 680/7	746/21 746/21	838/21 840/15
681/19 684/21	747/1 747/4	841/18 850/11
684/23 685/24	747/11 753/17	853/19 854/12
686/2 687/19	754/3 754/8	857/18 858/7
690/17 692/3	754/12 754/19	862/18 865/24
692/9 693/1	755/16 756/7	869/18 871/21
695/13 697/8	758/4 758/16	872/8 872/13
699/12 700/13	761/5 761/17	872/15 874/13
700/15 706/5	761/18 762/15	875/24 879/8
706/6 708/14	762/24 763/2	880/5 883/2
708/23 710/18	763/13 763/22	886/8 892/17
712/5 712/25	764/16 781/1	892/19 893/15
712/25 713/3	781/16 790/5	901/23 903/3
713/23 718/12	794/7 795/1	903/13 905/1
719/5 720/2	800/7 806/21	906/10 911/8
721/21 726/4	811/9 814/22	912/2 914/15
726/11 727/19	817/23 819/21	916/8 917/7
728/8 732/4	820/3 821/13	927/1 928/12
	822/18 825/1	933/20 937/24
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<p>S</p> <p>schizophrenia ... [3] 737/5 737/8 741/22</p> <p>scholar [1] 881/2</p> <p>school [1] 814/12</p> <p>science [1] 921/15</p> <p>sciences [1] 769/3</p> <p>scientists [1] 687/7</p> <p>scintilla [12] 722/4 722/10 728/15 742/10 742/11 758/13 809/4 821/21 822/7 824/12 925/11 925/14</p> <p>scope [19] 732/22 782/1 825/14 944/10</p>	<p>946/8 946/11 946/16 946/19 946/21 947/1 947/7 947/10 947/12 948/1 948/6 948/9 949/21 949/22 950/4</p> <p>scour [3] 891/18 892/7 892/19</p> <p>scoured [2] 890/24 892/17</p> <p>scouring [6] 891/3 891/25 892/21 893/4 893/9 893/16</p> <p>screen [2] 676/19 693/22</p> <p>screws [10] 731/17 731/19 732/4 732/5 732/8 732/15 732/16 732/17</p>	<p>732/19 732/20</p> <p>scrupulous [1] 837/15</p> <p>se [1] 664/18</p> <p>sea [4] 761/5 905/13 905/16 906/8</p> <p>search [13] 773/15 845/20 845/21 845/22 845/23 846/4 846/22 847/5 847/8 854/12 854/13 854/13 854/20</p> <p>searching [1] 891/13</p> <p>second [45] 663/18 676/14 685/8 687/16 688/1 690/22 721/9 728/24 739/17 740/4 740/16 754/15</p>
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<p>S</p> <p>second... [33] 768/13 774/21 777/21 777/22 785/16 788/1 802/22 803/12 804/9 806/6 820/24 831/8 831/10 834/8 836/25 837/8 840/4 863/5 866/6 867/6 870/23 876/9 879/21 882/1 900/25 903/12 910/7 911/12 918/15 924/8 935/12 944/1 944/14</p> <p>second-guess [1] 754/15</p> <p>secret [1] 855/11</p> <p>SECRETARY [1] 653/18</p>	<p>section [76] 664/22 666/7 666/14 675/12 687/6 716/24 717/22 722/20 727/2 741/4 741/6 741/12 743/9 755/9 755/17 771/11 771/19 775/16 775/16 775/17 775/18 775/19 775/21 775/22 783/21 792/13 793/5 793/11 795/20 796/10 796/11 796/25 797/6 798/19 799/5 799/13 799/22 800/12 801/2 801/20 801/21 802/8 802/17 804/22 804/24 805/5</p>	<p>805/6 805/22 806/3 806/7 807/11 807/12 828/15 877/13 883/9 883/18 883/19 883/21 884/1 884/21 885/9 891/24 944/3 944/7 944/8 944/15 945/19 946/4 946/24 947/5 947/11 947/16 948/2 948/3 949/18 950/1</p> <p>Section 12.02.01 [1] 793/5</p> <p>Section 12.02.02 [1] 793/11</p> <p>section 12.03.02 [1] 800/12</p>
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<p>S</p> <p>Section 12.04 [1] 792/13</p> <p>section 12.08.01 [2] 796/11 796/25</p> <p>section 16.02.01 [2] 801/2 802/8</p> <p>Section 16.10 [1] 801/21</p> <p>section 17.03.04 [1] 805/6</p> <p>section 2 [13] 771/19 804/22 805/5 805/22 807/12 883/9 884/1 885/9 945/19 946/4 946/24 947/16 948/2</p> <p>section 27 [1] 948/3</p>	<p>section 40 [1] 883/18</p> <p>section 53 [3] 722/20 727/2 755/17</p> <p>section 84 [4] 804/24 807/11 944/7 944/15</p> <p>sections [3] 885/8 909/11 942/19</p> <p>see [66] 659/2 664/22 693/21 698/23 704/10 728/6 732/5 733/25 734/24 743/1 749/7 759/8 763/15 765/11 767/23 768/3 771/11 784/4 784/9 785/22 788/1 788/9 792/13 792/18 792/22</p>	<p>795/14 797/6 797/8 797/10 797/13 797/15 797/20 800/12 801/4 801/22 804/4 806/4 806/7 829/6 851/7 862/10 877/11 877/23 877/24 885/10 889/20 889/22 889/24 898/17 905/15 911/19 911/21 913/5 924/18 930/14 933/2 933/9 935/24 941/9 942/24 943/19 943/24 944/3 945/12 946/2 951/5</p> <p>seeing [1] 757/5</p> <p>seek [3] 766/6</p>
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<p>S</p> <p>seek... [2] 812/22 917/16</p> <p>seeking [1] 803/4</p> <p>seem [1] 681/24</p> <p>seems [8] 671/24 672/15 800/2 805/13 805/23 867/5 880/11 922/20</p> <p>seen [10] 668/9 744/6 828/20 843/1 847/24 848/23 849/9 868/21 910/12 912/20</p> <p>segment [1] 796/11</p> <p>select [1] 737/1</p> <p>selection [25] 703/12 703/14</p>	<p>736/4 736/8 736/9 736/14 736/19 736/22 737/11 737/15 738/14 739/16 739/19 739/21 739/24 740/10 742/4 752/8 752/14 833/19 833/23 925/19 925/22 929/10 929/13</p> <p>self [1] 863/9</p> <p>self-evident [1] 863/9</p> <p>senior [6] 775/14 775/16 919/21 919/24 919/25 920/18</p> <p>sense [22] 687/19 702/17 715/12 719/24 721/18 722/18 729/17 744/20</p>	<p>744/24 752/21 752/21 755/19 755/25 763/18 763/20 800/15 861/23 884/16 891/17 908/7 914/21 947/18</p> <p>sent [1] 830/17</p> <p>sentence [27] 675/9 677/22 678/3 678/14 687/14 690/18 690/19 802/23 806/7 806/15 807/2 807/5 811/15 825/3 863/5 884/4 898/23 902/13 935/15 937/24 941/10 942/22 944/24 945/9 945/18 949/1 950/10</p>
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<p>S</p> <p>sentences [2] 801/12 883/1</p> <p>separate [3] 757/13 801/20 903/2</p> <p>September [5] 766/24 767/4 813/13 863/15 864/2</p> <p>September 11 [2] 813/13 863/15</p> <p>September 25 [1] 766/24</p> <p>September 9 [1] 767/4</p> <p>sequence [1] 783/6</p> <p>series [1] 764/22</p> <p>serious [5] 692/9 766/13 813/4 917/23</p>	<p>941/3</p> <p>seriously [1] 832/2</p> <p>servant [1] 919/9</p> <p>serve [1] 709/2</p> <p>served [2] 659/22 675/17</p> <p>serves [1] 659/13</p> <p>sessions [1] 924/22</p> <p>set [14] 668/7 673/2 674/21 676/6 739/15 739/17 740/3 740/5 758/15 771/8 782/4 821/6 829/16 943/18</p> <p>sets [4] 664/24 676/1 676/2 790/13</p>	<p>setting [3] 799/18 816/4 871/15</p> <p>settled [4] 748/23 752/6 753/1 888/22</p> <p>seven [1] 923/12</p> <p>several [8] 673/21 769/15 771/17 773/1 802/24 863/19 883/2 923/6</p> <p>shall [3] 918/2 944/16 944/17</p> <p>SHANE [1] 655/5</p> <p>shape [13] 667/4 669/11 669/19 669/25 671/19 672/4 672/13 692/9 711/11 711/21 711/24 878/8</p>
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<p>S</p> <p>shape... [1] 878/10</p> <p>share [3] 716/16 838/2 914/11</p> <p>sharp [1] 708/17</p> <p>SHAWNA [1] 655/7</p> <p>she [2] 824/3 864/5</p> <p>sheets [1] 839/5</p> <p>shift [2] 876/6 876/8</p> <p>short [6] 707/13 810/7 870/12 878/19 879/10 919/5</p> <p>shortly [1] 871/17</p> <p>should [64] 672/15 700/13</p>	<p>701/23 704/18 705/2 705/3 705/16 705/20 706/5 706/12 706/15 706/24 706/25 707/2 720/2 744/5 744/14 750/20 755/6 755/13 764/14 774/21 779/1 784/13 785/17 787/23 788/5 801/4 801/10 802/11 806/10 823/15 823/18 830/20 834/13 835/5 835/10 836/5 844/10 866/14 883/2 894/7 896/6 897/3 897/13 899/13 899/23 900/18 900/22 901/1</p>	<p>901/2 901/14 901/15 904/8 904/11 917/7 920/14 936/13 943/21 947/6 947/12 947/25 948/1 950/18</p> <p>shouldn't [3] 687/18 710/18 756/22</p> <p>show [15] 675/15 683/17 698/16 736/8 742/6 804/1 834/18 838/8 840/22 847/6 847/10 874/15 876/3 910/19 928/14</p> <p>showed [1] 838/12</p> <p>showing [1] 686/6</p> <p>shown [2]</p>
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<p>S</p> <p>shown... [2] 760/2 909/9</p> <p>shows [4] 717/22 741/18 846/7 847/9</p> <p>Sicard [1] 668/18</p> <p>sick [1] 775/22</p> <p>side [21] 706/20 706/22 737/1 737/2 737/6 737/8 737/25 739/10 739/10 739/11 739/20 739/22 741/23 787/23 828/1 828/8 832/5 893/18 898/16 898/20 916/20</p> <p>sides [2] 895/13 923/23</p>	<p>Siebrasse [28] 654/22 656/4 657/11 657/23 659/12 672/20 675/22 679/4 686/7 686/19 700/5 700/19 705/7 707/22 709/8 721/4 725/14 733/6 740/23 743/20 743/24 758/9 765/7 823/10 829/24 833/13 873/18 906/10</p> <p>Siebrasse's [2] 696/10 825/1</p> <p>signature [10] 766/25 767/1 767/6 767/7 813/15 813/16 918/11 918/12 918/13 918/16</p>	<p>signed [2] 863/15 864/2</p> <p>significance [2] 710/8 741/9</p> <p>significant [13] 746/10 748/13 750/14 780/12 795/15 796/4 811/16 821/9 831/14 852/15 874/25 875/18 913/5</p> <p>significantly [2] 741/23 863/6</p> <p>silent [1] 899/22</p> <p>Sim [1] 887/17</p> <p>similar [8] 662/15 687/24 700/17 731/20 751/24 788/20</p>
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S	747/24 754/18	situate [1]
similar... [2]	754/23 787/8	744/10
801/14 839/2	789/12 795/13	situation [7]
similarities [1]	814/23 824/5	659/19 777/12
744/11	828/20 844/24	790/17 822/22
similarity [1]	864/14 865/22	827/8 839/25
668/8	894/11 905/5	840/23
similarly [3]	929/20 933/22	situations [3]
718/9 833/12	sincere [2]	790/19 790/21
853/1	766/21 813/9	928/25
simple [3]	Sinclair [1]	six [2] 701/17
724/9 770/18	689/19	944/1
808/11	single [8]	size [2]
simply [13]	771/6 773/21	920/25 931/5
671/5 671/20	797/7 798/21	skill [2]
691/7 702/15	815/18 888/4	745/24 922/2
711/25 719/9	901/7 901/8	skilled [19]
722/9 728/7	sir [10] 653/15	680/15 682/2
755/5 759/7	743/20 774/25	682/9 682/10
821/15 833/5	807/22 933/3	682/18 691/6
833/22	933/25 935/15	698/2 698/16
since [20]	937/5 948/21	699/2 699/7
674/7 674/20	950/6	735/16 735/23
723/21 723/25	sit [1] 920/16	768/24 809/16

<p>S</p> <p>skilled... [5] 863/9 864/9 895/14 895/25 898/14</p> <p>slide [11] 688/16 767/23 786/5 786/16 795/11 795/21 797/4 814/16 815/10 827/18 931/24</p> <p>slides [2] 788/18 940/17</p> <p>slightly [3] 815/22 862/5 896/19</p> <p>slipped [1] 886/9</p> <p>small [3] 762/17 905/3 919/14</p> <p>Smart [6] 868/1 868/4</p>	<p>871/16 873/6 874/4 877/6</p> <p>smarter [1] 910/1</p> <p>SMITH [1] 654/6</p> <p>SMS [2] 839/16 910/21</p> <p>snippet [1] 879/10</p> <p>snow [5] 662/7 662/9 662/10 662/11 711/3</p> <p>so-called [2] 732/18 899/17</p> <p>soften [1] 839/5</p> <p>softener [1] 910/22</p> <p>software [2] 746/14 748/10</p> <p>sold [1] 705/22</p>	<p>solely [4] 756/18 788/4 788/12 821/6</p> <p>solemnly [3] 766/19 813/7 918/1</p> <p>solicitor [1] 876/15</p> <p>solicitor's [1] 869/3</p> <p>solution [1] 902/8</p> <p>some [73] 658/6 663/13 669/17 671/10 673/23 682/5 683/15 684/11 685/17 689/16 689/17 689/19 691/1 693/18 696/14 707/23 709/18 714/3 714/7 714/10 715/12 715/23</p>
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S**some... [51]**

721/23 728/23
 729/22 730/21
 735/3 735/6
 737/9 747/13
 752/21 753/18
 754/23 754/24
 755/1 756/3
 760/23 777/1
 777/8 779/25
 800/8 803/7
 809/22 814/15
 815/19 817/18
 834/16 843/11
 846/5 846/6
 852/8 852/21
 868/10 871/25
 875/11 877/21
 883/3 884/15
 892/13 910/4
 910/20 919/5
 921/14 927/5
 927/23 929/11

931/25 936/16
 946/20 946/25
 948/2 948/18
 950/3

somebody [8]

662/15 662/21
 711/21 753/19
 764/12 764/21
 816/25 949/11

somebody's

[1] 712/1

someone [4]

661/5 670/14
 763/22 914/21

someone's [1]

669/21

something

[37] 672/1
 686/14 711/25
 719/4 728/3
 750/10 753/21
 756/22 761/9
 761/14 796/14
 800/4 800/6

804/3 807/1
 807/2 808/8
 809/16 811/22
 821/1 821/20
 821/21 822/9
 823/3 823/3
 825/6 831/24
 835/17 854/18
 860/6 878/11
 893/11 902/15
 925/12 933/22
 934/17 949/16

sometimes [6]

696/1 755/1
 827/9 901/5
 911/9 949/16

somewhat [3]

716/19 740/13
 935/16

somewhere

[5] 660/14
 663/2 663/16
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666/12 676/2	751/9 765/8	709/13 712/3
684/21 685/21	766/12 812/9	786/11 786/17
691/25 692/2	813/3 842/21	878/14
711/24 718/10	917/4 917/22	tests [5]
718/12 730/20	testimony [29]	665/14 676/1
770/18 770/19	664/6 668/25	821/20 884/6
830/1 867/8	682/25 693/18	940/12
867/8 869/10	707/24 714/8	Teva [1]
872/4 895/7	715/6 719/13	849/11
895/11 922/8	723/9 724/5	text [7] 719/16
929/9 937/7	742/17 744/3	720/7 797/7
937/10 937/15	751/5 751/14	797/12 821/7
937/20 939/16	768/9 779/3	888/9 917/25
tested [11]	779/5 842/12	than [36]
669/19 695/8	842/14 843/13	657/24 669/20
699/5 711/8	845/2 845/5	669/21 671/5
711/16 711/18	853/24 861/5	671/20 714/1
926/8 926/13	882/16 902/19	716/18 718/14
926/16 927/20	914/17 916/24	740/2 741/24
929/6	951/2	742/1 742/4
testified [4]	testing [11]	747/12 750/1
708/6 842/23	669/21 670/8	750/7 754/11

T	765/10 765/22	896/1
than... [20]	766/22 767/12	that's [170]
769/4 783/10	767/15 767/20	658/13 658/19
797/13 798/22	768/2 774/15	661/8 661/17
843/5 853/20	774/16 774/18	661/21 662/24
854/19 910/1	778/25 810/9	664/2 666/15
919/10 923/19	812/6 812/9	666/20 670/11
924/19 930/5	813/7 813/11	672/9 673/25
930/11 933/19	813/21 814/4	674/22 675/2
936/6 937/6	826/2 830/13	677/6 677/14
937/13 944/10	831/3 834/7	678/22 679/16
946/8 950/9	836/23 841/24	680/21 680/23
thank [62]	842/1 843/8	680/24 681/8
657/6 659/6	861/2 884/2	687/20 690/1
659/11 707/10	905/8 909/3	690/8 690/10
720/6 721/12	911/22 915/23	691/17 692/17
723/7 723/23	917/1 917/3	693/13 694/16
728/22 730/3	918/4 918/21	697/11 698/7
732/23 735/2	932/4 932/23	698/23 699/20
737/13 740/11	951/5 951/6	700/3 700/14
743/13 743/18	Thanks [1]	701/24 705/20
750/9 750/25	950/25	706/12 707/1
758/8 763/9	that [1485]	707/2 712/3
765/2 765/8	that end [1]	712/13 712/23

T**that's... [126]**

717/8 718/15

718/17 720/1

720/3 720/17

721/16 721/18

722/9 722/18

722/21 726/4

727/12 729/1

729/23 732/9

732/17 734/14

734/18 736/5

737/3 737/25

738/5 739/10

739/24 743/6

743/7 745/24

749/3 749/8

751/10 753/22

754/25 755/3

755/8 755/23

756/13 778/18

782/8 787/5

793/12 800/18

800/21 804/8

806/22 807/16

820/1 821/23

823/19 823/21

824/20 826/22

826/23 827/16

829/2 830/4

831/8 832/6

832/6 832/19

838/15 840/22

842/12 843/23

849/13 851/9

855/5 856/15

857/21 858/10

860/1 860/3

860/16 861/12

861/20 864/8

864/9 864/22

864/25 865/7

867/13 867/22

873/23 874/1

874/19 875/6

878/15 878/19

880/25 888/24

891/5 893/9

893/20 894/11

895/3 898/4

900/2 900/3

900/8 900/23

905/4 906/1

911/17 911/19

912/17 923/11

928/11 928/17

929/13 933/1

933/25 937/13

937/22 938/10

940/7 940/11

940/15 940/23

944/20 948/15

948/18 948/19

948/25 950/1

950/4 950/20

their [48]

661/6 683/13

698/16 702/20

702/25 734/23

750/16 750/16

756/20 757/12

757/12 762/13

<p>T</p> <p>their... [36] 769/23 770/6 770/13 772/22 780/8 796/13 800/9 820/2 828/17 829/22 831/25 832/19 834/18 848/5 849/20 850/23 850/25 851/6 851/13 852/22 856/2 856/3 856/11 874/5 876/14 886/19 886/20 886/21 893/10 893/16 920/19 921/24 922/2 922/4 922/10 948/13</p> <p>theirs [1] 837/16</p> <p>them [55] 657/20 658/2</p>	658/9 678/4 678/15 686/20 686/23 686/24 688/12 692/15 697/18 698/21 699/9 700/12 702/21 706/8 721/8 721/11 727/9 730/24 733/17 744/7 745/11 747/14 763/2 773/2 788/8 790/14 828/15 833/24 843/2 843/15 847/24 851/21 852/18 853/4 853/6 853/7 856/16 860/13 868/9 873/3 875/5 876/15 905/15 910/3 910/4 910/18 911/7 916/2	922/14 922/19 950/17 950/20 950/22 <p>themes [1] 746/6</p> <p>themselves [2] 684/13 848/24</p> <p>then [89] 658/23 660/25 661/5 662/14 662/17 663/18 665/3 665/15 665/18 667/6 667/10 671/15 677/22 680/10 680/21 681/1 681/4 686/24 687/2 688/25 692/18 695/10 707/23 727/24 727/25 728/15 734/6 734/21 752/6 752/11</p>
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<p>T</p> <p>then... [59]</p> <p>752/23 752/25</p> <p>753/2 757/19</p> <p>758/16 758/18</p> <p>759/15 760/10</p> <p>761/2 761/13</p> <p>761/14 769/17</p> <p>777/4 777/17</p> <p>781/19 781/22</p> <p>789/20 799/22</p> <p>808/15 809/3</p> <p>811/15 822/20</p> <p>829/3 834/15</p> <p>834/18 835/24</p> <p>844/24 854/3</p> <p>865/9 870/2</p> <p>876/8 883/23</p> <p>884/3 884/8</p> <p>884/10 884/11</p> <p>889/24 893/14</p> <p>893/16 898/17</p> <p>899/21 903/8</p> <p>906/4 906/5</p>	<p>913/6 925/14</p> <p>925/16 926/18</p> <p>930/13 931/14</p> <p>931/18 942/12</p> <p>942/22 945/4</p> <p>946/25 948/12</p> <p>948/13 948/16</p> <p>949/6</p> <p>theoretical [1]</p> <p>661/20</p> <p>theoretically [2]</p> <p>660/23</p> <p>708/19</p> <p>theory [4]</p> <p>661/8 664/24</p> <p>871/22 884/22</p> <p>therapeutic [3]</p> <p>733/23 734/2</p> <p>734/2</p> <p>there [251]</p> <p>657/2 657/10</p> <p>657/16 657/19</p> <p>658/3 658/14</p> <p>658/23 659/17</p>	<p>660/20 660/24</p> <p>660/25 663/17</p> <p>663/21 666/24</p> <p>671/3 673/11</p> <p>674/24 675/9</p> <p>677/2 677/14</p> <p>677/19 678/3</p> <p>678/14 679/5</p> <p>681/5 682/19</p> <p>685/7 685/8</p> <p>685/9 687/11</p> <p>690/19 692/3</p> <p>693/3 693/9</p> <p>695/15 697/8</p> <p>700/12 700/18</p> <p>703/22 705/17</p> <p>705/18 706/20</p> <p>708/2 708/12</p> <p>708/19 709/8</p> <p>709/11 709/23</p> <p>714/8 715/12</p> <p>715/15 715/20</p> <p>716/22 717/16</p> <p>717/18 719/13</p>
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T**there... [195]**

719/19 721/7

724/8 725/10

725/15 727/17

727/24 728/7

728/8 729/7

729/16 729/22

730/21 730/23

731/6 732/10

732/11 732/14

733/15 734/4

734/10 735/3

735/6 740/14

741/5 741/9

742/7 743/19

745/4 745/19

746/5 746/6

746/8 746/18

748/2 748/4

748/13 749/21

751/24 752/19

752/22 752/24

753/4 755/25

758/18 760/6

760/11 760/15

760/25 762/18

762/23 770/8

770/22 771/6

771/6 771/21

772/12 772/25

773/3 776/17

782/18 783/22

784/6 784/25

785/3 785/17

785/21 786/6

795/6 795/8

796/20 796/22

797/3 797/16

797/16 801/16

801/23 802/3

802/9 802/24

804/5 806/6

808/4 813/18

814/13 818/16

820/5 820/8

820/19 823/25

824/6 824/12

825/14 832/5

833/9 835/17

835/20 835/25

836/3 836/4

836/14 837/25

838/4 838/12

838/13 838/16

839/8 839/11

844/19 846/15

851/19 853/11

855/7 855/21

862/11 864/19

865/4 869/12

869/16 869/19

870/7 870/20

870/24 871/2

871/9 871/18

871/19 871/20

873/7 875/11

876/13 877/20

880/4 880/13

885/12 888/3

889/18 890/8

892/13 896/11

<p>T</p> <p>there..... [55]</p> <p>896/24 897/5 897/9 897/15 899/13 900/18 900/22 901/21 902/9 903/4 903/5 905/13 905/16 906/17 907/10 908/2 908/16 908/18 909/12 911/15 912/2 912/5 914/6 914/7 915/9 918/18 921/20 922/19 922/20 922/24 923/2 926/11 928/19 931/2 934/6 934/7 934/9 934/13 935/7 936/8 937/9 938/13 938/14 939/25</p>	<p>941/5 941/9 941/11 942/14 944/13 946/6 946/20 947/4 947/23 948/5 950/19</p> <p>there's [66]</p> <p>664/10 666/18 675/9 682/5 695/18 695/25 697/6 706/20 708/17 716/3 716/16 719/15 720/15 723/6 725/19 728/9 729/24 737/19 747/7 748/21 754/25 756/21 760/24 762/24 783/4 783/22 808/21 821/15 824/20 824/24 827/25 831/13 835/24 836/6</p>	<p>839/12 839/17 839/23 839/23 846/5 846/6 851/19 854/24 855/6 862/25 867/1 868/13 883/25 885/7 885/11 903/10 903/11 903/12 903/14 904/24 905/1 906/19 906/20 916/12 921/3 926/3 927/21 933/3 941/18 944/23 947/9 949/25</p> <p>thereafter [2]</p> <p>816/9 871/17</p> <p>thereby [1]</p> <p>668/11</p> <p>therefore [10]</p> <p>679/2 682/18 685/24 690/17 732/19 809/25</p>
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T	740/8 740/17	913/11 913/21
therefore... [4]	748/13 761/19	914/4 914/20
810/1 839/13	763/15 769/7	915/1 923/17
872/8 902/16	769/9 769/12	923/21 924/23
these [107]	772/15 810/18	925/24 929/2
658/5 671/4	810/22 811/20	929/4 929/4
674/11 675/21	815/15 815/16	929/20 941/17
677/23 678/7	817/9 822/12	942/1 943/17
678/19 683/15	825/15 826/3	945/23 947/9
683/21 688/25	828/20 832/24	949/5 949/15
690/6 690/9	834/3 838/13	950/14
690/9 690/10	840/16 840/17	they [158]
690/11 690/20	842/6 842/8	658/6 664/17
690/21 691/13	851/1 853/2	670/9 682/18
691/16 692/25	853/15 856/13	688/13 688/22
695/17 697/25	857/13 859/4	689/9 690/4
698/3 698/13	859/14 860/6	690/8 690/12
699/2 699/6	872/23 875/1	690/14 691/17
701/15 702/24	876/8 876/16	691/18 691/18
702/24 702/25	879/17 885/4	691/20 693/10
705/10 706/7	885/21 894/23	693/14 695/13
713/6 713/15	896/16 899/8	698/18 699/18
727/21 733/15	900/13 901/11	702/8 703/1
733/18 734/7	912/18 913/10	703/5 714/1

T	819/18 823/12	885/23 886/3
they... [134]	828/15 828/16	886/6 888/2
717/20 720/21	830/23 831/2	888/24 888/24
721/9 722/3	832/12 832/15	889/2 889/3
733/16 734/7	832/16 832/18	892/24 892/25
734/8 735/24	832/19 837/13	892/25 893/8
744/16 745/10	837/22 837/25	893/9 893/16
747/11 750/6	838/8 840/20	893/18 896/5
752/9 754/10	840/25 848/23	897/6 901/15
754/10 756/5	848/24 849/11	908/12 911/1
756/19 756/19	849/13 849/21	914/21 916/4
761/24 762/12	850/10 850/23	916/15 921/14
762/12 764/4	851/7 851/18	921/19 921/19
769/22 769/23	852/18 852/20	921/23 921/25
769/24 770/13	853/3 855/9	922/2 922/3
773/16 776/7	855/9 855/17	922/13 922/22
776/8 776/20	855/19 856/5	923/9 923/10
780/12 783/14	856/12 856/12	923/10 923/21
793/9 793/16	862/2 863/9	929/6 931/12
793/21 795/6	868/9 868/10	934/17 935/5
799/10 804/2	873/4 875/6	937/7 943/12
808/14 808/17	880/15 880/15	they're [34]
808/17 817/8	880/16 880/25	685/1 690/10
817/17 819/13	881/6 881/15	702/9 702/10

<p>T</p> <p>they're... [30] 706/6 738/4 746/16 746/16 749/19 756/17 757/4 769/25 770/10 779/18 797/17 797/20 799/7 801/14 811/21 829/9 835/2 849/19 853/5 853/8 856/20 856/21 881/6 881/13 881/17 881/20 882/2 882/7 886/2 950/10</p> <p>they've [6] 819/14 819/15 832/1 848/25 885/25 924/3</p> <p>thin [2] 911/9 914/25</p> <p>thing [10]</p>	<p>716/14 724/24 735/21 786/11 804/21 836/11 878/9 888/10 927/17 931/6</p> <p>things [17] 671/4 691/16 705/18 708/13 756/4 820/5 829/15 835/3 835/13 882/7 903/2 924/23 927/9 936/14 936/16 937/3 941/14</p> <p>think [129] 657/22 677/14 686/14 694/2 696/8 697/22 697/23 702/10 703/4 706/8 710/23 713/9 719/3 720/1 721/13 724/3</p>	<p>724/4 724/15 725/15 738/22 740/15 743/1 746/18 751/13 751/23 752/5 752/7 753/3 753/4 757/8 760/23 767/14 779/1 781/8 782/14 799/4 806/17 807/1 808/13 809/11 809/21 810/7 815/5 816/21 817/2 819/2 821/16 822/15 824/2 825/13 827/12 832/25 836/9 837/11 840/15 840/22 844/10 846/4 846/5 846/6 846/25 847/4 848/15 849/11</p>
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<p>T</p> <p>think... [65] 849/19 850/13 851/12 852/5 852/17 853/8 853/21 854/20 858/1 862/11 864/13 865/11 868/8 868/9 869/22 874/9 875/15 876/18 878/15 878/20 880/4 880/12 880/24 881/5 881/12 881/15 882/4 885/23 886/3 886/11 887/5 887/8 893/13 893/21 903/21 906/3 906/16 906/19 907/2 907/7 907/8 907/21 909/9 910/5</p>	<p>910/25 911/4 911/20 912/1 912/19 912/21 914/5 914/18 914/24 915/8 915/20 916/12 916/15 916/16 933/9 933/17 933/21 948/7 948/8 949/14 950/22</p> <p>thinking [7] 665/16 667/13 744/10 762/11 765/11 884/9 933/21</p> <p>thinks [1] 831/19</p> <p>third [17] 669/18 671/10 684/20 685/9 685/14 692/3 724/16 725/3 802/23 821/4</p>	<p>830/7 836/11 871/1 884/4 900/24 902/23 923/16</p> <p>third-party [1] 923/16</p> <p>this [402]</p> <p>THOMAS [2] 654/10 654/23</p> <p>thoroughly [1] 806/24</p> <p>those [103] 658/11 658/17 677/8 684/25 685/10 686/12 689/4 691/20 695/4 695/7 696/18 697/13 701/21 702/2 702/3 702/5 703/24 706/19 706/22 714/10 714/16 715/4 715/7 716/12</p>
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T**those... [79]**

717/12 720/20

721/4 724/25

725/1 725/18

728/20 735/13

737/21 741/2

741/14 743/10

744/15 748/20

750/1 772/14

773/11 786/23

789/4 789/20

797/19 798/18

799/6 800/9

801/12 821/8

828/22 828/24

829/15 830/22

830/25 840/24

841/10 841/15

841/24 847/19

854/14 854/23

858/23 859/6

859/22 860/12

860/23 874/4

883/5 891/15

891/24 892/10

896/20 897/11

897/17 904/11

909/13 909/18

910/2 911/24

912/9 919/18

920/14 921/15

922/11 922/18

926/24 927/7

927/9 934/23

936/4 936/11

937/2 938/7

942/4 942/6

942/7 943/1

943/4 945/3

947/19 950/7

950/8

though [10]

677/24 678/8

678/21 726/4

730/18 809/22

832/17 838/24

839/17 910/4

thought [12]

670/4 681/2

697/20 808/17

821/24 858/8

864/13 873/13

904/3 910/19

913/20 949/20

thoughts [3]

658/19 658/21

677/8

three [47]

674/8 685/6

685/10 686/6

692/14 692/20

695/8 696/17

697/7 697/9

697/13 697/21

697/22 724/7

726/3 726/5

777/15 794/12

798/24 820/19

821/8 822/1

827/1 828/21

830/22 868/2

<p>T</p> <p>three... [21] 869/9 869/11 870/4 870/16 871/7 871/16 876/9 891/6 891/11 891/15 892/1 895/7 905/24 912/5 912/9 937/7 937/9 937/10 937/15 937/20 939/16</p> <p>three-compon ent [3] 869/11 870/4 870/16</p> <p>three-part [7] 871/7 871/16 937/7 937/10 937/15 937/20 939/16</p> <p>three-step [1] 895/7</p> <p>threshold [1]</p>	<p>771/9</p> <p>threw [1] 871/9</p> <p>through [32] 665/11 667/3 667/16 669/20 682/8 682/17 682/24 684/24 692/15 700/12 711/10 712/1 749/7 750/16 750/16 752/3 762/21 764/21 770/15 773/15 802/9 858/9 883/2 883/5 891/13 892/25 895/25 912/20 929/24 929/25 941/21 943/21</p> <p>throw [3] 662/10 807/2 807/5</p> <p>thrust [2]</p>	<p>713/21 809/21</p> <p>Thurlow [1] 889/12</p> <p>Thus [2] 668/3 675/10</p> <p>time [104] 663/3 665/14 666/1 667/9 671/15 683/15 687/1 687/7 688/13 703/19 703/19 707/23 716/20 718/23 721/11 723/4 723/18 723/20 724/19 725/2 725/9 727/7 727/9 761/8 764/10 770/21 772/4 772/11 775/15 775/21 776/18 777/7 778/3 780/1 782/20 783/4</p>
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T	928/11 928/19	713/11 713/19
time... [68]	929/24 930/4	713/20 713/22
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819/14 819/18

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826/14 828/5

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765/18 765/21	wishful [4]	766/2 812/10
765/23 765/25	665/16 667/12	812/18 821/13
766/11 767/17	884/9 933/21	842/22 842/22
767/19 767/22	within [20]	843/5 843/6
774/18 774/20	666/14 666/22	917/4 917/7
775/10 777/25	680/14 681/12	917/14 918/5
778/25 779/3	682/23 696/3	918/8 919/6
779/11 782/11	722/8 741/12	921/4
812/10 932/2	838/9 838/16	witnesses [4]
Wilson's [2]	839/8 843/4	682/25 777/16
775/4 775/7	908/24 919/25	815/12 923/22
Wilson.....	920/18 920/18	won't [3]
.....767 [1]	934/12 934/14	824/25 910/23
656/8	936/9 946/7	931/24
winning [1]	without [11]	wonder [2]
822/16	670/21 700/12	657/13 686/10
wire [2]	732/8 732/17	word [16]
832/14 832/17	737/8 827/15	759/4 759/11
wires [1]	831/19 844/11	759/13 763/16
836/1	870/7 883/11	800/3 825/7
wish [2]	884/16	837/12 848/4

<p>W</p> <p>word... [8] 885/12 888/4 906/10 910/9 912/14 913/16 914/2 914/24</p> <p>wording [3] 945/8 950/9 950/17</p> <p>words [24] 658/5 671/5 684/25 763/15 793/8 793/14 794/13 826/4 827/19 869/22 871/9 874/4 875/1 878/3 882/6 886/9 896/8 898/23 910/17 911/2 912/1 930/16 936/25 939/2</p> <p>work [33] 662/13 662/14</p>	668/19 670/10 670/23 719/4 719/6 719/6 731/16 769/23 770/7 771/1 775/20 775/23 791/14 799/10 800/15 808/15 810/13 831/25 846/16 869/3 871/24 871/24 875/19 876/13 878/8 878/12 891/2 922/22 923/5 923/6 923/9 <p>work' [1] 775/6</p> <p>worked [10] 662/16 662/17 703/18 735/1 770/24 819/11 846/9 919/13 919/25 949/11</p>	<p>working [8] 781/1 817/10 919/23 920/17 923/2 933/11 936/5 941/6</p> <p>workloads [1] 923/3</p> <p>workman [3] 717/1 718/1 718/6</p> <p>works [3] 817/2 871/23 892/23</p> <p>world [8] 663/17 745/14 815/20 825/10 826/8 826/10 895/22 911/12</p> <p>worst [1] 912/22</p> <p>worthy [2] 822/9 823/4</p> <p>would [244] 657/4 658/1</p>
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W**would... [242]**

658/20 659/12
659/21 660/13
660/20 661/15
665/19 665/24
666/4 669/2
670/5 670/10
670/13 670/22
671/1 672/3
672/11 673/9
675/22 678/5
678/16 679/13
680/14 681/24
682/19 683/15
687/9 693/23
695/5 695/11
695/15 697/12
698/17 698/20
698/21 699/6
699/7 699/8
699/10 699/13
699/14 699/25
701/2 701/11

702/13 703/5
705/9 705/19
705/21 705/25
706/1 706/3
706/6 706/13
708/23 711/21
712/25 713/24
713/25 714/3
714/22 715/5
716/3 716/13
716/15 717/1
717/14 718/6
721/5 722/9
726/4 726/6
727/19 727/25
728/3 729/11
730/24 734/18
734/22 735/9
735/15 735/23
736/22 737/4
737/5 737/11
738/20 739/15
740/9 745/23
746/4 746/21

746/25 747/11
749/24 753/9
754/12 756/7
758/2 761/16
761/17 763/24
764/1 764/7
764/8 764/12
764/16 771/2
771/4 771/14
775/4 775/6
778/21 778/22
778/23 780/22
780/25 781/5
783/7 783/8
783/12 783/13
784/20 785/14
785/24 790/5
790/24 793/24
801/8 806/19
806/22 807/4
808/16 809/16
814/2 814/21
819/24 823/4
823/24 825/3

W**would.....****[102]** 828/3

828/3 832/2

835/1 838/22

842/15 847/4

847/9 849/8

849/15 849/16

849/21 849/24

850/2 850/5

850/16 850/18

850/21 850/22

850/23 851/3

852/4 852/9

853/1 853/18

853/21 854/2

862/11 862/18

863/9 870/9

871/10 874/8

875/1 875/21

879/4 879/15

879/19 882/12

888/22 889/16

890/5 894/14

895/4 895/15

896/18 896/24

898/14 901/23

907/8 907/9

909/21 916/10

917/10 921/3

922/12 927/1

928/1 928/7

928/22 929/2

929/11 929/15

929/17 929/22

930/2 930/14

933/17 934/4

934/11 934/16

934/21 934/24

935/9 935/11

936/4 938/2

938/20 939/10

939/17 939/21

941/5 941/13

941/22 941/25

942/5 942/12

942/17 942/18

942/19 944/9

945/3 945/24

946/10 947/1

947/18 947/19

948/10 949/6

949/14 950/15

950/24

wouldn't [7]

660/3 676/5

679/11 695/10

735/24 871/7

933/20

wow [1]

753/22

wrapper [2]

771/24 772/7

wrappers [2]

785/9 785/13

write [22]

663/19 668/3

670/15 670/17

670/18 670/19

671/9 677/3

677/22 683/5

690/24 700/23

<p>W</p> <p>write... [10] 705/1 832/19 852/13 860/14 861/17 862/12 862/21 863/25 864/18 942/12</p> <p>writes [6] 685/15 761/11 882/25 884/4 884/20 889/10</p> <p>writing [9] 669/25 670/1 670/7 671/21 674/1 674/6 679/19 866/7 878/16</p> <p>writings [6] 715/23 715/24 742/18 742/19 742/21 743/11</p> <p>written [17] 669/17 674/19 704/8 711/15</p>	<p>711/21 759/19 759/20 762/19 832/8 832/10 832/13 847/17 865/1 867/14 871/17 881/1 898/5</p> <p>wrong [5] 691/15 711/20 756/22 825/18 899/6</p> <p>wrote [7] 684/24 703/19 703/20 704/24 849/5 867/21 886/23</p> <hr/> <p>Y</p> <p>yeah [5] 680/3 801/15 864/24 880/24 881/11</p> <p>year [20] 667/12 706/7 745/18 781/6 814/23 816/18</p>	<p>816/19 816/19 845/6 846/1 846/8 846/23 847/7 858/23 859/24 906/2 908/24 920/7 933/15 941/4</p> <p>years [24] 665/18 673/22 748/25 767/24 787/10 787/11 799/25 809/10 820/21 845/2 847/14 875/13 875/16 884/11 890/24 908/14 919/10 919/13 919/16 919/19 919/23 923/1 933/19 936/16</p> <p>yellow [1] 782/14</p> <p>yes [296] 658/6 659/6</p>
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Y	680/10 681/15	751/16 751/22
yes... [294]	682/20 683/8	754/3 754/8
659/15 659/24	683/19 685/13	754/20 754/22
660/12 660/16	686/4 686/22	756/9 757/18
660/19 661/10	686/25 687/3	758/25 759/3
662/1 663/2	687/15 691/11	759/11 760/1
664/4 664/7	692/9 692/12	760/8 760/15
664/16 664/20	694/4 696/23	762/6 763/8
665/8 665/22	697/1 697/15	764/19 765/14
666/5 666/9	698/24 699/11	766/3 766/16
666/17 666/20	700/3 700/22	767/2 767/8
667/19 667/24	701/5 701/18	767/15 767/20
668/22 669/12	701/22 702/4	774/23 775/1
669/22 670/3	702/19 703/10	777/23 779/6
670/12 671/25	703/17 704/10	780/2 780/5
673/1 673/6	704/23 720/25	780/10 780/14
673/14 673/17	723/25 724/12	780/17 780/20
673/20 673/25	725/19 726/11	780/24 781/3
674/10 674/14	729/3 732/10	781/8 781/18
674/18 675/7	741/1 741/8	781/21 781/24
675/14 675/19	743/1 743/6	782/22 783/11
676/11 676/24	743/12 747/19	783/15 783/20
677/6 678/1	748/8 750/2	784/1 784/7
679/9 679/16	750/7 751/10	784/11 784/15

Y	797/18 797/22	861/22 862/17
yes..... [154]	797/25 798/3	862/24 866/5
784/19 784/22	798/9 798/11	866/19 867/5
785/11 785/23	798/14 798/17	867/14 868/5
786/2 786/9	798/20 798/23	871/10 875/15
786/14 786/18	799/1 799/21	875/23 878/6
786/21 787/1	800/19 801/6	881/19 882/8
787/6 787/15	802/1 802/13	882/9 882/14
788/2 788/10	802/21 803/2	882/17 885/24
788/13 789/7	803/16 804/11	887/4 894/11
789/14 789/18	804/17 805/14	895/1 896/14
789/25 790/4	805/19 805/24	896/18 897/10
790/12 790/15	806/9 806/13	899/1 900/21
791/16 791/22	806/16 807/17	900/22 901/4
792/2 792/4	808/25 810/17	901/23 909/24
792/9 792/15	810/20 811/8	913/14 915/20
792/19 793/4	811/11 813/1	917/12 918/1
793/7 793/13	826/12 842/3	918/6 918/9
793/22 794/4	848/15 848/19	918/13 918/17
794/17 794/21	849/4 850/24	934/2 935/19
794/25 795/19	851/13 853/5	935/25 937/9
796/1 796/2	853/6 853/8	938/10 938/20
796/6 796/9	856/1 857/8	939/12 940/3
797/1 797/5	858/21 859/22	941/2 941/5

<p>Y</p> <p>yes..... [14] 942/25 943/11 943/24 944/5 944/15 944/15 945/6 945/13 945/16 946/2 947/18 950/19 950/19 951/4</p> <p>yesterday [32] 657/11 658/2 668/25 669/1 669/15 693/18 701/6 707/24 709/5 714/8 714/13 714/16 714/23 715/1 715/8 715/22 716/12 716/18 723/9 724/6 728/24 729/7 729/15 733/12 735/4 736/3 738/12 740/12</p>	<p>741/11 741/15 742/17 744/5</p> <p>yesterday's [1] 748/12</p> <p>yet [7] 663/16 693/10 727/14 758/7 790/19 851/18 867/10</p> <p>yield [2] 734/13 734/16</p> <p>yields [1] 734/23</p> <p>you [809]</p> <p>you'd [12] 663/7 666/23 704/8 716/4 786/10 786/14 786/19 788/14 788/19 852/17 857/9 862/6</p> <p>you'll [13] 755/19 759/15 784/4 784/9 797/15 797/20</p>	<p>800/12 801/16 846/10 933/2 943/20 944/12 945/11</p> <p>you're [56] 661/18 662/18 663/8 673/15 676/13 676/14 676/20 676/25 677/17 677/18 677/20 678/13 678/22 683/4 683/21 686/1 690/18 703/8 704/11 713/1 743/24 748/6 765/11 780/15 799/13 800/21 806/1 806/3 811/22 819/12 826/11 845/25 847/22 848/9 848/16 848/20 851/23 855/20</p>
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Y**you're... [18]**

857/4 862/8

868/19 871/11

878/13 881/9

913/3 914/13

931/2 938/19

939/9 940/13

940/22 941/9

941/24 942/2

942/9 942/23

you've [53]

661/23 664/6

669/14 671/7

682/17 702/11

704/7 705/7

706/16 706/18

710/14 714/12

732/16 734/16

737/6 737/6

747/15 747/17

749/6 755/10

756/1 766/8

782/1 783/22

788/19 797/2

799/17 808/2

809/25 812/23

820/18 820/21

821/22 822/10

827/11 843/13

844/16 849/2

851/23 853/23

855/15 859/2

861/4 866/18

873/16 874/22

876/2 885/24

910/12 913/2

913/13 917/18

943/8

young [1]

908/6

your [292]

658/21 659/5

663/5 664/2

668/1 668/20

668/25 669/25

671/20 672/11

672/21 674/23

675/21 676/10

678/5 678/11

678/19 679/19

679/19 679/25

680/2 681/17

682/7 683/1

683/3 683/3

684/5 684/8

687/1 690/22

691/9 696/6

700/20 701/14

701/19 702/11

704/7 705/7

707/13 707/25

710/8 710/14

713/7 715/6

718/25 721/9

723/9 723/18

724/5 724/17

728/24 729/9

730/7 730/8

731/9 733/7

735/8 738/15

738/16 738/17

Y	782/9 782/10	813/15 814/3
your... [232]	782/12 782/24	819/21 828/11
741/10 742/16	784/2 784/24	831/17 834/22
742/18 742/19	784/25 785/16	837/4 837/6
743/11 744/3	785/18 786/4	838/15 840/10
744/4 744/18	786/5 786/16	843/12 843/12
745/14 745/15	786/22 787/9	844/16 844/17
745/15 746/19	787/13 787/14	845/1 845/1
750/11 751/5	787/20 787/23	845/5 845/7
751/13 755/6	788/17 788/19	845/21 846/21
755/8 755/11	788/20 789/8	846/22 848/4
755/13 755/19	790/20 791/9	849/13 851/2
755/21 757/7	791/23 792/10	851/25 852/12
757/24 758/2	795/10 795/12	854/18 854/20
758/7 758/10	796/5 796/22	856/24 857/10
765/24 766/8	797/4 799/12	857/10 857/17
766/23 766/25	799/15 800/10	857/23 858/5
767/1 767/4	800/24 802/22	858/18 859/5
767/6 767/6	803/12 804/12	859/12 859/16
767/17 775/10	806/2 806/4	859/19 859/23
775/12 778/8	806/5 806/15	860/5 860/7
779/16 779/23	808/20 811/5	860/17 860/23
779/23 780/1	811/6 812/24	861/2 861/3
780/6 782/2	813/12 813/15	861/4 861/16

Y	892/16 892/18	yours [1]
your..... [92]	893/25 894/5	856/14
861/20 862/8	895/18 896/6	yourself [1]
862/14 862/14	897/20 898/10	908/13
862/22 863/1	900/11 900/23	Z
863/2 863/14	900/25 901/12	ZEMAN [5]
863/17 864/18	901/22 901/23	655/6 779/8
864/23 865/9	902/19 904/6	779/13 918/21
866/2 866/17	904/7 905/12	932/5
867/3 870/2	905/14 906/1	zero [4] 841/9
874/12 874/19	908/5 912/8	841/11 841/17
874/24 875/22	913/6 913/15	912/18
875/25 876/2	913/16 913/18	zone [1]
876/22 876/23	914/17 915/7	744/18
877/2 877/2	915/17 916/19	zoom [1]
879/20 879/21	916/24 917/11	744/2
880/20 880/22	917/18 918/5	Zyprexa [1]
881/23 882/1	918/7 918/12	782/20
886/4 886/9	918/12 918/16	
886/13 887/14	918/16 918/19	
887/20 889/9	919/1 932/24	
889/23 889/25	935/12 937/23	
890/18 890/22	940/17 941/7	
892/5 892/15	943/8 948/15	