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

4 BETWEEN:

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

Claimants

- and -

GOVERNMENT OF CANADA

Respondent

7 ARBITRATION HELD BEFORE  
8 JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),  
9 PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ  
10 held at ASAP Reporting Services Inc.,  
11 Bay Adelaide Centre, 333 Bay St., Suite 900,  
12 Toronto, Ontario  
13 on Tuesday, October 29, 2013 at 9:31 a.m.

VOLUME 6

14 COUNSEL:

15 Barry Appleton For the Claimants  
16 Gregory Nash  
17 Frank S Borowicz, Q.C.  
18 Kyle Dickson-Smith  
19 Dr. Alan Alexandroff  
20 Chris Elrich

21 Scott Little For the Respondent  
22 Shane Spelliscy  
23 Jean-François Hebert  
24 Stephen Kurelek  
25 Reuben East  
Adam Douglas

Dirk Pulkowski PCA (Secretary to the Tribunal  
Kathleen Claussen PCA

Teresa Forbes Court Reporter

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

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1 Toronto, Ontario  
2 --- Upon resuming on Tuesday, October 29, 2013  
3 at 9:31 a.m.

4 PRESIDING ARBITRATOR: Good  
5 morning, everybody. This is Day 6 of our hearing.  
6 And before we continue or start cross-examination,  
7 let me just read out what the Tribunal considers or  
8 has decided about these matters that we discussed  
9 yesterday.

10 So we considered the investor's  
11 application, which we received by letter yesterday,  
12 to modify P.O. 18 so as to a short rebuttal phase  
13 after the closing statements. And we also reviewed  
14 the respondent's letter that was sent to us in  
15 reply.

16 Now, in considering the format of  
17 the closings on Thursday, the Tribunal has also  
18 given some thought to the desirability or not of  
19 post-hearing briefs.

20 While it is true that the  
21 functions of closing statements and post-hearing  
22 briefs are not identical, both assist the Tribunal  
23 in assessing the evidence that it has heard in the  
24 course of the hearing. It therefore makes sense to  
25 address both points in tandem, together.

1                   So the result of the Tribunal's  
2 deliberation is as follows: First, as set out in  
3 P.O. 18, each side shall have a maximum of three  
4 hours available for oral pleadings on Thursday.

5                   Second, it will be open to each  
6 side to allocate a proportion of these three hours  
7 to a rebuttal statement or a sur-rebuttal  
8 statement. The investor's rebuttal must not exceed  
9 30 minutes, and the respondent's sur-rebuttal must  
10 not exceed 15 minutes.

11                   Thirdly, for the avoidance of  
12 doubt, the sequence of statements on Thursday will  
13 be as follows: First, closing statement by the  
14 investors; second, closing statement by the  
15 respondent; third, if desired, rebuttal by the  
16 investors; and, fourth, lastly, if desired,  
17 sur-rebuttal by the respondent.

18                   The fourth point, the Tribunal  
19 does not envisage any formal post-hearing briefs.  
20 Instead, the Tribunal would like the parties to  
21 prepare annotated versions of their closing  
22 statements; annotated versions of their closing  
23 statements.

24                   What the Tribunal has in mind is  
25 that each side shall submit to the Tribunal a



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1 him in.

2 PRESIDING ARBITRATOR: Yes, sir,  
3 please. Maybe in the meantime, do you have a  
4 binder? Do we have binders?

5 MR. PULKOWSKI: It is right here.

6 MR. DALY: Good morning.

7 PRESIDING ARBITRATOR: Good  
8 morning, Mr. Daly.

9 MR. DALY: Thank you.

10 PRESIDING ARBITRATOR: Good  
11 morning, Mr. Daly. Welcome.

12 Mr. Daly, you have in front of you  
13 a statement. Will you please read that out and  
14 identify yourself?

15 MR. DALY: Yes, sir. I am Chris  
16 Daly. I'm the Associate Deputy Minister of Nova  
17 Scotia Economic, Rural Development and Tourism,  
18 Nova Scotia. I solemnly declare by my honour and  
19 conscience that I will speak the truth, the whole  
20 truth, and nothing but the truth.

21 AFFIRMED: CHRISTOPHER DALY

22 PRESIDING MEMBER: Thank you,  
23 Mr. Daly. You have also signed an assurance  
24 document assuring that you had not cognizance of  
25 any of the prior witness statements.

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1 MR. DALY: That is correct.

2 PRESIDING ARBITRATOR: You have  
3 done so?

4 MR. DALY: That is correct, yes.

5 PRESIDING ARBITRATOR: Thank you.  
6 Mr. East.

7 EXAMINATION IN-CHIEF BY MR. EAST:

8 Q. Thank you. Good morning,  
9 Mr. Daly.

10 A. Good morning.

11 Q. Just for the benefit of the  
12 court reporter, again my name is Reuben East and I  
13 am counsel for the Government of Canada.

14 Mr. Daly, I am going to ask you a  
15 few questions really just for the purposes of  
16 introduction, and then my friend will ask you some  
17 questions on cross-examination. I may then ask you  
18 some questions as a matter of re-direct  
19 examination. Excuse me. And of course the  
20 Tribunal at any time may have questions for you.

21 Do you have any questions about  
22 the process?

23 A. I don't.

24 Q. Mr. Daly, you have submitted  
25 two witness statements in this arbitration?

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1 A. That is correct.

2 Q. And those were submitted  
3 along with Canada's counter-memorial, and then  
4 Canada's rejoinder memorial; is that right?

5 A. That's correct.

6 Q. And just so the Tribunal  
7 understands your role in the process, what is your  
8 current department and position in the Government  
9 of Nova Scotia?

10 A. I'm currently the Associate  
11 Deputy Minister at the Department of Economic and  
12 Rural Development and Tourism with Nova Scotia  
13 government.

14 My first statement, at the time I  
15 was the acting Associate Deputy Minister, but I am  
16 actually the Associate Deputy Minister now.

17 Q. You are no longer acting, but  
18 in fact are now the Associate Deputy Minister?

19 A. That is correct.

20 Q. Could you tell me when you  
21 were the Environmental Assessment Branch manager at  
22 the Nova Scotia Department of Environment and  
23 Labour?

24 A. I was branch manager from May  
25 1999 till November of 2004.

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1 Q. Okay. Thank you.

2 Mr. Daly, do you have any  
3 corrections to make to either of your statements?

4 A. I do not.

5 Q. Thank you very much. I will  
6 now turn it over to counsel for the claimants.

7 CROSS-EXAMINATION BY MR. NASH:

8 BY MR. NASH:

9 Q. Thank you, Mr. East.

10 Mr. Daly, my name is Greg Nash and  
11 I am co-counsel for the claimants in this case, and  
12 I have a few questions for you --

13 A. Good morning.

14 Q. Good morning -- about some of  
15 the evidence given in your witness statements on  
16 some of the subject matters.

17 In April 2002, Mark McLean was an  
18 assessment officer with your branch?

19 A. I believe that's correct,  
20 yes.

21 Q. And he had been an assessment  
22 officer with your branch since 1999 or 2000?

23 A. Around that time, yes.

24 Q. He was one of how many  
25 assessment officers?

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1                   A.    At that time, I think there  
2 may have been two. Two, maybe three.

3                   Q.    And your branch was  
4 responsible for coordinating and administering  
5 environmental assessments in Nova Scotia?

6                   A.    Yes, it was.

7                   Q.    And it was your branch's  
8 responsibility to conduct those assessments in an  
9 open, transparent, accountable and effective way;  
10 is that right?

11                  A.    Yes.

12                  Q.    And that would be for all  
13 parties involved in the environmental assessment  
14 process?

15                  A.    That's right.

16                  Q.    Including proponents?

17                  A.    Absolutely.

18                  Q.    Especially proponents?

19                  A.    Absolutely.

20                  Q.    In the period of 2002 to  
21 2007, all public servants in Nova Scotia had a  
22 duty, an obligation, to act in making their  
23 decisions fairly?

24                  A.    Yes.

25                  Q.    Objectively, honestly;

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1 correct?

2 A. Yes.

3 Q. With openness and  
4 transparency?

5 A. Yes.

6 Q. With impartiality? And all  
7 proponents could expect that you and your  
8 colleagues would be guided in your conduct by these  
9 principles; correct?

10 A. Yes.

11 Q. And that the proponents would  
12 have due process in all of their conduct of their  
13 affairs with your branch; correct?

14 A. Yes.

15 Q. And you expected the federal  
16 government, the DFO in particular, to be guided by  
17 the same principles and act in the same way;  
18 correct?

19 A. I have no reason to believe  
20 not.

21 Q. And under the provisions of  
22 the Nova Scotia Environment Act, all environmental  
23 assessments in Nova Scotia were intended to be  
24 carried out and were obliged to be carried out  
25 fairly and transparently?

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1 A. Yes.

2 Q. And not used for political  
3 purposes --

4 A. Absolutely.

5 Q. -- in any way; that's  
6 correct?

7 A. Not by -- certainly by staff  
8 of the department.

9 Q. Certainly not by anybody;  
10 correct?

11 A. Correct. Yes.

12 Q. And it would have been wrong  
13 in the period 2002 to 2004 for any environmental  
14 assessment being conducted by the Government of  
15 Nova Scotia to be used for political advantage of  
16 any kind; correct?

17 A. Correct.

18 Q. That's right?

19 A. Yes. Yes.

20 Q. When did the Whites Point  
21 quarry project first come to your attention?

22 A. It first came to my  
23 attention, I think my staff first met, I think,  
24 with the proponent in June of 2002. And we had  
25 heard about the project as part of the application

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1 for a 3.9 hectare quarry, but we didn't have all of  
2 the details at that time, but we had heard about  
3 it.

4 Q. Do you recall that the  
5 proponent had applied for an approval to operate a  
6 ten acre quarry?

7 A. I do recall hearing about  
8 that, yes. I wasn't involved in that process.  
9 Just to be clear, if I may, there's two divisions  
10 in the department, one that's responsible for the  
11 environmental assessment process under Part IV of  
12 the Act, which is the branch that I was managing,  
13 and there was another division responsible for  
14 issuing permits under Part V of the Act, which is  
15 operational approvals, which was the group that  
16 would be involved in that 3.9 hectare.

17 Q. And what knowledge did you  
18 have, prior to the meeting you referred to in June  
19 of 2002, of the proponent's obtaining of an  
20 approval to operate a quarry at Whites Point?

21 A. I have knowledge of -- that  
22 they were looking to establish and apply for an  
23 application, and I understood they applied for the  
24 application. Again, I was not involved in that  
25 process. That was a different branch -- group of

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1 the department that was involved in that part of  
2 it.

3 Q. Do you recall that that  
4 application was referred by the provincial  
5 government, by the compliance section in your  
6 branch or the government, to the federal government  
7 for comment on the potential implications for  
8 operating a quarry at that site?

9 A. I can't speak to whether or  
10 not it was referred. I know there was a condition  
11 that was put into that approval that related to  
12 DFO, if that is what you're referring to, yes.

13 Q. Do you know of the  
14 circumstances under which those conditions were put  
15 into the approval?

16 A. Other than I think that there  
17 may have -- obviously, I mean, again, I was not  
18 involved in issuing that permit or the conditions  
19 about it, but I am just -- what it might be was  
20 that there was obviously a potential for concerns  
21 with fisheries issues with regard to it that they  
22 made contact with DFO.

23 Q. If you could turn, there is a  
24 witness bundle binder in front of you.

25 A. Yes.

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1 Q. And if you could turn,  
2 please, to tab 1? Your affidavit, sir, tabs A and  
3 B.

4 A. Yes.

5 Q. If you turn to tab 1, which  
6 is Exhibit R-083, you will see there a letter from  
7 Mr. Langille, who is an inspector specialist with  
8 the department in the monitoring and compliance  
9 division.

10 A. Sorry, this is tab 3?

11 Q. Tab 1.

12 A. Oh, I'm sorry, tab 1.

13 Q. Sorry.

14 A. Okay. Sorry.

15 Q. That's okay. A letter from  
16 Mr. Langille to Mr. Conway at the Department of  
17 Fisheries and Oceans at the Bedford Institute of  
18 Oceanography.

19 I'm showing you this now, but did  
20 you see or hear about that initiative at the time  
21 or about the time?

22 A. I'm sorry, which initiative?

23 Q. The initiative to have Jerry  
24 Conway review the application with respect to  
25 potential concerns?

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1 A. I was not aware of that, no.

2 Q. If you go to tab 2, Exhibit  
3 R-076, you will see there an email from Mr. McLean  
4 to Mr. Langille and Mr. Petrie dated the 11th of  
5 April of 2002, and I am just going to ask: Have  
6 you seen this email before?

7 A. It is copied to me. So...

8 Q. Yes?

9 A. It may have -- it obviously  
10 came to me.

11 Q. And the issue being dealt  
12 with there by Mr. McLean is the question of the  
13 actual application, which was for a ten-acre  
14 quarry, being in excess of -- sorry, four hectares,  
15 being 4.05 hectares, and, therefore, requiring an  
16 environmental assessment; whereas quarries under  
17 four hectares did not require an environmental  
18 assessment; correct?

19 A. That's right.

20 Q. And you will see "on an  
21 unrelated note" at the very bottom, he says:

22 "On an unrelated note, I'm  
23 impressed with that the  
24 company has taken the time  
25 and effort to examine the

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1 whale issue and have offered  
2 to monitor the blast levels  
3 in the bay."

4 With that in mind, were you  
5 following or were you kept in the loop about what  
6 activities the proponent was pursuing in relation  
7 to blasting at Whites Point in the spring of 2002?

8 A. Not a great deal. Mainly  
9 just in passing. Again, I was not directly  
10 involved in that permit or...

11 Q. If you go to tab 3, Exhibit  
12 C-041, there is an email from Mr. Jollymore. Do  
13 you know him?

14 A. I do know Brian, yes.

15 Q. He's with the DFO?

16 A. He is, yes.

17 Q. And he says -- is he still  
18 with the DFO by the way, to your knowledge?

19 A. I have no idea. I don't know  
20 I have no idea.

21 Q. He says, "Hello, Bob". This  
22 is an email dated April 26th.

23 "This email is a follow-up to  
24 several discussions I've had  
25 with your shop recently. I

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1 understand the proponent is  
2 now applying for a quarry of  
3 under four hectares. A  
4 quarry of this size will not  
5 trigger the need for an  
6 environmental assessment  
7 under your legislation."

8 And that last sentence is correct,  
9 by your understanding?

10 A. That's right. If they are  
11 making application for a quarry that is under --  
12 that is under the trigger for environmental  
13 assessment, then obviously no environmental  
14 assessment would be required.

15 Q. Under four hectares was under  
16 the trigger for an environmental assessment;  
17 correct?

18 A. Yes. I think it was. I  
19 think it was under four hectares, yes.

20 Q. And he says in the third  
21 paragraph:

22 "I believe the company  
23 intends to get much larger.  
24 Because they have not applied  
25 at this time for a wharf, we

1                   have no legislative trigger  
2                   to request an environmental  
3                   assessment."

4                   Do you see that?

5                   A.    I do see that, yes.

6                   Q.    And that would have been your  
7 understanding at the time, generally speaking, that  
8 without an application for something within federal  
9 DFO jurisdiction, there was no legislative trigger  
10 to request an environmental assessment?

11                   A.    I mean, that is a DFO thing.  
12 I mean --

13                   Q.    You would take their word for  
14 it?

15                   A.    Well, I wouldn't be able to  
16 comment on the details of that.

17                   Q.    And you will see at the last  
18 full paragraph before the number 1:

19                                "I would appreciate the  
20                                following two clauses be  
21                                added to your permit."

22                   And he sets out two clauses which  
23 are in-filled by handwritten form. And if you go  
24 to tab 4, which is the approval, Exhibit R-087, and  
25 go to page 10 of that document, you will see, under

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1 H -- do you see H there, page 10?

2 A. Page 10?

3 Q. Yes.

4 A. Yes. I do see that, yes.

5 Q. It says:

6 "Blasting shall be conducted  
7 in accordance with the  
8 Department of Fisheries and  
9 Oceans Guidelines for the Use  
10 of Explosives in or Near  
11 Canadian Fisheries Waters."

12 I pause here to ask you: Were you  
13 familiar with or have you had any dealings with  
14 those blasting guidelines?

15 A. No, I haven't.

16 Q. And then "I":

17 "A report shall be completed  
18 by the proponent in advance  
19 of any blasting activity  
20 verifying the intended charge  
21 side and blast design will  
22 not have an adverse effect on  
23 marine mammals in the area.  
24 This report shall be  
25 submitted to the Department

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1 of Fisheries and Oceans DFO,  
2 Maritimes aquatic species at  
3 risk office, and written  
4 acceptance of the report  
5 shall be received from DFO  
6 and forwarded to the  
7 department before blasting  
8 commences."

9 As I read that to you now, can you  
10 recall whether you were aware of that provision  
11 back in 2002?

12 A. I was aware there was a  
13 provision put into the permit regarding blasting.  
14 I wasn't involved in drafting of it or being  
15 consulted on it or -- in any way.

16 Q. Were you aware at that time  
17 that there were setbacks required by the blasting  
18 guidelines for blasting near Canadian fisheries  
19 waters?

20 A. I was not aware of that, no.

21 Q. Were you aware that there  
22 were setback requirements in the standard permit  
23 that was issued under the provincial -- by the  
24 provincial compliance division?

25 A. I know there was setbacks. I

1 didn't know the details of setbacks, only that  
2 there were setbacks, only because of passing  
3 conversation.

4 Q. Were you kept apprised in any  
5 way of the proponent's progress in persuading the  
6 DFO that its blasting plan or plans would satisfy  
7 those two conditions?

8 A. I was not involved in those  
9 discussions with the DFO, no.

10 Q. Was anybody in your branch,  
11 the Environmental Assessment Branch, involved?

12 A. Not to my knowledge.

13 Q. So far as you were concerned,  
14 there was no provincial environmental assessment  
15 actually being conducted with respect to Whites  
16 Point in 2002; is that correct?

17 A. There was -- sorry, can you  
18 repeat the question? There was no provincial...

19 Q. As far as you were aware,  
20 there was no provincial environmental assessment  
21 being conducted with respect to the proponent's  
22 activity at Whites Point in 2002?

23 A. There was no assessment  
24 process from Part V of the Act. There was nothing  
25 that had started at that time, because we were

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1 still working through the details of the project  
2 description, and it wasn't till later that we had  
3 the full details of the project.

4 Q. So there was no provincial  
5 environmental assessment triggered with respect to  
6 the Whites Point site in 2002; do I have that  
7 right?

8 A. Well, I guess -- I mean, I  
9 guess I should add that there was when -- I think  
10 there was -- when the application came in for the  
11 ten hectare quarry, which would have been over the  
12 threshold for requiring an EA, I believe there  
13 was -- that application was rejected, because it  
14 would have to go through an EA.

15 So I think technically there  
16 probably would have been an EA requirement at that  
17 point.

18 Q. When that application for the  
19 ten-acre quarry had been abandoned and the new  
20 application for a 3.9 hectare quarry had been  
21 initiated from that point on, that latter point,  
22 which you may or may not recall was April 23rd,  
23 2003 or 2002, there was no provincial environmental  
24 assessment triggered with respect to the Whites  
25 Point quarry in 2002; correct?

1                   A.    No.  Once there was a new  
2 application for a smaller project, that no longer  
3 triggered the process.

4                   Q.    Had you heard the name Dennis  
5 Wright during the year 2002 in relation to this  
6 project?

7                   A.    I don't recall that name, no.

8                   Q.    Had you heard the name Jerry  
9 Conway in the context of this project?

10                  A.    I don't recall that name,  
11 other than reading some of the notes in here.

12                  Q.    All right.  And you don't  
13 have any details -- you didn't have any then and  
14 you don't have any now -- as to what applications  
15 were made or blasting plans submitted by the  
16 proponent to the DFO during 2002; correct?

17                  A.    No, I didn't review those  
18 details.

19                  Q.    And how those blasting plans  
20 were evaluated by DFO?

21                  A.    I don't know.

22                  Q.    No involvement in that at  
23 all?

24                  A.    No.

25                  Q.    And no knowledge of it?

1                   A.    I was not involved in that  
2 process.

3                   Q.    And you had no knowledge of  
4 it; correct?

5                   A.    I had no knowledge, no.

6                   Q.    Speaking generally, you would  
7 have understood in 2002 and 2003 that in Canada  
8 powers are divided, government powers are divided,  
9 between the federal and provincial jurisdictions?

10                  A.    Yes, sir, under the  
11 Constitution.

12                  Q.    Yes, your understanding was  
13 that federal and provincial jurisdictions over  
14 environmental matters, in particular environmental  
15 assessment, must be linked to a head of power,  
16 either provincial or federal and sometimes both?

17                  A.    I'm not sure what you mean.

18                  Q.    Did you have any knowledge of  
19 the constitutional overlay of the Constitution on  
20 environmental matters in 2002-2003?

21                  A.    I am not an expert in the  
22 Constitution.

23                  Q.    Did you have any general  
24 understanding of how that worked in terms of the  
25 federal government exercising powers with respect

1 to the environment and provincial governments  
2 exercising powers with respect to the environment?

3 A. The only thing I knew is that  
4 the powers around -- or obligations around  
5 environment were split. I don't know any more than  
6 that.

7 Q. The provincial government,  
8 however, you knew had the power to conduct  
9 environmental assessments on matters within  
10 provincial jurisdiction and could require certain  
11 matters to have an environmental assessment;  
12 correct?

13 A. That's correct. The Act and  
14 regulations require assessments under certain  
15 circumstances.

16 Q. And, similarly, the  
17 provincial government could determine what matters  
18 would not require an environmental assessment;  
19 correct?

20 A. No. Generally, no. I mean,  
21 there was -- it is quite clear in our process as to  
22 what would require an assessment.

23 Q. And, for example, the  
24 provincial government could decide that quarries  
25 under four hectares would not require an

1 environmental assessment; correct?

2 A. Under the schedule A of the  
3 regulations --

4 Q. Right?

5 A. -- it's clear that quarries  
6 of a certain size, which is over four hectares,  
7 require an environmental assessment.

8 Q. Did not require an  
9 environmental assessment?

10 A. Over four.

11 Q. I misheard you. But you  
12 could have circumstances which you did, where  
13 quarries under four hectares would not require an  
14 environmental assessment; correct?

15 A. I'm not sure what you're  
16 referring to.

17 Q. I'm referring to projects  
18 such as this, the 3.9 hectare quarry, which did not  
19 require an environmental assessment.

20 A. Oh, right. If it was less  
21 than that, it would not require an environmental  
22 assessment, yes.

23 Q. Similarly, the federal  
24 government could require environmental assessments  
25 for projects falling within federal authority;

1 correct?

2 A. They have federal legislation  
3 around environmental assessment, yes.

4 Q. And the federal government  
5 you knew at that time had jurisdiction over  
6 Fisheries and Oceans?

7 A. As the Department of  
8 Fisheries and Oceans, yes.

9 Q. And the federal government  
10 could require an assessment, environmental  
11 assessment, over matters affecting Fisheries and  
12 Oceans; you would understand that at the time?

13 A. I mean, there's -- the  
14 legislation I think probably has specific  
15 provisions around when a federal assessment is  
16 required, but I am not an expert in that.

17 Q. Right. Fair enough. And  
18 sometimes the provincial government and the federal  
19 government would have overlapping jurisdictions  
20 where both of them require an environmental  
21 assessment to be conducted over the same matter;  
22 correct?

23 A. It is possible that a project  
24 could trigger both federal and provincial  
25 assessments, you're right, yes.

1 Q. There is a statutes and  
2 guidelines binder just to your left there. And if  
3 you could turn to tab 4 of that document, of that  
4 binder?

5 A. This one?

6 Q. Yes, that's the one.

7 A. Yes.

8 Q. Tab 4. It should be the  
9 proponent's guide?

10 A. Yes, sir.

11 Q. You are familiar with the  
12 proponent's guide.

13 A. Yes, I am.

14 Q. Is the proponent's guide to  
15 an environmental assessment in Nova Scotia;  
16 correct?

17 A. Yes, it is.

18 Q. And it was published in  
19 February of 2001, so it would have been in effect  
20 at the time, the material time of this matter,  
21 being 2002; correct?

22 A. Yes, it is.

23 Q. And you will see at page 3 of  
24 the guide that it is stated there that, "The EA  
25 branch continually interacts", I'm in paragraph 2

00030

1 of section 2.1:

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

10 We spoke about those principles  
11 earlier.

12 A. Yes.

13 Q. And then if you go to page 5  
14 of the guide, I will ask you, were you one of the  
15 authors of the guide?

16 A. I was one of the authors,  
17 yes.

18 Q. Under section 2.4, "Federal  
19 Environmental Assessment":

20 "An undertaking required to  
21 complete a provincial  
22 environmental assessment may  
23 also require a federal  
24 environmental assessment."

25 And federal environmental

00031

1 assessment is legislated under the CEAA,  
2 administered by the CEAA agency, which is stated as  
3 independent from all other federal departments and  
4 reports directly to the Federal Minister of  
5 Environment. Do you see that?

6 A. I see that, yes.

7 Q. That was your understanding  
8 at the time?

9 A. It is a separate department,  
10 separate agency, yes.

11 Q. But in terms of your  
12 understanding that a federal government authority  
13 might require an environmental assessment, which  
14 your provincial branch might also require an  
15 environmental assessment for, that was your  
16 understanding?

17 A. Yes. There could be projects  
18 where it could be a provincial requirement for an  
19 environmental assessment and federal requirement  
20 for an environmental assessment, yes.

21 Q. Under 2.5, it is stated:  
22 "In many cases an undertaking  
23 may require both a provincial  
24 and federal environmental  
25 assessment. In these cases

00032

1                   the EA branch will coordinate  
2                   or harmonize its review with  
3                   the jurisdiction where  
4                   possible and practical."

5                   As I understand that, and correct  
6 me if I'm wrong, where the federal government and  
7 the provincial government both required  
8 environmental assessments under their respective  
9 legislation and within their respective  
10 jurisdictions over the same matter -- in other  
11 words, where there was an intersection of the two  
12 jurisdictions -- there could be harmonization. Do  
13 I have that right?

14                   A.    It would, sorry?

15                   Q.    There could be harmonization?

16                   A.    There could be harmonization;  
17 that's correct.

18                   Q.    Your government might  
19 approach Canada or Canada might approach your  
20 government to see if the other jurisdiction was  
21 interested in harmonizing; correct?

22                   A.    Yes.  Sometimes the federal  
23 government may find out or hear about a project  
24 first, and they may think there might be a trigger  
25 for a provincial process, so they may -- would

1 approach us. And if it was the other way around  
2 where maybe we heard about the project first, we  
3 would approach the federal government if we thought  
4 there could be potentially a federal trigger.

5 Q. Fair enough. Where that  
6 intersection, which you have referred to in  
7 paragraph 65 of your affidavit -- we will just  
8 actually turn to that for a moment.

9 A. Mm-hm.

10 Q. It is your first affidavit at  
11 tab A, at the very last paragraph, if my memory  
12 serves. Paragraph 65, are you with me, very last  
13 paragraph at tab A?

14 A. Sorry, which book are we in?

15 Q. That book you're in, it  
16 should be under tab A.

17 Is that your first affidavit?

18 A. Tab A.

19 Q. Yes.

20 A. I thought you said tab 8, I'm  
21 sorry.

22 Q. If you go to paragraph 65 at  
23 page 22.

24 A. Yes.

25 Q. You will see there that you

1 state:

2 "The size and duration of the  
3 project, the public concerns  
4 and, of course, the  
5 intersecting jurisdiction  
6 with the federal  
7 government..."

8 Do you see those words?

9 A. I do see that, yes.

10 Q. Intersecting jurisdiction  
11 with the federal government, that intersection is  
12 what I have just described. That overlap of  
13 jurisdiction, federal government, provincial  
14 government, over the same matter results in the  
15 ability to harmonize under the agreement with  
16 Canada; correct?

17 A. Yes.

18 Q. In the absence of that  
19 overlapping intersecting jurisdiction, you could  
20 also coordinate an EA. If there were two separate  
21 aspects of a project, one which came under federal  
22 jurisdiction and one which came under provincial  
23 jurisdiction, you could coordinate an environmental  
24 assessment, the respective environmental  
25 assessments; correct?

1                   A.    Yes.  I mean, there is a  
2 bunch of different options, depending on scope and  
3 levels of process, in terms of how we may  
4 coordinate.  I mean, "harmonization" and  
5 "coordination", I would think they are often used  
6 interchangeably in terms of what we mean by -- it's  
7 basically working together to minimize overlap and  
8 duplication and those kinds of things in the  
9 process.  There is different ways of doing that.

10                   Q.   And in order to gain  
11 efficiencies, you can coordinate, cooperate between  
12 the two jurisdictions.  Formal harmonization is not  
13 necessarily required, but you can still have a  
14 coordinated response on environmental assessments?

15                   A.   Yeah.  Right.  I mean, we  
16 tend to call it harmonization when we sign an MOU  
17 or, in this case, a joint panel agreement, where  
18 coordination is more of -- we just try to work  
19 together without actually having to sign anything.

20                   Q.   Right.

21                   A.   So to minimize duplication  
22 where we can.

23                   Q.   Right.  So you communicate  
24 with one another.  You deal with the proponent in a  
25 cooperative approach, each jurisdiction taking one

00036

1 approach and the other jurisdiction taking the  
2 other, in order to bring the parties together and  
3 make the environmental assessment process more  
4 efficient?

5 A. Yes, the two governments  
6 talking together about how to facilitate the two  
7 processes together and what is best in that  
8 situation.

9 Q. And in circumstances where  
10 there -- as I have described, where there is not  
11 the intersection of jurisdictions, but you have an  
12 independent jurisdiction to do your provincial  
13 environmental assessment, and the federal  
14 government has its independent jurisdiction to do  
15 its environmental assessment, are those the  
16 circumstances that I am describing correctly as  
17 being circumstances where you don't actually enter  
18 into an agreement, but you coordinate?

19 A. No. We could enter an  
20 agreement. I mean, in the case of the -- I mean,  
21 the Bear Head project is an example where we  
22 entered into an MOU.

23 Q. Yes.

24 A. Where there was -- the scopes  
25 of the projects were different.

00037

1 Q. Yes.

2 A. I mean, there was some  
3 intersection, but the scopes were a little bit  
4 different. But they weren't perfectly overlapping.

5 Q. But there was some  
6 intersection?

7 A. There was some intersection;  
8 that's correct.

9 Q. Where you have that some  
10 intersection, that is where you would most normally  
11 seek to get an agreement, formally harmonize and  
12 proceed in that way; correct?

13 A. Yes. I think it would just  
14 depend on the specific circumstances of the  
15 project, and we would evaluate certainly the  
16 options at the time.

17 Q. How many JRPs had you been  
18 personally involved in prior to 2003?

19 A. JRPs? This was the main one.  
20 There was -- I was involved in the Halifax lateral,  
21 as well, which is -- it wasn't really a JRP, but  
22 there was an NEB panel as part of that.

23 So I was familiar with the NEB  
24 panel process.

25 Q. In terms of actual JRPs,

00038

1     though, was this the first project that you had  
2     ever been involved in for a JRP in Nova Scotia?

3                     A.    Yes.  Directly as a JRP, yes,  
4     it would have been, yes.

5                     Q.    How many JRPs had been  
6     appointed in Nova Scotia prior to this JRP being  
7     appointed?

8                     A.    I couldn't say for sure.  I  
9     mean, there was others.  I mean, I mentioned the  
10    Blue Mountain one in my statement, which was around  
11    the -- in the early '90s, I believe.

12                    And there was others.  There was a  
13    joint panel for the Halifax Harbour project.  There  
14    was a joint panel for the Sable project.  There  
15    were some others.

16                    Q.    You hadn't been involved in  
17    any of those?

18                    A.    I hadn't been involved in  
19    those, no.

20                    Q.    Do you recall that in the  
21    spring of 2003, the Whites Point quarry had become  
22    what has been described in some correspondence as a  
23    hot file?

24                    A.    I haven't referred to it as  
25    that, or -- I have seen Mr. Hood's notes refer to

00039

1 it as that. I don't know why.

2 Q. Yes. In fact, do you recall  
3 being quoted as saying that it was a hot file?

4 A. I don't recall being quoted.

5 Q. Have you seen it being  
6 referred to in other correspondence not connected  
7 to you as being a hot file?

8 A. I don't remember that term  
9 "hot file" being specifically quoted, other than  
10 what I've seen in Mr. Hood's notes.

11 Q. Do you recall becoming aware  
12 that DFO headquarters in Ottawa was moving away  
13 from the idea of scoping in the quarry component of  
14 this project into the federal EA process?

15 A. Sorry, can you repeat the  
16 question?

17 Q. Do you recall, in the spring  
18 of 2003, becoming aware that the DFO headquarters  
19 in Ottawa was moving away from the idea of scoping  
20 into its environmental assessment the quarry  
21 component?

22 A. I knew there was debate  
23 within DFO. I don't remember maybe specific times  
24 or conversations that I had heard internally. I  
25 wasn't involved in internal conversations.

00040

1 Q. Right. Could you turn to tab  
2 5, please, Exhibit R-260. You mentioned Mr. Hood's  
3 notes. This is an excerpt from Mr. Hood's notes,  
4 in a few pages. If you go to page 801609 of R-260.

5 A. I see it.

6 Q. Is this the reference that  
7 you have referred to as having been made in  
8 Mr. Hood's notes to it being a hot file? I am  
9 going to read what I see there, at least:

10 "Chris Daly, Province of Nova  
11 Scotia. Province is  
12 concerned that DFO might not  
13 scope in the quarry because  
14 it is a hot file."

15 Does that refresh your memory?

16 A. That's where I mentioned that  
17 I saw it.

18 Q. Right.

19 A. Yes.

20 Q. And you don't recall  
21 referring to the file as a hot file?

22 A. I don't recall referring to  
23 it as a hot file, no.

24 Q. You may or may not have, but  
25 you just don't recall?

00041

1                   A.    I have no recollection of  
2    that.

3                   Q.    And if you go to page 801617,  
4    there is a note which I take it you may have seen  
5    before at the very top.  It says:

6                               "Friday, May 16th, Steve  
7                               Chapman called.  Steve spoke  
8                               to Richard yesterday.  
9                               Province is cranked because  
10                              they want to share the grief  
11                              with us."

12                   Do you see that?

13                   A.    I see where it says, yes.

14                   Q.    Do you recall expressing  
15    sentiments along those lines back in 2003, in the  
16    spring of 2003, to either Mr. Chapman or anyone  
17    else?

18                   A.    I don't.  I'm not sure  
19    exactly what Mr. Hood's notes are referring to  
20    either or what they are regarding.  We certainly  
21    had a desire to move along a harmonized process of  
22    some sort regarding this file and moving it along  
23    as quickly as possible.

24                               So if that is what Mr. Hood is  
25    referring to, of some conversation or something,

1 that may be what it means.

2 Q. It was important from your  
3 standpoint that the Government of Canada scope in  
4 the quarry into its environmental assessment; isn't  
5 that correct?

6 A. It didn't matter to us. The  
7 province had scoped in the whole project, anyway,  
8 so there was no reason for us to require the  
9 federal government to scope in the quarry.

10 Q. As of May 29th, were you of  
11 the impression that the Government of Canada had  
12 scoped in the whole project? I will refer you to  
13 tab 6, which is Exhibit C-129. It is a letter from  
14 Mr. Zamora to Mr. Buxton. Do you see that letter?

15 A. I see the letter, yes.

16 Q. You will see at page 2 that  
17 it is copied to Mr. McLean, who by that time, just  
18 by way of context, Mr. McLean had gone to the DFO  
19 for an exchange. Do you recall that?

20 A. Yes, I do recall that.

21 Q. He went at the beginning of  
22 May of 2002 and returned to the NSDEL assessment  
23 branch on April 1st, 2003. Do you recall that?

24 A. I can't recall the exact  
25 dates, but he was on an exchange.



00044

1                   cause destruction of fish,  
2                   contrary to section 32 of the  
3                   Fisheries Act, which states  
4                   'no person shall destroy fish  
5                   by any means other than  
6                   fishing except as authorized  
7                   by the Minister'."

8                   Reading that, does that refresh  
9                   your memory on the sentiments being expressed by  
10                  your branch, and in particular you, about the  
11                  federal government scoping in the quarry?

12                  A.    So this is -- sorry, this is  
13                  the first sentence of the third paragraph? The  
14                  second sentence?

15                  Q.    The second sentence of the  
16                  first paragraph, "DFO has concluded". Do you see  
17                  that?

18                  A.    "DFO has concluded..."

19                  Q.    "... proposed work is likely  
20                  to cause destruction of fish,  
21                  contrary to section 32 of the  
22                  Fisheries Act."

23                  A.    I don't remember seeing that  
24                  in this letter or...

25                  Q.    Seeing it now, does that

1 refresh your memory as to whether or not you were  
2 concerned that the federal government scope in the  
3 quarry into its federal environmental assessment?

4 A. As I said, we weren't -- it  
5 didn't matter to us whether or not the federal  
6 government scoped in the quarry or not. From a  
7 provincial perspective, we would have to look at  
8 the whole project, anyway. So it didn't make any  
9 difference.

10 Q. I am going to suggest to you  
11 that for the federal -- for the harmonization  
12 agreement to be established, as we've referred to  
13 in the proponent's guide and as you told us earlier  
14 this morning, there had to be this intersection of  
15 jurisdictions; correct?

16 A. Right. I mean, we were -- I  
17 mean, even if the federal government was looking at  
18 the marine terminal, for example, and we were  
19 obviously looking at the whole project, there would  
20 be that intersection. So whether or not the quarry  
21 was part of that or not, there was no requirement  
22 for us.

23 And that is kind of the situation  
24 as I mentioned about Bear Head. That was where the  
25 federal government just scoped in a marine terminal

1 as part of it, but didn't scope in the LNG terminal  
2 as part of that proposal, where we scoped in the  
3 whole thing.

4 Q. There is a reference  
5 throughout many documents, including memoranda  
6 going up to -- within the DFO, from region to  
7 officials in Ottawa in fact going up to the Deputy  
8 Minister, and I believe to the Minister, referring  
9 to the province being anxious to have the federal  
10 government scope in the quarry. Is that something  
11 that you have any recollection of?

12 A. No. I mean, if there is any  
13 anxiousness, it was the province wanting to move  
14 along with the coordination, the harmonization  
15 process. I mean, where there wasn't decisions  
16 being made, that caused delays. And obviously from  
17 our perspective, we wanted to move along the  
18 process as quickly as possible, because we already  
19 knew what our scope was.

20 You know, it was very clear to us  
21 as to what our involvement was, so we wanted the  
22 federal government to make their decisions, as  
23 well.

24 Q. Do you recall seeing any  
25 science that DFO had or purportedly had in support

00047

1 of this assertion that the proponent's blasting was  
2 likely to cause destruction of fish?

3 A. I never -- I haven't seen any  
4 science around that.

5 Q. No science was produced to  
6 you?

7 A. Nothing was provided to me.

8 Q. Have you ever seen any  
9 science, scientific analysis from the DFO, with  
10 respect to the Whites Point project?

11 A. Any scientific analysis from  
12 DFO? Again, I was involved only up until November  
13 of 2004. So, I mean, that stuff probably would  
14 have been provided in the EIS document when -- that  
15 was after my involvement.

16 Q. So up until your departure  
17 from the branch in November of 2004, you had seen  
18 no science at all from the DFO with respect to any  
19 potential effects of blasting on the land on fish?

20 A. I had not, no.

21 Q. That's correct?

22 A. That's correct, yes.

23 Q. Do you know if there was  
24 science that supported that proposition that you  
25 had not seen?

1                   A.    Again, I wasn't involved in  
2   that permitting process.  We were only involved  
3   with the proponent in talking about what the EA  
4   process was and what the project was in terms of  
5   scoping, stuff like that.

6                    So we were not at that point  
7   involved in the science around the project, more  
8   just around the process, the EA process.

9                   Q.    Did you see or hear about any  
10  science in support of the proposition that the  
11  federal government had a HADD with respect to the  
12  quarry, and a HADD being a harmful effect, adverse,  
13  on disruption and destruction of fish?

14                  A.    I hadn't seen any science  
15  around that, around a HADD, and I would not  
16  normally see science related to that process at  
17  that time.  The only time we would see sort of  
18  science around it was when the proponent does  
19  submit their environmental impact statement, which  
20  talks about the potential impacts.

21                  Q.    If you go with that document  
22  in front of you and go to the addendum, it has two  
23  pages.  It is over following Mr. Zamora's signature  
24  and go to page 1.

25                  A.    Sorry, oh, okay.

1 Q. The addendum, second to last  
2 paragraph:

3 "Habitat Management Division  
4 have calculated that a  
5 horizontal setback distance  
6 from the shoreline of 500  
7 metres would be required to  
8 protect iBoF Atlantic Salmon  
9 of the size that could be  
10 found at Whites Point from  
11 May to October."

12 Do you recall -- now seeing that,  
13 does that refresh your memory as to whether you had  
14 any knowledge at the time of setback requirements?

15 A. I don't recall seeing or  
16 hearing about that.

17 Q. It would have been Mr. McLean  
18 at your branch at that time who was handling that?

19 A. Again, I don't recall  
20 Mr. McLean being involved in -- if he was back at  
21 that time, which you say he was, he would have been  
22 involved in the environmental assessment process.  
23 I don't know if he was involved previously when he  
24 was at DFO. He may have had a conversation about  
25 this. I don't know.



1                                   necessitate an environmental  
2                                   assessment under CEAA."

3                                   Now, you would have received this  
4 letter at the time; correct?

5                                   A.    It was addressed to me, yes.

6                                   Q.    And you would have read it  
7 and reviewed it at the time?

8                                   A.    Presumably so.

9                                   Q.    And you will see that it is  
10 copied to Mr. Coulter, who was with CEAA. Do you  
11 remember that?

12                                  A.    Yes.

13                                  Q.    Did you see any scientific  
14 evidence in support of the proposition in that  
15 paragraph, that third paragraph, at any time  
16 following up the apparent discussions and field  
17 work of the DFO officials to determine if approvals  
18 are required under the Fisheries Act or section 35  
19 or section 32?

20                                  A.    Again, I mean, it is relating  
21 to the Fisheries Act, and I wouldn't see any  
22 science regarding that. That wouldn't normally be  
23 the process.

24                                  Q.    Wasn't the point -- your  
25 understanding of the point of this correspondence

00052

1 to confirm that the DFO might have a trigger over  
2 the quarry?

3 A. Let's read the section.

4 Q. Yes.

5 A. I mean, it could be  
6 that. Again, I am not an expert in the Fisheries  
7 Act or the federal process, so...

8 Q. In any event, you didn't see  
9 any evidence of any field work or discussions that  
10 were being conducted by DFO at that time or  
11 subsequently; correct?

12 A. No. I wouldn't be involved  
13 in that.

14 Q. That's correct? That's  
15 correct?

16 A. Yes. I wouldn't be involved  
17 normally in that.

18 Q. If you go to tab 8, Exhibit  
19 C-068, it is a letter from Mr. Buxton to Mr. Zamora  
20 requesting the calculations that had been used to  
21 calculate the setbacks that had been referred to in  
22 that letter of May 29th, which we have just  
23 covered.

24 Were you aware at all of  
25 Mr. Buxton's request being made to DFO for those

1 calculations?

2 A. I don't recall being aware of  
3 that, no.

4 Q. If you go to the next tab,  
5 tab 9, Exhibit C-113, you will see, again, this is  
6 a letter from Mr. Zamora to Mr. Buxton dated June  
7 11th, 2003.

8 It is regarding the guidelines and  
9 the basis for the calculation of the setbacks, and  
10 it indicates it is copied to Mr. McLean. I gather  
11 this wouldn't have come across your desk or you  
12 wouldn't have heard about it?

13 A. It may not have. It likely  
14 wouldn't have, but I guess it depends on what it  
15 was about and when Mr. McLean was -- if he was in  
16 the department or not.

17 Q. He mentions in the second  
18 paragraph:

19 "As implied in our letter to  
20 you on May 29th, 2003, the  
21 3.9 hectare quarry and the  
22 currently proposed blasting  
23 plan would be viewed as part  
24 of the larger project."

25 Then he goes down in the second

00054

1 paragraph -- or third full paragraph:

2 "You have asked for a meeting  
3 with Habitat Management..."

4 He talks about CEAA arranging that  
5 meeting and that he will be contacted. Then it  
6 states:

7 "You have also asked about  
8 the calculations carried out  
9 by HMD which led to the 500  
10 metre horizontal distance  
11 from the shoreline to the  
12 blast location..."

13 Are you with me?

14 A. Yes, I see that.

15 Q. "... being determined as  
16 required to protect inner Bay  
17 of Fundy Atlantic salmon.  
18 The calculations were  
19 performed using a computer  
20 simulation model supplied by  
21 the developer of the DFO  
22 Guidelines for the Use of  
23 Explosives in or Near  
24 Canadian Fisheries Waters,  
25 1998. The results of these

1                   calculations are available  
2                   for your examination."

3                   Do you have any recollection of  
4 being aware of any of that at the time?

5                   A.    Again, I mean, I would not be  
6 involved in this stage of the process or in these  
7 kind of details.  If I had any knowledge, it would  
8 have only been passing comments, but no knowledge,  
9 detailed knowledge, of it at all.

10                  Q.    If you go to tab 10, I gather  
11 there was urgency -- and this is Exhibit C-517.  
12 There was urgency to have the matter referred to  
13 the Minister of Environment for a panel review by  
14 the end of June.  Do you recall that?

15                  A.    End of June?  So this was --  
16 this was around -- I recall that there was an  
17 election coming up.

18                  Q.    Yes.

19                  A.    That, again, we're trying to  
20 move the process along, keep it going along  
21 quickly.  And I remember being -- talking about  
22 trying to avoid any delays that an election might  
23 cause.

24                  Q.    And so as you say in your  
25 second paragraph in the top email here:

1 "I think we need to meet  
2 sooner than later so we can  
3 get our ducks in a row to  
4 make an announcement by the  
5 end of June. Our regional  
6 folk would likely like to  
7 attend in person or by phone  
8 as well. Any word on the  
9 revised draft letter from  
10 DFO? We need it soon if we  
11 are going to keep this show  
12 on the road."

13 That is what you're referring to  
14 about the pending provincial election; correct?

15 A. Yeah, I mean, I think in this  
16 regard, but, I mean, constantly throughout the  
17 process we're trying to make sure that we minimized  
18 any delays along the way and -- for sure.

19 Q. Do you have a recollection of  
20 discussions with federal officials or CEAA  
21 officials at or about that time, speaking of the  
22 last two weeks of June, about getting the referral,  
23 the federal referral, to Minister Anderson quickly  
24 and urgently in order to take political pressure  
25 off the Ministers?

1                   A.    I remember talking about  
2 moving the process along quickly.  I don't  
3 remember -- I know I didn't have any conversations  
4 around taking any political pressure off anybody.

5                   Q.    And you would have considered  
6 it improper and inappropriate for a federal  
7 assessment at either level, either federal,  
8 provincial, to be accelerated for political  
9 purposes; correct?

10                  A.    I said our goal in this  
11 regard was trying to accelerate the process  
12 regardless of -- regardless of what kind of delay  
13 that would come in.

14                  Q.    You would have considered it  
15 inappropriate for the process to be accelerated for  
16 any political purpose; correct?

17                  A.    Yes, sure.

18                  Q.    Either federal or provincial;  
19 correct?

20                  A.    Yes.

21                  Q.    Yes?

22                  A.    Yes.

23                  Q.    In tab 12, Exhibit C-524, it  
24 seems to evidence that you were interested in  
25 having an invitation from the federal government, a

1 formal invitation. And correct me if I'm wrong,  
2 but if you go down to, halfway down that page -- at  
3 the very bottom, you will see "Sincerely, A. Daly".  
4 That is right after the draft of a letter. Do you  
5 see that?

6 A. "Sincerely, A. Daly"?

7 Q. Yes.

8 A. Oh, "Christopher A. Daly",  
9 that's right, yes.

10 Q. Yes, Christopher A. Daly?

11 A. Yes.

12 Q. That would be you?

13 A. That's correct, yes.

14 Q. And the letter is to

15 Mr. Boudreau. It is a draft letter; correct? Do  
16 you see "June XX" up there?

17 A. It is a draft letter, yes.

18 Q. Did you draft the letter?

19 A. Yes, I probably did. And  
20 this was after we had already received direction  
21 from our Deputy Minister that we had made the  
22 decision -- we were asked by DFO in around May 26th  
23 if we were interested in doing a joint panel, and I  
24 had provided that information to my boss, Bob  
25 Langdon. I think my statement is quite clear about

1 that, and there is an email that documents all of  
2 that.

3                   And Bob Langdon then took that to  
4 the Deputy Minister, and the Deputy Minister talked  
5 to the Minister and responded back, I think on the  
6 28th of May, providing that direction.

7                   And we did have subsequent  
8 conversations with the agency, I believe, around  
9 sort of the process, the mechanics to actually make  
10 that happen.

11                   Q.   And part of the process and  
12 the mechanics of making that happen was that you  
13 wanted the federal government to invite you to the  
14 table?

15                   A.   Well, they had already asked  
16 us. So this was just -- simply just documenting  
17 what the facts that already occurred.

18                   Q.   And basically you're drafting  
19 the invitation that you wanted them to make;  
20 correct?

21                   A.   No. This is -- this is my --  
22 let me read it. This is my response. Let me see.  
23 This is just my response.

24                   Q.   So this draft came to you  
25 from the federal government for your review to

00060

1 ensure that it was okay from your standpoint, and  
2 you reviewed it and sent it back and said it's  
3 fine?

4 A. This is -- may I take a  
5 moment just to look at it to make sure I have the  
6 right letter?

7 Q. Yes. Take as much time as  
8 you need.

9 MR. EAST: Counsel, I am just  
10 trying to be helpful here. By all means ask your  
11 question, but I would note the email does come from  
12 Mr. Daly and the draft letter is within the text of  
13 that email. So maybe that helps to ask the  
14 question.

15 BY MR. NASH:

16 Q. Does that help, Mr. Daly?

17 A. Yes. It is just me providing  
18 a draft of our response based upon conversations we  
19 have already had.

20 Q. So this is going to be --  
21 this is the draft of the response before you have  
22 actually received the invitation; correct?

23 A. Well, we've already been  
24 asked by the DFO if we would be interested.

25 Q. Yes.

00061

1                   A.    That's right.  So we've  
2  already got the invitation.

3                   Q.    You've already got the  
4  invitation?

5                   A.    We had a verbal.  This was  
6  just the formality of exchanging letters.  That is  
7  all this was.

8                   Q.    You don't recall you actually  
9  wanted to be invited to the party, if I could put  
10 it that way?

11                  A.    No, I don't recall.  That we  
12 were invited.  We were asked whether or not -- and  
13 I think in the record, my statement clearly shows  
14 that we were actually invited and asked if we would  
15 be interested.  And this is just the formal  
16 exchange of letters to be very clear as to the  
17 fact.

18                  Q.    And that invitation is on the  
19 next tab, tab 13, Exhibit C-522.  It is a letter to  
20 you from Mr. Boudreau, who was at that point, it  
21 appears, the acting division manager Habitat  
22 Management.  Do you recall receiving this letter?

23                  A.    Yes, I do.

24                  Q.    And it states in the third  
25 paragraph:

00062

1 "On May 29, 2003, DFO advised  
2 GQP..."

3 And that is Global Quarry  
4 Products; correct?

5 A. Mm-hm.

6 Q. That's the proponent in this  
7 case; correct?

8 A. This is May 29th, 2003?

9 Q. Yes.

10 A. And I guess Global Quarry  
11 Products was the...

12 Q. The proponent?

13 A. The proponent, yes.

14 Q. Yes.

15 "... has advised Global  
16 Quarry Products in writing  
17 that blasting as described in  
18 the blasting plan for a 3.9  
19 hectare test quarry submitted  
20 November 18, 2002 by Nova  
21 Stone Exporters would require  
22 a Fisheries Act section 32  
23 authorization to destroy fish  
24 by means other than fishing.  
25 DFO is conducting discussions

00063

1 and field work of the overall  
2 155 hectare quarry proposal  
3 to determine if it requires  
4 approvals..."

5 Focus on the words "requires"  
6 approvals":

7 "... under section 35(2) or  
8 section 32 of the Fisheries  
9 Act. Authorizations under  
10 each of these sections of the  
11 Fisheries Act necessitate an  
12 environmental assessment  
13 under CEAA."

14 And you would have seen that at  
15 the time?

16 A. Yes.

17 Q. And, again, at any time prior  
18 to your departure from the branch in November of  
19 2004, did you see any evidence of DFO conducting  
20 discussions in field work of the overall 155  
21 hectare quarry?

22 A. I didn't see any field work  
23 being done, no.

24 Q. And nor were any discussions  
25 of any nature with respect to the science around

1 that proposition brought to your attention;  
2 correct?

3 A. I mean, that would have been  
4 an internal DFO process. I would not have been  
5 involved in that.

6 Q. And you write in tab 14,  
7 Exhibit C-071, basically confirming your acceptance  
8 of the invitation in the identical terms to what  
9 you had earlier said would be your response in the  
10 email?

11 A. Yes. This was again just the  
12 formal exchange of letters.

13 Q. All right. If you would go  
14 to tab 17, Exhibit -- Mr. Buxton Exhibit 30, you  
15 will see that this is a letter from Mr. Buxton to  
16 Mr. Zamora, "Further to your letter of June 11th,  
17 2003", which we have already seen this morning:

18 "... and my response of June  
19 16th, 2003, we are still  
20 awaiting details of the  
21 calculations with respect to  
22 setback distances to protect  
23 iBoF salmon.

24 "We have engaged consultants  
25 who are located out of the

1 province to review the  
2 blasting plan and it is  
3 essential that we have your  
4 data to examine."

5 Again, were you aware during this  
6 period of time that Mr. Buxton was still asking for  
7 the data, the calculations that the DFO said that  
8 it had?

9 A. I was not aware. Again, I  
10 wasn't involved in that part of the process.

11 Q. If you go to tab 18, Exhibit  
12 C-671, you will see at the bottom there is an email  
13 from Mr. Dennis Wright to Mr. Phil Zamora with a  
14 copy to Mr. Jollymore.

15 Incidentally, did you know  
16 Mr. Zamora? Had you had dealings with him?

17 A. I knew who Phil Zamora was,  
18 yes.

19 Q. You knew he was in the  
20 Habitat Management Division at DFO?

21 A. Yes, yes.

22 Q. Mr. Wright exchanges  
23 pleasantries in the first part of this email, and  
24 then if you go over to the top of the second page,  
25 he says:

00066

1 "I am not comfortable with  
2 using the I-Blast model for  
3 buried charges as the model  
4 was developed using  
5 relatively few data points.  
6 I have much more confidence  
7 in the equations used for the  
8 guidelines. Because of the  
9 presence of an endangered  
10 Atlantic salmon population in  
11 the area, an endangered North  
12 Atlantic Right Whale  
13 population and a spawning  
14 area for herring, I would  
15 recommend a setback distance  
16 at least triple that  
17 determined by application of  
18 the equations in the  
19 guidelines. This would be  
20 approximately 100 metres or  
21 so. This is not as great as  
22 the setback you had proposed  
23 using the I-Blast model, but  
24 I think that it would be a  
25 much easier sell to the



1                   A.    I mean, I'm sure staff would  
2 provide the necessary information that their  
3 Minister would require.

4                   Q.    And the necessary information  
5 would include all accurate information?  Would you  
6 be sure of that, as well?

7                   A.    Again, I don't know what to  
8 say, because I really don't know if this is  
9 relevant.  I mean, I'm not involved in this  
10 process.

11                  Q.    And --

12                  MR. SPELLISCY:  I think that is a  
13 good time for me to interject here.  Again, we're  
14 spending a lot of time questioning Mr. Daly on  
15 things that don't appear in his affidavit, which he  
16 has said again and again that he was not involved  
17 in this process, and, again, we're spending time  
18 reading things into the record.

19                  I don't think this is an  
20 appropriate way to use the time we have.  Obviously  
21 it's the claimants' choice, but reading things into  
22 the record, asking a provincial official about  
23 federal processes, I don't see that that is an  
24 appropriate form of cross-examination for this  
25 witness.

1                   MR. NASH: Mr. Daly, with respect  
2 to my friend, has given evidence on his involvement  
3 in the Whites Point project, and it is incumbent  
4 upon us to find out what Mr. Daly and the province  
5 knew about this joint referral, the evidence for  
6 it, the basis for it. And that is the purpose of  
7 my questions.

8                   It is not simply to read matters  
9 into the record. It is to see what Mr. Daly knew.  
10 He was the responsible official with the province  
11 at the time. He was clearly involved in the  
12 coordination, if I can use that neutral term, of  
13 having this matter referred to a Joint Review  
14 Panel. It is important for us to know and, in our  
15 view, it would be important for the Tribunal to  
16 know who knew what at what time prior to the  
17 referral on August 7th.

18                   PRESIDING ARBITRATOR: Mr. Nash,  
19 of course you are also aware that the time left to  
20 the claimant is getting shorter and shorter.

21                   MR. NASH: Yes, I am.

22                   PRESIDING ARBITRATOR: So I am  
23 pretty sure that you know what you are doing.

24                   MR. NASH: Yes. In terms of the  
25 management of time, I can tell you --

1                           PRESIDING ARBITRATOR: I think you  
2 should go ahead.

3                           BY MR. NASH:

4                           Q. Thank you very much. If you  
5 go to tab 19, Exhibit C-026, it is a letter from  
6 Mr. Anderson to Mr. Thibault, and this is the  
7 referral letter. Do you see that?

8                           A. I see it. It is in French,  
9 and unfortunately I can't read it.

10                          Q. Is this the first time you  
11 have seen this?

12                          A. The first time I have seen --  
13 I don't even know what it is, because it is in  
14 French, so...

15 --- Laughter

16                          Q. Whatever it is, this is the  
17 first time you've seen it, is that it?

18 --- Laughter

19                          Q. Let me ask, did you see the  
20 letter June 26th, 2003 from Mr. Thibault to  
21 Mr. Anderson?

22                          A. June? I don't -- probably  
23 not. I don't know. I can't recall. I am not sure  
24 what the letter is about so...

25                          Q. It is the referral letter

00071

1 from Minister Thibault to Mr. Anderson. Does that  
2 ring any bells?

3 A. I can't recall seeing the  
4 letter.

5 Q. Just in terms of the flow of  
6 information, provincially, would you expect to be  
7 briefing your Minister or would your officials or  
8 officials in your department be expected to brief  
9 your Minister on a significant decision with  
10 respect to an environmental assessment armed with  
11 all of the accurate information?

12 A. If we were briefing our  
13 Minister on an issue -- I guess it is a  
14 hypothetical scenario.

15 Q. Yes.

16 A. If we are briefing our  
17 Minister on an issue, we would bring forward the  
18 information we thought was necessary for that  
19 information to have -- for that Minister to have.

20 Q. You would want the Minister  
21 to have the accurate information; correct?

22 A. I mean, we wouldn't provide  
23 the Minister with inaccurate information. I mean,  
24 we would provide the information that we thought  
25 was the information he would need.

1 Q. Right. And you wouldn't  
2 provide your Minister with serious -- with  
3 information seriously omitting relevant critical  
4 information; correct?

5 A. I mean, again, we would  
6 provide the information we thought the Minister  
7 would need.

8 Q. Right. To make a decision  
9 with integrity under the law; correct?

10 A. We would provide what we  
11 thought would -- depending on what we were briefing  
12 the Minister on. If it was a decision, we would  
13 provide the Minister with the information that we  
14 thought he would need in order to make his  
15 decision, and -- yeah.

16 Q. In order to make an informed  
17 decision with integrity; correct?

18 A. Yes.

19 Q. If you go, please, to tab 20,  
20 Exhibit C-657, you will see that there is an email  
21 from Mr. McDonald to Ms. Bastien:

22 "In fact, DFO has since  
23 revised its blasting  
24 calculations and determined  
25 that it does not have a

00073

1 section 32 trigger, but it  
2 still has a HADD for the  
3 terminal."

4 Did you at any time prior to  
5 November of 2004 come into possession of this  
6 information?

7 A. I don't recall ever seeing  
8 this, no.

9 Q. Then please go to tab 21. Do  
10 you recall that the Minister Anderson and your  
11 provincial Minister made an announcement on August  
12 11th with respect to the appointment of a Joint  
13 Review Panel?

14 A. I do recall that, yes.

15 Q. That was in 2003?

16 A. It was 2003, yes.

17 Q. And there is an exchange of  
18 emails here going back -- if you go over to page 2,  
19 from Mr. Crepault to Mr. Torrie, with a copy to  
20 Mr. Chapman and Ms. Richard.

21 The gist of these emails -- take  
22 your time to read them if you wish, but the gist of  
23 it is you not being able to come to an agreement  
24 with the federal government on the terms of the JRP  
25 agreement. Do you recall that?

1                   A.    Let me see here.  Lots of  
2 emails here.  I mean, it talks about discussions  
3 back and forth, and earlier down here it talks  
4 about discussions between the president and the  
5 Deputy Minister of my department about the  
6 agreement.

7                   Q.    Yes.

8                   A.    That's what it seems to be  
9 saying.

10                  Q.    And do you recall -- looking  
11 at that, do you recall there being some negotiating  
12 back and forth as to the terms of the agreement  
13 under which the JRP would be conducted?

14                  A.    I know there was an issue  
15 around or discussion around whether or not there  
16 would be, within the agreement, wording around  
17 whether or not there would be joint announcements  
18 and how that would work.

19                  Q.    Right.  And by the end of the  
20 year 2003, no agreement had been reached; correct?

21                  A.    The agreement -- I mean,  
22 there was a consultation period.

23                  Q.    Yes.

24                  A.    And I think there was  
25 obviously details that needed to be worked out and

1 it wasn't finalized until later, yes, you're right.

2 Q. It was finalized in November  
3 of 2004; correct?

4 A. It was -- that's when it was  
5 made public, yes.

6 Q. Well, in fact, it was  
7 finalized days before that; correct?

8 A. It was finalized earlier than  
9 it was released for sure, yes.

10 Q. If you go to tab 23, Exhibit  
11 R-234, you will see that there is an email from  
12 Helen MacPhail to Steve Chapman. Helen MacPhail  
13 worked in your branch; correct?

14 A. Yes, she did.

15 Q. She says:

16 "Hi, Steve: The agreement  
17 has been signed. I'll fax it  
18 through tomorrow morning,  
19 Helen."

20 That referred to the actual JRP  
21 agreement; correct?

22 A. I suspect, yes, it did.

23 Q. So 14 months after  
24 Mr. Anderson had written his letter to Mr. Thibault  
25 announcing his agreement to a JRP and referral to a

1 JRP, the agreement to have the JRP between the  
2 provincial and federal government was actually  
3 finalized; correct?

4 A. Yes. I mean, there is a lot  
5 of time period in between there where --

6 Q. Yes?

7 A. -- there was consultations on  
8 the agreement, and I know that there was some  
9 reorganization by the company, which had a bit of a  
10 gap in there, too.

11 Q. If I was to say that that  
12 reorganization was brought to the attention of the  
13 officials at the end of February of 2003, would  
14 that ring a bell to you? Does that sound about  
15 right?

16 A. I believe it was sometime in  
17 February that there was notification that there  
18 would be a reorganization of some sort.

19 Q. And if you go to the next --  
20 actually, tab 22, if you will. You will see midway  
21 down the page there is a message from Ms. Richard,  
22 who was at CEAA, to you of July 23rd, 2004. She  
23 says:

24 "Hi, Chris: As you must have  
25 heard, the proponent has

1 resolved its ownership issues  
2 and we are now in the process  
3 of having Minister Dion sign  
4 the federal-provincial  
5 agreement and put in place  
6 the panel review for the  
7 Whites Point quarry project."

8 Do you see that?

9 A. I see that, yes.

10 Q. So that would have been the  
11 time where the continuation of the process would  
12 have continued on from there until November 3rd?

13 A. Yeah. I can't remember  
14 exactly if that is the exact day, but it is within  
15 probably a number of weeks around that time period.

16 Q. And, in the meantime, there  
17 had been communications. If you go back to tab 21,  
18 Exhibit C-105, on December 8th, 2003 at the bottom  
19 of page 2, you will see that there is a statement  
20 by Mr. Crepault to Mr. Torrie:

21 "Brian, it seems that Nova  
22 Scotia is fighting hard and  
23 long on this one. It is my  
24 understanding that  
25 environmental groups are also

1 pushing on Nova Scotia. One  
2 of their leaders told me that  
3 they are lobbying at high  
4 level, DM and Minister, for  
5 the panel to be appointed  
6 earlier and for scoping  
7 meetings, amongst other  
8 things."

9 Does that ring a bell as to what  
10 was going on in Nova Scotia, from your perspective?

11 A. In which regard?

12 Q. In regards to Nova Scotia  
13 fighting hard with respect to something, and that  
14 there were environmental groups also pushing on  
15 Nova Scotia for certain things at a very high  
16 level.

17 A. I mean, again, I mean this is  
18 not an email involving me, so I can't say exactly  
19 what, what it is about. But I suspect they are  
20 probably referring to the fact that we're still  
21 negotiating that one term around joint  
22 announcements.

23 Q. Do you see just above that  
24 there is an email from Mr. Torrie to Mr. Crepault  
25 dated December 10th, "Anything new? WPQ...", which

1 I take to be Whites Point:

2 "... Bob Connelly has offered  
3 to follow up Sid's call."

4 Do you see that?

5 A. I see that, yes.

6 Q. Do you remember that Sid was  
7 the Deputy Minister of Environment in the federal  
8 level?

9 A. I don't recall that. I think  
10 he was the president of the agency.

11 Q. Do you recall Mr. Connelly's  
12 involvement in this process?

13 A. I know Bob Connelly and he  
14 was involved in the agency. I think he had a  
15 vice-president position within the agency. I don't  
16 remember his specific involvement in this process.

17 Q. Mr. Connelly was ultimately  
18 appointed the acting president of the agency and  
19 was involved in the selection of JRP members. Do  
20 you recall that?

21 A. I don't recall if he was  
22 acting president. He may be, but I don't recall  
23 that.

24 MR. NASH: Thank you, very much,  
25 Mr. Daly. Those are my questions. Thank you for

1 your time.

2 MR. DALY: Thank you.

3 PRESIDING ARBITRATOR: Thank you,  
4 Mr. Nash. Any re-direct?

5 MR. EAST: Yes, thank you, Judge  
6 Simma. I wonder if it might be appropriate, both  
7 for the court reporter and the witness and everyone  
8 else, if we have a 10-, 15-minute break, but I am  
9 in your hands.

10 PRESIDING ARBITRATOR: It depends  
11 a bit, in my view, on how long your process would  
12 go, because then we need to prepare for the next  
13 witness. We might lose -- we seem to be well in  
14 time, but if it is -- could you go on for another  
15 ten minutes? I don't want to limit you in any way.

16 MR. EAST: I think I would be a  
17 bit longer than ten minutes, but no longer than  
18 half an hour, that's for certain. I have to confer  
19 with my colleagues, but certainly not longer than  
20 that.

21 PRESIDING ARBITRATOR: So let's  
22 have the break now, then. So we will have a break  
23 until 11:05. And, Mr. Daly, you have to stay  
24 alone.

25 THE WITNESS: Yes.

00081

1 PRESIDING ARBITRATOR: Thanks.

2 --- Recess at 10:50 a.m.

3 --- Upon resuming at 11:10 a.m.

4 PRESIDING ARBITRATOR: Okay. As  
5 they say, tres faciunt collegium, we are complete,  
6 and please go ahead.

7 RE-EXAMINATION BY MR. EAST:

8 Q. Thank you, Judge Simma. As I  
9 indicated before the break, I don't think I will be  
10 very long on questions here, all will be glad to  
11 know.

12 The first thing, Mr. Daly, I would  
13 like to refer you to is your statement.

14 If you could go into I think it is  
15 the first binder that counsel provided to you and  
16 you will see your statement in there.

17 A. I see it.

18 Q. Let me know when you find it;  
19 okay. Then specifically I would like to go to  
20 paragraph 38 of your statement.

21 A. The first statement?

22 Q. The first statement. That's  
23 right. And, thank you, Chris, for putting it on  
24 the screen. The reason why I am taking you there,  
25 while you find it is that my friend asked you some

00082

1 questions about the process that led to the  
2 decision to harmonize the Whites Point quarry by  
3 way of Joint Review Panel and he asked you some  
4 questions about the Nova Scotia process and indeed  
5 he asked you some questions about, later on the  
6 federal side, including the ultimate letter in June  
7 of 2003.

8                                 But I want to take you to the Nova  
9 Scotia process, in particular, and paragraph 38 of  
10 your statement describes it and has some detail  
11 there and I think it is important to get these  
12 details out.

13                                 Do you see the beginning of that  
14 paragraph, Mr. Daly?

15                                 A. I do. "On May 26th"?

16                                 Q. Right. It says:

17   "On May 26th, 2003 we were  
18 informed that DFO was looking  
19 to recommend the  
20 establishment of a review  
21 panel for this assessment and  
22 that they wanted know if we  
23 were also interested in  
24 harmonizing our process with  
25 this type of federal review."



1 the Act, but could you tell me just in your  
2 understanding, what section 47 does?

3 A. Section --

4 MR. NASH: Excuse me,  
5 Mr. President. I did not take this witness to any  
6 statutory provision. This does not arise from any  
7 questions that I asked.

8 MR. EAST: With respect to my  
9 friend, he did ask about the process and did ask  
10 specific questions about how that was indicated --  
11 how that came about.

12 I'm referring to, Mr. Daly to his  
13 own statement in which he describes the basis for  
14 that decision.

15 PRESIDING ARBITRATOR: Go ahead.

16 BY MR. EAST:

17 Q. Thank you. So just briefly,  
18 the section 47, your understanding of it, sir.

19 A. Section 47 of the Environment  
20 Act allows the Minister to enter into agreements  
21 with other governments for the interests of  
22 harmonization of processes in whole or in part.

23 Q. Okay. And that can take a  
24 number of forms?

25 A. That's correct.

1                   Q.    Right?  Including a Joint  
2 Review Panel but certainly not limited to a Joint  
3 Review Panel; correct?

4                   A.    That is correct.  And section  
5 48 also specifies the panel, yes.

6                   Q.    Well, let's go back to the  
7 actual process that took place in the Whites Point  
8 quarry.  And that indeed is what you talk about in  
9 the following sentence.  You say:

10                                "As such, on May 26th, 2003  
11                                my executive director, Bob  
12                                Langdon, wrote to Ronald  
13                                L'Esperance, the Deputy  
14                                Minister, laying out the  
15                                options of either harmonizing  
16                                with a federal comprehensive  
17                                study or a federal assessment  
18                                by a review panel."

19                                Do you see that?

20                   A.    I do see it.

21                   Q.    If we could go to that  
22 document, because this, again, talks about the  
23 internal decision-making process.  This is not a  
24 document that was provided in the bundle, but it  
25 does speak to the internal decision-making process.

1 And it is, indeed, a decision that Mr. Nash asked  
2 you some questions about.

3 If we could flash that up; that is  
4 R-189. This is on the record. Could we have that,  
5 Chris, please? That way, Mr. Daly can see it. And  
6 indeed the tribunal can, too.

7 Now, have you seen this document  
8 before?

9 A. I have, yes.

10 Q. Okay. And your statement  
11 already says who some of these people are, but just  
12 so we're clear, Bob Langdon again is?

13 A. Bob Langdon was my boss, the  
14 executive director of the division.

15 Q. And Mr. Ronald L'Esperance?

16 A. Ron L'Esperance was the  
17 Deputy Minister.

18 Q. Okay. And then at the bottom  
19 of the document, if we could scroll down a little  
20 bit, there are some that are cc'd on the first of  
21 two emails. Do you see that?

22 A. I do see it, yes.

23 Q. Maybe you could tell us who  
24 some of these people are. Linda Baiden -- if you  
25 remember.

1                   A.    Linda Baiden was the  
2 Minister's secretary.

3                   Q.    Valerie Bellefontaine?

4                   A.    Valerie was our  
5 communications director.

6                   Q.    Gerard MacLellan?

7                   A.    Gerard MacLellan was the  
8 executive director of the compliance division.

9                   Q.    Right.

10                  A.    And Bob Petrie was a member  
11 of that division, as well.

12                  Q.    Thank you.  If we could look  
13 at the first of the emails, so it is not the top of  
14 the page, but right there where it says "Bob  
15 Langdon", and then you have the time and date  
16 there.

17                                There he is outlining a couple of  
18 options; correct?

19                  A.    That's correct.

20                  Q.    And those options are a  
21 comprehensive study takes about 18 months.  Even if  
22 they do this, the fed Minister could then order a  
23 panel if questions remain.

24                                Could you tell us anything about  
25 that?  Do you recall that option?

00088

1 A. Yes.

2 Q. Do you recall, indeed,  
3 bringing that option to your boss, Mr. Langdon's,  
4 attention?

5 A. Yes, I do, yes.

6 Q. Okay. And then the second  
7 option says:

8 "A review panel (takes about  
9 24 months but is open-ended)  
10 this is the final step."

11 So those are the two options;  
12 correct?

13 A. That's correct, yes.

14 Q. And Mr. Langdon is writing  
15 this email to the Deputy Minister, Mr. L'Esperance;  
16 right?

17 A. That is right.

18 Q. Then if we go up to the top  
19 of the page. This is the Deputy Minister's  
20 response to Mr. Langdon.

21 He says:

22 "Bob, I have now had a chance  
23 to speak to the Minister at  
24 some length on this matter,  
25 and given the local concerns,

1 the magnitude of the proposed  
2 future operation", and then  
3 there is some parenthetical  
4 there, "...and the  
5 intersecting jurisdiction  
6 with fed."

7 The "fed" is the federal  
8 government, I take it?

9 A. Yes, I believe so.

10 Q. "We think it appropriate to  
11 proceed with a joint assessment. We favour the  
12 panel approach."

13 Do you see that?

14 A. I do see it.

15 Q. Okay. And if you review the  
16 rest of the email he goes on to talk about a  
17 process, doesn't he?

18 A. Yes, he does.

19 Q. So at this point what  
20 decision has been made, in your view, based on the  
21 review of this document?

22 A. This, from my perspective  
23 this provides the authority to start the joint  
24 panel process.

25 Q. And this -- and the date

00090

1 again of that email is June 28th, 2003; right?

2 A. That's correct, yes.

3 Q. Okay.

4 A. May 28th.

5 Q. May. Pardon me.

6 A. Yes.

7 Q. In your view, what did this  
8 do for the process? Because you're involved in the  
9 process at this stage; right?

10 A. I mean --

11 Q. What did this mean?

12 A. This means that it allowed us  
13 to have, to enter into discussions with the agency  
14 around what a joint panel process would look like  
15 and all of the details of that would have to be  
16 discussed.

17 Q. So in other words you now had  
18 the authority to?

19 A. That's correct.

20 Q. To proceed with the joint  
21 review?

22 A. Yes.

23 Q. Okay. And then ultimately  
24 the -- over it took some time after this, but the  
25 federal government also came to the same

1 conclusion; correct?

2 A. Yes, they did.

3 Q. Okay. Those are all of my  
4 questions, you will be glad to know, Mr. Daly. The  
5 Tribunal may have further questions for you.

6 PRESIDING ARBITRATOR: Yes. Thank  
7 you, Mr. East. Colleagues, do you have  
8 questions? No questions on the part of the  
9 Tribunal.

10 Mr. Nash?

11 MR. NASH: Nothing arising,  
12 Mr. President.

13 PRESIDING ARBITRATOR: Thank you  
14 very much. So that concludes your examination,  
15 Mr. Daly. You are a free man --

16 --- Laughter

17 PRESIDING ARBITRATOR: -- again.

18 THE WITNESS: Thank you.

19 PRESIDING ARBITRATOR: You can  
20 leave. And we are going to spend a few minutes  
21 preparing for Mr. Chapman; right? So without  
22 running away. So thank you.

23 THE WITNESS: Thank you.

24 --- Mr. Christopher Daly withdraws from hearing  
25 room.

1                               PRESIDING ARBITRATOR: Mr. Stephen  
2 Chapman.

3                               Good morning, Mr. Chapman.

4                               MR. CHAPMAN: Good morning.

5                               PRESIDING ARBITRATOR: Welcome to  
6 the hearing.

7                               MR. CHAPMAN: Thank you.

8                               PRESIDING ARBITRATOR:  
9 Mr. Chapman, you should have in front of you a  
10 statement.

11                              May I ask you to read this out,  
12 please.

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

16 AFFIRMED: STEPHEN BENNET CHAPMAN

17                              PRESIDING ARBITRATOR: Thank you.  
18 Mr. Chapman, may I also remind you that you have  
19 signed, or I guess that you have signed the  
20 statement or an assurance with regard to you not  
21 reading or observing any of the prior witness  
22 statements.

23                              THE WITNESS: I have, yes.

24                              PRESIDING ARBITRATOR: You  
25 have? And you --

1 THE WITNESS: I have not had any  
2 contact, yes.

3 PRESIDING ARBITRATOR: Thank you.  
4 So, please go ahead with the introduction.

5 EXAMINATION IN-CHIEF BY MR. HEBERT:

6 Q. Yes, thank you, Judge Simma.  
7 Just for the record, my name is Jean-Francois  
8 Hebert. I am counsel for the Government of Canada.

9 Good morning, Mr. Chapman.

10 A. Good morning.

11 Q. For the Tribunal, could you  
12 please state your full name and current occupation.

13 A. My name is Stephen Bennet  
14 Chapman. I am a public servant working for the  
15 Canadian Environmental Assessment Agency. My role  
16 there is associate director of regional operations.

17 Q. Mr. Chapman, could you please  
18 confirm that you have provided this Tribunal with  
19 two affidavits, the first one signed, I believe, on  
20 December 2nd, 2011 and a second affidavit, on March  
21 11th, 2013.

22 A. I have, yes.

23 Q. Are there any corrections  
24 that you would like to make to these two documents?

25 A. I would. Regarding my first

1 affidavit, paragraph 3, I stated in that affidavit  
2 that I had a role in helping to draft the Joint  
3 Review Panel report. That was incorrect. What I  
4 meant to say is I had a role in helping the Joint  
5 Review Panel craft the final EIS guidelines.

6 Paragraph 45 of that same  
7 affidavit --

8 PRESIDING ARBITRATOR: Wait, wait.

9 THE WITNESS: It should be at the  
10 end.

11 PRESIDING ARBITRATOR: It is said  
12 here that you were assisting with the preparation  
13 of the panel report.

14 THE WITNESS: Right. It should  
15 say that I was assisting in the preparation of the  
16 final EIS guidelines.

17 PRESIDING ARBITRATOR: Okay.

18 Thank you.

19 THE WITNESS: In paragraph 45 of  
20 that same affidavit, there is an error in the date.  
21 I indicated that the scoping meetings for the EIS  
22 guidelines took place in January 2004. That should  
23 say that those scoping meetings took place in  
24 January of 2005.

25 PRESIDING ARBITRATOR: Okay.

1 MR. HEBERT: Thank you.

2 CROSS-EXAMINATION BY MR. NASH:

3 Q. Good morning, Mr. Chapman.

4 A. Good morning.

5 Q. My name is Greg Nash and I am  
6 co-counsel for the claimants in this case, and I've  
7 got a few questions for you on the subject matters  
8 arising in your affidavits.

9 You were a panel manager with CEAA  
10 from 2000 to 2007, as I understand it.

11 A. That's correct. Yes.

12 Q. And what was the role of a  
13 panel manager?

14 A. The role of the panel manager  
15 is an administrative role, in two parts: to help  
16 in the establishment of a review panel process; and  
17 then once the review panel is in place, to assist  
18 the review panel in undertaking its task and  
19 mandate.

20 Q. Am I correct that you were a  
21 panel manager for the Red Hill case?

22 A. I was at the end of the  
23 process, yes, I was.

24 Q. Was that one of your first  
25 cases that you worked on as a panel manager?

00096

1 A. It was, yes.

2 Q. And you're familiar with the  
3 Red Hill decision?

4 A. I am.

5 Q. And you commenced employment  
6 with CEAA in 1999?

7 A. Correct, yes.

8 Q. And I understand your first  
9 involvement with the Whites Point quarry was in  
10 February of 2003; is that correct?

11 A. That's correct.

12 Q. And that involvement lasted  
13 in 2003 until October of 2003; correct?

14 A. Sorry, I have a hearing  
15 problem. You're going to have to speak up a little  
16 bit.

17 Q. And I have a speaking  
18 problem.

19 --- Laughter

20 So there we go. It's a good  
21 combination. Your role as a person involved with  
22 the Whites Point quarry was from February to  
23 October of 2003; correct?

24 A. Yes.

25 Q. And then you had another role

00097

1 from October 2004 to November of 2005; is that  
2 correct?

3 A. That's correct, yes.

4 Q. And those were the only two  
5 time periods in which you were involved with Whites  
6 Point?

7 A. Generally speaking, yes.

8 Q. And Whites Point was not one  
9 of your files after 2005?

10 A. It was not.

11 Q. You did not attend the JRP  
12 hearings in June of 2007?

13 A. No, I did not.

14 Q. You did not hear the evidence  
15 given at that hearing?

16 A. No.

17 Q. Debra Myles was the CEAA  
18 panel manager for that, those hearings; correct?

19 A. That's correct.

20 Q. Did you read the transcript  
21 of those hearings?

22 A. No, I did not.

23 Q. My next question has actually  
24 been answered by your correction. I was going to  
25 ask you whether you assisted with the preparation

00098

1 of the JRP report, and I gather that was just an  
2 error; correct?

3 A. That's correct.

4 Q. When you first became  
5 involved with the Whites Point project in February  
6 of 2003, were you provided with a briefing on the  
7 Whites Point project?

8 A. The very first contact I had  
9 with the file was related to the email that I  
10 received from our regional office essentially  
11 giving us the heads-up that this was a  
12 controversial project; that was my first point of  
13 contact with the file.

14 Q. Did you have any briefing on  
15 the background of the Whites Point project other  
16 than simply being introduced to it in February of  
17 2003?

18 A. We had a document called a  
19 memo for our early warning system that was sent  
20 into headquarters, that was prepared by our  
21 regional office, that laid out the potential for  
22 this project to cause some controversy, yes.

23 Q. Did you have any background  
24 given to you on events involving the Whites Point  
25 in 2002?

00099

1 A. No, I did not.

2 Q. And the document that was  
3 prepared in the regional office was prepared by  
4 Derek McDonald, amongst others?

5 A. Yes, that's correct.

6 Q. At that time when you became  
7 involved in the project, Derek McDonald was already  
8 on the file; correct?

9 A. That's correct, yes.

10 Q. He had started on the file in  
11 January of 2003?

12 A. December 2002, January of  
13 2003, yes.

14 Q. And your office was in Ottawa  
15 at that time?

16 A. Yes.

17 Q. And did it remain in Ottawa  
18 throughout your involvement in the Whites Point  
19 quarry?

20 A. Yes.

21 Q. And the Halifax office of  
22 CEAA served the Atlantic region?

23 A. That's correct.

24 Q. Who were the other players in  
25 CEAA from the Halifax office who were or were at

00100

1 that time or became involved in the Whites Point  
2 project?

3 A. At that particular time it  
4 would have been Bill Coulter as well who was the  
5 Regional Director of that office.

6 Q. And Mr. McDonald reported to  
7 Bill Coulter directly?

8 A. That's correct.

9 Q. At or shortly after the time  
10 you became involved in the Whites Point project,  
11 did you become aware that the Whites Point project  
12 was in Mr. Thibault's riding?

13 A. It would be the spring of  
14 2003 I was made aware of that, yes.

15 Q. Yes. Around the time you  
16 first became involved?

17 A. Correct, yes.

18 Q. And Minister Anderson was the  
19 Minister of Environment at that time; correct?

20 A. That's correct.

21 Q. Had Minister Anderson had a  
22 role in the Red Hill case?

23 A. I do not believe so, no.

24 Q. Did you become aware that at  
25 Whites Point there was a 3.9 hectare quarry

00101

1 approval on this subject property?

2 A. In the spring of 2003; that's  
3 correct. Yes.

4 Q. And how did you become aware  
5 of that?

6 A. Through discussions with our  
7 regional office that I became aware that there was  
8 a proponent called Nova Stone Exporters that was  
9 proposing a 3.9 hectare quarry.

10 Q. Did you become aware that  
11 there had been blasting plans submitted by the  
12 proponent with respect to blasting on the 3.9  
13 hectare quarry?

14 A. Yes. I was, yes.

15 Q. And did you understand that  
16 the blasting plans were submitted pursuant to an  
17 approval that was granted to Nova Stone to blast on  
18 that quarry?

19 A. Through the Nova Scotia  
20 government, yes, that's correct.

21 Q. And did you become aware that  
22 there were two conditions in the Nova Stone  
23 approval, April 30th of 2002, which referred to  
24 blasting on the property and -- to the blasting  
25 guidelines and to marine mammals?

1                   A.    Yes.  I was also aware at the  
2 time that test blasting was proposed as part of the  
3 project description that was submitted by the  
4 proponent for the larger quarry project, as well.

5                   Q.    Did you ever hear the name  
6 "Dennis Wright" at or shortly after the time you  
7 became involved at CEAA with the Whites Point  
8 quarry project?

9                   A.    No.

10                  Q.    Did you know that Dennis  
11 Wright was the author of the federal, or co-author  
12 of the federal blasting guidelines?

13                  A.    No.

14                  Q.    Did you know that a blasting  
15 plan had been submitted to Mr. Wright for review  
16 with respect to the Whites Point 3.9 hectare  
17 quarry?

18                  A.    I was generally aware a  
19 blasting plan had been submitted.

20                  Q.    Did you know it had been  
21 reviewed by Mr. Wright, one of the DFO experts on  
22 blasting?

23                  A.    No, I was not aware of who  
24 was reviewing that.

25                  Q.    Did you know that Mr. Wright

00103

1 had come back and said, the plan, the blasting plan  
2 seemed to comply with the guidelines and that he  
3 suggested mitigation measures?

4 A. I was aware that some advice  
5 had been provided by Fisheries and Oceans.

6 Q. Did you know that Mr. -- had  
7 you heard the name Mr. Conway?

8 A. No.

9 Q. Did you know that a marine  
10 mammal coordinator in Atlantic Canada had reviewed  
11 a blasting plan submitted by the proponent and that  
12 he had no concerns with respect to marine mammals  
13 and, in particular, with respect to the blasting  
14 plan?

15 A. At that time, no.

16 Q. When did you become aware of  
17 that?

18 A. Through reviewing documents  
19 as part of this case.

20 Q. And so I take it much, much  
21 later in most likely 2011?

22 A. Yes, that's correct.

23 Q. Shortly before you swore your  
24 first affidavit?

25 A. Thereabouts, yes.

1                   Q.    Were you aware in the spring  
2 of 2003 that DFO had been receiving requests for  
3 briefings on almost a weekly basis from the  
4 Minister's office, Minister of Fisheries office?

5                   A.    I can't say for sure in terms  
6 of the frequency, but I was aware of the request  
7 for briefings that were coming in not only from the  
8 Minister of Environment's office, but also from the  
9 Minister of Fisheries and Oceans, as well.

10                  Q.    Could you turn, please, to  
11 paragraph 23 of your affidavit, and it will be in  
12 the binder that you have your hand on right there,  
13 tab 8.  You say in the second paragraph:

14                                "On February 17th, DFO  
15                                advised us that if it  
16                                required an EA of the  
17                                project, it intended to  
18                                request that the Environment  
19                                Minister refer the EA of  
20                                GQP's project to a review  
21                                panel."

22                                Do you see that?

23                   A.    Yes, I do.

24                  Q.    Did it remain your working  
25 assumption through the period of March, April, May,

1 June, July and August of 2003 that a federal  
2 involvement in the project would require, would be  
3 required by the operation of a trigger?

4 A. Sorry, can you restate the  
5 question?

6 Q. Yes. Did it remain your  
7 working assumption through the period of spring of  
8 2003, those months I mentioned, that in order for  
9 an environmental assessment, a federal  
10 environmental assessment of the project or a  
11 component of the project to be conducted, it had --  
12 it was required if there was a trigger for the  
13 project?

14 A. Absolutely. That was the  
15 mechanics of how the Act operated at the time.

16 Q. And the mechanics of the Act  
17 was that a proponent who wanted to do something  
18 either with respect to the water, the ocean or with  
19 respect to the quarry, had to apply for an  
20 authorization, if the activity would engage some  
21 federal concern; correct

22 A. There were certainly the  
23 views that were required by potential federal  
24 regulators or decision-makers that the project as  
25 proposed would require power, duty or function to

1 be exercised in relation to the project.

2 Q. And what triggered the  
3 operation of a section of a federal act was that  
4 application for an authorization to do the  
5 activity; correct?

6 A. The view early on upon  
7 reviewing the draft project description, based on  
8 the description of the project, in particular the  
9 marine terminal, there was certainly discussions at  
10 the time that, based on the proposal, the marine  
11 terminal would require federal decisions.

12 Q. Right. And so that's  
13 consistent with the proposition that I am putting  
14 to you that in order for a federal provision to be  
15 triggered, it required an application to be made;  
16 correct?

17 A. I wouldn't agree with that.  
18 We've had situations where, based on the proposal,  
19 we've come to the conclusion that power, duty or  
20 function is likely to be exercised in relation to  
21 the project.

22 So it doesn't necessarily require  
23 the actual application for a federal authorization.

24 Q. If you go to tab 3, please,  
25 of that binder in front of you.

1 A. Sorry, what tab? Three?

2 Q. Tab 3. This is a letter  
3 from, it is Exhibit R-151. A letter from  
4 Mr. Buxton to Mr. McDonald, your colleague in  
5 Halifax?

6 A. Yes.

7 Q. And it is dated April 20th,  
8 2003. Do you see that?

9 A. I do.

10 Q. Do you recall receiving a  
11 copy of this letter back in April of 2003?

12 A. I can't say for certain when  
13 I recall seeing this letter. I can't say for  
14 certain when I received a copy of it.

15 Q. You did receive a copy at  
16 some point?

17 A. I did.

18 Q. If you go down to the last  
19 paragraph there:

20 "We have had and no doubt  
21 will continue to have  
22 problems with site security."

23 Do you see that? Last paragraph  
24 on page 1?

25 A. Yes.

1 Q. "We have had and no doubt  
2 will continue to have  
3 problems with site security.  
4 Three of our bore holes were  
5 vandalized making it  
6 impossible to carry out  
7 hydrogeological work in these  
8 holes until we get a drill  
9 rig in to reopen them. A  
10 tree was felled across Whites  
11 Cove Road while the CIC was  
12 on site last year, and  
13 yesterday all of our hay  
14 bales were deliberately set  
15 on fire.  
16 "The Minister of Agriculture  
17 and Fisheries constituency  
18 assistant who lives in Mink  
19 Cove has had to replace six  
20 slashed tires, cannot get  
21 mail delivered due to  
22 continuous vandalism of her  
23 mailbox. We have equipment  
24 on site which has to be  
25 driven off site every evening

00109

1 at this time. A new gated  
2 road is essential to our  
3 operations.

4 "While we are gaining  
5 sufficient rock for the  
6 environmental controls, it is  
7 our intent to monitor early  
8 blasts to ensure compliance  
9 with the Terms and Conditions  
10 set out in the Approval, and  
11 also the parameters set out  
12 in the DFO's guidelines. The  
13 information gathered from the  
14 monitoring is seen by Global  
15 Quarry Products as a  
16 significant part of its CSR."

17 Is that the comprehensive study  
18 review? Is that what CSR means?

19 A. Yes. My assumption is yes,  
20 that is the terminology.

21 Q.

22 "...i.e., a clear  
23 demonstration that blasting  
24 can be carried out without  
25 creating problems. When

00110

1 permits are issued for the  
2 larger quarry and the marine  
3 terminal, the 3.9 hectare  
4 site will simply be enlarged  
5 to the northeast in order to  
6 provide sufficient rock for  
7 shipment over an extended  
8 period of time.  
9 "Under Section 10, blasting  
10 of the approval, subsection  
11 (i) refers to a report to be  
12 submitted to DFO verifying  
13 that the intended charge size  
14 and blasting design will not  
15 have an adverse effect on  
16 marine mammals in the area.  
17 An initial blasting plan was  
18 submitted for the 3.9 hectare  
19 quarry on September 17th,  
20 2002, i.e., seven months ago.  
21 It is difficult to understand  
22 how we have arrived at this  
23 date without a resolution,  
24 and it is even more difficult  
25 to understand how a plan was

00111

1                   apparently approved within  
2                   days at Tiverton with very  
3                   similar separation distances  
4                   from fish habitat and marine  
5                   work of sufficient scale to  
6                   create serious silt plumes in  
7                   the water.

8                   "As I have stated on many  
9                   occasions it is the position  
10                  of my principals to comply  
11                  with the spirit --"

12                                 MR. LITTLE: Excuse me, is there a  
13                   question, Mr. Nash? You have covered about three  
14                   or four subject matters, so perhaps you could ask a  
15                   question about the subject matter that you are  
16                   visiting this letter. It seems you are just  
17                   reading it into the record.

18                                 MR. NASH: I will ask the question  
19                   when I am finished reading this last paragraph.

20                                 Q.

21                                 "As I have stated on many  
22                   occasions, it is the position  
23                   of my principals to comply  
24                   with the spirit as well as  
25                   the specifications set out in

00112

1 the various guidelines and  
2 regulations.  
3 "It is further our position  
4 that from the inception we  
5 have in fact demonstrated  
6 this policy. We have faced  
7 continuous distortion of  
8 facts, deliberate mischief  
9 and vandalism from our  
10 opponents in this venture and  
11 I personally believe that  
12 this project should be  
13 rebalanced as succinctly  
14 stated by the Minister of  
15 Fisheries and Oceans in a  
16 recent local newspaper  
17 interview."

18 My question is, do you have a  
19 recollection of becoming aware of the circumstances  
20 described by Mr. Buxton?

21 A. All of the circumstances that  
22 you read into the letter?

23 Q. Yes.

24 A. Yes, generally I can say,  
25 yes, I do, yes.



00114

1 the scope of the project  
2 being assessed if they  
3 determined that they had no  
4 regulatory triggers with  
5 respect to its construction  
6 or operation. Again, these  
7 discussions were still  
8 hypothetical because DFO  
9 officials had not completed  
10 the necessary scientific work  
11 to determine whether the  
12 proposed quarry activity  
13 engaged a Fisheries Act  
14 trigger that would require an  
15 EA."

16 And that was your understanding at  
17 that point in time; correct?

18 A. That's correct.

19 Q. And did you become aware,  
20 subsequently, of any further scientific work or  
21 study that federal DFO did with respect to the  
22 site?

23 A. I was aware that officials  
24 from Fisheries and Oceans had visited the site to  
25 ascertain whether or not on the quarry site itself

00115

1 fish and fish habitat would be, would be an issue,  
2 a consideration that would require federal  
3 decision-making.

4 Q. Did you see any scientific  
5 evidence of there being fish or fish habitat issues  
6 on the site itself, on the quarry, that would  
7 engage federal concerns and, in particular, under  
8 section 35, the HADD section?

9 A. I was aware of concerns that  
10 Fisheries and Oceans had with respect to the  
11 proposed blasting and how that could impact upon  
12 fish and fish habitat.

13 Q. On the site?

14 A. On the site.

15 Q. Did you see any evidence of  
16 what you're describing their concern being?

17 A. It was simply through  
18 discussions with DFO that I was informed what their  
19 activities were and their concerns. I did not  
20 review any scientific documentation.

21 Q. You didn't receive any  
22 scientific documentation supporting the proposition  
23 that federal officials had evidence that there was  
24 a fish or fish habitat concern on the site; is that  
25 correct?

00116

1                   A.    No.  And it wouldn't be  
2  typical.  The agency would receive that  
3  documentation.  We're reliant on Fisheries and  
4  Oceans for providing us advice with respect to that  
5  subject matter.

6                   Q.    When did you receive the  
7  information that Fisheries and Oceans officials had  
8  established that they had a concern, an  
9  evidence-based concern about fish habitat or fish  
10 on the site itself?

11                  A.    When you say on the site  
12 itself, recognizing the quarry is directly adjacent  
13 to the marine environment and so the concerns that  
14 were being expressed by Fisheries and Oceans were  
15 with respect to blasting taking place on the quarry  
16 property affecting fish and fish habitat in the  
17 marine environment.

18                  Q.    Oh; so I misunderstood your  
19 evidence.  I thought you had said that the concerns  
20 were about fish and fish habitat on land.

21                  A.    No --

22                  Q.    Did you ever --

23                  A.    -- there were activities on  
24 land affecting fish and fish habitat in the marine  
25 environment.

1                   Q.    In the marine environment.  
2    So you never saw, just to be precise, any evidence  
3    or did you hear any expression of concern by DFO  
4    officials, about the possibility of disruption of  
5    fish or fish habitat on the site itself as a result  
6    of blasting?

7                   A.    I was aware that DFO had made  
8    some investigations to, there was I believe a small  
9    stream on site of the quarry, and also DFO was  
10   looking at whether or not, because of potential  
11   quarrying activities whether or not draw-down on  
12   groundwater can affect service water bodies in the  
13   area.

14                  Q.    So my question remains, did  
15   you see any evidence of any, any scientific  
16   evidence supporting the concern that DFO had  
17   expressed about fish and fish habitat on the site?

18                  A.    No.

19                  Q.    And when I -- and perhaps my  
20   question was unclear.

21                         Did they continuously express  
22   concerns about there being a possibility of  
23   disturbance of fish or fish habitat on the site as  
24   a result of blasting on land?

25                  A.    The concern around blasting

00118

1 would have been going on for some time. And so --

2 Q. Speaking specifically about  
3 land, now.

4 A. No.

5 Q. Not about --

6 A. No.

7 Q. That's correct?

8 A. That's correct.

9 Q. There was no evidence  
10 presented to you?

11 A. I was not aware of any, no.

12 Q. Okay. In paragraph 20, you  
13 say that:

14 "Ultimately, this debate  
15 became a moot issue. First,  
16 DFO determined that the  
17 quarrying activity engaged an  
18 EA trigger for DFO."

19 You cite in support of that  
20 footnote 31 a letter from Mr. Zamora to Mr. Buxton  
21 dated May 29th of 2003. If you go to tab 5 of the  
22 binder in front of you, you will see Exhibit C-129,  
23 which is a letter from Mr. Zamora to Mr. Buxton.  
24 Do you see that?

25 A. Yes.

00119

1 Q. This is the letter that you  
2 say established that DFO had determined that  
3 quarrying activity engaged an EA trigger for DFO;  
4 is that correct?

5 A. Yes.

6 Q. And if you go to the first  
7 paragraph, the last sentence:

8 "DFO has concluded the  
9 proposed work is likely to  
10 cause destruction of fish,  
11 contrary to section 32 of the  
12 Fisheries Act, which states:  
13 'No person shall destroy fish  
14 by any means other than  
15 fishing except as authorized  
16 by the Minister.'"

17 Do you see that?

18 A. I do.

19 Q. Is that what you are  
20 referring to when you say that DFO had established  
21 that they had a trigger for the quarry?

22 A. That's correct, yes.

23 Q. And did you receive a copy of  
24 this letter? I see that it is copied to  
25 Mr. McDonald, your colleague in Halifax.

00120

1                   A.    I recall seeing a copy of  
2 this letter, so it would have come to me after it  
3 was sent.

4                   Q.    Would you have reviewed it  
5 carefully?

6                   A.    I would have --

7                   Q.    Take your time to look at it  
8 if you wish.

9                   A.    Yes.  This would be the type  
10 of letter I would have read, yes.

11                  Q.    I gather you wouldn't have  
12 any input into the authorship of this letter;  
13 correct?

14                  A.    That's correct.

15                  Q.    If you go to page 1 of the  
16 addendum, which is the third page in on the  
17 exhibit, 001101 at the bottom.  You see in the  
18 second-to-last paragraph on page 1:

19                               "Habitat Management Division  
20                               (HMD) have calculated that a  
21                               horizontal setback distance  
22                               from the shoreline of 500  
23                               metres would be required to  
24                               protect iBoF Atlantic Salmon  
25                               of the size that could be

00121

1 found at Whites Point from  
2 May to October."

3 Do you see that?

4 A. I do.

5 Q. And do you remember that  
6 being a concern that there being a 500 metre  
7 setback? That if blasting occurred within that 500  
8 metre setback, there could be an adverse impact on  
9 fish and marine mammals in the water?

10 A. The letter speaks for itself.

11 Q. So you were aware of that at  
12 that time?

13 A. Yes.

14 Q. And would that have been  
15 significant to you?

16 A. No.

17 Q. Why?

18 A. It is simply the type of  
19 letter that we would have received from an expert  
20 department, indicating from their standpoint what  
21 needed to be done with respect to blasting.

22 Q. And so if there was a change  
23 in the 500 metre setback, it would be very  
24 important to know about that change so as to  
25 conduct the proper analysis as to whether blasting

1 on the site would have an impact on marine mammals  
2 and fish; correct?

3 A. There was a number of issues  
4 going on at the time that concerned us with respect  
5 to the blasting. In the project description that  
6 we received from the proponent --

7 Q. Excuse me, Mr. Chapman, my  
8 question is very specific. If there was a change  
9 in that setback, would it be significant to you  
10 with respect to the potential for adverse  
11 environmental effects on fish and marine mammals in  
12 the water?

13 A. Any elements of the project  
14 that would require further analysis would have been  
15 of importance to the agency.

16 Q. And it would have been  
17 important for the agency and for, in particular,  
18 Minister Thibault and even more in particular,  
19 Minister Anderson to have the accurate information  
20 so that they could make a determination as to  
21 whether this should be referred to a JRP based on  
22 accurate information. That's correct?

23 A. Yes. But the -- for the  
24 record I can state that the issue with respect to  
25 blasting was one of the environmental issues

1 associated with the project. And not the central  
2 issue.

3 Q. It was a very important  
4 issue, was it not, because as you've said in your  
5 affidavit, the matter of discussion about whether  
6 or not the federal government had a trigger, you  
7 said it was concluded, ultimately concluded by this  
8 letter and --

9 A. No. To be clear, though --

10 Q. Just let me --

11 A. -- trigger for the marine  
12 terminal.

13 Q. --I haven't finished my  
14 question, and you have said --

15 MR. SPELLISCY: I think, on that  
16 note, I would like to note that Mr. Nash has  
17 interrupted Mr. Chapman, as well, so perhaps both  
18 could let them finish answers and finish questions.

19 MR. NASH: In the efficiency of  
20 time, we can make it easy if you answer  
21 specifically the questions I've got. You've said  
22 in the first page of May 29:

23 "DFO has concluded the  
24 proposed work is likely to  
25 cause destruction of fish



1 determine if approvals are  
2 required under the Fisheries  
3 Act sections 35 and section  
4 32, either of which would  
5 necessitate an environmental  
6 assessment under CEAA."

7 Would you have seen a copy of this  
8 letter at the time?

9 A. Shortly after it was sent,  
10 yes.

11 Q. And do you recall comparing  
12 what was said in that letter to what was said in  
13 the previous letter of May 29th, 2009 (sic) to  
14 Mr. Buxton.

15 A. I can't recall if I compared  
16 the two letters.

17 Q. Did you receive any evidence  
18 of scientific work by the way of field work or  
19 discussions of the overall 155 hectare quarry  
20 during the month of June conducted by DFO?

21 A. I can't recall.

22 Q. Do you recall any discussions  
23 about an I-Blast model with respect to the  
24 calculations of setback distances?

25 A. It was only through reviewing

1 documentation for the matter before us that I  
2 became aware of that.

3 Q. So you're saying that you did  
4 not know, prior to June 26th, 2003, that there was  
5 a miscalculation made as a result of the use of the  
6 I-Blast model?

7 A. I was aware that DFO was  
8 looking at revising the setback distances.

9 Q. And when did you become aware  
10 of that? Before June 26th, 2003?

11 A. I can't recall.

12 Q. Well, the reason I'm asking  
13 you about that date in particular is, in respect to  
14 a document at tab 30 of the binder, and I'm sorry,  
15 I don't have an exhibit number on my copy. I will  
16 get one over the lunch break.

17 It is a letter from Minister  
18 Thibault to Minister Anderson dated June 26th. And  
19 this is the letter, of course, making the referral  
20 from the Minister of Fisheries to the Minister of  
21 Environment for the Minister of Environment's  
22 referral to a JRP. Do you recall all of that?

23 A. Yes.

24 Q. Do you have any recollection  
25 of whether you were aware -- before this letter,

1 the date of this letter -- as to, and seeing this  
2 letter now does that help refresh your memory as to  
3 whether or not you were aware of the miscalculation  
4 with respect to the setback?

5 A. You know, I simply can't  
6 recall in terms of when I became aware that DFO was  
7 looking at revising the setback distances.

8 Q. Okay. You were in ongoing  
9 discussions with DFO officials during the month of  
10 June, and I would say that those officials were  
11 Mr. Zamora and Mr. Boudreau.

12 A. Mr. Hood and Mr. Zamora, in  
13 particular, yes.

14 Q. And neither Mr. Hood nor  
15 Mr. Zamora, to your recollection, told you about  
16 the miscalculation about the setback at any time  
17 before June 26th, 2003?

18 A. I don't recall, no.

19 Q. Do you recall that there was  
20 a period between the time of June 26th, 2003 and  
21 the time of August 7th, 2003 -- which was the  
22 interregnum between the request by Minister  
23 Thibault and decision by Minister Anderson? Do you  
24 recall that?

25 A. Yes, I recall that period of

1 time.

2 Q. Do you recall if Mr. Zamora  
3 or Mr. Boudreau or Mr. Hood informed you -- during  
4 that period June 26th, 2003 to August 7th, 2003 --  
5 of the mistaken in using the I-Blast model and the  
6 necessity to recalculate the setback distance from  
7 500 metres to 100 metres?

8 A. No, I simply can't recall  
9 when I became aware of that.

10 Q. That would have been  
11 important to you, isn't that correct, because you  
12 were the person that was making the recommendation  
13 or at least was drafting the recommendation to the  
14 Minister of Environment to refer this matter to a  
15 JRP?

16 A. Let's be clear. The referral  
17 mechanism that the Minister of Fisheries and Oceans  
18 used was under the former Act section 21(b) which  
19 simply stated that when a project is described on  
20 the Comprehensive Study List, the responsible  
21 authority may refer the project for a referral to a  
22 review panel.

23 So it wasn't a recommendation.  
24 There was no discretion on the part of the Minister  
25 of Environment to act with respect to that sort of

1 referral.

2 Q. Do you recall having an  
3 understanding at that time, in that period of 2003,  
4 the usual and normal practice with respect to the  
5 referrals under section 1, 21(b) of the act?

6 A. Yes, I do.

7 Q. It was either based on  
8 significant adverse environmental effects, which  
9 could not be mitigated on the one hand, or a matter  
10 of public concern on the other hand; correct?

11 A. No. That's not correct.  
12 21(b) of the former act didn't make reference to  
13 the issue of significant adverse environment  
14 effects or public concerns.

15 21(b) simply states at the time,  
16 in 2003, that where a project is described on the  
17 Comprehensive Study List, the responsible authority  
18 may refer the project for referral to a review  
19 panel.

20 Q. That is what the legislation  
21 says. But were you aware of a practice in that  
22 regard?

23 A. I was aware of referrals that  
24 were taking place and that the referral mechanism  
25 under 21(b) is simply done with respect to the way

1 the legislation was drafted at the time.

2 Q. We will come back to that.

3 In any event, one of the issues  
4 that was penetrating the discussion at that time  
5 was the concern that the province wanted the  
6 federal government to scope-in the quarry to its  
7 environmental assessment. Do you recall that?

8 A. I recall we had discussions  
9 with the Province of Nova Scotia, yes.

10 Q. The Province of Nova Scotia  
11 was advising you, through Mr. Daly, if I've got  
12 this right, that the province wanted the federal  
13 government to scope-in the quarry into its  
14 environmental assessment; correct?

15 A. The province had expressed  
16 concerns that harmonization would be more difficult  
17 if the federal government and the provincial  
18 government were not looking at the same issues.

19 Q. And that concern, was that --  
20 if there was no trigger for -- no federal trigger  
21 for the quarry, then it might not be that they had  
22 an intersecting jurisdiction, in other words a  
23 requirement to conduct an environmental assessment  
24 over the same property; correct?

25 A. That's not correct. To be

1 clear, that the advice the agency offered to  
2 Fisheries and Oceans at the time was that a case  
3 could be made that, because of the interdependency  
4 and linkage between the quarry and marine terminal,  
5 they could be scoped as one project irrespective of  
6 whether or not there was a trigger identified on  
7 the quarry site.

8 Q. That may have been your  
9 advice, but I am talking about the provincial  
10 concern that was expressed.

11 A. Yes.

12 Q. The provincial concern was  
13 expressed that if the federal government didn't  
14 exercise a trigger, didn't have a trigger over the  
15 quarry, then there could be concerns under the Nova  
16 Scotia legislation that they could not harmonize  
17 with the federal government because there was not  
18 an intersecting jurisdiction. Isn't that right?

19 A. Nova Scotia didn't get into  
20 the details around whether or not there would or  
21 wouldn't be a trigger; they were simply concerned  
22 about whether or not the federal environmental  
23 assessment would be looking at the same project  
24 that the provincial environmental assessment would.

25 Q. And all aspects of the same

1 project; correct?

2 A. Yes.

3 Q. So that was the concern they  
4 were expressing; and by your recollection, were  
5 they expressing that fairly vociferously?

6 A. I mean, anytime we're looking  
7 at having a disharmonized environmental assessment  
8 process, the other jurisdiction would express  
9 concerns, and I relayed those concerns to Fisheries  
10 and Oceans.

11 Q. And the manner in which you  
12 relayed them were to Mr. Hood in particular.

13 Do you recall the discussion of  
14 the province being cranked about the federal  
15 government not exercising its jurisdiction?

16 A. Yes, I do.

17 Q. Over the quarry?

18 A. Yes.

19 Q. Do you recall that it was  
20 stated that the Nova Scotia government was  
21 concerned about it being a hot file? Do you  
22 remember that?

23 A. Absolutely, yes.

24 Q. And did you see -- have he  
25 reviewed Mr. Hood's journal?

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1 A. I have.

2 Q. Have you seen those phrases  
3 used in that journal?

4 A. I have.

5 Q. And they accurately reflect  
6 either your communication to Mr. Hood and/or other  
7 discussions around the file at that time?

8 A. Mr. Hood's journal will speak  
9 for itself.

10 Q. And it accurately reflects  
11 the discussions you had with Mr. Hood?

12 A. It reflects the fact that I  
13 called Mr. Hood to let him know that the province  
14 had concerns around harmonization.

15 Q. In the terms that we have  
16 just discussed it was a hot file and the province  
17 was cranked; correct?

18 A. Generally, yes.

19 Q. Yes. Could you go, please,  
20 to tab 7. And that is Exhibit C-113. Again, you  
21 will see that this letter -- which is from  
22 Mr. Zamora to Mr. Buxton -- is copied to  
23 Mr. McDonald, your colleague in Halifax.

24 A. Yes.

25 Q. Just in terms of information

1 flow. Was Mr. McDonald in Halifax keeping you  
2 routinely aware of documents and correspondence he  
3 was receiving and communications he was having on  
4 this file at this time?

5 A. We were having high-level  
6 briefings with the regional office. And so I was  
7 managing a number of files at the time.

8 So whether or not I would  
9 characterize it as routine detail briefings I am  
10 not sure. I was being briefed at the time with  
11 respect to this project.

12 Q. Do you recall seeing this  
13 letter at the time? Take a moment to read it, if  
14 you wish.

15 A. Yes, I recall seeing this  
16 letter at the time, yes.

17 Q. So you recall that the  
18 proponent was asking for the calculations for the  
19 I-Blast model, had requested them by letter dated  
20 June 6th, 2003. And that, in fact, if you look at  
21 the second page, it states:

22 "You have also asked about  
23 the calculations carried out  
24 by HMD which led to the 500  
25 metre horizontal distance

1 from the shoreline to the  
2 blast location being  
3 determined as required to  
4 protect inner Bay of Fundy  
5 Atlantic Salmon.

6 "The calculations were  
7 performed using a computer  
8 simulation model supplied by  
9 the developer of the DFO  
10 guidelines for the use of  
11 explosives in or near  
12 Canadian fisheries waters,  
13 1998. The results of these  
14 calculations are available  
15 for your examination."

16 Do you remember that dialogue  
17 going on between Mr. Zamora and Mr. Buxton?

18 A. I mean, the letter speaks for  
19 itself.

20 Q. Do you recall being aware of  
21 that at the time?

22 A. Yes.

23 Q. And at this time, you can  
24 think of no reason, I would suggest, that such  
25 calculations should have been withheld from the

1 proponent for any proper purpose?

2 A. We were concerned first and  
3 foremost about, first determining what the purpose  
4 of the test blasting was. In the project  
5 description that we received from the proponent for  
6 the large quarry project, they indicated that the  
7 purpose of test blasting was to generate data for  
8 the environmental assessment of the project.

9 Secondly, we had some concerns  
10 about the relationship between the 3.9 hectare  
11 quarry being proposed by Nova Stone Exporters and  
12 the relationship between that small quarry and the  
13 larger quarry project.

14 Q. So is the answer to my  
15 question -- I will repeat the question.

16 Were you aware of any proper  
17 reason for withholding the calculations and the  
18 data from the proponent at this stage?

19 A. We wanted to --

20 Q. By DFO?

21 A. We wanted to find out more  
22 from the proponent in terms the intended purpose of  
23 the test blastings.

24 Q. Who was "we"?

25 A. Both Fisheries and Oceans and

1 the agency.

2 Q. Did you have discussions with  
3 Fisheries and Oceans about the idea of either  
4 providing or not providing this important data to  
5 the proponent at this time?

6 A. Yes.

7 Q. And did you make a decision  
8 with DFO or did DFO make a decision with your  
9 concurrence that the information should not be  
10 passed on to the proponent at this time?

11 A. The agency had discussions  
12 with Fisheries and Oceans officials regarding the  
13 proper timing. Our view was that if the purpose of  
14 the test blasting was to generate data for the  
15 environmental assessment, there was no harm to the  
16 proponent to wait until a review panel was  
17 established.

18 Q. Who made the decision not to  
19 pass on this data, this important data regarding  
20 setbacks and whether there was in fact a federal  
21 trigger on that land? Who made the decision not to  
22 pass this information on to the proponent?

23 A. This information was passed  
24 along once the Joint Review Panel was established.

25 Q. I'm asking you this question.

1 In June, prior to June 26th of 2003, who made the  
2 decision not to pass on this important information  
3 to the proponent?

4 MR. HEBERT: Objection. I don't  
5 think the letter that you are presenting to the  
6 witness establishes that a decision had been made  
7 to withheld hold the information. I think quite  
8 the contrary; if you look at the letter, the letter  
9 says the information is available. So just to be  
10 clear on the timing here, Mr. Nash.

11 BY MR. NASH:

12 Q. In fact, it was stated in the  
13 letter that the information would be made available  
14 and the information was not made available, despite  
15 another request by Mr. Buxton by letter dated June  
16 16th.

17 And I ask the question again: Who  
18 made the decision not to pass on the information to  
19 the proponent prior to June 26th, 2003?

20 A. The responsibility for  
21 providing the proponent that information rested  
22 with Fisheries and Oceans.

23 Q. And so are you saying that  
24 Mr. Zamora made the decision not to pass that  
25 information on to the proponent?

1                   A.    I can't say who the  
2 individual was.  It simply was a departmental  
3 decision.

4                   Q.    Somebody at DFO decided that  
5 this important information, that they had used the  
6 wrong calculation in order to establish a section  
7 32 trigger for the property, a key question in this  
8 whole matter, somebody made that decision not to  
9 pass that information on to the proponent?  Have I  
10 got that right?

11                   MR. LITTLE:  Mr. Nash can you  
12 explain the time period to which you're referring?

13                   MR. NASH:  I'm referring to the  
14 letter of May 29th, which we already covered, which  
15 is a section 32 authorization.  For ease of  
16 reference it is tab number five, Exhibit C-129  
17 which we already covered.

18                   MR. LITTLE:  Can you explain the  
19 time period you're referring to, with respect to  
20 the wrong calculation in order to establish a  
21 section 32 trigger?

22                   MR. NASH:  The identity by  
23 Mr. Zamora as of June 11th in this letter to  
24 Mr. Buxton, Exhibit C-113 at tab 7, that the  
25 calculations are available.

1                   MR. LITTLE: Is that your -- that  
2 is, the point you're making is that the information  
3 was known to be wrong at that point in time?

4                   MR. NASH: Yes.

5                   MR. LITTLE: Okay.

6                   BY MR. NASH:

7                   Q. That was the discussion that  
8 you had, sir, with --

9                   A. No.

10                  Q. -- Mr. Zamora?

11                  A. No. To be clear I wasn't, at  
12 that point in time, I can say that I was not aware  
13 that there was an issue with respect to the 500  
14 metre setback.

15                  Q. You have just told us that  
16 there was a question about the 500 metre setback  
17 and there were discussions.

18                  A. Later on, but not at that  
19 particular point.

20                  Q. Are you certain of that?

21                  A. To the best of my knowledge.  
22 I don't believe I was aware at that point.

23                  Q. How did you become aware of  
24 that?

25                  A. It was later on, through

1 revised calculations by Fisheries and Oceans prior  
2 to the appointment of the Joint Review Panel that I  
3 became aware that the 500 metre setback had been  
4 revised back I believe to 100 metre setback.

5 Q. Were you in communications  
6 with Mr. McDonald at your Halifax office during the  
7 period between June 26th, 2003 and August 7th,  
8 2003?

9 A. I'm sure I was, yes.

10 Q. About the Whites Point  
11 project?

12 A. Yes.

13 Q. You would have been regularly  
14 in contact, I would suggest to you, with him at  
15 that time.

16 A. Yes. At that point the  
17 responsibility -- because of the pending decision  
18 by the Minister of the Environment to refer the  
19 project to a review panel, responsibility had  
20 switched for managing the file up to headquarters  
21 and so the, there was a transition that was taking  
22 place between our regional office and our Ottawa  
23 office.

24 Q. And all that had happened  
25 between June 26th, in terms of the legal status of

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1 the referral to the JRP, between June 26th, 2003  
2 and August 7th, 2003, all that had happened at that  
3 point was a letter from one Minister to another;  
4 correct?

5 A. Right. And a subsequent  
6 briefing by the agency to the Minister of the  
7 Environment.

8 Q. Right. And that briefing was  
9 provided by you?

10 A. The briefing was signed off  
11 by the president of the Canadian Environmental  
12 Assessment Agency.

13 Q. And it was signed off on the  
14 basis of information you provided to the president  
15 of CEAA; correct?

16 A. Yes.

17 Q. At that point you were the  
18 point person on the file; correct?

19 A. Yes.

20 Q. If you go to tab 8 which is  
21 part of Exhibit C-612, you will see that there is a  
22 journal entry from Mr. McDonald's journal.

23 Do you recall reviewing this  
24 before today?

25 A. I recall reviewing this, yes.

1 Q. Do you recall that this is a  
2 journal of Mr. McDonald?

3 A. Yes.

4 Q. Produced in this process;  
5 correct?

6 A. Yes.

7 Q. If you go to -- you will see  
8 Sunday, June 8th, '03?

9 A. What page is that? Sorry.

10 Q. Page 801522.

11 A. Yes.

12 Q. It says, about halfway to the  
13 bottom of the page from that point -- sorry, it's  
14 Monday, June 9th, '03.

15 "Phil Zamora phone call. DFO  
16 has received letter from  
17 Buxton asking for details of  
18 blasting calculations -  
19 Buxton wants a meeting with  
20 DFO, NSDEL (Petrie) and  
21 CEAA."

22 Do you see that?

23 A. Yes.

24 Q. And there is another entry:

25 "Returned call to Lisa

1 Mitchell, she is a lawyer  
2 representing citizens on  
3 Digby Neck.

4 "Lisa Mitchell calls, advised  
5 her to call Phil Z and that  
6 he is looking into the  
7 situation with Jim Ross's  
8 phone and email. She is  
9 representing the project's  
10 opponents and wants to ensure  
11 they know their rights and  
12 opportunities for  
13 participation. She is very  
14 well versed in CEAA and  
15 provincial EA. She asked  
16 questions about scope and  
17 joint review."

18 Now, you were familiar with  
19 Ms. Mitchell from previous experience at the  
20 Ministry of Environment; correct?

21 A. When I worked for Environment  
22 Canada, Lisa Mitchell had done some contract work  
23 for which I was involved with, yes.

24 Q. At this point you understood  
25 that she was a lawyer representing the opponents of

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1 the project; correct?

2 A. Yes.

3 Q. And if you go to the next  
4 page, page 801523. Wednesday, June 11th,  
5 Mr. McDonald has an entry:

6 "Review Phil's draft letter  
7 to Buxton re: Blasting plan  
8 meeting and model  
9 calculations."

10 Do you see that?

11 A. Yes.

12 Q. And then below, Thursday,  
13 June 12th:

14 "Phil Zamora calls re:  
15 Latest letter to Buxton. He  
16 is on the road until June  
17 20th."

18 I gather you were being kept in  
19 the loop at this point by Mr. McDonald as to what  
20 was going on in the grounds in Nova Scotia;  
21 correct?

22 A. Not at that level of detail.

23 Q. Okay. Could we go to,  
24 please, tab 9. And would you read out  
25 Mr. McDonald's Exhibit C-404 --

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1 A. Yes.

2 Q. Read out Mr. McDonald's email  
3 to you on Tuesday, June 10th, 2003?

4 A. You would like me to read out  
5 that letter?

6 Q. I would like you to do that,  
7 please, yes?

8 A.

9 "More thinking about this.  
10 Although not proceeding with  
11 the 3.9 hectare operation is  
12 arguably the high road, there  
13 is no clear legal impediment  
14 to its operation. A cynical  
15 view might be that DFO wants  
16 to avoid making a decision on  
17 the blasting plan and the  
18 Agency is a convenient  
19 scapegoat.

20 "The proponent is clearly  
21 frustrated and with good  
22 reason, I think. Things are  
23 dragging. I find it  
24 frustrating myself and it's  
25 not even my money. They are

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1 seeking legal advice, and in  
2 my view, there is a chance  
3 the proponent will soon seek  
4 legal recourse (against DFO,  
5 the province and/or CEAA I'm  
6 not sure who) to assert its  
7 right to proceed. Paul  
8 Buxton mentioned to me that  
9 they want to bid on some road  
10 upgrading work in the area  
11 (worth 60 K) but I cannot  
12 under the present  
13 circumstances. Clearly, we  
14 want to avoid legal action.  
15 "Notwithstanding CEAA's views  
16 on project splitting and the  
17 fact that this could be  
18 perceived as project  
19 splitting, this one appears  
20 to have gotten by us all, and  
21 it may be too late to make a  
22 compelling argument against  
23 the 3.9 hectare operation.  
24 Maybe CEAA should bite the  
25 bullet, recognize the

1 province's jurisdictions and  
2 chalk it up to a lesson  
3 learned. FYI the province is  
4 already on record (April 23  
5 letter from Mark McLean to  
6 Paul Buxton) with the  
7 position that 'GCP is not to  
8 commence work on any aspects  
9 of the proposed expansion of  
10 the Whites Point Quarry until  
11 all approval, if warranted,  
12 are issued by the regulatory  
13 departments and/or agencies'.  
14 I'm not sure if this would  
15 apply to an access road."

16 Q. You would have received that  
17 on that date as Mr. McDonald's sincere views of  
18 what was appropriate in the circumstance?

19 A. Mr. McDonald was a fairly new  
20 employee to the agency. You can see in my response  
21 to Mr. McDonald that, based on the wording in his  
22 email, he had his own personal views and I asked  
23 him to call me.

24 Q. What you say is:  
25 "Derek, we should communicate

1                   via telephone for discussions  
2                   of this nature. Give me a  
3                   call"?

4                   A. Yes.

5                   Q. And what was the problem in  
6 having the sincere views of an official working for  
7 CEAA on the ground in Halifax expressing those  
8 views in writing and not leaving a paper trail?

9                   A. Sure. You can see there  
10 is -- it had nothing to do with a paper trail.  
11 Derek clearly was indicating that he had his own  
12 personal views, that there was the potential for  
13 legal action, and that I wanted to get a better  
14 understanding of what Derek's views were and simply  
15 that is why I asked him to give me a call.

16                   Q. You felt you could not get a  
17 better understanding of those views by having them  
18 in writing as opposed to a telephone call?

19                   A. It is normal course for me to  
20 ask an employee to give me a call if there is a  
21 serious issue they need to discuss.

22                   Q. If you would go to the next  
23 tab, which is tab 10, C-969. You will see that  
24 there is an email from you to Mr. McDonald. You  
25 say:

1 "Derek, as you can imagine  
2 the timing of panel referral  
3 announcements are a very  
4 touchy subject especially if  
5 we are looking at a joint  
6 announcement with the  
7 province. I would really  
8 prefer to discuss these  
9 issues over the phone."

10 Now, there is that, that follows a  
11 lengthy exchange of emails going around two or  
12 three pages.

13 A. Yes.

14 Q. Again, what was the problem  
15 in having these views expressed in writing and  
16 having a paper trail?

17 A. It was simply a number of  
18 factors going on at the time. We were trying to  
19 determine when a public release would take place of  
20 any potential decisions that had been made. Derek  
21 was not involved in some of the discussions that  
22 were taking place between agency headquarters and  
23 DFO headquarters on the issue, and simply I wanted  
24 to discuss the matter with him over the phone.

25 Q. And you just didn't want a

1 written record left for others to view subsequently  
2 which could be subject to scrutiny?

3 A. It had nothing to do with  
4 that. Simply, as you mentioned, this is a very  
5 long exchange of emails and it was much easier for  
6 me to discuss the issue over the phone with Derek.

7 Q. If you would go back to tab  
8 8, which is part of Mr. McDonald's journal, part of  
9 C-612 and go to page 801525. You will see an entry  
10 under Monday, June 23rd, '03, on page 801525.

11 A. Yes.

12 Q. You will see about, just  
13 above "redacted" it says:

14 "Check with S Chapman, still  
15 no letter, Steve advises that  
16 there may or may not be an  
17 announcement associated with  
18 the referral. Also that  
19 referral is secret until  
20 accepted by Minister -  
21 Minister can turn down  
22 referral."

23 Do you see that?

24 A. I do.

25 Q. So your understanding at the

1 time that the Minister of Fisheries could make a  
2 request for a referral to the Minister of  
3 Environment and that the Minister of Environment  
4 had to make a decision based on the evidence before  
5 him and could either accept a recommendation and  
6 make the referral, or decline to make the referral;  
7 correct?

8 A. No. I wouldn't characterize  
9 it that way. I already stated that under 21(b) of  
10 the former act there is no discretion provided to  
11 the Minister of that Environment, that once the  
12 responsible authority refers the project for  
13 referral, it is simply a course the Minister of the  
14 Environment needs to follow.

15 Q. So you're saying that a  
16 request, in this circumstance by Minister Thibault  
17 to Minister Anderson, a request for a referral  
18 or -- or a referral to referral?

19 A. Yes. It is not a request,  
20 yes.

21 Q. That Minister Anderson was  
22 bound, having received that referral --

23 A. Yes.

24 Q. -- to make the referral to a  
25 JRP?

1 A. Yes.

2 Q. So Minister Thibault, then,  
3 effectively decided to have the matter referred to  
4 a JRP? Is that what you're saying?

5 A. The wording of, under the  
6 former act under section 21(b) states that the  
7 responsible authority may refer the project for  
8 referral to a review panel.

9 Q. So what you're saying -- is  
10 what I'm saying correct, that Mr. Thibault made the  
11 decision, then, effectively to refer the matter to  
12 the JRP?

13 A. Yes.

14 Q. Minister Anderson's  
15 consideration of anything in making that referral  
16 to a JRP was irrelevant? Is that what you're  
17 telling me?

18 A. No. I wouldn't use that  
19 terminology. The Minister of the Environment, once  
20 a panel or a project has been referred to a review  
21 panel, has a number of decisions to make including  
22 the scope of project and scope of assessment and  
23 the appointment of the panel members.

24 Q. In terms of appointing a JRP,  
25 Minister Anderson's views or consideration of

1 evidence was irrelevant? Is that what you're  
2 telling me?

3 A. Do you mean appointing the  
4 individual panel members?

5 Q. In terms of referring the  
6 matter to a JRP.

7 A. Yes, yes.

8 Q. That process was the decision  
9 was made by Minister Anderson and what you're  
10 saying is that, in terms of making the decision to  
11 appoint a JRP, Minister Anderson had nothing to do  
12 with it. Did I say that -- did I misspeak?

13 A. With the briefing that we  
14 provided the Minister's office, there were no  
15 concerns expressed with respect to the decision.

16 Q. With respect to the briefing,  
17 whether or not there were concerns expressed,  
18 you're saying that Minister Anderson had no  
19 discretion to exercise in referring the matter to a  
20 JRP. Do I have that right?

21 A. As compared to other sections  
22 of the Act where you can actually make a request  
23 for a recommendation, the view of the agency at the  
24 time was there was no discretion provided to the  
25 Minister of the Environment under section 21(b).

1 Q. Leaving as compared to other  
2 sections of the act, what you're telling me now is  
3 that under section 21 of the act Minister Anderson  
4 had no discretion to exercise having received the  
5 referral from Minister Thibault with respect to  
6 referring the matter to the JRP; correct?

7 A. Yes, that's correct.

8 Q. Okay. Mr. President, I know  
9 it is a little early but I may be able to shorten  
10 my cross-examination if we were to have a break for  
11 lunch at this point. This would be an appropriate  
12 time from my standpoint, if it is an appropriate  
13 time from the Tribunal's standpoint.

14 PRESIDING ARBITRATOR: I think it  
15 is an appropriate time also for the Tribunal so we  
16 will break until 1:20.

17 MR. NASH: Thank you.

18 PRESIDING ARBITRATOR: Thank you.  
19 Mr. Chapman, you are supposed to, not to be in  
20 contact with either, you have a lonely lunch.

21 THE WITNESS: Yes, okay.

22 PRESIDING ARBITRATOR: So called a  
23 naked lunch, in the literary sense.

24 --- Laughter

25 --- Luncheon recess at 12:21 p.m.

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1 --- Upon resuming at 1:18 p.m.

2 PRESIDING ARBITRATOR:

3 Mr. Appleton, if you could fasten the seatbelts.

4 --- Laughter

5 MR. NASH: Is Professor Schwartz  
6 here?

7 PRESIDING ARBITRATOR: Oh, yes.  
8 The other pilot -- one of the co-pilots --

9 MR. APPLETON: He was worried  
10 about the time, so he's -- he will be indisposed  
11 for a few moments.

12 PRESIDING ARBITRATOR:

13 --- (Off record discussion)

14 PRESIDING ARBITRATOR: We are on  
15 record and we will continue with the  
16 cross-examination of Mr. Chapman, and, Mr. Nash,  
17 you have the floor again, please.

18 BY MR. NASH:

19 Q. Thank you, Mr. President.  
20 Have you read the opinions of Mr. Connelly and  
21 Mr. Smith in this proceeding?

22 A. Sorry, I do have a hearing  
23 problem.

24 Q. Sorry, I should speak up have  
25 you read the opinions of Mr. Connelly and Mr. Smith

1 in this proceeding?

2 A. I have glanced through them,  
3 yes.

4 Q. I would like to refer you  
5 first to Mr. Connelly's opinion at page 23, please.

6 PRESIDING ARBITRATOR: Of  
7 tab? Which tab is that?

8 MR. NASH: It is not in a tab. I  
9 am just -- I thought this was...

10 MR. BOROWICZ: Our technician is  
11 just...

12 MR. NASH:

13 Q. Our technician is just away  
14 for a moment, so I will come back to that.

15 I would just like to go back,  
16 then, to tab 8, part of Exhibit 612, Mr. McDonald's  
17 journal notes.

18 And the note, we've covered this,  
19 but in the context of the question we left off on,  
20 it says, about the middle of the page:

21 "Check with S. Chapman.  
22 Still no letter. Steve  
23 advises that there may or may  
24 not be an announcement  
25 associated with the referral.

1                   Also, that referral is secret  
2                   until accepted by Minister.  
3                   Minister can turn down  
4                   referral."

5                   I take the reference to "Minister"  
6                   twice in that bottom line of that entry to be the  
7                   Minister of Environment.

8                   PROFESSOR MCRAE: Can you tell us  
9                   which page you're referring to?

10                  MR. NASH: I'm sorry, did I not  
11                  say so. Page 801525. My apologies to Members of  
12                  the Tribunal.

13                  BY MR. NASH:

14                  Q. And just to repeat, we're at  
15                  about the middle of the page just below, and it is  
16                  an entry called -- entitled "Check with S.  
17                  Chapman":

18                                 "Still no letter. Steve  
19                                 advises that there may or may  
20                                 not be an announcement  
21                                 associated with the referral.  
22                                 Also that referral is secret  
23                                 until accepted by Minister.  
24                                 Minister can turn down  
25                                 referral."

1                   And the way I am reading that,  
2 Mr. Chapman, and you can confirm that you had this  
3 discussion with Mr. McDonald or not, is that the  
4 referral that is being referred to is the one  
5 accepted by the Minister, being Minister Anderson,  
6 and that Minister Anderson can turn down the  
7 referral.

8                   A.    As I mentioned previously,  
9 there is different sections of the Act that can be  
10 used to refer a project to a review panel. I will  
11 note there is no specific reference there to  
12 section 21(b). In a case section 25, where it is a  
13 recommendation to the Ministry of the Environment,  
14 the Minister can or does have discretion around  
15 whether or not he will proceed with a referral to  
16 review panel.

17                   As this particular document  
18 states, we still hadn't received a letter from,  
19 from the Minister of Fisheries and Oceans, so we  
20 didn't know which section of the Act the Minister  
21 of Fisheries and Oceans would be using for the  
22 referral.

23                   Q.    And as I understand the  
24 position that you advanced before the lunch break,  
25 it was that if it was under -- if the referral by

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1 Minister Thibault was made under section 21(b),  
2 then Minister Anderson had no decision to make. It  
3 was simply an automatic flowthrough; correct?

4 A. We've been advised by Justice  
5 Canada with respect to that particular section of  
6 the Act, yes.

7 Q. I believe we're ready now to  
8 turn to Mr. Connelly's opinion, if we can.

9 I will wait for it to come up on  
10 the screen, if it can be done quickly.

11 It looks like it can't be done --  
12 oh, here we are. Page 23, and it is under the  
13 section "Review Panel 3.4.3", and if you go to the  
14 bottom of that page, footnote 54, if you could just  
15 go to the bottom of the page, please, at footnote  
16 54 at the very bottom. And if we can expand that,  
17 it states:

18 "The Canadian Environmental  
19 Assessment Act, section  
20 21(b), section 25 and section  
21 28, note that while section  
22 21(b) does not list these two  
23 reasons..."

24 Being significant adverse  
25 environmental effects and public concern:

1                                    "... for referral to a review  
2                                    panel, in practice a referral  
3                                    under section 21(b) would be  
4                                    based on likely significant  
5                                    adverse environmental effects  
6                                    or public concern."

7                                    Was that your understanding in  
8                                    July of 2002?

9                                    A.    By definition, the projects  
10                                   that are listed in the Comprehensive Study List  
11                                   Regulations are those projects that are likely to  
12                                   cause significant adverse environmental effects,  
13                                   yes.

14                                   Q.    And so in fact the Minister  
15                                   of Environment would have a decision, then, to  
16                                   make. Once the referral by Minister Thibault had  
17                                   been made to him for the establishment of a Joint  
18                                   Review Panel, the Minister of Environment would  
19                                   then have a decision to make to refer the matter,  
20                                   the assessment, to a Joint Review Panel based on  
21                                   one of those criteria, significant adverse  
22                                   environmental effects or public concern; correct?

23                                   A.    I would say that in fact  
24                                   there's a decision to be made by the Minister of  
25                                   the Environment whether or not it is going to be a

1 federal, only, review panel pursuant to section 29  
2 of the former Act, or a Joint Review Panel.

3 Q. And the decision to be made  
4 by the Minister of Environment in that event would  
5 be based upon a conclusion, one, that there was  
6 significant adverse environmental effects that were  
7 likely which could not be mitigated, or public  
8 concern; correct?

9 A. I wouldn't agree with that,  
10 no.

11 Q. If I was to state it that the  
12 Minister had a decision to make based upon one or  
13 other of the criteria, significant adverse  
14 environmental effects or public concern, would you  
15 agree with it?

16 A. As I mentioned before, the  
17 section of the Act that the Minister of Fisheries  
18 and Oceans used to refer this project forward for a  
19 review panel. Simply stated, when the project is  
20 described in the Comprehensive Study List, the  
21 Minister has the ability or discretion to refer the  
22 project to the Minister of Environment.

23 Q. And so are you saying that  
24 you agree with what Mr. Connelly's opinion in that  
25 regard, or was your understanding at that time the

1 same as Mr. Connelly's opinion?

2 A. The letter from Minister  
3 Thibault articulates that he is using section 21(b)  
4 to refer the project to a review panel, and in that  
5 same letter he does state some rationale for asking  
6 the Minister of Environment to act on that.

7 Q. He refers to environmental  
8 effects; do you recall that?

9 A. I do.

10 Q. He doesn't refer to public  
11 concern; do you recall that?

12 A. No. But because there was no  
13 need for the Minister to do that, I can -- I can  
14 say that Fisheries and Oceans was well aware of the  
15 public concerns being raised in relation to this  
16 project, and certainly the Minister of Fisheries  
17 and Oceans would have been aware of public concerns  
18 being raised in relation to this project at the  
19 time, as well.

20 Q. But the practice was to make  
21 a referral to a JRP based on one or other of the  
22 two concerns, significant adverse environmental  
23 effects or public concern. Would you agree with  
24 that?

25 A. No, I don't.

1                   Q.    Would you agree, though, at  
2    least that Minister Anderson had the obligation to  
3    make a decision to refer to a review panel?

4                   A.    Yes.

5                   Q.    And that the Minister of  
6    Environment had to make that decision based upon  
7    relevant criteria; correct?

8                   A.    The criteria being that the  
9    project was described in the Comprehensive Study  
10   List, yes.

11                  Q.    And that it also had  
12   significant adverse environmental effects?

13                  A.    Go back to my previous answer  
14   regarding what section 21(b) states.

15                  Q.    So you don't agree that he  
16   had a determination to make prior to August 7th as  
17   to whether or not this project was likely to cause  
18   significant adverse environmental effects in a  
19   matter involving federal jurisdiction, do you -- do  
20   you accept that?

21                  A.    The former Act does not  
22   specify the criteria upon which the Minister of  
23   Environment -- with respect to that particular  
24   section of the former Act that the Minister of  
25   Environment must consider.

1                   Q.    By taking into account,  
2    though, Mr. Connelly's opinion that the practice  
3    was that the referral would be made on one or the  
4    other of those two criteria, would you accept that  
5    the Minister had a decision to make with respect to  
6    whether or not there were significant adverse  
7    environmental effects?

8                   A.    The Minister or the letter  
9    from Minister Thibault is clear, in terms of what  
10   section of the former Act he was using to refer the  
11   project for referral to review panel, as well as  
12   the information upon which he based that referral.

13                  Q.    You have said that Minister  
14   Anderson had a decision to make; correct?

15                  A.    Yes.

16                  Q.    And the basis for that  
17   decision would be based on Minister Anderson's  
18   letter?

19                  A.    Yes.  As I mentioned before,  
20   the decision was whether or not it would be a  
21   federal, only, review panel pursuant to section 29  
22   of the former Act or a Joint Review Panel with Nova  
23   Scotia.

24                  Q.    Leaving aside whether it  
25   would be joint or federal only, the Minister -- are

1 you saying that Minister Anderson was simply to  
2 make a decision based upon the information in the  
3 letter from Minister Thibault?

4 A. Yes.

5 Q. And that if information came  
6 to the attention of the department prior to  
7 Minister Anderson making his decision and after  
8 Minister Thibault's letter had been sent, that the  
9 information that the DFO had was incorrect  
10 information, that Minister Anderson need not take  
11 that into account?

12 A. Incorrect in that the project  
13 wasn't described in the Comprehensive Study List?

14 Q. Incorrect in that there was  
15 the wrong calculation with respect to blasting and  
16 the proper setback.

17 A. The Minister would be -- we  
18 would want to advise the decision maker of all  
19 relevant information.

20 Q. And in this case, you're  
21 talking about the decision maker referring to  
22 Minister Anderson; correct?

23 A. Acting on the referral by  
24 Minister Thibault, yes.

25 Q. Yes. You would want Minister

1 Anderson in that circumstance to have all relevant  
2 and accurate information; correct?

3 A. With respect to the section  
4 29 determination that he needed to make.

5 Q. With respect to whether or  
6 not there was significant adverse environmental  
7 effects?

8 A. I said that that is not a  
9 criteria listed under section 21(b).

10 Q. So it didn't matter, then, to  
11 you if new information came to the attention of the  
12 DFO that was contrary to information that had been  
13 expressed in Minister Thibault's letter, but prior  
14 to the referral being made by Minister Anderson,  
15 that wouldn't matter to you that that shouldn't be  
16 brought to the --

17 A. I don't think that is a fair  
18 characterization that it wouldn't matter. It is my  
19 obligation as a bureaucrat to make sure that I give  
20 all relevant and necessary information to decision  
21 makers.

22 Q. You would want all relevant  
23 information, to clarify, to be in front of Minister  
24 Anderson before he made his decision to approve or  
25 not approve the recommendation to go to a review

1 panel; correct?

2 A. Yes.

3 Q. Could we also refer to the  
4 report of Mr. Smith that is before the Tribunal in  
5 this proceeding at page 28, please? And if you  
6 could go to footnote 104. Actually, in paragraph  
7 79, Mr. Smith says -- he's referring to Messrs.  
8 Estrin and Rankin, and he states that they ignore  
9 that the projects --

10 MR. LITTLE: Are you in the first  
11 report of Mr. Smith?

12 MR. NASH: I'm sorry, rejoinder  
13 report. We had the wrong one put up. No, it is  
14 the right one, sorry, Mr. Little. Rejoinder  
15 report, page 28.

16 BY MR. NASH:

17 Q. At paragraph 79, Mr. Smith is  
18 referring to Messrs. Estrin and Rankin and he is  
19 stating that:

20 "They ignore the project  
21 engaged the prospect of  
22 significant adverse  
23 environmental effects and  
24 considerable public concern."

25 And then he goes to footnote 104,

1 and at 104 he states:

2 "I note that in fact the  
3 Whites Point project was  
4 referred to a review panel  
5 pursuant to section 21(b) of  
6 the CEAA, which does not  
7 expressly list these two  
8 reasons for referral.  
9 However, I agree with Robert  
10 Connelly that in practice a  
11 referral under section 21(b)  
12 would be based on these  
13 criteria."

14 And, again, was that your  
15 understanding in July of 2002?

16 A. Right. And certainly the  
17 letter from Minister Thibault articulates his views  
18 on potential for significant effects.

19 Q. Would you take it, then, that  
20 Minister Anderson is simply relying on the letter  
21 of Minister Thibault?

22 A. Yes.

23 Q. And if the matter was  
24 referred to a joint panel under section 29, would  
25 it be important for the Minister of Environment to

1 know whether there had been an environmental  
2 assessment commenced in Nova Scotia at that time?

3 A. Section 29 simply speaks to  
4 the referral of the project to review panels.  
5 Sections 40 to 42 speak to referral to a Joint  
6 Review Panel.

7 Q. And with respect to the  
8 reference to a Joint Review Panel, it would be  
9 important for Minister Anderson to know whether an  
10 environmental assessment had actually been  
11 commenced in Nova Scotia; correct?

12 A. I would say it is important  
13 to know whether or not an environmental assessment  
14 was required for the project by Nova Scotia, not  
15 whether it had commenced.

16 Q. Could you turn to tab 27,  
17 please, in the binder before you? This is Exhibit  
18 C-851, and this is the -- it is called an Annotated  
19 Guide of the Canadian Environmental Assessment Act.  
20 And it is co-authored by Ms. Beverly Hobby. Do you  
21 see that?

22 A. Mm-hm.

23 Q. And this was originally  
24 published in 1998, but do you recall reading this  
25 guide before you started with CEAA?

1 A. No, I do not.

2 Q. Are you familiar with the  
3 constitutional overlay that is provided by this  
4 publication?

5 MR. HEBERT: Excuse me, objection.  
6 If you're going to ask the witness about  
7 constitutional law issues or his opinion about  
8 Canadian constitutional law, I don't think it is  
9 the appropriate witness to do so.

10 MR. NASH: The only questions will  
11 be about his understanding at the time, in 2003, at  
12 the material time. So it is not about legal  
13 opinion. It is a question of what he understood  
14 the obligations were under the Act.

15 BY MR. NASH:

16 Q. If you go to page 1-3 under  
17 the section 1.20, "Constitutional Framework", it  
18 states under 1.20.1, "Shared jurisdiction over  
19 environmental assessment".

20 Are you with me, Mr. Chapman?

21 A. I am, yes.

22 Q. "The environment is not an  
23 enumerated head of power in  
24 the Constitution. The Act  
25 must be read and interpreted

1 in the context of the  
2 jurisdiction over  
3 environmental assessment  
4 shared by the provinces and  
5 the federal government.  
6 "The federal Department of  
7 Fisheries and Oceans may, for  
8 example, conduct an  
9 environmental assessment of  
10 any project for purposes of  
11 determining the adverse  
12 environmental effect the  
13 project may have on fish  
14 habitat where it considers  
15 issuing an authorization  
16 pursuant to the Fisheries  
17 Act. This could be done on  
18 the grounds that the federal  
19 government has jurisdiction  
20 over fish habitat issues. At  
21 what point, however, will the  
22 department's environmental  
23 assessment exceed federal  
24 jurisdiction and be said to  
25 be intruding into an area of

1 provincial jurisdiction? The  
2 response to this question  
3 stems, to a large extent,  
4 from the power, duty or  
5 function the federal  
6 authority proposes to  
7 exercise or perform with  
8 respect to a project."

9 And then if you go down to the  
10 last paragraph on page 1-4:

11 "Where the federal authority  
12 proposes to exercise a power  
13 or perform a duty or function  
14 pursuant to a federal statute  
15 or regulation specifically  
16 provided for on the Law List  
17 Regulations, it is authorized  
18 to review all adverse  
19 environmental effects caused  
20 by the project. However,  
21 determining the level of  
22 significance of adverse  
23 environmental effects and the  
24 conditions a federal  
25 authority may attach to the

1 issuance of a regulatory  
2 approval will be limited.  
3 The limits will include the  
4 head of federal jurisdiction  
5 the legislation relates to  
6 (which may vary depending on  
7 the type of action or  
8 approval the legislation  
9 authorizes) as well as other  
10 areas of federal jurisdiction  
11 including areas of provincial  
12 jurisdiction that will likely  
13 affect the area of federal  
14 jurisdiction to be protected.  
15 For example, the Department  
16 of Fisheries and Oceans could  
17 issue an authorization  
18 pursuant to the Fisheries Act  
19 if it is of the opinion that  
20 all adverse environmental  
21 effects of the project on  
22 areas of federal jurisdiction  
23 (such as wildlife in a  
24 national park) are adequately  
25 dealt with. Effects on

1 wildlife outside the national  
2 park, however, would not  
3 normally be within its  
4 authority. The department  
5 could include conditions in  
6 the authorization to ensure  
7 that effects on wildlife were  
8 dealt with effectively and in  
9 a timely fashion - but only  
10 with respect to the national  
11 park and not adjacent  
12 territory."

13 In summary, was that your  
14 understanding in July of 2002 -- 2003 as to the  
15 federal jurisdiction over environment?

16 A. Generally, yes.

17 Q. And after the Red Hill  
18 decision was rendered in April of 2001, did you  
19 read that decision?

20 A. I did.

21 Q. And if you go, then, to tab  
22 29 and go to page -- which is Exhibit C-764, and  
23 go, please, to page 28 of 33, at paragraph 157,  
24 about halfway down the page:

25 "In Oldman, supra, the

1 Supreme Court also cautioned  
2 that it is not helpful when  
3 dealing with the respective  
4 levels of constitutional  
5 authority to characterize a  
6 project as a provincial or  
7 local project. While local  
8 projects generally fall  
9 within provincial  
10 responsibility, federal  
11 participation is required if  
12 the project impinges on an  
13 area of federal jurisdiction.  
14 This was the case in respect  
15 of the Oldman River dam.  
16 However, as stated at page 71  
17 of the decision, the federal  
18 government may not use 'the  
19 pretext of some narrow ground  
20 of federal jurisdiction, to  
21 conduct a far ranging inquiry  
22 into matters that are  
23 exclusively within provincial  
24 jurisdiction'."

25 That was your understanding as

1 well in June, July, August of 2003?

2 A. I am aware of the Red Hill  
3 decision.

4 Q. That was your understanding  
5 of the import of that decision in that aspect?

6 A. Yes.

7 Q. If you would go to paragraph  
8 174 at page 31 of 33, the court is referring to the  
9 question of the level of scientific basis required  
10 to conclude that there were or were not significant  
11 adverse environmental effects, and it states as  
12 follows:

13 "This is not to say that  
14 scientific certainty is  
15 required as to the existence  
16 of a deleterious effect on  
17 migratory bird populations in  
18 order for a referral to panel  
19 review to be properly  
20 grounded. However, there  
21 must be a valid basis on  
22 which to conclude that a real  
23 possibility exists that a  
24 panel would be able to  
25 conclude that, in this case,

1                   there would be a significant  
2                   adverse effect on migratory  
3                   bird preservation. That  
4                   necessary condition to engage  
5                   the process was absent. The  
6                   necessary relevant  
7                   information was noted to  
8                   likely be unavailable for a  
9                   long time and might never be  
10                  available."

11                                 And was that your understanding of  
12                  the test generally that would apply to matters of  
13                  this nature?

14                                 A.    Pursuant to section 25 of the  
15                  Act, yes.

16                                 Q.    And was your understanding  
17                  that it worked differently for section 21?

18                                 A.    As I mentioned before, that  
19                  section 21 makes no particular reference to  
20                  significant adverse environmental effects or public  
21                  concerns.

22                                 Q.    And taking into account the  
23                  practice as described by Mr. Smith and  
24                  Mr. Connelly, would you agree, though, that if you  
25                  were to make a determination that there were

1 significant adverse environmental effects, you  
2 would apply the criteria in that paragraph 174 of  
3 Red Hill?

4 A. You're asking me to  
5 speculate, and I can't do that.

6 Q. If we go back to tab 15,  
7 Exhibit C-678, the bottom email on this page is  
8 from Tim Smith to Steve Chapman. It is July 7th:

9 "Steve, I understand you are  
10 looking after Whites Point.  
11 In case you haven't yet seen,  
12 attached is a letter from a  
13 local citizen's group. I  
14 know the group's legal  
15 counsel, Lisa Mitchell, who  
16 copied me on the letter.  
17 Unable to access the public  
18 registry through DFO, she had  
19 called me earlier looking for  
20 contacts. I suggested she  
21 best speak with Bill or Derek  
22 in Halifax or yourself."

23 Do you remember receiving this  
24 email from Mr. Smith?

25 A. I do.

1 Q. And you responded:  
2 "Thanks, Tim. I also know  
3 Lisa from my days at  
4 Environment Canada. As this  
5 project is now at a review  
6 panel, Lisa should contact me  
7 and not our regional office."

8 Do you recall that?

9 A. Oh, I do, yes.

10 Q. Then Mr. Smith responds:  
11 "I had tipped her off that  
12 DFO might make a  
13 recommendation to refer to  
14 panel and that in such a case  
15 you would be the contact.  
16 She had seen Thibault's  
17 letter before sending the  
18 petition."

19 Now, this was the letter from  
20 Mr. Thibault, of course, as you explained to  
21 Mr. Buxton, about six weeks later, was a secret  
22 letter, a cabinet confidence letter. Do you have  
23 any idea how Mr. Thibault's secret cabinet  
24 confidence letter got into the hands of Lisa  
25 Mitchell, a lawyer for the opponent group?

1                   A.    I am aware that at the time  
2 Minister Thibault had sent the letter to the  
3 Minister of Environment, he made a public statement  
4 and had provided that letter to members of the  
5 media.

6                   Q.    And if you go to tab 14, the  
7 tab before Exhibit C-074, are you referring to the  
8 public statement reviewed there? And take a moment  
9 to read that article, if you wish.

10                  A.    Yes, I am aware of this  
11 article.

12                  Q.    Is it your understanding that  
13 the secret cabinet confidence letter of June 26th,  
14 2003 was presented by Minister Thibault to the  
15 press at or about that time?

16                  A.    That's my understanding, yes.

17                  Q.    Do you know -- have any  
18 understanding of why he did that?

19                  A.    No, I don't.

20                  Q.    Do you know that there was a  
21 provincial election pending two days later?

22                  A.    I did know that.

23                  Q.    If you go, then, back to tab  
24 8, there is just a previous note, previous in time,  
25 that I would like to refer you to on page 801525.

1 At the very bottom, it states:

2 "P. Zamora called. Still no  
3 word on referral. I  
4 advised..."

5 And this is Derek McDonald:

6 "I advised Phil that even  
7 then there would be a delay  
8 in notifying proponent until  
9 Minister is briefed and  
10 formally accepts.  
11 Notification would likely be  
12 done by CEAA HQ. Phil  
13 confirmed that Minister  
14 Thibault is scheduled to meet  
15 with local citizens Thursday  
16 morning at 10:15."

17 Now, Thursday morning was, I can  
18 tell you, June 26th. Were you aware that the  
19 Minister was meeting with an opponents group,  
20 including Cheryl Denton, on June 26th, the same  
21 date of the letter?

22 A. No, I was not.

23 Q. Are you aware that the  
24 proponent, through Mr. Buxton, learned of the  
25 referral to a Joint Review Panel by virtue of

1 reading this article at tab 14, Exhibit C-74, in  
2 the press?

3 A. I am aware of that, yes.

4 Q. And how and when did you  
5 become aware of that?

6 A. Because Mr. Buxton himself is  
7 quoted in that article.

8 Q. That was at your conference  
9 with Mr. Buxton on August 28th?

10 A. I believe he mentioned that  
11 is how he found out about the referral, yes.

12 Q. If you go to tab 16, which is  
13 Exhibit C-528, this is a memorandum to the Minister  
14 from the Deputy Minister of Environment, correct,  
15 tab 16?

16 A. This is a memo from the  
17 president of the agency to the Minister, yes.

18 Q. The first page of C-528 is a  
19 memorandum to Minister. Do you see that?

20 A. Yes.

21 Q. And that is dated July 18th,  
22 2003; correct?

23 A. Yes.

24 Q. And you were the author of  
25 this memorandum?

1 A. Yes.

2 Q. And on page 2, the memorandum  
3 is signed by Sid Gershberg. Do you see that?

4 A. Yes.

5 Q. Was with Mr. Gershberg the  
6 then president of CEAA?

7 A. He was, yes.

8 Q. And ultimately Mr. Connelly  
9 became the acting president of CEAA following  
10 Mr. Gershberg, is that right?

11 A. Yes.

12 Q. How long was Mr. Connelly the  
13 vice-president -- the acting president for, or do  
14 you recall? If you don't recall, that's fine.

15 A. A number of months, not a  
16 long period of time.

17 Q. He had been the  
18 vice-president before that; correct?

19 A. Yes.

20 Q. If you go back to page 1, you  
21 drafted a recommendation, and the recommendation  
22 that you drafted for Mr. Gershberg was:

23 "I recommend that you approve  
24 the referral of the Whites  
25 Point Quarry Project to a

00185

1                   Joint Review Panel pursuant  
2                   to section 40 of the CEAA..."

3                   Do you see that?

4                   A.    I do.

5                   Q.    "... and to approve the  
6                   release of the draft  
7                   agreement for public  
8                   comment."

9                   Do you see that?

10                  A.    I do.

11                  Q.    So Minister Anderson then had  
12                  to make a decision as to whether or not to approve  
13                  the referral of the Whites Point quarry project to  
14                  a Joint Review Panel?

15                  A.    Right, because the  
16                  alternative would have been a federal-only review  
17                  panel under section 29.

18                  Q.    And the memorandum attaches a  
19                  further backgrounder at page -- starting at page  
20                  018628. In fact, that might be the last page of  
21                  that document.

22                  Was this document also prepared by  
23                  you?

24                  A.    Yes.

25                  Q.    And you say, under the

00186

1 project:

2 "Global Quarry Products is  
3 proposing to construct and  
4 operate a basalt quarry,  
5 processing facility and  
6 marine terminal located on  
7 Digby Neck in Digby County."

8 Do you see that?

9 A. I do.

10 Q. And in the first paragraph,  
11 it refers to a description of quarrying; correct?

12 A. Mm-hm, yes.

13 Q. And then the second paragraph  
14 elaborates upon that, on what quarrying will  
15 actually occur; correct?

16 A. Yes.

17 Q. And in the third paragraph  
18 there, the reference is made to marine facilities;  
19 correct?

20 A. Yes.

21 Q. And then below, under  
22 "environmental assessment processes", it states:

23 "Global Quarry Products has  
24 applied for an authorization  
25 under subsection 35(2) of the

1                                    Fisheries Act for the harmful  
2                                    alteration, disruption or  
3                                    destruction of fish habitat  
4                                    for its respective projects."

5                                    And the projects you're referring  
6 to is, number 1, the quarry and, number 2, the  
7 marine facility; correct?

8                                    A.    You're looking at that as one  
9 project. I can't see if that was a typographic  
10 error or not.

11                                    Q.    I'm looking at it as it  
12 states, "respective projects". Do you see that?

13                                    A.    I see it. Your question to  
14 me is: Is it meant to refer to two separate  
15 projects or one project? I can state categorically  
16 we were looking at this as the one project. In  
17 fact, if you look at the background section, you  
18 will see that it refers to "the project" in  
19 singular.

20                                    Q.    So the "S" on "project" in  
21 the third line of that paragraph is simply an  
22 error?

23                                    A.    We weren't looking at the  
24 quarry and the marine terminal as separate  
25 projects. So, yes, it appears that it is a

1 typographic error.

2 Q. Now, you will recall -- and  
3 perhaps I can remind you about your affidavit in  
4 reference to the document at tab 5, Exhibit C-129.  
5 You will recall that I asked you a question this  
6 morning, regarding paragraph 19 of your affidavit,  
7 about the question of regulatory triggers.

8 A. Yes.

9 Q. And at paragraph 19, you  
10 don't have to refer to it, but if you want to,  
11 please go ahead. On the question of regulatory  
12 triggers and scoping, you say in that paragraph it  
13 was:

14 "... still hypothetical  
15 because DFO officials had not  
16 completed the necessary  
17 scientific work to determine  
18 whether the proposed  
19 quarrying activity engaged a  
20 Fisheries Act trigger that  
21 would require an EA."

22 A. That's correct, yes.

23 Q. And then down to paragraph  
24 20:

25 "Ultimately, this debate

1                                    became a moot issue. First,  
2                                    DFO determined that the  
3                                    quarrying activity engaged an  
4                                    EA trigger for DFO."

5                                    And you cite as your support for  
6 that this letter of May 29th; correct?

7                                    A.    Yes.

8                                    Q.    And if you go to this letter  
9 of May 29th, Exhibit C-129, ultimately the trigger  
10 that you're referring to is a section 32 trigger.  
11 Do you see that?

12                                   A.    Right, with respect to the  
13 quarry.

14                                   Q.    With respect to the quarry?

15                                   A.    Yes.

16                                   Q.    And if you go back, then, to  
17 your backgrounder --

18                                   A.    Yes.

19                                   Q.    -- at tab 16, Exhibit C-528,  
20 on the background, the last page of that exhibit?

21                                   A.    Sorry, what tab was that?

22                                   Q.    Tab 16. Nowhere in that  
23 background is there any reference to section 32;  
24 correct?

25                                   A.    That's correct.

1                   Q.    And so a section 32 trigger  
2 was not actually used in the materials that were  
3 prepared for Minister Anderson for consideration as  
4 to engaging federal jurisdiction; correct?

5                   A.    Minister Anderson would have  
6 been aware in the letter from Minister Thibault  
7 that Minister Thibault was referring to a section  
8 35(2) authorization under the Fisheries Act, as  
9 well as a section 32 authorization.

10                  Q.    For the quarry?

11                  A.    The letter from Minister  
12 Thibault speaks for itself.

13                  Q.    But it doesn't distinguish --  
14 well, let's just go to the letter.

15                  A.    Sure.

16                  Q.    Keeping in mind that you  
17 stated that the section 32 authorization question  
18 resolved the question of whether or not there was a  
19 federal trigger for the quarry, if you go to tab  
20 30 --

21                  A.    I don't have a tab 30.  
22 Sorry, it is in the wrong order.

23                  Q.    Okay, that's my mistake.

24                  You will see there at the third  
25 paragraph of this June 26th letter:

1 "On the basis of an analysis  
2 of the information received  
3 from the proponent, DFO has  
4 concluded that various  
5 components of the proposed  
6 project will likely require  
7 authorizations under  
8 subsection 35(2) of the  
9 Fisheries Act to harmfully  
10 alter, disrupt or destroy  
11 fish habitat, and section 32  
12 to destroy fish by means  
13 other than fishing. Our  
14 analysis has also determined  
15 that the marine terminal  
16 portion of the project will  
17 interfere substantially with  
18 navigation, thereby requiring  
19 formal approval under  
20 subsection 5(1) of the  
21 Navigable Waters Protection  
22 Act."

23 There are no particulars or  
24 definitions or description of how activity on land  
25 would engage federal jurisdiction?

1 A. In this letter, is that your  
2 question?

3 Q. That is my question.

4 A. The letter speaks for itself.  
5 No.

6 Q. That you would agree with my  
7 characterization?

8 A. I would agree that the  
9 Minister of Fisheries and Oceans has identified  
10 three separate federal authorizations that pertain  
11 to the project.

12 Q. And if you go back, then, to  
13 your backgrounder at tab 16, Exhibit C-528, you  
14 will agree there is no reference whatsoever to  
15 section 32 at all there?

16 A. That's correct.

17 Q. And no reference that section  
18 32 authorization would be required for the quarry;  
19 correct?

20 A. Correct.

21 Q. And is the reason for that  
22 because you had received information in the  
23 meantime that the calculation as regards the  
24 I-Blast model had changed the setback from 500 to  
25 100 metres?

1 A. No. Not at all.

2 Q. What is the reason for  
3 leaving out a reference to section 32 authorization  
4 with respect to the quarry?

5 A. As I mentioned before, the  
6 letter would have been brought forward to the  
7 Minister. He was sent Minister Thibault's letter  
8 directly.

9 My writing here is simply that  
10 Global Quarry Products had applied for an  
11 authorization under section 35(2) and that the  
12 approvals were also required under the NWPA, as  
13 well. It was likely an oversight on my part, but  
14 there was no predetermined conclusion on my part to  
15 not bringing that forward to the Minister.

16 Q. In fact, what you say here is  
17 that:

18 "Global Quarry Products has  
19 applied for an authorization  
20 under subsection 35(2) of the  
21 Act for the harmful  
22 alteration, disruption or  
23 destruction of fish habitat  
24 for its respective projects."

25 Let's just take it at your

1 correction that really meant to be "project".

2                   But you do use the word  
3 "respective", and I am going to suggest to you that  
4 what was being conveyed here is that Global Quarry  
5 Products had applied for a section 35 authorization  
6 for the quarry. Is that correct?

7                   A. I want to be clear that we  
8 were never considering the quarry and the marine  
9 terminal to be separate projects.

10                  Q. I understand that.

11                  A. We refer to the word  
12 "project" and it is singular all the way through  
13 this document.

14                  Q. Yes. Were you intending to  
15 convey, though, that Global Quarry Products had  
16 applied for a section 35 authorization, a HADD  
17 authorization, for the quarry?

18                  A. No, not at all.

19                  Q. So what you understood at  
20 that time was that they had only applied for a  
21 section 35 application for the marine terminal;  
22 correct?

23                  A. That's my understanding, yes.

24                  Q. The only two applications, in  
25 fact, outstanding at that time was the application

1 for the terminal under NWPA; correct?

2 A. The authorizations that we  
3 knew about at the time were related to the marine  
4 terminal.

5 Q. Were related to the marine  
6 terminal and there were two of them, two  
7 authorizations applied for?

8 A. Yes.

9 Q. One was for the terminal  
10 under the NWPA; correct?

11 A. Yes.

12 Q. The second was for a HADD  
13 under section 35 for the marine terminal; correct?

14 A. That's correct.

15 Q. There had been no  
16 applications for any authorizations having to do  
17 with the quarry at that time; that's correct?

18 A. Not that I was aware of, no.

19 Q. I have a question in relation  
20 to paragraph 59 of your affidavit.

21 I'm sorry, paragraph 53. And you  
22 could have before you tab 26, Exhibit C-194.

23 The statement you make in  
24 paragraph 53 of your affidavit is that:

25 "The federal government

1 departments that offered  
2 information to the Panel,  
3 with the assistance of the  
4 Agency, included Environment  
5 Canada, Health Canada,  
6 Transport Canada, DFO,  
7 Foreign Affairs and  
8 International Trade Canada,  
9 and Natural Resources  
10 Canada."

11 And this Exhibit C-194 is, as I  
12 understand it, the assistance of the Department of  
13 Foreign Affairs and International Trade Canada, a  
14 statement made to the JRP in this case by  
15 Mr. Gilles Gauthier. Do you see that?

16 A. Yes.

17 Q. Is it common for JRPs to ask  
18 for officials from federal government departments  
19 to make presentations to them in respect to  
20 particular areas of concern to the JRP?

21 A. At the time, we had received  
22 a federal court ruling with respect to the Cheviot  
23 Coal Mine Project. One of the shortcomings  
24 identified by the court for that particular review  
25 panel was that the panel failed to essentially seek

1 out the information it required for the conduct of  
2 the environmental assessment.

3                   Based on that, we were advising  
4 review panels to identify departments,  
5 organizations that may have information relevant to  
6 the conduct of the environmental assessment and ask  
7 them to come forward and present that information.

8                   Q. So in this case, the JRP for  
9 the Whites Point quarry asked Mr. Gauthier, or  
10 someone from the Department of Foreign Affairs and  
11 International Trade, to come and make a  
12 presentation on the NAFTA?

13                   A. There is a letter in the  
14 project file on the record regarding that request,  
15 yes.

16                   Q. Do you know what  
17 Mr. Gauthier's responsibilities would be at DFAIT?

18                   A. No, I do not.

19                   Q. Would you know -- he's  
20 identified as the director of investment trade  
21 policy division at the Department of Foreign  
22 Affairs and International Trade.

23                   Do you have any idea what the  
24 person in that position would have responsibilities  
25 for?

1 A. No, I don't.

2 Q. Would his presentation then  
3 be intended to represent the official view of the  
4 Government of Canada?

5 A. The presentation, I guess,  
6 will speak for itself. I can't add any context  
7 with respect to that.

8 Q. Would it be your  
9 understanding that Government of Canada officials  
10 who came to a JRP to make a presentation, in their  
11 capacity as representatives of the Government of  
12 Canada, would it be within your expectation that  
13 they would be presenting the official view of the  
14 government?

15 A. Yes, yes.

16 Q. Are you aware of other  
17 presentations made by the Department of Foreign  
18 Affairs and International Trade in environmental  
19 assessments?

20 A. No, I'm not.

21 Q. Is this the only one you have  
22 come across?

23 A. Yes.

24 Q. Are you aware, if you turn to  
25 tab 18, that Mr. Dennis Wright wrote to Phil Zamora

1 regarding the I-Blast calculations? Do you recall  
2 seeing this?

3 A. I wasn't aware of this  
4 document until I reviewed the material with respect  
5 to these proceedings.

6 Q. Were you aware, though, of  
7 the information contained on page 2 of this exhibit  
8 at the very top:

9 "I am not comfortable with  
10 using the I-Blast model for  
11 buried charges as the model  
12 was developed using  
13 relatively few data point. I  
14 have much more confidence in  
15 the equations used for the  
16 guidelines. Because of the  
17 presence of an endangered  
18 Atlantic Salmon population in  
19 the area, an endangered  
20 Atlantic Right Whale  
21 population and a spawning  
22 area for herring, I would  
23 recommend a setback distance  
24 of at least triple that  
25 determined by application of

00200

1                   the equations in the  
2                   guidelines."

3                   Do you recall becoming aware of  
4 that and becoming aware of the fact that if there  
5 was a recalculation, that would reduce the setback  
6 required from 500 metres to 100 metres?

7                   A.    I was aware of discussions,  
8 internal discussions, at the time regarding the  
9 setback calculations, yes.

10                  MR. SPELLISCY:  Mr. Nash, is there  
11 a date on that document?  I didn't get the date of  
12 that document.

13                  MR. NASH:  If you go to the  
14 previous page, Mr. Spelliscy, page 1 of the email,  
15 it is July 29th, 2003.

16                  MR. SPELLISCY:  You said July  
17 29th, 2003?

18                  MR. NASH:  2003.  Can you see  
19 that?

20                  MR. SPELLISCY:  Thank you.

21                  BY MR. NASH:

22                  Q.    And do you recall that  
23 Mr. McDonald received notification of the fact that  
24 the I-Blast model was found to be erroneously used  
25 in this particular case?

1                   A.    I recall having discussions  
2 with Mr. McDonald regarding the different setback  
3 calculations, yes.

4                   Q.    If you would go to tab 8,  
5 which are Mr. McDonald's notes, Exhibit 612, part  
6 of Exhibit C-612, at page 801531, "On Wednesday,  
7 July 30th" the first entry on that page:

8                                 "... Phil Zamora called.  
9                                 They have received advice  
10                                from Dennis Wright that  
11                                I-Blast model is for open  
12                                water, not explosives used on  
13                                land. They should use the  
14                                table provided in the DFO  
15                                Explosives Guidelines. It  
16                                seems that if proponent were  
17                                to modify the plan, it could  
18                                be acceptable to DFO and they  
19                                would be in a position to  
20                                enable the provincial  
21                                approval. Are seeking CEAA's  
22                                thoughts."

23                                Do you remember at or about that  
24 time becoming aware that the I-Blast model was the  
25 wrong model and that the setbacks would be affected

1 by that?

2 A. I recall that we had a  
3 discussion regarding the different setback  
4 calculations and the effect that that could have on  
5 the environmental assessment process.

6 We were concerned at the time that  
7 with the decision to refer the project to a Joint  
8 Review Panel, that with the stated purpose of this  
9 proponent to blast and to generate data for the  
10 environmental assessment, that because of the  
11 nature of the environmental assessment process it  
12 was important for a Joint Review Panel to be aware  
13 of that data collection exercise by the proponent.

14 Q. So my question was merely  
15 about becoming aware of this new information at or  
16 about the time of this entry, around July 30th, at  
17 least at the latest; correct?

18 A. Right. You can see that the  
19 notes identify that they have advice from Dennis  
20 Wright.

21 My recollection is that the  
22 departmental position with respect to the setback  
23 came some time after that.

24 Q. And that Mr. McDonald, your  
25 colleague in Halifax at CEAA, had received this

1 information as of July 30th; correct?

2 A. The notes speak for  
3 themselves.

4 Q. Yes. You would have become  
5 aware of those facts at or about that time;  
6 correct?

7 A. Sometime after that, yes.

8 Q. And the memorandum that you  
9 had written for Mr. Gershberg's signature on July  
10 18th, 2003 of course was before this?

11 A. Yes.

12 Q. But this was eight or nine  
13 days before Mr. Anderson actually made his  
14 referral; correct?

15 A. Yes.

16 Q. And were any steps taken to  
17 bring the new information to Mr. Anderson's  
18 attention before he made the decision to approve  
19 the referral to a JRP?

20 A. No.

21 Q. Were any steps taken at that  
22 point in time -- well, let me preface the question  
23 this way.

24 At this point of point, all that  
25 was in existence with respect to a referral to a

1 JRP was Minister Thibault's letter of June 26th;  
2 correct?

3 A. When you say "at this time",  
4 you mean July 30th?

5 Q. July 30th?

6 A. The memo had been generated  
7 prior to that, yes.

8 Q. So there was the referral  
9 from Minister Thibault on June 26th; correct?

10 A. Correct.

11 Q. The memorandum that you  
12 drafted and was dated July 18th, 2003; correct?

13 A. Yes.

14 Q. This information, apparently,  
15 on or about this date, coming to CEAA July 30th;  
16 correct?

17 A. Yes.

18 Q. And the decision by Minister  
19 Anderson to approve not having yet been made;  
20 correct?

21 A. Yes.

22 Q. And in that context, no steps  
23 were taken to bring this information to Minister  
24 Anderson's attention?

25 A. No. It is not the type of

1 information that, when discussed, we thought it  
2 would influence the Minister's decision.

3                   It was important for us to get a  
4 better understanding of what the purpose of the  
5 test blasting was, but the letter from Minister  
6 Thibault was clear in terms of what, what he  
7 thought the justification was for making that  
8 section 21(b).

9                   Q.   Speaking of your knowledge,  
10 though, from the May 29th letter, it is your  
11 understanding that the debate about whether or not  
12 the federal government had a trigger for the quarry  
13 had been ultimately concluded by a finding that  
14 there was a 500 metre setback which led to the need  
15 for a section 32 authorization, blasting on land  
16 could have a deleterious effect on fish in the  
17 water; correct?

18                   A.   Yes.

19                   Q.   This information changes that  
20 calculation with the result that it may be that --  
21 well, it is that if blasting is conducted further  
22 than 100 metres from the shoreline, it could be  
23 done safely with no adverse effect?

24                   A.   That was the opinion of one  
25 official from DFO, yes.

1                   Q.    From Mr. Wright, the author  
2 of the guidelines?

3                   A.    Yes.

4                   Q.    Yes.  That would be a  
5 fundamentally important piece of information for  
6 both the Minister and the proponent to know at this  
7 time with respect to whether or not a section 32  
8 trigger existed, federal jurisdiction over the  
9 quarry was engaged, and whether or not blasting  
10 could be conducted safely on the property without  
11 affecting fish in the water?

12                   A.    To be clear, the advice from  
13 the agency to DFO regarding the scope of project  
14 was that we felt the quarry was inextricably linked  
15 with the marine terminal, that they were very  
16 proximate to each other and that one couldn't go  
17 forward without the other, and that no federal  
18 decision was required in the quarry in order for  
19 the quarry itself to be scoped as part of the  
20 project.

21                   Q.    You will recall that the  
22 provincial government, though, wanted there to be a  
23 federal trigger for the quarry --

24                   A.    No, I recall --

25                   Q.    -- so there could be

1 harmonization; correct?

2 A. I recall that the provincial  
3 government was concerned that we would have a  
4 different scope of project than they would.

5 Q. And that the provincial  
6 government, therefore, wanted, and wanted badly,  
7 for the federal government to scope in the quarry;  
8 correct?

9 A. There was concerns expressed  
10 by the provincial government, but that's not to say  
11 that we were motivated to have a decision maker  
12 take a decision with erroneous information.

13 Q. Are you saying that knowing  
14 the provincial government is pressing for the  
15 federal government to scope in the quarry, that  
16 information that would put the scoping of the  
17 quarry by the federal government into question was  
18 not important information for Minister Anderson to  
19 have before referring it to any kind of panel --

20 A. To be clear --

21 Q. -- but, more importantly, a  
22 JRP?

23 A. Right. To be clear from our  
24 perspective, the agency's perspective, the scoping  
25 of the quarry was to be done in accordance with the

1 operational policy statement and guidance produced  
2 by the agency and that no federal decision under  
3 section 32 of the Fisheries Act was required in  
4 order for the quarry to be scoped in.

5 Q. It's quite possible, and in  
6 fact it had been done on other projects, for a  
7 marine terminal to be scoped individually without  
8 scoping in the activity on land, isn't it?

9 A. There are cases where that's  
10 been done, and I can show other examples where, in  
11 fact, a quarry and an LNG project were actually  
12 scoped together, as well.

13 Q. And there is a quarry and an  
14 LNG project, an LNG project and a marine terminal,  
15 were scoped separately; correct?

16 A. Yes.

17 Q. Yes. And so that was in fact  
18 later in 2003, wasn't it, the Bear Head Project?

19 A. You know, there was numerous  
20 rounds of litigation with respect to how --

21 Q. I am just asking you this  
22 fact. In 2003, December 2003, did the federal  
23 government decide that it would not scope in the  
24 LNG terminal at Bear Head, but would only scope in  
25 the marine terminal; is that correct?

1 A. That's correct, yes.

2 Q. Within five months of this  
3 referral to the JRP; correct?

4 A. Right. But I can bring up  
5 another example in the Bay of Fundy where in fact  
6 the LNG terminal was scoped in with the LNG  
7 project, as well.

8 Q. This information about the  
9 project which CEAA now had and you now had changing  
10 the 500 metre setback to 100 metres, this would be  
11 fundamentally important information for the  
12 proponent to have, would it not, in a transparent,  
13 open, honest, process carried out with integrity  
14 and good faith?

15 A. The process that we had was  
16 transparent and honest. The purpose of the  
17 blasting stated by the proponent was to generate  
18 data for the environmental assessment.

19 We wanted to make sure that we had  
20 the environmental assessment process established  
21 and that the review panel itself was made aware and  
22 the public was made aware of potential blasting  
23 that was required for the environmental assessment  
24 process.

25 Q. What policy, regulation,

1 guidelines, statement of principle were you relying  
2 upon to come to the conclusion that this very  
3 important information, generated in what was to be  
4 a transparent process, shouldn't be passed on to  
5 the proponent?

6                   A. We had examples previous to  
7 that, low-level flying project in Labrador, where  
8 in fact in the absence modelling data there was a  
9 proposal to actually conduct low-level flights as  
10 part of the environmental assessment process, and  
11 that was a very controversial thing to have done.

12                   We were looking at this in much  
13 the same manner, that we had a 3.9 hectare quarry  
14 completely surrounded by a much larger quarry  
15 project. We had a very vocal public who was  
16 concerned about the way the environmental  
17 assessment process was to be conducted, and we had  
18 not yet appointed a Joint Review Panel.

19                   We thought that if the stated  
20 purpose of the blasting was to generate data for  
21 the environmental assessment, there was a time and  
22 a place for that, and, simply, we wanted, and we  
23 advised DFO, that they should wait until the Joint  
24 Review Panel had been appointed before conveying  
25 information regarding blasting to the proponent.

1                   Q.    That is your rationale, but  
2 my question was more pointed.

3                   What policy, guideline,  
4 regulation, authority, legislative provision did  
5 you rely upon in determining that you should not  
6 share this information with the proponent?

7                   A.    We did share the information  
8 with the proponent.

9                   Q.    At the time that you received  
10 it.

11                  A.    Right.  What we relied on is  
12 the effect on environmental assessment process.  We  
13 were very concerned with the integrity of the  
14 environmental assessment process, and we felt that  
15 there was no harm to the proponent in delaying  
16 sharing information with it so we could have a  
17 Joint Review Panel established.

18                  Q.    Well, with respect, it is up  
19 to the proponent to make that judgment, but could  
20 you answer my question?  Is there a policy,  
21 guideline, regulation, statement of principle,  
22 legislative provision that you directed yourself to  
23 make a determination that you should not share this  
24 important information with the proponent?

25                  A.    I can't point to anything in

1 particular.

2 Q. Thank you. In fact, you met  
3 with Mr. Buxton on August 28th; correct? Do you  
4 recall that meeting?

5 A. I do.

6 Q. And Mr. McLean also attended  
7 that meeting; correct?

8 A. Yes.

9 Q. And Mr. Buxton, if you go to  
10 tab 23, there are notes from that meeting, and you  
11 will see that they are the notes of Mark McLean,  
12 and you and Cheryl Benjamin, Mr. McLean,  
13 Mr. Buxton -- sorry, are you with me, Mr. Chapman?

14 A. Tab?

15 Q. Tab 23, and that is Exhibit  
16 R-253 for the record.

17 PROFESSOR MCRAE: No.

18 MR. NASH: Do you see handwritten  
19 notes?

20 PRESIDING ARBITRATOR: 223?

21 BY MR. NASH:

22 Q. I have to push my boss to  
23 find those notes. It is group of handwritten notes  
24 dated August 28th, Exhibit R-253.

25 Sorry, C-253. Is there a tab

1 number? Could we have that... It may be difficult  
2 to see. Let's try.

3                   If you look on the screen, you  
4 will see the electronic copy of Exhibit C-253, and  
5 you will see that you and Ms. Benjamin, Mr. McLean  
6 are in a meeting with Mr. Buxton, Mr. Kern, who are  
7 representing the proponent; correct?

8                   A. Yes.

9                   Q. And Mr. Buxton states firstly  
10 to you, and if you can recall this and confirm it,  
11 that there has been no correspondence on the issue  
12 of going to a panel. Do you see that?

13                   A. Yes.

14                   Q. And Mr. Buxton was concerned,  
15 this issue having been raised in the press and in  
16 fact the letter having been quoted in the press,  
17 that they had been given no formal notice that this  
18 was going to a JRP at all; correct?

19                   A. Yes.

20                   Q. You said you would attend to  
21 writing Mr. Buxton following this meeting; correct?

22                   A. That's right.

23                   Q. And he was complaining that  
24 the company has been informed through the media.  
25 Do you see that?

1 A. Yes.

2 Q. And then at the bottom of the  
3 first page, there is a reference to panel review,  
4 "significant environmental concerns with fish and  
5 fish habitat." What I'm going to suggest to you is  
6 that you were asked by Mr. Buxton: What was the  
7 basis upon which this was referred to a review  
8 panel? And you told him that it was based on  
9 significant environmental concerns with fish and  
10 fish habitat; is that right?

11 A. The notes speak for  
12 themselves. I simply can't remember what I stated  
13 at that meeting.

14 Q. You can't recall?

15 A. No.

16 Q. And over to the next page, he  
17 expressed concern, about a third of the way down  
18 the page there is a note, the company was being  
19 treated unfairly. Do you see that?

20 A. The second paragraph?

21 Q. On page 21 at the top.

22 A. Yes.

23 Q. The note from Mr. McLean is  
24 that, "concerned the company is being treated  
25 unfairly". What Mr. Buxton was explaining to you

1 was that the proponent had been unable to blast  
2 because the industrial approval had a condition in  
3 it regarding blast limits under the DFO. Do you  
4 see that?

5 A. Yes.

6 Q. Do you remember him  
7 expressing that or the idea to that effect?

8 A. Generally, yes.

9 Q. And then he asked you for a  
10 copy of the Minister -- the Minister's letter from  
11 the Minister of Fisheries to the Minister of  
12 Environment, the referral letter, and you advised  
13 him that the letter was Minister to Minister and  
14 therefore not released and it was confidential;  
15 correct?

16 A. Yes. Before I attended that  
17 meeting, I sought advice and, notwithstanding the  
18 fact that Minister Thibault had made the letter  
19 public to some individuals in the media, it was  
20 still to be considered a cabinet confidence.

21 Q. Interesting that it wasn't  
22 considered the confidence had been waived and that  
23 the document was now a public document, but that  
24 was the advice you got; is that correct?

25 A. At that particular time, we

1 went back to the Privy Council Office later on and  
2 they conceded, in fact, we could make that letter  
3 public.

4 Q. Then over to the next page,  
5 which at the very bottom is 801714, it states:

6 "DFO has stated blasting  
7 closer than 500 metres would  
8 impact inner Bay of Fundy  
9 salmon."

10 And then there is the words "other  
11 projects blasting closer". And the context of that  
12 was that Mr. Buxton was complaining to you that  
13 there were other projects, another project or other  
14 projects, where blasting had been allowed closer to  
15 the ocean than the 500 metre setback which was then  
16 in place for the Whites Point quarry pursuant to  
17 the letter of May 29th; correct?

18 A. The notes speak for  
19 themselves.

20 Q. Do you recall him raising  
21 that, though, that the 500 metre setback was  
22 working an unfairness on this proponent?

23 A. Generally, yes.

24 Q. And as you're sitting there  
25 in the room, the five of you, you're sitting there

1 knowing that that 500 metre setback is based on a  
2 miscalculation; correct?

3 A. I can tell you that we hadn't  
4 seen anything conclusive from DFO regarding the new  
5 setback at that particular point in time.

6 Q. But you knew that the I-Blast  
7 calculation upon which the 500 metre setback was  
8 based was wrong. You told me that?

9 A. We knew that there was  
10 discussions internally within DFO that, in fact,  
11 the original setback was likely not the most  
12 appropriate one.

13 Q. Well, it was more than that.  
14 If you go back to tab 8, if you need to be referred  
15 to that, at page 801531, the information that was  
16 coming from Phil Zamora is that the I-Blast model  
17 was for open water, not for explosives. They  
18 should use the table provided in the DFO explosives  
19 Guidelines.

20 Now, that table itself provided,  
21 with respect to the charge size for this proponent,  
22 regarding the 35.6 metre setback. So you knew then  
23 that the 500 metre setback was way exaggerated  
24 beyond what setback would be required; correct?

25 A. To be clear, what we knew is

1 that there was analysis taking place within DFO  
2 regarding the appropriate setback. We simply never  
3 got into, from my recollection, the detailed  
4 discussion of that matter with Fisheries and  
5 Oceans.

6 Q. Well, if you go to tab 19,  
7 Mr. Buxton's Exhibit 33, this is a draft letter  
8 drafted by Mr. Zamora, run by CEAA, as to whether  
9 it should be sent. It is dated July 30th, that  
10 same day of that interview. It says:

11 "Thank you for your letter of  
12 July 21, 2003 in which you  
13 asked for details of the  
14 calculation with respect to  
15 setback distances..."

16 There is then reference to the  
17 Wright guidelines for the use of explosives, and  
18 Mr. Zamora states in this draft letter:

19 "We have contacted Mr. Wright  
20 for advice on the use of the  
21 I-Blast model for your  
22 application. Mr. Wright is  
23 not comfortable with using  
24 this model for the blasting  
25 plan you have proposed. He

1 is suggesting that you apply  
2 the equations used for the  
3 guidelines. However, because  
4 of the presence of endangered  
5 species in the area, it is  
6 recommended that the setback  
7 distance be at least triple  
8 that determined by the  
9 application of the equations  
10 in the guidelines. In  
11 addition, Mr. Wright has  
12 recommended that you rethink  
13 the blasting plan for the 3.9  
14 hectare quarry in order to  
15 reduce the size of the  
16 individual charges being  
17 used. If the individual  
18 charges could be split or  
19 decked, as described in the  
20 guidelines, the impact could  
21 be further reduced."

22 Now, you will see that this letter  
23 is a draft letter and it is copied to Mr. McDonald,  
24 Mr. McLean and Mr. Wheaton, Mr. Wright and  
25 Mr. Petrie. Do you see that?

1 A. Yes.

2 Q. And do you recall that that  
3 letter, draft letter was run by Mr. McDonald as to  
4 whether it should be sent?

5 A. I recall, as evidenced by  
6 Mr. McDonald's notes, he had discussed the matter  
7 with Bruce Young and that we had recommended that  
8 DFO hold off in sending that letter.

9 Q. Yes. And that was before  
10 your meeting with Mr. Buxton on August 28th, wasn't  
11 it?

12 A. It was, yes.

13 Q. In fact, it was before the  
14 referral was made by Minister Thibault on August  
15 7th, wasn't it?

16 A. It was --

17 MR. HEBERT: I think we need to be  
18 clear here the referral was made by Minister  
19 Anderson.

20 MR. NASH: I'm sorry.

21 MR. HEBERT: Not Thibault.

22 BY MR. NASH:

23 Q. I misspoke. The referral  
24 that I am referring to is the Minister Anderson's  
25 referral on August 7th.

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1 A. To a Joint Review Panel.

2 Q. To a Joint Review Panel. And  
3 that information had come to CEAA prior to that  
4 and, in fact, a draft of this letter had been run  
5 by CEAA officials as to whether it should be sent  
6 prior to the August 7th referral; correct?

7 A. Yes.

8 Q. And so going back to your  
9 meeting with Mr. Buxton on August 28th, the notes  
10 that were Exhibit C-253, you were sitting there  
11 with Mr. Buxton in the room, and at page 801714  
12 there is a reference to:

13 "DFO has stated blasting  
14 closer than 500 metres would  
15 impact inner Bay of Fundy  
16 salmon. Other projects  
17 blasting closer."

18 And you didn't think it was right  
19 to tell Mr. Buxton at that time that the setback  
20 had been vastly reduced; that's correct?

21 A. There were a number of things  
22 discussed in that meeting as I mentioned --

23 Q. On this particular topic, you  
24 didn't think that was important information to  
25 convey to Mr. Buxton; that's correct?

1 A. No. Not at that time, no.

2 Q. He was also complaining, if  
3 you go over to the next page, on page 801715, that:

4 "DFO has done computer  
5 modelling - not released to  
6 the proponent."

7 Do you see that, 801715 at the  
8 top?

9 A. Yes.

10 Q. And as he's making that  
11 complaint to you, you're sitting there knowing that  
12 the computer modelling is wrong, that it's  
13 mistaken, that it is erroneous, and you aren't  
14 pointing that out to the proponent?

15 A. As I mentioned before, there  
16 were a number of things discussed in the meeting  
17 and I didn't relay that information to the  
18 proponent, no.

19 Q. Mr. President, could we stand  
20 down for about five minutes? I just want to confer  
21 with my colleagues to see if there are any further  
22 questions. I don't think there are, but I would  
23 just like to confer for one moment.

24 PRESIDING ARBITRATOR: Certainly,  
25 Mr. Nash. So we will have a five-minute break.

1                   MR. NASH: No more than five  
2 minutes.

3                   PRESIDING ARBITRATOR: Yes.

4 --- Recess at 2:35 p.m.

5 --- Upon resuming at 3:00 p.m.

6                   PRESIDING ARBITRATOR:

7 Mr. Chapman, you may relax for a moment. The  
8 Tribunal has used this break to discuss the  
9 indicative timetable for Thursday, because tomorrow  
10 we will have Mr. Smith and then -- but on Thursday,  
11 again, there will be quite an accumulation of  
12 things that we need to work our way through.

13                   You should have before you -- no.  
14 Dirk is going to --

15                   MR. PULKOWSKI: Would you like me  
16 to...

17                   PRESIDING ARBITRATOR: Yes.

18 Copies of an indicative hearing timetable for  
19 Thursday, which I am going to just read out and  
20 maybe explain briefly.

21 --- Mr. Pulkowski passes out copies of timetable.

22                   PRESIDING ARBITRATOR: This  
23 timetable, the first thing to say is that this  
24 timetable is based on the parties using the maximum  
25 time allotted for the closing statements and the

1 rebuttal and the sur-rebuttal. That is, three  
2 hours, minus one-half, et cetera.

3                   And the other point is that of  
4 course the Tribunal might have questions asked in  
5 the course of the, of your closing statements or  
6 rebuttal and/or rebuttals. And these questions  
7 will be, I mean, be taken from your time so to say,  
8 but only to a certain extent, which means if  
9 questions turn out to be more let's say  
10 substantive, then we would have some leeway at the  
11 end of that schedule.

12                   So we would start at 9:00 with the  
13 investor's closing statement; then have a coffee  
14 break of 15 minutes. And then investor would  
15 continue the closing statement, and that would get  
16 us to 11:45, that is two-and-a-half hours, that is  
17 your three hours, minus 30, plus 15 minutes for the  
18 coffee break.

19                   Then the lunch break would start  
20 at 11:45 and the lunch break would -- I hope you  
21 can live with that -- would be only 30 minutes, but  
22 I think 30 minutes should do it.

23                   So that the respondent would  
24 begin, start its closing statement at 12:15.

25                   Then again there would be a break

1 of 15 minutes in between.

2 The responding, the respondent  
3 would continue and that would get us to 3:15 where  
4 we would have a break of 30 minutes, just in order  
5 to give you a bit more time to prepare for the  
6 rebuttal, sur-rebuttal rounds.

7 Then we would have a rebuttal at  
8 3:45 for 30 minutes, 4:15 a break of 15 minutes,  
9 followed by the respondent's sur-rebuttal and that  
10 would get us to 4:45 closing.

11 We will try to come, to deal with  
12 as many housekeeping matters tomorrow, as many as  
13 possible, so very little would be left for 4:45.  
14 Then just the usual hugs and goodbyes and...

15 --- Laughter

16 PRESIDING ARBITRATOR: And that  
17 would be the end of the exercise. Do you have any  
18 questions?

19 MR. LITTLE: No.

20 MR. APPLETON: We think it is very  
21 helpful. I would point out that I assume that each  
22 side could decide how much time they would want to  
23 reserve of their allocated rebuttal time.

24 PRESIDING ARBITRATOR: Yes.

25 MR. APPLETON: We would just use

1 this as an indicative guideline. If there was to  
2 be an adjustment, it would be based on this as the  
3 process, it looks wonderful.

4 PRESIDING ARBITRATOR: You don't  
5 have to use your full time spans, of course.

6 MR. APPLETON: Yes.

7 PRESIDING ARBITRATOR: But this  
8 would be maximum, maximum times. And of course we  
9 would need to be reasonably strict on keeping it to  
10 the maximum times. Okay.

11 Fine. Thank you very much. Now,  
12 let's see, I think the parties, you don't have --  
13 so what is left is questions -- oh, right, sorry,  
14 Mr. Hebert.

15 MR. HEBERT: That's fine. I just  
16 have two questions so I think this would be very  
17 brief.

18 PRESIDING ARBITRATOR: Okay.

19 RE-EXAMINATION BY MR. HEBERT:

20 Q. Mr. Chapman, Mr. Nash this  
21 morning and this afternoon had many questions on  
22 setback distances.

23 Now, in your view, are potential  
24 changes to setback -- blasting setback distances a  
25 necessary and/or relevant consideration for the

1 decision that the Minister of the Environment needs  
2 to make when he is faced with a decision to refer a  
3 project to a review panel, that's been sent to him  
4 under section 21(b) of the CEAA.

5           A. Compared to the other issues  
6 that we are aware of with respect to the marine  
7 terminal, in fact Minister Thibault in his letter  
8 indicated concerns around impacts on fishing and  
9 tourism in the area and we were aware that many of  
10 those issues were related to the marine terminal  
11 itself. And so I wouldn't say it was a central  
12 issue with respect to the justification for  
13 referral.

14           Q. Thank you, Mr. Chapman. You  
15 may even have answered my second question. Because  
16 my second question referred to the context that you  
17 wanted to bring to your answer to a question by  
18 Mr. Nash. I think it was at 11:49 this morning  
19 where Mr. Nash asked you a question about the 500  
20 metre setback distance.

21                   And in answering that question,  
22 you were providing more context, and you were cut  
23 off when you were answering that question.

24                   So were these concerns that you  
25 just talked about in your view, were these, in your

1 opinion, were these issues also issues that could  
2 be considered by Minister Thibault in making a  
3 decision to refer a project under section 21(b)?

4 A. Indeed, the -- certainly we  
5 were aware of the concerns around the marine  
6 terminal itself, impacting on the Northern Right  
7 Whale.

8 The concerns being expressed  
9 around the impact on the marine terminal itself on  
10 commercial fisheries in the area, and on tourism as  
11 well, especially with respect to whale watching  
12 enterprises that were operating in the area.

13 Q. Thank you. I have no other  
14 questions.

15 PRESIDING ARBITRATOR: Thank you,  
16 Mr. Hebert. Do my colleagues have questions?

17 QUESTIONS BY THE TRIBUNAL:

18 PROFESSOR SCHWARTZ: Good  
19 afternoon. I think if I recall correctly -- and  
20 please correct me if I don't -- you mentioned that  
21 there would be another time and a place to do test  
22 blasting with respect to the blasting issues.

23 And if that is outside of your  
24 expertise or knowledge, feel free to let us know,  
25 but what in your view -- if the test blasting is

1 not done in the context of the isolated 3.9 hectare  
2 quarry and a Joint Review Panel starts, what is the  
3 time and place, modality to do a test blast?

4 THE WITNESS: Yes. So we knew two  
5 things. First, that there was a proposal for a  
6 test blasting for the 3.9 hectare quarry being  
7 proposed by Nova Stone Exporters, and then we also  
8 had this larger quarry and marine terminal being  
9 proposed by the Global Quarry Products.

10 In the project description  
11 submitted by Global Quarry Products, there is  
12 mention in that project description of test  
13 blasting that is necessary to generate data for the  
14 environmental assessment.

15 At the time the agency and  
16 Fisheries and Oceans were confused about the  
17 relationship between that 3.9 hectare quarry and  
18 the larger quarry project.

19 When we looked at the issue,  
20 knowing how contentious this project was in the  
21 community and that we were working with our  
22 provincial partners to get an environmental  
23 assessment process established, we were of the view  
24 that test blasting could be done, it needs to be  
25 brought forward to the attention of the review

1 panel at the minimum.

2                   As I mentioned before, we had a  
3 previous situation in Labrador with respect to  
4 supersonic flights. It was felt at the time that  
5 computer modelling wouldn't generate the data  
6 necessary for the environmental assessment and that  
7 essentially real life scenarios needed to be  
8 conducted. That was done as part of the  
9 environmental assessment process.

10                   This is what we anticipated for  
11 this particular project. And what we didn't see,  
12 though, however, is once we had the Joint Review  
13 Panel established, and the letter had been sent  
14 from Fisheries and Oceans to the proponent  
15 regarding setbacks for the test blasting, that in  
16 fact the proponent never came forward with a plan  
17 for test blasting. Or never intended to conduct  
18 it. So we never had the data actually being  
19 generated as part of the environmental assessment  
20 process.

21                   PROFESSOR SCHWARTZ: Okay. Thank  
22 you.

23                   Now, I think I also recall you  
24 said that "we did tell the proponent later about  
25 departmental views about setbacks."

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1 THE WITNESS: Yes.

2 PROFESSOR SCHWARTZ: There was  
3 controversy about as I understand it 500 metres if  
4 it is a water-based blast; 100 metres if it's a  
5 land-based blast.

6 THE WITNESS: Yes.

7 PROFESSOR SCHWARTZ: I thought I  
8 heard you say that you shared this information  
9 after the referral to the Joint Review Panel?

10 THE WITNESS: Right. Once -- the  
11 DFO actually communicated that information to the  
12 proponent once the review panel member themselves  
13 had been appointed.

14 PROFESSOR SCHWARTZ: Do you happen  
15 to remember, is there documentation on that that we  
16 have in your brief or material? Or where we might  
17 be able to -- or is that something that was done  
18 orally?

19 THE WITNESS: No, no. It was done  
20 by way of a letter.

21 PROFESSOR SCHWARTZ: Oh, okay.  
22 Thank you.

23 THE WITNESS: Yes.

24 PROFESSOR SCHWARTZ: We also heard  
25 some testimony about a controversy about whale

1 safety in which a Mr. Conway was involved.

2 Do you remember whether that  
3 departmental insight was shared with the proponent  
4 after the decision was made to refer?

5 THE WITNESS: No. I can't  
6 remember that, no.

7 PROFESSOR SCHWARTZ: Okay, thank  
8 you. Just one more question.

9 The focus of your affidavit had to  
10 do with what happened during the events around the  
11 time of the referral, and then there is some brief  
12 discussion at the end of your testimony about the  
13 consideration of the eventual output.

14 THE WITNESS: Yes.

15 PROFESSOR SCHWARTZ: Were you  
16 involved in the response to the recommendations of  
17 the joint panel?

18 THE WITNESS: Only one particular  
19 recommendation, and that is the recommendation the  
20 panel made to the Canadian Environmental Assessment  
21 Agency regarding the need to develop further  
22 guidance material on the issue of adaptive  
23 management.

24 And so I was the point of contact  
25 for that. And our policy group, within the agency,

1 led the response for that particular  
2 recommendation. But I was not involved with  
3 respect to the details in terms of the  
4 justification aspect of the environmental effects,  
5 no.

6 PROFESSOR SCHWARTZ: Thank you  
7 very much.

8 MR. HEBERT: Excuse me, Professor  
9 Schwartz. If I can maybe be of assistance, we  
10 found the letter that the witness just referred to,  
11 and you can find it -- it is actually a letter  
12 attached to an email and it is Exhibit R-531.

13 PROFESSOR SCHWARTZ: Thank you  
14 very much.

15 PRESIDING ARBITRATOR:  
16 Mr. Chapman, you are the one fact witness which is  
17 "closest" to the JRP, let's say, process, and so I  
18 have a few questions in that regard.

19 My first question is rather  
20 preliminary, and I hope you don't find it too  
21 nasty, because at the outset of your statement you  
22 made two corrections. And the first correction  
23 referred to paragraph 3 which originally read, so  
24 the last sentence:

25 "Subsequent to the

1 appointment of the JRP, my  
2 role as panel manager  
3 consisted of providing  
4 administrative and technical  
5 support to the JRP and  
6 assisting with the  
7 preparation of the panel  
8 report."

9 And your correction was: Please  
10 replace the preparation of the panel report with...  
11 so that it would read now, "...assisting with the  
12 drafting of the panel's EIS guidelines."

13 THE WITNESS: Correct, yes.

14 PRESIDING ARBITRATOR: My question  
15 is very simple: How it can be that you made that  
16 mistake?

17 THE WITNESS: You know, it is  
18 unfortunate. I apologize for that.

19 PRESIDING ARBITRATOR: No, no, no  
20 apologies, because to me that is a bit of a riddle.

21 THE WITNESS: Yes. It was an  
22 oversight on my part when this was drafted.

23 PRESIDING ARBITRATOR: But you  
24 wrote this yourself?

25 THE WITNESS: I am responsible for

1 the content, yes.

2 PRESIDING ARBITRATOR: Okay. So  
3 that was my first question.

4 The second question was: Was it  
5 an attractive thing for professors from Dalhousie  
6 to be appointed members of the JRP? Sub  
7 question: What remuneration did they get for their  
8 job?

9 THE WITNESS: Sure. I will deal  
10 with your second question first. \$650 a day for  
11 the Chair of the review panel and \$500 a day for  
12 the other two members.

13 When we were looking at candidacy  
14 for the review panel -- and review panels in  
15 general, we try to match the project with a certain  
16 sort of toolbox of expertise that individuals could  
17 bring forward.

18 In this particular case, because  
19 we knew we were dealing with issues in the ocean,  
20 we were looking for marine biologists or an  
21 oceanographer; because we had the quarrying  
22 component, we were looking for a geologist or  
23 somebody with that sort of background.

24 Because we were looking at  
25 community planning issues and concerns with the

1 community, somebody that either had a planning  
2 background or an administrative background.

3 With that in mind, what we did is  
4 started contacting our regional office and working  
5 with the province to try to find individuals who  
6 may be, number one, available, and number two,  
7 interested in sitting on this review panel.

8 And so that is how the short list  
9 of members were -- or candidates were developed.

10 So is it attractive? My  
11 experience has been with some review panels, our  
12 remuneration is not attractive and many people see  
13 it as a form of public service.

14 We have sometimes difficulties  
15 identifying individuals who are able to make  
16 themselves available for a particular length of  
17 time, you know, one to three years. It has been an  
18 impediment for us in the past.

19 PRESIDING ARBITRATOR: Okay, thank  
20 you. Next question: Did the members of the JRP  
21 have assistance or type of clerks available for  
22 the, let's say, rough work or...

23 THE WITNESS: Sure. So for each  
24 review panel that we have in place, we have a  
25 secretary that is managed by a panel manager, and

1 then individuals who report to the panel manager,  
2 who arrange everything from the contracts needed  
3 for court reporters, to flights arrangements; help  
4 type up letters, reports; things like that on  
5 behalf of the review panel.

6 PRESIDING ARBITRATOR: I mean I  
7 myself, and probably my colleagues, we have all  
8 been members of panels or courts or tribunals or  
9 what have you of the kind that, where you really  
10 had to do the work and draft it, right?

11 THE WITNESS: Yes.

12 PRESIDING ARBITRATOR: And then we  
13 have all been -- made the experience that there are  
14 other panels where other people do the work for  
15 you, and then submit you a nice draft and, et  
16 cetera. So what kind of --

17 THE WITNESS: You know, I can  
18 speak to my particular involvement, which -- and  
19 when the EIS guidelines were issued, this was a  
20 very hands-on panel.

21 This panel took its role very  
22 seriously. Read everything that was put before it.  
23 Developed all of their own questions, had  
24 particular views on everything from the schedule  
25 for the scoping meetings that were held to

1     appropriateness of the room, and things like that.  
2     So this was a very hands-on review panel.

3                     PRESIDING ARBITRATOR: From the  
4     way you describe the panel's work later in the  
5     report -- that is, later on -- I have the  
6     impression that you kind of remained close, I mean  
7     you had a good insight into how the panel worked.

8                     And my question would be, with  
9     regard to the actual panel report, I mean, who  
10    wrote the rough draft? Who wrote the draft?

11                    THE WITNESS: I wasn't involved in  
12    that. My understanding is that the panel members  
13    themselves are responsible for the content of the  
14    report, and --

15                    PRESIDING ARBITRATOR: Right.  
16    Responsible of course is one thing, but whether you  
17    actually got the text with which you could identify  
18    yourself more or less, or whether you actually had  
19    to sit down and write up that stuff.

20                    THE WITNESS: Sure. My  
21    understanding is that the panel members themselves  
22    did the writing.

23                    PRESIDING ARBITRATOR: In your  
24    affidavit in paragraph 54, it is said that, at the  
25    hearings, questions were asked by the Panel and the

1 various participants could not answer probably all  
2 of them immediately, but they undertook to respond.

3 Then it says:

4 "After all of the  
5 undertakings had been  
6 fulfilled, on October 13...  
7 the JRP determined" that  
8 matters had come to a close  
9 and that the panel submitted  
10 its report on October 22nd,  
11 which means that about one  
12 week after the last, let's  
13 say, questions had been  
14 answered, the final report  
15 was submitted. And, of  
16 course, a report of that kind  
17 would take time to be -- just  
18 be complete and look good, et  
19 cetera, et cetera.

20 THE WITNESS: Yes.

21 PRESIDING ARBITRATOR: And do you  
22 think that, it was the panel members themselves  
23 which, within a couple of days, inserted the  
24 information they got from the last let's say  
25 repliers to questions?

1 THE WITNESS: I mean, I can't,  
2 because I wasn't involved in this particular phase  
3 of the review, I can't speak specifically.

4 What -- I can tell you in a  
5 general sense, that when there's still outstanding  
6 undertakings, the panel will still be writing its  
7 report. And I can't say what in particular was the  
8 last undertaking that came in on the October 13th,  
9 2007. I can't say if it was a major or a minor  
10 undertaking.

11 PRESIDING ARBITRATOR: Of course  
12 it could be that only a couple, let's say minor,  
13 let's say, replies --

14 THE WITNESS: But I can tell you  
15 it is typical that the panel starts writing its  
16 report, filling in the framework, things like that,  
17 whilst information might still be waiting to come  
18 in.

19 PRESIDING ARBITRATOR: Okay. That  
20 gets me already to my last question, which relates  
21 to the activities between the report being brought  
22 to the attention -- the report being issued and the  
23 decision of the Minister to accept the report.

24 So we have heard some things that  
25 took place within that relatively short timespan.

1 THE WITNESS: Okay.

2 PRESIDING ARBITRATOR: And my  
3 question would be, do you have any information as  
4 to what kind of activity or exchange or  
5 conversation between applicants of a project took  
6 place in comparable instances where panel reports  
7 were made?

8 THE WITNESS: Sure. I can tell  
9 you that, in fact, as a general rule we advised the  
10 Minister of the Environment not to meet with  
11 proponents when there is an active decision under  
12 consideration.

13 So if that was your question, do  
14 ministers typically meet or converse with  
15 proponents of projects, once a panel report has  
16 been issued, our advice to ministers is that they  
17 should not have that interaction.

18 PRESIDING ARBITRATOR: So if let's  
19 say a proponent is convinced that certain arguments  
20 that it made were not adequately being dealt with  
21 or mistakes had been made, and they try to get in  
22 touch with the Minister, that was not regarded as  
23 desirable?

24 THE WITNESS: Well, I guess I need  
25 to differentiate between sort of a face-to-face

1 meeting versus all interested parties in a typical  
2 review write into decision makers. I mean, that  
3 does happen.

4                               In fact I recall, in fact, that  
5 Mr. Buxton -- we had a decision come out for a gold  
6 mine in British Columbia several months before the  
7 decision in Whites Point had come out, and he  
8 expressed concern over the government decision with  
9 respect to Kemess.

10                              So we do have individuals,  
11 proponents, environmental organizations writing to  
12 decision makers during that period of time.

13                              PRESIDING ARBITRATOR: Was it your  
14 impression that when the report came out, that the  
15 ministers were really greatly disappointed about  
16 the outcome, or did everybody think that things had  
17 fallen in place?

18                              THE WITNESS: No, I -- that would  
19 be a very difficult question for me to answer.

20                              PRESIDING ARBITRATOR: There must  
21 have been kind of a, how should I -- "stimmung",  
22 what is the -- sentiment around about --

23                              THE WITNESS: There were no  
24 concerns, as far as I am aware, expressed with  
25 respect to the content of the panel's report.



1 for all of our panel members. We have a panel  
2 member's guide. We talk to the panel members about  
3 conflict of interest and the perception of conflict  
4 of interest, how to interact with the general  
5 public during hearings.

6 We also give the panel members a  
7 briefing about the project, and talk to them about  
8 everything from remuneration to expected length of  
9 certain stages in the review process.

10 PROFESSOR MCRAE: Does that  
11 include the expectation of what they ought to cover  
12 in their report?

13 THE WITNESS: No. I mean, what we  
14 advise the panel members is, they have a terms of  
15 reference that are laid out by the Minister of the  
16 Environment and the expectation is that they fulfil  
17 the terms of reference and that the report reflects  
18 what the terms of reference has laid out.

19 PROFESSOR MCRAE: And in your  
20 experience in looking at reports of review panels,  
21 how widely do they vary in what they cover?

22 THE WITNESS: There is a wide  
23 variation due to I guess the nature of the  
24 jurisdiction that we might be harmonizing with.

25 So there might be additional

1 requirements of the other jurisdiction that might  
2 not be, say in the case of a federal-only review  
3 panel.

4 I can tell you too that some  
5 review panels have made recommendations to the  
6 federal government that have not been accepted by  
7 the federal government, or that recommendations are  
8 accepted in principle but not fully adopted.

9 This is the case for Voisey's Bay  
10 where the panel made a recommendation that the  
11 federal government could include land claims in  
12 negotiations prior to issuing any approvals for the  
13 project.

14 The federal government rejected  
15 that recommendation, and that goes to show that in  
16 fact governments aren't I guess beholding to the  
17 review panel or at least the content in the report.  
18 They're free to accept or reject, based on the  
19 information that is brought forward to them.

20 PROFESSOR MCRAE: And regardless  
21 of whether or not the panel recommends acceptance  
22 or rejection, does CEAA expect normally to see  
23 mitigating measures listed or included?

24 THE WITNESS: The panel has to  
25 come to a conclusion of whether or not there are

1 significant adverse environmental effects after  
2 mitigation measures are applied.

3 So, no, there does not need to be  
4 mitigation measures listed in the report.

5 The review panel can consider the  
6 information that is brought forward by the  
7 proponent and other intervenors in terms of those  
8 mitigation measures that are technically and  
9 economically feasible, but there is no requirement  
10 for the panel to list mitigation measures in the  
11 report.

12 PROFESSOR MCRAE: And when the  
13 recommendations in the Whites Point report, JRP  
14 report were seen, was it felt that the  
15 recommendations, some of the recommendations had  
16 nothing do with the mandate of the panel?

17 THE WITNESS: All I can speak to  
18 is those recommendations that were accepted by the  
19 federal government. So the federal government  
20 accepted the recommendations by the review panel.

21 PROFESSOR MCRAE: Thank you.

22 PRESIDING ARBITRATOR: One  
23 follow-up, again because we are kind of...

24 Has there been -- in Canadian  
25 practice, have there been cases where panel reports

1 were considered to be so insufficient that the  
2 panels were asked to give it back to improve them  
3 or new panels were formed, or all kinds of  
4 follow-up?

5                   THE WITNESS: Sure. There's been  
6 two court cases I can bring your attention to, the  
7 Cheviot coal mine project in Alberta, where the  
8 court found that the panel had been deficient on a  
9 number of areas about information-gathering and the  
10 fact that a document in that case had been  
11 submitted but hadn't been recorded in the public  
12 registry and the panel hadn't gone far enough in  
13 trying to gather information it deemed necessary.

14                   So in that case the panel had to  
15 go back and correct the deficiencies by essentially  
16 amending its report.

17                   We also have the Kearl oil sands  
18 project in Alberta. It is an open pit oil sands  
19 mine where the panel had made a conclusion  
20 regarding the potential environmental effects of  
21 the project, but the court had found that the panel  
22 had not substantiated how it arrived at that  
23 conclusion within the body of its report.

24                   So in that case, the panel was  
25 reconstituted and had to correct the deficiencies

1 by essentially issuing an addendum to its report.

2                   The Governor-in-Council also has  
3 the ability to request additional information from  
4 a review panel prior to issuing its response to the  
5 report. And to the best of my knowledge, that has  
6 not been done.

7                   PRESIDING ARBITRATOR: Have there  
8 been cases where review panels have said, no, and  
9 the executive or the government has, let's say,  
10 implemented the project despite the negative  
11 outcome?

12                   THE WITNESS: Sure. I mean, to be  
13 clear, the mandate for a CEAA-only review panel is  
14 not to say "yes" or "no" to the project. It is  
15 simply to advise whether or not federal decisions  
16 can be exercised in relation to it.

17                   I am not aware of a government  
18 response that essentially overturns any of the  
19 conclusions regarding the significance of the  
20 environmental effects.

21                   The Mackenzie gas project is  
22 notable in that the review panel made numerous  
23 recommendations to government, and to the best of  
24 my knowledge, about 20 or 30 percent of those were  
25 not -- were rejected by the government in

1 responding to the report.

2 PRESIDING ARBITRATOR: Thank you  
3 very much.

4 PROFESSOR SCHWARTZ: If I could  
5 just follow up on your answers to one of my  
6 questions. And if this is too hypothetical or  
7 speculative, just let me know.

8 But you mentioned coming forward  
9 and proposing a test blast.

10 So is that in a sense of coming  
11 forward and applying for a Fisheries Act license to  
12 do a test blast? Or informal consultation with DFO  
13 to see if it is consistent with the DFO blasting  
14 guidelines? Is there any insight you can give us?

15 THE WITNESS: I consider that to  
16 be separate. In fact, we have a situation right  
17 now in British Columbia for the Ajax mine, where in  
18 fact this very issue is coming to the forefront  
19 where this mine is located next to the City of  
20 Kamloops. It is actually within the city limits of  
21 Kamloops, and there is concerns being raised by the  
22 public around the effects of blasting on quality of  
23 life, noise, dust, et cetera.

24 And so there is the question about  
25 whether or not one large test blast should be done

1 as part of the environmental assessment process, or  
2 several small.

3 So this is the type of, type of  
4 issue that is properly dealt with in the  
5 environmental assessment context, because you're  
6 trying to determine what the impacts will be of  
7 blasting.

8 And that was the position that the  
9 Agency took in the case of Whites Point, that if we  
10 need to have this type of invasive testing done, at  
11 the minimum, the review panel should be aware of  
12 the type of blasting that is being proposed and the  
13 public should be aware of that, as well.

14 PROFESSOR SCHWARTZ: I am just  
15 wondering, if the proponent wants to do that and  
16 they don't want to risk getting charged or  
17 something, how do they do that?

18 THE WITNESS: That's a  
19 hypothetical question.

20 PROFESSOR SCHWARTZ: That's fine.

21 THE WITNESS: I am not sure I can  
22 answer that one.

23 PROFESSOR SCHWARTZ: That's fine.

24 Thank you.

25 PRESIDING ARBITRATOR: Okay. No

1 further questions from the Tribunal.

2 Any follow-up on the part of  
3 the...

4 MR. NASH: None from the  
5 claimants, Mr. President.

6 PRESIDING ARBITRATOR: No?

7 MR. HEBERT: None from the  
8 respondent.

9 PRESIDING ARBITRATOR: Thank you.  
10 If I am correct, that brings us to the end of this  
11 afternoon's program. Lots of free time.

12 [Laughter]

13 PRESIDING ARBITRATOR: Okay. So  
14 we conclude this Day 6 of the hearings, and we will  
15 meet again tomorrow at 9:30 to hear  
16 Mr. Smith. Okay.

17 And this is going to be Mr. Smith  
18 and then at some stage the issue will arise of the  
19 so-called, I don't like -- I mean, the term  
20 "hot-tubbing" is simply -- expert conferencing, but  
21 I think the Tribunal's view is we cannot really  
22 tell you what we think about that, about the  
23 necessity, until we have heard Mr. Smith. I hope  
24 that will work for you.

25 MR. APPLETON: Mr. President, we

1 will have our two experts available at the end of  
2 Mr. Smith's testimony, and then the Tribunal can  
3 decide.

4                               So we have made arrangements to  
5 have Mr. Rankin come back from Ottawa, and  
6 Mr. Estrin will be returning here so that you can  
7 decide at that point if you would like to have the  
8 experts' conference or not.

9                               PRESIDING ARBITRATOR: Okay.  
10 Thank you very much, and have a nice evening.  
11 --- Whereupon the hearing adjourned at 3:33 p.m.,  
12 to be resumed on Wednesday, October 30, 2013 at  
13 9:30 a.m.

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