

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

BETWEEN:

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

Claimants

- and -

GOVERNMENT OF CANADA

Respondent

TRANSCRIPT OF PROCEEDINGS
HELD BEFORE JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),
PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ
held at the offices of Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario
on Tuesday February 20, 2018, at 9:31 a.m.

VOLUME 2 - FULL TRANSCRIPT {REVISED}

CONDENSED TRANSCRIPT WITH WORD INDEX

APPEARANCES:

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ALSO PRESENT:

Lorinda Edmunds, Alison Burns, Raman Bath, Chelsea
MacDonald, Annie Ronen, Tyler Lalande, Darian
Parsons, Benjamin Tait, Derek Hehn

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1 Toronto, Ontario,
2 --- Upon resuming on Tuesday, February 20, 2018
3 at 9:31 a.m.
4 DR. PULKOWSKI: Good morning
5 everyone. Before we go on the record, just a quick
6 housekeeping matter the tribunal has asked me to
7 take up with the parties.
8 I'd just like to know that today, as
9 anticipated, we do not have any viewer in the public
10 viewing room and we've thus asked the technicians to
11 turn off the feed to the public viewing area.
12 Should that change during the course
13 of the day, we'll certainly let you know but for now
14 we would expect that nobody is in the room next door.
15 The tribunal would still suggest that
16 we continue to identify confidential information to
17 the extent that that is possible in the course of the
18 direct and cross-examination because that will
19 significantly facilitate the editing of the
20 transcript and of the videos later. But certainly
21 there would be a scope for making small amendments
22 and extending or limiting confidentiality later on if
23 that were necessary. Thanks.
24 PRESIDING ARBITRATOR: This having
25 been said, we will open the second day of the

1 hearing.
2 We are going to have the
3 cross-examination of claimants' witnesses Mr.
4 Clayton, Mr. Forestieri and Mr. Estrin and I think I
5 will give the floor to Mr. Nash for the direct.
6 MR. NASH: Thank you, Judge Simma.
7 Good morning.
8 PRESIDING ARBITRATOR: Before -- not
9 to forget that the declaration that witnesses will
10 have to...
11 MR. NASH: So, our first witness is
12 Bill Clayton who we would call up now.
13 PRESIDING ARBITRATOR: Okay, yes,
14 please.
15 MR. CLAYTON: Good morning.
16 PRESIDING ARBITRATOR: Good morning,
17 Mr. Clayton. You should find -- you have before you
18 the declaration and could I ask you to read it
19 please.
20 MR. CLAYTON: I solemnly declare upon
21 my honour and conscience that I will speak the
22 truth, the whole truth and nothing but the truth.
23 AFFIRMED: RICHARD CLAYTON
24 PRESIDING ARBITRATOR: Thank you very
25 much. Mr. Nash.

1 MR. NASH: Thank you, Judge Simma.
2 EXAMINATION IN-CHIEF BY MR. NASH:
3 Q. You are William Richard Clayton?
4 A. Yes, I am.
5 Q. And you've signed two statements
6 in the damages phase of this arbitration?
7 A. Yes.
8 Q. And your first witness statement
9 is December 15th, 2016 and your second is
10 August 21st, 2016 -- 2017?
11 A. Yes, it is.
12 Q. And you are still operating the
13 Clayton Group of companies along with your brothers
14 Doug and Dan?
15 A. That's true.
16 Q. And the Clayton Group is still a
17 family business, owned and operated by you and your
18 brothers?
19 A. Yes, it is.
20 Q. And there are members of the next
21 generation working in the Clayton Group; is that
22 correct?
23 A. Yes, my -- two of my three
24 children work there and my brother has a child that
25 works there, as well as her husband.

1 Q. And your two children who work
2 there are Casey and Jennifer?
3 A. Yes.
4 Q. What does Casey --
5 MR. SCOTT LITTLE: Excuse me, Judge
6 Simma, I think we are already diverting from the
7 procedural order with respect to the introduction of
8 the witness. It's supposed to be a brief
9 introduction of the witness and any clarifications
10 or corrections to witness statements and we're
11 getting into evidence that I'm not even aware of as
12 having been mentioned in the witness statements.
13 MR. NASH: It's a brief introduction.
14 Just to give some --
15 PRESIDING ARBITRATOR: It's not going
16 going to be --
17 MR. NASH: It's ten seconds.
18 Q. So your son Casey, what does he
19 do for the Clayton Group of Companies?
20 A. He works in the administration
21 office with me.
22 Q. What does your daughter Jennifer
23 do?
24 A. She's in sales.
25 Q. Your father is Bill Clayton

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1 Senior?
2 A. Yes, he is.
3 Q. Does he still go to the office?
4 A. Yes, he goes in every day.
5 Q. And how does he get there?
6 A. I drive him in. He's 89.
7 Q. Thank you very much, Mr. Clayton,
8 those are my questions.
9 PRESIDING ARBITRATOR: My guess is
10 that Mr. Clayton doesn't have any corrections to
11 the -- witness.
12 MR. NASH: That's correct.
13 CROSS-EXAMINATION BY MR. LITTLE:
14 Q. Good morning, Mr. Clayton.
15 A. Good morning.
16 Q. My name is Scott Little. I'm
17 counsel for the Government of Canada. We met back
18 in the liability phase of the arbitration. We met
19 in the elevator last night. I recognize that you
20 gave testimony back in 2013 and you know how this
21 all works, but just so we're on the same page. I'm
22 going to ask you a few questions so I can understand
23 the fact testimony that you've provided in your
24 witness statements.
25 If you don't understand a question,

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1 please let me know and I can repeat it or rephrase
2 it.
3 We've put a small binder of documents
4 in front of you. These are documents that I'm going
5 to be asking you questions about today, though if we
6 need a different document to understand something,
7 we can also have it pulled up.
8 Do you have your witness statements
9 with you, sir?
10 A. No, I did not bring anything with
11 me.
12 Q. I think we can provide you with a
13 copy.
14 When I refer to documents in the
15 binder that's this front of you, I'll be noting the
16 tab number in the binder and the exhibit number for
17 the record. Okay? And just so you know and Mr.
18 Nash knows, while I have a few questions that would
19 be classified as public, I anticipate it will mostly
20 be classified as confidential and we'll be switching
21 into shortly probably for the duration.
22 So I want to just first start off,
23 Mr. Clayton, by going over some of the corporate
24 entities that we've read about in the claimants'
25 written materials so I have a handle on those.

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1 So first off, the Clayton Group of
2 Companies, now that's -- that group of companies was
3 the group of companies started by your father,
4 correct?
5 A. Yes, my father started it back in
6 very early '50s.
7 Q. And it's the largest supplier of
8 ready-mix concrete in the State of New Jersey?
9 A. Yes, we are.
10 Q. All right. And the Clayton Group
11 operates a number of concrete plants throughout New
12 Jersey; right?
13 A. Yes, 11 or 12.
14 Q. Twelve plants --
15 A. Yes.
16 Q. -- in the State? And it
17 manufactures concrete products in these plants;
18 right?
19 A. Yes, ready-mix concrete.
20 Q. Does it manufacture any other
21 types of concrete products?
22 A. No, it's -- our concrete plants
23 are ready-mix concrete plants.
24 Q. Now another company is
25 Bilcon of Delaware. The Clayton Group of Companies

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1 includes Bilcon Delaware, right?
2 A. Yes.
3 Q. And Bilcon of Delaware was
4 incorporated in 2002?
5 A. Approximately, yes.
6 Q. And your brothers Douglas Clayton
7 and Daniel Clayton are the shareholders along with
8 yourself of Bilcon of Delaware; correct?
9 A. That is correct.
10 Q. Okay. Let's move to Bilcon of
11 Nova Scotia. So Bilcon of Delaware was the sole
12 shareholder in Bilcon of Nova Scotia; correct?
13 A. Yes, that is correct.
14 Q. Okay. And Bilcon of Nova Scotia
15 was incorporated in Nova Scotia in 2002?
16 A. Yes.
17 Q. And the purpose of Bilcon of Nova
18 Scotia was to establish and then operate the Whites
19 Point Quarry and Marine terminal; correct?
20 A. Yes, it was.
21 Q. All right. There's another
22 company in the Clayton Group that you refer to in
23 your witness statement that I want to ask some
24 questions about and it was called "Amboy" Amboy
25 Aggregates; is that correct?

1 A. Yes, Amboy Aggregates was a joint
2 venture located in South Amboy, New Jersey which
3 mined sand off the coast. We were the only company
4 on the east coast that mined off the coast.

5 Q. Okay. Can you turn to -- it's in
6 your binder at Tab 2 and that's paragraph 27 of the
7 first witness statement of Tom Dooley. I'm just
8 taking you there because Mr. Dooley provides some
9 information about how Amboy fits in.

10 Now, in paragraph 27 Mr. Dooley
11 describes Amboy aggregates and if you look at the
12 second sentence of paragraph 27, as he states:

13 "It is the principal -- Amboy
14 Aggregates principle business was to supply natural
15 sand products for use in the production of concrete
16 to the New Jersey market, particularly in northern
17 New Jersey."

18 Is that on an accurate description of
19 what Amboy did?

20 A. Amboy Aggregates, South Amboy is
21 based in north Jersey and they definitely sold a lot
22 of sand in north Jersey but they also sold a lot of
23 sand by barge to barge customers in New York City.

24 Q. All right. Looking at the first
25 sentence of paragraph 27, this, I think confirms

1 something that you mentioned earlier. Mr. Dooley
2 writes that Amboy was formed in 1989 as a joint
3 venture which you told me, and that joint venture
4 was between Clayton Materials and a company named
5 Great Lakes Dredge and Dock Company, would that be
6 accurate?

7 A. Yes, Great Lakes was 50 per cent
8 owner and they were out of Chicago.

9 Q. Okay.

10 A. They were actually there before
11 us with another partner and we in '89 bought out
12 their other partner.

13 Q. Now, Clayton Materials and I
14 believe the full name of that company is Ralph
15 Clayton & Sons Materials; is that correct?

16 A. Ralph Clayton & Sons is the
17 concrete company that we run.

18 Q. Okay. Would that be Clayton
19 Materials then?

20 A. Materials is another company.

21 Q. All right. So, when Mr. Dooley
22 is referring to Clayton Materials in paragraph 27,
23 that's a different company than than Ralph Clayton &
24 Sons Materials; is that correct?

25 A. Yes, I -- that is a company that

1 was the partner in Great Lakes Dredge and Dock --
2 I'm sorry, in Amboy Aggregates.

3 Q. Clayton Materials was?

4 A. Yes.

5 Q. And Clayton Materials is
6 different than Ralph Clayton & Sons Material; is
7 that correct?

8 A. Yes, another LLC.

9 Q. All right. To be clear, I think
10 you were clear about that, great Lakes Dredge and
11 Dock Company was not owned in any way by the Clayton
12 Group?

13 A. No, that's a large -- one of the
14 largest dredging companies in the world out of
15 Chicago.

16 Q. This would be where I'd turn to
17 confidential.

1 --- CONFIDENTIAL SECTION BEGINS AT 9:43 A.M.
2 BY MR. SCOTT LITTLE

3 Q. If you could turn please to Tab
4 3, sir. This is Exhibit C-1050 for the record and
5 it is the Amboy Aggregates Joint Venture Agreement.

6 If you look at the first line it
7 appears that the Joint Venture Agreement is dated
8 January 1989; is that correct?

9 A. Yes, that's what it says.

10 Q. Okay. If you can turn to page
11 1050-006.

12 [REDACTED SECTION]

1 [REDACTED]
 2 Q. All right. There is another
 3 company in the Clayton Group that we see mentioned
 4 lots in the written materials and that is including
 5 at paragraph 24 of your witness statement. You
 6 don't have to go there right now but that company is
 7 called New York Sand & Stone. And I want to just
 8 get a bit of an understanding of how New York Sand &
 9 Stone fits into the picture if we could.

10 If you could turn to paragraph 32 of
 11 Mr. Dooley's witness statement and again that is at
 12 Tab 2 of your binder.

13 A. Thirty-two.

14 Q. Now, Mr. Dooley, he was the sales
 15 and marketing manager of New York Sand & Stone;
 16 correct?

17 A. Yes, Tom Dooley was New York Sand
 18 & Stone. He was the one that made it work.

19 Q. And in paragraph 32 if you look
 20 at the first sentence, Mr. Dooley states that:

21 "New York Sand & Stone was formed
 22 in 1998 by Amboy Aggregates and a
 23 company by the name of New York
 24 Sand."
 25

Is that accurate?

1 [REDACTED]

10 Q. So New York Sand was a joint
 11 venture then between Amboy Aggregates which the
 12 company we just discussed and another company called
 13 New York Sand?

14 A. Yes.

15 Q. If we could turn to Tab 4 which
 16 is Exhibit C-1015.

17 And this document is entitled
 18 "Operating Agreement of New York Sand & Stone." If
 19 you could turn, please, sir, to page 15 of that
 20 agreement. I'm sorry, page 15 on the actual
 21 agreement itself.

22 [REDACTED]

1 [REDACTED]

13 [REDACTED]

1 [REDACTED]

9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED] Can you turn please to your
 20 witness statement at paragraph 4. At paragraph 4
 21 you note:
 22 "We've been importing coarse
 23 aggregates from the Bayside
 24 Quarry in New Brunswick for
 25 mixing with our fine aggregates
 at our facility in Amboy, New
 Jersey and for sale through your
 New York Sand & Stone facilities
 in the New York City market."
 And then I'll look to paragraph 5 and
 in particularly last sentence of paragraph 5, you
 note that:
 [REDACTED], so we were
 looking to secure our own

1 long-term supply of high quality
 2 stone."
 3 [REDACTED]
 4 [REDACTED] Now, the Bayside Quarry was operated by a
 5 company called Atlantic Coast Materials too?
 6 A. I believe so.
 7 Q. Well, maybe we can turn to
 8 paragraph 31 of Mr. Dooley's witness statement,
 9 which is at Tab 2 of your binder.
 10 At paragraph 31 of Mr. Dooley's
 11 statement, Mr. Dooley states that:
 12 "In the late 1990s, Amboy
 13 Aggregates found an alternate
 14 source of supply of grit in
 15 Canada from Atlantic Coast
 16 Materials which operated the
 17 Bayside Quarry in New Brunswick."
 18 [As read.]
 19 Do you agree that's an accurate
 20 statement?
 21 A. Yes. Tom would definitely know
 22 the names -- Mr. Dooley.
 23 Q. So Bayside was operated by
 24 Atlantic Coast Materials. My understanding then is
 25 that New York Sand & Stone was in the early 2000s

1 being supplied with aggregate from a quarry that is
 2 the Bayside Quarry
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
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 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] Q. I have a couple of more questions
 5 on New York Sand & Stone and these relate to its
 6 purpose vis-a-vis the Whites Point Project.
 7 If you could turn to paragraph 51,
 8 please, of Mr. Dooley's statement. Actually
 9 paragraph 50, I'm sorry. Here Mr. Dooley states:
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [As read.]
 19 Is that an accurate statement?
 20 A. I would like to think so.
 21 Q. In fact, Mr. Dooley in paragraph
 22 51 notes that:
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

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[REDACTED]

A. Yes, our quarry operator that we intended to run our quarry, John Wall, we had known for a long time and he was highly capable and at one point I think he built a quarry in New Jersey from a million tons, probably or maybe half a million tons up to maybe the eighth largest quarry in the country. So, he was extremely qualified and he was going to be our quarry superintendent.

Q. Let's discuss some of the planning, that you note in your witness statement, went into the Whites Point Quarry Project. I want you to turn, please, to paragraph 31 of your first witness statement.

In paragraph 31 you note that:

[REDACTED]
The Whites Point rock is of very good quality.
[REDACTED]
and the site

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offered great longevity." [As read.]

Do you see that?

A. Yes.

Q. Okay.

[REDACTED]

Q. If you could turn to paragraph 32, I note you state that

[REDACTED]

and then you refer to a pro-forma. Do you see the reference to the pro-forma?

A. Yes.

Q. And then the second sentence at paragraph 32 provides that the pro-forma:

"Sets out the project's operating costs that would have been incurred and the revenue you

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would have earned from the sales into New York in the first five years of operating the quarry."

Correct?

A. Yes.

Q. And the third sentence in paragraph 32 you note that you:

[REDACTED]

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[REDACTED]

Q. Correct, okay. I want to turn to

1 the pro-forma that you mentioned in 32 at Tab 5 and
2 it is Exhibit C-1046 for the record.

3 If we look at the front page of the
4 pro-forma that sets out the operating costs and
5 revenues you would have incurred, the date on the
6 pro-forma is December 7th, 2016; correct? Front
7 page?

8 A. Oh, yes. Yes.

9 Q. So this pro-forma is not a
10 document that was prepared back in the planning
11 stages of the Whites Point Project; correct?

12 A. That's correct.

13 Q. This document was prepared for
14 the purposes of this phase of the arbitration?

15 A. Yes.

16 Q. Okay. Now, I understand that the
17 pro-forma was prepared by a Mr. Dan Fougere; is that
18 right?

19 A. Yes, Mr. Fougere was a person who
20 worked for, like, 15 years for Martin Marietta at
21 their Nova Scotia quarry. And what I've seen in
22 these -- in this process is that the quarry that he
23 ran for Martin Marietta

24 [REDACTED] shipped down the east coast to the US.

25 Q. Okay. Mr. Fougere has filed two

1 witness statements in this arbitration I believe.

2 Can you turn to Tab 6 which is the
3 first witness statement of Mr. Fougere.

4 At paragraph three Mr. Fougere says
5 from 1998 to 2011, as you've noted, he says:

6 "I was administrator manager of
7 the Porcupine Mountain Tidewater
8 Quarry located in Auld's Cove,
9 Nova Scotia owned by Martin
10 Marietta." [As read.]

11 So Martin Marietta I'll ask a question
12 about them, [REDACTED]

[REDACTED]

16 Q. And then looking at paragraph 10
17 of Mr. Fougere's statement, he says:

18 "Since 2011 I have served as
19 director of finance for the
20 Sisters of St. Martha in
21 Antigonish, Nova Scotia."

22 So just looking at these two
23 paragraphs during the time in which Bilcon was
24 planning, he was never employed by Bilcon group of
25 companies; is that correct?

1 A. No, he never worked for us.

2 Q. Let's look back at the pro-forma
3 at Tab 5. I'd like you to turn to page 3 of the
4 pro-forma, 1046-003.

5 At the top of that page under the
6 heading "Annual volumes", and that's production and
7 shipment volumes. Here we see that you say you
8 planned to produce and ship certain volumes from the
9 Whites Point Project in the first five years of the
10 project. Those volumes are reflected there on the
11 production and shipment rows.

12 Now we were interested in the back up
13 for these numbers and we made information requests
14 for this and other data in the claimants' witness
15 statement during the arbitration. And if you could
16 turn please to Tab 7 of your binder, which is
17 Exhibit C-1342 for the record. Are you there? Are
18 you at the front page?

19 A. Yes.

20 Q. So, this is a letter from Mr.
21 Nash to the Tribunal setting out the claimant's
22 responses to Canada's information request. I'd like
23 you to turn to page 11 please.

24 [REDACTED]

1 [REDACTED]

10 [REDACTED]

13 A. I didn't know that but yes,
14 that's what it says.

15 Q. If you look back to paragraph 32
16 of your witness statement, in the beginning of the
17 third sentence you state -- sorry I'll wait for you.

18 There in paragraph 32 beginning of
19 the third sentence you state:

20 [REDACTED]

21 [REDACTED] " [As read.]
22 Do you see that?

23 A. Yes.

24 Q. So beyond paragraph 32 and the
25

1 pro-forma, is the annual volume data in the
2 pro-forma based on any other source document?
3 A. Say that again, sir?
4 Q. Beyond what's in paragraph 32 and
5 what's in the pro-forma, is the annual volume data
6 showing in the pro-forma based on any other source
7 document?

8 A. I don't know.
9 Q. You don't know?
10 A. No.
11 Q. Let's look at -- I want to stay
12 on 32, paragraph 32. In the third sentence of
13 paragraph 32 you state:
14

[REDACTED]

24 Do you see that?
25 A. Yes, I do.

1 Q. If you can turn please to Tab 9
2 of your binder, and that's a documents that Exhibit
3 R-7.17 for the record.

4 This is a business plan for the
5 Whites Point Quarry prepared by Clayton Concrete.
6 And looking at the front page, it
7 appears to have been prepared in April of 2004;
8 correct?

9 A. Yes.
10 Q. If you could turn three pages in
11 on this document, please.
12 A. 504?

13 Q. Sorry, 502. It is the third page
14 of the document. You will see a heading entitled
15 "Operations" and it provides:
16

[REDACTED]

1 [REDACTED]

10 Q. Okay. Let's turn to Tab 10
11 please, which is Exhibit R-581. This tab contains
12 excerpts from Bilcon's Revised Project Description
13 for the Whites Point Project.

14 It is dated November 2006. If you
15 could please turn to page 19 which is the first
16 document, the first page in. We've just provided
17 excerpts.

18 A. The first page?
19 Q. Yes. One second. Actually, it
20 is page 19 I would like you to go to, sir. Are you
21 there?
22 A. Yes.
23 Q. If you could read the first two
24 sentences of the second paragraph. I'm sorry, the
25 third paragraph starting:

1 "Land-based..."
2 "Land-based [quarries] of this
3 type of massive, hard volcanic
4 flow of basalt rock generally
5 includes drilling and blasting
6 rock faces. This means is
7 considered to be the industrial
8 standard for this type of basalt
9 to produce the proposed
10 production of 2 million tons per
11 year." [As read.]

12 Q. Okay, can you please turn to page
13 40 of this document?

14 A. Yes.
15 Q. If you read the second sentence
16 of the paragraph beginning with the words "Various"
17 or the word "Various". It is the second-last
18 paragraph on the page?

19 A. The second sentence?
20 Q. Yes.
21 A. "Approximately 40,000 tons is
22 planned to be shipped each week for a total of
23 2 million tons per year."

24 Q. Okay, and then on page 96 of this
25 document under the heading "Stationary equipment",

1 if you could read the first sentence please?
 2 A. "The operation of the quarry will
 3 require stationary equipment to process and load the
 4 projected 2 million tons of aggregate production per
 5 year."
 6

7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
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 14 [REDACTED]
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8 Q. Let's turn to paragraph 28 please
 9 of your first witness statement. Are you there?
 10 A. Yes.
 11 Q. The first paragraph of
 12 paragraph -- sorry, the first sentence of paragraph
 13 28 you state:
 14 "We had experience with other
 15 quarries so we knew what we were
 16 getting into." [As read.]
 17 Now I'd like you to look at paragraph
 18 18 of your second statement please. I'm looking at
 19 the second sentence of paragraph 18 and you state:
 20 "We had extensive experience in
 21 operating aggregate operations.
 22 We were already importing stone
 23 from Canada for sale in New York
 24 City, and for use in our sand
 25 dredging operations." [As read.]
 A. Is that number 18?

1 Q. By my count it's paragraph 18 of
 2 your second statement.
 3 A. I'm sorry, I'm in the wrong
 4 place.
 5 Q. I will give you a chance to get
 6 there.
 7 This is your second witness statement
 8 in that book.
 9 A. Is it on page 5?
 10 Q. Yes, it is.
 11 A. Okay.
 12 Q. So second sentence of paragraph
 13 18. You state:
 14 "We had extensive experience in
 15 operating aggregate operations.
 16 We were already importing stone
 17 from Canada for sale in New York
 18 City, and for use in our sand
 19 dredging operations." [As read.]
 20 Can you see that?
 21 A. Yes. Yes.
 22 Q. Turn please to Tab 11 of your
 23 binder and that's Exhibit C-154. This is the
 24 June 16th, 2007 transcript of your testimony at the
 25 JRP hearing.

1 was one that you bought into; correct?
 2 A. Yes, we were [REDACTED] partners
 3 with Millington Quarries [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 Q. All right. So I want to touch on
 9 Riverdale in a couple of minutes but the Whites
 10 Point Project would have been the first stone quarry
 11 that the Claytons would have constructed, developed
 12 and operated; correct?
 13 A. Yes, we believe in hiring the
 14 best people we can get and letting them do their
 15 job. That's why we had a professional design it
 16 with John Wall and John Wall was going to be the
 17 operator of it. He was going to be there
 18 day-to-day, running the business.
 19 Q. Okay. Now, you mentioned the
 20 Riverdale Quarry. This was a quarry in New Jersey;
 21 correct?
 22 A. Yes.
 23 Q. And it wasn't a coastal quarry?
 24 A. No.
 25 Q. And it had no marine terminal or

1 international shipping component to it; correct?
 2 A. No, it did not.
 3 Q. Okay. Can you turn please to Mr.
 4 Dooley's statement at Tab 2 of your binder. I'd
 5 like you to turn to please to page 6.
 6 Here Mr. Dooley provides a bit of
 7 history about the Riverdale Quarry. At paragraph 23
 8 he states:
 9 "In 1995 the Claytons acquired an
 10 interest in the Riverdale Quarry
 11 through their affiliated company
 12 Amboy Aggregates."
 13 Is that correct?
 14 A. I'm not sure of that. I don't
 15 remember it that way. I'd have to ask Joe
 16 Forestieri.
 17 Q. Okay. so you think it may have
 18 been another...?
 19 A. [REDACTED]
 20 Q. Okay. But are you -- do you
 21 agree with the fact that Amboy Aggregates was in on
 22 this project [REDACTED]
 23 A. I don't remember it that way, no,
 24 I'd have to ask.
 25 Q. You don't remember that.

1 A. Yeah.
 2 Q. But it was either Amboy or
 3 another company in the Clayton Group bought into
 4 this existing quarry; correct?
 5 A. Yes, I believe the name was
 6 Riverdale Quarry.
 7 Q. And then if you look at paragraph
 8 25, it states that:
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 Correct?
 13 A. That's correct. [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
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 25 [REDACTED]

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 3 [REDACTED]
 4 [REDACTED]
 5 Q. Let's go back to your first
 6 statement again, please. I'm looking now at
 7 paragraph 30, Mr. Clayton.
 8 A. Page 8?
 9 Q. Yes, it's at page 8. In
 10 paragraph 30 you note:
 11 "We were very confident of the
 12 market demand for rock from
 13 Whites Point and that [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [As read.]
 18 And you note also that there were
 19 other major markets down the entire east coast;
 20 right?
 21 A. Yes, [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

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[REDACTED]

Q. Okay. Then if you look at paragraph 31, if you look at the second sentence it kind of echoes what you said. It says:

"The Whites Point rock is a very good quality.

[REDACTED] and the site offered great longevity."

Q. Can you turn please to the first statement of Tom Dooley again at Tab 2 of your binder?

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Again, Mr. Dooley, he was the sales and marketing manager, I think you mentioned that, of New York Sand & Stone; correct?

A. That was his title, but he actually ran the docks, yes.

[REDACTED]

Q. If you could look to paragraph 51 -- actually we've already looked at paragraph 51 in Mr. Dooley's first statement where he says

[REDACTED]

So rather than 51, I'd like you to

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look at paragraphs 95 and 96, please. On paragraph 95 it appears Mr. Dooley is referring to

[REDACTED]

[As read.]

And then at paragraph 96 he notes:

[REDACTED]

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[REDACTED]

Q. Okay. Can you turn back to Tab 9, please?

This is the business plan. If you go in one page, please, right after the cover page. If you look about two-thirds of the way down the page, it provides that

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 A. It's not middle paragraph.

5 Q. Well, it's hard to tell what a

6 paragraph is here. But it is a paragraph that

7 starts:

8 [REDACTED]

9 A. I'm in the wrong place.

10 Q. It is just one page in right

11 after the cover page, sir.

12 A. Okay.

13 Q. And you can see it on the screen,

14 if that makes it easier.

15 A. Okay. Okay, I have it.

16 Q. So:

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] [As read.]

23 Do you see that?

24 A. Yes.

25 Q. And then if you go seven pages in

1 and I'll give you the page number. It is BIL012506.

2 And under a heading at the bottom of the page called

3 "Revenues"?

4 A. Yes.

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 Q. Let's look at -- I want to look

9 at a couple of documents that were prepared for the

10 JRP process. And I'd like you to look please to Tab

11 12.

12 Tab 12 is an excerpt from volume 1 of

13 the Environmental Impact Statement prepared by

14 Bilcon in 2004 for the EA of the Whites Point

15 Project and it is Exhibit R-575 for the record.

16 I have provided some excerpts from

17 this doc. And if you could look to page four, four

18 paragraphs down, it states that:

19 "Bilcon will ship by common

20 carrier the crushed rock and

21 grits to New Jersey for use by

22 its parent company, Clayton

23 Concrete Block and Sand in the

24 manufacture of concrete and

25 concrete block." [As read.]

1 Do you see that?

2 A. Yes, I do.

3 Q. Can you turn please to --

4 [REDACTED]

5 [REDACTED]

6 Q. I want you to turn to Tab 13,

7 please. Turn in one page. For the record, this is

8 another part of the EIS.

9 A. Uh-hmm.

10 Q. Right under the heading it

11 states -- the heading 10.04 states:

12 "The development of the Whites

13 Point Project by Bilcon is

14 designed to supply Bilcon's

15 parent company, Clayton Concrete

16 Block and Sand, with washed

17 aggregates to be used in the

18 current concrete and block

19 operations in New Jersey." [As

20 read.]

21 So that was never your intention?

22 A. The term "Clayton Block Concrete

23 and Sand" is kind of a generic term for our company

24 which is made up of 33 companies. When you look at

25 our logo, it says "Clayton Concrete Block and Sand".

1 I mean, that's what a lot of people know us by.

2 It's what's on our logo is what they see, but we

3 have 33 companies. [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 Q. Turn back to Tab 10. This is the

9 revised product description that we looked at

10 earlier and it's Exhibit R-581 for the record.

11 I'd like you to turn, please, to page

12 7. Here we have a long description of the purpose

13 of the Whites Point Project. I will have it

14 highlighted on the screen and I'd like you to just

15 read that please for the record.

16 A. Second paragraph?

17 Q. Yes, it appears on the screen if

18 you'd like to --

19 A. (Reading):

20 "Bilcon of Nova Scotia

21 Corporation is a private,

22 family-owned business. Its

23 parent company, Clayton Concrete

24 Block and Sand manufactures

25 concrete products in New Jersey.

1 Bilcon needs a source of raw
 2 materials that is not subject to
 3 market fluctuations or market
 4 disruptions. Their development
 5 of Whites Point Quarry could
 6 satisfy this need for the next 50
 7 years. Thus, the fundamental
 8 rationale for the development of
 9 this quarry is to supply a stable
 10 'Fixed market' with the raw
 11 materials necessary for
 12 manufacturing processes. The
 13 importance of achieving market
 14 stability cannot be overstated.
 15 Clayton Concrete Block and Sand
 16 presently purchases aggregates on
 17 the 'Open market.' In order to
 18 ensure a dependable and
 19 interrupted supply, not subject
 20 to inconsistencies, Clayton
 21 Concrete Block and Sand, through
 22 Bilcon intends to develop and
 23 control their own supply of
 24 aggregate exclusively for Clayton
 25 concrete block and sand. In

1 essence the stability of a
 2 guaranteed market eliminates the
 3 instability of the competitive
 4 marketplace which has contributed
 5 to the demise of other mining
 6 ventures in Nova Scotia." [As
 7 read.]
 8 Q. Can you turn please to Tab 11,
 9 please? And this is the Whites Point JRP
 10 transcripts of June 16th, 2007. And one page in Mr.
 11 Buxton states:
 12 "Why are we here now? The
 13 Claytons produce a million and a
 14 half cubic yards of concrete and
 15 50 million concrete blocks a
 16 year. This requires a secure
 17 supply of crushed aggregates and
 18 sand. While the company has been
 19 able in the past to secure these
 20 supplies on the open market, the
 21 company sees a vital need to
 22 generate these products in-house
 23 in the future." [As read.]
 24 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 So first question: Would you agree
 4 with me that Bilcon repeatedly represented in its EA
 5 documents and as late as June of 2007 to the
 6 Joint Review Panel that the purpose of the Whites
 7 Point Quarry was [REDACTED]
 8 [REDACTED] but rather to ship the stone
 9 exclusively to New Jersey for the Clayton companies
 10 own use and captive production?
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 Q. So was Paul being truthful to
 18 regulators or --
 19 A. I think he was mistaken.
 20 Q. Okay. Those are my questions.
 21 Thank you.
 22 PRESIDING ARBITRATOR: Thank you, Mr.
 23 Little. Mr. Nash?
 24 RE-EXAMINATION BY MR. NASH:
 25 Q. Mr. Clayton, was Mr. Buxton

1 employed in New Jersey or New York?
 2 A. No, he worked out of his office
 3 in the Digby area.
 4 Q. Was Mr. Buxton intimately
 5 familiar with all of the internal operations, all of
 6 the companies of the Clayton Group of companies when
 7 he was doing work for you in Nova Scotia?
 8 A. Paul was inundated for a handful
 9 of years in trying to get this EIS approved and he
 10 had his hands full preparing this five year journey
 11 he was on which consumed his time.
 12 He worked out of his Digby area
 13 office and a little bit into it he worked out of the
 14 Bilcon of Delaware office which was in that town.
 15 We opened an office there to have a place to meet.
 16 And so John Wall would go up in the early stages
 17 almost weekly or bi-weekly until he finally moved
 18 there in '06. And Paul was working very hard at
 19 keeping up with the requests for new studies, new
 20 findings. I forget the number of the count that it
 21 went up to. It was incredible but, you know, we had
 22 given him instructions that it's pretty much carte
 23 blanche, get the best people that you can find to
 24 answer the questions as they come up because the --
 25 to us, it seemed normal at the time. As they came

1 up with questions it was something, okay, we have to
2 address this question. It is another study. And we
3 gave Paul permission to go ahead and find the best
4 people that were available at the time to try and
5 get it done.

6 Well, that went on for four and a
7 half years or something like that, so he was quite
8 busy. He did make trips down to visit us now and
9 then but he was pretty much consumed in the Nova
10 Scotia market.

11 Q. Did you have an understanding at
12 what stage of the development of the Whites Point
13 Project the EIS was prepared? You've been asked
14 questions and pointed to the EIS. You've referred
15 to the 40,000 tons. You've been referred to the
16 2 million tons.

17 A. It was quite early -- it was
18 quite early in the process that he was having to
19 prepare the EIS and the business questions that
20 were, in my opinion, included in that were very
21 preliminary stuff that he was just using to get this
22 EIS prepared to be finished and presentable.

23 It was never -- I mean, what is in
24 the EIS is not a business plan. It is Environmental
25 Impact Study and the business plan developed later.

1 I mean, this is -- you don't put a full business
2 plan in an EIS that something that you're not sure
3 how many years it's going to take you to even get
4 heard.

5 Q. You were referred to the Global
6 Quarries Business Plan in one of the tabs of the
7 binder that was put before you. Do you know for
8 what purpose that document, which is called a
9 "business plan" was prepared and who prepared it?

10 A. I don't recall, but if -- if the
11 name was Global Quarry, it had to be very early into
12 the project because Global Quarry was a name that
13 was used when we had a joint venture partner there
14 and I think the same year we got put to a Joint
15 Review Panel we had to buy out that partner which
16 was the other half of Global Quarries [REDACTED]
17 [REDACTED] So we bought him out
18 and took it forward ourselves through the Joint
19 Review.

20 Q. And who prepared, to your
21 knowledge, the document called the EIS?

22 A. Paul Buxton pretty much was doing
23 all of the leg work up there. We had no time to go
24 up there and help him or participate. He was our
25 man on the ground there who happened to be, lucky

1 for us, a local engineer who had worked there for
2 maybe 40 years or something. He was the engineer to
3 go to in the area. Any project that had gotten done
4 in that area basically was done by Paul. And we
5 actually found Paul through our joint venture
6 partner who we bought out and it was just a stroke
7 of luck because Mr. Buxton turns out to be probably
8 the most honest man I've ever met and he treated
9 every penny of our money like it was his own. So it
10 was a unique find by sheer luck, so, but he was very
11 good for us.

12 Q. You've been referred to the EIS,
13 the project description which refers to one of the
14 Clayton companies. To your recollection, did you
15 ever have discussions with Mr. Buxton about the
16 details of which company exactly would be purchasing
17 the stone from Whites Point? Where it was located
18 and exactly where it would be going?

19 A. I don't recall having that
20 conversation. It may have taken place, I don't
21 recall. But, like I said, Paul's total focus was on
22 trying to get clear of this Environmental Impact
23 Study which we felt, and I think we proved, that had
24 we given it enough attention and with the right
25 experts, that we could prove that we could in the

1 end mitigate any of the problems that they had
2 thought would come up. And I believe even, you
3 know, with the way the Joint Review Panel conducted
4 itself, they were so desperate to turn this down had
5 they been able to poke holes in any of our finding,
6 they would have. Instead, they took a more
7 difficult path. And it is my understanding that the
8 departments of the Canadian government that were
9 involved in -- normally involved in the course of
10 such an undertaking, there wasn't one person in the
11 Canadian government that told that Joint Review
12 Panel that they thought that this quarry should be
13 rejected.

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
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[REDACTED]

Q. You mentioned in response to one of Mr. Little's questions about your experience in ready-mix concrete. What is ready-mix concrete?

A. The, you know, the ready-mix comes from the term where you load the truck and the truck is spinning. You see them on the streets here. They are mixing the concrete while it's on the way to the job, so it was ready-mix was a term, a very old term. It's just the concrete business.

Q. And when your father started the business, had he had any experience at that very point in ready-mix concrete when he started back in the '50s?

A. No. We were in a very remote

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area and nobody had any experience with ready-mix concrete because it didn't existed. There was one other operator in the county. The cities had ready-mix concrete but the rural areas, it was still done by hand. When you dug a footing, the material that came out of the footing, you mixed with bag cement and it went right back in the hole again. That was the footing. So ready-mix concrete was kind of a new concept when he first got into it. It was early '50s.

Q. So, when Mr. Buxton -- I think you said that he made a mistake in the EIS. What did you understand the implications of that mistake were from an environmental standpoint?

[REDACTED]

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[REDACTED]

Q. Thank you, Mr. Clayton. Those are my questions.

PRESIDING ARBITRATOR: Thank you, Mr. Nash. I see Mr. Little looking at me, but not asking for anything; is that correct?

MR. SCOTT LITTLE: I did have one follow-up question.

PRESIDING ARBITRATOR: Okay. So we

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1 will go for a short re-cross.
2 FURTHER CROSS-EXAMINATION BY MR. SCOTT LITTLE:

3 Q. Mr. Clayton, you mentioned that
4 Mr. Buxton made a mistake with respect to the
5 New Jersey -- shipment to New Jersey for THE
6 production element of the EIS; correct?

7 A. Yes, I mean, we definitely could
8 have shipped to New Jersey and in fact some of it
9 was going to go to New Jersey, meaning the grits to
10 South Amboy for Amboy Aggregates. We could have
11 also shipped stone to Amboy Aggregates at the
12 receiving dock.

13 Q. Okay.

14 A. It was a possibility but it was
15 not the intention.

16 Q. All right. Now, earlier I
17 referred you to the business plan which was at Tab 9
18 of the document, of the binder, sorry.

19 Okay. And this is the document where
20 I took you to the first page and then I believe it
21 was page 12506 with respect to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

25 MR. NASH: Well, this question

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1 doesn't arise from anything I asked Mr. Clayton.

2 MR. SCOTT LITTLE: I have one
3 question.

4 MR. NASH: I didn't take him to that
5 page. I didn't take him to the pricing. I didn't
6 do anything with respect to that. So I object to
7 that -- any question about this document at this
8 stage, I object to.

9 PRESIDING ARBITRATOR: Mr. Little,
10 let's see what you have to say and then ...

11 MR. SCOTT LITTLE: My only question
12 is on the first page of the document.

13 BY MR. SCOTT LITTLE:

14 Q. The very first page.

15 A. Yes, I'm --

16 Q. No, the very first page, sir.

17 Would you agree with me that it states that it
18 was -- the business plan was prepared by Clayton
19 Concrete?

20 A. Yes, that's what it says.

21 Q. Okay. Thank you. Those are my
22 questions.

23 PRESIDING ARBITRATOR: Thank you very
24 much, Mr. Little.

25 Next point would be are there

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1 questions from the Tribunal? I have a couple of
2 questions to Mr. Clayton.

3 PRESIDING ARBITRATOR: ... (off
4 record comments). The entire exercise has been
5 going on for nine years, I think --

6 MR. CLAYTON: We've been at it 17 --

7 PRESIDING ARBITRATOR: -- for us.

8 QUESTIONS BY THE ARBITRAL TRIBUNAL

9 PRESIDING ARBITRATOR: My first
10 question is: Now, after all the work you have
11 invested a ton on Whites Point quarry and the high
12 quality of the stone there, when the -- when it
13 became clear that or when the Ministers had decided
14 that they would not -- they would deny the
15 environmental, let's say, approval. Why did you not
16 consider going to the Canadian courts?

17 Mr. Little yesterday referred to that
18 is that I called it some kind of an elephant in the
19 room and it is still in the room a bit for me so my
20 question is: What made you, let's say, just to
21 choose to go to arbitration before and not TO
22 Canadian courts?

23 THE WITNESS: The process, maybe four
24 and a half year process that they put Mr. Buxton
25 through basically because he was the one there

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1 living it every day, the process that they put him
2 to and the absolute unfairness of it and that was
3 our opinion before we went to this group and found
4 out what was really going on behind the scenes with
5 the Canadian Ministers, and the actions that were
6 taken from the very beginning of our process. We
7 weren't even aware of all that at the time. We were
8 just aware of how the review panel was handled. So,
9 going back to their courts after the way this was
10 handled, all I can say would have been tantamount to
11 throwing yourself on the mercy of Kim Jung Ung.

12 There was no reasonable person that
13 would have even considered going back to the Canadian
14 courts for this. We would have gone through five
15 years of struggle to end up back where we were,
16 possibly being dealt with by the same people. So
17 there was no law, rule or ordinance in the Canadian
18 law that we knew of that said we had to, there was no
19 obligation to. And we had a right to go to the NAFTA
20 and we chose to go to the NAFTA because going back to
21 them and being dealt that way for another ten years
22 is absolutely unreasonable.

23 It wasn't even an option to us. And I
24 know he seems to think that was the only method that
25 we had of redressing what went on, and like I said,

1 we didn't really find out what was going on until we
2 came here and found discovery. So it's incredible
3 that they even mention it, that that was an option,
4 in my opinion.

5 PRESIDING ARBITRATOR: And of course
6 that decision not to go to the Canadian courts for
7 the reasons that you mentioned was done in -- you
8 were advised by lawyers?

9 THE WITNESS: Yes, yes. To go to
10 NAFTA, yes.

11 PRESIDING ARBITRATOR: Okay.

12 THE WITNESS: I mean we're not, you
13 know, we've been in business like since '52. We are
14 not in the business of suing. We are in --
15 day-to-day you are in the business of avoiding
16 lawsuits because it's just -- it needs to be
17 avoided. So we are not in the business of filing
18 lawsuits.

19 This, obviously, you know, this is
20 extraordinary going on for this many years but I
21 think the problem they had was that when you are in
22 business for a long time in New Jersey, it kind of
23 like means that you don't -- you are not smart enough
24 to give up. Because New Jersey is year in and year
25 out the 50th worst place of the 50 states to do

1 business in, so if you do business there all your
2 life, you don't give up easily. So, when we were
3 going through that extended process, we kind of
4 thought "Well, they have a question on this. Go get
5 the right guy, Paul, to answer it," and it went on
6 and it went on and it went on. So, you know, we gave
7 Paul wide latitude to do what needed to be done, but,
8 you know, once we found out what was really going on,
9 then it, you know, has a tendency to focus your
10 attention on what was really going on then. So there
11 was no going back to their courts.

12 PRESIDING ARBITRATOR: For my second
13 question, I think we need to go into confidential
14 session.

15 --- CONFIDENTIAL SECTION CONTINUES AT 11:05 a.m.

16 PRESIDING ARBITRATOR: [REDACTED]

22 THE WITNESS: [REDACTED]

1 [REDACTED]

8 [REDACTED]

24 PRESIDING ARBITRATOR: Thank you very

25 much. Mr. Nash, you were going to, at least --

1 MR. NASH: Yes, I have a question
2 arising.

3 PRESIDING ARBITRATOR: Yes.
4 FURTHER RE-EXAMINATION BY MR. NASH.

5 Q. [REDACTED]

9 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 MR. NASH: Thank you, Mr. Clayton.

20 PRESIDING ARBITRATOR: Thank you, Mr.

21 Nash.

22 PROFESSOR SCHWARTZ: This might be on

23 the record already and I don't know how important it

24 is, but does Bilcon of Nova Scotia still own the

25 Whites Point property and does your company still

1 own Bilcon of Nova Scotia?

2 THE WITNESS: [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 PROFESSOR SCHWARTZ: Thank you.

10 PRESIDING ARBITRATOR: I think this

11 brings to an end if I --

12 MR. NASH: I just have one more

13 question.

14 PRESIDING ARBITRATOR: Okay, one more

15 question.

16 THE WITNESS: You are killing me

17 here.

18 FURTHER RE-EXAMINATION BY MR. NASH:

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 Q. Thank you.

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 PROFESSOR SCHWARTZ: Thank you.

8 PRESIDING ARBITRATOR: Okay. I think

9 that brings to an end the witness examination of

10 Mr. Clayton. Mr. Clayton, thanks for --

11 THE WITNESS: Thank you very much.

12 PRESIDING ARBITRATOR: -- coming here

13 and stating your views.

14 THE WITNESS: It is good to be seen

15 after all these years.

16 PRESIDING ARBITRATOR: Good to -- and

17 you are a free man, again.

18 THE WITNESS: Thank you very much.

19 PRESIDING ARBITRATOR: And I think

20 for us it's time for the coffee break. So the

21 coffee break we will have a coffee break until

22 11:30.

23 --- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT

24 11:15 A.M.

25 --- Recess taken at 11:15 a.m.

1 --- Upon resuming at 11:34 a.m.

2 --- PUBLIC TRANSCRIPT BEGINS AT 11:34 A.M.

3 PRESIDING ARBITRATOR: It looks like

4 we're all set. We will continue this morning's

5 program with the examination of Mr. Forestieri, if

6 that is ...

7 MR. NASH: If we could have one more

8 minute, Mr. Forestieri has stepped out.

9 PRESIDING ARBITRATOR: Good morning,

10 Mr. Forestieri.

11 You have in front of you a statement,

12 declaration. Would you please read it?

13 THE WITNESS: I solemnly declare upon

14 my honor and conscience that I speak the truth, the

15 whole truth and nothing but the truth.

16 AFFIRMED: MR. FORESTIERI

17 PRESIDING ARBITRATOR: Thank you. I

18 will give the floor for Mr. Nash for his direct

19 examination.

20 EXAMINATION IN-CHIEF BY MR. NASH:

21 Q. Mr. Forestieri, you've signed two

22 witness statements for the this phase of the

23 arbitration; that's correct?

24 A. That's correct.

25 Q. One is dated December 13th, 2016;

1 is that correct?

2 A. That is correct.

3 Q. And one is dated August 21st,

4 2017?

5 A. Yes.

6 Q. And you are the Chief Financial

7 Officer of the Clayton Group of Companies?

8 A. Yes, I am.

9 Q. And you've been the CFO of the

10 Clayton Group of Companies since 2003?

11 A. That is correct.

12 Q. And you're responsible for

13 operating the financial affairs of the Clayton Group

14 of Companies?

15 A. Yes.

16 Q. And before becoming the CFO, you

17 were the controller from 1994 to 2003; is that

18 right?

19 A. Yes, that is also correct.

20 Q. And you have over 35 years'

21 experience in the accounting profession; is that

22 correct?

23 A. Yes, I do.

24 Q. Thank you very much.

25 PRESIDING ARBITRATOR: Thank you.

1 of an economic feasibility study; correct?
 2 A. Yes.
 3 Q. Now, an economic feasibility
 4 study would typically include analysis of factors
 5 such as anticipated production levels, pricing
 6 potential fluctuations, demand in the target market
 7 and consumer base, competitors in the industry and
 8 their market share, sales, marketing strategy and
 9 cost of construction operations and distribution;
 10 correct?
 11 A. So, we put Paul Buxton in charge
 12 of that EIS and it was an environmental document and
 13 I -- that is not a business plan. It was a very,
 14 very early document just like Bill Clayton Junior
 15 had just mentioned.
 16 Q. I haven't asked you about this
 17 document that you are referring to right now. I
 18 just asked you about your understanding of an
 19 economic feasibility study.
 20 MR. NASH: Well, I think the witness
 21 should be allowed to answer the question as he
 22 understands it and then further clarification may be
 23 required.
 24 MR. KLAVER: That's fine.
 25 PRESIDING ARBITRATOR: Okay, good.

1 BY MR. KLAVER:
 2 Q. Please clarify what you mean.
 3 A. So I'm not aware of an EIS
 4 document having to have all of that information
 5 provided within it.
 6 Q. Okay.
 7 A. I'm not aware of that.
 8 Q. Just to be clear on what you said
 9 there, you are not aware of an economic feasibility
 10 study that was conducted for the Whites Point
 11 Project?
 12 A. No, I'm aware of a feasibility
 13 study that was conducted and what was included in
 14 it. I am just answering you saying that I was not
 15 aware that it needed to have that information that
 16 you had mentioned to me that should have been in it.
 17 Q. I understand. So you are aware
 18 of an economic feasibility study that was produced
 19 on the record, sir?
 20 A. Are you talking about the EIS?
 21 Q. No. I'm asking you if any
 22 economic feasibility study was create the by the
 23 Claytons and produced on the record.
 24 A. Okay. So we did not produce an
 25 economic feasibility study for this quarry. We are

1 in the business of the aggregate business, have been
 2 for 50 years. I'm well aware, completely aware of
 3 what an aggregate financial statement and P&L looks
 4 like. How much it costs to a manufacturer a ton of
 5 aggregate, and how much it costs, how much we would
 6 sell it for, what the margins look like.
 7
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 9
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 21
 22
 23 Q. Okay. Now, I'd ask you to turn
 24 to Tab 6 of your binder, please.
 25 This is Exhibit R-17 for the record.

1 We will pull it up on the screen as
 2 well. This is the April 2004 business plan prepared
 3 by Clayton Concrete. If you could turn to the
 4 bottom of page 507. And this contains a pro-forma
 5 revenue and expense statement for 2006.
 6 Are you familiar with this document,
 7 sir?
 8 A. I have seen it before. I think
 9 it was part of the EIS application that Paul Buxton
 10 had created and Paul and Bill Clayton Junior
 11 testified earlier that this was an early document
 12 and that Paul Buxton provided the information the
 13 way he saw it, but it is not really a business plan
 14 and this is not a pro-forma.
 15 Q. So this is not a business plan?
 16 A. Right.
 17 Q. And so it does not constitute an
 18 economic feasibility study either does it, sir?
 19 A. Correct.
 20 Q. Are you aware of any other
 21 financial forecasts that the claimants did conduct
 22 and that have been produced on the record for the
 23 Whites Point Project?
 24
 25

1 [REDACTED]

1 [REDACTED]

1 [REDACTED]

1 [REDACTED]

[REDACTED]

1 [REDACTED]

11 Q. Now, you explain in your first
12 statement that as CFO you were responsible for
13 supervising the tax returns and providing advice on
14 tax planning to the Clayton Group.
15 [REDACTED]

25 Bilcon of Delaware owns Bilcon of

1 Nova Scotia. It is the only partner of Bilcon of
2 Nova Scotia. [REDACTED]

17 Q. I understand. So please turn to
18 paragraph 29(d) of your first statement.
19 Here you explain --
20 A. Wait, 29(d)?
21 Q. Yep.
22 A. Yep.
23 [REDACTED]

1 [REDACTED]

7 Q. Now, Mr. Rosen used these
8 [REDACTED] and [REDACTED] tax rates to calculate
9 his tax gross-up factor; correct?
10 A. That is correct.
11 Q. And it is the difference in these
12 tax rates that leads to the gross-up factor being
13 required; correct?
14 A. Correct.
15 Q. Now, the taxes for which the
16 claimants gross-up is being made are US taxes rather
17 than Canadian taxes?
18 A. Can you say that again?
19 Q. The taxes for which the
20 claimant's Gross-Up is being made are US taxes
21 rather than Canadian taxes; correct?
22 A. If we -- if we were to run the
23 quarry in Nova Scotia, the profits generated by
24 Bilcon of Nova Scotia would have been taxed in
25 Canada 31 per cent. Right?

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 The damage calculation has 31 per
 21 cent tax taken out of it. [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 Q. So, you do acknowledge that the
 5 claimant's tax gross-up is made under US taxes;
 6 correct?
 7 A. Yes.
 8 Q. And you also did explain that the
 9 US recently changed its tax laws.
 10 A. Uh-hmm.
 11 Q. But, sir, you are confirming
 12 after conducting analysis as CFO that none of your
 13 analysis changes based on the reforms to the tax
 14 law?
 15 A. Yeah, I can't answer to that
 16 100 per cent in my, you know, entirety. I would,
 17 you know, much rather consult our long-term tax
 18 accountants.
 19 However, the way I see it is that my
 20 statement stands. I don't think there's a
 21 significant change. The Code is to stimulate
 22 businesses in the United States, and this, you know,
 23 the some -- some things out there on the Code that
 24 allows for 20 per cent deductions. But that has
 25 nothing to do with an international company. And

1 even though the rate has been reduced two per cent,
 2 it is minimal because it does not allow a taxpayer
 3 in the United States to deduct their State of
 4 New Jersey taxes.
 5 I know I'm getting into detail, but I
 6 think at the end of the day, this -- these rates are
 7 very accurate.
 8 Q. Okay, sir. Now, the new tax law
 9 eliminates the US foreign tax regime in most
 10 circumstances, does it not?
 11 A. I don't have -- I don't -- I'm
 12 not aware of that. I don't have knowledge of that.
 13 And I don't --
 14 Q. Well, sir, you just explained
 15 that the analysis --
 16 MR. NASH: Sorry, Mr. Forestieri was
 17 not finished his answer.
 18 MR. KLAVER: Sorry.
 19 THE WITNESS: I -- maybe you can
 20 rephrase your question?
 21 BY MR. KLAVER
 22 Q. Sure, no problem.
 23 A. Or ask me the question again.
 24 Q. Absolutely. So the new tax law
 25 in the United States --

1 A. Right.
 2 Q. -- it eliminates the US foreign
 3 tax credit regime in most circumstances; correct?
 4 A. I don't know that.
 5 Q. You don't know that?
 6 A. No.
 7 Q. But you did just here testify
 8 that you maintained that your tax analysis of the
 9 [REDACTED] and [REDACTED] tax rates is correct.
 10 A. To my knowledge, this is correct.
 11 And a change in the Code does not change this
 12 analysis.
 13 Q. The change in the Code does not
 14 change this analysis?
 15 A. I could not even speak to the
 16 change in the Code at this moment. I don't know if
 17 the accountants and tax accountants have completely
 18 digested it. It's too new. And I am not a tax
 19 expert. And this was advised to me by our tax
 20 accountants and we engage them currently to this day
 21 and they will continue to advise us. But that's the
 22 best I can answer that question.
 23 Q. Okay, so it sounds like the
 24 changes in the Tax Code are not accounted for in
 25 your calculation of the [REDACTED] and [REDACTED] per cent rate;

1 for you today.
2 PRESIDING ARBITRATOR: Thank you, Mr.
3 Klaver. And the floor is to Mr. Nash for the
4 Re-direct.

5 MR. NASH: Thank you, Judge Simma.

6 RE-EXAMINATION MR. NASH:

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
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15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

Q. You mentioned that there were certain changes to the Tax Code and Mr. Klaver introduced that topic to you. You mentioned that

1 there were tax credits that you understand had been
2 discontinued.

3 Can you just itemize a few of the
4 ones that you know about or deductions that you are
5 able?

6 A. The largest one is that when you
7 file a -- when you used to file a Federal tax
8 return, you would get, as a deduction, the taxes you
9 paid by individual States. So these are, the state
10 tax in New Jersey is nine per cent. So when you
11 filed your Federal tax return, you'd have your
12 taxable income and your taxable income would be
13 lowered by the taxes you paid to the States.

14 So, you know, I mean, whatever your
15 number is, if you are looking at that, its reduced
16 by the taxes you are paying to the State of
17 New Jersey, then you have an effective tax rate. So
18 they lowered it two per cent to 37 per cent.

19 However, the taxable income which the
20 jury is still out there. This is pretty clear. So
21 your income is not going to be reduced by your State
22 taxes. So they lowered your percentage, but your
23 taxable income will be higher and there are also
24 other things that phase out from high income. You
25 know, higher income level tax returns will phase out

1 a lot of deductions.
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

MR. NASH: Thank you. Those are my questions.

PRESIDING ARBITRATOR: Thank you, Mr. Nash. Any demand for --

MR. KLAVER: No.

PRESIDING ARBITRATOR: Then it's on the Tribunal.

Are there questions from my colleagues?

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1 just to set things up for, Mr. Estrin, so we will
2 just have a couple -- let's say we will have a break
3 until 12:35. Thank you.
4 --- Recess taken at 12:32 p.m.
5 --- Upon resuming at 12:37 p.m.
6 PRESIDING ARBITRATOR: It appears
7 that we are all set for the witness examination of
8 Mr. Estrin.
9 So, Mr. Nash you have the floor. Mr.
10 Estrin, welcome back.
11 Would you please read the statement in
12 front of you, sir?
13 MR. ESTRIN: Yes. I solemnly declare
14 upon my honor and conscience that I will speak the
15 truth, the whole truth and nothing but the truth and
16 that my statement will be in accordance with my
17 sincere belief.
18 --- CONFIDENTIAL TRANSCRIPT ENDS AT 12:38 P.M.
19 --- PUBLIC SECTION BEGINS AT 12:38 P.M.
20 AFFIRMED: MR. DAVID ESTRIN
21 PRESIDING ARBITRATOR: Thank you.
22 EXAMINATION IN-CHIEF BY MR. NASH:
23 Q. Mr. Estrin, you appeared here
24 before the Tribunal many years ago, back in October
25 of 2013. But just to refresh and update your

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1 Q. More than that. Okay. Before
2 environmental law was even thought of, I suspect?
3 A. That's right. My mother asked me
4 "what is environmental law?"
5 Q. You were on the Environmental
6 Defence Fund Legal Advisory Committee from 1972 to
7 1980?
8 A. Yes.
9 Q. You were a contributing editor to
10 the Ottawa Law Review, the faculty of law 1975 to
11 1980?
12 A. Yes.
13 Q. You were a member of the
14 International Joint Commission Great Lakes Research
15 Advisory Board 1977 to 1978; correct?
16 A. Yes.
17 Q. You were the founding director
18 and member on the National Executive Committee of
19 the Canadian Environmental Law Association from 1971
20 to 1978.
21 A. Yes.
22 Q. Is that right?
23 A. Yes.
24 Q. You were the founding editor of
25 the Canadian Environmental Law Reports; correct?

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1 imminent qualifications.
2 In 2013 and 2014 you were a lecturer
3 at the Faculty of Law at the University of Ottawa;
4 is that correct?
5 A. Yes.
6 Q. And in 2014 and 2015 you were the
7 McMurtry Fellowship visiting Professor at Osgoode
8 Hall Law School; is that correct?
9 A. Yes.
10 Q. In 2014, to 2016 you were the
11 Senior Research Fellow at the International Law
12 Research Program at Waterloo?
13 A. Yes, at the Centre for
14 International Governance Innovation.
15 Q. And in 2015 you were an Adjunct
16 Professor and I think still remain now a
17 distinguished Adjunct Professor and Academic
18 Co-director in Environmental Justice and
19 Sustainability Clinic at Osgoode Hall Law School; is
20 that right?
21 A. Yes.
22 Q. Just going back a bit. You've
23 been an environmental lawyer for 45 years; is that
24 right?
25 A. More than that.

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1 A. Yes.
2 Q. For 12 years you were an
3 Associate Professor in the Faculty of Environmental
4 Studies at the University of Waterloo; is that
5 right?
6 A. Correct.
7 Q. And you taught there hundreds of
8 planners, engineers and environmental managers about
9 environmental law and resource management; correct?
10 A. Yes, that's right.
11 Q. And you were also the co-author
12 of a pioneering a book called Environment On Trial
13 now in its Third Edition founded in -- you founded
14 it in 1973; correct?
15 A. Right.
16 Q. More recently in 2006 you were
17 honoured by the CBA for your achievements in the
18 development of Canadian Environmental Law practice
19 by the establishment of the David Estrin Prize; is
20 that right?
21 A. Yes, for the best law school
22 student essay on anything to do with natural
23 resources environmental law.
24 Q. And in 2014 you co-chaired the
25 International Bar Association President's Task Force

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1 that produced a report called "Achieving Justice and
2 Human Rights in Era of Climate Disruption"?
3 A. Yes.
4 Q. And you are the past chair of the
5 International Bar Association, Environment Health
6 and Safety Committee?
7 A. Correct.
8 Q. From 2014 to 2016?
9 A. Yes.
10 Q. Currently a council member of the
11 IBA Section on Energy Environment and Natural
12 Resources and Infrastructure Law; correct?
13 A. Yes.
14 Q. In 2016, two years ago, you were
15 honoured by receiving the Law Society of Upper
16 Canada medal to recognize your outstanding
17 achievements in community contributions; correct?
18 A. Yes.
19 Q. And you are the author of three
20 environmental law texts, is that right?
21 A. Yes.
22 MR. NASH: I'd like to offer Mr.
23 Estrin as an expert in environmental law.
24 PRESIDING ARBITRATOR: I think the
25 point was well made.

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1 First paragraph 52 of my March 2017
2 expert report should read, in effect:
3 "The Federal Department of
4 Fisheries and Oceans and
5 Transport Canada were both
6 responsible authorities under
7 CEAA in respect to the Whites
8 Point Quarry, up until the time
9 of and after the JRP hearing."
10 And to make the equivalent correction
11 in my November 2017 expert report at paragraph 36
12 there is a sentence in parentheses that -- sorry, in
13 my August in my August -- it's August 2017 reply
14 report, not November.
15 At paragraph 36 please strike out the
16 reference in parentheses starting at the fourth line
17 of the paragraph that begins "Mr. Connelly was
18 mistaken, the TC was also an RA."
19 Thank you.
20 PRESIDING ARBITRATOR: Okay, thank
21 you very much. Ms. Kam, you have the floor please.
22 CROSS-EXAMINATION BY MS. KAM:
23 Q. Good morning, Mr. Estrin.
24 A. Good morning.
25 Q. My name is Suzanna Kam and I'm

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1 This is a point well made.
2 Then I call on, is it going to be --
3 MR. SCOTT LITTLE: It will be Ms. Kam
4 conducting the cross-examination.
5 THE WITNESS: Judge Simma, first of
6 all, we did hand out so every someone is aware,
7 corrigenda for my two reports indicating the exhibit
8 numbers that needed to be added or corrected and
9 everyone has them I believe but there is a
10 correction that I want to make before my
11 cross-examination begins, if I may.
12 And that is, Mr. Connelly had pointed
13 out in I think his rejoinder report he said that I
14 potentially misunderstood something and therefore was
15 mistaken in my assertion in my report, my reply
16 report -- well, both of my reports -- that there was
17 only one RA, one Responsible Authority, for this
18 project. I said it was just under the aegis of
19 Fisheries and Oceans Canada and I had assumed from an
20 earlier letter from Transport Canada that they had,
21 in effect, signed off; that I had not looked at a
22 couple of pages in that document. And at the end of
23 the day, I simply agree with him that there were two
24 RAs, department of Fisheries and Oceans and Transport
25 Canada so I have two corrections.

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1 counsel for the Government of Canada.
2 Just before we begin, I note that you
3 have a whole bunch of notes that you've brought up
4 to the table with you. I believe Ben has provided a
5 copy of your expert reports which are clean copies.
6 Do you mind just referring to those
7 documents as well?
8 A. Sure, if you want. Although, if
9 I'm looking for something, I'm going to take out my
10 copy because I think I've got it more easily marked
11 but I'm happy to answer --
12 Q. Well, would you be able to
13 provide Canada a copy of those marked up copies?
14 A. No. I think we'll deal with your
15 copies.
16 Q. Okay.
17 A. Except, as I said, if I feel that
18 there is something useful I can add that I can't
19 find readily, I'd like the opportunity to look.
20 Q. Well, we --
21 PRESIDING ARBITRATOR: You might get
22 a bit closer to the microphone.
23 THE WITNESS: Okay, sure. I'm happy
24 to put these away and use your clean copies, as I
25 said except to the extent that I need to find

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1 something quickly and I can't.
2 BY MS. KAM:
3 Q. Mr. Estrin, to the extent you
4 refer to any notes, we would need any copies of
5 those. So I see you still have notes on your table,
6 would you be willing to provide those copies to
7 Canada?
8 A. These are just for my purposes,
9 thank you.
10 Q. But our usual procedure in
11 arbitration is that if an expert brings up notes for
12 their testimony, that the other party would be able
13 to see a copy of those notes. Would that be a
14 reasonable approach? You could put them away if
15 you'd like.
16 A. I'm putting them away at the
17 moment.
18 PRESIDING ARBITRATOR: Mr. Nash?
19 MR. NASH: There is a lot of
20 information in these reports and in these binders.
21 And if, for any reason, Mr. Estrin has to refresh
22 his memory about where something is in all of these
23 documents, it is only fair that he has an
24 opportunity to look at his private notes to remind
25 himself this is where it is in the report. It is

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1 matter of the recourse to your private notes and
2 what's to happen to them, can we play that by ear
3 and see?
4 THE WITNESS: Yes, I think so.
5 PRESIDING ARBITRATOR: And of course
6 the hope is that you won't resort to them too
7 frequently.
8 THE WITNESS: No.
9 PRESIDING ARBITRATOR: Thank you.
10 BY MS. KAM:
11 Q. And just so you know, there is a
12 document of binders -- or sorry, a binder of
13 document in front of you. And to the extent that I
14 refer to these documents in my questions I will let
15 you know what tab number to turn to so you can
16 return refer to the document. And just for the
17 record, I will also refer to the exhibit number and
18 Derek will also be helping me pull up those
19 documents on the screen. So you won't be without
20 any reference materials.
21 A. Terrific.
22 Q. Great. So I'd like to start by
23 asking you a questions about your background and
24 experience and I know that Mr. Nash just went over a
25 large chunk of your resumé, but you are an

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1 not cheating. But it's also private notes, not
2 available for other counsel.
3 PRESIDING ARBITRATOR: Thank you.
4 THE WITNESS: There is another
5 problem. Sorry, there is a bit of a problem using
6 your copies because they don't have all the
7 footnotes, all the references to the exhibit which
8 is why I prepared a corrigendum..
9 BY MS. KAM
10 Q. Right, so I have that copy as
11 well.
12 A. But I have those in my copy and
13 I, for that reason, I would like to use my report.
14 Q. But that's why I would like a
15 copy as well so that we could both have the same
16 document to refer to, if that's the reason why.
17 A. Well, no, I'll use your clean
18 copy and I'll have to take whatever time I require,
19 if that's all right with you, in order to look up
20 the right exhibit number by having reference to the
21 corrigenda. How's that?
22 Q. Okay. So we'll proceed on the
23 documents in front of you.
24 A. Okay.
25 PRESIDING ARBITRATOR: Maybe the

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1 environmental lawyer; correct?
2 A. I specialized in environmental
3 law. I've also been an advocate before the courts
4 on civil litigation and judicial reviews and so it
5 would not, in terms the area on which I focus, these
6 have arisen in the context of environmental matters.
7 Q. Okay but you are a lawyer;
8 correct?
9 A. I hope so.
10 Q. Great. Well, I just need you to
11 answer my questions.
12 You've never -- but you've never been
13 appointed by the Canadian government to conduct a
14 review panel assessment?
15 A. No.
16 Q. Okay, and just to be clear then,
17 for the record, you've been appointed by the Nova
18 Scotia government to conduct a review panel
19 assessment?
20 A. No, but I've reviewed assessments
21 by Nova Scotia for clients. I participated in major
22 project on in Nova Scotia on behalf of a major
23 utility company that was seeking to get approval for
24 an undersea cable from Newfoundland to the top end
25 of Newfoundland Island and to take that power from

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1 Newfoundland to Nova Scotia which was the proponent
2 was a Nova Scotia company. And I was legal counsel
3 to that company in terms of the environmental
4 assessment process which was both a Federal and Nova
5 Scotia process.
6 Q. Okay, but you've never chaired a
7 environmental assessment review panel?
8 A. No.
9 Q. And so you've never served as an
10 independent review panel member either?
11 A. Correct.
12 Q. And you've never drafted a review
13 panel report?
14 A. I hope not, if I wasn't a member.
15 Q. So let's start by turning to
16 paragraph 6 of your damages memorial report, which
17 is in front of you.
18 A. Sorry, which? Which report are
19 you referring to?
20 Q. Your damages memorial report,
21 please.
22 A. Well, my -- I don't have a
23 damages memorial.
24 Q. The first report in the damages
25 phase, your March 17th report.

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1 A. All right. I refer to it as my
2 expert report.
3 Q. I'll refer to it as your damages
4 memorial report.
5 A. I'll have to make a note so
6 I know what you're talking about. Damages memorial
7 report.
8 Q. So, at paragraph 6 of this
9 report, you state that:
10 "The WPQ project was approvable
11 and would be approved if
12 standard, Federal Canada and Nova
13 Scotia Environmental Assessment
14 Evaluation criteria and practices
15 were fairly and objectively
16 applied to the project." [As
17 read.]
18 Right?
19 A. Yes.
20 Q. Just so I understand, your
21 opinion is that the Whites Point Project would have
22 been approved if standard, federal and Nova Scotia
23 Environmental Assessment Evaluation criteria and
24 practices were applied?
25 A. Yes.

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1 Q. In the case of the Whites Point
2 Project, you would agree that the project was
3 subject to both an environmental assessment under
4 the Canadian Environmental Assessment Act as well as
5 the Nova Scotia Environment Act?
6 A. Yes.
7 Q. So, let's start by turning to Tab
8 2 of your binder, which is Exhibit R-1.
9 A. Sorry, what is Exhibit R-1?
10 Q. Sorry, exhibit -- it is just for
11 the record, sir.
12 A. Sorry, sorry, which?
13 Q. I'm asking you to turn to your
14 binder, and Tab 2, please, sir.
15 Just for the record, this document is
16 titled "The Canadian Environmental Assessment Act
17 1992", which I'm going to refer to as the CEAA.
18 A. Yes, I understand that, and every
19 time I'm going to refer to it, unless I say
20 otherwise, I'm talking about CEAA 1992, all right?
21 Q. Understood. We are on the same
22 page. And you would agree that the CEAA was the
23 statute governing the Whites Point federal
24 environmental assessment process?
25 A. Yes.

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1 Q. And starting -- if you turn to
2 page 8, there is a part of the Act that is entitled
3 "The Environmental Assessment Process." Do you see
4 that?
5 A. I don't see that where is it.
6 Q. At the bottom of page 8.
7 THE COURT: Where's page 8? Oh, page
8 8.
9 Q. You are there?
10 A. Yes.
11 Q. And if you go on to page 9,
12 section 16(1) of the Act, it sets out the factors to
13 consider?
14 A. Right.
15 Q. And you would agree that
16 section 16 sets out the review panel's required
17 factors for consideration in a federal environmental
18 assessment?
19 A. Yes.
20 Q. Okay, ad under the CEAA, a review
21 panel must consider whether or not a project is
22 likely to cause significant adverse environmental
23 effects?
24 A. Yes.
25 Q. And according to

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1 section 16(1)(a), the environmental effects that the
2 review panel must consider are the environmental
3 effects of the project?

4 A. Yes.

5 Q. So, let's turn now to Exhibit
6 R-20, which is at Tab 3 of the binder.

7 It is titled "A Reference Guide for
8 the Canadian Environmental Assessment Act
9 determining whether a project is likely to cause
10 significant adverse environmental effects".

11 And you would agree that this
12 reference guide was prepared by the Environmental
13 Assessment Review Office?

14 A. Yes.

15 Q. And you would also agree that
16 this reference guide sets out an approach to
17 determining whether a project is likely to cause
18 significant adverse environmental effects?

19 A. Yes.

20 Q. Okay. And so let's turn to page
21 187 of the reference guide. Let's take a look under
22 section 4.

23 You would agree that this reference
24 guide provides a framework for determining likely
25 significant adverse environmental effects under the

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1 CEEA; correct?

2 A. It is the guide issued by the
3 bureau office at that time, yes.

4 Q. But it provides a framework,
5 correct, for determining likely significant adverse
6 environmental effects?

7 A. I don't see the word "framework",
8 but it does set out steps.

9 Q. Sir, if you look at the screen,
10 section 4, it's called "a framework", "This
11 section provides a framework for guiding RAs in
12 determining whether" --

13 A. You're right, I missed that word.

14 Q. Thank you. Sir, do you mind
15 reading out the steps of the framework which are on
16 the screen in front of you?

17 A. (Reading):

18 "Step 1: Deciding whether the
19 environmental effects are
20 adverse.

21 Step 2: Deciding whether the
22 adverse environmental effects are
23 significant.

24 Step 3: Deciding whether the
25 significant adverse environmental

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1 effects are likely." [As read.]

2 Q. Thank you. Let's look at the
3 4.1, which is step 1, deciding whether the
4 environmental effects are adverse.

5 If you look at paragraph 3 of the
6 section, you would agree that the most common way of
7 determining whether a project's environmental
8 effects are adverse is to compare the quality of the
9 existing environment with the predicted quality of
10 the environment once a project is in place?

11 A. I don't disagree with that.

12 Q. So you agree with that statement?

13 A. If you like.

14 Q. I just need your answer to the
15 record, sir, "yes" or "no"?

16 A. Most common way? Using some or
17 all of the criteria shown as Table 1 as variables
18 so...

19 Q. So, sir, do you --

20 A. I can't agree until I -- you left
21 off those words. So I want to make sure I'm fully
22 answering your question. So let me just see what it
23 says more carefully.

24 So the quote you have up on the
25 board, on the screen, is running together two

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1 different paragraphs, but in any event I just want
2 to focus on the words "using some or all of the
3 criteria shown in Table 1 as variables". Let me
4 have a look at the criteria in Table 1 to see if I
5 agree with that.

6 Yeah, what Table 1 is setting out,
7 Judge Simma, Members of the Tribunal, is what later
8 became known as VECs or valuable ecosystem
9 components.

10 Q. So, Mr. Estrin, I'm not asking
11 about Table 1 yet. I'm asking you to answer my
12 question.

13 A. That's what -- it seems
14 appropriate, yes.

15 Q. But my question is fairly simple:
16 Do you agree with the statement on the screen that
17 the most common way of determining whether a
18 project's environmental effects are adverse is to
19 compare the quality of the existing environment with
20 the predicted quality of the environment once the
21 project is in place?

22 A. If you also consider potential
23 mitigation measures. You can't compare the effects
24 --

25 Q. Yes.

1 A. -- until you've also considered
2 effective or potentially useful mitigation measures
3 because the whole purpose of environmental
4 assessment is not just to say what might be the
5 effect, but what will be the net effects after
6 mitigation is applied.

7 Q. Right. But the most common way
8 of determining whether a project's environmental
9 effects are adverse, so not-significant, but
10 adverse, is to compare the quality of the existing
11 environment with the predicted quality of the
12 environment once the project is in place?

13 A. I think I would agree, if you
14 understand and it's understood that that's a way of
15 identifying potential adverse environmental effects.

16 Q. Okay, thank you. I just want you
17 to look up at paragraph 2 under section 4.1. It's
18 on the previous page of the report.

19 A. Sorry, under what? What page?

20 Q. It's page 187 --

21 A. Uh-hmm.

22 Q. -- of the report.

23 A. Yes.

24 Q. So the second paragraph that
25 starts with Table 1:

1 "List the major factors that
2 should be used to determine
3 whether environmental effects are
4 adverse." [As read.]

5 Do you see that?

6 THE WITNESS: Yes.

7 Q. Could you please read the next
8 sentence:

9 "Obviously, the importance of
10 individual characteristics will
11 be different in different EAs.
12 To assist the RA and the Minister
13 in deciding whether the
14 environmental effects are
15 adverse, the proponent should be
16 required to submit information on
17 these factors." [As read.]

18 Q. Thank you. So the Table 1, just
19 for reference, that was the table that you were just
20 referring to in your testimony prior which is on the
21 next page; you were talking about VECs?

22 A. That's what the paragraph is
23 referring to, yes.

24 Q. And you would agree that that
25 table lists changes in the environment and effects

1 on people resulting from environmental changes?

2 A. Sorry, where are you focussing?

3 Q. Table 1.

4 A. Yes, where?

5 Q. So the headings of that table, it
6 refers to changes in the environment and effects on
7 people resulting from environmental changes in the
8 two columns, the title of the two columns. I'm just
9 reading the title.

10 A. If we are talking about the
11 Canadian Environmental Assessment Act, you can't
12 evaluate any of the factors in the right-hand column
13 unless they arise from environmental effects that
14 are in the left-hand column. We've already been
15 through all this, I think.

16 Q. Right, but sir, you are not
17 disagreeing that the table lists -- I'm just asking
18 what the table lists. It lists changes in the
19 environment and effects on people resulting from
20 environmental changes.

21 A. It does, but I'm saying that you
22 have to understand, as I'm sure this tribunal does,
23 that you don't get to even look at those factors
24 under a Canadian environmental assessment process
25 unless you have environmental effects in the

1 biophysical sense that are actually potentially
2 causing the effects in the right-hand column.

3 Q. But you would agree that changes
4 in the environment can vary from project to project?

5 A. Well, yes.

6 Q. Okay. So let's move on to
7 section 4.2 of the guide which describes step 2:

8 "Deciding whether adverse
9 environmental effects are
10 significant." [As read.]

11 Do you see that?

12 A. Yes.

13 Q. Okay, and according to the
14 reference guide, there are several criteria that
15 should be taken into account in deciding whether the
16 adverse environmental effects are significant;
17 correct?

18 A. Yes.

19 Q. Okay. And these criteria, just
20 for the record, they are listed in the following
21 paragraphs as the magnitude, geographical extent,
22 duration and frequency, reversibility, and
23 ecological context of the adverse environmental
24 effect; correct?

25 A. You are looking at the headings?

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1 Q. Yes.
2 A. Yes, those are often used as
3 guidelines.
4 Q. And just so that you and I have
5 an understanding, I am going to refer to those as
6 significant criteria going forward; okay?
7 A. No, you can refer to them as
8 that, but as I said, if you're -- as long as we
9 understand that you are trying to address potential
10 adverse environmental effects because even if you
11 come within these factors, unless you actually then
12 start applying mitigation, you don't know in the net
13 result whether they are adverse. So these are all
14 potential adverse environmental effects, not
15 environmental effects per se, adverse environmental
16 effects per se. These are criteria that would help
17 identify potential environmental adverse effects.
18 Q. All I'm saying though for the
19 next set of questions, I'll just refer to these
20 criteria as significant criteria, okay?
21 A. If you like.
22 Q. And looking at the second-last
23 paragraph on page 190, you would agree with the
24 statement that:
25 "All of these criteria are

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1 relevant in the determination of
2 significance under the CEAA"?
3 A. Where's the statement?
4 Q. The second-last paragraph on page
5 190.
6 A. Well, they say -- it says, all of
7 them should be considered in deciding whether the
8 adverse environmental effects are significant, not
9 different criteria will be important in different
10 EAs.
11 Q. Right, so Mr. Estrin, you would
12 agree that all of these criteria, the significance
13 criteria, which I'm going to refer to them as that,
14 they are all relevant to the determination of
15 significance; correct?
16 A. They are generally accepted as
17 that.
18 Q. Okay, and you would also agree --
19 A. Potential significance.
20 Q. And you would also agree with the
21 following statement that "Different significance
22 criteria will be different in different EAs"?
23 A. Well, you know, this was written
24 in 1974. That was 11 years before the Canadian
25 Environmental Assessment Act came into force, which

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1 was 1995. And the reality is that there are --
2 the -- it evolved from 1974.
3 Q. But this guide, sir, it's dated
4 November 1994; correct?
5 A. Sorry, did I miss out by five
6 years? Yeah, I guess the copy wasn't too -- 1994,
7 well that's still -- yes, you're right, you're
8 right. Sorry about that. You're right. It is
9 one-year before CEAA took effect.
10 Q. So I'll just repeat my question
11 to you then: You would agree with the statement that
12 different significance criteria will be important in
13 different EAs?
14 A. These -- no, I can't agree with
15 that statement because what you have in this -- what
16 you've asked me to look at are criteria to evaluate
17 whether something is going to be adverse effects.
18 Whether or not there are differences
19 in individual EAs is a matter of what comes up in
20 that particular assessment.
21 Q. Right, sir, but this part of the
22 report is under section 4.2, right, this statement?
23 A. Uh-hmm.
24 Q. And 4.2 is step 2, deciding
25 whether adverse environmental effects are

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1 significant?
2 A. Yes, and ...
3 Q. Right, so you would agree that
4 the significance -- different significance criteria
5 will be important in different EAs? So the criteria
6 that we're looking at here, you would agree that
7 ecological context could differ in differ EAs
8 depending on where the project --
9 A. The factors that are evaluated
10 under each of these headings could be potentially
11 different but, generally speaking, there is a common
12 approach.
13 Q. Right, but there are potential
14 differences amongst these factors when evaluating
15 the significance of adverse environmental effects?
16 A. Well, yes, there could well be.
17 Q. Okay, and you -- would you agree
18 with the following statement after that, in the
19 second-last paragraph of section -- or page 190,
20 that "The extent to which individual criteria will
21 influence the overall determination of significance,
22 that will vary between assessments"?
23 A. Sorry, where is that?
24 Q. We are -- we're still in the
25 second-last paragraph of page 190. So it says:

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1 "Different criteria will be
2 important in different EAs and
3 the extent to which individual
4 criteria will influence the
5 overall determination of
6 significance will vary between
7 assessments." [As read.]
8 A. Yes, that is a very general
9 statement and it certainly could, but on the other
10 hand, given the experience we've had to date under
11 CEAA in looking at various types of projects that
12 normally came under CEAA, it's been quite accepted
13 in the practice of environmental assessment, not
14 just by environmental lawyers but by the consultants
15 in the industry who prepare environmental
16 assessments that they generally agree on what these
17 common criteria should be that are evaluated in
18 environmental assessment. So, if you look at the
19 environmental assessments for any number of quarry
20 projects, you will find essentially that the same
21 criteria are evaluated in each one.
22 Q. But considering the criteria that
23 we have listed here, so magnitude, duration of
24 frequency, reversibility and ecological context,
25 those criteria can differ from project to project;

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1 correct?
2 A. If you have any effects that are
3 identified that need to be evaluated under those
4 headings, yes.
5 Q. Yes, okay.
6 A. If, if.
7 Q. Let's turn now to page 186 of the
8 reference guide.
9 A. 180...
10 Q. 186, so we're going --
11 A. That's turning backwards.
12 Q. -- backwards.
13 You would agree with the statement
14 here that in all cases --
15 A. Sorry, where are you?
16 Q. We're in the second full
17 paragraph. So you would agree with the statement
18 here that "In all cases, significance and the
19 related matters are determined only after taking
20 into account mitigation measures"?
21 A. That's what I said.
22 Q. Correct? I'm just asking you to
23 confirm your agreement with that statement. So you
24 agree with that statement, "yes" or "no"?
25 A. Yes. Well, taking into account

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1 any mitigation measures the RA considers
2 appropriate. I mean, are you wanting me to read the
3 whole sentence and agree to the whole sentence or
4 just stopping at "measures"?
5 Q. Please just listen to my
6 question. My question is: You would agree with the
7 statement that:
8 "In all cases significance in the
9 related matters are determined
10 only after taking into account
11 any mitigation measures",
12 correct?
13 A. Yes.
14 Q. So, let's turn back to the CEAA,
15 which is Exhibit R-1 at Tab 2 of your binder. Tab
16 2. I'd like you to turn to page 4 of this exhibit.
17 If you look at the third definition in this page,
18 you see the definition of mitigation; "yes" or "no"?
19 Are you there?
20 A. I'm reading it. Do you want me
21 to read it?
22 Q. No, I'm asking: Do you see that?
23 A. I see it.
24 Q. And you would agree that
25 according to this definition, a mitigation measure

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1 is required to eliminate, reduce or control an
2 environmental effect; correct?
3 A. Well, "Elimination, reduction or
4 control of the adverse environmental effects of the
5 project, it includes restitution or restoration,
6 compensation, or any other means."
7 I mean just -- that's what it says.
8 Q. Right. But, so I'm asking you to
9 confirm, a mitigation measure must eliminate, reduce
10 or control an adverse environmental effect?
11 A. That's the intention of
12 discussing mitigation, yes.
13 Q. Okay. And you would agree that
14 what -- a measure that eliminates, reduces or
15 controls an adverse environmental effect, that would
16 depend on what the adverse environmental effect is?
17 A. And also what the mitigation
18 measure is.
19 Q. Yes, but it would depend on what
20 the adverse environmental effect is; correct?
21 A. Yes.
22 Q. And whether a measure eliminates,
23 reduces or controls an adverse environmental effect,
24 that would also depend on the significance criteria
25 that we just looked at?

1 A. It would certainly have a bearing
2 on it, yes.
3 Q. Let's go to section 16 of the
4 Act, which is on page 9. Section 16(1)(d) specifies
5 that:
6 "Mitigation measures that are
7 required to be considered are
8 those that are both technically
9 and economically feasible;" [As
10 read.] correct?
11 A. Well, you haven't read the whole
12 sentence:
13 "And that would mitigate any
14 significant adverse environmental
15 effects of the project." [As
16 read.]
17 So if you are discussing specifically
18 significantly adverse environmental effects, then
19 mitigation measures are defined in that term. They
20 would have to be technically and economically
21 feasible.
22 Q. So to answer -- just so I can
23 restate my question, you would agree then that the
24 mitigation measures that must be considered in an
25 environmental assessment are these are both

1 effects, that would depend on the individual
2 project?
3 A. No, I think we all -- anyone who
4 practices in this area, and I don't mean just
5 lawyers, I mean environmental consultants,
6 understand that -- and even Ms. Griffiths said in
7 her -- when she was the chair of the Voisey's Bay
8 panel, "Hey, we are looking at a mining project.
9 Mining projects have basically common potential
10 impacts and we can understand that they would
11 probably all have common mitigation measures."
12 So there's a kind of, with
13 experience, consultants and even panel members
14 understand that there can be a commonality to the
15 approach, and if you are not dealing with something
16 that is rocket science and you are dealing with
17 something that's well-known and you've done it for
18 10 or 20 years, you have a feeling, just begin with,
19 of what type of mitigation measures you have to look
20 at, right?
21 Q. But Mr. Estrin, you'd agree, even
22 with a common mitigation measure, you would have to
23 evaluate that mitigation measure against the adverse
24 environmental effects of the specific project?
25 A. Against the specific --

1 technically and economically feasible?
2 A. No, because the sentence says:
3 "Measures that are technically
4 and economically feasible and
5 that would mitigate any
6 significant adverse environmental
7 effects." [As read.]
8 It doesn't say "any adverse
9 environmental effects". It doesn't say "any
10 environmental effects". It says, "mitigate any
11 significant adverse environmental effects".
12 Q. But, sir, you don't disagree that
13 the measures that are required to be considered must
14 be technically and economically feasible?
15 A. If you are speaking of SAEE, yes.
16 Q. Okay.
17 A. Because really that's the only
18 time in section 16 that, 16(1), that mentions the
19 word mitigation --
20 Q. Right, I understand.
21 A. -- in connection with SAEE.
22 Q. Okay. And Mr. Estrin, you would
23 agree that the types of mitigation measures that are
24 technically and economically feasible and would
25 mitigate any significant adverse environmental

1 Q. You still have to consider --
2 A. -- potential adverse effects that
3 would arise in that --
4 MR. NASH: If the witness could be
5 allowed to finish his sentence before he was
6 interrupted. Thank you.
7 MS. KAM: He finished and looked at
8 me.
9 Q. But you would agree though, you
10 still need to consider the adverse environmental
11 effects of the project even there is a common
12 mitigation measure that you are referring to?
13 A. You have to consider the
14 potential adverse environmental effects and make a
15 determination, first of all, of whether or not they
16 are likely to be significant, and if you do that,
17 then you would have to look at mitigation measures
18 that are technically and economically feasible.
19 If you don't identify SAEE, there is
20 nothing in Section 16 that says you have to address
21 mitigation measures.
22 Q. But in order to make finding of
23 likely SAEE, you must consider the potential adverse
24 environmental effects of the project; correct?
25 A. Taken into consideration with

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1 mitigation measures, yes.
2 Q. And those mitigation measures
3 must be taken into account with the potential
4 adverse environmental effects of that project?
5 A. Well, Section 16(1)(d) doesn't
6 say that. It says:
7 "Measures that are technically
8 and economically feasible and
9 that would mitigate any
10 significant adverse effects."
11 [As read.]
12 So I don't see anything in here that
13 specifically says that mitigation measures need to
14 be taken into account in respect of matters that the
15 consultants say, for example, they propose to a
16 project.
17 Q. But I'm not asking that, sir, I'm
18 asking --
19 A. Well, you are not letting me
20 finish my sentence.
21 Q. Go ahead then.
22 A. That, you know, when you do an --
23 when you do an environmental assessment, you set out
24 the VECs, the valuable ecosystem components that may
25 likely -- are the ones that we want to protect in

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1 project, but as I said, the phrase occurs in the
2 sentence that says "would mitigate any significant
3 adverse effects of that project".
4 Q. Yes. So you agree that the
5 mitigation measures must be measured against the
6 significant adverse environmental effects of that
7 project?
8 A. Right.
9 Q. Okay.
10 A. Assuming they have some.
11 PRESIDING ARBITRATOR: Okay, and
12 would that be a good moment or would you --
13 MS. KAM: I was just going to suggest
14 that it might be a good time to take a break.
15 PRESIDING ARBITRATOR: So you are
16 suggesting it?
17 MS. KAM: Yes.
18 PRESIDING ARBITRATOR: Super. Okay.
19 So we are going to break until 2:30, because we
20 granted ourselves an extra 15 minutes for lunch as a
21 mitigation measure against fatigue. And you will
22 have to spend a very solitary lunch hour, Mr.
23 Estrin, as you know.
24 THE WITNESS: Right, right, right.
25 I have -- yes, that's fine.

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1 the context of what potential impacts the project
2 may have. And then you try and gather data and you
3 try and then, in a reasoned way, use judgment to
4 determine whether or not those VECs will be affected
5 and in what specific way. And then you try and
6 determine whether or not there may be adverse
7 effects.
8 Q. But I'm not asking that, sir.
9 I'm asking -- it says here, "The measures that are
10 technically and economically feasible and that would
11 mitigate any significant adverse environmental
12 effects of the project", correct?
13 So when you are taking into account
14 technically and economically feasible mitigation
15 measures, you measure those against the significant
16 adverse environmental effects of the project?
17 A. Assuming those have been
18 identified.
19 Q. Yes.
20 A. Yes.
21 Q. But you don't forego the analysis
22 of the mitigation measures against the environmental
23 effects of the project; correct? You still consider
24 the environmental effects of that project?
25 A. You are always looking at that

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1 PRESIDING ARBITRATOR: Okay. Thank
2 you.
3 --- Lunch recess taken at 1:16 p.m.
4 --- Upon resuming at 2:30 p.m.
5 PRESIDING ARBITRATOR: Okay. We can
6 resume the examination of Mr. Estrin.
7 THE WITNESS: May I just say
8 something about the dealing with the reports that
9 were handed to me, my reports? They are not -- the
10 way they are is prejudicial in the sense that I have
11 some -- each report has several appendices. There
12 is no tabs in their documents even as to where to
13 find the appendices, and I wanted to be able to
14 refer, to the extent that it would help answer the
15 question, to the appendices.
16 I'm quite happy if my friend would
17 like to photocopy my reports with any writing I have
18 in them because they only have corrections to
19 footnotes. But if she -- so, and you want to have a
20 look, go ahead. But otherwise, as you see, Mr. --
21 Mr. President, there is, you know, six tabs to that
22 one and there is four tabs to the other one. I have
23 no idea where they are in this document.
24 PRESIDING ARBITRATOR: Anybody
25 wanting to take the floor on that?

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1 I'm not aware of a rule on that.
2 Anybody wanting to help out here
3 because I'm not aware of a rule either for or in
4 favour or against the witness using his own -- or in
5 case of using his own document, having to present
6 that to the examining party.
7 MS. KAM: I'm fine with Mr. Estrin
8 referring to his own document, if we could just take
9 a look at the --
10 PRESIDING ARBITRATOR: Sorry?
11 MS. KAM: I'm fine with Mr. Estrin
12 referring to his own version of the documents. If
13 we could take look at the notes after the words,
14 that would be helpful for us.
15 THE WITNESS: You're welcome to.
16 PRESIDING ARBITRATOR: If you're fine
17 with that?
18 THE WITNESS: That's fine.
19 MS. KAM: That's what we proposed in
20 the beginning too.
21 PRESIDING ARBITRATOR: Fine. Thank
22 you.
23 BY MS. KAM:
24 Q. So Mr. Estrin, I hope you had a
25 good lunch. Let's start by turning to paragraph 282

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1 of your second damages report.
2 A. Let me just put away certain
3 things. Sorry, paragraph 282?
4 Q. 282 of your second report filed
5 in the damages phase of this arbitration.
6 A. Yes.
7 Q. In paragraph 282 you refer to "a
8 standardized EA Review and approval process in Nova
9 Scotia that applies to quarries, mines and sandpits
10 and other similar undertakings greater than 4
11 hectares area..."
12 Do you see that?
13 A. Yes.
14 Q. And you state that this process
15 is established formally under the environmental
16 assessment regulations?
17 A. Yes.
18 Q. In addition to the regulations,
19 you also referred to several documents that Nova
20 Scotia has prepared to guide EA proponents?
21 A. Yes.
22 Q. And just for the record, I'm
23 going to read them out and they are listed in
24 paragraph 283 of your report.
25 A. Uh-hmm.

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1 Q. As the "Guide to preparing an EA
2 assessment registration document," "The Nova Scotia
3 Department of Environment Pit and Quarry Guidelines,
4 revised 1990", and "A Proponent's Guide to
5 Environmental Assessment", correct?
6 A. Yes.
7 Q. So let's turn to tab 6 of your
8 binder and that's Exhibit R-6.
9 A. Tab 6 of the binder you gave me,
10 right? Yes.
11 Q. These are the environmental
12 assessment regulations that you referred to in your
13 report as establishing the standardized EA Review
14 and approval process in Nova Scotia; correct?
15 A. Yes.
16 Q. You'd agree that in Nova Scotia
17 the EA process entails the filing of a registration
18 document?
19 A. Yes.
20 Q. And the registration document is
21 a document prepared by the proponent?
22 A. Yes.
23 Q. And the document, the
24 registration document, includes information about
25 the project?

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1 A. Yes.
2 Q. Great. Let's turn to page 7
3 which -- and look at section 13(1), which refers to
4 the Minister's decision upon the registration of a
5 Class I undertaking.
6 A. Yes.
7 Q. According to section 13(1),
8 following the following of a registration, the
9 Minister may decide to take various courses of
10 action; correct?
11 A. Yes.
12 Q. You would agree that ultimately
13 the Minister's decision to approve or reject a
14 project is based on the likelihood in which a
15 project will cause adverse effects or significant
16 environmental effects; correct?
17 A. Yes.
18 Q. Okay, and --
19 A. Under that section. There are
20 other sections that come up into that decision
21 depending on -- the section is normally -- normally
22 used, I think, to take a first cut at the
23 registration document to determine whether or not
24 there is missing information or whether it can be
25 approved just as is, or -- and sometimes, in a rare

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1 case, it may be used to immediate -- almost
2 immediately reject a project, because Nova Scotia
3 has made it a priority to process quarry-like
4 projects with a alacrity.

5 They have said it is their policy
6 that they are going to deal with a registration
7 document within 25 days.

8 In other words, they want the
9 industry to be going forward, and that's consistent
10 with a document that's made Exhibit 7 to Mr. Lizak's
11 first report which is Mineral Policy for Nova Scotia
12 1996, and the one-window approach, which is another
13 important document in understanding Nova Scotia's
14 desire and it's really a desire and a policy to
15 really, in effect, give as smooth a path forward for
16 these kinds of applications as possible because they
17 think it's important for their economy.

18 So there is an ability under this
19 section for the Minister to say, you know, it's just
20 too much -- there is nothing here. Goodbye.

21 Q. Pursuant to section 13(1), the
22 approval or rejection is based on the likelihood
23 that the project will cause adverse effects or
24 significant environmental effects?

25 A. Those are words that are used

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1 there, yes.

2 Q. And you would agree that under
3 the Nova Scotia legislation, there is no requirement
4 that there be a finding of significant adverse
5 environmental effects in order for the Minister to
6 reject the undertaking?

7 A. Significant -- what was your
8 phrase? Question?

9 Q. So under the Nova Scotia
10 legislation, there's no requirement that there be a
11 finding of significant adverse environmental effects
12 in order for the Minister to reject the undertaking?

13 A. Right, but you -- it says -- it
14 will either cause adverse effects, will cause
15 adverse effects or significant adverse environmental
16 effects which are unacceptable, which really implies
17 that there are obviously some negativity to those
18 effects.

19 Q. But I'm not asking about
20 negativity, sir. I'm just asking, there is no
21 requirement to make a finding of significant adverse
22 environmental effects?

23 A. The word "adverse" doesn't appear
24 there. That is in one respect how the wording
25 differs from SAEF.

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1 Q. But if you look at 13(1)(e) it
2 says that a review of the information indicates that
3 there is a likelihood that the undertaking will
4 cause adverse effects or significant environmental
5 effects?

6 A. Which are unacceptable. You
7 can't stop reading --

8 Q. Which are unacceptable and the
9 undertaking is rejected; correct?

10 A. Yes, so if you are trying to
11 suggest that -- I agree with you as to the fact
12 that, of course, the word "adverse" doesn't apply.
13 It doesn't appear in this -- doesn't appear in --
14 "significant adverse" doesn't appear in that clause.
15 But if you are trying to say it is significant
16 adverse environmental effects then that is not a
17 fair reading because the way environmental effects
18 is defined under the Nova Scotia statute, as I think
19 you would be aware, is that it can be positive or
20 negative effects.

21 Q. Right, but in this provision it
22 refers to "adverse effects" or "significant
23 environmental effects", correct? Looking at the
24 wording of this provision.

25 A. Which are unacceptable.

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1 Q. Which are unacceptable, and the
2 undertaking is rejected.

3 A. I think the words "which are
4 unacceptable" in my opinion modify the words
5 "significant environmental effects". That's my
6 opinion.

7 Q. But this provision does not state
8 that there must be a finding of significant adverse
9 environmental effects in order to reject an
10 undertaking?

11 A. The word "adverse" is not used in
12 clause (e) yes, you're right.

13 Q. So you would agree that this
14 provision does not state that there must be a
15 finding of significant adverse environmental effects
16 in order to reject the undertaking?

17 A. That would be the fair
18 implication of what I just said.

19 Q. Great.

20 According to subparagraph (b) of
21 section 13.1, the extent to which adverse effects or
22 significant environmental effects are mitigable,
23 that is also a relevant consideration in the
24 Minister's decision; correct?

25 A. Yes, that's what it says.

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1 Q. So let's turn to page 2 of the
2 regulations and let's look at the definition of
3 mitigation under section 2(r).
4 A. Sorry, where is that?
5 Q. So that would be page 2 of the
6 regulations.
7 A. Where's the regulation? Sorry.
8 Q. You're in the regulations.
9 A. Oh, we're in the --
10 Q. 2(r), about halfway down the
11 page.
12 It is also on the screen in front of
13 you.
14 A. Yes.
15 Q. And so you would agree that the
16 definition of mitigation under the NSEA also means:
17 "With respect to an undertaking,
18 the elimination, reduction or
19 control of the adverse effects or
20 significant environmental effects
21 of the undertaking and may
22 include restitution for any
23 damage to the environment caused
24 by such effects through
25 replacement, restoration,

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1 compensation or any other means."
2 [As read.]
3 A. Yes.
4 Q. Now let's turn to section 12 of
5 the regulations.
6 A. While we're on that page, the
7 definition of environmental effects is on the same
8 page and you'll see, I think, what I was saying
9 before that it is sort of one of those ambiguous
10 terms. It says any change, whether positive or
11 negative that the undertaking may cause, so that's
12 why I think it is important to understand that in
13 the clause you directed me to, it said environmental
14 effects that are unacceptable, which is connoting
15 something that is not obviously positive.
16 Q. Let's go to section 12 of the
17 regulations, which is "Factors Relevant to the
18 Minister's Decision."
19 A. Where is that? At the beginning
20 of bottom of page 6?
21 Q. Bottom of page 6. Looking at
22 this provision, you would agree that the factors
23 that -- that the provision lists the information
24 that shall be considered by the -- in the Minister's
25 decision following the review of a registration

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1 document?
2 A. Yes.
3 Q. Just for the record, you would
4 agree that these factors include information such as
5 the location of the proposed undertaking and the
6 nature and sensitivity of the surrounding area?
7 A. Yes.
8 Q. It also includes the size and
9 scope of the proposed undertaking?
10 A. Yes.
11 Q. It also includes concerns
12 expressed by the public about adverse effects or the
13 environmental effects of the proposed undertaking?
14 A. Yes.
15 Q. It also includes steps taken by
16 the proponent to address environmental concerns?
17 A. Yes.
18 Q. And I won't read them all, but
19 you would agree that each of these factors under
20 section 12 relates specifically to the project
21 that's being assessed?
22 A. Yes.
23 Q. All of these factors would be
24 relevant to the Minister's determination of adverse
25 effects and significant environmental effects?

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1 A. Yes.
2 Q. And just looking at these
3 regulations, you would agree that there is nothing
4 in the regulations that requires the approval of all
5 quarry projects in Nova Scotia?
6 A. Correct.
7 Q. Let's go now to Exhibit R-081?
8 A. And that's not my position. I
9 hope you understand that. There is nothing that
10 requires approval. Obviously, there are criteria,
11 but what I am saying is when you look at the track
12 record of what has happened in Nova Scotia, they
13 have all been approved with terms and conditions,
14 but for one that Mr. Geddes came up with was hidden
15 in records that are not publicly available.
16 Q. I understand you have an opinion
17 but I'm only asking about this document.
18 A. Right.
19 Q. So let's turn now to Exhibit
20 R-081, which is at Tab 8, 7 of your binder, and it
21 is titled, "The guide to preparing an assessment
22 registration document for pit and quarry
23 developments in Nova Scotia."
24 A. Right.
25 Q. And if you just look at paragraph

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1 284 of your second report which is in front of you.
 2 A. Uh-hmm.
 3 Q. You state that:
 4 "Importantly, the purpose of this
 5 guide is to provide consistency
 6 and a greater degree of certainty
 7 regarding the information
 8 submitted to register a pit or
 9 quarry undertaking..." [As read.]
 10 Do you see that?
 11 A. I do.
 12 Q. And you would agree that this
 13 statement is taken from the second paragraph of page
 14 I of the guide?
 15 A. I don't know, I'd have to look.
 16 Q. It is the first page after the
 17 cover page in the second paragraph.
 18 A. Yes, yes, yes, thank you.
 19 Q. Okay. If we continue down to the
 20 third paragraph below, do you see the statement that
 21 says:
 22 "The issues addressed in this
 23 guide are those typically
 24 associated with pit and quarry
 25 developments ..."

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1 vary according to the project type, location, and
 2 surrounding environment"?
 3 A. I can't agree with that statement
 4 without qualification, no. In fact, when you look
 5 at what is addressed in quarry registration
 6 documents, and I have a whole -- I have appendix of
 7 typical quarry registration documents as an appendix
 8 to my reply report.
 9 It is Appendix A:
 10 "Tables Of Contents From Class I
 11 EA Registration Documents For
 12 Three Nova Scotia Quarry Projects
 13 -- Seabrook Quarry Expansion,
 14 Elmsdale Quarry Expansion Project
 15 And Nictaux Pit And Quarry
 16 Development."
 17 Generally speaking, if you look at
 18 the table of contents as to what is being dealt with
 19 in a registration document, you will see that they
 20 are generally similar.
 21 Q. But in terms of project-specific
 22 information, you would agree that project-specific
 23 information can vary depending on the location of a
 24 project?
 25 A. Of course, of course. Each site

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1 A. Yes.
 2 Q. And can you please read out the
 3 rest of this sentence?
 4 A. "... however, there may be
 5 project-specific issues that the proponent needs to
 6 address in the registration document that have not
 7 been identified in the guide. Similarly, there may
 8 be issues outlined in this guide that are not
 9 relevant to the project."
 10 Do you want me to keep reading?
 11 Q. No, I just asked you to read the
 12 rest of the sentence.
 13 A. Oh, sorry. Okay.
 14 Q. But thank you. So you would
 15 agree that project-specific issues may need to be
 16 addressed -- may need to be addressed in an EA of a
 17 quarry?
 18 A. Yes, I would hope so.
 19 Q. In the third sentence of this
 20 paragraph it states that coming upon-specific
 21 information will vary according to the project type,
 22 location and surrounding environment."
 23 A. Yes.
 24 Q. Do you see that? And you would
 25 agree that information about quarry projects will

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1 may have little particularities that need to be
 2 considered.
 3 Q. And you are not disputing that
 4 project-specific information can also vary depending
 5 on the project type?
 6 A. No.
 7 Q. Okay. And you --
 8 A. But having regard to what happens
 9 in Nova Scotia, Nova Scotia has given guidance.
 10 This is the whole purpose of this document, as
 11 you've pointed out, is to provide consistency and a
 12 greater degree of certainty regarding information
 13 submitted to -- so the government is telling
 14 proponents of quarries, here's what we want in order
 15 for us and you to be successful, and that's very
 16 important, very helpful.
 17 Q. And you would agree though, Mr.
 18 Estrin, that project-specific information would be
 19 relevant to the Minister's decision with respect to
 20 an undertaking?
 21 A. Well, it won't even get to the
 22 Minister probably if it doesn't have
 23 project-specific information. It would be said to
 24 be an incomplete report.
 25 Q. So you would agree with that

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1 statement that project-specific information would be
2 relevant to the Minister's decision?
3 A. Every registration document will
4 have project-specific information -- it -- it won't
5 comply with what's required.
6 Q. So you agree, "yes"?
7 A. I think, in general terms, yes.
8 Q. I just need a clear answer for
9 the record.
10 A. But it doesn't seem to me --
11 it's -- it's an observation about -- that doesn't
12 really necessarily -- well, I'll let you do with it
13 what you want.
14 Q. Well, if we look at this
15 document, there is nothing in this guide that
16 requires the approval of all quarry projects in Nova
17 Scotia?
18 A. I thought I answered that
19 question.
20 Q. But I'm asking about this
21 document here.
22 A. There is nothing -- of course
23 not. There is nothing in -- no government would say
24 all projects are prior approved except -- there can
25 be an environmental assessment process. Actually,

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1 generally speaking, of common considerations and
2 common mitigation measures. Yes, there might be a
3 specific difference between that project over there
4 and this one over there, and that would be taken
5 care of by terms and conditions. That is why all of
6 these quarries are approved, because the proponents
7 actually pay attention to the guide, know what
8 information they're supposed to provide, and to the
9 extent that the government feels that there's
10 something missing, they say, "Well, you haven't done
11 this quite right, you haven't done this. We don't
12 have enough information. We will give you an
13 approval subject to preparing a blasting plan that
14 we'll approve or preparing a groundwater protection
15 plan that we'll approve". So, yeah, there is
16 some -- they do take those things into account but
17 they generally know that they are not approving a
18 nuclear stockpile.
19 Q. Mr. Estrin, let's turn to tab 9
20 of your binder, which is Exhibit R-163, and this is
21 titled "A proponent's guide to environmental
22 assessment".
23 A. Tab 9. Yes.
24 Q. Yes. And just for the record I
25 want to ask you, there is nothing in this guide that

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1 in Ontario, for example, we have class environmental
2 assessments.
3 Environmental assessments started out
4 as a project-specific assessment, as a planning
5 tool, and is appropriate for larger projects. But
6 then it was recognized that many projects go on that
7 have similar characteristics and it doesn't
8 necessarily do any good to reinvent the wheel every
9 time you are proposing to, let's say, widen a street
10 or extend a highway by a bit or extend a quarry, for
11 example.
12 You can publish or you can regard
13 those things as common features, common elements, to
14 which we know what are the common -- likely common
15 environmental attributes. So they provided for
16 class environmental assessments which made it a much
17 simpler document. And so it's been recognized and
18 even the Canadian Environmental Assessment Act
19 provides for class environmental assessments. So,
20 really, yes, there will be individual differences
21 between projects to some extent but when you look at
22 this guide, what it's really saying is -- we are
23 talking about sui generis, we are talking about a
24 type of project, pits and quarries that have common
25 characteristics that will require an application,

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1 requires the approval of all quarry projects in Nova
2 Scotia?
3 A. There is nothing in anything I've
4 seen that would require that.
5 Q. But nothing in this document; I'm
6 just asking you to confirm.
7 A. I'd have to read it carefully
8 again but, if there was, I would have said that. I
9 would have pointed it out, you can be sure.
10 Q. So let's go to page 43 of your
11 second report.
12 A. Yep. Which I recall my reply
13 report or August report.
14 Q. Yes, the second one. And it's
15 page 43, please.
16 A. Okay.
17 Q. Part 2 of your report is titled
18 "Reply to Ms. Griffiths and Dr. Blouin expert
19 reports that prognosticate approvability challenges
20 for WPQ if considered by a further review panel."
21 Do you see that?
22 A. Yes.
23 Q. And paragraph A states that,
24 "Looking at approvability through a review panel
25 lens is the wrong focus"?

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1 A. Yes.
2 Q. So you take issue with
3 Ms. Griffiths' and Dr. Blouin's analysis because it
4 is based on their experience as former review panel
5 chairs?
6 A. What -- I took issue with that
7 approach because there has never, ever been a review
8 panel for a quarry in Nova Scotia.
9 Q. Okay, but --
10 A. Other than Whites Point.
11 Q. And you don't dispute though that
12 the Whites Point Project was referred to a review
13 panel assessment by the Nova Scotia Minister of
14 Environment and Labour and the Minister of
15 Environment Canada?
16 A. No.
17 Q. Okay. And in paragraph A you
18 also refer to -- you also state that - and I think
19 you just confirmed this - that other than the WPQ,
20 there has never been a review panel that has ever
21 been convened in Nova Scotia to consider the EA
22 acceptability of a quarry?
23 A. Right, under other piece of
24 legislation.
25 Q. And so you'd agree that none of

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1 the other Quarry and Marine Terminal Projects that
2 you identified in your reports were conducted
3 through a review panel assessment?
4 A. Well, that's right. I couldn't
5 find one. That's why it was so unique and
6 potentially prejudicial to the proponent, but if you
7 are -- want to go on from that to imply that or
8 question whether or not then the assessment of other
9 quarries is a lesser degree or somehow different,
10 the answer to that would be, no, it isn't, in the
11 sense that they use the same criteria in both cases,
12 whether it is a panel review or not. And I think
13 this tribunal already recognized that when we looked
14 at comparative projects such as Belleoram and
15 Aguathuna, which were Quarry and Marine Terminal
16 Projects. It was the same section 16 factors, et
17 cetera, et cetera, and CEAA applied there. It was
18 just who was applying it that made the difference.
19 One case, it was a panel.
20 In this case in Whites Point, it was
21 a panel. In every other case, it is civil servants
22 within departments of environment.
23 PRESIDING ARBITRATOR: Mr. Estrin,
24 I'm very sorry but could you try to keep your
25 answers short maybe if you cannot just express "yes"

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1 or "no", but keep it -- because otherwise I think we
2 will go on for too long a time.
3 THE WITNESS: Sure.
4 PRESIDING ARBITRATOR: So if you
5 could try, please.
6 THE WITNESS: Sure.
7 BY MS. KAM:
8 Q. Please turn to paragraph 49 of
9 your first report, in the damages phase. This would
10 be your March report.
11 A. Sorry, page or paragraph?
12 Q. Paragraph 49. Here you state
13 that:
14 "No federal or provincial
15 government agency or official
16 took the position before the JRP
17 that the WPQ should not be
18 approved or that after mitigation
19 it would look likely cause SAEE."
20 [As read.]
21 Do you see that?
22 A. Yes.
23 Q. And this was a key factor that
24 you relied many on in support of your opinion that
25 the Whites Point Project would have been approved?

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1 A. It is one of them, but it is a
2 key one.
3 Q. So, I'd like to turn now to the
4 rejoinder expert reports of Robert Connelly, which
5 is at tab 10 of your binder.
6 A. Yes.
7 Q. And prior to your testimony
8 today, you have reviewed Mr. Connelly's report?
9 A. Yes.
10 Q. Let's turn to page 15 of
11 Mr. Connelly's report.
12 A. Right.
13 Q. In paragraph 38 of Mr. Connelly's
14 report, he refers to three Federal Review Panels
15 which found a likely SAEE without a federal
16 department stating that one was likely; do you see
17 that?
18 A. Sorry, where is that exactly?
19 Q. It's in paragraph 38 of
20 Mr. Connelly's report. It is also up on the screen.
21 A. Right. Right. Yes, I'm quite
22 aware of that.
23 Q. Okay. And you don't disagree
24 with Mr. Connelly's statement?
25 A. Well, that's right. Panels can

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1 find SAEE even -- even if -- even if a department
2 doesn't say that it it's going to be, and as I
3 acknowledged, you know, it isn't all the time that
4 departments get up and say in their opinion there
5 will be SAEE but sometimes they do.
6 Q. So let's turn to Exhibit 1405 at
7 tab 11 of your binder and this is a letter from
8 Environment --
9 A. Sorry, which tab?
10 Q. Tab 11.
11 A. Yeah, okay.
12 Q. And it is a letter from
13 Environment Canada to the co-chairs of the Lower
14 Churchill JRP?
15 A. Yes.
16 Q. And you are familiar with the
17 Lower Churchill JRP assessment?
18 A. Well, I think -- not as familiar
19 as Ms. Griffiths, who was a co-chair.
20 Q. But you've cited it to your
21 report, so you are aware of the process. Okay, so
22 this letter attaches Environment Canada's
23 submission, which starts at page 4 of the exhibit.
24 Do you see the submission on page 4?
25 A. Yeah, I did. All right.

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1 department's mandate."
2 Q. So you'd agree, Mr. Estrin, this
3 is an example where a government department
4 expressly states its opinion that there would be no
5 likely significant adverse environmental effects in
6 respect of a project?
7 A. Yes, exactly, and it confirms
8 what I'm saying, that these departments will use the
9 opportunity, should they find likelihood of
10 significant adverse environmental effects, to advise
11 a panel of it.
12 Q. And you would agree here,
13 Environment Canada's opinion is broadly stated in
14 respect of environmental matters within the
15 department's mandate?
16 A. Of course. That's all I'd they'd
17 be focussing on. Somehow someone was trying to
18 misconstrue my view that you could not possibly have
19 one government official try and say that -- you
20 would never expect to have one government official
21 come to a review panel with an opinion about the
22 whole project at SAEE. I never, ever said that. I
23 said they would be very careful to act within their
24 own jurisdiction, within their own framework, and
25 evaluate whether there would be SAEE within their

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1 Q. And if you turn to page 3 of the
2 submission, you get to the table of contents. It is
3 also up on the screen here.
4 A. Right.
5 Q. And you would agree that
6 Chapter 2 identifies Environment Canada's mandates,
7 roles and responsibilities as including the
8 Fisheries Act, Pollution Prevention Provisions, the
9 Migratory Bird Convention Act 1994 and the Species
10 at Risk Act?
11 A. Yes.
12 Q. So let's turn to page 6 of the
13 submission. And could you please read out
14 Environment Canada's conclusion which starts in the
15 first sentence of the last paragraph?
16 A. Overall...
17 Q. Yes.
18 A. Yes.
19 "Overall, if the project and
20 associated mitigation activities
21 are well executed, Environment
22 Canada expects there will not be
23 any significant adverse
24 environmental effects on
25 environmental matters within the

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1 department's responsibility. So it is very
2 important in that case. And I understand
3 Ms. Griffiths, at the end of the panel of Lower
4 Churchill and her cohorts decided they disagreed
5 with Environment Canada, right?
6 Q. Right. So let's turn to tab --
7 sorry.
8 A. And then the cabinet didn't agree
9 with Ms. Griffiths.
10 Q. Okay, but let's turn to tab 12 of
11 the binder then since you referred to the
12 JRP Report.
13 A. All right.
14 Q. And let's go to page 110 of the
15 report. And for the record, this is Exhibit C-81,
16 the Lower Churchill JRP.
17 A. Page 110, the heading "Caribou"
18 or something? Sorry, where are you?
19 Q. Page 110, and I'm looking under
20 the heading "Caribou". And you would agree that it
21 states in the first paragraph, in the context of
22 this EA, "The Red Wine Mountain ..."
23 A. Sorry, I'm not with you. Where
24 does that start?
25 Q. I'm going to start with the

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1 second sentence under this paragraph.
 2 A. The second sentence says, "The
 3 Red Wine Mountain Caribou."
 4 Q. Yes, I'm not quoting it directly,
 5 but you would agree --
 6 A. Let me read it please.
 7 All right, go ahead, sorry.
 8 Q. So looking at this sentence, you
 9 would agree that in the context of this EA, the Red
 10 Wine Mountain caribou herd was considered threatened
 11 under the Provincial Endangered Species Act and the
 12 Canadian Species at Risk Act?
 13 A. This is under the heading
 14 "Nalcor's view". Are you says this is Nelcor's
 15 view?
 16 Q. That was a submission made by the
 17 proponent. I'm just asking you to confirm that.
 18 A. I know nothing more about that
 19 than what can be read here read hear.
 20 Q. But that's what it states here on
 21 page 110?
 22 A. Apparently, yes, it states that,
 23 yes.
 24 Q. And you would agree that the
 25 Species at Risk Act was one of the pieces of

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1 legislation identified in Environment Canada's
 2 submission as being part of its mandate?
 3 A. Yes.
 4 Q. So let's turn to the panel's
 5 conclusions and recommendations which are at page
 6 117 of the report.
 7 A. Uh-hmm.
 8 Q. Could you please read the panel's
 9 conclusion in the box at the bottom of the page?
 10 A. (Reading):
 11 "The panel concludes that in
 12 light of the current state of the
 13 herd and the cumulative effect on
 14 its recovery, the project would
 15 cause a significant adverse
 16 environmental effect on the Red
 17 Wine Mountain caribou herd." [As
 18 read.]
 19 Q. So, you would agree that this
 20 confirms your statement that the panel made a
 21 determination of significant -- significance despite
 22 Environment Canada's submission that it did not
 23 expect there to be any significant environmental
 24 impact?
 25 A. Yes, panels can do that.

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1 Q. So, just for the record, it is
 2 possible for a review panel to determine likely
 3 significant adverse environmental effects even if
 4 governments state -- officials state their opinion
 5 otherwise?
 6 A. Yes, and the converse is true as
 7 well.
 8 Q. So, let's turn to paragraph 334
 9 of your damages reply report, which is the second
 10 report that you filed.
 11 A. Just before -- you know, you took
 12 me to tab 11 and where you introduced the comments
 13 of Environment Canada.
 14 There is something very significant,
 15 I think, in the letter that accompanies that
 16 document to which you referred me that I think it
 17 needs to be noted.
 18 Q. I didn't ask a question about
 19 this.
 20 A. Under the heading, "Environmental
 21 management, monitoring and follow-up".
 22 PRESIDING ARBITRATOR: I think, Mr.
 23 Estrin, we are now again --
 24 THE WITNESS: Okay, all right. Maybe
 25 it's something that I'll have a chance to do. All

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1 right. So where are we?
 2 BY MS. KAM:
 3 Q. Paragraph 334 of your second
 4 damages report. Here you state:
 5 "I find it puzzling that in
 6 providing expert opinions for
 7 Canada in this matter,
 8 Ms. Griffiths and Dr. blouin do
 9 not consider how terms and
 10 conditions used in similar
 11 projects did address such
 12 concerns." [As read.]
 13 Do you see that?
 14 A. Yes.
 15 Q. So, your concern is that Canada's
 16 experts did not consider the use of terms and
 17 conditions in their findings?
 18 A. Correct.
 19 Q. So let's turn to page 83 of the
 20 Lower Churchill JRP Report, which is the document we
 21 were just on.
 22 PRESIDING ARBITRATOR: What number?
 23 MS. KAM: It is tab 1 of the binder
 24 and Exhibit C-81.
 25 PRESIDING ARBITRATOR: And page?

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1 MS. KAM: Page 83, please.
2 BY MS. KAM:
3 Q. And Mr. Estrin, you would agree
4 that here in the boxed text, the panel concludes --
5 And I'm not quoting here but --
6 A. Sorry, which paragraph is this
7 from on the page?
8 Q. I'm just referring to the boxed
9 text.
10 A. Well, I'd like to see where it
11 appears on the page so I get the context, if you
12 don't mind.
13 Q. It is in the box on the page so
14 it is not an actual paragraph number. It is under
15 the first two bullets.
16 A. Sorry, I -- I'm not on -- it is
17 where?
18 Q. Page 83.
19 A. Yes, but where on the page?
20 Q. In the boxed text.
21 A. Oh, I see, "The panel concludes
22 ..." Thank you. Yes, that's fine.
23 Q. Do you need a second to read the
24 box?
25 A. I guess so.

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1 read, if you need.
2 A. But, yes, go ahead.
3 Q. And now if we turn to page 100 of
4 the report. And there is another conclusion in a
5 box. Could you please read that out loud for the
6 record?
7 A. (Reading):
8 "The panel concludes that the
9 residual adverse effects of the
10 project on wetlands and riparian
11 habitat, even with the
12 appropriate mitigation is
13 significant."
14 Q. So based on this example, you
15 would agree that even if a panel recommends
16 mitigation, it can still conclude that a project is
17 likely to result in significant adverse
18 environmental effects?
19 A. Certainly, I would hope they
20 would take that into account in reaching because the
21 test is likely significant adverse environmental
22 effects. So if they didn't take into account
23 mitigation, they would be missing something.
24 Q. Well, thank you, Mr. Estrin,
25 those are all my questions.

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1 Yes.
2 Q. So here you would agree that:
3 "The panel concludes that because
4 of uncertainty about the effects
5 on fish and fish populations ...
6 the project would result in
7 potentially irreversible
8 significant adverse environmental
9 effects..." [As read.]
10 Right?
11 A. Yes.
12 Q. And you would agree that here in
13 this part of the report the panel did not recommend
14 any terms and conditions for this environmental
15 effect?
16 A. Not here I don't.
17 Q. So now let's turn to page 99 of
18 the report. If we look at the bottom of the page,
19 you would agree that here the panel recommends in
20 its conclusions on riparian and wetland habitat, a
21 wetland compensation plan and riparian compensation
22 plan. Do you see that?
23 A. I see the recommendations. I
24 just want to make sure I've got the context.
25 Q. Sure. I'll give you a second to

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1 A. Okay.
2 PRESIDING ARBITRATOR: Thank you,
3 Ms. Kam. And I give the floor to Mr. Nash for
4 re-direct.
5 RE-EXAMINATION BY MR NASH:
6 Q. Mr. Estrin, in follow-up to one
7 of Ms. Kam's questions, you were going to refer to a
8 letter in the documents that you felt was
9 significant with respect to a question that Ms. Kam
10 asked. Could you go to that letter now and direct
11 the tribunal to that document and the point you were
12 going to make.
13 A. Yes. It's the document -- it's
14 Environment Canada letter that is found at tab 11 of
15 the binder which I assume the panel -- or the
16 tribunal has.
17 And I think it is important to
18 recognize here that this letter and the accompanying
19 document that I was taken to, was generated in
20 response to a request from the review panel to that
21 department, that expert department, to provide its
22 opinion within its mandate as to whether or not
23 there are likely -- what type of impacts might arise
24 from this project, and that's consistent with my
25 observation that this -- these types of letters have

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1 been used by Ms. Griffiths and Mr. Connelly and
2 others and they all write -- and in the Whites
3 Point. They all write to these departments and
4 basically ask, we need your expert advice, would you
5 please look at the document and tell us what your
6 view is as to whether or not there is likely impacts
7 or significant adverse impacts.

8 So this is a letter that was sent by
9 Ms. Griffiths in that case -- in response to a
10 letter from Ms. Griffiths. And so, they say -- they
11 say, in the bottom paragraph of the first page, they
12 say:

13 "Certain things that you've asked
14 us to talk about is not in our
15 jurisdiction. Natural Resources
16 Canada and DFO can deal with
17 modelling and certain other
18 things." [As read.]

19 And then, and also at the top of the
20 next page, with regard to repair plans/wetlands not
21 within their mandate." But it is the paragraph at
22 the bottom on page 2, under the heading
23 "Environmental management, monitoring and
24 follow-up", they do say that:

25 "Environment Canada is making

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1 recommendations to the panel
2 regarding follow-up programs for
3 mercury accumulation and fish
4 eating wildlife effects on
5 specific waterfowl species and
6 compensation for wetlands lost
7 to flooding. EC intends to
8 address each of these
9 recommendations within the
10 context of the key indicator
11 effected during the relevant
12 topic-specific session." [As
13 read.]

14 Meaning at the hearing. But here's
15 the most important sentence -- next two sentence:

16 "Similarly, with respect to
17 environmental management, EC has
18 mandated interest and expertise
19 with respect to the management,
20 storage, handling, transportation
21 of hazardous materials and waste.
22 Nevertheless ..." [As read.]

23 And this is the key paragraph of the
24 sentence:

25 "... with respect to all these

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1 issues, EC does not expect to see
2 detailed programs or contingency
3 plans at this stage of project
4 planning. Rather, our
5 expectation and recommendation is
6 that these programs be developed
7 in future and approved by the
8 appropriate agencies, prior to
9 construction." [As read.]

10 And this is exactly typical of normal
11 environment assessment process, where the --
12 Environment Canada would, without a panel review,
13 would be expected to review Nelcor's EA and comment
14 on it on its own, without a panel context, would say,
15 well, we think perhaps there are certain things that
16 are not addressed well enough at this point but, in
17 our view, these can be left here to later to be
18 considered as part of a term and condition.

19 That's why, in part, I -- counsel took
20 me to a paragraph where -- where we were commenting
21 that they -- it was a wrong lens to look at this
22 through a panel review report and why that might be
23 inappropriate, and what they didn't recognize is,
24 first of all, for example, in Lower Churchill, they
25 actually did look at whether or not mitigation could

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1 deal with it and they did identify, in the paragraphs
2 she took me to, some mitigation measures that the
3 cabinet could apply, should the cabinet want to do
4 that. But in looking at Whites Point, neither
5 Ms. Griffiths or Dr. Blouin ever turned their mind to
6 the normal types of terms and conditions that could
7 be applied to Whites Point, even though they had some
8 queries about this, that, and the other thing.

9 Q. Ms. Kam made reference to the
10 fact that each, and I'm paraphrasing, each project
11 is different and that specific criteria for that
12 project have to be applied. I understand your
13 response to be that there is commonality between
14 certain projects and that there are certain common
15 features of projects which need to be taken into
16 account. Can you elaborate on that, please, and
17 why -- what the basis is for your statement in that
18 regard?

19 A. Sure. Well, I think one of the
20 best rationales for that is the government of Nova
21 Scotia's own documents that weren't referred -- that
22 weren't referred to. One of them is -- which is --
23 it is an exhibit in this proceeding, it is the
24 appendix 7 to John Lizak's witness statement of
25 July 2011:

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1 "A user's guide to the one window
2 process for mine development and
3 approvals in Nova Scotia." [As
4 read.]
5 And that was issued in March 2000.
6 And very important statements are made in that
7 document which, I think, helps put all this into
8 focus. They say, the preface:
9 "The Government of Nova Scotia
10 has undertaken a one window
11 approach for reviewing,
12 permitting and monitoring mine
13 development projects in Nova
14 Scotia." [As read.]
15 Stopping there, I take it that --
16 throughout this proceeding I think we've all taken it
17 that quarries and aggregate are generically part of
18 mining for Nova Scotia's purposes.
19 It goes on to say:
20 "This approach formalizes how
21 government departments involved
22 with mine development activities
23 act collectively to streamline
24 the review process for both
25 government and the mining

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1 industry. The 'one window'
2 process facilitates an informed,
3 timely and consistent review of
4 new and existing mining projects
5 in the province." [As read.]
6 And they basically say we are going to
7 get all the government departments together to have,
8 in effect, a one window approach and have a one
9 window standing committee. And then they go on to
10 say, in the next paragraph:
11 "This users' guide has been
12 prepared by the Department of
13 Natural resources to assist
14 interested parties to understand
15 the approvals process for mine
16 development in Nova Scotia. It
17 contains information on
18 environmental approvals, binding
19 leases, et cetera. The guidebook
20 focuses on the early stages of
21 the project screening through
22 planning and implementation,
23 thorough planning and
24 implementation provide the
25 strongest likelihood for the

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1 start of a successful mining
2 venture in Nova Scotia." [As
3 read.]
4 And then the last paragraph on that
5 page:
6 "The Government of Nova Scotia
7 believes that mineral development
8 is essential to the economic
9 future of the province's
10 practical users' guide intended
11 to assist regulators and
12 proponents alike in contributing
13 to that future." [As read.]
14 Just on the next page, it says in the
15 introduction, this is page 1 of that exhibit, under
16 heading "introduction":
17 "The mineral industry is a major
18 contributor to the economy of
19 Nova Scotia. In the interest of
20 encouraging future mineral
21 development, the provincial
22 government has sought to make the
23 process of review, permitting and
24 approval more efficient." [As
25 read.]

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1 And they go on to say in the next
2 paragraph:
3 "The one window process provides
4 for interaction among various
5 government departments and with
6 the mine development proponent
7 making the review process more
8 consistent and expedient for
9 all." [As read.]
10 And they talk about how they will have
11 meetings with the proponent at the beginning of every
12 project and they are welcome to come in and do that.
13 And so, this all is recognition, I
14 think, it seems to me, that the government itself
15 considers these types of projects to be generic, sui
16 generis generic, and there is a common aspect to them
17 and the government officials are well equipped to
18 appreciate nuances and they will deal with them as
19 the Minister's own documents say, if you go back to
20 the pit and quarry guide, for example, with terms and
21 conditions but, generally speaking, they have a
22 process for not only accommodating but trying to get
23 these things through the process as fast as
24 reasonably possible, consistent with economic -- the
25 view that they view these as economically important

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1 to the department.
2 And that's -- that's really, I think,
3 fundamental. I'm from Alberta, I grew up in Alberta,
4 and I went to law school in Alberta, and I've
5 appeared before the Energy Resources Conservation
6 Board in Alberta and the National Energy Board, and
7 I've actually acted for ratepayers in Alberta trying
8 to oppress a petrochemical complex, and you just get
9 the feeling that you shouldn't even be in the room
10 when a petrochemical complex is being proposed
11 because government favour petrochemical development
12 in Alberta.

13 Well, similarly, it seems to me, in
14 Nova Scotia, it's quite clear from their policy
15 documents that they favour very highly the advantages
16 of aggregate and other mineral resources being
17 developed. They want to have an expeditious and
18 consistent process for the proponents, and so that's
19 why they help -- tell everyone, here's the kind of
20 information you need, and that, I think, helps
21 explain why things do get approved, because they set
22 it out and proponents listen.

23 And I can't understand how Whites
24 Point Quarry could be any different than a pit or
25 quarry that goes through the standard process.

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1 Whites Point Quarry's environmental impact statement
2 was comprehensive, thousands of pages, considered
3 things in much more detail, and yet didn't reveal
4 anything startling or unique. So if it had been
5 handled in the ordinary regular way by regulators, it
6 would have been approved by Nova Scotia.

7 Q. Could you turn, please, to tab 6
8 of the white binder in front of you, Environmental
9 Assessment Regulations.

10 A. Yes.

11 Q. You were taken by Ms. Kam to page
12 7, tab 6, page 7. Paragraph 13. And that is the
13 paragraph which refers to the Minister's decision
14 upon registration of Class I undertaking; do you see
15 that?

16 A. Yes.

17 Q. And 13(1) says:
18 "No later than 25 days following
19 the date of registration, the
20 administrator shall advise the
21 proponent in writing of the
22 decision of the Minister within
23 25 days.

24 See that?

25 A. Yes.

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1 Q. And 13 (1) says:
2 "No later than 25 days following
3 the date of registration, the
4 administrators shall advise the
5 proponent in writing of the
6 decision of the Minister within
7 25 days."

8 Was the Whites Point Project handled
9 under that paragraph by your understanding?

10 A. No.

11 Q. And why do you say that?

12 A. Because it was referred by the
13 Minister to a review panel. So that particular --
14 so that would not be the process that was applied to
15 Whites Point.

16 Q. So by your understanding, did the
17 provisions of paragraph 13 apply to the Whites Point
18 Project?

19 A. No. There is other specific
20 wording in the statute and regulations that pertain
21 to the Minister's decision-making ability following
22 referral of a project to the Environmental
23 Assessment Board in Nova Scotia. So there's other
24 sections, other sections to which this one -- that
25 are relevant. This one isn't specifically.

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1 Q. Ms. Kam also made the distinction
2 for you between significant environmental effect and
3 adverse effect. Is it your understanding that every
4 human activity has an effect and often an adverse
5 effect on the environment?

6 A. Well, the -- it goes back to the
7 definition in Nova Scotia of environmental effect on
8 page 2 of that same regulation. Environmental
9 effect means, in respect of an undertaking, any
10 change, whether positive or negative, that the
11 undertaking may cause in the environment.

12 So, you know, it could be -- allow
13 more hiking trails, if you clear some bush. That
14 could be an environmental effect.

15 Q. Thank you. And you've indicated
16 that it was significant for you that government --
17 no government official stated or took the position
18 before the Whites Point JRP that the project should
19 not be approved or that after mitigation it would
20 likely have SAEES. What is the significance of that
21 for you? How is that significant?

22 A. Well, as a lawyer who's practised
23 in front of Environmental Assessment Tribunals for
24 several years, for many years, it's always critical
25 to have a -- some idea of where the government is

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1 coming from in respect of my project, if I'm acting
2 for the proponent -- or even if I'm acting for the
3 opponent -- because government officials' opinions
4 will matter most to an Environment Assessment
5 Tribunal. Even though they are independent of the
6 government, an Environmental Assessment Panel member
7 will obviously have close regard to opinions of a
8 government scientists unless they are shown to be
9 completely off base or incredible.

10 So just in the same way that
11 Ms. Griffiths in Lower Churchill wrote to
12 Environment Canada and DFO and everybody else "say
13 come and tell me whether or not you believe there is
14 significant adverse environmental effects or effect
15 or what are the impacts of the project" and
16 Mr. Connelly wrote in the Prosperity Goldmine case
17 and several other examples that I've provided and in
18 the Whites Point Quarry wrote panel, JRP, wrote to a
19 government department saying please come and tell us
20 what you think the effects are. If these people,
21 they are invited to come and they have a
22 responsibility under the Act to provide their
23 expertise under the Canadian Environmental
24 Assessment Act and so they know that they have some
25 real concerns, they have an obligation to identify

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1 it. Or if they have a concern that can be taken
2 care of by a term and condition later without
3 effecting of approvability, they should say that.

4 And it is the latter that happened in
5 Whites Point. Government officials were invited to
6 come, both Nova Scotia and Canadian and I reviewed
7 the transcripts and everything they've said and not
8 one of them ever said there would be likely SAEE.
9 They said in some cases "we have a concerns but
10 these can be taken care of by either by terms and
11 conditions". Mostly the Nova Scotia folks said
12 that. And the other people would say, "well, yeah,
13 and by appropriate conditions or follow-up work
14 afterward."

15 So, it's significant and contrast
16 that with what happened with Mr. Connelly and the
17 Prosperity Gold case. He wrote a witness statement
18 that said "oh, no it would be really a bad thing.
19 It would be bias if a government official came to a
20 tribunal and told the tribunal that in his or her
21 opinion there would be SAEE". That's in his first
22 report.

23 And I was quite perplexed by how he
24 could say that because that's actually opposite what
25 government officials do if they have to do it. And

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1 lo and behold -- and Mr. Connelly only has chaired
2 two panels under SAEE and one of them, Prosperity,
3 the government officials came and told his panel
4 that in their view there would be significant
5 adverse environmental effects and Mr. Connelly and
6 his panel accepted that. And in fact, acknowledged
7 it in their panel report on Prosperity Gold that
8 they relied on the opinion of, I think it was
9 Transport Canada, that there would be significant
10 adverse impacts for the aboriginal community on
11 navigation.

12 So I was very perplexed by
13 Mr. Connelly's first report when he said "it would
14 be bias, almost bias" for a government official to
15 say something like that when he knew it happened in
16 front of one of his panels and he relied on it and
17 he accepted it.

18 Q. I'm not sure exactly that I
19 followed your evidence with respect to mitigation
20 and its relationship to a finding of likely
21 significant adverse environmental effects.

22 Can you just run us through the
23 process of establishing likelihood, significance,
24 an effect and how mitigation then folds into that
25 analysis by your understanding?

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1 A. Yeah. I just want to get
2 section 16 in front of me if I could. So
3 section 16, one of SAEE, talks about -- and it was
4 put to me:

5 "Every screening or comp study of
6 a project in every mediation or
7 assessment by a review panel
8 shall include a consideration of
9 the following."

10 MR. NASH: Could I interrupt for one
11 second? We are at tab 2 of the binder.

12 THE WITNESS: Yeah, sorry.

13 MR. NASH: At page 9.

14 THE WITNESS: Thanks.

15 Right, on paragraph -- section 16.

16 So they -- whether it's a screening, a
17 comp study which are both done by government
18 department officials or a review panel, they shall
19 include a consideration of the following factors.

20 A) is the environmental effects of the
21 project, including environmental effects of
22 malfunctions or accidents, and any cumulative effects
23 that are likely to result from the project. So,
24 right. So, you have to consider the environmental
25 effects of the project. That's one thing. So that's

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1 whether or not there is any change, in affect, to a
2 valued ecosystem component like birds or water
3 quality.

4 Then they have to, under (b) look at
5 the significance of any effects that they identify.
6 And they have to take into accounts into account
7 comments by the public and then (d)take into account
8 and consider measures that are technically and
9 economically feasible and that would mitigate any
10 significant adverse environmental effects of the
11 project and then any other matters that they are
12 told to look at by terms of reference, if there are.

13 So what's really quite simple in a
14 way is you identify environmental effects of a
15 project and then you consider potentially the
16 significance of those effects and then you need to
17 determine whether or not they are going to be
18 with -- with reasonable mitigation measures, whether
19 or not they are likely to result in SAEE or not.

20 But, there's, you know, the only
21 thing that specifically in section 16 that says that
22 mitigation measures need to be technically and
23 economically feasible and need to be particularized
24 is in respect of significant adverse environmental
25 effects because, as Mr. Connelly says the cabinet

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1 would like it have some help if they want to
2 overturn a finding of SAEE. But otherwise, a panel
3 strictly speaking, can go with the proponent's
4 environmental impact study because all these studies
5 say here's the effect, here's the potential
6 mitigation measure and here is the net result and we
7 consider it not to be significant.

8 And I made an analysis of these, of
9 these factors, Mr. Chair -- Mr. Simma, in Appendix
10 D, for example, to my first report. I actually
11 looked at a comparison of valued ecosystem
12 components, potential environmental effect and
13 residual environmental effects for Whites Point,
14 Black Point, Aguathuna, Belleoram and Tiverton.

15 And this is my March report 2017.
16 What it does is it actually -- so I've got a list of
17 the VECs that were considered in each one and they
18 are set out side by side.

19 I've got a list and then we look
20 at -- I don't know if you have it handy, if you want
21 to look at it. But, for example, let's take the VEC
22 for birds which is about four pages into the
23 appendix under the heading "Birds". So there is a
24 VEC of migratory land birds for Whites Points; Black
25 Point said effects on birds; Aguathuna was

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1 considering the effects on migratory birds; and
2 Belleoram, marine birds.

3 Anyway, then potential effects. Each
4 one considered potential effects and they describe
5 them and they are quite similar in each case. What
6 are the potential effects from lighting, from
7 alteration of the habitat? And then they at the end
8 of the day come up with residual effects after
9 mitigation. So they have to make a determination,
10 if we apply certain mitigation measures.

11 And so what I found for each one of
12 these things, for all of these VECs, that after
13 these proponents went through their documents and in
14 the case of Belleoram and Aguathuna and Black Point
15 this had to be the Federal government at the end of
16 the day agreeing with these, civil servants, in all
17 cases they found residual effects after mitigation
18 as not-significant, not-significant, nonsignificant,
19 insignificant, same terms. And that was the same
20 assessment as was contained in Whites Points
21 Environmental Impacts Statement.

22 So it's quite important to at least
23 look at and see is there some reason when you
24 consider all these things, when you evaluate these
25 VECs, when you think about mitigation measures, what

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1 is it that makes one project so bad that it can't be
2 approved considering the comparable projects all
3 ended up being evaluated as having nonsignificant
4 environmental effects with certain measures being
5 taken.

6 And I can't find anything in the
7 years that I've spent on this project now, going
8 through the documents that suggest to me there's
9 anything unique about Whites Point Quarry and had it
10 been processed in the normal way, for those reasons,
11 among other things, it would have been approved.

12 Q. If you, Mr. Estrin, those are my
13 questions.

14 No request for -- sorry, no request for? So
15 questions from the tribunal and Mr. Schwartz.

16 QUESTIONS BY THE TRIBUNAL:

17 PROFESSOR SCHWARTZ: If there had
18 been a judicial review and an order that, a
19 determination that things had been done below the
20 legal standard from the point of view of judicial
21 review, the same officials or a different panel
22 would have done the do-over?

23 THE WITNESS: Well, often the court
24 might suggest -- the court may or may not say
25 anything on the topic. But if they do say anything

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1 they might suggest that it should be different
2 people.
3 PROFESSOR SCHWARTZ: I'm looking at
4 the table you just referred to, sir, and the
5 conclusions about residual effect after mitigation,
6 your source for that is the proponent's own
7 environmental impact statement?
8 THE WITNESS: Right. But what's
9 important, I guess in that regard, is that federal
10 official had to consider that and determine whether
11 or not in each case they agreed with those
12 conclusions. And in each case government in
13 Aguathuna, and Belleoram, Tiverton, they all agreed
14 that those mitigation measures that would be applied
15 would be appropriate to make it nonsignificant.
16 There's -- I mean I found -- so we
17 could go back and look at the details, but the fact
18 is it isn't just a proponent coming up and saying
19 hey, we found them insignificant. Federal officials
20 still have to apply the same degree of inquiry to
21 those things as they would to anything else and they
22 did. Both before and after Whites Point, they...
23 I actually prepared a document where I
24 looked at the mitigation measures that were actually
25 used in these projects. And I found that they were

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1 which are in the record and I can help you identify
2 where they are in the exhibit.
3 Basically, the Federal Minister of
4 Environment would approve -- approved Tiverton and
5 Belleoram and Aguathuna or the Fisheries Minister
6 did, essentially on condition that they apply the
7 mitigation measures they identified in their report.
8 And they might say, "and develop a follow-up program
9 to be approved by the department".
10 So they normally -- I mean,
11 consultants acting for proponents want to get an
12 approval for their client so they have discussions
13 with government officials and make sure that before
14 they hand in their document, at least they have an
15 understanding of what government officials would
16 like. And so, that's why it isn't surprising,
17 really, that government officials are able to -- I
18 mean, they give consideration to it but they are not
19 taken by surprise when a proponent hands in the
20 document with these mitigation measures.
21 PROFESSOR SCHWARTZ: Right, but the
22 Joint Review Panel or the Nova Scotia Minister or
23 the Governor in Council could have attached terms
24 and conditions as long as they did so reasonably
25 within the terms of their statute.

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1 essentially similar, which explains why, in effect,
2 there is reason to have confidence that they could be
3 mitigated because government officials agreed in each
4 case. But the mitigation measures -- and I compared
5 them to Whites Point, Black Point, Aguathuna and they
6 were essentially similar. So, again, that's another
7 reason why I think it's, it's -- it can be
8 objectively determined, if you like, that there isn't
9 anything really unique about Whites Point that would
10 stand in the way of some approvability, except
11 politics.
12 PROFESSOR SCHWARTZ: Well, between
13 approvability and rejection there is approval with
14 mitigation measures?
15 THE WITNESS: Yes, yes.
16 PROFESSOR SCHWARTZ: And your table
17 relies it seems entirely on the proponent's own
18 identification of whether there is adverse effect.
19 It doesn't say that the federal government agreed
20 with the proponent in every case.
21 THE WITNESS: No, well, that's right.
22 And actually if you go to the screening decisions by
23 Canada, for example, with regard to Aguathuna and
24 Belleoram and the actual approval document that they
25 got at the end of the day from the government --

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1 THE WITNESS: Right.
2 PROFESSOR SCHWARTZ: And could they
3 not have reasonably come to different mitigation
4 measures than the proponent itself identified?
5 THE WITNESS: Well, what I have
6 identified I believe is that the mitigation measures
7 proposed by Whites Point were actually very similar
8 to the Black Point Quarry.
9 And if you turn to -- and I actually
10 document this quite carefully. There is an appendix
11 to my August report. It is Appendix C which is
12 comparison of Black Point Quarry Federal Ministerial
13 EA Mitigation and Measures Opposed to Whites Point
14 Quarry proposed mitigation measures.
15 And I think it would be helpful to
16 just look at that for a minute to help more
17 meaningfully answer your question. So it's -- I
18 don't know if your volume is tabbed or not but it is
19 Appendix C and it is headed -- do you have it?
20 PROFESSOR SCHWARTZ: Yes.
21 THE WITNESS: Okay. Just, for
22 example, go to the first page of that, well it is
23 page 2.
24 So on the left-hand side I have the
25 federal -- BPQ, Federal Ministerial Condition

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1 Statement which is actually the whole document is at
2 Appendix F, the original copy of the federal
3 decision. And I've extracted these things under
4 specific heading.
5 So under the heading Prevent and
6 Mitigate Water Impact on Fish Habitat, the conditions
7 for BBQ was -- this is under the general public --
8 measures to control erosion and runoff. They will
9 have measures to capture and treat runoff prior to
10 discharge in the environment.
11 And there is -- you can actually, I
12 think, go to appendix F and you see that there
13 is actually under that -- maybe it's not that useful.
14 They just say -- that's all they say. They say:
15 "The proponent shall implement
16 under 3.1 generally, all
17 reasonable measures to prevent,
18 mitigate adverse environment
19 effects on fish and fish habitat
20 from changes to water quality
21 during all phases of the
22 designated project in compliance
23 with the Fisheries Act regarding
24 the deposition of deleterious
25 substance and taking into account

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1 and the Nova Scotia pit and
2 quarry guidelines."
3 The measures shall include "measures
4 to control erosion and runoff". So then I put, okay,
5 so what did about did Bilcon propose? And that's in
6 the right-hand column. And you can see exactly what
7 Bilcon proposed in that regard. And these are all
8 footnoted to various sections in the Bilcon
9 Environmental Impact Statement.
10 Implementation, Bilcon committed to
11 implementation of erosion and sediment control plan.
12 Incremental reclamation procedures will reduce areas
13 susceptible to erosion. Recycling of soils for use
14 in incremental reclamation will use existing
15 resources. The quarry floor will be back sloped to
16 direct run off waters from Bay of Fundy," et cetera.
17 And you can see the same thing. Let's
18 go to the next -- I think it is even more helpful to
19 the go to the one about whales. So let's go to --
20 let's go to page 4.
21 The one under "measures to mitigate
22 risk of collision with marine mammals and sea
23 turtles."
24 So on the left we have what was
25 imposed by the federal Minister in the Black Point

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1 Quarry which, as you've heard and is written about is
2 a much larger quarry than Whites Point would be, much
3 more blasting, much larger, much more shipping, all
4 of those things.
5 Anyway, it says for designate -- this
6 is what they imposed on Black Point:
7 "For designated project-related
8 vessels transiting between
9 shipping lanes in the marine
10 terminal, the proponent shall
11 implement measures to mitigate
12 the risk of collisions with
13 whales, harbour porpoises, and
14 sea turtles taking into account
15 the notice for mariners general
16 guidelines for aquatic species at
17 risk in important Marine Mammal
18 Areas. The measures shall
19 include conducting and recording
20 observations for whales, harbour
21 porpoises and sea turtles."
22 Just to go the right-hand column on
23 what Bilcon was proposing in that regard. First of
24 all:
25 "Vessels will use designated

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1 inbound and outbound shipping
2 lanes. They will consider new
3 information at risk."
4 Third bullet:
5 "Employment of trained observers
6 for citing mammals and water fowl
7 within defined safety zones and
8 vessel approach/departure route.
9 Observation of shipping channel
10 and safety zone for presence of
11 marine mammals." [As read.]
12 Let's go to 3.6.2.
13 "The Minister at Black Point
14 required that vessels respect
15 speed profile applicable to the
16 operation of the designated
17 project subject to navigational
18 safety to prevent, reduce the
19 risk of collisions between
20 vessels and whales and harbour
21 porpoises and sea turtles." [As
22 read.]
23 And what did Bilcon propose ten years
24 before? Because Black Point was approved in 2016.
25 Bilcon's EIS was written well before -- even before

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1 the hearing, so it was written in 2003, or 2004 or
2 2005. So Bilcon actually anticipated this issue and
3 they said, this is the right-hand column, the bottom
4 bullet on page 4 of appendix C:
5 "Vessel speed reductions and/or
6 course alteration in case of
7 whale sightings within designated
8 approach speed,
9 approach/departure routes,
10 reduced vessel speed, ten knots
11 or less, and/or alteration of
12 course in case of sighting of
13 marine mammals within designated
14 shipping route." [As read.]
15 And they went on to say:
16 "Marine mammal interactions
17 within the vessel turning radius
18 are uniquely..." [As read.]
19 And then the last bullet:
20 "Bilcon also stated in its
21 commitment table that it would
22 not permit a ship speed in excess
23 of 12 kilometres an hour during
24 the transit from shipping lanes
25 to the marine terminal." [As

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1 read.]
2 Well, you're going to possibly hear
3 about what the Minister has been doing in other
4 areas, like the Gulf of St. Lawrence, about potential
5 risk of collisions with vessels. And if -- a fair
6 comparison, if it was trying to make a fair
7 comparison, we would see that Bilcon actually
8 anticipated everything that's been imposed today in
9 terms by the Minister in its concern about Right
10 whales. And so one maybe, just one more because this
11 was an issue in the last hearing, on page 6:
12 "Avoid harm to fish habitat when
13 using explosives." [As read.]
14 So the issue of what blasting might do
15 to fish was also an issue in both cases.
16 In Black Point, under condition 3.7,
17 the Minister said:
18 "The proponent shall, unless
19 otherwise authorized under the
20 Fisheries Act, implement measures
21 to prevent or avoid the
22 destruction of fish or any
23 potentially harmful effects to
24 fish during all phases of the
25 project when using explosives in

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1 or around waters frequented by
2 fish and shall conduct blasting
3 by taking into consideration DFO
4 measures to avoid causing harm to
5 fish and fish habitat under the
6 Nova Scotia pit and quarry
7 guidelines." [As read.]
8 What did Bilcon say, in the right-hand
9 column:
10 "Blasting will be guided by
11 Bilcon of Nova Scotia's
12 Corporation's blasting protocol
13 and adhere to the Department of
14 Fisheries and Oceans guidelines
15 for the use of explosives in or
16 near Canadian fishing waters."
17 [As read.]
18 Bilcon anticipated the very types of
19 conditions that came up and were applied in the much
20 bigger Black Point quarry ten years later.
21 That's why I think it's helpful to in
22 fact compare these and you will see that, in almost
23 every case, Bilcon actually anticipated and in some
24 cases had even more detailed mitigation measures
25 proposed than were required in Black Point. So I

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1 think it does help to compare what has happened and
2 particularly because Black Point, what's unique about
3 Black Point, Professor Schwartz, is that the
4 mitigation, Black Point was considered, it wasn't a
5 panel review but it was conducted by the Canadian
6 Environmental Assessment agency - this is the agency
7 with all the expertise in it - to really look at and
8 basically handle possibly larger contentious projects
9 that aren't sent to a panel. And so they have
10 available to them all the resources of Canadian
11 government departments and they are a full-time staff
12 of professionals within the CEAA Agency.
13 So they actually conducted a detailed
14 environmental assessment review and made a report,
15 and it's an exhibit. Their environmental assessment
16 report is actually contained in tab 13 of this binder
17 of documents that was handed out by Canada.
18 They basically -- and it was -- so at
19 the end of the day, they made recommendations to the
20 Ministers on what type of conditions would be --
21 mitigation measures would be appropriate. And the
22 Minister, by and large, followed some -- followed
23 those recommendations, and so here we have an example
24 of Canadian government officials at the highest level
25 who are charged to really look at the environmental

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1 assessment process carefully. In the result they
2 came up with mitigation measures that were ones that
3 Bilcon had anticipated were required ten years ago
4 because of all the expertise that they had involved.
5 So I think that helps, it certainly confirms to me
6 and I think should have confirmed to Canada ten years
7 before, that you know, there was -- everything that
8 they were -- might have been concerned about could
9 have been handled, in terms and conditions.
10 PROFESSOR SCHWARTZ: Let me go back a
11 step before pressing you a bit more on that.
12 If I understand your report correctly,
13 your contention is that if Government of Nova Scotia
14 and the Government of Canada had seen any other
15 deficiencies in the JRP panel, they would have
16 identified them and sent them back to the panel. But
17 isn't it possible that because the CCV approach was
18 considered sufficient to dispose of the applications
19 that the Nova Scotia government and Canada didn't
20 think very hard, or at all, about these other issues?
21 THE WITNESS: I agree with that and I
22 think the JRP's report was intentionally designed to
23 not provide mitigation measures to the GIC because
24 they knew very well that the JRP understood very
25 well that, had they identified mitigation measures

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1 which were ordinary in the scheme of things, as we
2 see from my chart there, exhibit -- appendix C,
3 cabinet could have actually rejected their SAEE
4 finding and then said, "Here are some ways of
5 dealing with that."
6 The JRP did not want to hand the
7 Governor in Council mitigation measures that the
8 governor in council could use, and it is really
9 astounding how the Governor in Council considered
10 that report complete enough to act on. But
11 Mr. Connelly says it was complete. His evidence is
12 they considered the report carefully and considered
13 it and were able to make a decision.
14 So, what's fascinating, Professor
15 Schwartz, is I went through the JRP report just a
16 couple of days ago and found something, a couple of
17 important statements which I think will help you
18 determine whether or not you agreed that, in fact,
19 that JRP panel did, in fact, assess the significance
20 of environmental effects and did consider mitigation
21 measures but they just didn't bother to report them.
22 For example, if you turn to page 84 of the
23 JRP Report -- I don't know if I have a copy of it
24 handy. I have the quote. Yeah. Sorry, it is page
25 20. Page 20. I'm very sorry.

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1 Let's look at page 20.
2 I'm looking for a phrase that says,
3 begins:
4 "When determining the nature and
5 effects and significance of
6 environmental effects," on page
7 20.
8 Anybody have that?
9 PRESIDING ARBITRATOR: In the middle
10 of the right...
11 THE WITNESS: Yes, thank you. Thank
12 you, Judge Simma.
13 Yes:
14 "When determining the nature and
15 significance of environmental
16 effects, the panel analyzed and
17 evaluated the information
18 provided along with the
19 monitoring and mitigation
20 proposed in order to draw
21 conclusions about the adequacy of
22 the proposed measures and
23 predicted effects on valued
24 environmental components." [As
25 read.]

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1 So, they say very clearly in that
2 statement that when determining -- and they are not
3 talking about SAEE here, they are talking about the
4 normal kind of environmental effects. They say they
5 looked at all of those things. Now, they say
6 something similar at page 83 and, in fact, they say
7 it even more clearly at page 83. They say -- and I'm
8 sorry, my copy is not marked up. It is a phrase that
9 begins "the panel's analysis"... Can anybody help
10 me with that? Yes, it is at the bottom of page 83,
11 under the heading "Adequacy Summary". It is about
12 eight lines from the bottom of page 83:
13 "The panel's analysis of the
14 project has identified the
15 adverse and positive
16 environmental effects expected
17 from the project." [As read.]
18 And that's when that other phrase that
19 we've always looked at, most environmental effects
20 would be judged not-significant, but they do say,
21 they do say:
22 "The panels' analysis identified
23 the adverse and positive
24 environmental effects ... on the
25 project." [As read.]

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1 And then they say actually -- where
2 did it -- there was a phrase that they use early on:
3 "Based on its comprehensive
4 synthesis and analysis of all the
5 information provided ..." [As
6 read.]
7 Et cetera, so they keep saying they've
8 done a comprehensive job, that they looked at the
9 valuation, they looked at the mitigation, et cetera,
10 et cetera. They didn't report on mitigation
11 measures, but it can be clearly implied that they --
12 and from what those statements, it's a very
13 reasonable conclusion, they say "We looked at
14 everything carefully. We looked at whether or not
15 mitigation was possible," and they just didn't bother
16 reporting. That was a problem with the report in
17 that sense. But it doesn't mean that the report
18 doesn't necessarily mean -- mean that it can't be --
19 it doesn't mean that they found SAEE and -- in regard
20 to anything else. Well, they clearly did not find
21 SAEE in regard to anything else. And it can also be,
22 I think, inferred reasonably that they considered
23 what they needed to consider under section 16. They
24 unfortunately didn't bother to report, but I think,
25 as I said, that was consciously done. And if the

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1 Governor in Council had wanted to act in a forthright
2 way, they would have sent it back and say articulate
3 those mitigation measures. They didn't want to hear
4 them either because for political reasons they wanted
5 to kill the project.
6 PROFESSOR SCHWARTZ: But I think
7 you've actually reinforced the concern I was trying
8 to get at. We don't know on a hypothetical do-over
9 precisely what a panel acting absent the CCV issue
10 would have identified as significant adverse effects
11 or which specific mitigation measures it would have
12 proposed. We can't project that on the basis of
13 earlier decisions because earlier decisions seem to
14 have been arguably have been overwhelmed by the CCV
15 decision.
16 So you seem to be saying, yes, but if
17 we look at comparable projects in the area, larger
18 area, look at what mitigation measures were proposed
19 by various panels or proposed by various governments
20 and, as I understand your evidence, you believe that
21 the proponent at Whites Point had anticipated all of
22 those. So, we would have to accept that there's no
23 possibility, no reasonable possibility, that a panel
24 or the Nova Scotia government or the Government of
25 Canada, acting reasonably, would have identified

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1 adverse effects or would have specified mitigation
2 measures beyond what the proponent itself proposed.
3 I know that's a long sentence, but that seems to be
4 the upshot of your evidence.
5 The counter concern is, you know,
6 certainty is a big issue in these NAFTA case cases in
7 assessing damages. Are we being unreasonably
8 speculative about anticipating what adverse effects
9 would be identified and what specific mitigation
10 measures would be proposed on a reasonable
11 consideration absent the CCV issue.
12 THE WITNESS: Well, I'm not sure what
13 the burden of proof is on these issues because I've
14 not appeared on a NAFTA panel before. But if the
15 burden of proof is let's say the balance of
16 probabilities for the sake of argument, in my
17 opinion, having looked at the available comparative
18 projects, all of which involve quarries or marine
19 terminals and issues of whales and fish and
20 explosives and all of that, every other one of them
21 was approved, that I could find, by Canada or Nova
22 Scotia, and with mitigation measures that are not in
23 any way materially different from what is -- what
24 was -- Whites Point came up with.
25 Now, Mr. Connelly has annexed to his

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1 first witness report in which he summarizes what he
2 said are 18 concerns that he found lingering in the
3 Whites Point JRP panel about the project. I went
4 through those 18 concerns and I asked myself: Have --
5 to what extent have these concerns that he identified
6 in his annex been actually taken care of in other
7 projects in Nova Scotia or in Canada by terms and
8 conditions? And I, without going through it -- I
9 could go through it. I've got an analysis here that
10 I just made in handwriting of those 18 concerns. I
11 found, my general overall finding was they could
12 certainly be and were in other cases taken care of by
13 terms and conditions, none of which were much
14 different, in any way materially different than those
15 things that Bilcon had proposed. And to the extent
16 that you think that this is an important issue, I'd
17 be happy to provide a more articulated comparison of
18 table of his concerns versus what has been --
19 happened in other cases for the help of the tribunal.
20 PROFESSOR SCHWARTZ: I will just ask
21 one or two more questions. You refer to "terms and
22 conditions" but terms and conditions in your table
23 is sometimes stated in a fairly general way. Not a
24 criticism, but the fact of the matter is you could
25 say we are going to comply with blasting guidelines

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1 or we'll have some set-off but, as a panel, we might
2 be wondering, well, there's a whole lot of different
3 ways you could comply with blasting guidelines or
4 set-offs. So, one way of complying, for example, is
5 you don't blast certain times of years or certain
6 times of day. So if you have a general concept of
7 complying, there still would seem to be a lot of
8 flex in there for different terms and conditions,
9 some of which might have a significant impact on the
10 economics and viability of the project.

11 THE WITNESS: Well, you are right.
12 It could, but the -- let's consider that in Black
13 Point they were going to blast, I've got it in here,
14 but I think it's twice as much as Bilcon was
15 proposing. They had to, in order to fill up many
16 more ships. So it would be potentially much more
17 difficult for them to restrict their blasting
18 activity to certain days or hours or whatever than
19 Bilcon, which was only proposing to blast, I think
20 it was 12 times -- here we go. If you go to my
21 August reply report on this very point, you'll see
22 page 53, there's a table where I compared statistics
23 between White Point and Black Point. And you can
24 see that there are, you know, many more times rock
25 reserves to be exploited at Black Point than White

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1 example where these conditions are somewhat general.
2 But here's the fascinating point about
3 Whites Point. As I understand it, and I think we
4 heard that evidence today and it only entered my
5 consciousness for the first time, Whites Point is not
6 actually increasing vessel traffic through the Bay of
7 Fundy more than existed prior to Whites Point.

8 As you heard, there's been one vessel
9 coming from Baysville to fulfill their aggregate
10 requirements in New York up till recently, or up till
11 2010, and so to the extent that Bilcon said we
12 need -- they need one vessel a week, 52 ships per
13 year to go in and get rock shipments, that would, in
14 effect, be a replacement, a replacement of that
15 vessel traffic. So, actually, in actuality, Bilcon's
16 Whites Point Quarry would not have caused any adverse
17 effects on whales or lobsters more than whatever
18 vessel was transiting that Bay of Fundy for the ten
19 or 15 years before that that they were contracting to
20 get gravel from Baysville, which is on the Bay of
21 Fundy.

22 This is a very fascinating point and
23 yet it's not considered in the speculations of
24 Dr. Blouin or Ms. Griffiths or anybody else when they
25 talk about whales. This project, Whites Point, would

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1 point, 100 million versus 400 million.

2 Annual rock production at White Point
3 was going to be 2 million tons a year approximately
4 versus 7.5 million tons a year peak at Black point.
5 And then frequency of blasting, this is a very
6 interesting point.

7 What is the frequency of blasting
8 going to happen at Black Point at full production?
9 200 days a year.

10 So they would potentially -- and yet
11 the mitigation measures that were applied to them are
12 the same mitigation measures, in effect, follow DFO
13 guidelines. So, you know, I don't know how it can --
14 you know, I think this helps put those guidelines in
15 perspective.

16 If Black Point is proceeding after
17 the approval, which I understand it is, they must not
18 feel that they're -- that this has caused them to
19 have a problem. And I don't know that that would be
20 the case with any of the other mitigation measures.
21 You know, actually, the Canadian Environmental
22 Assessment Agency wanted to actually specify in
23 conditions for Black Point a speed limit for vessels
24 as it came into areas frequented by whales, and the
25 Minister declined to do that. So it is just an

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1 not have increased the shipping activity beyond that
2 which was already occurring. So all this
3 consideration of what restrictions there might be on
4 economic viability because of whales or lobsters or
5 anything like that has to be put in context, and the
6 context is that this project, as I understand the
7 evidence, is not actually going to increase it beyond
8 that which already existed.

9 PROFESSOR SCHWARTZ: Just a few quick
10 follow-ups.

11 So that your consideration of the --
12 whatever it was, 18 points submitted by Connelly,
13 that's in the material?

14 THE WITNESS: No, because I didn't
15 have -- I wasn't able -- that came in his -- I think
16 it's his November -- I don't know, it came in his
17 first report. I could have actually articulated
18 those things in writing before. I didn't really get
19 around to that. I had four expert witness
20 statements filed contrary to mine. I was pretty
21 busy trying to read them all and coming and trying
22 to analyse them, and I didn't get a chance. But
23 since I knew that Mr. Connelly had referred again in
24 his rejoinder witness statement to concerns of the
25 JRP, I went back and looked at his annex 2 or 3,

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1 whatever it is, where he actually looks at these
2 things and, as I said, I -- just a second. Let me
3 get it out of here. I made a little chart. So I
4 put his concerns on the left-hand column.
5 MR. SCOTT LITTLE: Judge Simma, just
6 to be sure --
7 THE WITNESS: You can have this.
8 MR. SCOTT LITTLE: We don't want it.
9 PRESIDING ARBITRATOR: Mr. Little,
10 please.
11 MR. SCOTT LITTLE: The objection is
12 he shouldn't be referring to this material.
13 I believe he's already referred to other material
14 which wasn't provided to him in the course of his
15 cross-examination, so he should put this material
16 away.
17 THE WITNESS: Okay, well, all the
18 information that's referred to in here, is in the
19 material already made exhibits. I have just tried
20 to say where these 18 concerns have already been
21 dealt with by terms and conditions in Black Point or
22 the Nova Scotia -- or by Nova Scotia in their terms
23 and conditions for Black Point. Every one of these
24 concerns, almost, these 18 concerns have been taken
25 care of by Black Point by terms and conditions

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1 blasting proposal by Bilcon for the Whites Point
2 Project was based upon and takes into account the
3 recommendation by DFO's blasting expert, Dennis
4 Wright, who wrote the guidelines for blasting in or
5 near Canadian waters? In other words, a DFO
6 scientist who reviewed the blasting plan and
7 reviewed the project in the early stages and made a
8 recommendation as to how blasting should be
9 conducted and, in particular, the setback which he
10 recommended be 100 metres; does that make a
11 difference to you in anything you've said?
12 A. Well I think it would be --
13 confirm, help confirm that Bilcon took into account
14 the restrictions that were reasonably contemplatable
15 and incorporated them into both their commitments
16 and obviously decided that the project was viable
17 enough, even with those types of restrictions, to
18 proceed to do whatever they did.
19 MR. NASH: Thank you.
20 PRESIDING ARBITRATOR: Okay. Thank
21 you. That -- no further questions from the panel.
22 That then concludes the cross-examination of Mr.
23 Estrin. And so you are free, whatever that means.
24 And we have coffee break now until
25 4:25.

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1 issued by Nova Scotia.
2 PROFESSOR SCHWARTZ: Okay, just to be
3 clear, I just asked if the responses were in the
4 material. I didn't mean to, in any way, open up
5 admissibility of evidence that we've already decided
6 could not be admitted here.
7 So, just if I could just summarize
8 what your evidence is: It's your position, seems to
9 be the following. Based on your methodology, which
10 is comparing what the proponent proposed in its EIS
11 at Whites Point with conditions that were ultimately
12 stipulated in what you say are the comparable
13 projects in the area, you submit on a balance of
14 probabilities that there would have been no
15 additional conditions proposed, beyond what the
16 proponent proposed, that would have materially
17 effected the economics of the project?
18 THE WITNESS: Yes.
19 PROFESSOR SCHWARTZ: Thank you.
20 PRESIDING ARBITRATOR: Any questions
21 for -- okay, Mr. Nash.
22 FURTHER RE-EXAMINATION BY MR. NASH:
23 Q. Mr. Estrin, Professor Schwartz
24 asked you about the question of blasting. Would it
25 make a difference to you if you knew that the

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1 --- Recess taken at 4:09 p.m.
2 --- Upon resuming at 4:25 p.m.
3 PRESIDING ARBITRATOR: Let's return
4 back to your program, the cross-examination of Mr.
5 Sossin.
6 Mr. Sossin, do you have a declaration
7 in front of you?
8 Would you please read that out?
9 THE WITNESS: Is the mic working all
10 right? Can you hear me?
11 I solemnly declare upon my honour and
12 conscience that I will speak the truth, the whole
13 truth and nothing but the truth and that my statement
14 will be in accordance with my sincere belief.
15 PRESIDING ARBITRATOR: Thank you, and
16 I give the floor to Mr. Nash.
17 MR. NASH: Thank you, Judge Simma.
18 Q. Professor Sossin, you've
19 submitted two opinions in this matter, one dated
20 December 10th, 2016 and one dated August 3rd, 2017;
21 correct?
22 A. That's correct.
23 Q. And you are a Professor of law
24 and the Dean of the Osgoode Hall Law school?
25 A. Yes, I am.

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1 Q. You've published extensively in
2 the areas of public administration, ministerial
3 discretion, public policy, legal process and
4 constitutional law and administrative law?

5 A. Yes, that is correct.

6 Q. Books that you have -- and
7 articles that you have authored or co-authored have
8 been cited by the Supreme Court of Canada?

9 A. Yes.

10 Q. You are an expert on issues
11 relating to the rule of law?

12 A. Yes.

13 Q. And you're an expert on the issue
14 of accountability for ministerial discretion through
15 civil actions?

16 A. That is right.

17 Q. Do you have any corrections to
18 make to either of your opinions?

19 A. Just one that I wanted to alert
20 the tribunal to. It is in my reply expert opinion
21 dated August 3rd. This is in tab 2 of the
22 cerlox-bound document I've just been provided.

23 If you go to paragraph 54, you will
24 see that I reference a decision relied on by former
25 Justice John Evans in his original expert report,

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1 the Alberta Wilderness Association, and he points
2 out in his rejoinder report that the version of that
3 litigation that I rely on, it gave rise to several
4 decisions before the federal court, was not actually
5 the one that he was relying on. So the broad point
6 at issue in this section of the report was simply
7 whether a JRP could itself be judicially reviewed.

8 I don't take issue with that, and in
9 the earlier paragraph 53, say something to that
10 effect, so it's not a substantive point but I would
11 like to correct the record by just asking you to
12 strike out that one paragraph 54 which, in its
13 entirety, is the one reference to, again, an
14 incorrect citation from justice -- former Justice
15 John Evans' report. So, if that's sufficiently
16 clear, that would be the correction that I would ask
17 to have made to my second report.

18 Q. Thank you, Professor Sossin.

19 Those are my questions.

20 PRESIDING ARBITRATOR: All right, I
21 give the floor to Mr. Little for the
22 cross-examination.

23 CROSS-EXAMINATION BY MR. SCOTT LITTLE:

24 Q. Hello, Dean Sossin.

25 A. Hello, good afternoon.

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1 Q. Good afternoon. We just met
2 earlier. You should have in front of you a binder
3 of documents --

4 A. I do.

5 Q. -- that I will be referring to
6 today. The tribunal members and the secretary have
7 a copy of this binder, as well. As we've done
8 today, when I'm going to turn to one of these
9 documents, I'm going to refer to them by their title
10 and tab and the exhibit number as well, so I'll just
11 ask you to turn to it when I do.

12 And Derek, our tech guy, will be
13 pulling each document up on the screen as well if
14 you want to look at them there.

15 A. Sounds fine.

16 Q. All right, Dean Sossin. "Dean
17 Sossin" is appropriate?

18 A. Dean Sossin, Professor Sossin,
19 whatever you'd like -- Mr. Sossin. I'm fine with
20 any of --

21 Q. I'll go with "Dean Sossin."

22 A. Thank you.

23 Q. Okay, I want to get a few things
24 straight regarding the reports that you've filed in
25 the arbitration. Mr. Nash just mentioned them. So

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1 you've filed two reports?

2 A. That's correct.

3 Q. And they are the two reports that
4 are in front of you; correct?

5 A. Yes.

6 Q. And the first one is
7 December 10th, 2016.

8 A. That is correct.

9 Q. Okay, and that one was filed with
10 the Claimant's memorial?

11 A. That's right.

12 Q. And the second report is
13 August 3rd, 2017, and this one was filed with the
14 claimant's reply; correct?

15 A. That's my understanding.

16 Q. I want to turn to the questions
17 that you looked at in your two reports. So, if you
18 can look at the first report, please. That is the
19 one dated December 10, 2016.

20 A. That's at page 2 of the report,
21 "The purpose of this report" is the heading.

22 Q. Well, I was actually going to
23 take you to paragraph 10, but we can look at
24 paragraph 2 after if you wish.

25 A. No, paragraph 10, I have in front

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1 of me on page 6.
 2 Q. That's it. So, in paragraph 10,
 3 you note that you were asked to provide your opinion
 4 on the issue of whether, under Canadian law, the
 5 findings of the tribunal in this matter would give
 6 rise to a conclusion that the decision of the
 7 federal and Nova Scotia Ministers, and that's on the
 8 project, breached Canadian administrative law
 9 standards and, if so, what remedies such breaches
 10 could give rise to. So is that an accurate
 11 encapsulation of the issue that you looked at?
 12 A. That is what it says although, to
 13 be more precise, it likely should have said the
 14 federal cabinet and the Nova Scotia Minister of the
 15 Environment and Labour, as I understand those to be
 16 the two ultimate decision-makers, but again subject
 17 to any back and forth if that's a controversial
 18 statement.
 19 Q. And the remedies that you
 20 canvassed in this report were the remedies that
 21 would have been available under Canadian law; is
 22 that correct?
 23 A. That's right. So, the expertise
 24 I have is in domestic Canadian administrative law
 25 and what I tried to apply my experience to was if

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1 this matter were assessed with the findings of the
 2 tribunal under that domestic administrative law
 3 standard, what would have been the remedial pathways
 4 open, what would have been the implications.
 5 Q. And those implications are, just
 6 to be clear, under Canadian domestic law?
 7 A. That is correct.
 8 Q. All right. The second report,
 9 August 3rd, to 2017. And in this report it appears
 10 you provided your opinion on two issues. And I'm
 11 going to take you to paragraph 14 of this report,
 12 there is an outline there.
 13 A. Page 4 under "Analysis."
 14 Q. That's correct, yes. So as you
 15 note in paragraph 14(a):
 16 "The first section of this report
 17 elaborates on the statutory
 18 discretion of the Minister and
 19 considers how the JRP process and
 20 the record before the Ministers
 21 following the JRP constrained
 22 that discretion." [As read.]
 23 And then if you look a little bit
 24 below at paragraph 16, you state that:
 25 "What I wish to elaborate upon in

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1 this Reply Expert Report is
 2 whether, had the JRP not based
 3 its findings on the CCV factor,
 4 the Ministers could have
 5 nonetheless refused approval for
 6 the project." [As read.]
 7 So that's an encapsulation of the
 8 first issue that you looked at in this report?
 9 A. That is, subject to that same
 10 clarification on cabinet and the Nova Scotia
 11 Minister being the more precise way to describe the
 12 decision-makers who were ultimately exercising the
 13 statutory discretion.
 14 Q. Okay. And then also in your
 15 second report, the report that was filed with the
 16 reply, if you look in paragraph 14(b), you note that
 17 the second section of the report explored the
 18 recourses that were open to the claimants in
 19 Canada's domestic courts and how these recourses
 20 interacted with the NAFTA process; correct?
 21 A. That's correct.
 22 Q. So, in light of what you've
 23 addressed in your reports, I want to ask a few
 24 questions about the mandates of the Whites Point JRP
 25 and decision-makers in both the federal and Nova

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1 Scotia governments who were involved in this EA
 2 process, the Whites Point EA process; okay?
 3 A. All right.
 4 Q. So, first of all, the Whites
 5 Point JRP's mandate was to carry out a review of the
 6 Whites Point Project under the Canadian
 7 Environmental Assessment Act and the Nova Scotia
 8 Environment Act; is that your understanding?
 9 A. That is my understanding.
 10 Q. And just for ease of reference,
 11 I'll refer to these statutes as the SAEE and the
 12 NSEA.
 13 A. Okay.
 14 Q. And as the Whites Point Project
 15 was subject to an EA under both of these statutes,
 16 in order for it to be built and operated, it had to
 17 be approved under both of these statutes; correct?
 18 A. That is my understanding as well.
 19 Q. So, you wouldn't take issue with,
 20 if just one of the Nova Scotia or federal
 21 governments decided not to approve the project or
 22 decided not take action that would allow it to
 23 proceed, then the project couldn't be built or
 24 operated; correct?
 25 A. That is correct. My

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1 understanding is there was some coordination in this
2 case, as there often will be, to try to align
3 outcomes so that there is a more effective process
4 than simply what would have occurred if you had gone
5 to each level of government and pursued the
6 environmental approval. So subject to that goal of
7 some coordination, it is clear that there was a
8 different statutory mandate in each of those
9 decision-makers case under the two statutes you
10 referenced. Two different documents conveying the
11 decision, again, in my understanding of the record,
12 are present, one from the federal cabinet and one
13 from the Nova Scotia Minister who I just referred
14 to. So, I think you're capturing my understanding
15 as well.

16 Q. I'd like you to turn, please, to
17 tab 1 of the binder which is Exhibit C-336, please.

18 Now, this is a document entitled the
19 Agreement Concerning the Establishment of a Joint
20 Review Panel for the Whites Point Quarry and the
21 Marine Terminal Project, and it is between the
22 Minister of Environment of Canada and the Minister
23 of Environment and Labour of Nova Scotia.

24 Now, you reviewed this document in
25 preparing your reports, correct?

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1 A. I reviewed a number of documents
2 relating to the JRP. I do believe that saw this
3 document but, again, I don't recall referencing it
4 in either of my reports.

5 Q. Can you look at paragraph 35 of
6 your Reply Expert Report, please? I'm at the bottom
7 of page 10 in paragraph 35 and there you state:

8 "Since the language of the CEAA
9 and NSEA differ, it is important
10 to consider the terms of
11 reference of the JRP itself which
12 reflects the blended mandates of
13 both Ministers under each
14 governing Act."

15 Now this document contains the terms
16 of reference so...

17 A. And I did refer to the terms of
18 reference and reviewed that in some detail.

19 Q. So did you review this document
20 then?

21 A. I did.

22 Q. So the document at Tab 1, it is a
23 nine-page document and I'd like you to turn to the
24 fourth page, please. In particular, at paragraph
25 4.1.

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1 Are you there?

2 A. I am.

3 Q. Now, this paragraph is contained
4 under a heading entitled "Conduct of the Review by
5 the Panel". Do you see that?

6 A. I do.

7 Q. And paragraph 4.1 states that:

8 "The panel shall conduct its
9 review in a manner that
10 discharges the requirements set
11 out in the CEAA, Part IV of the
12 NSEA, and the terms of reference
13 attached hereto."

14 Dean Sossin, do you agree with me that
15 paragraph 4.1 reflects the mandate of the Whites
16 Point JRP in carrying out the Whites Point EA?

17 A. If I understand your question
18 correctly, the document at this stage is indicating
19 that there are these two different statutory schemes
20 that are empowering the two Ministers in the conduct
21 of this JRP, that is to say the JRP needs to fulfill
22 a function that each of those statutes will then be
23 able to adapt or adopt into the decision-maker's
24 context and that is correct. That is my
25 understanding.

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1 Q. Okay. So just to be clear then,
2 the JRP had to carry out its review in a manner that
3 discharges the requirements of both CEAA and NSEA;
4 is that correct?

5 A. That is my understanding.

6 Q. Okay.

7 A. Yes.

8 Q. And the JRP was also responsible
9 for making recommendations to decision-makers on
10 what it found in the course of its review; correct?

11 A. Yes.

12 Q. Okay. Let's look now at
13 section 6 of this agreement. Section 6 is entitled
14 "Record and Review". Sorry, "Record of Review and
15 Report."

16 Now, this section of the agreement
17 gets into how the JRP was supposed to convey its
18 recommendations once it completed its review. I'll
19 just note that paragraph 6.2 for context provides
20 that once the panel completed its review, it was to
21 prepare a report for submission to the Nova Scotia
22 Minister of Environment and Labour and the Minister
23 of Environment Canada.

24 Now I'd like you to look to paragraph
25 6.3, please.

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1 A. Yes, I have it.
 2 Q. Looking at paragraph 6.3 would
 3 you agree with me that as regards the federal side
 4 of the JRP's mandate, the JRP's report was to
 5 include recommendations on all factors set out in
 6 section 16 of the Canadian Environmental Assessment
 7 Act?
 8 A. Yes.
 9 Q. Yes, you are agreeing?
 10 A. Yes, I see that in 6.3 that the
 11 report shall include recommendations on all the
 12 factors set out in section 16.
 13 So I'm not clear on the question
 14 you're asking in terms of my review or my experience
 15 but I do see that reference.
 16 Q. Okay.
 17 A. And I guess the response is just
 18 trying to make clear that the terms of reference
 19 clearly state what they state. I think there was a
 20 question or is a question. It's not one I was asked
 21 to opine on specifically as to whether, in terms of
 22 reference of a JRP it's open to the relevant
 23 statutory decision-makers to fetter their discretion
 24 in any way.
 25 In other words, if the discretion

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1 under CEAA or the Nova Scotia Environment Act
 2 indicates a range of things are to be considered,
 3 and the responsible decision-makers purport to enter
 4 into an agreement that something less than that that
 5 range will be considered, in my view, that certainly
 6 raises a question about the extent to which there is
 7 authority in those statutes for those
 8 decision-makers to fetter their discretion.
 9 The broader point from my experience
 10 and expertise is this authority is not the
 11 Minister's or cabinet's or the government's. It's
 12 the legislature and Parliament that has conferred a
 13 role on these decision-makers so it is not open to
 14 them on their own to change or alter what is a
 15 statutory authority that they are under an
 16 obligation to discharge.
 17 So, again, I haven't addressed the
 18 question because it wasn't asked to me about 6.3 and
 19 its consistency with the full palate of obligations
 20 that each of those decision-makers would be under,
 21 under various sections of their Act.
 22 Again, but with that question aside,
 23 I don't want to be unduly cumbersome to the
 24 questioning and I certainly take your point that
 25 this is an agreement that the decision-makers

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1 entered into and it clearly states that all the
 2 factors under section 16 of CEAA would be
 3 considered.
 4 Q. Okay, yes, that's all I was
 5 asking. I think you gave me a response to a
 6 question I didn't ask there, but so we can just keep
 7 it simple. My questions are going to be pretty
 8 simple.
 9 A. Well, let's hope that will be the
 10 first and only time.
 11 Q. Okay, thank you. So looking at
 12 paragraph 6.3, would you agree with me that as
 13 regards to the provincial side the JRP's mandate,
 14 the report to the JRP was required pursuant to Part
 15 IV of the Nova Scotia Environment Act to recommend
 16 either the approval including mitigation measures or
 17 the rejection of the project?
 18 A. That is what it indicates, yes.
 19 Q. If we can look now at paragraph
 20 6.6. Paragraph 6.6 sets out the mandate of federal
 21 decision-makers once they receive the JRP's report;
 22 correct?
 23 A. Yes.
 24 Q. And what it provide is that the
 25 responsible authority shall take into consideration

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1 the report and with the approval of the Governor in
 2 Council respond to the report; right?
 3 A. That is what it indicates, yes.
 4 Q. Okay, if you can look at
 5 paragraph 6.7. Would you agree with me that this
 6 provision reflects the decision-making mandate of
 7 the Nova Scotia Minister after getting the JRP's
 8 report?
 9 A. Again, that's a question that
 10 speaks more to the statutory scheme than to this
 11 agreement. So the Nova Scotia Minister is under the
 12 authority of that Environment Act and its
 13 provisions. And as I indicated earlier, that can't
 14 be altered simply by entering into an agreement --
 15 Q. I'm not suggesting it can. I
 16 asked you if you agree that this provision reflects
 17 the decision-making mandate of the Nova Scotia
 18 Minister after getting the JRP's report?
 19 A. It is what the document indicates
 20 it reflects. I think it's fair to infer what the
 21 Minister believed the appropriate role to be since
 22 this is an agreement between those Ministers so
 23 absolutely.
 24 The only point I don't want to be
 25 heard to be giving an opinion on is whether or not

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1 this captures the entirety of the Minister's
2 statutory discretion under the Act. In other words,
3 these options and only these options, that's the
4 analysis I haven't had a chance to undertake but
5 would be important to before answering in the
6 affirmative the question as I heard you pose it.
7 Q. Okay. But it's not -- I wasn't
8 suggesting that the Minister had to take one of
9 these options. It simply provides that the Minister
10 had to consider the recommendation of the JRP and
11 then exercise one of these options; correct?
12 A. Yes.
13 Q. Now, all of these provisions of
14 the JRP agreement, they refer to the CEAA and the
15 NSEA as you've noted so I want to drill down a
16 little bit into these statutes.
17 If you could please turn to Tab 2 of
18 the binder which is Exhibit R-1.
19 A. Right.
20 Q. And that is a document I'll refer
21 to as the CEAA 1992 if it's okay?
22 A. That's fine.
23 Q. All right. And there is another
24 document that you've referred to in your report or
25 another statute called the CEAA 2012 that's now in

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1 force. But just to confirm that we're on the same
2 page, it was the CEAA 1992 that applied to the EA of
3 the Whites Point Project?
4 A. That's correct.
5 Q. Okay, if you could turn, please,
6 to section 16 CEAA. It's at page 9.
7 A. Yes, I have it.
8 Q. This is a section called "Factors
9 to be Considered." Looking at subsection 16(1)
10 would you agree with me that pursuant to this
11 subsection, every environmental assessment by a
12 review panel is to consider the environmental
13 effects of a project, the significance of those
14 effects and measures that are technically or
15 economically feasible that would mitigate against
16 any significant environmental effects of the
17 project.
18 A. Broadly speaking, yes.
19 Q. Okay. And there are other
20 factors set out in 16(1) such as comments received
21 from the --
22 A. That's why I said "broadly
23 speaking", but again I take your point to have on
24 the record the relevant key aspects that were
25 guiding the discretion and certainly that's the

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1 point of departure for my analysis as well.
2 Q. Okay. And then if we get to
3 section 16(2) on the next page. This provision
4 provides that every assessment by a review panel is
5 to include consideration of other factors,
6 additional factors.
7 If we look at paragraph (d) those
8 include the:
9 "The capacity of renewable
10 resources that are likely to be
11 significantly affected by the
12 project to meet the needs of the
13 present and those of the future."
14 [As read.]
15 A. Yes, I see that section 2(d)
16 provision.
17 Q. Now, let's look at subsection
18 37(1) of the CEAA. It's at page 17 of the document.
19 A. Yes I have it.
20 Q. And it's contained under heading
21 called "Decision of Responsible Authority."
22 A. Yes.
23 Q. And you mention this one in your
24 reply expert opinion so I want you to turn to that,
25 please, particularly at paragraph 20. Okay?

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1 A. Yes.
2 Q. There in you say in reference to
3 section 37 that:
4 "A responsible authority with
5 approval of the government in
6 council, must take one of two
7 courses of action following a EA
8 by a review panel".
9 And then you summarize those. You
10 say: "First, if the project is not likely to cause
11 significant adverse environmental effects or if such
12 effects are likely but GIC believes these negative
13 environmental effects can nevertheless be justified,
14 the Responsible Authority may exercise any power or
15 perform any duty that would allow the project to
16 proceed."
17 And your reference here is paragraph
18 37(1)(a) of the CEAA; is that correct?
19 A. Yes, I see that reference there
20 as well.
21 Q. And turning the page you say:
22 "If the project is likely to cause
23 significant adverse effects that cannot be
24 justified, the RA may not exercise any power or
25 perform any duty that would allow the project to

1 proceed."

2 And your reference here is paragraph
3 37(1) (b); is that right?

4 A. Yes, that's right.

5 Q. If we could look back to
6 section 37(1) it might be easier in the statute.

7 Now I take it from your summary of
8 subsection 37(1) of paragraph 20 you don't take
9 issue with the fact that any course of action by a
10 Responsible Authority under this provision is
11 subject to the approval of the Governor in Council;
12 would that be correct?

13 A. Under 37(1) you are referring to?

14 Q. Yes. And for ease of reference
15 you can look to what you say in paragraph 20.

16 A. Yes.

17 Q. So it's any decision or course of
18 action by an RA under CEAA subsection 37(1) is
19 subject to the approval of the GIC; is that correct?

20 A. Where there is the presence of
21 the significant adverse environmental effects that
22 cannot be justified; is that your question or just
23 generally?

24 Q. I'm asking generally if any
25 action taken under section 37(1) is subject to the

1 approval of the Governor in Council.

2 A. My understanding is that the
3 Governor in Council is the decision-maker and that
4 these references, while there are some differences
5 in the relationship between the Responsible
6 Authority and Cabinet, particularly in that later
7 piece of legislation you were referring to in 37(1),
8 if that's the question, was Cabinet the responsible
9 decision-maker for the ultimate determination, yes.
10 And if the Responsible Authority was going to take
11 action under this, would that have to be in
12 alignment with Cabinet; is that -- do I have the
13 question right?

14 Q. Yes. So I'll say is it again to
15 you just so we're on the same page.

16 A. Sure.

17 Q. So you don't take any issue with
18 the fact that any course of action by a Responsible
19 Authority under SAEE subsection 37(1) is subject to
20 the approval of the Governor in Council?

21 A. I don't take issue with that, no.

22 Q. Okay. And just so we're -- maybe
23 makes it easier, we can look at paragraph 37(1.1)(a)
24 says that a Responsible Authority to exercise
25 discretion in responding to the JRP's report must be

1 approved, correct?

2 A. That's correct. I just wasn't
3 sure of the context in which the line of analysis
4 was taking me, but I know that will be unfolding
5 shortly.

6 Q. Okay. And then under paragraph
7 37(1.1)(c) provides that any action taken by the
8 Responsible Authority must be in conformity with the
9 approval of the Governor in Council.

10 A. Yes, that's right.

11 Q. Would you agree with me that
12 subsection 37(1.1) says nothing about how the
13 Governor in Council is to go about providing its
14 approval or the circumstances in which it's to
15 provide its approval of the RA's response?

16 A. Well, that's an interesting
17 question. So the provision that you've taken me to,
18 that is, 37(1.1) does not refer to specific
19 conditions. But if the scope of the question is:
20 Could the Governor in Council, for example, act
21 without evidence, act without there being a
22 foundation in either the JRP or subsequent
23 information sought and obtained in a legitimate and
24 lawful way by the Responsible Authority. In other
25 words, can the Governor in Council, can cabinet

1 simply make a decision under this authority that,
2 for example, was based on no evidence or flew in the
3 face of the evidence that was provided. If that's
4 the question, does the scope extend to that kind of
5 discretion? I would say the answer is "no."

6 If the question as I understood it is
7 this encumbered by a specific criteria under
8 section 37, then I do not see the criteria in the
9 statute that would specifically encumber cabinet.

10 There is obviously other criteria.

11 You took me to section 16 already that speaks to a
12 range of factors will animate the decision overall.

13 So, in short, my point is simply that
14 the context for this broad grant of discretion
15 remains bounded as all broad grants of discretion
16 will be, at least in the domestic administrative law
17 with which I'm familiar and the constitutional and
18 rule of law principles, by set boundaries that are
19 both going to be tied to the overall purpose and
20 context of the statute and to the specific record in
21 front of the cabinet decision-makers.

22 Q. Okay. You've posed an answer to
23 a question that I didn't ask?

24 A. Well, that's twice.

25 Q. Yeah. So just answer the

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1 question. I think you did answer it but to be fair
2 you posed and you answered another question.
3 A. So just to be clear and I'll be
4 as explicit as I can be, often the questions are
5 coming in a context. So to answer that question out
6 of context would not be consistent with the views
7 I've expressed and what I will endeavour to do is
8 ensure I understand the context within which you're
9 asking and answer again as briefly and as clearly as
10 I can.
11 Q. Just so you know, the context
12 that I'm asking is what the statute provide, as
13 simple as that. So I think you gave me the answer
14 but I want to be clear.
15 You'd agree with me that subsection
16 37(1.1) says nothing about how the Governor in
17 Council is to go about providing its approval or the
18 circumstances under which it is to provide its
19 approval?
20 A. Yes, read on its own the answer
21 is goings "yes". Statutes are not read on their own
22 at least in Canadian Public Law so a provision would
23 be read in context with the statute generally and
24 that context, of course, would inform constraints on
25 the discretion. So yes, you are correct in this

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1 section there are no criteria listed or constraints
2 set out. It would not be correct, however, to say
3 that that discretion is unencumbered by any criteria
4 or boundaries.
5 Q. There is nothing in subsection
6 37(1.1) that provides the Governor in Council is
7 bound by a JRP Report in providing its approval;
8 correct?
9 A. That's correct.
10 Q. Okay. And just to be clear,
11 looking back at subsection 37(1), it provides that
12 the Responsible Authority must take into
13 consideration the JRP's report but there's nothing
14 in subsection 37(1.1) that requires the Governor in
15 Council to take into consideration the JRP's report;
16 correct?
17 A. There is not a provision in that
18 part of the statute, no.
19 Q. If you could look to paragraph 31
20 of your second report, please?
21 A. Yes.
22 Q. In paragraph 31 of your second
23 report you state:
24 "If the Ministers wish to rely on
25 additional evidence or

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1 information not contained in the
2 record of the JRP, they could
3 have requested that the JRP
4 undertake additional actions."
5 [As read.]
6 Do you see that?
7 A. I do.
8 Q. So, I take that you don't
9 preclude the possibility that if faced with such a
10 request by the Ministers, the JRP could take further
11 additional actions in connection with such evidence
12 or information that you refer to there?
13 A. Yes. And just to clarify, the
14 question that was posed to me initially on which I
15 offered my views was that the actual record in this
16 case and the actual decisions reached. For example,
17 the decision not to seek clarifications from the
18 JRP, seek additional information. So in the
19 abstract, your characterization is to my
20 understanding correct. In this context we actually
21 have a record of what was asked or not asked, what
22 was clarified or not clarified so we don't, or at
23 least I wasn't looking at this as an abstract
24 exercise of statutory interpretation, but one
25 applied to this context, again, within the

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1 experience with Canadian Public Law that I'm
2 familiar with.
3 Q. I'm simply starting with the
4 statute though right now, okay.
5 A. Yes.
6 Q. All right. So would you agree
7 that any additional actions, to use your words, by
8 the JRP could result in new or different findings or
9 recommendations?
10 A. In other words, in a scenario
11 where additional clarifications were sought or
12 information requested from decision-makers to the
13 JRP, could they have come up with additional
14 information, factors, analysis? I would say that is
15 correct.
16 Q. Okay. All right, Dean Sossin,
17 let's turn to the Nova Scotia Environment Act which
18 is at tab 3. That's Exhibit R-5 for the record.
19 Now I want to as we with did with
20 CEAA, just look at what the JRP was supposed it do
21 in conducting a review in a manner that discharges
22 the requirements of Part IV of the Nova Scotia
23 Environment Act.
24 If you could turn to paragraph 34
25 please of your second report?

1 A. The one that begins:
2 "Under the NSEA"
3 Q. That's it. So here you state
4 that:
5 "Under the NSEA panels are
6 authorized to evaluate the
7 likelihood that a project will
8 cause 'adverse effects and
9 significant environmental
10 effects'. "
11 And then you list some definitions
12 from the Act. And these are adverse effects,
13 environmental effect and significant; right?
14 A. That's correct.
15 Q. And we heard these terms earlier
16 today in the cross-examination of Mr. Estrin. And I
17 want to just discuss a few aspects of them in terms
18 of what review panels conducting a review under the
19 NSEA are to do in discharging the requirements of
20 the NSEA.
21 So, given what you say in your
22 preamble at paragraph 34, specifically that panels
23 are authorized to evaluate the likelihood that a
24 project will cause adverse effects and significant
25 environmental effects. Would the identification and

1 a more accurate determination or description of the
2 mandate; would you agree?
3 A. I would accept that mitigation
4 plays a key role and is present in the statute and I
5 would not disagree with that assessment.
6 Q. All right. Now, just to be
7 clear, a review panel under the NSEA doesn't need to
8 make a finding regarding the existence of adverse
9 effects that can't be mitigated and significant
10 environmental effects that can't be mitigated in
11 order to discharge its mandate; correct?
12 Maybe I'll clarify.
13 A. If you could clarify that?
14 Q. A review panel could make a
15 finding of one or the other of adverse effects or
16 significant environmental effects in discharging its
17 mandate; correct?
18 A. I believe that is correct
19 although some of the details of how panels, in fact,
20 operate veers into some of the territory that David
21 Estrin has greater expertise on, but I have no basis
22 to disagree with that assessment.
23 Q. Okay. Now, in light of what
24 we've just discussed, a review panel under the NSEA
25 has a different statutory mandate than a review

1 evaluation of the likelihood of adverse effects and
2 significant environmental effects be part of a
3 review panel's mandate under the NSEA?
4 A. Can you repeat the first part of
5 your question?
6 Q. I simply referred to the first --
7 the preamble, the paragraph 34 which is that you say
8 that:
9 "Panels are authorized to
10 evaluate the likelihood that a
11 project will cause adverse
12 effects and significant
13 environmental effects"
14 A. That is my understanding, yes.
15 Q. So in light of that, I asked:
16 "Is the identification and
17 evaluation of the likelihood of
18 such effects part of a review's
19 panel's mandate under the CEEA"
20 or under the NSEA, excuse me.
21 A. Under the NSEA, I would imagine
22 so, yes.
23 Q. Okay. And I would add that the
24 issue of whether such adverse effects or significant
25 environmental effects could be mitigated is probably

1 panel under the CEEA; would you agree?
2 A. That's correct.
3 Q. Because a review panel under
4 the CEEA has to consider whether a project will
5 cause significant adverse environmental effects,
6 taking into account mitigation under that statute.
7 Whereas, as we've just discussed, a review panel
8 conducting a review under the NSEA is going to
9 consider whether a project's going to cause adverse
10 effects or significant environmental effects that
11 can't be mitigated; correct?
12 A. That's correct. Although, my
13 understanding is also that the JRP terms of
14 reference were attempting to blend statutory
15 mandates for the panel itself.
16 So, again, my opinion or my views
17 are, for the most part directed at the
18 decision-makers, their discretion and their decision
19 as opposed to the specific decision of the JRP.
20 Although, obviously, these are intertwined on the
21 record in this case so I believe your
22 characterization would align with my view as well.
23 Q. Okay. A couple more points on
24 review panels under the NSEA. If you still have
25 paragraph 34 open?

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1 A. I do.
2 Q. And in particular, the definition
3 of environmental effect.
4 A. Yes, I have it.
5 Q. Would you agree with me that in
6 discharging their mandate under NSEA, review panels
7 must evaluate any change that a project may cause
8 not only on the biophysical environment but also on
9 the social-economic conditions of the surrounding
10 area?
11 A. Yes.
12 Q. One last point with respect to
13 review panels. And I'd like you to turn to tab 3 of
14 the binder which is the Nova Scotia Environment Act.
15 It is Exhibit R-5.
16 A. Yes. I have it.
17 Q. And are you at section 39 or can
18 you turn to section 39?
19 A. I am now at section 39 under the
20 heading "Hearing and Recommendation by the Board."
21 Q. That's it. So this explains what
22 the Nova Scotia Environmental Assessment Board which
23 is what are what review panels are now called in
24 Nova Scotia must do in terms of carrying out a
25 public hearing and making recommendations.

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1 "Upon receiving a recommendation
2 from the Board under section 39,
3 the Minister may approve the
4 undertaking, approve the
5 undertaking subject to any
6 conditions deemed appropriate or
7 reject the undertaking." [As
8 read.]
9 A. Correct.
10 Q. And if you look at section 39(2)
11 just above that.
12 In relation to review panels, the
13 powers of the Minister in section 40 are reflected
14 in section 39(2); correct?
15 A. That's my understanding.
16 Q. Now, decision-making by the
17 Minister under the NSEA, it provides three options
18 to the Minister; correct?
19 A. Under section 40(1) there are
20 three options, yes.
21 Q. And it doesn't specify how those
22 options are going to be exercised; correct?
23 A. Can you clarify what you mean
24 "how"? In other words, are you referring to the
25 methodology or analysis undertaken or how those

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1 And I'd like you to read out
2 subsection 39(1)?
3 A. (Reading):
4 "Upon receiving a referral from
5 the Minister pursuant to
6 section 38, the Board shall
7 conduct a public hearing or
8 review and submit a report and
9 make a recommendation to the
10 Minister to approve the
11 undertaking, reject the
12 undertaking, or approve the
13 undertaking with conditions." [As
14 read.]
15 Q. So, this reflects what a review
16 panel is supposed to do in discharging its mandate
17 under the NSEA; would you agree with that?
18 A. Yes.
19 Q. All right. Let's turn to EA
20 decision-making under the NSEA for just a few
21 minutes. If you can keep in the NSEA and it's on
22 the same page, section 40.
23 A. This is "Powers of Minister"?
24 Q. That's it. So section 40(1)
25 provides:

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1 decisions are to be reached in relation to any other
2 process like a JRP or a panel?
3 Q. Well, I guess my question is: It
4 doesn't really provide anything other than the
5 three -- one of the three options that the Minister
6 is supposed to take; would you agree with that?
7 A. With respect to the powers of the
8 Minister and the decision-making? Yes, I would
9 agree with that.
10 Q. Okay. Now, to be fair I'll turn
11 to paragraph 8 of your second report. There you do
12 note that the effect of the statutory framework for
13 the decision on the project is to authorize the
14 Ministers to exercise their discretion and here
15 we're talking about the discretion under section 40:
16 "On the basis of the evidentiary
17 record before them (as set out in
18 the findings of the JRP)."
19 Correct?
20 A. Which paragraph are you referring
21 to?
22 Q. I was, oh, I'm sorry did I not
23 note that? I thought I said paragraph 8. And at
24 the very bottom of paragraph 8, sir?
25 A. Sorry, I was on page 8.

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1 Q. Oh, okay.
2 A. This, in other words, page 6?
3 Q. It is actually page 2.
4 A. Oh, you know what, I was on the
5 wrong report. My apologies. Page 2, paragraph 8
6 "as I elaborate below..."
7 Q. Yes, but I'm taking you to the
8 last sentence of paragraph 8 and you note that:
9 "The effect of the statutory
10 framework..."
11 A. Yes:
12 Q. (Reading):
13 "... for the decision on the
14 project is to authorize the
15 Ministers to exercise their
16 discretion only on the basis of
17 the evidentiary record before
18 them (as sit out in the finding
19 of the JRP)." [As read.]
20 Correct?
21 A. That's correct. And that again
22 is based on my understanding in the case that there
23 was no other separate information analysis sought by
24 the decision-makers beyond the report that is
25 indicated in their decision documents to have been

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1 aside the grammatical issue, you do note that
2 denying the Whites Point Quarry Project could only
3 be lawful if rooted in the record and the evidence
4 before the JRP?
5 A. That is my understanding and my
6 view.
7 Q. I want to look at the kind of
8 considerations that might be made in the evidentiary
9 record that the Minister might look at in making his
10 or her decision.
11 A. Yes.
12 Q. Once in receipt of a review
13 panel's recommendations, would you agree with me
14 that the panel's evaluation of adverse effects or
15 significant environmental effects would be relevant
16 to the Minister's decision if in the evidentiary
17 record?
18 A. You are talking about the Nova
19 Scotia Minister or both...
20 Q. Yes. We're still in the Nova
21 Scotia realm.
22 A. Yes, I would think that would be
23 relevant to the Nova Scotia Minister of the
24 Environment and Labour, yes.
25 Q. Could you turn please to the Nova

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1 carefully studied, reflected on and adopted. And by
2 "adopted" I don't believe that word is used in the
3 decision documents. I'm inferring based on reading
4 those decisions and the fact that there aren't other
5 bases in the record referred to beyond the
6 JRP Report, that it was the key evidentiary record
7 and certainly the primary factor in each of the
8 decision-makers' justification for the rejection of
9 the project.
10 Q. Okay. So, if you could turn to
11 paragraph 43, I think this --
12 A. Paragraph 43 of...
13 Q. Of the same report.
14 A. Paragraph 43, page 13. "If there
15 were ambiguity."
16 Q. Yes, and --
17 A. Shouldn't it read "if there was
18 ambiguity"?
19 Q. You tell me.
20 A. If there were ambiguity. If
21 there was -- well, let me take it under advisement.
22 The grammatical experts at home may have a word to
23 say about this. But if it should have been "was",
24 let the record reflect that I stand corrected.
25 Q. Okay. In paragraph 43 putting

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1 Scotia Environmental Assessment Regulations and this
2 is in tab 4.
3 A. Yes.
4 Q. And this is in Exhibit R-6 for
5 the record. Section 13, please. This is a
6 provision entitled "Minister's Decision Upon
7 Registration of Class I undertaking"?
8 A. And that's page 7?
9 Q. I believe it is. Yes, it is.
10 A. Yes, I'm with you.
11 Q. Okay. We saw this provision
12 earlier.
13 A. We did.
14 Q. And it maps out a whole suite of
15 options for the Minister when presented with the
16 registration of a project; correct?
17 A. Yes.
18 Q. And these would include allowing
19 a project to proceed, see for example paragraph (b),
20 all the way to rejecting a project as you can see,
21 for example, paragraph (e). Do you see that?
22 A. I do see that.
23 Q. Looking at these provisions, Dean
24 Sossin, would you agree that it conditions all of
25 the Minister's actions on the basis of whether the

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1 project may cause or is likely to cause adverse
2 effects or significant environmental effects?
3 A. Could you clarify "conditions" in
4 the question that you posed? Are you asking for,
5 are these the framing regulatory boundaries of the
6 discretion or how would you characterize it?
7 Because the conditioning is a bit unclear to me.
8 Q. Well, I suppose I'm asking if
9 they are the factor that is considered under each
10 one of the provisions but for (a) in section 13, the
11 significance of adverse effect and significant
12 environmental effects or lack thereof is what feeds
13 into the decision; would you agree with that?
14 A. Are you asking me what feeds into
15 a decision under this regulation or the actual
16 decision we have? Because of course we have the
17 decision document. So we have the reference to, for
18 example, unacceptable and significant adverse
19 effects in relation to the environment and I'm
20 paraphrasing from the decision document. But we do
21 know what the Minister of the Environment and Labour
22 did conclude in this case on this record.
23 Q. Again, I'm not in that world yet.
24 A. Okay. So if you're asking (a)
25 rather than (b), so would a Minister look to these

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1 provisions to be guided in the application of that
2 discretion, the answer would be "yes" in my view.
3 Q. Okay. One more question about
4 the Minister's decision under the NSEA. Unlike the
5 Responsible Authority under the CEAA who has to take
6 action in conformity with the approval of Governor
7 in Council, the Nova Scotia Minister doesn't have to
8 take -- doesn't have to seek the approval of or act
9 in conformity with any other body in the Nova Scotia
10 government; correct?
11 A. That is my understanding, yes.
12 Q. Can you turn, Dean Sossin, to
13 your paragraph 9?
14 A. Paragraph 9 of the August
15 opinion?
16 Q. Yes.
17 A. On page 3?
18 Q. That's it.
19 A. "Without Legitimate Grounds."
20 Q. Yeah. So here you state:
21 "... without legitimate grounds
22 to deny approval to the project,
23 but for the inappropriate
24 reliance on the JRP's finding in
25 relation to CCV, in my view the

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1 Ministers were legally compelled
2 to exercise their discretion to
3 approve the project."
4 [As read.]
5 So, that's the opinion that you
6 express in your second report; correct?
7 A. That is the opinion I express.
8 Q. I want to just consider that
9 under the federal realm first, okay.
10 A. Sure.
11 Q. I want to first briefly consider
12 a couple of findings on the liability award. The
13 liability award is at Tab 5 of your binder. I'd
14 like you to turn to paragraph 535 of the award.
15 Just for the record, I'll read it:
16 "While it is not strictly
17 necessary to decide the point in
18 order to resolve this case, the
19 tribunal's view is that the CCV
20 approach actually went beyond
21 just being problematic and that
22 on any of its plausible
23 interpretations it does not by
24 itself warrant a finding of
25 'likely significant adverse

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1 effects after mitigation.' In
2 any event, it appears certain to
3 the tribunal that the JRP was,
4 regardless of its "CCV" approach
5 still required to conduct a
6 proper 'likely significant
7 effects after mitigation'
8 analysis on the rest of the
9 project effects. By not doing
10 so, the JRP to the prejudice of
11 the investors, denied the
12 ultimate decision-makers in
13 government information they
14 should have been provided."
15 So just keep that one in mind and I'd
16 like you please to turn to paragraph -- and we'll
17 keep it on the screen too -- if we could turn to
18 paragraph 452.
19 Could we do that, Derek, keep them
20 both on?
21 A. Yes, I have paragraph 452 in
22 front of me and I see it on the screen.
23 Q. Okay. In paragraph 452 I am
24 looking at the second and third sentences. They
25 say:

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1 "The JRP did not carry out its
2 mandate to conduct a 'likely
3 significant effects after
4 mitigation' analysis to the whole
5 range of potential project
6 effects as required by the CEAA.
7 The JRP thus arrived at its
8 conclusions under both the laws
9 of Federal Canada and Nova Scotia
10 without having fully discharged a
11 crucial dimension of its mandated
12 task."

13 Okay, they are both up there on the
14 screen.

15 So, one question regarding these
16 paragraphs. Would you agree with me, Dean Sossin,
17 that if the Whites Point JRP carried out its mandate
18 to conduct a likely significant effects after
19 mitigation analysis to the whole range of potential
20 project effects, as it was required to do by CEAA,
21 that it could find other likely significant adverse
22 environmental effects of the project?

23 A. Well, that turns on insight that
24 we don't have and that has already been subject to
25 some discussion here which is what did the JRP do

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1 with the voluminous record before it about exactly
2 the foundation of what would have led to any finding
3 of likely significant effects after mitigation to
4 quote from paragraph 535.

5 So, for example, there is no
6 restriction that I'm aware of that says a JRP was
7 under an obligation to come up with only one
8 significant adverse environmental effect after
9 mitigation. Presumably we have to take it to have
10 understood its task to analyze the entirety of the
11 record and apply its expertise under its mandate to
12 all of it. And it did so and was viewed as complete
13 by the decision-makers or a decision could not have
14 flowed.

15 So what we have is a complete JRP
16 that is deeply flawed, highly or beyond problematic
17 in the words of the Arbitral Tribunal and had also
18 had all the evidence it would need in front of it.
19 So, in that sense, I don't know that I do accept the
20 view that had it gone back to look at those other
21 factors, it would have found significant adverse
22 environmental effects that could not be mitigated.
23 We don't have that understanding.

24 What we do know is what they did do.
25 And it was open to them to do it and more

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1 importantly it was open to the decision-makers to
2 review what they done and if it was lacking in any
3 way, either not having the right information,
4 inadequate analysis to go back and seek
5 clarification, seek additional process.

6 So if you look at paragraph 584, for
7 example, of the Arbitral Decision and 583, as well.
8 But 584, in particular, is the provision in which
9 the Arbitral Tribunal makes this point itself. It
10 says the JRP is not the decision-maker. It is the
11 relevant GIC federally, as you pointed out, and the
12 Nova Scotia Ministry of the Environment that had the
13 opportunity to seek additional analysis, had the
14 mandate to consider the entirety of the record, as
15 you've pointed out, the JRP and anything in addition
16 to it that it might need. And it's ultimately the
17 decision-maker that was found to have breached the
18 Articles 1105 and 1102 standards in this NAFTA
19 matter.

20 So the JRP completed its task and did
21 so in a flawed, unreasonable, inappropriate,
22 arbitrary, unfair way and there is a
23 characterization of many, many adjectives.

24 It denied a fair, just, expected
25 opportunity I think are the phrases used in varying

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1 parts to the Investors to have their record
2 considered according to an appropriate set of
3 factors and analysis.

4 So, had that happened, as you pointed
5 out, my conclusion is that acting reasonably, the
6 Cabinet federally and the responsible Minister in
7 Nova Scotia, based on that record and the absence of
8 any other finding of significant adverse
9 environmental effects or the reference of the Nova
10 Scotia Minister to unacceptable and significant
11 adverse effects on the environment, absent anything
12 else beyond that one JRP Report recommendation,
13 there was no other basis for the Minister's acting
14 reasonably with the record they actually had in
15 front of them, in my view, to have denied the
16 project based on this statutory mandate, the dual
17 mandate you've taken me to federally and
18 provincially.

19 Q. Right. You again just provided a
20 response to a question I didn't ask.

21 A. So the context I thought you were
22 asking is my understanding of what the Arbitral
23 Tribunal did or said, I should say, in these two
24 paragraphs.

25 Q. Okay. So that's --

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1 A. That's what I was attempting to
2 provide.

3 Q. Well, you went into a whole host
4 of elaboration on decision-making and a number of
5 opinions that really aren't even expressed in this
6 second expert report, sir.

7 A. Well, I thought the second expert
8 report makes it clear that it's based on my analysis
9 of the tribunal's award on liability and
10 jurisdiction or jurisdiction and liability in
11 addition to the other factors.

12 So that's the basis for the key
13 conclusion that you took me to of why, again, in my
14 analysis I've concluded that acting reasonably the
15 decision-makers would have approved the project.
16 That's the basis for that conclusion that you took
17 me to.

18 Q. Well let's just rewind a bit
19 because I want to get a clear answer to my question.

20 I think I know what it's going to be,
21 but I want a clear answer. Would you agree with me
22 that if the Whites Point JRP carried out its mandate
23 to conduct a likely significant effects after
24 mitigation analysis to the whole range of potential
25 project effects as it was required to do by CEAA,

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1 that it would find other likely significant adverse
2 environmental effects of the project? Just a simple
3 response this time.

4 A. Hypothetically, and in a
5 different context, I don't see why not. Actually,
6 in this context of course we have different
7 information. But hypothetically, if that's the
8 question to speculate on, I have no reason or basis
9 to say otherwise in a speculative context.

10 Q. Okay. And then I take it that
11 your non-hypothetical response, we'll say, is that
12 the JRP only found one likely SAEE; is that correct?
13 Simple answer; is that correct?

14 A. Yes, that is my understanding of
15 the two decision documents. And my understanding of
16 the arbitral finding was to that effect as well.

17 Q. Okay. And you don't see any
18 inconsistency with that conclusion and what you see
19 in paragraph 452, sir?

20 A. In paragraph 452 I see the
21 Arbitral Tribunal making a finding that one of the
22 flaws in this process and of course there were
23 substantive and procedural flaws found. One of them
24 was that the decision-makers were not provided a
25 full analysis in the -- again, the evidence that

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1 ultimately has come out including the coverage of
2 speeches or CBC interview after-the-fact with the
3 chair of the JRP.

4 There is a range of things that
5 flowed into that view that the JRP, from either the
6 outset or somewhere along the way, had determined
7 this view around community core values would be its
8 overriding approach. But as David Estrin mentioned
9 earlier and as the record shows, when looked at in
10 its entirety including the Arbitral Tribunal's
11 finding in its entirety, there was nothing at all
12 preventing the decision-makers from obtaining
13 exactly that additional analysis you are referring
14 to if they saw the need for it. And, again, every
15 decision-maker is presumed to understand the
16 statutory mandate under which they're making the
17 decision. And I see no reason that wouldn't apply
18 here.

19 Q. Okay. And we're not talking
20 about decision-makers yet. And I believe your
21 evidence, sir, was that decision-makers were not
22 provided a full analysis; is that correct?

23 A. The decision-makers, I
24 characterize one of the errors in the decision
25 included, as set out in these paragraphs, and again

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1 I was asked to take these findings and give an
2 opinion as to the implications of them. I would not
3 disagree that one of the errors in the decision was
4 that the JRP had taken the approach that it took.

5 Q. So you agree that the
6 decision-makers were not provided a full analysis by
7 the JRP?

8 A. Well, the JRP was complete.
9 Obviously the Ministers could not have issued their
10 decision if they didn't believe the JRP was
11 complete. So I'm trying to understand what you're
12 characterizing as a full analysis.

13 Q. Well, it's actually your word.
14 You said that the decision-makers were not provided
15 a full analysis.

16 A. Well, if it's my words then it
17 must be right.

18 Q. Okay, that's good to hear.

19 A. And you can see I'm not trying to
20 be difficult. I just want to be precise in the
21 hopes of assisting the Tribunal in this distinction
22 between the range of things that could have been
23 done and, again, what was actually done.

24 Q. Okay. Well, it seems to me, Dean
25 Sossin, that you are not far off from paragraph 452

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1 if your conclusion is that decision-makers were not
2 provided a full analysis given that paragraph 452
3 provide that the JRP did not carry out its mandate
4 to conduct a likely significant effects after
5 mitigation analysis to the whole range of potential
6 project effects; would you agree with that?

7 A. I would.

8 Q. Okay. I don't want to belabour
9 the point but I'll ask the question again.

10 If the JRP provided a full analysis,
11 that is, to conduct a likely significant effects
12 after mitigation analysis to the whole range of
13 potential project effects, would you agree with me
14 that it could find other likely significant adverse
15 environmental effects of the project?

16 A. Are you asking whether it could
17 theoretically or whether it could on this record?

18 Q. Well, I think we are a
19 theoretical construct here because we're looking as
20 what could have happened.

21 Would you agree with me, if the JRP
22 carried out its mandate, to use your words, the JRP
23 provided a full analysis to the whole range of the
24 potential project effects as it was required to do
25 so, that it could find other likely significant

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1 adverse environmental effects of the are project; is
2 that possible?

3 A. Again, I was asked to give an
4 opinion and my views on what actually did occur. So
5 in a theoretical or hypothetical world, I don't know
6 that I'm qualified to speculate on what could have
7 occurred in that hypothetical set of, you know, set
8 of suppositions or assumptions that you are posing.
9 So there may well be people who could do that, but
10 my opinion has been focussed on what actually
11 occurred.

12 Q. Okay. I wasn't asking what could
13 occur. I was asking: Is it possible that the JRP,
14 if it provided a full analysis, if it conducted a
15 likely significant effects after mitigation analysis
16 to the whole range of potential project effects as
17 it was required to do, is it possible that it could
18 find other likely significant adverse environmental
19 effects?

20 A. Maybe the best way to answer you
21 is by saying that I also, in my report, expressly
22 rely on the reports of David Estrin who has spent
23 some time this afternoon, I think, addressing that
24 question based on an analysis.

25 He didn't seem to come to the

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1 conclusion that there was a basis in the record for
2 that finding, at least as I understood his
3 discussions. So I just don't feel I'm in a position
4 to answer the question based on my expertise of what
5 could have happened based on this record in a
6 hypothetical, other and different analysis by a JRP.

7 We do know the JRP had all the
8 information before this time. We do know it
9 considered exactly these kinds of considerations and
10 we do know that it didn't fulfill its task in a way
11 that could be described as appropriate or
12 reasonable. I know those things. But I simply
13 don't have a basis for addressing the question
14 you've asked, if I've understood it.

15 Q. So you are not going to respond
16 to if it's -- the question of whether it would be
17 possible for the JRP to find other likely
18 significant adverse environmental effects of the
19 project if it had carried out its mandate?

20 MR. NASH: With respect, he has
21 responded to that question. He just responded to
22 that question. He's actually responded to your
23 question.

24 THE WITNESS: I believe the response
25 is I don't believe I'm in a position given my

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1 expertise and the foundation of the record in this
2 case. But I don't want to be difficult and I don't
3 want to, you know, have you go to unnecessary
4 trouble.

5 If you want to try reframing or
6 rephrasing, I'm more than happy to try and work with
7 you, but I'm trying to be honest about the expertise
8 I have and what I was asked to give an opinion on in
9 this matter based on the actual decisions and the
10 record I was provided with.

11 BY MR. SCOTT LITTLE

12 Q. Okay. Let's move on. I want to
13 try to unpack your opinion in paragraph 9 as it
14 relates to the Minister's decision under the NSEA.

15 A. Okay.

16 Q. Now, it seems that paragraph 9 is
17 based on two assumptions. I'm going to phrase them.

18 One, that there were no legitimate
19 grounds to deny approval to the project. Two, there
20 can be no inappropriate reliance on the JRP's
21 finding in relation to CCV.

22 I want to take a closer look at the
23 assumptions.

24 A. Okay.

25 Q. So the first one is no legitimate

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1 grounds to deny a project approval. If we can turn
2 back to paragraph 8, and I believe we've looked at
3 this already.
4 A. Paragraph 8 in my...
5 Q. In your second report.
6 A. In my second report "as I
7 elaborate below".
8 Q. That's it. And here we already
9 made note of the fact in paragraph 8 you make the
10 point clear that:
11 "... the Ministers may exercise
12 their discretion only on the
13 basis of the evidentiary record
14 before them (as set out in the
15 findings of the JRP)."
16 A. Or, of course, supplement that by
17 seeking other information as they were entitled to
18 do under their statute, but that's correct.
19 Q. Okay. And if you could turn to
20 paragraph 44 of your second report, please?
21 A. 44?
22 Q. Yes.
23 A. On page 13?
24 Q. That's it. In the second
25 sentence of this paragraph you actually refer to the

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1 Q. Yes, if you could read that full
2 paragraph, it goes on the next page:
3 "The panel concludes that the
4 proponent has not demonstrated
5 that its mitigation measures can
6 protect the ecological integrity
7 and the continuing viability of
8 the wetland. The panel believes
9 that the wetland would experience
10 adverse environmental effects
11 from the disruption of its
12 watershed."
13 [As read.]
14 Q. If you could turn to page 59 now.
15 A. Yes.
16 Q. I am second column, the first
17 full paragraph beginning, "The panel believes..." if
18 you could read that one?
19 A. (Reading):
20 "The panel believes that the
21 project carries a reasonable
22 risk..." [that's the one?] "of
23 introducing unwanted diseases or
24 invasive organisms to the Bay of
25 Fundy from ballast water. The

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1 evidentiary record before the Ministers in the case
2 of the Whites Point Project in support of your
3 opinion regarding the fact that the Minister had no
4 discretion but to approve. Here you state:
5 "In my view, given the Arbitral
6 Tribunal's finding, the JRP
7 recommendation was based on CCV
8 in breach of NAFTA, it follows
9 that the Ministers, acting
10 reasonably and within their
11 statutory authority, would have
12 approved the Whites Point Quarry
13 Project based on the record and
14 evidence before them."
15 Do you see that?
16 A. Yes, and that is my conclusion.
17 Q. Okay. Can you turn please to tab
18 7 of the binder. This is the JRP's report.
19 A. Yes, I have it.
20 Q. If you could turn, please, to
21 page 35. I will have Derek highlight it for your
22 ease of reference. It goes over to paragraph 36,
23 Derek.
24 A. This is:
25 "The panel concludes..."

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1 ship's destination waters in
2 New Jersey are known to carry
3 organisms that may affect a
4 commercially important species
5 and the mainstay of the regional
6 economy. Mitigation measures
7 beyond those codified by
8 Transport Canada are not
9 technically or economically
10 feasible to completely contain
11 the risk at this time. Hence,
12 this must be considered as a
13 potential adverse environmental
14 effect." [As read.]
15 Q. Let's look at page 64, please.
16 We're almost done.
17 A. No, this is helpful.
18 Q. Can you read the last two
19 sentences in the second column starting with "The
20 Panel believes..."
21 A. (Reading):
22 "The panel believes that direct
23 physical harm and behavioural
24 effects that could undermine
25 survival rates of critically

1 endangered species must be
2 avoided. Hence, the requirement
3 for mitigative measures well
4 beyond those proposed by the
5 proponent would qualify this as
6 an adverse environmental effect."
7 [As read.]
8 Q. Okay, one more. Page 77.
9 First column, second paragraph
10 beginning:
11 "The range..."
12 Would you be able to read that,
13 please, too?
14 A. (Reading):
15 "The range of the effect on the
16 fishery would have environmental
17 repercussions that extend
18 throughout lobster fishing area
19 34. Displacement of fishers from
20 Whites Cove and shipping access
21 areas would force fishers to
22 relocate. This could put greater
23 pressure on stocks in other areas
24 of LFA34. The effect would last
25 throughout the operation of the

1 project. Any risk to the lobster
2 stock that may come with invasive
3 species could affect the fishery
4 throughout the Bay of Fundy. The
5 panel concludes that the project
6 is likely to have an adverse
7 environmental effect on the
8 social-economic health and
9 viability of some of the fishing
10 communities of Digby Neck and
11 Islands." [As read.]
12 Q. Okay. Now, earlier, Dean Sossin,
13 we found that the evaluation and finding of an
14 adverse environmental effect, taking into account
15 mitigation would be relevant to the Nova Scotia's
16 Minister's decision under Section 40; correct?
17 A. I believe that is correct.
18 Q. So, if these findings remained in
19 the JRP Report, and to the extent that the Minister
20 relied upon CCV, and he could no longer rely on CCV,
21 these findings would be relevant to the Nova
22 Scotia's Minister's decision; correct?
23 A. Are you okay if I put that in
24 context because that's an important question and I
25 don't believe I can give a "yes" or "no" answer, but

1 I would be more than pleased to address it directly.
2 Q. Maybe answer my question and then
3 you can offer your context.
4 A. Well, again, I think the answer
5 is part of the context so I would feel uncomfortable
6 giving an answer without the context.
7 Q. Okay.
8 A. So, the passages you've taken me
9 to are precisely the passages that one would have
10 expected if they rose to the level of the Nova
11 Scotia Environment Act such that the Minister was
12 relying on them as a basis for denying the project,
13 to mention them.
14 In other words, the decision document
15 refers not to the various concerns you've expressed,
16 but to only one concern as set out in the JRP which
17 is the community core value. So this goes to the
18 view, again, that I've expressed that the Minister
19 was fully apprized of the relevant effects,
20 environmental effects, adverse effects that would
21 have been necessary to reach a finding.
22 So there is a decision from the
23 Supreme Court of Canada that I believe is analogous
24 on this point, in particular, the Trinity Western
25 University decision of 2001 where the British

1 Columbia College of Teachers performed a rigorous
2 analysis of whether a university could offer teacher
3 training to those wishing to be teachers in the
4 province. And it was found to have undertaken that
5 analysis in an appropriate way, but for one factor.
6 It looked to a discriminatory aspect of the
7 university expression of values in its covenant and
8 found that disqualified it from being able to be
9 accredited.
10 Supreme Court found that that was an
11 inappropriate consideration, very similar said, but
12 for that, there was no other basis that the College
13 of Teachers had found that would justify not
14 accrediting that body. And it had all that
15 opportunity. It had the full analysis before it.
16 There's no question that it was missing information
17 it needed or that it didn't understand its statutory
18 role. It simply added a provision that was not open
19 to it to add, at least without balancing freedom of
20 religion and other concerns and considerations.
21 So, the effect of the decision was
22 simply to say that without that inappropriate
23 factor, irrelevant consideration within the language
24 of Canadian public law or administrative law, the
25 decision, in effect, is clear from the record. The

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1 only reasonable course of action was to grant the
2 accreditation to the University. And the Supreme
3 Court did so in that case directly through an order
4 of mandamus, coming to the conclusion that there was
5 no further analysis needed.

6 Now that case didn't involve
7 procedural flaws of the kind that are also found
8 here and we may get into why I've also concluded a
9 likely outcome if it did go through a domestic court
10 process would be a further process, again, before a
11 different ministerial decision-making environment,
12 but that's the conclusion I've reached.

13 There was no finding of any other
14 significant environmental effects or to use the
15 language of the Nova Scotia Minister, unacceptable
16 and significant adverse effects on the environment.
17 There was no other reference in that decision
18 document to any of the matters you've raised, and no
19 reason why such matters wouldn't be referred to,
20 given the Minister's assumed or presumed interest in
21 wanting the proponents to be aware of exactly why
22 this quarry was not going to go forward in
23 circumstances where everyone was aware that was a
24 very rare occurrence, and a very significant
25 occurrence. So that's the context where I think the

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1 provisions you've taken me to are part of what led
2 to my conclusion itself.

3 Q. I am mindful of the time --

4 A. No, I am as well --

5 Q. And I want to get through --

6 A. -- but I thought that was a
7 critical point you raised and I wanted to do justice
8 to an important question you asked.

9 Q. If you could turn, please, to Tab
10 8 of the document or to the binder.

11 A. Yes.

12 Q. This is Exhibit R-331.

13 Now, you said that the decision
14 document refers to just community core values. This
15 is the decision document.

16 A. I said -- I believe I said it
17 referred to the panel's report. And the panel's
18 report had reached one recommendation only on the
19 significant adverse environmental effects that were
20 likely which was the community core values even
21 though it had, again, that full record before it.

22 Q. Well, I had that you referred --
23 the decision document refers to just community core
24 values but I think we are on the same page.

25 A. I do as well and if I did

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1 mischaracterize that, you have my apologies.

2 Q. So in paragraph four, the
3 Minister notes that the definition of environmental
4 effect in the Environment Act is broad in nature and
5 includes any change to the project may have on the
6 environment, including social-economic conditions,
7 environmental health, physical and cultural
8 heritage; correct?

9 A. That's correct.

10 Q. All right. And in paragraph 5
11 the Minister notes:

12 "The project poses the threat of
13 unacceptable and significant adverse effects to the
14 existing and future environmental, social and
15 cultural conditions influencing the lives of the
16 individuals and families in the adjacent
17 communities."

18 So, in this determination the
19 Minister refers to adverse effects on environmental
20 conditions; correct?

21 A. Yes.

22 Q. And adverse effects on social
23 conditions; correct?

24 A. The reference here is, as you've
25 read it out, yes.

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1 Q. And adverse effects on cultural
2 conditions; correct?

3 A. Yes.

4 Q. All right. And all of these
5 factors, environmental, social and cultural, they
6 are all contained in the definition of environmental
7 effects under the NSEA; correct?

8 A. That is correct.

9 Q. All right. And nowhere in this
10 letter does the Minister mention community core
11 values; right?

12 A. Well the Minister refers to
13 having arrived at the decision after careful
14 consideration of the panel's report and if you turn
15 to the panel's report and the, I believe, seven
16 recommendations that the panel makes, only one
17 refer -- and my understanding -- only one of those
18 seven recommendations refers to an environmental
19 effect that would justify denial of the project,
20 significant adverse environmental effect or likely
21 significant adverse environmental effect, that is,
22 community core values. When it was, as you point
23 out, clear in their record had they actually
24 concluded that after mitigation, for example, those
25 other considerations could not have been addressed

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1 to the satisfaction of the project going forward, it
2 was open to them to make those recommendations.
3 And, again, the decision-makers could have sought
4 greater clarification of any of those and if the
5 Nova Scotia Minister, in particular, did believe,
6 for example, that the effect on the lobster fishery
7 justified not approving this project or accepted,
8 for example, that the other considerations you took
9 me to were of such a nature that it rose to a level
10 that was contemplated under the Minister's statutory
11 mandate, I just can't imagine a reason why that link
12 would not be mentioned in this decision document.

13 In other words, the panel report is
14 mentioned. The panel made one recommendation
15 related to these matters which was the CCV, as
16 you've been referring to it when all those other
17 considerations were before it.

18 So you have a theory -- you've
19 accepted a theory. That's the wrong way of putting
20 it. You've made a finding in, I believe, it's
21 paragraph 583 of the award on jurisdiction and
22 liability to the effect that the chair believed if
23 other mitigation measures were alerted, the
24 government was alerted to or if there were other
25 environmental effect or adverse effects which could

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1 be mitigated, if those were mentioned, a reasonable
2 outcome would well be approval so they weren't
3 mentioned.

4 Now, that may or may not be true.
5 I'm not in a position of course to take issue with
6 the analysis. I assume it's an analysis based on
7 the record, but be that as it may, there was no bar
8 on the JRP coming to conclusions about other
9 environmental effects or adverse effects or
10 significant adverse environmental effects. And
11 you'll will forgive me if I'm not getting every term
12 of art exactly correct. That Minister chose not to.
13 So at this point, I don't -- in my analysis and
14 understanding of this decision document, I do not
15 see it as resting on all those other matters which
16 could have led the JRP to make a recommendation in
17 those areas, but for which they chose not to.

18 Q. Let's -- I'm very mindful of the
19 time now. I'm going to try to ask you two simple
20 questions.

21 The passages from the JRP Report that
22 you just read into the record are findings of
23 adverse environmental effects that can't be
24 mitigated; correct?

25 A. Did you see a reference to "that

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1 cannot be mitigated here"? I'm just looking for you
2 to take me to where it says that.

3 Q. No, I'm talking about the
4 passages to the JRP report that you referred to
5 earlier that you read into the record --

6 A. Yes.

7 Q. -- those were findings of adverse
8 environmental effects.

9 A. I would have to go back to them.
10 If you want to take me to them again, I wasn't
11 reading them with that precision in mind. If you
12 are of the view they are, and it is not contentious
13 I don't want to belabour this.

14 Q. Let's assume they are because I
15 don't want to read them into the record again. They
16 are.

17 And would you agree with me with the
18 Minister's decision letter notes the threat of
19 unacceptable adverse effects to the existing and
20 future environment?

21 MR. NASH: Well, I think the document
22 should be read correctly. The document does not say
23 that.

24 MR. SCOTT LITTLE: I'm sorry,
25 unacceptable and significant adverse effects to the

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1 existing --

2 MR. NASH: Unacceptable and
3 significant. Unacceptable and significant adverse
4 effects to the existing, et cetera.

5 BY MR. SCOTT LITTLE:

6 Q. Okay. Would you agree with me
7 that this letter notes the threat of unacceptable
8 and significant adverse effects to the existing and
9 future environment?

10 A. I certainly would agree it says
11 what it says. Absolutely.

12 Q. Okay. Would you agree with me
13 that the finding that you read into the record just
14 earlier, would they be inconsistent with the
15 Minister's decision to approve the project?

16 A. I don't know that I have a basis
17 to offer a conclusion on that kind of speculation.
18 Again, the JRP certainly did not find those various
19 measures justified recommendations that the project
20 be -- approval for the project be denied on that
21 basis. So I have to take into consideration the JRP
22 didn't take that step. And then the
23 decision-makers, the Nova Scotia Minister we are
24 we're talking about in particular, could have and
25 chose not to seek any clarification of whether those

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1 matters, in the view of the JRP, did justify denial,
2 could have asked for further clarification, for
3 example, on exactly that point, chose not to. And
4 the only basis for the decision other than that
5 characterization of the language that you've now
6 taken us to, taken me to, is the panel report which
7 had its one recommendation in relation to
8 environmental effect.

9 So that's been the inference that
10 I've drawn based on that line of logic. So I am not
11 in a position to say, based on my expertise, that
12 the effect on the lobster fishery for example could
13 have risen to that level for the JRP for the Nova
14 Scotia Minister and whether that would have been in
15 some other, again, hypothetical context on its own
16 or cumulatively part of a reasonable analysis.

17 All I can say is, again, what was
18 decided here and the justification offered for that
19 decision and that's what I was asked to express my
20 opinion on.

21 Q. Okay. I have one more area of
22 questioning. I just want to look at the no
23 inappropriate reliance on the JRP's findings in
24 relation to CCV assumption on which your opinion is
25 based.

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1 Now, I want to specifically get an
2 understanding of what would remain in the JRP Report
3 for the purposes of your opinion if there is no
4 inappropriate reliance on the JRP's findings in
5 relation to CCV.

6 So, can you turn to Tab 7 of Exhibit
7 R-212?

8 A. Tab 7 of my binder?

9 Q. Yes, tab 7. It is the
10 JRP Report.

11 A. Yes I have it.

12 Q. At page 103.

13 A. Page 103.

14 Q. Yes, the last paragraph?

15 A. Yes.

16 Q. I have that. In the first column
17 it states:

18 "A primary consideration
19 influencing the panel's decision
20 to recommend rejection of this
21 project is the adverse impact on
22 a valued environmental component,
23 the people, communities and
24 economy of Digby Neck and
25 Islands. The region of Nova

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1 Scotia is unique in its history
2 and in its community development
3 activities and trajectory. Its
4 core values, defined by the
5 people and their governments
6 support the principles of
7 sustainable development."

8 So if there's no inappropriate
9 reliance on the JRP's findings in relation to
10 community core values, I am wondering if there would
11 still be a recommendation made by the JRP. So
12 I have a few questions about that.

13 So the JRP was legally mandated to
14 make a recommendation that the project should be
15 approved, approved with conditions or rejected so
16 there has to be a recommendation still; correct?

17 A. And a recommendation was made
18 that as you pointed out has been found to have been
19 inappropriate and unreasonable, yes.

20 Q. So there has to have been a
21 recommendation made?

22 A. My understanding from the
23 JRP Report as it flowed is that there was one
24 recommendation that related to these environmental
25 effects and that is precisely the criterion that

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1 you've taken me to that has been found to be
2 unreasonable. So if the gist of your question is:
3 If you take away the CCV, if I can refer to it that
4 way, does that mean there is no recommendation from
5 the JRP? I would frame it differently.

6 I would say that the JRP concluded
7 that the only basis on which to deny approval was
8 something that now has been discredited as highly
9 problematic.

10 So when you remove the one basis that
11 the decision-makers had for denying it, then the
12 logical inference that I've drawn is that acting
13 reasonably in the absence of CCV and based on this
14 record, without any other recommendation on the
15 evidence from the JRP, they would have approved it.

16 So if your question is: But wouldn't
17 that have violated the very statutory condition that
18 requires a recommendation, I come back to paragraph
19 535 of the arbitral findings that you took me to
20 which is that the reliance on this aspect of the JRP
21 was to the prejudice of the Investors.

22 So I just, in my view, came to the
23 conclusion that it would not be visited on the
24 Investors. In other words, not to have the
25 conclusion be because of the reliance on this

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1 unreasonable factor, that somehow then there was not
2 a proper foundation for the decision.

3 This was the only environmental
4 effect that was found to justify denial. And it's
5 been, in effect, removed, like in Trinity Western.
6 They've taken that aspect away. What's left?

7 What's left is there is no barrier to
8 approval on the record in light of that fact. So
9 that's how I reach the conclusion I did.

10 Now your point about, but they had to
11 make a recommendation. They did make a
12 recommendation and it's been found to have been
13 inappropriate to the prejudice of the Investors.
14 And I emphasize that because I think it's important
15 in framing certainly my understanding of this
16 matter.

17 Q. Okay. So am I correct then that
18 if there's no inappropriate reliance on the JRP's
19 findings in relation to CCV, then the recommendation
20 would be for approval, is that what you're saying?

21 A. Acting reasonably, my conclusion
22 is the Ministers would have approved and I believe
23 the record reflects that.

24 Q. No, I'm asking if the JRP would
25 have recommended approval with no reliance on CCV?

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1 A. The JRP had no other basis for
2 recommending denial so I think maybe it's a semantic
3 distinction. No other basis for recommending denial
4 strikes me as ultimately the conclusion would be
5 approval.

6 If you are asking me to put a
7 recommendation in the language of the JRP Report
8 that was not there, again, I've gone as far as to
9 say once you take away the only legitimate basis
10 provided for denial as not legitimate, the only
11 choice that's left to the Ministers acting
12 reasonably would have been to approve. That's my
13 conclusion.

14 But, again, I take your question to
15 be a more precise one and I don't know that I'm able
16 to say what the JRP would have recommended. I'm
17 basing my conclusion on the record before the
18 decision-makers.

19 Q. Okay. So, you don't know what
20 the JRP would have recommended if there was no
21 inappropriate reliance on the JRP's finding in
22 relation to community core value; is that correct?

23 A. I think the logic of their own
24 analysis, given that they had the ability to choose
25 other grounds and didn't, would be that they would

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1 have recommended approval. But, again, my expertise
2 is not on the interstices of environmental standards
3 and their assessment. My expertise is on the scope
4 of ministerial discretion, its boundaries and
5 accountabilities.

6 Q. And your conclusion that they
7 would have recommended approval, qualified as it
8 was, that's despite all the findings of adverse
9 environmental effects that we just reviewed earlier;
10 correct?

11 A. I'm informed by the JRP's own
12 view that those did not rise to the level of matters
13 that could have justified denial because had they
14 risen to that there is absolutely no reason I'm
15 aware of why they wouldn't have mentioned it.

16 There is reference, again, in
17 paragraph 583 to a rationale is not a proper
18 rationale and, again, looked at from the standpoint
19 of what should now happen with the Investors' impact
20 of this decision in mind, that informs my view that
21 the decision-makers had the entirety of the record
22 before them and the ability to supplement it. They
23 made the decision in reliance on a factor that no
24 longer can have that impact. There was no other
25 factor recommended as rising to that level by the

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1 JRP.

2 So, again, I'm only giving you a hard
3 time on what I say the JRP approved because it's
4 asking, I think, for a level of expertise that I'm
5 not comfortable that I have but I do feel comfort in
6 saying the record before the decision-makers did not
7 have another legitimate basis for denial and
8 therefore reasonable Ministers or Ministers acting
9 reasonably or cabinet in the Nova Scotia Minister
10 acting reasonably would have approved in that
11 context.

12 Q. Those are my questions. Thank
13 you, Dean Sossin.

14 A. Thank you very much.

15 PRESIDING ARBITRATOR: Thank you, Mr.
16 Little. Mr. Nash, I trust that your re-direct can
17 be short because I think you have taken, in a
18 wonderful way, care of your own re-direct.

19 MR. NASH: Very, very short. Thank
20 you, Judge Simma.

21 THE WITNESS: And if I have
22 overstepped at any point, I do want to offer Mr.
23 Little my sincere apologies.

24 RE-EXAMINATION BY MR. NASH:

25 Q. You turn to Tab 3 in front of

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1 you. It is the Nova Scotia Environmental Act?
 2 A. Yes.
 3 Q. And could you turn please to --
 4 well just at the first page, the Purpose of the Act.
 5 Do you see that on the first page of tab --
 6 A. Yes I do.
 7 Q. -- Tab 3. You refer, you were
 8 referred to the Nova Scotia Environment Act in Tab 3
 9 in your cross-examination and you noted that a
 10 statute must be interpreted in its context. Does
 11 section 2 of the Act, the Purpose section inform
 12 your analysis on that point?
 13 A. Yes, it does.
 14 Q. Can you explain why?
 15 A. So as the Tribunal itself found,
 16 the structure of this NSEA and of SAEE for that
 17 matter both look at environmental protection and
 18 economic development not as juxtaposed interests but
 19 as reinforcing and reconciled interest in this
 20 scheme. So looking to the ways in which that is set
 21 out is important and of course looking to the
 22 evidence-based nature of the analysis to follow is
 23 equally important.
 24 And again if what you wanted to do is
 25 give an open-ended discretion to cabinet to, for

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1 example, under the SAEE approve or not approve what
 2 they wish to approve or not approve period, there
 3 would be no reason to set out purposes. It would be
 4 redundant. Why would you do that?
 5 So I take the establishment of
 6 purposes here and again in the Nova Scotia and
 7 federal legislation for these purposes to be, in
 8 effect, the foundation from which the boundaries on
 9 that ultimate decision-makers discretion flow.
 10 Q. Thank you. Could you turn to
 11 page 14 of 55. You will see the numbered pages at
 12 the top of the page. In particular, section 34 on
 13 that page.
 14 A. Yes.
 15 Q. You commented on the Minister's
 16 exercise of discretion under the Nova Scotia
 17 Environment Act.
 18 Could you turn to section 34(1)(f)
 19 please and comment on whether that section,
 20 subsection factors into your opinion regarding the
 21 Minister's exercise of discretion about mitigation?
 22 A. It does. And again clearly
 23 states that the undertaking is -- where undertaking
 24 is rejected because of the likelihood that it will
 25 cause adverse effects or environmental effects,

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1 mitigation is part of that analysis.
 2 Q. Thank you. Those are my
 3 questions.
 4 PRESIDING ARBITRATOR: Thank you very
 5 much. Questions on the part of the Tribunal?
 6 Can I ask one question please: Just as
 7 a -- how should I say, as a outsider -- it would
 8 occur to me, couldn't the Minister have taken the
 9 view that the reliance of the panel on community core
 10 values was inadmissible and then gone back to the JRP
 11 and said "could you please elaborate. We find your
 12 main reason doesn't really carry?"
 13 Would you please elaborate on the
 14 various other findings that Mr. Little pointed out?
 15 I think you pointed to three or fours finding that
 16 say there are problems. Well, I expressed in a
 17 very -- problems here and there and here and there,
 18 and elaborate what these issues and then get back to
 19 me?
 20 THE WITNESS: Yes, in other words,
 21 that stage, after receiving the JRP Report to obtain
 22 additional information or analysis or independently
 23 to seek information, in other words, from staff or
 24 others, not necessarily only the JRP was, in my
 25 understanding, available and a decision was actively

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1 taken not to seek it. In other words, it's a -- an
 2 area of the statute that we must understand every
 3 decision-maker to have adverted to and decided if
 4 they did not take that opportunity to not take that
 5 opportunity.
 6 PRESIDING ARBITRATOR: Uh-hmm. Thank
 7 you very much. That was my only question. And
 8 that, I think, that brings us to the end of this
 9 exercise.
 10 Mr. Sossin you are relieved. You are
 11 free again.
 12 THE WITNESS: Thank you.
 13 PRESIDING ARBITRATOR: I note for the
 14 record that there we are one witness short today.
 15 Mr. Geddes was on for today so my guess is that we
 16 will have him tomorrow morning, together with an
 17 impressive number of people.
 18 So I just wonder whether anything can
 19 be done to, let's say, to prevent any further fall
 20 back. Just to mention if everything -- if you don't
 21 make -- we would be ready to also sit on Sunday
 22 because what can you do on a Sunday in Toronto?
 23 Just relying on that terrible joke I
 24 heard about Canada. Is it interesting? Well, what
 25 do you do in the afternoon? We could sit in the

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1 afternoon so please don't take that as an offence. I
2 love that country. It is just -- we could --
3 actually, we could start half an hour earlier if
4 that -- at 9:00 instead of 9:30. Would that be okay?
5 So let's start tomorrow at 9:00 and hope for the
6 best.

7 MR. SCOTT LITTLE: Sorry, we are just
8 interested in getting a time check in terms of the
9 time that's been used so far.

10 DR. PULKOWSKI: I can provide that
11 immediately. So I have down for the claimants, 3
12 hours and 44 minutes and the respondent has used 7
13 hours and 7 minutes of the 21 hours allotted to each
14 party. And do let me know if that does not concord
15 with your own time count, please.

16 PRESIDING ARBITRATOR: Any questions?
17 Mr. Little, is that going to end up in a question or
18 can we -- no further questions.

19 MR. SCOTT LITTLE: We're talking
20 about dinner tonight.

21 PRESIDING ARBITRATOR: Have a nice
22 evening and tomorrow at 9:00 okay, thank you.
23 --- Whereupon proceedings adjourned at 6:10 p.m.
24 to be resumed on Wednesday, February 21, 2018 at
25 9:00 a.m.

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