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, 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 Friday, February 23, 2018, at 8:39 a.m.

VOLUME 5 - FULL TRANSCRIPT {REVISED}

CONDENSED TRANSCRIPT WITH WORD INDEX

APPEARANCES:

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Brent Johnston
Chris Elrick
Alex Little
Alex Baer
Frank Borowicz, QC
Randy Sutton

Scott Little on behalf of the Respondent
Shane Spelliscy
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--- Upon resuming on Friday, February 23, 2018, at 8:39 a.m.,

PRESIDING ARBITRATOR: I think we are ready. This is Day 5 of the hearings, and we resume the witness examination of Mr. Dooley.

And, Mr. Nash, you have the floor.

WITNESS DECLARED PREVIOUSLY: TOM DOOLEY

MR. NASH: Thank you, Judge Simma. I have handed up two documents. One is an excerpt from Tab 8, this chart, page 25, and the other one is exhibit, or Tab 2 from the cross-examination binder, for ease of reference. I will also be referring to Mr. Dooley's first affidavit, December 9, 2016.

RE-EXAMINATION BY MR. NASH:

Q. Good morning, Mr. Dooley.

A. Good morning, Mr. Nash.

Q. Could you please turn to Tab 1 of the binder in front of you. This is the operating agreement which Mr. Spelliscy took you to yesterday.

And could you turn, please, to Clause 12.2 on page 23.

And this is -- also, this is the paragraph or a paragraph in the document that counsel took you to. It's the paragraph.

A. Yes.

Q. And you will see that it states:

If you go down to D:

And then, please turn to page 20. That is the And could you just read that paragraph out?

A. 10.3, Mr. Nash?

Q. 10.3 on page 20.

Q. So, is that your -- is it your understanding that it is that that was...

A. That's exactly the that's correct?
A. That's correct.
Q. And at that point in
time, what happened to this agreement?
A. In my opinion, 
Q. Thank you.
If you could go to Tab 17,
please. And, if you go to the page that
Mr. Spelliscy took you to yesterday, which is
page 18 on the bottom left or 829 on the bottom
right of the page.
A. So this would be BIL
025818 in the lower right-hand side?
Q. 829.
A. 829. Okay.
Q. You will see and you will
recall that this is a
A. I do see that, yes, sir.
Q. And you'll see that
the -- under that box on the left-hand side, you
will see
So pursuant to that
A. Yes.
Q. And of that,
that's correct?
A. Yes.
MR. SPELLISCY: Excuse me, I
just remind Mr. Nash, this isn't a
cross-examination. These questions are leading
the witness.
MR. NASH: It's perfectly
acceptable leading, just taking him through a
document that he was taken through on cross.
MR. SPELLISCY: He can read
the document. I just remind you that I am going
to watch carefully because we are leading the
witness right now.
MR. NASH: And quite
permissibly so.
MR. SPELLISCY: No, not
permissibly so.
MR. NASH: With respect, we
disagree.
MR. SPELLISCY: Then I ask for
a ruling from the tribunal.
PRESIDING ARBITRATOR: I think
if you want anything from me, at least, you would
have to speak up a bit because I couldn't really
follow.
MR. SPELLISCY: My point,
Judge Simma, is that this is a direct examination
-- redirect examination, and while Mr. Nash is
taking him to a document that I certainly took him
to, he is walking through the document, asking and
pointing to things, reading them into the record
and asking if that's correct. This is not a
cross-examination. As Mr. Nash was at pains to
point out the other day with one of our other
counsel, leading questions are not appropriate on
redirect. So if he would like to ask him
generally about the document, he can do so. What
he can't do is lead the witness by simply reading
something into the record and asking him to agree
with it. That's cross-examination.
MR. NASH: So what I was
asking him to do was to look at a particular part
of the written words on the document and just
confirm that he read them and that he understood
them. That's all --
PRESIDING ARBITRATOR: Are we
through with that document?
MR. NASH: No.
PRESIDING ARBITRATOR: Not
yet?
MR. NASH: No. And it's
perfectly permissible on redirect examination to
take a witness to a document that's been put to
him, take him to the certain portions of the
document, point them out to him and go no further.
I might ask some questions about that, but the
questions about that will not be cross-examination
questions. They will be non-leading questions.
PROFESSOR SCHWARTZ: As we
understand it, the purpose of the prohibition on
leading questions is to make suggestions that will
influence the substance of the witness' response.
Simply taking somebody to a section and asking
that person to read it out doesn't undermine the
purpose of not influencing the substance of the
witness' responses, it is therefore acceptable.
Does that answer the question?
MR. NASH: Thank you.
BY MR. NASH:

Q. From your perspective as

A. There is no distinction.

I mean, the

Q. And did you know anything

about the

A. I was not made privy to

that information.

Q. Would that be normal, from your perspective, from your experience?

A. Yes, that would be the

standard, and that was the -- that was what we had
dealt with. I was not privy to

; do you see that?

A. I see the number

yes.

Q. And that's referred to as

; do you see that?

A. That is correct, yes.

Q. And you will see the

figure ; do you see that?

A. I do see that number,
yes.

Q. And below that, we see

the figure ; do you see that?

A. Yes, I see that figure.

Q. And if you go across that

line to the left, the title for that part is

and then under

that, it says, , that's Whites Point

Quarry, and we see ; do you see that?

A. I do see that, yes.

Q. Now, keeping that figure

of in mind, I'd like to take you back to

the , which you were also
taken through yesterday. And that is at Tab 9,
Q. Going back to the revenue matrix, then, what is the relationship between those two figures, the one in 2012 in the revenue matrix, and that one there in the figure.

A. They are exactly the same.

Q. And why is that?

A. Because that's what was proposed, that's what the document says.

Q. So I understand, is the was it intended by you, to equate to something in the revenue matrix?

A. **Yes.**

Q. Why is that?

A. **Because in this particular case, the**.

Q. And in the example of , what is the scenario there?

A. The **represents the**.

Q. And so how is that coordinated.

A. **I am talking about the**.

Q. Thank you.

Now, you were referred yesterday to -- let me locate it.

A. Are we done with these documents, Mr. Nash?

Q. I will come back to them in a moment.

A. Okay.

Q. And was that route the same or different for the
A. Could you repeat that?
Q. Sure. You had spoken yesterday about the fact that, correct?
A. That is correct.
Q. So, you
A. Was the scenario of the
Q. And where was the

By land,
Q. Can I ask you to go to Tab 18, which is the excerpt from Mr. Clayton's evidence on the first day of the hearing of evidence in this proceeding. And you go to page 19 of that tab, which includes page 363 from the transcript. Are you with me?
A. I am.
Q. Now, you recall that Mr. Spelliscy put to you some excerpts from this page and culminated at line 17. I will read it out:

And then you said:

Q. Paragraph 91, you state in your statement:
Q. So, I mean, those were the circumstances. I don't know the internals of the
Cobalt but that was the parameters on what had happened.

Q. And as I took you to, you referred in your affidavit to the fact that the Claytons had been unsuccessful in obtaining environmental approval for the Whites Point Quarry,

A. What I meant by that statement was, is that, if in fact, the approvals had been granted for the Whites Point Quarry and

Q. Your evidence yesterday was that you ran New York Sand & Stone; do you recall that?

A. I do.

Q. You told counsel yesterday in response to a question that New York Sand & Stone had sold about I think were your words.

A. That is correct.

Q. We see on this [redacted] Who increased the sales of New York Sand & Stone from [redacted] to [redacted]

A. You know, without patting myself on the back, I guess I was responsible for it.

Q. You mentioned yesterday that Amboy had appointed you the manager of New York Sand & Stone and their interest in it; is that correct?

A. That is correct.

Q. And was that through Great Lakes Dredging or was it through the
Q. Who --
A. Well, we received our

Q. Run that by me again.
A. That's correct.

Q. And was
A. Yes, we were.

Q. Okay. Who was, during that period,
A. Yes, well, we would

Q. You are talking about the
A. I am talking about the

Q. By 2007 that's correct.
A. They were

Q. And during that period of
Un fortunately,
Q. So in 2007,
A. Yes. I believe 2007,
Q. You were referred yesterday to Tab 2, which you should have a loose copy of on the table in front of you. That's the letter to from you; do you see that?
A. Correct.
Q. And that letter?
A. Right.
Q. And that's -- and
A. These
Q. And there's then as read
And were those
A. These
Q. Di
A. I do see that, yes, sir.
Q.

A. That's correct.
Q.

A. Okay.
Q.
A. No, it was not, because

Q. Do you know if

A. Not to my knowledge.

Q. Did they

A. Absolutely not.

Q. What we have discussed so far is a non-Whites Point world; would you agree with that?

A. I would agree.

Q. How does that change -- you said that it changed if Whites Point got approved. How would that change, from your perspective, if Whites Point was the new supplier?

A. Well, first of all, in

In addition, the

So the fact of the matter is, is that the Whites Point Quarry was
Q. Mr. Spelliscy took you in your affidavit to page 23, paragraph 95. And could you read out paragraphs 95 to 96? I believe he also took you to paragraph 96. Could you read those out?

A. Read out 95 and 96?

Q. Yes.

A. Okay.
Q. And what is your basis for those confident judgments?
A. That is based upon my

May I rephrase that?
A. Yeah.

wouldn't be an appropriate time for a short break
just so I could go over my notes and see if there
is any dangling matters? Would that be suitable?

PRESIDING ARBITRATOR: I think we are going to have two breaks in the course of
the morning, starting so early, and so I think
it's fine to have a first break. Just a short
break, like 10 minutes?

MR. NASH: As long as you
would prefer.

PRESIDING ARBITRATOR: Well, 10 minutes, shall we have a break?

MR. NASH: Sure.

PRESIDING ARBITRATOR: And we
will resume again at 9:50.

MR. NASH: Thank you.

PRESIDING ARBITRATOR: Wait a
minute, 9:55, sorry.

MR. NASH: 9:55, okay, thank
you.

--- Upon recess at 9:44 a.m.
--- Upon resuming at 9:57 a.m.

PRESIDING ARBITRATOR: We are
ready to go, and let me just say that I hope that
the end of the hockey game is not going to
disqualify any German participants.

MR. SPELLISCY: The Government
of Canada has no comment.

PRESIDING ARBITRATOR: I
almost feel sorry about it.

So we continue, Mr. Nash.

Mr. Nash, please.

BY MR. NASH:

Q. Yes, Mr. Dooley, aside
from

A. No. Every -- any

Q. If you go to Tab 3, the
binder in front of you, please. Counsel, this is
a letter from you to to you. It's signed
by

A. I do.

Q. And

A.
Then there are quantities of and I believe we covered this yesterday, that there was

A. That's correct.

Q. Now, if you go to Tab 9, the and you go to page 7 -- we touched on this earlier -- you will see, in that square that we touched on, there's the Number 7, Number 57, et cetera. And there is a

A. I do see that.

Q. Back at Tab 3, on the first page, what is that relationship in terms of equivalency of price depicted by

A. 

Q. Yes.

A. Which means this is

Q. Yes.

A. -- delivered.

Q. How does that yes.

A. Well, th And then --

Q. Why do you say that?

A. Because there is an If you look at the next page, if

Q. Right. While we are on page 2 of that document, there is reference in the fifth paragraph down regarding the implications of that fact to you?

A. It wa

Q. In a Whites Point

A. Not at this particular
Q. And there's reference to

A. Well, it was my
understanding -- and, again, I'm not privy to the
details of it.

in 2009, they did not get their permits. At that
particular point, it's my understanding.

A. No, they did not.
Q. Do you know the circumstances?
A. Again, this is secondhand, but this is my understanding of what transpired. In 2009, they were attempting -- Bayside Quarry was attempting to expand their facility at Bayside. The Bayside operation initially was a port expansion. It wasn't initially permitted as a quarry. It was actually a port expansion of a port in that area there, in Bayside. And, umm, after they had successfully mined a certain amount of material out of it, they were to leave. With the acquisitions and what had transpired as far as the success of selling stone down in New York and potentially down into the Florida area, they wanted to expand that capability and go beyond it and add that long-term capability, which any company of the size of Vulcan or Florida needs to recover the capital expenditures that would be needed to expand their quarry.

So, you know, unfortunately,

MR. SPELLISCY: I am sorry, before we go on to this, I didn't hear from the record. I don't believe I used this letter at all. We are at Tab 9 from the Morrison binder, and you've got an exhibit? Is this something that was cross-examined on, Mr. Nash?

MR. NASH: It's a directly-related document to the document. One is inextricably related to the other.

MR. SPELLISCY: So the answer is no?

MR. NASH: The first letter leads to the second letter. The first letter of leads to the second letter. The answer to my friend's question is no, but it's perfectly admissible to put to the witness. Who has been asked about one matter in a certain context, to be directed to comment on another letter which is inextricably related to the subsequent letter.

MR. SPELLISCY: The cross-examination on this topic was on the fact of And so to the extent we are now introducing other
letters -- and I have to say, I mean, this has been despite Mr. Nash's promise yesterday that the overnight period would help him be more efficient. We've been going for an hour and a half. This has been very wide ranging. I have let this redirect, which is really a direct, go on and on. But at some point, with the time limited, I do think that I'm going to have to start objecting, and I object to this. If the letter wasn't put to him and if he wants to ask about

Otherwise, like many of the topics, we are outside of the scope of cross.

MR. NASH: I'm just trying to understand my friend's point. is what you just said? I don't get that.

MR. SPELLISCY: Yes, sorry.

MR. NASH: Well, it forms the context in which that. We have a described event where one a competitive price. They say in the second

The questions in relation to the second document, the one that was put to Mr. Dooley yesterday, is my friend is correct about the manifest itself. It manifests itself through a significant factor.

So

The letter of

The second letter sets out the so that's how the two relate together.

And there's also another aspect to it, which is a component of

On the second page, the document says:

Then follows the letter of

PROFESSOR SCHWARTZ: Okay. Now that it's been explained to us, the panel's prepared to allow that question, but would take Mr. Spelliscy's point that, of course, redirect does have to be directly related to matters that were cross-examined on in the first place.
BY MR. NASH:
Q. And so, Mr. Dooley, looking at the letter And if there is any significance, could you explain it?
A. No. Just like I had indicated before in my testimony, the major significance for us was the

MR. NASH: Thank you, Mr. Dooley. Those are my questions.

PRESIDING ARBITRATOR: Thank you, Mr. Nash.

Does the respondent want to take the floor? Yes, Mr. Spelliscy.

MR. SPELLISCY: Yes. I don't want to call another break. Just give me 30 seconds or a minute to consult. It's been a long redirect.

PRESIDING ARBITRATOR: Okay, correct?
A. Absolutely correct.
Q. Absolutely? Okay. And so right?
A. Correct.
Q. Okay. You talked in your redirect examination about the correct?
A. Yes, it was.

Q. Mr. Nash walked you through the timeline. correct?
A. Can you repeat that question?
Q. Mr. Nash walked you through the timeline. correct?
A. Correct.
Q. Okay. So you could not have right?
A. Not -- if the Whites Point Quarry did have correct?
Q. Right.
A. Please read the document aloud.
Q. Right. So you would have
A. Not necessarily

Q. I'm not sure I understand, Mr. Dooley. You had --
A. Okay. So let me -- what I'm saying is --
Q. Hold on. Let me ask the question.
A. Okay. I'm sorry.
Q. You had testified that you could not that was your testimony; right?
A. We didn't have
Q. Right.

A. -- is what my response was.
Q. Right. Sufficient

A. Yes. Okay.
Q. Right. And if Whites Point is
A. We would hav
Q. It's a
A. Yes, it is.
Q. Okay. You don't have any correct?
A. Can you repeat that, please?
Q. You don't have any

A. Any
Q. Right. And that's a
A. Each
Q. Now, let me ask another question to try and understand what you had been saying about . In the context of your comments and responses to Mr. Nash, you had said that ; do you recall that comment?
A. I do.
Q. Okay. Have you reviewed the evidence of Mr. Wick in this arbitration as to the size of the New York market, Mr. Dooley?
A. Umm, I believe I have,

you to know that, in 2008, if we take a year, his evidence is that the size of the New York City market was . Sounds about right to you, anyways?
A. That's in the ballpark, but I don't know what Mr. Wick is specifically using as a geographical area for the New York City market. So if you could give me a little bit of a better parameter as to, you know, how inclusive that would be.
Q. Well, we can ask Mr. Wick when he is hopefully up here today.

But the size of sounds about right to you for the New York City market?
A. It sounds a little bit on the higher side. And I think -- and, again, I'm assuming something here, which maybe you don't want me to do. But, you know, the markets up in and around Rockland County, which is up above the city, Westchester counties, would be, in a normal context, considered part of the New York City market. But we -- as New York Sand being booked,
about a market share for New York Sand & Stone, we are talking about

A. Yes.

Q. Now, ... right?

A. Yes.

Q. Okay. So that's ... correct?

MR. NASH: I actually don't believe that's correct. Could you just run that by Mr. Dooley again?

BY MR. SPELLISCY:

Q. Okay. This is on this chart?

A. Okay. This is on this chart?

MR. NASH: Just let him finish.

MR. SPELLISCY: Sorry.

THE WITNESS: The document is ... that you yesterday.

A. Again, my testimony was yesterday, and is today.
Q. One thing to clarify, Mr. Dooley. Look at the first sentence of the document. What does it say?
A. [as read]
Okay.
Q. So it is a
A. Okay. I mean, we could argue, I guess, you know, what that means.
Q. It's your words; right, Mr. Dooley?
A. Yeah. I will give you

Q. I understand it's not a Mr. Dooley.
A. Okay. I mean, we could argue, I guess, you know, what that means.
Q. It's your words; right, Mr. Dooley?
A. Yeah. I will give you

Q. And sitting here today, Mr. Dooley, you can't tell us ho
A. I could not tell you that --
Q. I'm sorry?
A. -- without looking at the records, no.
Q. You haven't
A. Not -- I don't believe
Q. Right. But you would agree with me, Mr. Dooley, you have talked about and you discussed with Mr. Nash how

Q. So I put it to you again, Mr. Dooley. We can go back to the transcript yesterday, but this was for
A. This was a

Q. You would agree that the
A. Well, I will tell you that we made
Q. You would agree that the
A. Say that again for me.
Q. You would agree that, if you are right?
A. No, I wouldn't agree with
Q. Um-hmm. But you weren't 
A. I guess you could look at 
it that way. I didn't look at it that way in my 
estimations in my witness statements. Let me put 
it that way.
Q. You have said, as well, 
in response to Mr. Nash's questions about the 
that are listed in that presentation, you 
have said that the 
and you have testified, as well, that 

A. I would say, yes, you 

Q. You would agree with me 
A. I will give you that, 
yes.
Q. So the 
correct?
A. That's correct.

MR. SPELLISCY: Just give me 
one second. Thank you, Mr. Dooley. That is all I 
have for now.

PRESIDING ARBITRATOR: Thank 
you, Mr. Spelliscy. Mr. Nash has another 
question.

MR. SPELLISCY: I do want to 
raise one procedural point. I won't object. We 
have, in this hearing so far, consistently allowed 
re-direct from Mr. Nash. It's not provided for in 
the procedural order. If you look at the 
procedural order, it's very clear that there is 
cross-examination, redirect. It doesn't say 
recross either, which we have consistently 
allowed, but we are now into this game where we 

would probably have to construe that, yeah.
Q. Okay.
A. I'm not -- I wouldn't 
debate that point with you, no, because it's an 

Q. You would --

Q. But it's not part of 
that.
A. Well...

Q. Mr. Dooley, you defined 
the

Q. Right. That's why --

are constantly standing up and sitting down. I 
don't want to lodge an official objection to it, 
but I note we are not following what the 
procedural order says. And with the time 
constraints we have, I think we have to monitor 
what we are doing here.

PRESIDING ARBITRATOR: Did we 
exclude it in the order, or did we not mention the 
possibility?

MR. SPELLISCY: I will turn to 
Mr. Pulkowski for help, but my recollection of the 
order is that it said that the examinations shall 
proceed as follows, which is a short introduction 
or direct, cross-examination, followed by 
redirect.

DR. PULKOWSKI: That is 
correct. There was no specific exclusion of the 
possibility; rather, the procedural order proceeds 
by defining the ordinary course of examination, 
brief introduction followed by cross-examination, 
and then the side summoning the witness may then 
re-examine the witness with respect to any matters 
or issues arising out of the cross-examination. 
The tribunal may examine the witnesses at any 
point.
PRESIDING ARBITRATOR: Does the word in "ordinary course", "ordinary" in there, or was that your description?

DR. PULKOWSKI: No. Let me -- so we are talking about section 4.3:

"At the hearing the examination of each witness shall proceed as follows."[as read]

And then come these three steps that are contemplated.

MR. NASH: Could you just repeat those three steps again for us, Mr. Pulkowski?

DR. PULKOWSKI: Sure.

"At the hearing, the examination of each witness shall proceed as follows: The side summoning the witness may briefly introduce the witness and provide him or her with an opportunity to make corrections or clarifications to his or her statement. The opposing side may then cross-examine the witness. The side summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination."[as read]

MR. NASH: So I'm going by recollection, but my recollection is that you invited me up to ask the question.

PRESIDING ARBITRATOR: Yes, actually, in -- with a certain disregard to the rule in there. So would you allow that? Would you -- you would rather not have Mr. Nash ask that question or let him have his question, and, from then on, we are going to be more rigid with regard to our reading of the 4.3?

MR. SPELLISCY: Well, I certainly can't accept the last option, because we have a number of our own witnesses coming up.

Mr. Nash, are you going to have one question or two?

MR. SPELLISCY: I will count and hold him to that.

MR. NASH: Two questions.

PRESIDING ARBITRATOR: Sorry?

MR. SPELLISCY: I said I will count, and I will hold him to that.

PRESIDING ARBITRATOR: All right. So okay.

MR. NASH: I feel held.

PRESIDING ARBITRATOR: So okay. You have two questions and then, from then on, we follow the rule more strictly.

MR. SPELLISCY: Well, I would ask for the same leeway. If I have one or two questions on redirect, that I be permitted to do that as well.

PRESIDING ARBITRATOR: Right.
MR. SPELLISCY: But I do suggest that, with recross and redirect, that we, in general, become more rigid on this.

PRESIDING ARBITRATOR: Yes, fully agreed, and you have, how do you say, good faith two questions.

MR. NASH: Two questions. And I also recall, Judge Simma, that, after the tribunal has asked questions of the witnesses, either side has been invited to get up and, "Are there any questions arising out of those questions?" And I recall getting up myself. I don't recall if Canada got up in response to those invitations. But, again, I have got no objection at all for that practice -- procedure, as we move forward, to be equally distributed between both parties.

PRESIDING ARBITRATOR: Well, from now on, we are certainly going to be much more aware of what we do.

MR. SPELLISCY: Yes. This is fine. I note -- and I think, if we look at the time that has been used, I mean, just the constant examination of the same witness over and over has been one of the drags on the time when I have looked back at the schedule.

MR. NASH: I fundamentally disagree with that.

MR. SPELLISCY: Sorry, you fundamentally disagree?

MR. NASH: I do. I simply disagree with that.

MR. SPELLISCY: With the simple calculation of time?

MR. NASH: With your characterization, but I don't propose to spend any more time debating it.

FURTHER RE-EXAMINATION BY MR. NASH:

Q. So the two questions are, Mr. Dooley, Mr. Spelliscy asked if you could have

A. Yes.

Q. Mr. Spelliscy also raised a question of document production, and he said -- and I'm paraphrasing -- you didn't produce documents relating to a matter that he raised in re-cross. You left New York Sand & Stone when?

A. Uh... December of 2015.

Q. And --

MR. SPELLISCY: That's two questions.

MR. NASH: Well, there's a follow-up.

MR. SPELLISCY: This seems to be a problem. It's exactly what I am pointing to. There was two questions. That's two questions.

MR. NASH: This is a subpart of the same question.

PRESIDING ARBITRATOR: I think that's fair, because if then some conclusion, if it builds on Mr. Dooley having left in -- so let's see what comes.

BY MR. NASH:

Q. Yes. The first question was 2A, and this is 2B.

So were you aware of the status of this tribunal proceeding at the time that you left?

A. No.

Q. Did you have access -- this is sub C. Did you have access to New York Sand & Stone after you left in December?
WITNESS DECLARATION: DAN FOUGERE

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

PRESIDING ARBITRATOR: Thank you. Mr. Nash will direct you.

EXAMINATION IN-CHIEF BY MR. NASH:

Q. Good morning, Mr. Fougere.

A. Good morning, sir.

Q. You have signed two witness statements in this matter; correct?

A. That is correct.

Q. And you're a chartered accountant, now a CPA, in Canada?

A. I am.

Q. And how long have you been a chartered accountant?

A. Approximately 40 years, since 1977.

Q. And you're still practising?

A. I'm not in public practice, but I'm in industry.

---

CROSS-EXAMINATION BY MR. SPELLISCY:

Q. Good morning, Mr. Fougere.

A. Good morning.

Q. I have good news and bad news for you. My good news is I have only one question. The bad news is it has many, many subparts. This is an inside joke that, because you haven't been sitting here, you won't get.

MR. NASH: How many?

(Laughter)

MR. SPELLISCY: Many.

BY MR. SPELLISCY:

Q. Let me first start with a little background about the Auld's Cove Quarry, which you were the manager of. And as we go through, I'm going to ask you some specific questions. We are pressed for time, and so I'd appreciate if you can be as direct in your responses as possible.

Let's turn to Tab 1 of the white binder that we have put in front of you there. Tab Number 1 is Exhibit C 893, for the record.

This is an article profiling Martin Marietta's Auld's Cove Quarry in which you are quoted. The article itself doesn't have a date on it, but I think you have testified in your witness statement it was written in 2008; is that correct?

A. That is correct.

Q. Okay. Now, in the -- I just want to flip to the last paragraph of the article on the second page. In that last paragraph, you confirm that it is an operation running 24 hours a day and seven days a week; right?

A. That is correct.

Q. And, in 2008 Auld's Cove was producing about 3.7 million tons of stone per year; is that right? I can take you to your witness statement if you'd like to refresh your recollection. It's at page 8 of your first witness statement -- or paragraph 8, sorry, of your first witness statement.

A. Yeah. This reference is 2008, at the onset of the recession. 2007, the production was actually somewhat higher than that.
Q. My question is in 2008.
A. That is correct.
Q. In 2008, Auld's Cove was producing 3.7 million tons annually; correct?
A. That is correct.
Q. Thank you.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 10:50 A.M. ---

BY MR. SPELLISCY:
Q. I'd like to go to paragraph 7 of your second witness statement, Mr. Fougere. You talk about the recession, the one that you just mentioned in there. You say that, prior to 2008, Martin Marietta had not, but, with the recession, it was forced to look to other markets; correct?
A. That is correct.
Q. Okay. Now -- and you would agree with me that Martin Marietta, correct?
A. That is correct.
Q. Okay. And you were the manager at Auld's Cove at the time; right?
A. I was the manager, but I was not a party -- a signatory to the document.

BY MR. SPELLISCY:
Q. This was the first time that Martin Marietta, is that right?
A. That is correct.
Q. And Martin Marietta was correct?
A. That is correct.

Q. Right.
A. I was aware of that.
Q. Okay.

BY MR. SPELLISCY:
Q. Okay. And the document goes a little bit the other way. So if we turn to the page marked 006. As I understand the document, Mr. Fougere, it is, is that right?
A. It is.
Q. That is correct. And we see there that...
A. It is.
A. That is correct.
Q. We'll just get these on the record. So if we flip the page...
A. What page is that?
Q. Go to 005. Like I say, the document is...
A. Yes. I -- yes. I do see that.
Q. And on the same page, but above, correct?
A. That is correct.
Q. Okay. And if we go the other way, we have, correct?
A. That is correct.
Q. I note.
A. That is correct.
Q. And.
A. That is correct.
Q. And, correct?
A. That's correct.
Q. Right.
A. I don't know about -- that, I'm not certain of.
Q. You are not certain of that, Mr. Fougere? Help me understand that. You had testified earlier that...
A. I, I don't know that right?
Q. Okay.
A. Well, possibly.
Q. That's right.
Q. Mr. Fougere, you would also agree with me that, right?

A. Oh, absolutely.

Q. So you would agree with me that right?

A. I am aware of that. It's one of my exhibits, actually.

Q. Yes, exactly. And, Mr. Fougere, you earlier talked about correct?

A. That is correct.

Q. Okay. And we looked at the numbers. did they?

A. To my knowledge, they didn't.

Q. No. In fact, we looked at the numbers above. right?

A. It would appear.

Q. You are also aware, Mr. Fougere, is that right?

A. I have some recollection of that, yes.

Q. That sounds familiar? A. It sounds, yeah, in the right range.

Q. Now, I'd like to go to Tab 7 in the binder there, which is exhibit R 834, for the record. These are And if you look at the bottom on the right, correct?

Q. If we look in the box, we see do you see that?

A. I do. I do see that.

Q. Okay.
Q. If you look at do you see that?
A. I do.
Q. Okay.

Q. It is. Well, we can turn to it. It's at Tab 6 of the binder in front of you, Mr. Fougere.
A. Um-hmm. Yes.
Q. And so, if you go to page 5, Mr. Fougere, you see that are they not?
A. Well, what you need to

Q. You would agree with me that, correct?
A. Yes. That -- you know,

Q. That is your testimony?
A. That had a general awareness of it as -- on a need-to-know basis. There were some requirements in there that were important that I would know.
Q. To your knowledge, is Martin Marietta in the practice of Martin Marietta nor the practice of me as a practising chartered accountant.
A. That would not be the practice of Martin Marietta nor the practice of me as a practising chartered accountant.
Q. Let's turn to Tab Number 9 in the binder in front of you, Mr. Fougere, which is Exhibit C-1046, for the record.
A. That is correct.
Q. Okay. Now, just to clarify, you were not working for Bilcon of Nova Scotia in 2007; correct?
A. In 2007? No, no, I was not.
Q. You weren't the CFO of Bilcon of Nova Scotia; correct?
A. In 2007, I was working with Martin Marietta Materials Canada Limited.
Q. So you don't have any information as to what Bilcon of Nova Scotia actually expected in 2007 in terms of what their thoughts were on a pro forma; correct?
A. I'm trying to recall if there were any historical documents shared with me, but I, I don't recall seeing documents from pre-dating 2007; that's your testimony? That's my question, Mr. Fougere. Did you look at data from pre 2007?
A. No. It wasn't historical data. It was their best estimates that they could provide me on the cost of operating that quarry as designed.
Q. So the data you looked at, all of the data you looked at to prepare this pro forma, was prepared once -- long after this arbitration had begun in 2008; correct?
MR. NASH: That's not a correct representation of his evidence.
MR. SPELLISCY: Then he can correct me, Mr. Nash, and if you want to interrupt and lead your witness, I suggest you don't, because it's inappropriate. Just like we let you consistently ask questions, he can disagree with me. In fact, we had a conversation about this where we had the same objection, and you said, "I can put a statement to him, and he can disagree". I put a statement, and he can disagree. He can say, "That was not my testimony". I think it was. Let's let the witness decide what it says.
A. That's not a correct representation of his evidence.
MR. NASH: Are you finished?
MR. SPELLISCY: No, I'm not finished.

MR. NASH: Okay. Well --

MR. SPELLISCY: I'm going to ask my question again. Can we read it back?

MR. NASH: Well, I am going to object, and the reason is that Mr. Fougere has given a clear answer to the question with respect to what he saw prior to the pro forma or back in -- before in 2007, or documents existing as of 2007, which were then given to him for the preparation.

It's unfair to a witness when he has given clear evidence on a point to then represent that he hasn't given that evidence.

MR. SPELLISCY: I would point out I believe the other day there was a question where Mr. Little made the same comment to questions from Mr. Nash, and I believe the ruling from the tribunal was, if Mr. Nash wants to ask it three times, then I'm sure the witness can say no three times, even when the evidence was clear.

As for what his evidence was, I asked him about pre 2007, and I had a response that included a visit to the site in 2015, so I do not think his evidence was clear.

PRESIDING ARBITRATOR:

MR. SPELLISCY: I believe I had a question: Did you, in preparing your pro forma -- you did not, in preparing your pro forma, review any documents pre-dating 2007; is that not correct?

A. Well, I did review the documents from the prior arbitration round available on, I think it was, the Permanent Court website, and there were some references there to financial representations. I did not use those in preparing my pro forma. But, you know, I think everyone has seen what was in the EIS document, and there were some financial representations included there.

Q. Okay. So you used for your data in the pro forma the information created after 2007?

A. I used the best contemporaneous documentation available to me,

Q. To be clear, what you received were documents and their best contemporaneous evidence from this process; correct?

A. That's correct.

Q. Thank you. In your pro forma, you have assumed production in the five years that's there correct?

A. That is correct.

Q. And so, then, you would also be assuming production costs correct?

A. That is correct.

Q. Let's come to the page in your pro forma, which is at Tab 9 in your binder, if you're there. And it is the page marked 006, -006 in the bottom right. It's page 4 of the pro forma, but it is marked 006, so it can be either one. It is the Whites Point Quarry where the personnel, energy, and supplies and raw materials costs are listed.
Q. Auld's Cove produced at the rate of about 14 tons an hour; is that right?
Auld's Cove, 14 tons an hour?
A. No, no. Better than that.

Q. Okay. Let's go to Tab 1 in your binder. Maybe you can just help me understand. Back to the article that you had sent.
Tab 1, if you come to that last paragraph that we were looking at --
A. Mm-hmm. Yes.

A. Well, if you look at a stretch of 1,000 days, that's, you know, about three years, so that would include nine months of maintenance downtime, yes.

Q. And your number, includes hours for maintenance crews too, correct, in the pro forma?
A. It does.

Q. It does. So it's apples to apples to compare Auld's Cove maintenance time with Whites Point in the hours, and that's all I'm trying to do here. 704 person hours per day, you say, if we operate 24/7, 365 days in a year, it's 256,000. If we multiply that, that's 256,960 person hours per year at Auld's Cove. I have done the math.

And I will put this to you. At 3.7 million tons per year, at least in 2008, if we divide 3.7 million tons by 256,960 person hours, that's just over 14 tons per hour, isn't it?
A. Well, you know, for that particular year. But I think you are ignoring that the production in 2007 and 2006 was considerably in excess of 4 million tons a year.

So, you know, your math is not reconciling with me because tons per hour is something we measure on almost a daily basis, and if we were producing 14 tons an hour, I would have been hauled on the carpet. That is way too low.

Q. And yet you say the math doesn't reconcile. You would agree with me the math works. Your explanation was 2008 wasn't a good year. Is that not correct?
A. Well, that was the onset of the recession. It was not a good year, and it took us a while to idle back. We were operating with excess. We had guys sitting on their loader with no place to go. We had to take some time to idle back. Nobody at that time realized the recession was going to be as deeply entrenched as it was. We thought it's a temporary blip, but...

Q. But it was deep, and it lasted for several years?
A. It was deep, and it lasted a long time.

Q. I want to look at the revenue matrix summary, which is on page 10, the
last page of Tab 9 of your binder, your pro forma statement, C-1046 for the record.

A. Yes.
Q. In this pro forma, you used

you see that?

A. I do.
Q. Okay. So these are the

correct?

A. Well, I don't know if

Mr. Dooley, I believe, was provided to me through

Mr. Dooley.

Q. You didn't verify it yourself before attaching it or didn't understand it before attaching it to your witness statement?
A. It looked reasonable to me based on, you know, my knowledge of the market.

Q. Okay. You didn't verify those numbers?
A. They appeared reasonable to me. I had no reason to suspect they weren't proper numbers.

Q. You will see

do you see that?

A. Could you highlight? I don't see that.
Q. Sorry, on the pro forma. I'm in your pro forma. Yup. Sorry, my fault. Tab 9 of your binder. There were many confused faces.

PRESIDING ARBITRATOR: The last page?

BY MR. SPELLISCY:
Q. The last page, page 010,

you have correct?

A. That is correct.
Q. Okay. And you would agree with me, Mr. Fougere, that the impact of that is that correct?
A. It does indeed.
Q. It does indeed. In fact, you would agree with me that correct?
A. At least that, yes.
Q. At least that. Okay.

A. It was.
Q. It was. And we're looking there correct?
A. That is correct.
Q. Okay. So you would agree with me, then, that correct?
A. Well, that is correct, and you know, there's some obvious reasons for that. You know,

MR. SPELLISCY: Give me one second. I do have another question, Mr. Chair. It may have subparts.
MR. NASH: You gave us an assurance, Mr. Spelliscy.
MR. SPELLISCY: I didn't finish. It may have more than one subpart.
BY MR. SPELLISCY:
Q. You had testified when we were discussing the is that a correct paraphrase of your testimony? I don't want to get it wrong, so if that's right, let me know.
A. Well, yeah, that, indeed, was the governing document I used in preparing

Q. Let's turn, again, briefly to that document, Mr. Fougere.
PRESIDING ARBITRATOR: Which is where?
MR. SPELLISCY: Sorry, it's Tab 6, Exhibit C-1025, for the record.

BY MR. SPELLISCY:
Q. You can look through this if you want, Mr. Fougere, but I will put it to you that
A. I don't see it. So --
Q. Let's come --
A. But, you know, the numbers in

MR. SPELLISCY: Thank you, Mr. Fougere. Those are my questions.
PRESIDING ARBITRATOR: Thank you, Mr. Spelliscy. I call on Mr. Nash.
RE-EXAMINATION BY MR. NASH:
Q. Mr. Fougere, could you go to Tab 7, please, of the binder in front of you.
Going to the questions that Mr. Spelliscy asked you around what he called the representation of do you see that?

A. I do see that line.

Q. Is that statement a representation of what?

A. It's --

A. It's a representation of the

Q. Right. Okay. You were asked a question about whether there were other

A. That is correct.

Q. And you were employed by Martin Marietta for the Auld's Cove Quarry; that's correct?

A. Porcupine Mountain is the name specific to the quarry. Auld's Cove is the community --

Q. I see.

A. -- which includes Porcupine Mountain, but it includes a residential area as well.

Q. Other than the Bayside site on the Bay of Fundy and the Whites Point site on the Bay of Fundy, were there any other Atlantic quarries of which you are aware that were closer in distance by ship to New York City and New Jersey than the Auld's Cove Quarry?

A. There were none.

Q. Where were the other Atlantic Maritime province quarries located of any size, of any significant size?

A. Of any significance?

Well, there would be Belledune, up northeast coast of New Brunswick, considerably more distant away from New York than Porcupine --

Q. When you say "considerably", what do you mean? By what factor?

A. Well, it's double, again, the distance from Digby to New York. And there was a limestone quarry on the western coast of Newfoundland, which, again, would be considerably more distant, and the transportation costs would have made them uncompetitive.

Q. In terms of the distance being double, again -- what would be the magnitude of increase in the shipping cost to come from Belledune or the other quarry, the limestone quarry, in Newfoundland, approximately?

A. It's a difficult question to answer because I'm not familiar with the load-out rates in those locations, and that would factor in. But, you know, just based on distance,
the New York City market?
A. Well, no. They had no immediately obvious entry point to New York. And I, and I have taken a look at their 10K filings in recent years, and they need that product to serve their markets along the Gulf Coast. They are running out of permitable areas, and they need Black Point to supply their traditional markets, not new markets.

Q. Mr. Spelliscy took you to a portion of your affidavit which referred to the year 2008, the turndown, the recession, and Martin Marietta's search for other markets because of capacity. Can you comment further on that and what the markets had been for Martin Marietta prior to

A. Just what years are you referring to?

Q. Speaking of 2008, which was the year you were referred to, and that was as the recession was taking course.
A. Um-hmm.
Q. Did Martin Marietta --

Martin Marietta, I gather, had other markets down the eastern seaboard down to the south of the United States prior to 2008?
A. Well, it was -- Martin Marietta owned a series of -- or owned or leased distribution yards all the way from the Carolinas to as far as Texas, and most of our shipments went to these distribution yards to serve customers of Martin Marietta along the seaboard and Gulf Coast.

Q. And was the effect of the recession, as you experienced it in that company, Martin Marietta, greater or lesser in the south of the United States as -- than it was in the north, say, the Boston, New York City area in respect to the consumption of aggregate?
A. It was pretty widespread.

I think the impact was felt throughout North America.

Q. If you go to the pro forma at Tab 9 and you go to the page that counsel took you to, page 4, at the bottom 006, and you go to Number 2 and seven categories down, "Tons Per Paid Man-Hour", which is what Mr. Spelliscy took you to. He took you to the figure of

A. What page are you on again?

Q. I'm on page 4 of Tab 9, page 4, "Tons Per Paid Man" --
A. "Tons Per Paid Man-Hour", yes.

Q. Right. And you see the figure?
A. Yes.
Q. And you were asked a question as to what the comparison of that tons per paid man-hour was as between
A. Well, I needed to reconcile those numbers, in my mind, in preparing this pro forma, and it's attributable to a number of factors, really, gentlemen.

Q. You said you went to the site, and what was your impression of the site?
A. Oh, I remember walking onto that site with Mr. Buxton, and I said, you know,

Q. The Porcupine Mountain site is on the Strait of Canso; is that correct?
A. It is.
Q. And how far is it from the Strait of -- Auld's Cove site, along the Strait of Canso to the Atlantic where the ship can pick up speed?
A. Is your question how far is Porcupine Mountain from the open ocean?
Q. Yes.
A. Oh, I would, I would guess it's about 10 kilometres.
Q. And is the ship going from Auld's Cove out to the open ocean? Is it going at full speed in the Strait of Canso?
A. Certainly not. It's a very busy port. There's a number of industrial operations in the Strait of Canso. There's a large petroleum trench shipment facility, which is bringing in tankers on a daily basis, pulp and paper mill. There's Nova Scotia Power bringing in coal. There's a lot of activity in that strait, so there's often delays in vessels coming in and out. And they need to come in and out accompanied by a tug. They can't just come in unassisted -- two tugs, actually. And it's a slow journey in and out to the Atlantic Ocean.
Q. You were referred to the last page of that document, the revenue matrix summary at page 8. And I believe your evidence
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1 was, when you were referred to following me?

A. I am.

Q. I think your evidence was you saw that, and you thought it was reasonable.

Mr. Spelliscy then took you to

13 A. Well, like, in my memory,

14 Q. And when was -- did you ever

20 A. Well, I did, certainly,

24 when I read Mr. Dooley's witness statement. Prior

Page 1614

to that, it just -- the numbers just looked reasonable to me.

Q. And looking in your -- you were asked about those?

A. I do.

Q. And do you recall that he took you to those?

A. Well, you know, I looked through those, and, you know, I elaborated on the reasons earlier, you know, why I would have expected it to be different.

Q. You would expect Auld's Cove to be different from these?

A. Oh, absolutely.

Q. Did you have an impression from your own perspective as a quarry manager as to whether

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1 A. To me, they were reasonable based on the known differences.

Q. Could you go, please, to Tab 5 and go to the page, which is cited at the end 001. I think it's the last page or maybe the first page, sorry, on the -- in the tab. Do you see this page 001 under Tab 5?

A. Is this page 001 under Tab 5?

Q. I'm sorry. I have misdirected you. It's Tab 4. I apologize. So go to Tab 4.

16 So these are

A. Yes.

Q. -- that you amassed. And if you go to 001 on that document, it should be the page entitled do you see that?

A. I do.

Q. Now, you commissioned

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these figures; is that correct?

A. I did.

Q. And Mr. Spelliscy asked you whether you were aware that and I'm giving some parameters around that, but that was the question.

A. Yeah, he did. He did ask.

Q. And what is this -- what does this page here show?

A. Well, it shows what I suspected. You know.

22 Q. And can you tell us what

25 What does that represent?
A. Well, it represents -- I don't know. I don't know if this information is totally complete, but it's what the subscription service provided to me representing.

Q. And if you go to the bottom, correct?
A. There is.
Q. to be exact.
A. There is, yes.

Q. do you see that?
A. I do.

Q. You described in answer to one of Mr. Spelliscy's questions that What did you mean by that?

Q. If you could go to page 003 of that same document. Mr. Spelliscy took you to many pages, including this page, 003. do you see that?
Q. And you'll see that do you see that?
A. I do.
Q. do you see that?
A. I do.

Q. To your knowledge, is there anything -- and this is a follow-up to Mr. Spelliscy's question about the is my question clear, or should I repeat it?
A. Could you repeat that question?
Q. Okay. I garbled the question. Is there anything that dictates, to your knowledge.
A. Well, you know, not to my knowledge.

MR. NASH: Thank you, Mr. Fougere. Those are my questions.
--- CONFIDENTIAL PORTION OF TRANSCRIPT ENDS AT 12:09 P.M.

PRESIDING ARBITRATOR: Thank you, Mr. Nash. Questions?
MR. SPELLISCY: We will follow the procedural order.
PRESIDING ARBITRATOR: Thank you. Despite that positive spark, I think we are really facing a serious situation. If we look at the list of witnesses that sit before us, we are close to lunch on Friday. We have Saturday, and I sincerely hope that -- oh, sorry, you don't have to listen to this, so you are released from your witness duties, and you may leave, and thank you for your input into this procedure.
So I hope that both parties have some secret solution with which they want to come up at a certain point and say, "We are going to..." I hope so. But I would want -- I request both Mr. Little and Mr. Nash, at the end of the
lunch break, at the beginning of the session, to
come up and present me with their ideas as to how
to cope with the remaining issues, because I'm
afraid that the only -- Sunday being excluded, the
only possibility will be to go into Monday and rob
you of part of the time that you need to write
your concluding statements.

So would you -- so we have
Mr. Lizak, but yesterday I think you -- I think
you announced that you thought that we would get
two witnesses done, and we got about 60 per cent
of one witness done, Mr. Dooley. So don't be
optimistic, just be realistic. Is there a chance
that Mr. Lizak might be treated fully before our
lunch break, even if the lunch break -- we are on
sandwiches too, so, I mean, we can -- if the lunch
break extends to -- sorry, the end of that
exercise extends to 1:30 or so, or -- okay,
Mr. Spelliscy, you have an idea.

MR. SPELLISCY:  My --
certainly we have made efforts to streamline our
examinations in light of the time. I would
request in terms of -- well, I will say two
things, one from my perspective and how long my
questions will take. If Mr. Lizak answers them
directly, I would expect to be done before we need
a lunch break. I can't speak to redirect
examination. I think in terms of an overall
planning perspective, it might be useful to hear
from Mr. Pulkowski as to where the parties are,
because one thing that we certainly want to make
sure is the parties have 21 hours of party time
this week. We will not consent to a minute more.
We have been rigorous in ensuring that our
examinations are stemmed down where we need to, if
some go longer, and as long as we are staying to
the 21 hours, I believe that we will have time to
make it. It is only if there is any thought of
going over 21 hours, which we reject, that is our
view. But maybe we can hear from Mr. Pulkowski.

PRESIDING ARBITRATOR:  Dirk,
do you have --

DR. PULKOWSKI:  Sure. I can
provide an updated time count, which is, at this
point, in fact, almost identical for each side.
The claimants have used 13 hours and 13 minutes,
and the respondent has used 13 hours and
14 minutes. So assuming that each side wants to
set aside 3 hours for its clothing statements,
this leaves each side essentially with 7 hours 45

for the entire remainder of the exercise.

MR. SPELLISCY:  That's 7 hours
and 45 minutes, but only 4 hours and 45 minutes
each.

DR. PULKOWSKI:  Sorry, that
leaves each side with 4 hours and 45 minutes for
the reminder of the cross-examination and direct
examinations, yes.

MR. SPELLISCY:  So, by my
count, that's nine and a half hours, Judge Simma,
to get through today and tomorrow, which should be
perfectly doable, between a day and a half.

PRESIDING ARBITRATOR:  Okay.
Can I have Mr. Nash give --

MR. NASH:  Yes. May I make
this modest proposal, that we take the lunch break
now if it works, and that Mr. Little and
Mr. Spelliscy and our team will discuss this over
the noon hour and then come back, and I would
request that we have a discussion, an-in camera
discussion. This is a procedural question, and as
with all procedural questions in the process, they
are dealt with by the tribunal and counsel, and
that we deal with it as a matter of dealings
between the tribunal and counsel, and we have an
open discussion about what's realistic and what's
reasonable in the circumstances to achieve
fairness to both parties but, from our
perspective, to our client and our team. So that
is what I would propose. And we can have a frank
discussion between counsel over lunch and come
back to you with a position, either a common one
or a different one.

PRESIDING ARBITRATOR:  If I
have heard you correctly, we would break for lunch
now. That is, Mr. Lizak would be number one in
the afternoon, and you would use the lunch break
to have some kind of conversation. And then, at
the beginning of the afternoon meeting, there will
be a, well, a procedural -- a discussion on how to
handle the rest of the matters?

MR. NASH:  Exactly.
And, in that context, I would
appreciate from Mr. Pulkowski just some
clarification. Is it 4 hours and 45 minutes in
total left for cross-examination of all witnesses
for both sides, each, for each side?

DR. PULKOWSKI:  Yes, 4 hours
45 per side.

MR. NASH:  And we had 3 hours
set aside in the program in the schedule for the
cross-examination of each of the valuators.
Tomorrow was scheduled to be a three-hour
cross-examination of Mr. Rosen and a three-hour
cross-examination of Mr. Chodorow. So that was --
so, if we were to stick to that program, we would
have, in effect, 1 hour and 45 minutes each side,
as I understand the figures, to do all the rest of
the other witnesses; is that right?
DR. PULKOWSKI: That's how I
would understand these figures to work out. If
you wanted to use the full three hours on the
witnesses tomorrow, that would leave you with
1 hour 45 to deal with direct and
cross-examination today.
PRESIDING ARBITRATOR: So
1 hour and 45 today with how many persons? Quite
a number.
MR. NASH: It's a significant
number. And if I can just express my preliminary
concern here. I think we are returning into an
artificial compression of the reasonable processes
in order to have all of the relevant evidence
properly presented from each of the witnesses,
from both sides. As we are identical -- I think

be potentially, if I hear Mr. Nash's suggestion
right, an adjournment of the closing arguments,
which I can tell you right now there is zero
chance we will consent to, why would that be
in-camera?
PRESIDING ARBITRATOR: Can we
leave that to the --
MR. SPELLISCY: But why would
we be -- I see no reason to be in-camera. I mean,
the hearing is transparent; it's public.
PRESIDING ARBITRATOR: Right.
Can we leave that to 1:05?
MR. SPELLISCY: Sure.
--- Upon luncheon recess at 12:20 p.m.
--- Upon resuming at 1:06 p.m.
PRESIDING ARBITRATOR:
Preliminary question, have you agreed on an in
camera session for what follows; is there an
agreement on that?
MR. NASH: We have not.
PRESIDING ARBITRATOR: You
have not?
MR. NASH: No.
PRESIDING ARBITRATOR: You
have?
MR. NASH: We have not.

PRESIDING ARBITRATOR: Oh, you have not. So let's have our in-camera session.

MR. SCOTT LITTLE: We have not agreed to have one.

PRESIDING ARBITRATOR: What does it actually mean that --

MR. SCOTT LITTLE: In camera means it wouldn't be on the transcript, Judge Simma. That's my understanding.

PRESIDING ARBITRATOR: Yeah, it's not going to be on the transcript.

MR. SCOTT LITTLE: Well, no, Canada objects to it not being on the transcript.

PRESIDING ARBITRATOR: Not being on the transcript, oh.

MR. SCOTT LITTLE: Canada thinks this should be fully open.

PRESIDING ARBITRATOR: Okay, it's not going to be on the transcript.

MR. SCOTT LITTLE: Well, no,

Canada objects to it not being on the transcript.

PRESIDING ARBITRATOR: Not being on the transcript, oh.

MR. SCOTT LITTLE: Canada thinks this should be fully open.

PRESIDING ARBITRATOR: All right, so --

MR. NASH: And nor have we agreed on a common position with respect to how to proceed further with the hearing.

PRESIDING ARBITRATOR: Okay, so let me just add a few numbers to what we had before the lunch break. I think the situation is as follows, that each party has available three hours, I am just adding three hours for the closing observation, three hours for the quantum and the -- the quantum phase, and one hour forty-five minutes for the cross-examination, which adds up to seven hours forty-five minutes. Canada's situation is that you have two more, let's say, witnesses to cross-examine?

MR. SCOTT LITTLE: That's correct.

PRESIDING ARBITRATOR: The situation of the claimant is that they have four; right? Four? Three? Four?

DR. PULKOWSKI: Excluding the -- Mr. Rosen, so it would be five, three including Mr. Chodorow because, of course, that's one and the same time budget as far as procedural order number --

PRESIDING ARBITRATOR: No, I am not counting the quantum people. I am just counting the remaining people to be, let's say, witnessed before we turn to quantum.

MR. NASH: We have four more witnesses to cross-examine.

PRESIDING ARBITRATOR: Four more.

MR. NASH: Yes.

PRESIDING ARBITRATOR: Including quantum?

MR. NASH: Excluding Mr. Rosen.

PRESIDING ARBITRATOR: Okay, so that means that you have a problem. Because you have the same amount available, one hour forty-five minutes, but -- and it's not quite clear to me how you can handle the examination of four witnesses within one hour and forty-five minutes, so one question will be -- so there might be difficulties. One possibility might be that, instead of four, you could just decide to only examine three because my impression is that maybe two of the remaining witnesses kind of, let's say, they focus on more or less the same problem, but I might be wrong on that.

Another possibility would be, I mean, in theory, to just give each party an hour in addition, but I think that would be unfair vis-à-vis Canada because you have done your job.

And then you might end up with an hour and not really with anything much to do.

MR. SCOTT LITTLE: We agree with that entirely. We have not only done our job but we made choices, Judge Simma, on who we were going to cross before we even got here, who we were going to call in to cross based on the 21-hour limit. So we don't see how this can be undone at this point.

PRESIDING ARBITRATOR: So the last opportunity or possibility I see for claimant to somehow accommodate the entire thing would be that you cut off time from the time available for the quantum.

DR. PULKOWSKI: Mr. Rosen.

PRESIDING ARBITRATOR: Mr. Rosen.

MR. NASH: Or Mr. Chodorow.

PRESIDING ARBITRATOR: Or maybe have a shorter closing.

DR. PULKOWSKI: Sorry,

Mr. Chodorow, my mistake.

PRESIDING ARBITRATOR: Have a shorter closing statement. So do you have a view on that?

MR. NASH: I do.
PRESIDING ARBITRATOR:

Mr. Nash, maybe it would not be, let's say, very, let's say, how shall I say, productive to go into the issue that at the beginning you asked that, the view was that you needed two more weeks, and then we cut it to one week and three days and that stuff, I mean, that's done.

MR. NASH: Yes. Can we have a decision from the tribunal on the question of this part of this proceeding being in camera? This is a procedural question purely. We deal with all procedural questions in --

PRESIDING ARBITRATOR: You mean from now on?

MR. NASH: From here on.

PRESIDING ARBITRATOR: In view of the present situation of the entire institution of ISDS at the great accent on transparency of the procedure, that we have decided that this will remain open.

MR. NASH: Thank you, Judge Simma.

We are prepared to proceed on the basis of our total time available under the budget, that's not an issue.

The issue is the timing of the hearing of the witnesses and the time to marshal the evidence in an appropriate way, in a timely way, in a fair way. We have been sitting now, and the tribunal has recognized that we needed to have more time for the hearing, and we have been sitting for six extra hours in this time-compressed time we have had, two and a half hours budgeted for today, we had two hours budgeted for yesterday, and I think with other parts of it, about an extra hour or so.

PRESIDING ARBITRATOR: May I just make one reminder?

MR. NASH: Yes.

PRESIDING ARBITRATOR: I think we had a couple of redirect which took almost as long as the cross-examination. Which is --

MR. NASH: It may be true, but we are prepared to live within our time availability, within the 21 hours, and we will allocate that time as required.

The question is the timing of the procedure -- the proceeding from here to Tuesday. And the reality of it is that in order to get from here to Tuesday, I think the tribunal is already recognizing that we need more time rather than just to the end of tomorrow. And the compression of this time into these number of days has resulted in everything getting pushed back to where we are. And to have the two full days to prepare for final argument, which is always contemplated within the order, was requested by both parties, the full two days, which would be Sunday and Monday, in order to come back before the tribunal on Tuesday means, the result of that, is that these witnesses, including Mr. Chodorow, including Mr. Rosen, have to be finished tomorrow.

And the quantitative experts, those two experts, it was always contemplated that they would have at least overnight to review the evidence, look at the evidence and then take it into account in presenting their evidence. The reality is they will not have that. We are not going to finish all of our other witnesses today. We have six more witnesses to go. And the requirement, from our position, to have some fundamental fairness to the process, this case has been going on for ten years, as I said before lunch, we've had almost three years since the liability decision was given, and it is the way it is, but what we are proposing is that all of the evidence be done by the end of Monday, we take Sunday off, that we finish all of the other witnesses by the end of tomorrow, which is Saturday, take Sunday off, the quantitative experts, remember, keeping in mind, this case is about damages. We spent an awful lot of time in this proceeding, in this hearing, so far this week on the question of environmental assessment, the question of ministerial discretion, and those related questions. The quantum is a complex issue, it's evidence voluminous. It should be marshalled in a comprehensive way, in an understandable way so that the tribunal has the opportunity to properly deal with and properly assess it. And I can say, from my perspective and from our team's perspective, it is not possible to finish all of the evidence by tomorrow, including the quantitative experts, and to complete this task and then to provide on Tuesday a comprehensive presentation which does the evidence in this case justice. And it is prejudicial to our clients, I am saying that, it is unfair to our clients, who have been in this for ten years, it's not a large multinational, these are three brothers who have
been in this for ten years, to not adjourn for the
shortest mutually convenient time for the tribunal
and for counsel to reconvene at a later date for
one day for the closings on the available time
left for the parties to deal with that so that a
proper marshaling of the evidence can be
presented, and that's what we are requesting.
And, in my vigorous and strong submission,
anything less would render a fundamental
unfairness upon our clients. And we, there's no
reason, there is absolutely no reason for this
proceeding to adjourn for a few weeks, whatever
time it is, to have one day extra. We have
already recognized, I think, Judge Simma, you said
before lunch, that it looks like we might be into
Monday for -- or Sunday for the remainder of the
evidence that we could be going over from
tomorrow, which is contrary to the combined wishes
of the parties and the agreement of the tribunal
that we have two full clear days to make our --
prepare our arguments.
And so to go anything further
than tomorrow is a breach of the procedural order,
is not contemplated by the procedural order, and
we will have one day to prepare final arguments.

on track for where we should be right now at this
time to be finished tomorrow night. Maybe it
takes a little bit of starting early in the
morning or later at night, but we are pretty on
track, so --

"we", you mean?
MR. SCOTT LITTLE: Both sides.
I think the party time that's remaining, we are
not really that far off. So with diligence and
obviously keeping to the time that is available
that's left to the parties, we shouldn't have any
problem making it, having a closed evidentiary
record by tomorrow night.

Now, in terms of doing
closings, I think it was a luxury in this case to
have two days for closings. I think that's
something that the parties asked for and were
granted, and it's, it is a luxury, but there's
many cases -- in fact, typically, we have no more
than one day to do it. I believe that was the
case in the liability phase. And there's cases
that we are involved in where we break into
closings the next day. So, overall, the plan for
this arbitration was that it was to start last

And, so, in my submission,
there should be an adjournment on that basis, we
finish all of the evidence of the non-quantitative
witnesses tomorrow in the time available tomorrow,
we come back on Monday, we have the evidence of
the quantitative experts, we then have an
adjournment of the shortest possible duration as a
convenience of the tribunal and the parties and
counsel, and we come back at that time for one
day.
PRESIDING ARBITRATOR: And
Tuesday would not be used?
MR. NASH: Tuesday would not
be used.
PRESIDING ARBITRATOR: Maybe
Mr. Little or Mr. Spelliscy?
MR. SCOTT LITTLE: First of
all, I still don't think that that addresses the
fact that we have governed ourselves accordingly
in the matter to date. We have, by my count,
three more witnesses left to cross, and we can
finish that by tomorrow night without an issue.
We might have to sit a little bit late, but we can
finish that by tomorrow night. And the time that
the parties have remaining, I think we are pretty
on track for where we should be right now at this
time to be finished tomorrow night, there
would be two days to prepare closings, and then
closings would be offered.
We think that the entire
schedule up to Saturday can be met tomorrow night,
and the parties can have their two days. Time is
going to expire if we -- in any event, although
the parties are free to eat into their closing
time. But we think we can do that, and we don't
think that there should be any change to the
schedule because Canada has adhered to that, kept
the time limits in mind and governed itself
accordingly, and, at this point, to change that is
going to cause prejudice to Canada.
PROFESSOR McRAE: I was just
going to ask Mr. Nash, you said you can finish it
during the time. That means keeping the one hour
forty-five or whatever it is for your four
witnesses, or do you envisage you have the freedom
to eat into your experts' time or eat into your
closing time?
MR. NASH: We will have to eat
into some of the remaining time. Yeah, we will
have to cannibalize some of that time.
PRESIDING ARBITRATOR: I am
very sorry.

MR. NASH: Not a problem.

So the question was how would we organize ourselves to utilize the time available to us but to use less for the quantitative experts or the closing. We can do -- we will abide by that. We don't think the timing of doing that is proper, fair, because the experts, the quantitative experts should have some time between the end of the cross-examination of the other witnesses, which are quantum witnesses. We started the quantum of the actual damages witnesses for the first time yesterday morning, and what we are contemplating, what is being contemplated now is that, obviously, we are not going to sit late, late, late tonight, until 9 o'clock, that's not reasonable. We've started early and we have ended late on a number of days now. And so in order to accomplish that reasonable separation of time between quantum witnesses, non-quantitative experts, not Mr. Rosen, not Mr. Chodorow, the only realistic way to do that is to have Sunday, either for their evidence or on Monday, and to proceed from there. In any event, what will occur under any scenario is that the time for preparation of closing will be shortened and will be shrunk, and that's not contemplated at all in the procedural order. And luxury or not, that was what the parties agreed to, that's what they asked for, that's what the tribunal also agreed to. That forms part of the procedural order.

Procedural fairness is important, it's important. This is a substantive issue for our clients who have been at this for a very, very long time, and there's absolutely no reason to artificially constrain and to compress the time in order to stick to a schedule when a short adjournment for a reasonable time to finish this case off in the way it should be finished off at this last part of the process.

PRESIDING ARBITRATOR: Mr. Little, you have to say something?

MR. SCOTT LITTLE: I don't really see what's artificial about the constraint that Mr. Nash is talking about. We both have had a given set of time, and we have to adhere to the time that we have and then closings can unfold. Nothing artificial about it.

PRESIDING ARBITRATOR: Dirk, and a half days that are allocated for the hearing.

The only question, I believe, is the one put to you by Mr. Nash, Mr. Chairman; namely, the question whether there is anything that should be done by the tribunal in order to leave a separation after the fact witnesses and before the valuation experts. In terms of the actual time budget, I think we are doing okay.

PRESIDING ARBITRATOR: At the moment, I don't see a solution for that separation, that's an overnight separation.

Mr. Nash, are you convinced that the examination of -- if we go into Saturday with the witness examination, that the testimonies of these people is particularly relevant for the quantum part of the exercise?

MR. NASH: Fundamentally relevant, from our perspective. Fundamentally.

MR. SCOTT LITTLE: All I can say is that we do this all the time. Two days is a luxury.

PRESIDING ARBITRATOR: No, what I meant was the, for instance, if we go into Saturday morning with the remaining witnesses, and
then after, maybe hopefully before lunch, we would
start with Mr. Rosen and the, so with the quantum
people in the strict sense. And I think that is
your problem; right, that they should have --
MR. NASH: They should have
Mr. Rosen on our side -- I am not speaking for
Mr. Chodorow -- Mr. Rosen on our side should have
a period of time, it would normally -- it was
scheduled to be overnight between the end of
Friday and the beginning of Saturday, overnight, a
period of time to take into account whatever
admissions are made on the cross-examinations for
those witnesses and to incorporate that into a
comprehensive presentation by him, and that would
require us to go beyond tomorrow into Sunday.

PRESIDING ARBITRATOR: Would
one kind of solution that I see is that we start
even earlier tomorrow morning, finish, I say deal
with the remaining gentlemen, which hopefully
would not be too many, by tomorrow morning, and
then give the quantum experts like two hours, two
to three hours to kind of digest what was said in
the morning and then have the statements into
Saturday night?
MR. NASH: No, there has to be
schedule just like all the other witnesses have.
There's nothing that talks about them having a
period of time to review their evidence.

In fact, if you look at
paragraph 5.4, it contemplates that one of the
experts could give evidence the day after the
other one. It had to make that provision because
the presentation that that expert was to provide
was to be held in escrow by Mr. Pulkowski in that
kind of a situation.

So they are just like the
causation witnesses. As it turned out, Mr. Estrin
and Mr. Sossin, I believe, ended Tuesday, but had
they ended Wednesday morning, our causation
witnesses, that is the EA decision-making and JRP
witnesses, would have followed right in their
wake.

So there's nothing special
about the quantification or damages witnesses that
Mr. Nash is calling that would warrant their being
this break taken. They are just like every other
witness.

MR. NASH: With this
exception, they were always scheduled to be on
Saturday, Mr. Rosen in the morning, Mr. Chodorow
in the afternoon.

MR. SCOTT LITTLE: That's not
correct. Because it says if the presentations
cannot be made on the same day, then at the end of
the day on which FTI Consulting gives its
presentation, the Brattle Group's presentation
shall be provided to the tribunal secretary and
held by him in escrow. So it contemplates that
they could be on different days. And I am
assuming that means that -- or the way this reads
is that FTI could have been giving evidence today.

MR. NASH: The schedule, as
it's been set for this hearing, has always
scheduled them on Saturday, one in the morning,
one in the afternoon. That has been from the
beginning of the scheduling of witnesses. It was
contemplated that every other witness would be
finished by Friday, and then there would be an
overnight, and then there would be a presentation
by Mr. Rosen in the morning, tomorrow, and
Mr. Chodorow in the afternoon.

MR. SCOTT LITTLE: I don't
want to belabour the point, but Mr. McLean was
scheduled for Tuesday night -- sorry, not
Mr. McLean. Mr. Geddes was scheduled for Tuesday
night, but Mr. Estrin's and Mr. Sossin's exams and
re-exams took a little longer and they started the
next day. One witness must roll after the next.
That's how an efficient proceeding unfolds.
PRESIDING ARBITRATOR: I think
the tribunal will have...
--- Brief recess taken at 1:34 p.m.
--- Upon resuming at 1:51 p.m.
PRESIDING ARBITRATOR: Okay,
so the tribunal will be ready to handle things in
the following way: that tomorrow is devoted to
the examination of witnesses. By "witnesses", I
mean the people that I -- I call the others the
quantum experts, such as the quantum people, which
means the two, Mr. Rosen and Mr. Chodorow, I
think.
So tomorrow, examination of
witnesses. Sunday, first day for the teams to
prepare their closing statements. On Monday, have
the two quantum experts. On Tuesday, you will
have the second day of preparation of closing.
The closings will be on Wednesday in a very
disciplined manner. I think we could put them
into Wednesday and still get our original planes,
because we need to leave on Wednesday. Would that
be something that would be acceptable to the
parties?
I repeat, so the quantum
people would be heard and examined on Monday.
Sunday and Tuesday would be off for the
preparation of closing. And on Wednesday would be
devoted to the closing statements of the parties.
So I think on Wednesday, I
think the absolute time bar would be around 4,
4:30 in the afternoon.
Mr. Little?
MR. SCOTT LITTLE: We are
already losing a member of our team. A member of
our team has to be in another place on Wednesday.
PRESIDING ARBITRATOR: And you
would need that person for the, just for the
presentation of the closing?
MR. SCOTT LITTLE: Well, just
let me discuss.
PRESIDING ARBITRATOR: Sorry?
MR. SCOTT LITTLE: Let me
discuss with my colleagues here.
PRESIDING ARBITRATOR: Please.
MR. SCOTT LITTLE: Okay.
The problem that you've left is that we are
not sure whether the Arbitration Place is in a
position to accommodate that, but we will find out
until the end of the day. Okay. All right.
MR. SCOTT LITTLE: Thank you.
EXAMINATION IN-CHIEF BY MR. JOHNSTON:

Q. Thank you, Judge Simma.

A. Yes, I am.

Q. You are John Lizak?

A. Yes, I am.

Q. You signed two expert reports for this phase of the arbitration?

A. Yes, I did.

Q. Your first statement is dated November 30th, 2016, and is titled "An analysis of the regional market for crushed stone imports into the United States from the Whites Point Quarry, Nova Scotia"?

A. Yes, it is.

Q. And your second report is dated August 8, 2017, and is prepared in reply?

A. Yes.

Q. And you signed, also, one statement for the merits phase of this arbitration?

A. Yes.

Q. And you are a professional geologist and mineral valuation expert?

A. Yes.

Q. And you have professionally evaluated over 500 domestic and international mineral ventures and markets?

A. I have, and I think what's noteworthy to this proceeding is I have had the opportunity to literally evaluate all of the exporting companies in New Brunswick, Nova Scotia, those in Mexico, et cetera, and also virtually all the quarries in the New York City metro market and New Jersey.

Q. Sir, have you been qualified by a court to give expert testimony?

A. I have, many courts, federal, state and local courts in the United States. Many on behalf of the U.S. Department of Justice.

Q. And have you also been appointed a court master, arbitrator and mediator to resolve disputes concerning minerals and construction materials?

A. I have, gentlemen, and I prefer my job in lieu of yours.

Q. And do you have any, sir, any corrections or clarifications to make to either of the two statements that you have tendered in this phase of the arbitration?

A. I don't. And I'd also like to add, gentlemen, that I have had an opportunity, a couple of my clients are Vulcan, CRH - Oldcastle, U.S. Concrete, they are major market participants in the markets in which I value.

Q. Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Johnston.

And examination will be done by Mr. Spelliscy. You have the floor.

CROSS-EXAMINATION BY MR. SPELLISCY:

Q. Good afternoon, Mr. Lizak.

A. Good afternoon,

Q. You have been here before, so you know the drill, so we can get right into it. Let's turn to page 29 of your second report.

A. And where do I find that, sir?

Q. Your counsel has given
you --

A. Just in mine, okay, 29 in my second report.

Q. We should go into confidential session, for the record.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 2:03 P.M.

THE WITNESS: Okay.

BY MR. SPELLISCY:

Q. Third sentence of paragraph 29 of your second report, I am just going to read it for now:

My question, Mr. Lizak, is a simple one: You would agree with me that the expert reports and witness statements that you reference were done in 2016; correct?

A. I am sorry?

Q. The expert reports and witness statements that you mention in this sentence were done in 2016; right?

A. Yes.

Q. They were not due diligence conducted before this arbitration; correct?

A. That's correct.

Q. Let me try to understand another one of your statements. It's in the next paragraph of the same report, the reply report -- sorry, it's on page 30 of your reply report.

A. May I say something, sir?

Q. No. I will ask the questions, Mr. Lizak. We are short on time. You will have the chance.

MR. JOHNSTON: No, members of tribunal, I am not going to have Mr. Spelliscy cut off Mr. Lizak if he has got something to add. He has been taken to a paragraph, and if he has got something to add, it can be short and controlled and managed, but I won't have Mr. Spelliscy cut off Mr. Lizak.

MR. SPELLISCY: He was taken to a paragraph simply to ask a question on time.

MR. JOHNSTON: He needs to be fair to the witness.

MR. SPELLISCY: I am being fair to the witness. My question was solely on time, and when that was conducted, he answered it.

If Mr. Johnston would like to use his time on redirect, he can do that.

PRESIDING ARBITRATOR: We don't have paragraphs. It's pages; right?

MR. SPELLISCY: Pages, I am sorry.

BY MR. SPELLISCY:

Q. Page 30 of your second report, Mr. Lizak, and it is in the second-to-last paragraph on the page. You say:

You would agree with me, Mr. Lizak, that economic viability depends not just on the size of the stone reserves but also on how much it will cost to develop the quarry, operate it, send the products to market, how much you could sell it for and the prices you could obtain, you would agree with that; right?

A. Can we say that again, please?

Q. So economic viability depends not just on the reserves but also on other factors such as how much it will cost to develop the quarry, how much it will cost to operate it, how much it will cost to send the product to market, how much product you can sell, what you could sell it for?

A. Let me comment on that statement. What I am saying is that we have...
Q. What you say, Mr. Lizak, is that you had done a report on reserves, but you would agree with me, my question again, that economic viability depends on more than just the size of the deposit; right?

A. Yes, it does.

Q. It does. And you would agree with me, for example, isn't that right, by 2002?

A. Not in 2002, that's correct.

Q. There was right, in 2002?

A. Correct.

Q. In 2002, right?

A. I don't know. That wasn't my task.

Q. You don't know. All right. So your comment on this last sentence I'd like to focus on.

A. Uh, let me, let's, in order to help the tribunal, let's do away with some of the jargon. And, fundamentally, there's just in an effort to eliminate the jargon and make it a little more palatable.

Q. I think you said 200 million tons. A. I am sorry, 200 million tons.

Q. Okay.

A. In excess of.

Q. Right, but you had correct?

A. I had not, no.

Q. Let's spend just a few minutes discussing aggregate prices and aggregate markets.

I want you to turn to your first report now and look at the bottom of page 14 and carrying over to page 15. Here you say that have they?

A. Let's go to my -- that figure you reference.

Q. Just answer my question first, Mr. Lizak. If we

A. When are we starting? It depends when you start. If I start in

Q. Your testimony, Mr. Lizak, is, correct?

A. No, that's not my statement. It's that they have

Q. Mr. Lizak, you said it
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1. depends on when you start. If I start in

A. Let's go back to what I am saying, that if you do not

Q. Right. And if you include -- exclude the

right?

Q. Please go to Tab 10 in your binder.

A. Can we go to my charts, sir, that I am referring to?

Q. Please come to Tab Number 10 in your binder.

A. All right.

Q. This is data produced by

the USGS, Exhibit C-1152. And this is

spreadsheets that gives actually data and

If you look with me on the first page here, you will see that there are two units in the chart. You have, about three-quarters of the way down, see you have

include -- do you see that Mr. Lizak?

A. I do.

Q. Okay.

A. Yes.

MR. JOHNSTON: Excuse me. Mr. Spelliscy, these terms are specifically defined at the first page. Can you take Mr. Lizak to his affidavits?

MR. SPELLISCY: We are reading them, Mr. Johnston.

MR. JOHNSTON: Thank you.

MR. SPELLISCY: This will go a lot faster if you read along with us.

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BY MR. SPELLISCY:

Q. Yes, Mr. Rosen, which is why they

would you not agree?

PRESIDING ARBITRATOR:

Mr. Lizak.

MR. SPELLISCY: Mr. Lizak.

THE WITNESS: Yes.

BY MR. SPELLISCY:

Q. We will get to Mr. Rosen. This is -- read the chart, the

value with me:

You would agree with me that here, the United States Geological Survey has
Q. We are talking, Mr. Lizak, about your comment about the period you were talking about. You wrote in your report:

The period you were talking was

A. Yes, in

Q. Right, so your statement was correct?

A. Correct.

Q. Now, let's come to another part of your report. You say on page 33, this is in your second report again, and that -- the first little arrow on that page in the second sentence, you say:

But you would agree with me that, in fact, ....

A. Yes. It is. But, again, these are macro markets, and, again, if you start

Q. Right, so your statement was correct?

A. So I am seeing both the

Q. We are talking, Mr. Lizak, about your comment about the period you were talking about. You wrote in your report:

The period you were talking was

A. Yes, in

Q. Right, so your statement was correct?

A. I haven't done that study.

Q. It's right here, Mr. Lizak. The United States Geological Survey has done that study for you; have they not?

A. Okay. It's, it has dropped, but, again, what's the time frame? And the other thing that's, I think, that is important, these are macro markets. All stone markets are local. So this is basically macroeconomic data.

Q. I agree with you, Mr. Lizak. I am trying to understand a statement that you made in your report, which was you

And we were agreed, now, that in

we are agreed on that; right?

Q. Now, you said just now that from 2000 through 2014, isn't that right?

A. Yes, there are some gyrations in there, as you'd expect.

And let me also say this: I think it's important for the tribunal to understand that why this isn't so important where you take your snapshot is, for example, if you look at

Suddenly, the United States starts building its highway. Eisenhower comes in, he has the international highway transportation act. That's
when the industry starts moving forward. Okay, if you look at the mid-'70s, you
were looking at a much lower commodity price, and it's a function of the

Q. Mr. Lizak, the snapshot that you took and you put in your report was

A. Yes, but I am pointing out to the tribunal, that's the element of complexity. You have to look at when you start the snapshot and what market you are looking at. If you look at the

What's impressive, also, if I might, please, if I can go to my table here, can I do that?

Q. I am sure your counsel can take you. Actually, I want to move on to a different subject.

A. All right.

And if you turn the page, you continue down talking about you say:

"For example, no new quarries have been permitted in northern New Jersey and southeastern New York since 1998."[as read]

And you have a similar sentence in the next paragraph that says:

All right, Mr. Lizak, obviously, the Whites Point Quarry was

A. Well, in order to be in

Q. You could turn to your reply report, and let's turn to page 19 in your second report. So same report we are in now, page 19.

The last sentence on this page.

A. I am sorry. Page?

Q. Nineteen of the second report, the same one we were in.

A. Okay.

Q. Turn to page 19, and I want you to look first at the last sentence and then at the next sentence following, and then I will ask you some simple questions.

A. Where? Would you start the paragraph for me?

Q. The last paragraph, so the last sentence on the page, the very last sentence on page 19.

A. Yes.

the I take it we can agree to that; correct?

A. Yes.

Q. Okay. You would agree with me, then, that simply because no correct?

A. Let me provide some context. I would also like to point out that it's been 40 years since a new quarry has been developed in Nova Scotia. I spend my time looking globally for new quarries. We can't find them. Okay? I have -- literally scouring the Maritimes, the Gulf Coast, Columbia, Jamaica. I have clients that are looking for this stuff all over the planet. We can't find them. Okay? We can't find those that meet the quality and the quantity of Whites Point, and we can't find a place to offload these quarries. So my point is that, if
Q. I don't think I got an answer to my question, Mr. Lizak. You would agree with me that simply because correct?

A. That's possible, of course it's possible.

Q. Let's come to page 11. Maybe I will just ask you the question because I think you said it already.

You mentioned in response when I was taking you to the data that -- on the USGS that you had referenced that stone prices

So you would agree with me, then, that in order to assess the economic viability of a project, it is important to consider where the project will be sold because that will affect the price that can be obtained;

information and have to really dive into that in order to look at the that study?

A. No, sir. If you look at my conclusions, I made no conclusions regarding

Q. Well, perhaps you can help me with that last comment because it was another question I had.

In your first expert report, page 6, and the summary of conclusions where it is paragraph 9.

A. Page 6?

Q. Page 6. And so you have your summary of conclusions and you have 9 here. So this is the last one, halfway down.

A. Bear with me one second, sir.

Q. Are you -- please, one more time?

A. You have got to look at pricing in the marketplace, yes.

Q. Yes. And you would agree with me that

A. Sir, I didn't do -- I had no

Q. You have no knowledge of those studies.

A. Sir, I didn't do that study. I'd have to -- I would need a lot of

Q. Sure. Oh, you don't have the nice little book I have.

A. Which one of my -- which conclusion, sir?

Q. Nine.

A. Okay.

Q. Do you have it?

A. I do.

Q. Perhaps you can clarify this for me. You said here:

My first question, Mr. Lizak, is you understand that Bilon was not slated to be in production until 2011; correct?

A. Correct. But I was tasked with going back to look beyond -- or before 2011.

Q. How can you write, Mr. Lizak, that Bilon as
I don't understand.

A. I am simply saying if they were

We have the benefit of hindsight with this particular estimate.

You are aware, Mr. Lizak, that the plan of Bilcon estimated in this arbitration was to

A. No, I am not really aware of that. What I am simply saying is you have got

right?

A. That's correct, they haven't and I haven't.

Q. You haven't as well.

A. Correct.

Q. So if they did

I would like to go to Table 2 with you for a second, which is -- unfortunately, Table 2 doesn't have a page number on it. Do you have it, Mr. Lizak?

A. I do.

Q. Let me make sure everybody else is caught up.

Page 1685

Page 1686

Page 1687

Page 1688
Here you have -- it's up on the screens for those who have it. Here, you have, Mr. Lizak, you have

My only question for now is do you see that?

Q. Do I see that on my chart?

A. Yes.

Q. Now, I want to -- you to keep this chart open. I want to look at another document here. That's Tab 9 in the binder. This is Exhibit R-581, for the record. It is an excerpt from the revised project description submitted by Bilcon. And if you turn to page 18, the last page, you have a similar chart. And you prepared this chart as well; right?

A. Yes, I did.

Q. And under yourself -- down in New Jersey. He had the adequate depth. That is unusual because most facilities, they don't have the area, they don't have the water depth.

You see that, Mr. Lizak?

A. I do.

Q. Now, Mr. Lizak, you would agree with me that during the planning phase of this project when you were working on it, as reflected in these documents and in your testimony, sworn testimony before this tribunal, that was the plan. Well, no, wait.

A. I think it was, sir, yes.

Q. So your testimony now is that was the focus of this study.

A. I think that's probably the salient point here. So, you know, in hindsight, I would -- that, in itself, tells you that it was

Q. That's your testimony?

A. Well, I am trying to think back, sir. It's been like 12 years. Let me.
that's your sworn testimony here today?
A. Again, sir?
Q. Your testimony before this tribunal today is that you knew it was, or you thought it was

that's the position you are taking in front of this tribunal today?
A. The position I am taking is this, sir: To be frank, I was not overly concerned whether

What I do know for a fact is that I was retained to assess the

I mean --
Q. I am not sure I understand, Mr. Lizak.
If you weren't concerned with it, if you didn't know it, why did you say it?
A. Again, sir? I am sorry.
Q. I am not sure I understand. If you didn't know and you weren't concerned with it, why did you say it?
A. One more time. I am sorry.
Q. Your testimony was that you weren't concerned with
My question is, if that is true, why did you say it?
A. My point is this, sir, I don't know if it was

What I do know for a fact is, recalling my contract, is that I was sent up there to

I believe it's in your --
A. The first report or second report?
Q. First report. I'm sorry, no, it's your second report. The reference in the report is at page 14.
A. I don't have the charts.
I just have the text.
Q. You don't have any of the figures in that?
A. No, not in this one. I may have the same chart in the first report.
Q. I am sorry, I believe it is the first report.
A. Okay, I am sorry.
Q. It's Figure 2, my apologies. Figure 2 of your first report, and it's a chart. As I understand it, sir, it's a chart titled

And if it may assist,
Mr. Lizak, I can put my copy in front of you.
MR. SPELLISCY: Can we make sure that there is no notes of --
MR. JOHNSTON: It's just the
chart, Mr. Spelliscy.

DR. PULKOWSKI: I am happy to provide my binder.

MR. JOHNSTON: That would be better.

DR. PULKOWSKI: That might make things easier.

MR. JOHNSTON: The title is

I am sorry, there's no page reference. It's two pages after the title page figures. It's titled "Figure 2", and we are in the first report of Mr. Lizak, dated November 30th, 2016.

THE WITNESS: Um-hmm, yes.

PRESIDING ARBITRATOR: I am almost there. Okay.

BY MR. JOHNSTON:

Q. Mr. Lizak, thank you, and I apologize, I think I started us off on the wrong report.

Mr. Lizak, is this the figure that you referenced in responding to Mr. Spelliscy's questions about ?

A. Yes, it is.

Q. And what does this figure depict?

A. This figure depicts the .

Q. And you were asked as well, Mr. Lizak, you recall, a question about the reference in your report to the .

A. Yes.

Q. That's why I am starting -- yeah, go ahead, sorry.

Q. And my question is simply whether you can assist us in understanding the significance of that reference in your report for your analysis. What was it about the lack of in the analysis you provided?

A. Well, if you look, again, if you look at the , like I said, .

Q. Right. And the question that -- you were asked a question about your, or the reference , you recall that question?

A. You mean the one with the chart?

Q. Well, it was a reference to -- in the environmental impact statement or the project description --

A. Yes.

Q. .

A. Yes.

Q. You recall questions about that?

A. Yes.

Q. And my question is whether at the time back when you were first engaged by the Claytons to look at the quarry opportunities in Nova Scotia, whether you had been told that there was any .

A. No. I mean, and I think
I would be thinking more like... I mean.

Q. And you referenced a contract in one of your answers to Mr. Spelliscy's questions, and I would just like to have you reference that document, please, Mr. Lizak. If you can...

A. It's -- I think it's part of my first report. It's one of my exhibits, I think. One second.

Q. I think I have identified it here, Mr. Lizak. It's Appendix 4 to your first report.

A. It doesn't seem to be part of my package.

DR. PULKOWSKI: Would you like to show him in this binder?

MR. JOHNSTON: If we can.

Thank you, Dr. Pulkowski.

Why don't we use this set here, if we can, Mr. Lizak.

THE WITNESS: Okay.

BY MR. JOHNSTON:

Q. We will put this one aside. So your first report, and it is Appendix 4. It should be behind Tab 4.

A. Okay.

Q. That's it there. Thank you.

And would you just please describe for the tribunal what this document is?

A. Yes, my initial engagement on this project happened in April 2002, and this is the -- essentially my first part of the project, and this is the contract specifically related to the project.

Q. And, Mr. Lizak, there's -- I just refer you to the second paragraph of the letter dated April 25, 2002, that covers the contract, and I direct your attention to, just for clarification and comprehension purposes here, do you see those six letters?

A.

Q. What is that in reference to with respect to your contract and your mandate for the Claytons, please?
moved to another hearing room, and having 
consulted both with the AV company and Arbitration 
Place, the decision has been taken to use the 
Cabernet room after all, which can be more 
flexibly configured, the one that's closest to the 
reception. Seems, from the tech point of view, 
that that is more appropriate for this hearing. It will be ready, we are being told, for Monday 
morning start.

PRESIDING ARBITRATOR: Well, 
at least it's a wine that we all know. I have 
ever heard of this one before. Okay. All right. Thank you.

Would you be so kind and 
please read the statement that is in front of you, 
sir.
WITNESS DECLARATION: MICHAEL WICK
MR. WICK: Yes. I solemnly 
declare upon my honour and conscience that I will 
speak the truth, the whole truth, and nothing but 
the truth and that my statement will be in 
accordance with my sincere belief.

PRESIDING ARBITRATOR: Thank 
you, Mr. Wick, and you will be directed by 
Mr. Johnston.

Q. And John T. Boyd Company 
is an international mining and geological 
consulting firm?
A. Correct.
Q. And prior to joining John 
T. Boyd, you were vice president of mining 
operations with Rogers Group, which was the 
largest private building materials company in the 
US from 2005 to 2009?
A. Correct.
Q. And you also served as 
the manager of greenfield and business development 
with Lafarge North America, establishing Lafarge 
aggregate and cement operations in Chicago and 
conducting in-depth market studies for Lafarge?
A. Yes. And, also, one of 
my focus areas was New York City, so Chicago and 
New York City.
Q. While you were with 
Lafarge?
A. Correct.
Q. And you also served, sir, 
as manager of operations services for American 
Limestone TN, Zinc Division, which is now CEMEX,
BY MR. SPELLISCY:

Q. I would like to start, Mr. Wick, by trying to understand some of the basic distinctions that you seem to be drawing in your report. So let's start by turning to page 1 of your second report. By that, I mean the page numbered 1 in the report, not in the cover letter.

A. Okay.

Q. Say in the second paragraph, at paragraph Number 2 here, you say: "In reality, a seaborne Canadian stone quarry is not a market participant of the New York City building and construction markets." [as read]

MR. JOHNSTON: There is a word in parentheses, "competition". I just want to produced from Canadian seaborne quarries includes New York City, New Jersey, and other markets; does that sound familiar?

A. Yes. Correct.

Q. Okay. And so your report, your opinion, does not actually concern who would supply New York Sand & Stone, just what the market for New York Sand & Stone's products were in New York City; correct?

A. Correct.

Q. Now, your projections, as well, they only go to 2020, and that is because projections beyond 2020 are inherently inaccurate; correct?

A. Yes, that's correct.

Q. Now, let's turn to something where I hope you can help me understand, Mr. Wick. It's in paragraph 6 of your second report.

A. Okay.

Q. About halfway down that paragraph, there's a sentence that says:

But...
1. That is the point of that statement.

Q. Okay. So if there was a right?

A. No. What I'm saying is, when you have understand. correct?

Q. I'm not sure I

A. Right. And I think the big --

Page 1714

Q. Now, let me turn to paragraph 22 of your second report, Mr. Wick, so you can help me understand something else. In the first sentence, paragraph 22, talking about the chart above, it says:

And then you say:

[as read]

And then you say:

[as read]

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Do you see that?

A. Correct.

Q. Now, you are aware, Mr. Wick, that the plan was ; are you aware of that?

A. No. I'm not aware of any of the ; would you not?

Q. Okay. Well, you would agree with me, then, would you not, that . I did know that, correct.
Q. Okay. And so Bilcon of Nova Scotia is, correct?
A. Correct. That's correct.
Q. Now, you said with, so I take it you would correct?
A. If you mean by that that there was, yes, I would agree with you.
Q. You would agree? So I'm not sure if you have been here, Mr. Wick, throughout the hearing, but are you aware that

A. I'm not sure at what point, but no.
Q. You weren't aware of that?

Q. Right. But you didn't go back and in
A. No, I did not.
Q. No, you did not. Now, you would also agree with me, I think, based on what we talked about earlier, that, if one of

A. No. I totally disagree with that. Just because you are a

Q. You would agree with me, Mr. Wick, that if, in fact,

A. Could you please repeat that?
Q. You would agree with me that if, in fact, there were correct?
A. Yes, if there was no correct.
Q. Right. But you would agree with me that that might mean correct?
A. Yes. If there was no correct.
Q. Okay. In fact, you would agree with me, Mr. Wick, would you not, that when you talk about the correct? A. When you say
Q. I don't understand your question. Q. For the b do you?
A. Oh, yes.
Q. I'd like to take just a little bit of time to understand your projections as to what Mr. Wick?
A. Oh, yes.
Q. I'd like to take just a little bit of time to understand your projections as to what Let's do this by turning to page 8-1 of your first report. I want to look at a sentence midway through this paragraph that starts: You see that sentence?
A. It's about -- yes, yes, I do.
Q. Okay. But help me understand, Mr. Wick, because when I can't -- I'd have to look at where the -- but I
Q. So your statement says: Let me ask it a different way. A. I'm not sure what you're asking.
Q.
Q. -- you say Whites Point would be commissioned in 2011.
   A. Where? I'm sorry. You are at paragraph 8 of my second report? I'm reading something different.
   Q. Let me find it. It is on page 4, the top paragraph there. It's actually paragraph 8 from the previous page.
   A. Okay.
   Q. Okay. And if you come down to the bottom there, you say:

   A. Correct.

Q. Well, I'd like to understand a couple of other statements in that context, Mr. Wick, because in your reply report -- and if we turn to your reply report at paragraph 8 --
   A. Okay.

Q. -- you say Whites Point would be commissioned in 2011.
   A. Where? I'm sorry. You are at paragraph 8 of my second report? I'm reading something different.
   Q. Let me find it. It is on page 4, the top paragraph there. It's actually paragraph 8 from the previous page.
   A. Okay.
   Q. Okay. And if you come down to the bottom there, you say:

   A. Correct.

Q. Well, I'd like to understand a couple of other statements in that context, Mr. Wick, because in your reply report -- and if we turn to your reply report at paragraph 8 --
   A. Okay.

Q. -- you say Whites Point would be commissioned in 2011.
   A. Where? I'm sorry. You are at paragraph 8 of my second report? I'm reading something different.
   Q. Let me find it. It is on page 4, the top paragraph there. It's actually paragraph 8 from the previous page.
   A. Okay.
   Q. Okay. And if you come down to the bottom there, you say:

   A. Correct.

Q. Well, I'd like to understand a couple of other statements in that context, Mr. Wick, because in your reply report -- and if we turn to your reply report at paragraph 8 --
   A. Okay.

Q. -- you say Whites Point would be commissioned in 2011.
   A. Where? I'm sorry. You are at paragraph 8 of my second report? I'm reading something different.
   Q. Let me find it. It is on page 4, the top paragraph there. It's actually paragraph 8 from the previous page.
   A. Okay.
   Q. Okay. And if you come down to the bottom there, you say:

   A. Correct.

Q. Well, I'd like to understand a couple of other statements in that context, Mr. Wick, because in your reply report -- and if we turn to your reply report at paragraph 8 --
   A. Okay.

Q. -- you say Whites Point would be commissioned in 2011.
   A. Where? I'm sorry. You are at paragraph 8 of my second report? I'm reading something different.
   Q. Let me find it. It is on page 4, the top paragraph there. It's actually paragraph 8 from the previous page.
   A. Okay.
   Q. Okay. And if you come down to the bottom there, you say:

   A. Correct.

Q. Well, I'd like to understand a couple of other statements in that context, Mr. Wick, because in your reply report -- and if we turn to your reply report at paragraph 8 --
   A. Okay.

Q. -- you say Whites Point would be commissioned in 2011.
   A. Where? I'm sorry. You are at paragraph 8 of my second report? I'm reading something different.
   Q. Let me find it. It is on page 4, the top paragraph there. It's actually paragraph 8 from the previous page.
   A. Okay.
   Q. Okay. And if you come down to the bottom there, you say:

   A. Correct.
You say that

A. Correct.

Q. Okay. They are not

... They are... ; correct?

A. According to this, they are, but I have never seen this document. You are putting a document in front of me that I have never seen.

Q. Mr. Wick, you testified as to what you understood the plan was, and you drew a conclusion based on that plan. So you now understand your conclusion in that paragraph is in error?

A. The plan I looked at was the financial analysis that showed production, not this document. I have never seen this document.

Q. So your conclusion would -- in fact, the conclusion you have in that paragraph would be different if, in fact, as this pro forma shows, produced by the claimants, that Bilcon, in fact, or Whites Point would just said, it makes no difference if you go from... It doesn't matter.

Q. So why did you feel it important to tell this tribunal, then, in writing your report, that...

A. Because, when I looked at the... I cannot comment on something I cannot see. It is unfair.

Q. Would it surprise you to know Mr. Wick?

A. I'm not sure what it's based on. I just looked at the... But, again, it doesn't matter if it's... That's the point I am making.

Q. Your testimony just there, Mr. Wick, was that there...

A. Correct.

Q. That's not what you wrote in your opinion, is it?

A. No. And I would have to -- we can go back through the financial model.

Q. You would agree with me and with Mr. Dooley... correct?

A. Yes, I would agree with you.

Q. And you would agree with me that, if, in fact, in history.

A. Well, again, I think we've stated that New York City -- the exact... Companies look at long-term averages. They don't cherry-pick and pick snapshots and distort downward trends. They look...
They don't look at one, two, five years. It's 10 years minimum. Thirty to 50 years is average in the aggregates industry.

Companies do not make decisions based on cherry-picking downward trends and up cycles or down cycles.

Q. You would agree with me, Mr. Wick, that, in fact, during an

A. No. I completely disagree with that. We were doing extensive

They want a -- one of the misconceptions here is that

That's poor business.

Q. And did you look -- and you didn't look, Mr. Wick, I put it to you, at the history of what happened with

A. As far as what?

A. Well, right.

Q. What I asked about was

A. No. I did not have so the answer is no.

MR. SPELLISCY: I will take a minute, or a second. Mr. Wick, that's all my questions for now. Thank you.

THE WITNESS: Thank you.

PRESIDING ARBITRATOR: Thank you, Mr. Spelliscy. And redirect will be done by Mr. Johnston.

MR. JOHNSTON: Thank you, Judge Simma.

RE-EXAMINATION BY MR. JOHNSTON:

Q. Mr. Wick, a few minutes ago, in your answer, you referenced , and I believe the question that you were asked referenced

A. Umm,
Q. And do you recall Mr. Spelliscy asked you questions about your consideration of history? Do you recall those questions?

A. Yes, I do.

Q. Within the scope of your report and your analysis of the New York market, do you recall those questions?

A. Yes, I do.

Q. Would you please go, sir, to your first report, page 11.

A. Okay.

Q. And the subheading under 1.0, Is this where you set out the for your first report?

A. Yes, correct.

Q. And the two paragraphs of the period immediately beneath that heading, do those summarize the.

A. Yes.

Q. I take it, in your report, you considered the New York City market in your analysis?

A. The New York City market?

Q. Yes.
Q. And then if you can go, please, Mr. Wick, to your second report, page 4.
A. Okay.
Q. And this, you will recall, is the continuation of numbered paragraph 8 that begins at the bottom of page 3. And Mr. Spelliscy asked you questions about the

Q. If you go back, please, sir, to page 1-1 of your first report, I just want to be clear about an aspect of your analysis here.
A. Yes, I'm there.
Q. And, again, we are back at the section of your report, sir.

If you look at paragraph 2, under heading 1.1,
A. Yes.
Q. And it reads:

And I will stop there. And is this a separate component of your analysis as opposed to the

A. Yes, it is.
A. No, no.

Q. And then I would like to now take you, sir, to Tab 9 of the binder Mr. Spelliscy put in front of you.

And it was page 3. There was a table there that Mr. Spelliscy took you to.

A. Yes.

Q. Okay. And the first column, is the column that -- or the first row, is the row that you were asked about; do you recall that?

A. Correct.

Q. And do you have any understanding of what?

A. No. I would assume it's both the

Q. But you have no particular understanding of that one way or the other?

A. Right.

Q. Right. But, Mr. Wick, the sentence says:

again.

THE WITNESS: Thank you very much.

PRESIDING ARBITRATOR: Thank you very much for your presence.

I suggest that we go into the next witness, which is -- okay. So now we are changing to Canada's experts, and Dr. Sterling would be the first to go.

MR. NASH: We can easily finish with Dr. Sterling today after a 10-minute break. I would appreciate a 10-minute break.

PRESIDING ARBITRATOR: I see.

MR. SPELLISCY: No objection.

PRESIDING ARBITRATOR: Would a break up until four sharp do?

MR. NASH: Sure.

PRESIDING ARBITRATOR: Okay.

--- Upon recess at 3:52 p.m.

--- Upon resuming at 4:04 p.m.

PRESIDING ARBITRATOR: Good afternoon, Mr. Sterling. Would you be so kind and read out the statement that is in front of you.

WITNESS DECLARATION: DR. ARLIE STERLING

DR. STERLING: Declaration for
I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth and that my statement will be in accordance with my sincere belief.

PRESIDING ARBITRATOR: Thank you.

I give the floor to Ms. Zeman for the direct.

EXAMINATION IN-CHIEF BY MS. ZEMAN:

Q. Good afternoon, Dr. Sterling. Can you briefly describe for the tribunal your background and experience?

A. Yes, thank you. I am trained as an economist. I have an undergraduate degree from MIT as an -- in economics, a master's in economics from Northwestern University and a PhD in macroeconomics and finance from the MIT Sloan School.

I am one of the founders of Marsoft, my company, and I am the president of Marsoft Incorporated. I serve on the board of two companies, the Balticmax Holding Company and the Acquisition Company One, Maltese companies. We own a fleet of 24 small container ships.

My area of expertise for the past nearly 35 years has been in the maritime industry. We started our business in the basement of the Sloan School doing research on oil trade and tanker market analysis and since then have grown to span almost all the major shipping markets.

My personal role has been in developing models for the market research, developing the credit rating models for shipping market -- or for the ship finance based on our market research. I advise investors with regard to investments in shipping, banks with regard to pricing a debt, and have served as an expert witness in a number of shipping cases in the past several years.

Q. Do you have any corrections to make to your opinions?

A. I do. On page 34 of my first report, a -- well, we should be in confidential session, for the record.

MS. ZEMAN: We should be in confidential session, for the record.

DR. PULKOWSKI: We will be editing in due course time, that's good. Fine.

--- CONFIDENTIAL PORTION OF TRANSCRIPT RESUMES AT 4:07 P.M.

THE WITNESS:

And then on page 6 of my second report, paragraph 21, line 2, there is a reference to . That's a mistake. It should be . That's page 6, paragraph 21. The second line in that paragraph.

Neither of these corrections have any impact on my analysis or conclusions.
CROSS-EXAMINATION BY MR. NASH:

Q. Good afternoon, Dr. Sterling. How are you?
A. I am well, thank you, sir. How are you?
Q. Very well.

You have signed these two reports that you referred to. The first is in Tab 1, you will see that your report there is dated June 9th?
A. That's correct.

Q. And in Tab 2, your report is dated November 6th, 2017; do you see that?
A. Yes, I do.

Q. Please turn to Tab 1, and we are in the binder now. Or you can stay in that document if you wish, but to page 44 of your first report, which you will find is your CV. Do you see that?
A. Yes, sir.

Q. And this CV was complete and up-to-date as of the date you presented it to the tribunal for this proceeding?
A. Yes, sir.

Q. And it contains all of your relevant experience in relation to the matters at issue in this tribunal in regards to shipping; correct?
A. To my knowledge, sir, yes, it contains the -- my background and professional experience.

Q. That would be relevant to the shipping issues in this proceeding?
A. I believe so, sir.

Q. Looking at page 44, it says that you are the president of Marsoft. And, as I understand it, you have been the founder and president of Marsoft since 1979; is that right?
A. Yeah, sir, just to be precise, I am the president of Marsoft Incorporated.

Q. Okay. And Marsoft Incorporated was founded by you in 1979; that's correct?
A. My partners and I, yes, sir.

Q. And you've been the president of Marsoft Incorporated ever since?
A. Yes, sir.

Q. And Marsoft Incorporated is a consulting company; is that right?
A. That's correct.

Q. In the shipping industry?
A. Yes.

Q. And you have been a consultant with Marsoft Incorporated since 1979; correct?
A. My -- I have -- we have been engaged in various tasks with Marsoft -- at Marsoft since 1979, including some of them consulting but also product development and sales, yes.

Q. So you would describe your function and position with Marsoft Incorporated as developing models and also consulting; is that fair?
A. Developing models, interpretation of model results and consulting on project-specific work, yes.

Q. That would be a reasonable summary of what you do?
A. Yes.

Q. And what you have been doing for the last 39 years?
A. Yes, sir.

Q. And in the first paragraph, your CV says you lead the development and commercialization of Marsoft's decision support and risk management services for the shipping and ship finance markets; is that a correct description of what you do?
A. Yes.

Q. And I take it, then, that there, because you lead the development and commercialization of risk management services to
the shipping industry, that implies to me that
there is risk in the shipping industry; is that
fair?
A. There is a risk in the
shipping industry. The specific area in which
I've focused my time is in the use of scenario
tools to evaluate risk and the use of a number of
statistical tools to evaluate the probability of
default and loss given default on shipping loans.
Q. So going back to my
question, there are risks involved in the shipping
industry; that's correct?
A. Yes, sir.
Q. And part of what you have
been doing for the last 39 years is developing
models to assist shipowners, investors and
financial institutions in the management of the
risk in the shipping industry; is that correct?
A. Yes. Yes, sir.
Q. And if you go down for a
moment to the bottom paragraph on that page,
page 44, you'll see that under part of your
experience, there's credit risk evaluation and
management; do you see that?
The last paragraph.

big part of what you do; is that correct?
A. Yes, sir.
Q. And then if you go down
to the next line, well, actually, just continuing
on in that sentence:
"Risk analytics and deal
evaluation, portfolio
management systems for
the highly fragmented and
volatile maritime
shipping markets." [as
read]
Now, you have been in the
shipping industry for 40 years, thereabouts, and
you have experienced, and you have described here,
that shipping markets are fragmented and volatile;
correct?
A. As I describe here, the
tools that we have developed are specialized in
those -- for the shipping industry, which is a
volatile industry, and the ownership is highly
fragmented across the industry. Ownership of
ships, I should say.
Q. The ownership of ships is
fragmented and volatile; correct? Sorry, the

A. Yes, risk analytics and
deal evaluation/portfolio management systems,
that's the paragraph we are getting to, that
sentence?
Q. Yes.
A. Yes.
Q. So an important part of
what you do is the development of risk analytics,
and that's to address the risks in the shipping
market; that's correct?
A. Indeed. And the tools to
help our clients manage those risks.
Q. And you have been making
your living for the last 40 years assisting your
clients in whatever aspect of the shipping
industry they are involved with managing and
analyzing risk; that's correct?
A. Our focus in the shipping
industry spans the dry bulk, tanker, container,
LNG, and large parts of the ship finance industry.
That is not the totality of shipping.
Q. I understand. But there
is certainly an important component of managing
risk, analyzing risk, providing your clients with
advice about risk in the shipping industry is a

shipping industry generally is volatile, and the
ownership is fragmented; have I got that right?
A. The ownership is
fragmented. There are many small owners, and
charter rates and vessel values in the shipping
industry are highly volatile. They move up and
down quite a bit.
Q. And part of the risk that
needs to be managed arises from the fact that the
shipping industry is a highly competitive
industry; correct?
A. No, sir, I am not sure
I'd characterize the degree of competition as a
risk. Many industries are competitive and don't
show the same risk profile.
The characteristics that drive
shipping industry risk are the volatility of
trade, changing trading patterns, changing
commodities, prices, tendencies in the industry to
excessive ordering driving excess supply in the
markets, I would characterize those as the drivers
of risk, not competition per se.
Q. Well, isn't competition
based, in part at least, on excess supply in the
market, for example? There could be more
availability of ships to transport goods than there is the need for them; isn't that fair?
A. Sir, it's my understanding of competition is that it refers to competition between shipowners for business.
Q. And doesn't that exist here in the shipping industry?
A. You better step me back. What exactly is your question again?
Q. I am talking about competition between shipowners for market, that is the import of my question.
A. Isn't there competition between shipowners for market share, and isn't there price competition or price competition between them?
Q. So would you call it a highly competitive industry?
A. I would agree that the shipping industry is highly competitive. I think the different segments of the industry will show different degrees of competition and concentration, but, on the whole, I think it's fair to characterize the shipping industry as highly competitive.
Q. And there are uncertainties involved in the shipping industry; that is correct?
A. Yes, sir. There are uncertainties, as I mentioned earlier, having to do with the volume of pattern of trade, the demand for ships and the supply of ships. Those factors are translated into volatile charter rates in the short term and volatile vessel values as well.
Q. In the short and the long term; correct?
A. The short-term volatility, if you will, has its upsides as well as its downsides. In the long-term, those tend to average out.
Q. And you were retained to help manage the risks that you describe inherent in the shipping industry; that's correct, at least that's part of what you do?
A. Does your question refer to this, these proceedings, sir?
Q. No, my question refers to what you do in your consulting business. You advise --
A. Yes --
Q. -- shipping owners, investors and financial institutions on uncertainties and risks in the shipping markets; correct?
A. Yes, we advise our clients with regard to the outlook for the markets and the uncertainties in that outlook and how those uncertainties translate into the financial performance of vessels and loans.
Q. If we go back up to the top paragraph, we refer to risk management services for the shipping and ship finance markets; are you with me?
A. That's the second and third line of the first paragraph, yes, sir.
Q. Yes. And you advise shipowners, investors and financial institutions on the development and execution of effective investment, chartering and risk management strategies.
Now, for in -- for shipowners, the -- that's the existing shipping lines; correct?
A. I don't understand your question, sir.
Q. Shipowners are -- what do you mean by "shipowners"?
A. Well, individuals or companies that own ships.
Q. So they would be normally categorized as shipping lines?
A. Not necessarily, no. No. They would be characterized as shipowners.
Q. Shipowners, okay.
Investors are investors in the shipping industry, or potential investors?
A. Investors span --
investors in shipping, they invest in many different aspects of the shipping industry, from ships to, to, shipping services, to the companies themselves that own the ships. So there are a wide range of ways to invest in shipping. They...
could invest in securitized debt that originated
against loans collateralized by ships.

Q. Under the heading
"Experience" a little bit below, down the page,
under "cycle management", what is cycle
management?

A. The shipping industry is
characterized by sharp cycles. Rates are high and
then rates are low, and then rates hopefully rise
again. They -- broadly, that's the cycle in the
shipping business. The shipping, the success or
failure of shipping investments typically is
driven by the timing in the cycle. If you buy a
ship at a low point in the cycle and sell it at a
high point in the cycle, you can make a lot of
money. Indeed, that's where great fortunes are
made in shipping. Buying at a high point in the
cycle and selling at a low point is a way to lose
a lot of money.

And it's those capital gains
components, cyclical components of the financial
performance which are generally the difference
between success and failure as a shipping investor
in the business. And it's one of our roles is to
help identify the timing and magnitude of cycles

clients timing-critical decision tools to assist
them in engaging in the exercise and analysis of
whether time A is a good time to buy a ship or a
bad time to buy a ship; is that part of what you
do? So they get the timing right?

A. We help our clients
evaluate the market cycles and the entryway, if
you will, or the type of ship or the contract that
they choose to enter those cycles and understand
their financial performance in those cycles.

What a specific investor or
charter or other player in the market does depends
on what they're interested in. If they need a
ship to move aggregates from A to B for 50 years,
they will have a different perspective from
someone who might want to buy into what is
perceived to be a cyclicly depressed market, so
they will have different attitudes towards the
opportunities.

Q. So the question of the
timing of the purchase of either a ship or of
shipping services can very much depend on the
flexibility around the timing of the purchase of a
ship; isn't that correct?

A. Again, there's, there's

in the market and, related to that, what might be
the best type of ship or alternative financing
mechanism that would give an investor access to
those -- the financial gains from those market
cycles.

Q. So, as I understand it,
the timing of the purchase of a ship can be
critical to whether or not you make money or lose
money on the purchase of that ship; is that fair?

A. The timing is often a
critical element. The key, though, again, there
are, if you think about the various tools
available to an owner or an investor, timing is
one critical tool. The extent to which employment
is available or confirmed for a ship is another
alternative -- is a related alternative. If you
buy a ship, a very expensive ship, charter it out
long term, then there's, there may be relatively
low risk even if the market falls.

So you have to think about
shipping risk as in various dimensions, the
timing, the employment, the degree of financing
associated with a project, they all contribute to
risk in different ways.

Q. And you provide to

several dimensions of shipping risk in financial
performance. The timing of an investment is one,
the employment of the ship is -- can mitigate that
risk or not, and the extent of the financing. So
timing is one important part of several factors
which determine the overall performance, and it's
getting that whole package right which is one of
our, one of the things that we try to help our
customers with.

Q. And you try to help them
with timing-critical shipping investments; that's
correct?

A. That's correct.

Q. I have read through
your -- the first page and the top of the second
page of your CV, and I think I have seen the word
"risk" either six or seven times in that. It
looks to be a significant part of what you have
done and what you do. Analyzing, assessing,
advising on, developing models for, all of those
things around reducing risk, managing risk; is
that fair?

A. With risk comes reward.
The reason many of our clients are interested in
shipping is that they see that there is an
1. opportunity to make substantial gains, and so they
2. seek those opportunities. At the same time, they
3. may take risk, they do take risk associated with
4. that, and managing that risk is critical.

5. In many of our conversations
6. with our clients, we find that it's important to
7. challenge our clients' assessment of risk and the
8. risk profile because it may -- they may sometimes
9. perceive things as more certain than they actually
10. are.

Q. And you're there to
11. identify the uncertainties and the risks
12. associated with a particular investment; correct,
13. at least --

A. As I say, the risks comes
14. with upsides, and so our job is to help evaluate
15. the upside potential as well as the uncertainty
16. around that, both in the markets and in the
17. financial performance of the markets.

Q. On page 45 of your CV, if
18. you go down to -- from the "Investment and
19. Restructuring" to "Professional Affiliations", I
20. see that you have been an expert witness before.
21. You have got where you refer to "Management", and
22. it appears from your CV that you are, your only
23. management experience is, in fact, the founder and
24. sponsor with Peter Lorange of the Investment and
25. Risk Management in Shipping Program for management
26. and development; is that right?

A. I spend a fair amount of
27. my time, sir, managing Marsoft and its efforts. I
28. may have not fully expanded on those, but I find
29. managing Marsoft to be a time-consuming part of my
30. time. But Peter Lorange and I are very proud to
31. have built this investment risk management program
32. which we have developed and delivered in
33. Switzerland for many years. And Peter Lorange and
34. I continue to have a strong professional
35. relationship.

Q. The models you developed
36. over the years include probability of default
37. model and loss given default model; is that right?

A. The output of these
38. models is what is known in the banking industry as
39. the probability of default and loss given default,
40. yes.

Q. So you are --
41. A. Excuse me, sir, as it
42. relates to shipping loans. I didn't mean to
43. suggest that it relates to all sorts of debt.

Q. And I understand that you
44. have actually never been involved with the
45. management of a shipping company; that's correct?

A. No, sir, I have, as you
46. say, been on the boards of BHC and AC One, but I
47. have not been a line manager of a ship-owning
48. company or a charterer.

Q. Have you ever been
49. employed in any capacity by a ship-owning company?

A. All the time, sir. Our
50. business is, we have been employed, been retained.

Q. I mean employed as
51. distinct from retained. Employed in the shipping
52. company.

A. No, we have been retained
53. by many shipowners and continue to be retained by
54. many shipowners. I am not a full-time employee of
55. a ship-owning -- nor a part-time employee of a
56. ship-owning company.

Q. You have never been a
57. full-time or part-time employee of a shipping
58. company; that's correct?

A. That's correct, sir.
Q. We can have a short discussion about that.

A. Yes, and I appreciate the time.

Shipping is in a category of volatility that is associated with office buildings, residential real estate.

Q. I am just talking about the shipping industry.

A. So it's in a high risk, high volatility segment of the world, and it has a relatively high level of bankruptcies commensurate with that style of business.

Q. So it is known in the shipping industry that shipping lines, even very large shipping lines, can go bankrupt, become insolvent, fail to meet obligations; that's right?

A. Shipowners may become insolvent, liner companies may become insolvent, yes.

Q. Any number of factors could contribute to the failure of a shipping line, shipowners, any segment of the shipping industry, and some of those factors, I am going to suggest to you, could be, for example, overexpansion?

A. There are a number of factors which contribute to the financial performance of a shipping company. It may -- there are a number of factors which may contribute to the performance of a shipping company.

Q. And one factor leading to potential insolvency could be overexpansion at the wrong time; would you agree with that?

A. It is certainly a risk in the shipping industry if an owner decides to build or buy a lot of ships at the wrong time or even one ship, one expensive ship at the wrong time, then it can cause financial difficulty, yes.

Q. So you buy one ship which is a very big capital investment, you buy it at the wrong time, it can lead to serious financial problems for entities involved in the shipping industry; correct?

A. Again, sir, there are multiple dimensions of this. It is possible one ship, highly leveraged, bought at the wrong time can be a very risky investment. One ship with little leverage with long-term employment can be a very secure investment.

I think it's, it's critical to look at all of these factors in judging the financial performance of a shipping investment.

No shipowner thinks of a single ship, sorry, only very specialized kinds of shipowners think of a single ship investment highly leveraged, et cetera, et cetera. Most shipowners will think of themselves as running a business and having a portfolio concern rather than a -- or a portfolio strategy, excuse me, rather than a single ship strategy.

Q. So using a portfolio strategy of multiple ships within a portfolio, the, that objective is to amortize the risk of that shipping fleet over the portfolio so that you get ups and downs and you average them out; is that a fair description?

A. A large fleet can provide the opportunity to diversify across multiple markets. It can provide the opportunity to be -- have multiple age profiles. It can provide a number of advantages for an owner.

Q. And is that diversification of the portfolio that can be one of those advantages; would you agree with that?

A. The extent of diversification in the shipping industry is -- or the potential for diversification as a risk mitigation tool in the shipping industry has been demonstrated not to be great, as we saw in the most recent crisis. All the markets crashed at the same time. Diversification across ship types offered very little hedge to that cycle. And changes in the sourcing of commodities, et cetera, can change the structure of the industry and change correlations dramatically, as we have seen over the past several years.

So, yes, diversification across ship types and ages may provide a degree of security, that's -- may provide a degree of risk mitigation. You'd have to take a look specifically at the, at what is being diversified and how to assess the potential gains from that.

Q. Got it. So there can be risk -- diversification of portfolio can be a positive factor in reducing risk for, say, a
shipping line, but it's not a guarantee that the
bottom won't fall out of the market and the
compny goes bankrupt; is that a fair summary?
A. Diversification offers
potential benefits. In itself, there is no
guarantee in the shipping business, or, I believe,
in any other business, that risk will be avoided.
Q. Are you familiar with the
bankruptcy of the Hanjin shipping lines?
A. Yes, sir.
Q. And was that the eighth
largest shipping line in the world?
A. It was the top ten, sir.
I cannot honestly remember whether or not it was
the eighth. It was certainly one of the largest.
Hanjin is a big Korean liner company.

PRESIDING ARBITRATOR:

THE WITNESS: Yes, exactly, it
was in the container business.
BY MR. NASH:
Q. And it went bankrupt. It
was unable to meet its obligations, and there were
ships stranded, Hanjin ships were stranded around
the world?

A. Hanjin ships and cargo on
those ships were stranded around the world. The
Hanjin -- the withdrawal by the Korean government
of its support for Hanjin was a traumatic event
for shipping and, of course, for Hanjin, but
Hanjin had enjoyed long-term support from the
Korean government so that it endured even weak
times in shipping. The Korean government decided
it was going to focus its support elsewhere, and
Hanjin was quickly eliminated from the scene.
Q. It went under. Right.
Now, have you ever negotiated
contracts, I don't see it on your CV, for the
shipment of goods from the Canadian Maritimes to
New York City?
A. I have never negotiated
contracts for the shipment of goods from the
Canadian Maritimes to New York City, no.
Q. Have you ever negotiated
contracts for the shipment of goods from Canada to
anywhere on the East Coast in the United States?
A. As an advisor --
Q. As a negotiator --
A. I personally have not,
have never been an employee of a shipping company

Q. You were instructed to
conduct your analysis in this case from the
vantage point of October 22nd, 2007; that's
correct?
A. Yes, the date of the
breach, yes.
Q. Do you know the date in
this case when the federal Minister of Environment
denied approval for the quarry?
A. I am not familiar with
that date, no, sir.
Q. You performed your
analysis in this case on the basis of information,
information available to you as of October 22nd,
2007; that's correct?
A. Yes. We relied on
information available to us as --
Q. As of that date?
A. Let me be more precise,
sir.
We were -- when we were
retained to provide this analysis, we were
provided a range of information, all of which
dates prior to November -- excuse me,
October 2007. We have, of course, as a matter of
Q. Did you know that when you wrote your opinion?
A. It was clear as we read the EIS that it was early thoughts about the project. It was -- in some areas, it appeared to be inconsistent or not fully thought through, so certainly our interpretation of it is that it was at an early stage in the project.
Q. An early stage, conceptual stage of the development of the project; correct?
A. Well, conceptual, I mean, they seemed to have a very good idea about what equipment they would need, what stone they expected to pull out and that they needed a ship to run it. There were lots of details that you need to drill down in to write a real business plan, but I think the concepts were quite clear.
Q. You say in the second-to-last line:
as read
Correct?
A. That is my statement, sir.
Q. And that was what you understood you were doing?
A. And that was my understanding at the time.
Q. And your opinion was developed and was based on that assumption; that's correct?
A. That was the, yeah, the -- yes, we used that, that was one of the assumptions that we used, as well as there were other descriptions and other factors that
We also looked at, of course, the Morrison report and took that into perspective as -- took information there.

Q. Well, just let’s hold on for a moment.

A. Sure.

Q. You are saying that we were instructed to do the analysis as of October 2007 and to use the documentation available at that time --

A. To be clear, we were instructed to do the analysis as of October 2007 and to use the documentation available at that time --

Q. Right. That’s just my point, yes.

A. -- to drive our analysis.

Q. Right. So the assumptions and the only available information that you had at that time were based upon

A. As we initiated the project, as I said, we had --

Q. Can you just answer my question --

A. Sorry, excuse me.

Q. -- first, and then provide your explanation after that.

Is that a yes or a no?

A. Could you repeat your question, sir?

Q. Your assumption and the analysis was driven by the fact which you assumed; is that correct?

A. That is correct, that is one of the assumptions in our analysis.

Q. Thank you.

If you go to page 27, paragraph 87, in that same tab, Tab 1.

A. What was the paragraph number?

Q. Paragraph 87.

A. Yes.

Q. You say: 

Let’s just stop there for a moment.
Q. Were you aware that Auld's Cove was not in Bay of Fundy when you wrote your second report?
A. Yes, sir, I had the opportunity to take a -- to look at the map and learn a little bit more about the geography of Canada and the location of these terminals.

Q. When you wrote your second report, you assumed that Auld's Cove was located in Bay of Fundy; that's correct? And you state that in your report; do you recall that?
A. Excuse me?
Q. Do you recall stating in your report that Auld's Cove was located in Bay of Fundy?
A. I think we may -- if that's what we said in the report, that's what we said, yes.
Q. And that was a mistake; wasn't it?
A. That was a mischaracterization of where Auld's Cove is located.

Q. Yes. And that would have an effect on the -- could have an effect on the speed with which a ship could travel from its location, one in Bay of Fundy, as distinct from the open ocean in the Atlantic Ocean?
A. When we took a look at the specific contracts and we analyzed the, we took a look at the differences in location. And I apologize for the misstatement of the location of Auld's Cove, but our analysis of the observed the speeds as calculated by the Coast Guard. We understood that they were -- that they -- that they had mapped the origin and destination correctly and the distances correctly, and satisfied ourselves and were satisfied that the Coast Guard was a reliable source of this information.

Q. Did you understand the actual location of the Auld's Cove Quarry in relation to the open Atlantic Ocean, did you look at that directly yourself?
A. Did I specifically look at the location of the quarry versus the Atlantic Ocean?
Q. Yes.
A. I have --
Q. You didn't?
A. Sir, I will tell you what I did. I did a Google Map and I found a little big red dot that showed where it was, and I zoomed into it a few times. It's a -- I did capture, I think, what is the sense of it, but I must say, at that, I Google Mapped it.

Q. And you based your assessment of what the ship travelling from the
Whites Point Quarry to New York City based upon your understanding of the ship travelling from Auld's Cove to New York City; that's correct?

A. To be precise, we asked for data from the Canadian Coast Guard on voyages of speed and asked the Canadian Coast Guard to identify the starting point and the ending point of those voyages. And so, in the table that we got from the Canadian Coast Guard, it showed us origin, destination, and average speed over that track, and that's what we relied upon.

Q. And you used that average speed over the voyage and applied it to a voyage of a same or similar ship from Whites Point to New York City; correct?

A. We believe that that -- that the performance of over that voyage from Auld's Cove is representative of its performance of what it would achieve from Whites Point to New York.

Q. You believe that?

A. I am sorry, yes. That was a question.

Q. Could you turn to page 21 of your first report, please, at Tab 1. At the bottom paragraph, Number 3: Do you see that?

A. Yes.

Q. I am sorry, I lost the context a bit here. Could you explain?

A. I am sorry, I lost the context a bit here. Could you explain?

Q. Looking at the line -- I will repeat the words:

[Thus, transcription of a legal exchange]
Q. So if you go to Tab 5 of the binder in front of you -- sorry, Tab 6.
A. Tab 6?
Q. Yes. The reply witness of Paul Buxton. And if you go to page 11, and this is Mr. Buxton's reply report, or reply statement, dated August 18th, 2011. It says at paragraph 41 on page 11:

step back. What part of this paragraph did you wonder if I ignored, if we ignored?
Q. Well, what Mr. Buxton is doing here is that's correct?
A. As far as I can read this paragraph, it says that Buxton -- excuse me, Mr. Buxton -- Mr. Paul Buxton

A. We -- the statement was available to us prior to the date that we delivered the second report, yes.
Q. And you ignored that evidence, didn't you?
A. No, sir. We didn't ignore the -- let me as read]

Now, you had that statement before you wrote your second report; isn't that right?
A. We -- the statement was available to us prior to the date that we delivered the second report, yes.
Q. And you ignored that evidence, didn't you?
A. No, sir. We didn't ignore the -- let me
Q. Right. So the baseline for the project was based on what you understand to be the best available information as of October 22nd, 2007, and you didn't take into account any subsequent knowledge after that date; that's correct?
A. The EIS is sometimes incomplete, sometimes required some interpretation, amazingly specific and consistent throughout, reference to.
Q. I understand that, and that's what you stayed with; that's correct?
A. Excuse me?
Q. That's what you stayed with, because that was the information available, as you understood it, as of October 22nd, 2007; that's correct?
Q. I can. Page 17 of your second report, Tab 2.
A. Tab 2?
Q. Yes.
A. What page on Tab 2?
Q. Page 17. You see that chart, Figure 5?
A. Perhaps I have not located things correctly, sir. On Tab 2 is a Figure 5.
Q. Figure 5, page 17.
A. Figure 5 on page 17, is that what we are looking at? Yes.
Q. Yes. Figure 5, your Figure 5, do you see that?
A. Yes, sir.
Q. Yes. And do you see that
A. Yes.
Q.
Q. Now, if we can turn to paragraph 34 of your first report.
A. Page 34?
Q. Yes. Or paragraph 34.
A. Paragraph 34, sorry.
Q. Right. So Mr. Nash asked you about your views on Mr. Rosen's treatment of freight rates and suggested to you that you may.
A. There's no reference to the Bay of Fundy in this paragraph.
Q. Now, if we can turn to paragraph 34 of your first report.
A. Page 34?
Q. Yes. Or paragraph 34.
A. Paragraph 34, sorry.
Q. Right. So Mr. Nash asked you about your views on Mr. Rosen's treatment of freight rates and suggested to you that you may.
A. There's no reference to the Bay of Fundy in this paragraph.
Q. Now, if we can turn to paragraph 34 of your first report.
A. Page 34?
Q. Yes. Or paragraph 34.
A. Paragraph 34, sorry.
Q. Right. So Mr. Nash asked you about your views on Mr. Rosen's treatment of freight rates and suggested to you that you may.
A. There's no reference to the Bay of Fundy in this paragraph.
Q. Now, if we can turn to paragraph 34 of your first report.
A. Page 34?
Q. Yes. Or paragraph 34.
A. Paragraph 34, sorry.
Q. Right. So Mr. Nash asked you about your views on Mr. Rosen's treatment of freight rates and suggested to you that you may.
A. There's no reference to the Bay of Fundy in this paragraph.
Q. Now, if we can turn to paragraph 34 of your first report.
A. Page 34?
Q. Yes. Or paragraph 34.
A. Paragraph 34, sorry.
Q. Right. So Mr. Nash asked you about your views on Mr. Rosen's treatment of freight rates and suggested to you that you may.
A. There's no reference to the Bay of Fundy in this paragraph.
It was you found mysterious the term, as I do also. PROFESSOR SCHWARTZ: Oh, okay. THE WITNESS: It was in reference to. It was an odd -- PROFESSOR SCHWARTZ: Oh, okay. THE WITNESS: It was not how someone -- it was not how I would have described anything. I would have used different -- I didn't understand exactly what that description meant. PROFESSOR SCHWARTZ: Okay. Thanks for clarifying that.

The second question: You are advising clients about risks in the shipping industry. What sort of plus or minuses -- what sort of standard deviations do you provide to clients when you are advising them? Are you able to say, "Yeah. This is going to work out within plus or minus 5 per cent with one standard deviation or" -- is that something you typically do in the business? How does that work?

THE WITNESS: Professor Schwartz, we spend a lot of time talking about

standard deviations and how to measure (a) the uncertainty around a forecast, and we measure it both in a statistical sense, using the extent to which our most likely scenarios deviate from actual or -- and how frequently actuals deviate from our extreme high and low cases. So we try to capture confidence intervals from a scenario perspective as well as a risk perspective -- as well as, excuse me, a statistical perspective.

And translating that characterization of the uncertainty to the outlook into the uncertainty of the financial performance is another key step. And for the banking sector risk, as I mentioned earlier, it's typically thought of in two -- at least two dimensions, the probability that you will fail to have sufficient cash flow to meet your debt obligations and the likelihood in that case that the value of the ship will be below the debt outstanding. So it's the translation all the way from those scenarios of future market development, the uncertainty around the scenarios, then down to the likely or to the possibility of default and the cost of that default. All of those are statistically characterized.
-- feel free to tell me you can't give me a meaningful answer to this, but if you are looking over shipping costs over 50 years and a client comes to you and says, "What are my shipping costs over the next 50 years on this route?" what sort of band of standard deviation around certainty am I looking at here? Like, I'm able to say, "Okay. I've got this within 25 per cent, 50 per cent". Are you able to give me any rough guidance as to what kind of precise science or guesswork is involved here?

THE WITNESS: First, to characterize the historical variation in the market, in the dry bulk market we have recently come out of one of the very weakest points since -- in our memory, where Panamax ships, Handymax ships were all earning about the same thing, and that was about $5,000 a day. In 2008, I believe in June of 2008, those ships were earning $65,000 a day -- excuse me, 50 to 60,000 dollars a day. That's the historical range. That's the maximum we have to deal with. Typically, the markets will not show that much variation. They might show, in our more recent analysis, plus or minus 10 to 15,000 dollars a day.

Our -- so that's the actual historical variation. Forecasting where the markets go is, as you can imagine, a humbling exercise. We measure our precision both in the sense that the extent to which the actual markets deviate from our most likely forecasts, the next quarter, six months, nine environments hence and also to the extent to which they deviate from the range that we have indicated as a plausible range on the basis of our scenario analysis. And the analysis going out two years ahead is that -- sorry, one year ahead is that we have an 80 per cent success record in finding those turning points in the market when they flip from declining to rising, but that, in terms of the point estimates of the charter rates -- and I'm sorry for all this jargon I'll throw at you, but about two-thirds of the time rates are within 30 per cent of our base case forecast.

PROFESSOR SCHWARTZ: Thank you very much.

PRESIDING ARBITRATOR: A couple of questions.

First of all, could you explain or clarify the meaning of these terms, Panamax and Handymax? Especially -- I would have thought that they do not -- there is no necessary correlation between tonnage and the max, whatever, Panama Suez, whatever, because it's more a matter of the draft and the size, whether you can pass a canal or not. So could you clarify that, especially what Handymax means?

And the second question would be: I have the impression that the shipping part of our -- the case here, the shipping strikes me as a relatively cozy business.

THE WITNESS: Let's start with the easier one of those two questions, which is what the heck is a Handymax.

This is a term of art that the industry artfully uses over time. A Handymax in the good old days was worth 48,000 -- sorry, it was 48,000 dead weight tons. I have no idea why that was regarded as handy, but it has gear on it --

PRESIDING ARBITRATOR: A few hours ago, one participant -- I forgot who it was -- said Handymax means a ship which has all the loading gear on board and doesn't -- which is actually handy to load and unload; is that correct?

THE WITNESS: And, sir, you are absolutely right. There is a size component, and there is a gearing component. So typically ships less than, nowadays, 64,000 dead weight ton, which is called an Ultramax, just to confuse things, they have gear on them, and that gearing is -- makes it easier to load and discharge at ports which don't have cranes. And so, in that sense, they facilitate trade to areas which have less well-developed port infrastructure.

PRESIDING ARBITRATOR: They are called Handymax in the jargon?

THE WITNESS: And, again, the jargon has gone from Handymax to Supramax to Ultramax, sir. So the jargon of the trade is generally Handymax is less than 50,000 dead weight
ton. Supra is probably less than 60, and ultra is
less than 70 dead weight tons, and they all have
gear on them. And they are all, you know, as you
can, imagine wonderful ships.

A Panamax is a ship that
starts -- again, depends how old you are, but
think of it now as a ship larger than 60,000 dead
weight ton, now typically averaging about 85,000
dead weight ton, and it's got no gear, no cranes
on it. So it relies on cranes at the port or
terminal to load or discharge. So you have got a
bigger ship. It -- Panamax used to be defined by
what was the biggest ship that could go through
the Panama Canal. Then they dug a deeper Panama
Canal, and so that term of the trade is obsolete
is the fact. There's a whole new class of ships
that will fill that gap.

PRESIDING ARBITRATOR:

THE WITNESS: Yes. Well,
that's a very interesting question, sir.

hundred ships just lying there, waiting for some
business to do. And the same is true even in The
Hague. You see in Scheveningen, you see some
ships lying out there for weeks and weeks. So
they cannot just lie there in order to save a port
going in.

Compared to that, this seems
to be a pretty good business, and risks, the risks
involved seem to be minimal.

THE WITNESS:

that trade within the United States is governed by
the Jones Act, and the Jones Act is a highly
restrictive and very costly trade to be engaged in. If you can start in Canada, you are no longer
subject to the Jones Act. And if you can match
your cargo flows down from Canada up from the US
Gulf, say, or from Latin America, then you can --
PRESIDING ARBITRATOR: Could
you, just for the record, in a few words, explain
what "Jones Act" means?

THE WITNESS: Yes. The Jones
Act restricts the carriage of goods between US
US built means they are generally three times the
cost of something you would build in Korea. US
operated means you are three or four times the
cost, daily cost of the crew, than international
flags. So it's a very costly operation. It is
one -- we have heard complaints about that in the
recent disasters in Puerto Rico, but limited trade
there. So when you start with cargo originating
outside the United States or you are delivering
cargo that originates in the United States to,
say, Canada, you are not subject to those Jones
Act restrictions.
PRESIDING ARBITRATOR: Thank you very much.

PROFESSOR SCHWARTZ: If I could just ask you to -- I find your earlier answers very helpful, but if you could just give me a bit more precision.

You mentioned that about two-thirds of the time your projections were within 30 per cent of the base case forecast?

THE WITNESS: Yes, sir.

PROFESSOR SCHWARTZ: Over what period of time are those forecasts?

THE WITNESS: Well, we will have a forecast -- our typical forecasts range from three months out to five years out. So every quarter we will update our five-year outlook. So that confidence interval I gave you was at, I think, six months.

PROFESSOR SCHWARTZ: So are you ever in the business of giving 10-, 20-, 50-year forecasts.

THE WITNESS: Well, this was an exercise in such a forecast, if you will, and

so you do it the best you can. You take a look at what you know of the key drivers, and you say, "This is how they look. This is how you build out an infrastructure to serve the needs". But there's certainly some intrinsic uncertainty to that style of calculation.

PROFESSOR SCHWARTZ: I will just pursue that a bit further. I don't have an intuition about this. If it's 50 years, does that mean the uncertainty is less because the ups and downs average it out, or is it just the sheer accumulation of time that adds more to the uncertainty band?

THE WITNESS: Over a 50-year span, we tend to think of technology as a huge disruptor, and industries that plan for 50 years, for example, that were planning to export crude oil from Saudi Arabia to the United States find that market goes away, and so whereas we can do a -- we can run a spreadsheet with the best of them and roll out numbers for 50 years. There's always a discussion about what you do when something changes, and it's that discussion which, frankly, is sometimes the most useful thing when -- that we do for our clients.

discussed, because if we are -- we now past -- as the tribunal will recall, from Procedural Order Number 25, witnesses were to make themselves available for half a day before and half a day after. Mr. Power has a -- we are now past that for Mr. Power. He has a flight and another commitment. He has a flight at noon and another commitment that he cannot miss. So I would suggest that, if we are not beginning very, very early, that it would be more advisable to do him tonight.

PRESIDING ARBITRATOR: Would it make a difference for him if he had to stay another -- I assume that you are referring that he would have to stay another night. But he would have to stay another night anyway, right, because, as far as I am concerned, tonight, I really need to get out of here at seven sharp. This is the only night during the entire hearing, so...

MR. SPELLISCY: Mr. Power, as I understand it, cannot stay another night, Saturday night, so he is on the noon flight back to Halifax tomorrow. And I'm not sure. I think that the next flight is not available for him either. So essentially it means that it's either
now or it is bright and early, and he would have
to be probably on the road by, I'm guessing, you
know 10:00 a.m. or earlier, 10:00 a.m., I'm
guessing, to get to the airport.

PRESIDING ARBITRATOR: You
mean finish him at ten?

MR. SPELLISCY: He would have
to be completely finished at that point, maybe
even a little earlier, if we don't do him tonight.

PRESIDING ARBITRATOR: But
what will you do if I tell you that I really need
to leave here? Would you just say, "Well, Simma
doesn't understand what's going on anyway, so just
let's do it". Or I -- this is -- I don't mean I
seriously understand everything. This is -- what
is the situation?

MR. SPELLISCY: Let me -- give
me a minute to talk to Mr. Power --
PRESIDING ARBITRATOR: Yes.
MR. SPELLISCY: -- and we can
see what it is. As I said, Procedural Order 25
only requires half a day before and after. So he
has arranged his life accordingly, so let me check
in with him to see what --
PRESIDING ARBITRATOR: Let me
just say that I think we have reached a point
where that provision of the procedural order is
not applicable anymore. It's not our fault.

MR. SPELLISCY: I would say
that, yes, so we've made arrangements with all our
other witnesses, but witnesses, of course, do have
lives otherwise and have made commitments in light
of that procedural order. So let me check with
Mr. Power and see what his availability is.

PRESIDING ARBITRATOR: Yes,
please. Why don't we have a very short break
during six sharp.

--- Upon recess at 5:52 p.m.

--- Upon resuming at 5:59 p.m.

PRESIDING ARBITRATOR: So what
is the situation of Mr. Power?

MR. SPELLISCY: So he does
have -- his flight is at noon tomorrow. When he
was changing it already once from late tonight to
tomorrow to make himself further available, the
fights later in the afternoon were booked. And so
that means, to get out to Pearson from here, I
think that he probably needs to leave here by the
latest at -- people will know better, but I'm
saying probably 9:45 in the morning.

MR. SPELLISCY: I believe his
ticket is on Air Canada out of Pearson.
PRESIDING ARBITRATOR: You
mean he would have to leave here, or be in the
taxi to the airport at 9:45?

MR. SPELLISCY: Yes.
PRESIDING ARBITRATOR: So we
would have today. Tonight, we would have quite a
bit of time left, and tomorrow, if it's not -- I
mean, I don't have a problem starting even at
eight.

MR. SPELLISCY: I have been
told by Mr. Power and Mr. Ward that we can use
quarry hours and start at 5:00 a.m., but that
seems perhaps a little excessive. We could have
an early morning start, perhaps. It depends on
Mr. Nash and how much time he thinks he needs.
PRESIDING ARBITRATOR:
Mr. Nash, do you have an estimate?

MR. NASH: If we start at
8:30, he will be out of here with time to spare.
PRESIDING ARBITRATOR: So
including the time available tonight and then
tomorrow.

MR. NASH: We don't need any
tonight. If we start at 8:30 -- if we start at
8:30 tomorrow, we don't need tonight. He will be
finished with plenty of time.
PRESIDING ARBITRATOR:
Mr. Nash, for a number -- in a number of cases
now, we have had -- or at least I understood you
as indicating we are fine; we are going to have
these two; we are going to finish, and then it
took much longer. So are you really confident
that -- I mean, it's -- in a way, it's in your
hands; right?

MR. NASH: I am confident. If
we start at 8:30, he'll be easily out of here by
9:45 so far as I'm concerned.

MR. SPELLISCY: From my
perspective, as the tribunal has seen from the
letters, Mr. Power's involvement is limited here.
I don't expect to have much, as well. So if we
can tell him -- I mean, he will need to leave at
9:45, and so that will be a hard deadline.

MR. NASH: That will not be a
problem.
PRESIDING ARBITRATOR: Okay.
If that is no problem, then I would say that we
der this for tonight, and tomorrow we really make
every effort to be there, as already the case. We
are all here at 8:30, and Mr. Power can be
confident that he will catch his plane. Okay. Is
that --

MR. SPELLISCY: This sounds
fine. I will get our evening time check, so that
we know where we are, from Dr. Pulkowski.

DR. PULKOWSKI: I suspected
you would ask that, Mr. Spelliscy. The claimants
have used 14 hours and 51 minutes, and the
respondent has used 14 hours and 33 minutes.

PRESIDING ARBITRATOR: That
means, too, Mr. Nash, how you want to spend the
rest of your time and spend time tomorrow a bit
taking from either the three hours or the other
three hours.

MR. NASH: We fully
understand.

PRESIDING ARBITRATOR: Thank
you. Okay. Thank you very much, also, for this
understanding. And then we will see each other
again at 8:30 sharp tomorrow. Thank you.

--- Whereupon proceedings adjourned at 6:02 p.m.,
to be resumed on Saturday, February 24, 2018 at
8:30 a.m.
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(613) 564-2727

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