

Third-Party Information Liability Disclaimer

Some of the information on this Web page has been provided by external sources. The Government of Canada is not responsible for the accuracy, reliability or currency of the information supplied by external sources. Users wishing to rely upon this information should consult directly with the source of the information. Content provided by external sources is not subject to official languages, privacy and accessibility requirements.

Désistement de responsabilité concernant l'information provenant de tiers

Une partie des informations de cette page Web ont été fournies par des sources externes. Le gouvernement du Canada n'assume aucune responsabilité concernant la précision, l'actualité ou la fiabilité des informations fournies par les sources externes. Les utilisateurs qui désirent employer cette information devraient consulter directement la source des informations. Le contenu fourni par les sources externes n'est pas assujéti aux exigences sur les langues officielles, la protection des renseignements personnels et l'accessibilité.

00001

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

4 BETWEEN:

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

Claimants

- and -

7 GOVERNMENT OF CANADA

Respondent

8 ARBITRATION HELD BEFORE
9 JUDGE BRUNO SIMMA (PRESIDING ARBITRATOR),
10 PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ
11 held at ASAP Reporting Services Inc.,
12 Bay Adelaide Centre, 333 Bay St., Suite 900,
13 Toronto, Ontario
14 on Wednesday, October 23, 2013 at 9:41 a.m.

VOLUME 2

15 COUNSEL:

16 Barry Appleton For the Claimants

17 Gregory Nash

18 Frank S Borowicz, Q.C.

19 Kyle Dickson-Smith

20 Scott Little

For the Respondent

21 Shane Spelliscy

22 Jean-François Hebert

23 Stephen Kurelek

24 Reuben East

25 Adam Douglas

Dirk Pulkowski PCA (Secretary to the Tribunal

26 Kathleen Claussen

PCA

27 Teresa Forbes

Court Reporter

28 A.S.A.P. Reporting Services Inc. © 2013

29 200 Elgin Street, Suite 1105

300 333 Bay Street, Suite 900

31 Ottawa, Ontario K2P 1L5

Toronto, Ontario M5H 2T4

32 (613) 564-2727

(416) 861-8720

00002

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(ii)

INDEX

PAGE

AFFIRMED: PAUL BUXTON, P.ENG.	3
Examination In-Chief by Mr. Nash	4
Cross-Examination by Mr. Little	10
Re-Examination by Mr. Nash	139
Questions by the Tribunal	174
Further Re-Examination by Mr. Nash	196
Further Cross-Examination by Mr. Little	198
Examination In-Chief by Mr. Nash	201
AFFIRMED: T. MURRAY RANKIN, Q.C.	203
Cross-Examination by Mr. Spelliscy	205
Cross-Examination by Mr. Kurelek	300
Questions by the Tribunal	383

00003

1 Toronto, Ontario

2 --- Upon resuming on Wednesday, October 23, 2013

3 at 9:41 a.m.

4 PRESIDING ARBITRATOR: Good
5 morning, everybody. I think we are ready. Sorry.
6 Okay, except me.

7 Good morning, everybody. It looks
8 like we are all ready. Good morning -- we will
9 continue with the examination. Good morning,
10 Mr. Buxton.

11 MR. BUXTON: Good morning.

12 PRESIDING ARBITRATOR: Mr. Buxton,
13 you should find before you a form, a declaration.

14 MR. BUXTON: Yes.

15 PRESIDING ARBITRATOR: Could you
16 please read that out.

17 THE WITNESS: I solemnly declare
18 upon my honour and conscience that I will speak the
19 truth, the whole truth and nothing but the truth.

20 AFFIRMED: PAUL BUXTON, P.ENG.

21 PRESIDING ARBITRATOR: Thank you.
22 And you have also signed an assurance that you have
23 not listened to the live stream video.

24 THE WITNESS: That is correct.

25 PRESIDING ARBITRATOR: You did not

00004

1 do so?

2 THE WITNESS: I did not.

3 PRESIDING ARBITRATOR: Thank you,
4 okay. So I will give the floor to Mr. Nash.

5 MR. NASH: Thank you,
6 Mr. President.

7 EXAMINATION IN-CHIEF BY MR. NASH:

8 Q. Mr. Buxton, I would just like
9 to ask you a few questions about your personal
10 background. You're a professional engineer?

11 A. Yes, I am.

12 Q. How long have you been a
13 professional engineer?

14 A. I've been a professional
15 engineer for well over 40 years.

16 Q. And you have worked
17 continuously as a professional engineer since that
18 time?

19 A. Pretty much. One year out in
20 1970, but other than that, as a professional
21 engineer.

22 Q. And you still work as a
23 professional engineer full time in your own
24 practice?

25 A. Yes, I do.

00005

1 Q. Where do you live?

2 A. I live in a little village
3 called Deep Brook in Nova Scotia. And to orient
4 you, it is between the Town of Digby and the Town
5 of Annapolis Royal.

6 This would be about 50 kilometres
7 from the project in question.

8 Q. And how far from where you
9 live is Annapolis Royal?

10 A. Annapolis Royal is about 20
11 kilometres; Digby, about 14, 15 kilometres in the
12 other direction.

13 Q. And how long have you lived
14 in the area of Digby, Annapolis Royal and Deep
15 Brook?

16 A. I have lived in the area
17 since 1973. In the specific location I am now, I
18 have been for over 20 years. Prior to that, 20
19 years on the other side of the Annapolis Basin, so
20 40 years in the immediate area.

21 Q. And have you worked on
22 projects as a professional engineer requiring
23 government approvals?

24 A. Yes, very much so. In the
25 past 30 or 40 years, I've worked for three levels

00006

1 of government, municipal, provincial, and federal
2 governments, both as a consultant and occasionally
3 on a contract basis. And many of those projects
4 have required approvals of one sort or another.

5 Q. Have you ever worked on
6 projects requiring the approval of more than one
7 level of government?

8 A. Yes. A number of projects,
9 in fact, involve whether it is Nova Scotia
10 environment or fisheries or Environment Canada,
11 yes.

12 Q. Have you worked on any
13 heritage-related projects?

14 A. Yes, I have. In fact, I
15 would say that a vast majority of my work,
16 certainly over the last, say, 35 years, has been in
17 the cultural heritage, environmental spheres.

18 In the early 1980s, I was engaged
19 to restore the Town of Annapolis Royal, which is
20 actually Canada's birth place.

21 It commenced as Port Royal in
22 1605, so even prior to Quebec, and Annapolis Royal
23 was in fact the capital of Nova Scotia until 1749,
24 but it had fallen on hard times and it was
25 economically depressed. The buildings were

00007

1 beginning to go, and there were some very important
2 buildings in the town. I was engaged to both find
3 the money and to bring the town back to its former
4 glory.

5 And this involved projects as
6 diverse as buying an old theatre and restoring it
7 to actually a live theatre, as well as a cinema,
8 and in fact operating it. My organization operated
9 it for four years.

10 The design and construction of the
11 Annapolis Royal historic gardens, which are still
12 open and doing very well, they are in the
13 thirtieth-odd year now, and the restoration of the
14 two oldest buildings in English Canada, one of them
15 built in 1710 and one of them built in 1712.

16 Q. Have you worked on projects
17 during the course of your career requiring
18 environmental assessments?

19 A. Yes. In fact, even tourism
20 projects occasionally get into environmental
21 assessment processes. I was responsible as project
22 manager for the design and construction of the
23 Upper Clements theme park, which is an historic
24 theme park, if you like. Although it has rides, it
25 has a historic theme, and that required an

00008

1 environmental assessment of the property and, of
2 course, dealing with the various elements of
3 environmental material on the site, human waste, et
4 cetera.

5 Q. Generally speaking, do you
6 work on projects requiring environmental
7 assessment?

8 A. Really, it depends on the
9 time period. Certainly for the last two years, for
10 example, I think almost exclusively I have worked
11 on projects requiring environmental assessment,
12 because the Department of Agriculture in Nova
13 Scotia brought in new regulations under the Fur
14 Industry Act, and I am one the small number of
15 accredited engineers in Nova Scotia who were
16 accredited to produce environmental farm management
17 plans for the mink industry.

18 MR. LITTLE: Excuse me, Judge
19 Simma. I hate to interject here, but direct
20 examinations are supposed to be for a brief
21 introduction of the witness and to correct any
22 statements in the witness statements, and we're
23 getting far beyond that at this point.

24 MR. NASH: I am just endeavouring
25 to give a brief introduction and an indication of

00009

1 Mr. Buxton's background, his work experience.

2 MR. LITTLE: We are getting into
3 evidence, Judge Simma, that is beyond what is in
4 Mr. Buxton's witness statement.

5 PRESIDING ARBITRATOR: Yes. So
6 would you please just come to the end.

7 MR. NASH: Yes. Yes, sir.

8 I would like to ask, though,
9 whether Mr. Buxton has had experience working on
10 projects requiring consultations with First
11 Nations.

12 MR. LITTLE: Again, Judge Simma,
13 this was not covered in Mr. Buxton's witness
14 statement.

15 PRESIDING ARBITRATOR: Mr. Nash.

16 MR. NASH: Yes, I understand.

17 BY MR. NASH:

18 Q. Could you turn, please -- you
19 should have in front of you, and, if you don't, I
20 will put it in front of you -- a copy of your first
21 witness statement. This witness statement you
22 signed on July 20th, 2011.

23 I would like to -- you also signed
24 another witness statement, a supplementary witness
25 statement. Could you advise the Tribunal as to

00010

1 whether or not there are any corrections in your
2 witness statements.

3 A. Yes. Paragraph 14 has a
4 couple of words missing.

5 PRESIDING ARBITRATOR: The first?
6 In the first witness statement?

7 MR. BUXTON: The first one. This
8 is July 20th, 2011.

9 Paragraph 14 has a few words
10 missing. What it should say is the first meeting
11 after the referral between Nova Stone and various
12 government officials.

13 BY MR. NASH:

14 Q. And after the referral, you
15 mean after the referral of the Whites Point project
16 to the JRP?

17 A. Yes, yes.

18 Q. Thank you. Those are my
19 questions.

20 PRESIDING ARBITRATOR: Thank you,
21 Mr. Nash. I will give the floor to -- is it
22 Mr. Little? Thank you. To Mr. Little.

23 CROSS-EXAMINATION BY MR. LITTLE:

24 Q. Good morning, Mr. Buxton.

25 A. Good morning.

00011

1 Q. Mr. Buxton, I have handed up
2 to you a package that is called a core bundle, and
3 it contains the documents that I am going to ask
4 you questions on this morning.

5 And the documents in the core
6 bundle, they consist of your two witness
7 statements. They are the first two tabs in the
8 core bundle, and then they are followed by a series
9 of R exhibits. R exhibits are Canada's exhibits in
10 the arbitration, and then there is a selection of
11 those, and then following that there is a few C
12 exhibits, which are the claimant's exhibits. Okay?

13 So I will be referring you to
14 those throughout the course of my questions today.

15 A. Okay.

16 Q. Now, Mr. Buxton, you filed
17 one of two witness statements in this arbitration;
18 correct?

19 A. Yes, I did.

20 Q. And can you confirm that
21 those are the witness statements at -- well, if you
22 look at the first two tabs of the core bundle, we
23 will work off of that. Can you confirm those are
24 your witness statements?

25 A. Yes, I can confirm.

00012

1 Q. Okay, thank you. Mr. Buxton
2 I understand you are the project manager for Bilcon
3 of Nova Scotia; is that correct?

4 A. Yes, that is correct.

5 Q. And in my comments today, I
6 will refer to Bilcon of Nova Scotia as Bilcon.
7 Okay?

8 A. Yes, fine.

9 Q. And as the project manager of
10 Bilcon, you are responsible for overseeing the
11 business operations of the company; correct?

12 A. My duty as project manager
13 were to get this project up and running. So, yes,
14 there were business aspects of this, but that was
15 the primary function that I had as project manager.

16 Q. Okay. You have an honours
17 degree in civil engineering?

18 A. Yes, I do.

19 Q. Correct? And we have heard
20 you are an engineer by profession?

21 A. That is correct.

22 Q. All right. And we have
23 heard, as well as an engineer, you provided
24 engineering services to various clients in
25 southwest Nova Scotia; correct?

00013

1 A. That is correct.

2 Q. We have heard that you
3 provided engineering services to heritage and
4 tourism projects, like the theme park and Annapolis
5 Royal?

6 A. That is correct.

7 Q. Okay. And I also see, from
8 your witness statement, that you have managed
9 cleanup operations for oil spills and residential
10 and commercial premises; is that correct?

11 A. Yes.

12 Q. Now, you were the project
13 manager for Bilcon during the EA of the Whites
14 Point quarry and marine terminal? I think that is
15 clear.

16 A. Yes.

17 Q. And Bilcon was the proponent
18 of the Whites Point project; right?

19 A. Early on, if you go right
20 back to 2002, Nova Stone was, in fact, the
21 proponent for the 3.9 hectare quarry.

22 Q. But I understand there was a
23 corporate reorganization and that a bit later on in
24 the EA process Bilcon was the sole proponent;
25 correct?

00014

1 A. Later on in the process, yes.

2 Q. Okay?

3 A. Yes.

4 Q. We will get to that in a bit.

5 A. Yes.

6 Q. Now, you just said that as

7 the project manager of Bilcon, you were responsible

8 for running the EA process of the Whites Point

9 project; correct?

10 A. That is correct.

11 Q. Of moving the regulatory

12 process forward?

13 A. Yes.

14 Q. And gathering all of the

15 required information for the environmental

16 assessment; correct?

17 A. Yes.

18 Q. Also ensuring that the

19 applicable scientific requirements of the EA

20 process were satisfied?

21 A. Yes.

22 Q. And of ensuring the

23 applicable legal requirements of the EA process

24 were satisfied; correct?

25 A. Yes. That would be -- that

00015

1 would be true. We certainly obviously looked at
2 the Canadian Environmental Assessment Act and the
3 Provincial Act to ensure that we were, in fact,
4 complying throughout the piece.

5 Q. So ultimately you were
6 responsible for getting the project approved?

7 A. That is correct.

8 Q. For your principals?

9 A. That is correct.

10 Q. All right. Now, we know that
11 there were two environmental assessment Acts that
12 were engaged by the Whites Point project; correct?

13 A. Well, again, you have to be
14 clear about the time period here.

15 In the beginning when I was first
16 engaged, the Nova Scotia Department of Environment,
17 the Provincial Environment Act, was certainly
18 central and, in fact, singular with respect to the
19 3.9 hectare quarry.

20 Q. When I say the Whites Point
21 project -- and we'll just establish this for
22 clarification -- when I say the Whites Point
23 project, I am going to be -- I'm referring to the
24 Whites Point quarry and marine terminal, okay? We
25 will get to the 3.9 hectare quarry in a bit, but

00016

1 I'm referring to the Whites Point project --

2 A. I just wanted to make
3 absolutely clear that the 3.9 hectare quarry was
4 not subject to an environmental assessment, because
5 it was under the 4 hectare limit.

6 So I think we -- I need to make
7 that point and that in the beginning there was no
8 environmental assessment process.

9 Q. Fair enough. My question was
10 that there were two EA regimes engaged by the
11 Whites Point project; correct?

12 A. If you are talking about the
13 larger quarry and the marine terminal, there were
14 two, two processes.

15 Q. And these regimes were the
16 Nova Scotia Environment Act; right?

17 A. Yes.

18 Q. And the other one was
19 contained under the Canadian Environmental
20 Assessment Act; correct?

21 A. Yes.

22 Q. Now, I might be referring to
23 these, just to save some time, as the NSEA and the
24 CEAA in my comments.

25 Now, we also know that the type of

00017

1 EA that was used to review the Whites Point project
2 was a joint review panel; right?

3 A. Yes.

4 Q. And the Whites Point JRP
5 carried out the environmental assessment pursuant
6 to or under both the NSEA and the CEAA; correct?

7 A. Yes.

8 Q. Is it accurate to say,
9 Mr. Buxton, that the Whites Point EA was the first
10 Joint Review Panel process that you had ever
11 conducted on behalf of a proponent?

12 A. It certainly was the first,
13 yes.

14 Q. Is it fair to say it is the
15 only Joint Review Panel process that you have
16 conducted on behalf of a proponent?

17 A. It is the only Joint Review
18 Panel. Joint Review Panels are extremely rare, as
19 you well know.

20 Q. If you can turn, please, to
21 your first witness statement at paragraph 5,
22 please.

23 Now, here, Mr. Buxton, you state
24 that you have been involved with a number of Phase
25 I and Phase II environmental assessments for

00018

1 commercial buildings, service stations and the Town
2 of Annapolis Royal; right?

3 A. Yes.

4 Q. Okay. And that:

5 "I have carried out Phase I
6 and Phase II Environmental
7 Assessments for commercial
8 buildings, service stations
9 and the Town of Annapolis
10 Royal, which is close to the
11 Whites Point community."

12 Right?

13 A. Yes.

14 Q. Now, when we read this
15 statement, we weren't really sure what Phase I and
16 Phase II environmental assessments were, and so we
17 asked your counsel through the interrogatory
18 process in this case. And in response, we were
19 informed that what was being referred to under
20 paragraph 5 were actually what were called
21 environmental site assessments under what is known
22 as the guidelines for management of contaminated
23 sites in Nova Scotia; correct?

24 A. Yes, that is correct.

25 Q. And these guidelines describe

00019

1 the process that is to be followed by owners and
2 governments in Nova Scotia in managing land that
3 has the potential for unacceptable impacts due to
4 the presence of contaminants; is that accurate?

5 A. Yes, or at least that
6 contaminants are suspected on the site or could be
7 there because of prior activities on the site.

8 Q. So what you might see in an
9 abandoned gas station site, for example?

10 A. That would be typical, yes.

11 Q. Now, these EA processes under
12 the guidelines weren't the type of EA process that
13 the Whites Point project was subject to; correct?

14 A. No. They are not -- they are
15 not the same sort of process, no.

16 Q. But this wasn't -- you didn't
17 note this in your witness statement, did you? You
18 just stated that you have been involved with a
19 number of Phase I and Phase II environmental
20 assessments for these types of projects?

21 A. Well, they are environmental
22 assessments, yes.

23 Q. But the Whites Point project
24 wasn't conducted pursuant to these types of
25 environmental assessments; correct?

1 A. No. They were conducted
2 under -- obviously under the Nova Scotia Act and
3 CEAA.

4 Q. At the outset of the Whites
5 Point project, you knew that this project could
6 require an EA under both the provincial and the
7 federal regimes; correct?

8 A. Yes. We assumed that the
9 quarry would come under the provincial Act and that
10 the marine terminal would come under CEAA, yes.

11 Q. Thank you. And faced with
12 this possibility that the Whites Point project
13 would require an EA under both regimes, I take it
14 you were still comfortable with the workings and
15 requirements of an EA under these regimes?

16 A. Yes.

17 Q. I want to take a closer look,
18 Mr. Buxton, at just a couple of the features of the
19 federal and provincial EA regimes and, in
20 particular, at what happens at the end of an EA
21 process under each regime.

22 Now, you would agree with me, just
23 as a general matter, in an EA process information
24 is gathered and provided regarding the
25 environmental effects of a project; is that a fair

1 statement?

2 A. Yes, that is -- that is
3 basically what an environmental assessment does.

4 Q. Okay.

5 A. Yes.

6 Q. And this information also
7 focuses on whether these environmental effects can
8 be or how they can be mitigated; correct?

9 A. Very much so. In fact, the
10 mitigation is always considered before the residual
11 effect is, or the impact is considered.

12 Q. And then after that
13 information is gathered and considered, an
14 environmental assessment decision is made with
15 respect to the project or the undertaking; correct?

16 A. Yes, I think that is
17 generally true.

18 Q. Let's take a look at a
19 provision in the Canadian Environmental Assessment
20 Act, Mr. Buxton. Could you turn to Exhibit R-1,
21 please, and, in particular, section 37,
22 subparagraph 1, which is on page 17, if you are
23 looking at the page number, Mr. Buxton.

24 This section, Mr. Buxton, is
25 called decision of responsible authority; correct?

1 A. Yes.

2 Q. And in the preamble of the
3 provision, it states that a number of courses of
4 action can be taken in respect of a project after
5 taking into consideration the report submitted by a
6 review panel or a comprehensive study; correct?

7 A. Correct.

8 Q. And then if you look at
9 subparagraph (a) (i), it states what one of these
10 courses of actions can be, specifically that if a
11 project is not likely to cause significant adverse
12 environmental effects, then the responsible
13 authority may exercise any power or perform any
14 duty or function that would permit the project to
15 be carried out in whole or in part. Do you see
16 that?

17 A. Yes.

18 Q. And then in paragraph (b),
19 another course of action set out, it provides that
20 where the project is likely to cause significant
21 adverse environmental effects that cannot be
22 justified in the circumstances, the responsible
23 authority shall not exercise any power or perform
24 any duty or function that would permit the project
25 to be carried out in whole or in part.

1 Do you see that?

2 A. Yes, I do.

3 Q. So the decision at the end of
4 an EA under the CEAA could be that the responsible
5 authority doesn't take action that would permit the
6 project, as it has been proposed, to be carried
7 out; correct?

8 A. You'll have to repeat that,
9 I'm sorry.

10 Q. Would you agree with me that
11 looking at in particular paragraph (b), that the
12 decision of an EA conducted under the CEAA could be
13 that the responsible authority doesn't take action
14 that would permit the project to be carried out?

15 A. If the project is likely to
16 cause significant adverse environmental effects.

17 Q. Yes.

18 A. Yes.

19 Q. All right. Let's take a look
20 at the Nova Scotia Environment Act, which is at tab
21 R-5, in particular, if you could turn to section
22 40.

23 Now, this provision speaks to the
24 powers of the Minister after information has been
25 gathered on the environmental effects of an

1 undertaking through the Nova Scotia EA process and
2 the Minister's been provided with a report or a
3 recommendation in connection with the information.
4 And just like the CEAA, it sets out the types of
5 decisions that can be made.

6 And you will agree with me that
7 the Minister can (a) approve the undertaking, (b)
8 approve the undertaking subject to any conditions,
9 or (c) reject the undertaking; correct?

10 A. Yes, I see that.

11 Q. So, again, at the end of an
12 EA under the Nova Scotia EA regime, the decision
13 could be rejection of the project; correct?

14 A. Yes.

15 Q. Now, let's give this a little
16 bit of practical application, if you could turn to
17 Exhibit R-27, please, Mr. Buxton.

18 This is the JRP agreement for the
19 Whites Point project. Are you familiar with this
20 document, Mr. Buxton?

21 A. Yes.

22 Q. You have reviewed this
23 document before?

24 A. Yes.

25 Q. Can you turn to section 6 of

1 the JRP agreement, Mr. Buxton? That is on page 5.

2 Okay, I want to take a look
3 specifically at sections 6.6 and 6.7, which speak
4 to what the federal and provincial governments were
5 to do on receiving the Whites Point JRP's report
6 and recommendations. Okay?

7 Now, 6.6 provides that the
8 Responsible Authority shall take one of the courses
9 of action provided for in subsection 37(1) of the
10 Canadian Environmental Assessment Act. Do you see
11 that?

12 A. Yes.

13 Q. And having just reviewed that
14 provision, we know that one of those courses of
15 action could be to not take action that would
16 permit the project to be carried out in whole or in
17 part; right?

18 A. Yes.

19 Q. And then if we look at
20 section 6.7, this one provides that the Minister of
21 Environment and Labour, Nova Scotia, shall consider
22 the recommendation of the Panel and either approve
23 with conditions, or reject the project; correct?

24 A. Yes.

25 Q. So you will agree with me

1 that like the NSEA and the CEAA, the Whites Point
2 JRP certainly contemplated that the decision that
3 was made at the end of the Whites Point EA process
4 could be that the Whites Point project might not be
5 allowed to proceed; correct?

6 A. Are you saying the panel
7 contemplated that?

8 Q. No. I'm saying the JRP
9 agreement contemplates that.

10 A. Yes, yes.

11 Q. All right. Mr. Buxton, I
12 want to go over some basic facts regarding your
13 initial involvement in the EA of the Whites Point
14 project.

15 Could you turn to paragraph 8 of
16 your first witness statement, please. Now, you
17 note at paragraph 8 that in January 2002 you were
18 approached by Nova Stone to assist it in obtaining
19 a permit to operate a quarry at Whites Point;
20 correct?

21 A. Yes.

22 Q. And Nova Stone was a
23 locally-owned Nova Scotia-based company?

24 A. Yes, it was.

25 Q. And then if you look at

1 paragraph 10, you state that in May 2002 you were
2 informed by Nova Stone that it had a partner, which
3 was Bilcon; correct?

4 A. Yes.

5 Q. So you weren't aware of the
6 fact that Nova Stone and Bilcon were in a
7 partnership until May of 2002; is that correct?

8 A. I did know that Nova Stone
9 was trying to find a partner to do a larger
10 project, but until I saw a copy of a draft
11 agreement between the two, no, I did not know.

12 Q. This was not until May of
13 2002; correct?

14 A. To the best of my knowledge,
15 that is correct.

16 Q. Now, Bilcon at this point was
17 also a Nova Scotia incorporated company; correct?

18 A. I believe so.

19 Q. All right. And it was owned
20 by the claimants in this arbitration; right?

21 A. Yes.

22 Q. Bilcon was incorporated
23 around April 24, 2002; does that sound right?

24 A. That could very well be, yes.

25 Q. And the partnership that Nova

1 Stone and Bilcon was in was called Global Quarry
2 Products; correct?

3 A. That is correct.

4 Q. And if we look at paragraph
5 10, again, you became responsible for moving plans
6 forward for what I'm calling the Whites Point
7 project on behalf of the partnership; correct?

8 A. Yes.

9 Q. Now, a couple of other
10 questions regarding the property on which the
11 quarry would be located.

12 I will ask you to turn to Exhibit
13 R-113. It is a confidential document, so we won't
14 put it up on the screen, but I don't think we need
15 to turn off the live stream, because the few
16 questions I am going to ask won't reveal any
17 information that isn't already on the public record
18 in the public version of Canada's counter memorial.

19 It is Exhibit R-113.

20 A. Yes, I have it.

21 Q. Now, this document is the
22 April 3rd, 2002 aggregate lease agreement for the
23 Whites Point property?

24 A. Yes.

25 Q. That agreement was executed

1 between Nova Stone and the owners of the Whites
2 Point property; correct?

3 A. Yes.

4 Q. So would it be fair to say
5 from this exhibit that the land on which the Whites
6 Point project was to be developed was known to Nova
7 Stone and Bilcon by the date of this lease,
8 Mr. Buxton?

9 A. In general terms, yes,
10 although I think probably certainly in April I was
11 not aware of this agreement.

12 Q. I'm not suggesting you were
13 aware of it, but given the date of it, it would be
14 a fair statement that the land on which the project
15 was to be developed was known to both Nova Stone
16 and Bilcon by the date of this lease?

17 A. I think that that is a
18 reasonable statement.

19 Q. That was April 3rd, 2002;
20 correct?

21 A. Yes.

22 Q. Now, can we turn to your
23 supplemental witness statement, Mr. Buxton and, in
24 particular, paragraph 4.

25 Here you state, Mr. Buxton, that:

00030

1 "It never struck me as
2 problematic to develop and
3 operate a quarry at Whites
4 Point. The land at Whites
5 Point had previously been
6 used as a gravel pit."

7 Now, as it was contemplated, the
8 Whites Point project was to consist of a quarry;
9 correct?

10 A. Yes.

11 Q. And the quarry production
12 would be approximately 2 million imperial tons of
13 aggregate a year. That is what was contemplated?

14 A. Yes, that is what was
15 contemplated.

16 Q. And the quarrying operation
17 would eventually be carried out over 150 hectares
18 of land?

19 A. Yes.

20 Q. And the Whites Point project
21 was also to consist of a marine terminal,
22 Mr. Buxton?

23 A. Yes.

24 Q. And it was envisioned that
25 you would have ships of up to 225 metres in length

00031

1 that could moor to this marine terminal; right?

2 A. Yes, Panamax size vessel.

3 Q. And the ships would be loaded
4 with processed aggregate for export; correct?

5 A. Yes.

6 Q. And this was envisioned to
7 happen anywhere from 40 to 50 times a year;
8 correct?

9 A. Yes, that is correct.

10 Q. And all of these activities,
11 the blasting, the crushing, the shipping, they were
12 to last up to 50 years; right?

13 A. Yes, that is correct.

14 Q. And by my calculation, over a
15 50-year period, that is up to 100 million tons of
16 exported aggregate. Does that sound accurate?

17 A. Yes.

18 Q. Mr. Buxton, would you agree
19 with me that the Whites Point project, the Whites
20 Point quarry and marine terminal, was a more
21 significant undertaking than a gravel pit?

22 A. Well, certainly larger, yes,
23 no question.

24 Q. And there was no marine
25 terminal at this gravel pit that you say was

00032

1 operating at the site?

2 A. No. The gravel pit actually
3 operated in the 1940s and 1950s.

4 Q. Okay.

5 A. My point being that it had
6 operated and was shown on the geological maps as a
7 pit and quarry up to that time.

8 Q. But the gravel pit wasn't as
9 significant an undertaking as what was contemplated
10 for the Whites Point project?

11 A. No, no, no.

12 Q. I want to review some of the
13 first steps you took to advance the regulatory
14 review of the Whites Point project now.

15 Now, one of the first things that
16 you did was to arrange a meeting with the Nova
17 Scotia Department of Environment and Labour;
18 correct?

19 A. That is correct.

20 Q. Can you turn, please, to
21 Exhibit R-171.

22 Now, Mr. Buxton, these are -- yes,
23 it might be easier to look on the screen, and we
24 even try to highlight some of the parts of the
25 document that I am referring to for your ease,

00033

1 okay?

2 A. Okay.

3 Q. Now, these are notes of a
4 meeting between yourself and others at NSDEL and
5 Mr. David Kearns, who was assisting you with the
6 project; correct?

7 A. That is correct.

8 Q. It appears from this document
9 at the top corner that the meeting took place on
10 June 14th, 2002?

11 A. That sounds correct.

12 Q. From these notes, it appears
13 you had engaged a number of consultants already in
14 connection with the project; correct?

15 A. Yes.

16 Q. For example, at the bottom of
17 the first page, the notes appear to state that you
18 had engaged a Dr. Paul Brodie on the issue with
19 shipping and blasting as it related to marine
20 mammals; correct?

21 A. Actually, we never did engage
22 Dr. Paul Brodie, but we did ask him to prepare a
23 proposal for us --

24 Q. Okay.

25 A. -- to really take us through

00034

1 all of the issues that might be surrounding the
2 issue of marine mammals, yes.

3 Q. Dr. Brodie was an expert in
4 marine mammals?

5 A. He was recommended by
6 Dr. Lien of Memorial University in Newfoundland
7 that I had been in touch with, and Dr. Lien himself
8 said he was too busy to carry out the work, but
9 suggested that Dr. Brodie could handle the work and
10 we made contact with him.

11 Q. And you contacted him because
12 the contemplated activity raised the potential for
13 impacts on whales in the Bay of Fundy and you
14 wanted his proposal for a study of the potential
15 effects of blasting, and also to suggest potential
16 mitigation measures; correct?

17 A. Yes. Really, we -- living in
18 the area and being well aware of whale-watching
19 activities and having been whale-watching a number
20 of times, I knew that there were both whales and
21 pinnipeds in the Bay throughout the summer, and it
22 was obvious that for a number of reasons, certainly
23 for ship traffic, we would need to consider these
24 and to look for appropriate mitigation methods.

25 Q. Can you turn, please, to

00035

1 Exhibit R-301, please, Mr. Buxton.

2 Now, this is a note from
3 Dr. Brodie to yourself, and it is dated June 19th,
4 2002; correct?

5 A. Yes.

6 Q. Actually, if you look at
7 paragraph 3, Dr. Brodie appears to have visited the
8 site on June 12, 2002 with Mr. Kearn, so this would
9 have been just a couple of days before your June
10 14th meeting with NSDEL; correct?

11 A. Yes.

12 Q. Now, if you could look down
13 at the second-last paragraph on the first page,
14 Dr. Brodie notes:

15 "What is important is that
16 the quarry site is proximal
17 to an area known for marine
18 mammals. What must be
19 addressed here is the
20 potential for interaction."

21 Correct?

22 A. Yes, indeed. That is why we
23 contacted him, yes.

24 Q. And he had the same views as
25 you. I suppose that is the reason why you

00036

1 contacted him?

2 A. We knew they were there.
3 They had to be dealt with as an issue.

4 Q. Now, looking at page 3,
5 Dr. Brodie talks about this potential interaction.
6 He states in the third paragraph:

7 "It appears that the basalt
8 is directly exposed to the
9 water, which could result in
10 a large surface for
11 transmission directly into
12 sea water."

13 Do you see that? You can look up
14 on the screen, too, Mr. Buxton, if it would help.

15 A. Yes, yes. I've got that,
16 yes. Thank you.

17 Q. Then just one paragraph below
18 that, it states that:

19 "The temporary effects of
20 blasting on hearing and
21 orientation of marine mammals
22 can have serious consequences
23 in an area of extreme tides
24 and complex coast lines where
25 there is fishing gear and

00037

1 commercial shipping."

2 Correct?

3 A. Yes.

4 Q. And then finally, if you turn

5 the page over to page 4, in the second paragraph

6 Dr. Brodie states that the:

7 "...increasing profile of

8 marine mammals and the North

9 Atlantic Right Whale in

10 particular require that a

11 high level of caution is

12 necessary in planning any

13 long-term industrial venture

14 within or proximal to their

15 habitats."

16 Correct?

17 A. Yes.

18 Q. Now, I just have a question

19 with respect to Dr. Brodie's note to you, and it is

20 connected to something that you have said in

21 supplemental witness statement in paragraph 18. So

22 if you could turn to that, please.

23 Now, at paragraph 18, you state

24 that:

25 "Instead of preparing a

00038

1 proposal for a comprehensive
2 scientific study, Dr. Brodie
3 merely gave us a four-page
4 personal statement of opinion
5 based on a single site visit
6 without any significant
7 science-based research and
8 analysis."

9 So, I take it you didn't further
10 engage Dr. Brodie after he provided you with this
11 initial note; correct?

12 A. No, no. He didn't give us a
13 proposal.

14 Q. And it is what you call a
15 personal statement of opinion?

16 A. That is certainly what I
17 would classify his report as. There was certainly
18 no scientific backup to it, and we knew that we
19 were going to have to provide scientific backup.
20 That is what I was looking for from a whale expert,
21 and I was looking for a detailed proposal to
22 indicate to us exactly what we needed to do, the
23 state of the science, what was known, what sort of
24 mitigation we could bring to bear. And certainly I
25 knew that it was an important factor. That's why

00039

1 we were dealing with it in June of 2002.

2 Q. Okay.

3 A. So...

4 Q. You would agree with me that
5 as a marine mammals expert, it appears that
6 Dr. Brodie had some significant concerns about the
7 project proposal?

8 A. He expressed a personal
9 opinion, yes. He gave a worst-case scenario, yes.
10 But I think you must remember that the Bay of Fundy
11 is not -- is not bereft of activity.

12 The shipping lane, as it was in
13 2002 at the time Dr. Brodie was there, actually
14 went right through the middle of the North Atlantic
15 Right Whale conservation area.

16 And my information at the time was
17 that about 900 or so ships entered Saint John on an
18 annual basis, significant-sized ships, tankers, and
19 certainly tourist ships, right the way through the
20 middle of the North Atlantic Right Whale
21 conservation zone into the port of Saint John.

22 Certainly we knew that at least 50
23 ships per year, and the same sort of size that we
24 were contemplating, Panamax-sized ships, were in
25 fact going to the Port of Hantsport every year to

00040

1 pick up gypsum.

2 So it is not as if this was us
3 trying to introduce the first ship of any size into
4 the Bay of Fundy, and, indeed, there had been
5 discussions going on for a significant period of
6 time to move the shipping lanes so that they still
7 actually cut the corner of the North Atlantic Right
8 Whale conservation area, but it meant that the
9 majority of the ships no longer went through it.

10 And that, in fact, came into place
11 in 2003. The shipping lane that we had predicted
12 for our ship, in fact, would go nowhere near the
13 North Atlantic Right Whale conservation area. So
14 we were immediately aware that there was an issue,
15 and, even where we were going to bring the ship in,
16 we were very careful to avoid the North Atlantic
17 Right Whale conservation area.

18 So, yes, it was an issue and we
19 certainly wanted to know what the state of the
20 science was, and, you know, on a scientific basis,
21 and what do we do. Are there things that we can do
22 to assist the conservation of the North Atlantic
23 Right Whale?

24 Q. You have just told me a whole
25 bunch of information about the shipping lanes in

00041

1 the Bay of Fundy, but you would agree with me that
2 Dr. Brodie's concerns related to the impacts of
3 blasting on marine mammals; correct?

4 A. Well, I think he was alluding
5 to ship traffic, as well.

6 We knew then and we know now that
7 the two worst factors affecting particularly Right
8 Whales, that tend to sit at the top for longer
9 periods, are fishing activities. They get tangled
10 in fishing nets, and, secondly, they get hit by
11 ships.

12 So, you know, blasting was
13 certainly a concern of ours for cetaceans and
14 pinnipeds, but probably for us, the ship traffic
15 was probably as important, if not more important.

16 Q. My question to you, again,
17 Mr. Buxton was: You will agree that Dr. Brodie had
18 concerns about the impact of blasting on marine
19 mammals that could have frequented the areas around
20 the site?

21 A. Yes.

22 Q. Thank you. Now, in addition
23 to meeting with NSDEL, Mr. Buxton, you also had a
24 preliminary meeting with the officials at DFO to
25 discuss the project; correct?

00042

1 A. That is correct.

2 Q. That happened, does it sound
3 accurate to say, July 25th, 2002, that meeting?

4 A. Yes. Yes, yes, that would
5 sound reasonable.

6 Q. Now, several months after
7 these initial meetings with NSDEL and DFO, you
8 provided government officials with a draft project
9 description for the Whites Point project; correct?

10 A. Yes.

11 Q. All right. Can you turn,
12 please, to Exhibit C-47. C-47, it is at the very
13 back of your binder.

14 A. Sorry, sorry. I'm struggling
15 to get to it.

16 Q. Yes.

17 A. Sorry.

18 Q. Now, this is the draft
19 project description that you provided to government
20 officials for the Whites Point project; correct?

21 A. Yes.

22 Q. It is a four-page document;
23 correct?

24 A. Yes. I don't think this is a
25 complete document, but it is certainly a draft.

00043

1 Q. Now, looking at the top of
2 this document on the first page, it appears you
3 sent this to Helen MacPhail; right?

4 A. Yes.

5 Q. And Ms. MacPhail was an
6 employee of NSDEL?

7 A. Yes.

8 Q. And while it is dated August
9 9th, 2002, looking at some other documents in the
10 record, it appears to have been sent to
11 Ms. MacPhail a little bit later on September 30th,
12 2002, would you agree?

13 A. I can't tell you. I can't...

14 Q. We can take a look at Exhibit
15 R-129, or, actually, do you know what? It is
16 easier if you flip one document over to C-49.

17 A. Forty-nine-nine?

18 Q. C-49. Do you see that
19 document?

20 A. Yes, yes.

21 Q. On the second page in,
22 Ms. MacPhail writes to you and states:

23 "This letter is to let you
24 know that last week staff
25 from the environmental

1 assessment branch met with
2 federal authorities to
3 discuss Nova Stone's proposed
4 quarry expansion on Digby
5 Neck as described in your fax
6 of September 30, 2002."

7 A. Yes.

8 Q. So let's go back to C-47.

9 Now, looking through the document, it provides an
10 overview of the infrastructure of the project and
11 how the infrastructure would be constructed, and
12 then some information about the project's
13 operation; correct?

14 A. Yes.

15 Q. And on the third page, there
16 is some discussion of equipment needed to operate
17 the quarry and how long the process to aggregate
18 would be transported or -- sorry, how the processed
19 aggregate would be transported to market?

20 A. Yes.

21 Q. And then this section ends
22 kind of abruptly with a five and a ten, but then on
23 the fourth page, there is a list entitled,
24 "Environmental Component Outline."

25 That suggests there will be more

00045

1 information provided on matters such as research
2 and mitigation, and restoration and monitoring. Do
3 you see that?

4 A. Yes.

5 Q. But that information wasn't
6 provided in this draft at that time?

7 A. Not at that time, no.

8 Q. This was just a draft and a
9 more project detailed would be provided?

10 A. Yes. We were still working
11 on designs at this point, yes.

12 Q. Right. Can we talk about the
13 meeting that you had with government officials
14 after you filed the draft project description that
15 we have just looked at?

16 A. Okay.

17 Q. Now, this meeting, I think
18 you referred to it in your direct testimony. It
19 was January 6th, 2003; correct?

20 A. Yes, yes.

21 Q. And for the Whites Point
22 project proposal, all that you had provided to
23 government officials by this point in time was the
24 draft project description we just looked at; right?

25 A. That is correct.

1 Q. So can you turn, please, to
2 Exhibit R-178, Mr. Buxton. These are -- I will
3 just wait one second. Okay, Mr. Buxton, these are
4 Christopher Daly's notes of the January 6th, 2003
5 meeting that I am referring to.

6 And from the list of attendees at
7 the meeting on the first page, it appears that
8 yourself and David Kearn were there; correct?

9 A. Yes.

10 Q. And officials of NSDEL and
11 DFO and the Canadian Environmental Assessment
12 Agency were at this meeting as well; right?

13 A. Yes.

14 Q. Looking at this exhibit, it
15 appears that there was some discussion about the
16 proponents and the project on the first page, and
17 then when you get to the second page, there is some
18 discussion about the type of EA that would be used
19 to review the project; right?

20 A. Yes.

21 Q. Now, looking near the bottom
22 of the second page, someone is recorded as having
23 said "comp study is more than likely"; correct?

24 A. Yes.

25 Q. And a comprehensive study is

00047

1 a particular type of environmental assessment;
2 right?

3 A. Under CEAA.

4 Q. Yes, under CEAA?

5 A. Correct.

6 Q. Then there is a notation a
7 bit below that that says, "Bill also talked about
8 possibility of a panel"; correct?

9 A. Yes.

10 Q. And would "Bill" be Bill
11 Coulter of the Canadian Environmental Assessment
12 Agency?

13 A. I assume so, yes.

14 Q. And would you agree with me
15 that in these notes "panel" refers to panel review?

16 A. Yes.

17 Q. And then beneath this
18 reference, there are two arrows that state "likely
19 significant effects" and "public concerns";
20 correct?

21 A. Yes.

22 Q. And then there is a notation
23 below that says, "Need project description before
24 federal departments can decide"; correct?

25 A. Yes.

00048

1 Q. Now, I take it you didn't
2 take any notes of this meeting, Mr. Buxton?

3 A. No, I didn't, no.

4 Q. All right. Now, it's been
5 over ten years since these notes were prepared, so
6 I don't expect you to remember everything that
7 everybody said, but would you agree with me, from
8 these notes, it would appear that at your first
9 meeting to discuss the Whites Point project with
10 all of these government officials, you were
11 informed about the possibility of a panel?

12 A. Frankly, I don't remember
13 that, but I'm willing to accept that perhaps Bill
14 Coulter raised the issue. But I personally don't
15 remember it.

16 Q. Would you agree with me that
17 someone at the meeting, from what you see in these
18 notes, said this possibility would depend on the
19 likely significant effects and public concerns over
20 the project proposal?

21 A. Yes. Let me just sort of
22 rephrase that, that we knew, even prior to going
23 into this, that a panel review was a part of the
24 CEAA process. I mean, there are three levels of
25 screening, comprehensive study, and then into a

00049

1 panel review. We did not contemplate ourselves
2 that it would go into a panel review, but we knew
3 that it existed.

4 It wasn't -- if somebody had said
5 this at the meeting, it wouldn't have been a big
6 surprise that it -- it was in the Act.

7 Q. So you are not disputing that
8 someone had said this at the meeting, then?

9 A. It's possible.

10 Q. You're not disputing it?

11 A. I'm saying it is possible
12 that somebody did mention it, yes.

13 Q. Were you aware at the time of
14 the meeting, Mr. Buxton, that likelihood of
15 significant adverse environmental effects and
16 public concerns were the two statutory grounds
17 under the CEAA on which a project can be referred
18 to a review panel?

19 A. Yes, we would have known
20 that.

21 Q. And were you aware at the
22 time of the meeting that under the CEAA, such a
23 referral could be made at any point in the EA
24 process?

25 A. Yes, we were aware of that.

00050

1 We had read the Act fairly thoroughly.

2 Q. Were you aware, for example,
3 at the time of the meeting that under the CEAA a
4 referral to a panel could be made even at the end
5 of a comprehensive study process?

6 A. Yes, we were aware of that.

7 Q. Now, if such a referral to a
8 panel is going to be made, you would agree with me
9 it would obviously be best for everybody, the
10 proponent, the public, the government departments,
11 if the referral is made earlier on or at the
12 beginning of the process rather than at the end
13 after a comprehensive study has been completed?

14 A. I wouldn't necessarily agree
15 with that, no.

16 Q. You think it would be better
17 to carry out all of the expense of a comprehensive
18 study, file the report, and then have a decision
19 that the referral -- that it gets referred to a
20 panel, and then to have to go through the cost and
21 expense of a panel process, sir?

22 A. Well, I would point out that,
23 in fact, from the scientific and technical content,
24 there is no difference between a comprehensive
25 study report and a panel report.

00051

1 Because it is in a panel doesn't
2 mean that you need more scientific data, more
3 studies. The technical content is the same,
4 whether it is a panel review or a comprehensive
5 study. And certainly I would want to know as a
6 proponent -- and I think we did know very shortly,
7 if not at that time -- that we did not anticipate
8 creating a significant adverse environmental
9 effect. But I would certainly want to crystallize
10 that.

11 Certainly there is the other
12 public concerns issue, which we could do nothing
13 about, but I would certainly as a proponent want to
14 do all the scientific research that we needed, all
15 the valued ecosystem components that we had
16 identified, to assure ourselves that we were not
17 going to get into a problem with a significant
18 adverse environmental effect that perhaps could not
19 be mitigated.

20 I would want to know that.

21 Q. I am not sure you answered my
22 question, though.

23 A. I think I did. I would say
24 that, no, I don't think that it is necessarily true
25 that it is an advantage to the proponent to be put

00052

1 into a panel early in the comprehensive study
2 process. No, I don't think that that is true. At
3 least in my opinion, it is not true.

4 Q. So do I take it from that,
5 then, that you don't think it would be problematic
6 to have completed a comprehensive study and gone to
7 all of the expense of preparing a comprehensive
8 study report and going through that process, and
9 then at the end of that process having your project
10 referred for assessment to a review panel? Is that
11 correct?

12 A. Well, in my view at that
13 point, we would either have found a significant
14 adverse environmental effect, which is likely, in
15 which case we would have significant concerns
16 ourselves if it could not be mitigated, and we
17 would have to think twice about the project.

18 But certainly I would want to know
19 that. If at the end of the day we determined, with
20 all of the scientific work that was being done,
21 that there was no significant adverse environmental
22 effect that could not be mitigated, then it would
23 be on the public concern issue and really there was
24 not very much we can do about that.

25 Q. My question is more about

1 process and essentially that there could be two
2 processes stacked up on top of one another.

3 A. Well, you asked me as a
4 proponent, and I have given you the answer as a
5 proponent.

6 To step, as this project did, into
7 a panel review with no evidence whatsoever that
8 there was going to be a significant adverse
9 environmental effect I thought was inappropriate,
10 totally inappropriate.

11 We certainly had not released any
12 of our scientific documentation to the government,
13 so how would the government have even known or
14 suspected that there was going to be a significant
15 adverse environmental effect?

16 Q. I am not suggesting, sir,
17 that they did know at that point in time. In
18 fact --

19 A. But they must have known.
20 Excuse me, Mr. Little. They must have known
21 because of the letter of referral. The Minister
22 actually says to Minister Anderson that, in fact,
23 there are going to be environmental effects over a
24 wide range of vectors in a wide geographic area, et
25 cetera. That was in the letter of referral.

00054

1 Q. Mr. Buxton, what was the date
2 of that letter?

3 A. That was a June letter.

4 Q. What was the date of this
5 meeting, Mr. Buxton?

6 A. January.

7 Q. Okay, thank you. Moving back
8 to the notes of the January 6th meeting, it would
9 appear someone said "need a project description
10 before federal departments can decide." Would you
11 agree?

12 A. Yes.

13 Q. Because all that government
14 officials had at this point on your plans for the
15 Whites Point project was that four-page draft
16 project description?

17 A. It was very, very brief and a
18 draft at that stage, yes.

19 Q. The four-page draft wasn't
20 something that government officials could really
21 act on at this point in time?

22 A. No.

23 Q. Thank you.

24 A. No.

25 Q. All right. Mr. Buxton, I

00055

1 want to turn on to the next steps that you took in
2 the process after that January 6th meeting.

3 If you can turn to Exhibit R-133,
4 please, this is a document entitled "Navigable
5 Waters Protection Application" --

6 A. Yes.

7 Q. -- "Whites Point Quarry and
8 Marine Terminal"?

9 A. Yes.

10 Q. Now while it is dated
11 December 1st, 2002, it appears that, if we look at
12 the cover letter on the next page in, you filed the
13 application with the Canadian Coast Guard on
14 January 8th, 2003; correct?

15 A. Yes.

16 Q. And about four pages into
17 this package, we see the actual Navigable Waters
18 Protection Application; correct?

19 A. Yes.

20 Q. And it was you that filled
21 out this form?

22 A. That looks like Mr. Kearn's
23 writing, my signature on January 8th, 2003.

24 Q. Now, if we look at the
25 description of project on the application, you have

00056

1 written in "marine terminal"; correct?

2 A. Yes.

3 Q. And on the next page, there
4 is an authorization from the property owners of the
5 abutting property authorizing you to make
6 application for a marine terminal; right?

7 A. Yes.

8 Q. Now, I would like you to
9 turn, if you could, now to Exhibit R-299, which
10 provides just a little bit of insight on this
11 Navigable Waters Protection Application.

12 All right. First off, the first
13 page of this document is entitled "CLC Minutes".

14 A. Yes.

15 Q. Then it lists the table of
16 contents of the minutes, the table of contents for
17 the minutes of a series of meetings of a CLC;
18 right?

19 A. Yes.

20 Q. And CLC stands for community
21 liaison committee; correct?

22 A. Yes.

23 Q. And the community liaison
24 committee was a committee established pursuant to a
25 conditional approval that NSDEL issued to Nova

00057

1 Stone for this 3.9 hectare quarry; right?

2 A. It was a condition of the
3 approval of the 3.9 hectare quarry.

4 Q. And that was the 3.9 hectare
5 quarry that had been applied for at the site of the
6 Whites Point project; right?

7 A. That is correct, yes.

8 Q. Now, I want to discuss, as I
9 said, the 3.9 hectare quarry a bit later on. But
10 this approval was a conditional approval, and it
11 was issued to Nova Stone back in April of 2002; is
12 that right?

13 A. Well, it wasn't a conditional
14 approval -- I'm sorry.

15 MR. NASH: Excuse me. It's okay.
16 I was just going to intervene to see if Mr. Little
17 had misstated the answer that he had received from
18 Mr. Buxton about the approval being a conditional
19 approval, as opposed to an approval subject to two
20 conditions.

21 THE WITNESS: That was my point I
22 guess I was going to make.

23 BY MR. LITTLE:

24 Q. So shall I call it the
25 approval subject to two conditions?

00058

1 A. Yes. All approvals are
2 subject to conditions, yes.

3 Q. Now, this approval subject to
4 two conditions was issued before any project
5 description was filed for the Whites Point project;
6 correct?

7 A. Yes.

8 Q. All right. And the
9 establishment of the community liaison committee,
10 that was one of the conditions of the approval;
11 right?

12 A. Yes. It gave the department
13 the ability to ask us to form a CLC at their
14 request.

15 Q. And the CLC was established
16 to facilitate public communications about this
17 project?

18 A. That is correct, yes.

19 Q. Now, as the project manager
20 for the 3.9 hectare quarry, you would provide
21 updates and information on this project at meetings
22 of the CLC; correct?

23 A. Yes.

24 Q. And as the 3.9 hectare quarry
25 was connected in certain ways to the larger Whites

00059

1 Point project, it would turn out you would also
2 provide updates and information on the Whites Point
3 project at meetings of the CLC; correct?

4 A. That is correct.

5 Q. Now, these CLC minutes that
6 we have at Exhibit R-299 were supposed to serve as
7 minutes of those meetings; right?

8 A. Yes.

9 Q. If we could go back to the
10 table of contents, about halfway down the page, the
11 table of contents show that there was a meeting
12 held on January 9th, 2003; correct?

13 A. Yes.

14 Q. And that was the day after
15 the application was made for the Navigable Waters
16 Protection Act; right?

17 A. Yes.

18 Q. And if we look at the minutes
19 from this date, they actually mention the filing,
20 so I would like to look at these.

21 If you could turn to page 107,
22 please, these are minutes of a meeting dated
23 January 9th, 2003. In a response to a question
24 from -- all right.

25 In response to a question from an

00060

1 attendee as to the stage you are at in the project
2 development, you are recorded as stating, with
3 respect to the marine terminal, that an application
4 has been mailed in under the Navigable Waters
5 Protection Act and that this will likely trigger a
6 Canadian environmental assessment.

7 Now, these are -- they are
8 obviously not transcriptions of the CLC meetings,
9 and I know it has been some time, but do you take
10 any issue with what you are recorded here to have
11 said?

12 A. I didn't record it. Our
13 duty, with respect to a CLC, was to set one up, and
14 then to provide a facility for the committee to
15 meet in and to provide whatever secretarial
16 services they required.

17 Q. I am not saying that -- I'm
18 not asking whether you recorded it or not. I am
19 asking if you --

20 A. I thought that was your
21 question, whether I recorded this.

22 Q. No. Do you take any issue
23 with what you are recorded as having said?

24 A. No.

25 Q. Now, if you can turn to page

00061

1 117 of these minutes, then. Now, close to the
2 bottom of that page, an attendee asked if you would
3 provide a copy of the preliminary marine terminal
4 design to the CLC. And in your response you say:
5 The CLC members can view it, but because it is a
6 preliminary drawing, he is reluctant to distribute
7 it. The intent is to trigger a CEAA.

8 Now, again, it is not a
9 transcription, but do you take any issue with what
10 you are recorded as having said there, that the
11 intent is to trigger a CEAA?

12 A. No.

13 Q. No issue?

14 A. No.

15 Q. So it is fair to say that in
16 filing the application for the marine terminal, you
17 understood that an EA would be triggered under the
18 CEAA?

19 A. Really, the application was
20 to, in fact, get us into the process with CEAA, and
21 the only way or the best way for us to do that was
22 to file an application under the Navigable Waters.
23 We would then hear, presumably, from the agency,
24 Canadian Environmental Assessment Agency, as to
25 what it determined we would need to do and whether

1 there were, in fact, triggers under the Navigable
2 Waters Act.

3 And, again, we had looked at this,
4 and there seemed to be some question as to whether,
5 indeed, a marine terminal serving a sole-purpose
6 facility would be -- would be a trigger.

7 We didn't know that, but we
8 thought that the best way to find out was to file
9 the application with CEAA and see what the
10 determination was.

11 Q. So the intent was to trigger
12 a CEAA?

13 A. No. The intent was to find
14 out what triggers CEAA may say we were subject to,
15 and then we could analyze those and see where we
16 went from there.

17 Q. Just to be clear, then, on a
18 number of points, you filed the Navigable Waters
19 Protection application?

20 A. Yes. That got us into the
21 process.

22 Q. Right. And in that
23 application, you described the project being
24 applied for as a marine terminal; correct?

25 A. Yes.

00063

1 Q. And in filing the
2 application, you knew that it might trigger a CEAA;
3 correct?

4 A. Yes.

5 Q. Okay.

6 Q. Now, about a month later it
7 was determined by the Canadian Coast Guard the
8 application did indeed trigger a CEAA; right?

9 A. Yes, I believe that's true.
10 A ship over 25,000 dead weight tons is typically a
11 trigger.

12 Q. If you can turn to Exhibit
13 R-136, please, Mr. Buxton, this document, it is a
14 document dated February 17, 2003 and it is from
15 Navigable Waters Protection to DFO's habitat
16 management division.

17 And, indeed, it provides that a
18 CEAA has been triggered by the marine terminal
19 application, would you agree?

20 A. That is what the letter says,
21 yes.

22 Q. Okay.

23 A. Yes.

24 Q. Now, Mr. Buxton, I want to
25 turn to some of the next steps in the EA.

1 You filed a more complete project
2 description on March 10, 2003. Does that sound
3 fair?

4 A. That sounds the right date,
5 yes.

6 Q. And we know that about
7 three-and-a-half months after that, that the
8 project was referred to a review panel by the DFO
9 fisheries Minister Robert Thibault; correct?

10 A. Yes. June 26th I think the
11 date was.

12 Q. And it was ultimately decided
13 the project would be assessed by a Joint Review
14 Panel; right?

15 A. Yes.

16 Q. Now, it is safe to say that
17 as the project manager in charge of the EA process,
18 you weren't happy with this decision?

19 A. That it went to -- being
20 referred to a panel?

21 Q. Yes.

22 A. We weren't happy about it,
23 and we were certainly not impressed or happy that,
24 in fact, we had to learn about it through the
25 press.

00066

1 Agency to ask why our simple
2 quarry project was
3 reclassified to require a
4 Joint Review Panel..."

5 Now, this meeting with Mr. Chapman
6 took place on August 29th, 2003; correct?

7 A. Yes. That sounds like the
8 right date, yes.

9 Q. Can you turn now to Exhibit
10 C-304, please, Mr. Buxton?

11 A. Yes.

12 Q. Now, this is a reporting memo
13 from yourself to Bill Clayton dated September 3rd,
14 2003; correct?

15 A. That is correct.

16 Q. Now, if you will read the
17 first paragraph, it refers to the meeting that you
18 had with Steve Chapman and others on August 29th,
19 2003; correct?

20 A. Yes.

21 Q. And the memo appears to then
22 report on the meeting; correct?

23 A. Yes.

24 Q. If you will turn to page 2 of
25 this document, here you report at your meetings

00067

1 with Mr. Chapman that:

2 "... we noted that in our
3 view six months had been
4 wasted during the CSR process
5 when a panel review could
6 have been called for on
7 January 6th at the meeting
8 held in Halifax when all of
9 the players were around the
10 table."

11 Do you see that?

12 A. Yes.

13 Q. But you'll agree with me on
14 January 6th, all that you provided to government
15 officials was the draft four-page project
16 description that we looked at earlier; right?

17 A. That is correct.

18 Q. And a more complete project
19 description had to be filed, obviously; right?

20 A. Yes.

21 Q. And you'd also agree with me
22 that on January 6th you hadn't yet filed that
23 Navigable Waters Protection application that
24 actually triggered the EA process under the CEAA;
25 right?

1 A. That is correct.

2 Q. So an EA process hadn't been
3 triggered on January 6th, 2003; correct?

4 A. Certainly not under CEAA, no.

5 Q. All right. Mr. Buxton, I
6 want to move on to -- I'm wondering it might be an
7 appropriate time to break, actually, to give the
8 reporter a break.

9 PRESIDING ARBITRATOR: Yes, okay.
10 So we will have a break until 11:10. Thank you.
11 Mr. Buxton, you are not supposed to speak with any
12 member of the...

13 THE WITNESS: I understand. Thank
14 you.

15 --- Recess at 10:53 a.m.

16 --- Upon resuming at 11:11 a.m.

17 PRESIDING ARBITRATOR: It looks
18 like we're all in place. So, Mr. Little, if you
19 could continue.

20 MR. LITTLE: Thank you, Judge
21 Simma.

22 BY MR. LITTLE:

23 Q. Now, Mr. Buxton, if you
24 could please turn to Exhibit R-235.

25 Now, this document is a news

00069

1 release announcing the Whites Point Joint Review
2 Panel to the public. It is entitled, "Canada and
3 Nova Scotia established Joint Review Panel for the
4 Whites Point quarry and marine terminal project",
5 and it is dated November 5, 2004.

6 Now, at this point, Global Quarry
7 Products was no longer the proponent of the
8 project; right?

9 A. That is correct.

10 Q. Bilcon's partnership with
11 Nova Stone had been dissolved; correct?

12 A. Yes.

13 Q. And the sole proponent of the
14 Whites Point project was now Bilcon; right?

15 A. Yes.

16 Q. But you were -- because we
17 know from your earlier comments, you were still the
18 project manager; correct?

19 A. Yes.

20 Q. And you were still
21 responsible for running the EA; correct?

22 A. Yes.

23 Q. Now, looking at this news
24 release, it provides in the first paragraph that
25 the panellists that would be sitting on the JRP

00070

1 were Dr. Robert Fournier, who was the chair, and
2 Dr. Jill Grant and Dr. Gunter Muecke; correct?

3 A. Muecke.

4 Q. Pardon me?

5 A. Muecke.

6 Q. Muecke. Thank you.

7 PRESIDING ARBITRATOR: Or

8 "Muecke", in German.

9 --- Laughter.

10 MR. LITTLE: I'm not sure which I
11 should use, then.

12 --- Laughter.

13 MR. LITTLE: Could I have some
14 instructions?

15 --- Laughter.

16 PRESIDING ARBITRATOR: Whatever.

17 MR. LITTLE: I am going with
18 "Muecke".

19 BY MR. LITTLE:

20 Q. Now, in the second paragraph,
21 it provides that an agreement establishing the
22 panel had been signed between the federal and
23 provincial environment ministers; correct?

24 A. Yes.

25 Q. And this agreement would set

00071

1 out the rules for conducting the JRP process, and
2 it also contained the panel's terms of reference;
3 right?

4 A. Yes.

5 Q. This agreement is actually
6 the JRP agreement that we looked at earlier at
7 Exhibit R-27; correct?

8 A. Yes.

9 Q. Now, is it fair to say that
10 as the project manager, on learning of the
11 panellists, you looked into their backgrounds to
12 learn about their expertise and experience?

13 A. Yes, we did.

14 Q. And is it fair to say that as
15 the panel manager, you also reviewed the final
16 version of the JRP agreement and the panel's terms
17 of reference that we looked at earlier?

18 A. Yes.

19 Q. You would have done this
20 shortly after this press release?

21 A. Yes. At least when we
22 received the copy of the agreement, we would have
23 reviewed it; I would have reviewed it.

24 Q. Indeed you had been given
25 opportunity earlier in the process to review and

1 provide comment on a draft version of the JRP
2 agreement and the panel's terms of reference?

3 A. Correct.

4 Q. That's correct?

5 A. Yes, yes.

6 Q. Can you turn again, please,
7 to Exhibit R-299 Mr. Buxton? These are the CLC
8 minutes we looked at earlier, and I would like you
9 to look at page 230 of these minutes, please.

10 Now, these are minutes of a
11 meeting dated November 24th, 2004; correct?

12 A. Yes.

13 Q. So these minutes record the
14 CLC meeting that was held 19 days after the
15 announcement of the JRP members and the JRP
16 agreement and terms of reference; right?

17 A. Yes.

18 Q. And if you could turn to 232,
19 please, it appears that there was some discussion
20 about the panellists, and I would just like to look
21 at this.

22 About a third of the way down the
23 page, it appears that a Mr. Ivans asked if Bilcon
24 was comfortable with the panel members, and the
25 minutes then state:

1 "Mr. Buxton replied that the
2 proponent is comfortable that
3 the panel members understand
4 the science."

5 Do you see that?

6 A. Yes.

7 Q. A third of the way down the
8 page on 235, the minutes provide that:

9 "Mr. Buxton noted the federal
10 government nominated two
11 members and all three members
12 are Nova Scotian. The chair,
13 Bob Fournier, has been on
14 several other panel reviews
15 in the past and is very well
16 respected."

17 Correct?

18 A. Yes.

19 Q. Then lower down, on page 235,
20 the minutes provide that:

21 "Mr. Buxton noted that if
22 they had the option to
23 choose, they may well have
24 chosen these professionals."

25 Do you see that?

1 A. Yes.

2 Q. Now, again, this is not a
3 transcript, but would you agree that these minutes
4 suggest that in November of 2004, after learning of
5 who the JRP members were and looking into their
6 backgrounds, you were comfortable with the three
7 individuals that had been appointed to the Whites
8 Point JRP?

9 A. I can say that we were
10 comfortable with the Chair, because we had looked
11 into the Sable Gas project, which he chaired, and
12 had spoken to one of our consultants, Mr. Fader,
13 who was with Natural Resources Canada until he
14 retired. And he had, I think, a fair amount to do
15 with the Sable project and assured us that if
16 Mr. Fournier was chair of the panel, that he would
17 insist on decisions being made on a scientific
18 basis.

19 And that's basically what we
20 wanted to hear.

21 Q. If we could look to the
22 bottom of page 234 now, Mr. Buxton, it appears you
23 said the following at this meeting:

24 "Mr. Buxton noted this
25 project is a legal project

1 and there is nothing in law
2 to prevent this project from
3 going ahead. He noted there
4 are hoops to jump through and
5 satisfy to obtain permits,
6 but there is nothing to say
7 that the quarry can't proceed
8 at Whites Cove."

9 Now, again, you read the JRP
10 agreement and terms of reference after they were
11 released?

12 A. Yes.

13 Q. And as we saw earlier,
14 section 6.7 of that agreement provides that the
15 Minister of Environment shall consider the
16 recommendation of the panel and either approve with
17 conditions or reject the project; correct?

18 A. Yes.

19 Q. So that provision does
20 provide there is something in law to prevent the
21 Whites Point project from going ahead; would you
22 agree?

23 A. I think the point that I was
24 making here is that there was no zoning in place at
25 Digby County, so there was no prohibition under a

00076

1 zoning bylaw that says one can't quarry in that
2 area.

3 Secondly, Nova Scotia doesn't
4 have, for example, a coastal zone policy wherein if
5 you wanted to quarry in a certain area, if it was
6 inside a designated area, then the province could
7 basically say, No, sorry, you can't quarry there.

8 My point being here was that
9 provided that we satisfied all of the regulatory
10 agencies, and I believe we did so, then there was
11 nothing in itself to prohibit the quarry from going
12 ahead.

13 Q. But would you agree with me
14 that in light of the wording of section 6.7 of the
15 agreement establishing the JRP, there was, indeed,
16 something that could prevent the project from going
17 ahead; that is, a decision by the Minister to --

18 A. Exactly. I don't dispute, I
19 don't dispute that.

20 Q. Okay, thank you. Now, I want
21 to turn briefly to the environmental impact
22 statement guidelines that were issued by the JRP
23 for Bilcon to prepare its EIS or environmental
24 impact statement.

25 Now, a draft version of the

00077

1 guidelines was issued by the JRP shortly after the
2 JRP was announced; is that accurate?

3 A. Yes, that is correct.

4 Q. The date is November 10th,
5 2004; does that sound fair?

6 A. Yes. That sounds right.

7 Q. Can you turn to Exhibit
8 R-209, please. Can you confirm this document is
9 the draft EIS guidelines?

10 A. It certainly appears to be,
11 yes.

12 Q. Turning just one page over,
13 it appears, just looking at the table of contents,
14 that this draft was about 30 pages in length;
15 right?

16 A. Yes.

17 Q. When the draft was released,
18 the public was invited to comment on them, and so
19 too was Bilcon; correct?

20 A. Yes.

21 Q. Can you turn, please, to
22 Exhibit R-242.

23 All right. This is a letter from
24 Dr. Fournier to yourself dated December 15th, 2004;
25 right?

1 A. Yes.

2 Q. And in it, Dr. Fournier
3 states the Joint Review Panel believes that it is
4 important for Bilcon of Nova Scotia's views
5 regarding the draft guidelines to become part of
6 the public record; correct?

7 A. Yes.

8 Q. Then he writes that:
9 "The Joint Review Panel
10 requests that Bilcon of Nova
11 Scotia review the draft
12 guidelines and return
13 comments to the Panel no
14 later than January 21, 2005."

15 Correct?

16 A. Yes.

17 Q. Now, if you can turn one
18 exhibit over to R-243, please, it appears that on
19 January 16th, 2005 you provided a two-and-a-half
20 page letter commenting on the draft EIS guidelines;
21 correct?

22 A. Yes.

23 Q. In it, you provided a few
24 comments on some, but not all, of the sections of
25 the draft EIS guidelines; correct?

1 A. That's correct.

2 Q. Now, as part of the public
3 comment process, the JRP held four public meetings,
4 called scoping meetings, to give the public an
5 opportunity to comment on the draft guidelines; is
6 that right?

7 A. Yes.

8 Q. And these meetings were held
9 from January 6 to 9, 2005; does that sound
10 accurate?

11 A. It does.

12 Q. And as Bilcon's project
13 manager, you were free to attend these meetings;
14 correct?

15 A. And I did attend all
16 meetings.

17 Q. And you did, okay. On March
18 31st, 2005, a few months later, the JRP released
19 the final EIS guidelines; right?

20 A. Yes.

21 Q. Can you turn to that? That
22 is at Exhibit R-210.

23 Now, on the front page of this
24 document is a cover letter from Dr. Fournier to
25 yourself, and it attaches the final EIS guidelines;

00080

1 correct?

2 A. Yes.

3 Q. And those final EIS
4 guidelines are at the second page of this document?

5 A. Could you repeat that,
6 please?

7 Q. The final EIS guidelines are
8 at the second page of the document; correct?

9 A. Yes, yes.

10 Q. And this document, the final
11 EIS guidelines, is what you used to prepare
12 Bilcon's environmental impact statement; right?

13 A. Yes.

14 Q. Now, the JRP, it didn't issue
15 a hard deadline as to when Bilcon's EIS had to be
16 filed; right?

17 A. That's correct.

18 Q. In fact, if you look at the
19 cover letter from Dr. Fournier on the final EIS
20 guidelines, the first page of that exhibit, all he
21 asked was that you advise the panel no later than
22 April 30, 2005 as to when an EIS is likely to be
23 submitted; correct?

24 A. Yes.

25 Q. So Bilcon was given as much

00081

1 time as it needed to prepare its EIS?

2 A. Yes, there was no stipulation
3 as to end point.

4 Q. I want to ask you just a few
5 questions now about the preparation of the EIS.
6 Now, as the final EIS guidelines provided the
7 instructions on Bilcon's environmental impact
8 statement, I assume you reviewed them in detail?

9 A. Most certainly did, yes.

10 Q. And if we can turn to the
11 table of contents of the final EIS guidelines, it
12 provides at section 7 that the EIS was to contain a
13 project description; right?

14 A. Yes.

15 Q. And then looking at section 9
16 in the table of contents, it was asking for a
17 description of the existing environments, including
18 the physical, the biological and the human
19 environment?

20 A. Yes.

21 Q. And then the EIS also had to
22 provide an environmental impact analysis that was
23 required for each of these environments; right?

24 A. Yes.

25 Q. And one of those analyses was

1 in respect of the human environment. And if we can
2 look under the human environment in the table of
3 contents, it shows that it was to include analyses
4 of the impact of the project on things like
5 community profile?

6 A. Yes.

7 Q. Demographics and mobility,
8 the economy and fishing and harvesting and tourism
9 and recreation. Do you see that?

10 A. Yes.

11 Q. Land use and value?

12 A. Yes.

13 Q. And things like human health
14 and community wellness and social and cultural
15 patterns; right?

16 A. Yes.

17 Q. Now, after you received the
18 EIS guidelines, you prepared a reporting memo to
19 Bill Clayton, and that is at Exhibit R-315, which I
20 would like you to turn to.

21 Now, if you could just turn one
22 page in, you note in the first paragraph that:

23 "We have had the final
24 environmental impact
25 statement guidelines since

1 the end of March and have
2 been reviewing them since
3 that time."

4 Right?

5 A. Yes.

6 Q. So I take it, from what you
7 said about reviewing the final EIS guidelines, that
8 what you are saying here was that you had reviewed
9 all of those sections that we just looked at?

10 A. Yes.

11 Q. And also on the first page of
12 Exhibit R-135, you state your estimate, that you
13 would submit the EIS by October of 2005, but that
14 you would give the JRP a status report on your
15 progress; right?

16 A. Yes.

17 Q. And you also make note of the
18 time that would be put in to get the EIS completed.
19 For example, you state that:

20 "I have asked Dave Kearn, our
21 principal writer, to provide
22 me with 40 hours of work a
23 week until the permit is
24 granted."

25 Right?

1 A. Yes.

2 Q. Now, David Kearn, he was a
3 business associate of yours?

4 A. Yes.

5 Q. Now --

6 A. He's an environmental
7 planner.

8 Q. In addition to being the
9 principal writer of the EIS, it appears that
10 Mr. Kearn was also responsible for gathering and
11 providing scientific information regarding the
12 impacts of the project on marine mammals; is that
13 correct?

14 A. No. I don't think that that
15 is correct at all.

16 Mr. Kearn certainly acted as my
17 contact person for several of the consultants, for
18 George Alliston, certainly, for Ruth Newell,
19 certainly, but, no, he was not the consultant
20 engaged in mammal research, no, marine mammal
21 research.

22 Q. Maybe if you could just
23 assist in clarifying something for me, then, If you
24 could turn to Exhibit R-299 again, please. So at
25 page 100 of that document and just three-quarters

1 of the way down the page, it is asked --
2 Mr. Dittrick asked who was handling the information
3 regarding marine mammals. Mr. Buxton replied that
4 David Kearn is responsible for this aspect.

5 A. Yes, yes.

6 Q. Is that accurate, then?

7 A. Well, responsible in the
8 sense that he was responsible for lining up the
9 experts, the consultants, and making sure that the
10 studies which we required under that section were,
11 in fact, done.

12 Q. Okay, okay. Now, going back
13 to R-315, on page 2 of the memo, you state you
14 would be spending a minimum of 44 hours a week to
15 get the EIS completed and a permit granted;
16 correct?

17 A. Yes.

18 Q. Now, I am noting here you are
19 speaking to getting the EIS completed and a permit
20 granted. What permit are you referring to there?

21 A. This would be the
22 environmental assessment process. It wasn't
23 referring to anything beyond that at this stage.

24 Q. So before getting to a state
25 of a permit being granted, there would certainly be

00086

1 a public and JRP review of the EIS that Bilcon was
2 to file; right?

3 A. Well, yes, yes.

4 Q. And public hearings,
5 obviously?

6 A. And I would be -- I would
7 commit my time through to the end of the process,
8 yes.

9 Q. And that process contemplated
10 the public hearings, as well?

11 A. Oh, yes.

12 Q. So there was far more to the
13 process than getting the EIS completed and a permit
14 granted?

15 A. Well, the permit that would
16 be referred to here is sort of the environmental
17 clearance, which -- which is the first thing.

18 After that, then there are other
19 processes. There is the industrial approval under
20 environment. There may have been more data
21 required by DFO, but they come after the
22 environmental assessment process.

23 Q. Now, it turns out that you
24 filed the environmental impact statement on April
25 26th, 2006; correct?

00087

1 A. That sounds -- that sounds
2 correct, yes.

3 Q. And that is about 13 months
4 after the...

5 A. My thing has gone off here.

6 PRESIDING ARBITRATOR: Microphone,
7 Mr. Buxton --

8 THE WITNESS: It is on again now.
9 Sorry, about that.

10 BY MR. LITTLE:

11 Q. That was about 13 months
12 after the EIS guidelines were finalized?

13 A. Yes.

14 Q. And thereafter it was
15 released for public comment and for review by
16 government departments and the JRP; right?

17 A. Yes.

18 Q. All right. I want to turn to
19 a couple of statements that you make in your
20 supplemental witness statement with respect to what
21 the JRP expected from Bilcon, Mr. Buxton. Could
22 you turn to paragraph 55, please.

23 At paragraph 55, you state that:

24 "The JRP's report
25 demonstrated to me a lack of

00088

1 understanding of the role the
2 JRP was supposed to play in
3 the process."

4 Correct?

5 A. Yes.

6 Q. Again, this was your first
7 JRP process that you had acted on behalf of a
8 proponent; right?

9 A. Yes.

10 Q. And you continue in paragraph
11 55 by stating:

12 "When a proponent is
13 proposing an industrial
14 project, there are two broad
15 stages before it becomes
16 operational: A planning
17 stage and a design stage."

18 Do you see that?

19 A. Yes.

20 Q. Then you say at paragraph 58
21 that:

22 "The JRP expected Bilcon to
23 provide detailed designs
24 during the panel review
25 process. This was not the

1 practice or expectation in
2 the industry..."

3 Do you see that?

4 A. Yes, that is what I've said.

5 Q. It wasn't the practice or
6 expectation in the industry to have to provide
7 detailed designs during the panel review process.

8 In fact, can you please turn to
9 the draft EIS guidelines that we looked at before.
10 It is at Exhibit R-209. Are you there?

11 A. At what...

12 Q. Page 11 of that document.

13 Can you tell us the title of section 7.3,
14 Mr. Buxton?

15 A. "Detailed Project
16 Description".

17 Q. Under the heading "Detailed
18 Project Description", the draft EIS guidelines
19 provided that:

20 "The description must address
21 all phases of the Project in
22 sufficient detail to allow
23 the Proponent to predict
24 potential adverse
25 environmental effects and

00090

1 address public concerns about
2 the Project."

3 Now, from this passage,
4 Mr. Buxton, would you agree with me the draft EIS
5 guidelines were attempting to elicit a project
6 description that provided sufficient detail to
7 provide -- to predict potential adverse
8 environmental effects and address public concerns?

9 A. That is what it says, but
10 that is quite a very different thing from
11 requesting detailed design. They bear no
12 comparison to each other.

13 In fact, the whole -- the whole
14 point of holding an environmental assessment at the
15 planning stage is so that these sorts of -- the
16 environmental issues can be reviewed at the
17 planning stage and, in fact, major decisions made
18 in that process which will be of significant
19 environmental advantage.

20 And a good example of that would
21 be the process that we went through to determine
22 what sort of marine terminal we would have. Would
23 we have a massive rock fill? Would we have a pipe
24 pile? Would we have, if it is even possible, a
25 floating structure out there? Because each one of

00091

1 those comes with an environmental burden, and you
2 don't -- you go through the process at the planning
3 stage to see what the environmental effects of each
4 of these are, and then basically you select, during
5 that process, the one that has the least
6 environmental consequences, okay, which for us was
7 the pipe pile structure.

8 And that is -- that is what it
9 means by a detailed project description. It means,
10 what sort of marine terminal are you going to use?
11 Are you going to have a massive rock fill or are
12 you going to have a pipe pile structure, so that we
13 can assess the environmental effects of those.

14 What it does not mean is that we
15 need to define precisely the pipe pile should be 36
16 inches in diameter or 39 inches in diameter,
17 whether the steel should be five-eighths or
18 three-quarter steel.

19 We don't need to know that at this
20 stage. That is an engineering thing and that comes
21 at the industrial approval stage.

22 My comments here go to the fact
23 that the panel continued to demand throughout the
24 process detailed design, and detailed design is
25 simply not a part of the environmental assessment

1 process.

2 You can't -- you simply can't do
3 the detailed design for a project, even -- this is
4 a relatively simple project -- at the environmental
5 assessment stage.

6 Q. Okay.

7 A. You know, it's monstrous.
8 You would end up with -- on some projects, the
9 detailed design might be 10,000 sheets of drawings.
10 You don't do that at the environmental assessment
11 stage.

12 You do the environmental
13 assessment at the planning stage, okay, and then
14 you know the client -- the proponent knows, in
15 fact, you know, what major decisions have been made
16 from an environmental sense, and then you get into
17 the detailed design.

18 Q. Can you turn, please,
19 Mr. Buxton, to Exhibit R-219. I want to look at an
20 example of the kind of information the JRP was
21 requesting. Now, this was a letter from
22 Dr. Fournier to yourself dated July 26th, 2006?

23 A. Yes.

24 Q. It attached information
25 requests that were issued by the JRP after you

00093

1 submitted Bilcon's EIS; right?

2 A. Yes.

3 Q. And information requests are
4 a standard part of any EA process or JRP process;
5 right?

6 A. Yes, yes.

7 Q. And indeed the final EIS
8 guidelines put Bilcon on notice that following the
9 release of the EIS for review by the public, the
10 panel might be requesting further information from
11 Bilcon; right?

12 A. Yes.

13 Q. And, indeed, some of the
14 information requests that were issued after Bilcon
15 filed its EIS focussed on the project description
16 Bilcon had provided?

17 A. Yes.

18 Q. So can you turn to page 3,
19 please, of the information request. Now, regarding
20 the project description, it appears that JRP's
21 concerns were that the level of detail for most
22 project components described in the EIS is not
23 adequate for the panel to properly understand the
24 project and assess its potential effects or to
25 judge the effectiveness of the proposed mitigation

1 measures, and that discrepancies in the various
2 documents and maps make it difficult for the Panel
3 to confirm where activities occur.

4 Do you see that?

5 A. Yes.

6 Q. Now, I want to just turn to
7 an example of one on page 5 of this information
8 request. At the bottom of page 5, it states:

9 "Plans OP-1 to OP-4 show the
10 organic and sediment disposal
11 areas for the first 20 years
12 located on slopes that range
13 possibly up to 25 percent.
14 (Sediment retention
15 structures are usually sited
16 on level ground or in
17 depressions) provide details
18 on the berms along with
19 measures proposed to prevent
20 down-slope movement of the
21 sediments and berms by creep
22 or flow. What mitigative and
23 contingency plans are
24 proposed in the case of berm
25 failure during extreme

1 precipitation events?"

2 Now, from this request,
3 Mr. Buxton, would you agree with me that in this
4 instance the JRP was simply requesting project
5 design information that would allow it to assess
6 the potential environmental effects of the use of
7 the disposal areas and effectiveness of mitigation
8 approaches, given where they appeared to be located
9 on maps that you had submitted with the EIS?

10 A. Again, the design of berms is
11 a very commonplace thing in the engineering world.
12 In order to do a final design, you would need to
13 know precisely where that berm was, not that it was
14 20 feet this way or 20 feet that way, but that the
15 berm was precisely there.

16 Not only that, but if I were
17 designing the berm, I would go dig a test hole
18 there. I would find out what the overburden was,
19 as well as things like the slope of the rock.

20 So to do a detailed design when we
21 could not say, within plus or minus 50 feet, where
22 that berm is going to be, it is just simply a waste
23 of paper. But the fact is that it is an exercise
24 which is well within the capacity of any competent
25 engineer to design a berm.

1 After all, we have berms which, in
2 fact, get translated into earthen dams which are
3 200 feet high. We're talking about a berm here of
4 perhaps five metres high. There is nothing
5 complicated or technical about this, but there is
6 no point in doing a detailed design unless you know
7 the precise spot that it's going to go on.

8 So to basically say that this is
9 how we're going to do this is or should be adequate
10 at this stage. The Nova Scotia Department of
11 Environment could look at that and say, Well, we're
12 now -- you're now in the industrial approval stage,
13 so we would like detailed designs of that berm.

14 And by this stage, of course,
15 we're through the environmental assessment process.
16 We're doing detailed site planning. We know
17 exactly where everything will go on the site to
18 within plus or minus six inches. We know where the
19 berm will go, and we would be very happy, then, to
20 design that berm as we are required to do and pass
21 the design to Nova Scotia Department of Environment
22 and Labour.

23 It is simply not appropriate at
24 this stage here. It is certainly appropriate to
25 recognize that that is or could be an environmental

00097

1 issue.

2 Q. All right.

3 A. So...

4 Q. You still haven't answered my
5 question, Mr. Buxton. It was a pretty simple one.

6 Would you agree with me that in
7 this instance the JRP was simply requesting project
8 design information that would allow it to assess
9 the potential environmental effects of the use of
10 these areas and the effectiveness of your
11 mitigation approaches, given where they appeared to
12 be located on the original project designs, which
13 was on slopes of up to 25 percent in gradient?

14 A. No, I wouldn't agree with
15 that, no.

16 Q. You wouldn't agree the JRP
17 was --

18 A. No, no.

19 Q. Can you let me finish the
20 question, please? You would not agree that from
21 this information request that this is what the JRP
22 was requesting?

23 A. I know what they are
24 requesting. They were requesting detailed design
25 and continuously requested detailed design through

1 this process.

2 This isn't the only instance of
3 the request for detailed design, and it is not
4 appropriate at this stage of environmental
5 assessment, period.

6 Q. And you didn't think it was
7 appropriate, notwithstanding the JRP's concerns
8 that it didn't feel it could assess the
9 environmental effects of these disposal areas given
10 what you had presented?

11 A. I don't know whether there
12 was anybody competent on the JRP to do that, but
13 certainly they had the option, if they wanted to,
14 to hire their own engineer to take a look at our
15 conceptual plans and say, Are those reasonable
16 conceptual plans?

17 Q. Can you turn to Exhibit
18 R-255, and that's an excerpt from your response to
19 the information request of the panel? And in
20 responding to this information request, you noted
21 reference to plans OP-1R1 to OP-7R1 shows a
22 refinement for the organic and sediment disposal
23 areas, so that they are now located on essentially
24 level ground; correct?

25 A. Mm-hm.

1 Q. So in responding to that
2 information request, you redesigned the sediment --
3 or the retention areas to put them on level ground;
4 right?

5 A. I did not mean, in any way,
6 shape or form, to suggest that we would not do what
7 the panel asked. And, in fact, we went to great
8 lengths to do what the panel asked, even to
9 rearranging and redesigning or replanning the site
10 to satisfy the panel.

11 My point is very simply this, that
12 detailed design is not required in an environmental
13 assessment process. If the panel seemed to be
14 concerned about things, we were not going to get
15 into an engineering debate at this part of the
16 process, and, if we could, we would simply move the
17 stuff around on the site to remove their concerns.

18 Q. One other thing about
19 responding to the information requests of the JRP,
20 Mr. Buxton. Now, after the JRP issued its first
21 series of information requests, I understand that
22 Bilcon retained AMEC; is that correct?

23 A. I'm sorry?

24 Q. Bilcon retained AMEC,

25 A-M-E-C?

00100

1 A. AMEC.

2 Q. AMEC?

3 A. Yes, yes.

4 Q. AMEC is a consulting firm
5 that conducts environmental assessments; correct?

6 A. Yes.

7 Q. This was in or around August
8 of 2006?

9 A. AMEC had been working for us
10 long before that. AMEC was engaged -- AMEC are a
11 very large company with tremendous amount of
12 experience in environmental assessments, and they
13 were our consultants from day 1 on the human
14 element of -- human component of our environmental
15 impact statement. So they had been around for a
16 long time.

17 On that particular element we
18 hired Dr. Susan Sherk to supervise the entire human
19 element, human component element.

20 In 2006, as we got into some of
21 the requests from the panel as to how to -- how
22 they would like things arranged in the EIS, we went
23 back to AMEC, and particularly to somebody who was
24 very familiar with putting EIS together, and
25 engaged him to do a very significant amount of work

00101

1 for us, yes.

2 Q. Can you turn to Exhibit
3 R-317, please. Now, this is an exchange between
4 Josephine Lowry and a -- with apologies, Judge
5 Simma -- Uwe Wittkugel; correct?

6 A. Yes.

7 Q. And it is dated August 31,
8 2006?

9 A. Yes.

10 Q. And Josephine, who was she?

11 A. Josephine was the person in
12 my office putting together the document itself,
13 yes.

14 Q. And in the exchange,
15 Josephine notes that:

16 "Paul and I feel a great deal
17 more comfortable with the
18 entire process now that AMEC
19 is on board for guidance."

20 Correct?

21 A. Yes.

22 Q. And the "Paul" she is
23 referring to is you?

24 A. Yes.

25 Q. Do you take issue with what

1 Ms. Lowry has stated here to Mr. Wittkugel?

2 A. No. I think Uwe Wittkugel,
3 in particular, was very helpful in structuring
4 parts of the EIS, and we were very pleased with his
5 work. And that is what she is alluding to.

6 Q. And this is of course,
7 though, after the EIS had originally been filed and
8 when you're dealing with information requests at
9 this stage; right?

10 A. While we were dealing with
11 information requests, yes.

12 Q. Okay.

13 PRESIDING ARBITRATOR: Could I
14 just ask either of you to clarify for me what the
15 "copper" issue was, copper issue? This is what
16 this Wittkugel thing turns out. It says:

17 "Hi, Uwe: I am working on
18 getting the copper questions
19 together."

20 Later on, it says:

21 "I have identified two eco
22 toxicologists who are
23 available to look into the
24 copper issue."

25 THE WITNESS: If I could,

00103

1 Mr. President, it was an informational request from
2 the panel, and I assumed that it was probably
3 generated by Gunter Muecke. And he noted that we
4 had not done a significant section on the presence
5 of copper in the rock.

6 It is well known in the area that
7 the middle flow unit of the basalt has high
8 concentrations of copper, and it's been leaching
9 into the water, into the Bay of Fundy, for a long
10 time. And, in fact --

11 PRESIDING ARBITRATOR: That's
12 fine. Thank you. Thank you.

13 THE WITNESS: Yes.

14 BY MR. LITTLE:

15 Q. Mr. Wittkugel was retained on
16 more issues than just the copper issue. He was, he
17 provided you assistance with responding to the
18 information request; correct?

19 A. Yes, yes, yes.

20 Q. I have just a couple of
21 questions about the hearing before the JRP,
22 Mr. Buxton. Now, the hearing was held in June of
23 2007; correct?

24 A. Yes.

25 Q. And if you could turn to

00104

1 paragraph 73 of your first witness statement.

2 A. Of the first one, sorry?

3 Q. Yes, the first. In paragraph
4 73 you state that:

5 "Bilcon also expected that
6 individuals or groups making
7 presentations before the
8 panel would submit their
9 presentations 10 days before
10 the hearings. Since the panel
11 did not enforce this
12 requirement, Bilcon was
13 unable to prepare for
14 questions of a highly
15 technical nature that were
16 posed to Bilcon without
17 notice. Bilcon was also not
18 provided an opportunity by
19 the panel to respond in the
20 following days, as it
21 expected it would have the
22 opportunity to do. Bilcon
23 also expected that
24 individuals or groups making
25 presentations before the

1 panel would submit their
2 presentations 10 days before
3 the hearings. Since the panel
4 did not enforce this
5 requirement, Bilcon was
6 unable to prepare for
7 questions of a highly
8 technical nature that were
9 posed to Bilcon without
10 notice. Bilcon was also not
11 provided an opportunity by
12 the panel to respond in the
13 following days, as it
14 expected it would have the
15 opportunity to do."

16 Now, while you note that Bilcon
17 was not provided an opportunity by the panel to
18 respond in the following days, you don't provide
19 any evidence in your witness statement that you
20 actually asked for such an opportunity, do you?

21 A. No.

22 Q. Would you agree with me that
23 you could have asked for such an opportunity?

24 A. We just simply -- we wouldn't
25 have been able to, even -- what would we -- you

1 know, how would we respond to material that was
2 launched at us in the thirteenth day of the
3 hearing, a fairly lengthy and perhaps technical
4 report? How would we have responded to that?

5 Q. So you wouldn't have even
6 thought about asking for the opportunity to respond
7 to that as a result; is that what you're saying?

8 A. I don't recall asking for the
9 opportunity to respond.

10 For some of these -- and, you
11 know, I think it is -- it is an important point.
12 We had no idea who the people were who were
13 presenting some of these technical papers.

14 The panel certainly didn't require
15 them to provide us with a CV, so we didn't know
16 whether these people were amateurs or whether they
17 were professionals, or whether they had been hired
18 to make a presentation on a fairly highly-technical
19 subject. We didn't know quite what we were dealing
20 with, because the -- we were supposed to have that
21 material before the hearings, and we just didn't
22 get it.

23 Q. So as a result, you didn't
24 see the need, then, to ask for the opportunity to
25 respond or to --

1 A. It wasn't a question of that.
2 I don't think we would have been able to respond by
3 the end of the hearings.

4 Q. You couldn't have asked for
5 an undertaking, Mr. Buxton, to respond or an
6 opportunity to respond? I mean, the day that a --
7 the day that one of these presentations was made,
8 you couldn't have asked for the opportunity to
9 address it later on in the hearings?

10 A. Oh, well, it's possible, but
11 some of them, obviously a very significant amount
12 of time went into the preparation of these things.
13 And, you know, if we had them ten days before --
14 and this applied also to some of the government
15 presentations that were not there in time.

16 And the whole purpose of this is
17 to look at -- to enable the proponent to look at
18 the presentations prior to the hearings and, if
19 necessary, assign its consultants to review them
20 and prepare a response.

21 When they are dumped on you
22 halfway through the hearings, you really have no
23 opportunity at all to do anything with them.

24 Q. Mr. Buxton, if you're saying
25 that these presentations only had to be provided

00108

1 ten days before the hearing --

2 A. Yes.

3 Q. -- that is not a heck of a
4 lot of time either. So it wouldn't have been
5 reasonable to try to address them when they came up
6 to you or if they come up to you during the hearing
7 if you only had ten days in the first place?

8 A. Well, you're assuming you
9 only had ten days if they came up on the first day
10 of the hearing. The hearings were 15 days.

11 We would have had certainly
12 adequate time to determine whether they were
13 valuable, scientific, and prepared by somebody that
14 had the necessary training.

15 We didn't know who these people
16 were that were making these presentations.

17 Q. Okay.

18 A. There were no CVs. We didn't
19 know whether they were university professors with a
20 high degree of skill and capacity and experience,
21 or whether they were people off the street. We had
22 no idea.

23 Q. We have focussed thus far on
24 the Whites Point quarry and marine terminal
25 project, Mr. Buxton.

00109

1 A. Yes.

2 Q. I want to now turn to that
3 3.9 hectare quarry on the Whites Point project site
4 that you have discussed in your witness statements,
5 okay?

6 A. Yes.

7 Q. Now, you were involved in
8 applying for the industrial approval for the 3.9
9 hectare quarry; correct?

10 A. Yes.

11 Q. And this application was made
12 to NSDEL?

13 A. Yes.

14 Q. All right. And if you could
15 turn to Exhibit R-75, please, this document is
16 entitled "Application for Approval to Operate a
17 Quarry"; right?

18 A. Yes.

19 Q. And it was submitted by Nova
20 Stone Exporters; correct?

21 A. Yes.

22 Q. And if we turn in one page,
23 it appears that the application for approval was
24 made February 18th, 2002; right?

25 A. That sounds correct.

00110

1 Q. And looking at section 1, it
2 says that Nova Stone Exporters would be the owner.
3 Does that make sense?

4 A. Yes.

5 Q. And in section 2, it lists
6 yourself as the applicant contact; correct?

7 A. Yes.

8 Q. Now, if you can turn nine
9 pages in, there is a project description.

10 A. Yes.

11 Q. On the second paragraph of
12 the first page of the project description,
13 Mr. Buxton, it is stated that:

14 "It is proposed that
15 approximately 50,000 metric
16 tonnes of basalt will be
17 quarried and crushed per
18 month."

19 Correct?

20 A. Yes.

21 Q. All right. Then at the
22 bottom of the first page, it states:

23 "The rock will be quarried in
24 40 foot lifts on a 400-foot
25 face which will advance to

00111

1 the south, and the total area
2 to be quarried under this
3 permit application will be
4 approximately 6.5 hectares."

5 A. Yes.

6 Q. So this project description
7 describes how the 3.9 hectare quarry would be
8 operated and developed. Would you agree?

9 A. Yes.

10 Q. Now, I understand that after
11 this application, Nova Stone had to reapply for the
12 3.9 hectare quarry, due to the technical issue with
13 the size of the quarry footprint; correct?

14 A. Yes.

15 Q. It was found to be just
16 slightly over 4 hectares and could have required an
17 environmental assessment under Nova Scotia law, so
18 there was a reapplication?

19 A. Yes.

20 Q. And that reapplication was
21 made April 23rd, 2002?

22 A. That sounds correct.

23 Q. Now, we know that NSDEL
24 issued an industrial approval for the 3.9 hectare
25 quarry seven days later after that reapplication on

00112

1 April 30th, 2002; correct?

2 A. That sounds correct, yes.

3 Q. And if you can turn to
4 Exhibit R-87, please, this is a letter from Bob
5 Petrie to yourself?

6 A. Yes.

7 Q. And it is dated April 30th,
8 2002; right?

9 A. Yes.

10 Q. And it attaches the approval
11 for the 3.9 hectare quarry?

12 A. Yes.

13 Q. And Mr. Petrie's letter in
14 the first paragraph notes that the approval was
15 issued to Nova Stone Exporters?

16 A. That's correct.

17 Q. And indeed the first page of
18 the approval provides that the approval holder is
19 Nova Stone Exporters; right?

20 A. Yes.

21 Q. So Bilcon didn't apply for
22 this industrial approval; correct?

23 A. No.

24 Q. Now, we've had a little bit
25 of discussion earlier on -- this was, I believe

00113

1 Mr. Nash said, an approval subject to conditions,
2 because Nova Stone's quarrying operations couldn't
3 proceed on the 3.9 hectare site until certain
4 conditions were satisfied; right?

5 A. That is correct.

6 Q. And these related to the
7 impact of blasting on the 3.9 hectare site on the
8 marine environment; correct?

9 A. Yes, in addition to all of
10 the other conditions under the NSDEL.

11 Q. Oh, of course.

12 A. Yes.

13 Q. Oh, okay. Now, those
14 conditions regarding blasting are in paragraphs
15 10(h) and 10(i)?

16 A. Yes.

17 Q. Now, Nova Stone, it applied
18 for and it received the conditional industrial
19 approval for the 3.9 hectare quarry before you
20 submitted any project description for the Whites
21 Point project; correct?

22 A. Yes.

23 Q. As we know, this conditional
24 approval was issued April 30th, 2002?

25 A. Yes.

00114

1 Q. And that draft project
2 description for the Whites Point project that you
3 filed, I think, was provided to government
4 officials, Helen MacPhail specifically, on
5 September 30th, 2002; correct?

6 A. Yes.

7 Q. Because at that point, you
8 wanted to get the regulatory review of the larger
9 Whites Point project up and running; correct?

10 A. Yes.

11 Q. All right.

12 A. I certainly wanted to be -- I
13 certainly wanted to advise NSDEL that that was the
14 thinking of the proponent at that time, yes.

15 Q. Now, this was around the very
16 same time that you were preparing and providing
17 information for DFO's review in connection with
18 those blasting conditions that we just mentioned?

19 A. Yes.

20 Q. Correct? Okay. So in other
21 words, when you filed the draft project description
22 for the Whites Point project, the industrial
23 approval that we're talking about here for Nova
24 Stone's 3.9 hectare quarry was still conditional on
25 the conditions; correct?

00115

1 A. Yes.

2 Q. Now, when we look at Exhibit
3 C-47, Mr. Buxton, that is the draft project
4 description we looked at earlier?

5 A. Yes.

6 Q. On page 2 of this draft
7 project description, at the top of the page you
8 state that the land-based infrastructure of the
9 Whites Point quarry -- sorry, you state "the
10 land-based infrastructure", and I think you are
11 referring to the Whites Point quarry, "will be
12 constructed on the previously-approved 3.9 hectare
13 quarry site."

14 Do you see that?

15 A. Yes.

16 Q. And the components of the
17 land-based infrastructure, they are listed on page
18 1 of the draft project description; correct?

19 A. Yes.

20 Q. And they include things like
21 office facilities, and workshop facilities, and
22 fuel tanks and environmental controls, such as
23 sedimentation ponds; correct?

24 A. Yes.

25 Q. So Nova Stone's 3.9 hectare

00116

1 quarry was fully contained within the site of the
2 quarry for the Whites Point project; correct?

3 A. Yes.

4 Q. And Nova Stone's 3.9 hectare
5 quarry would actually be where the infrastructure
6 that was needed for the operation of the larger
7 quarry would be constructed; is that right?

8 A. Certainly, certainly a part
9 of it. And as the project description -- and
10 obviously the project description became much more
11 detailed, and it is an iterative process as more
12 decisions are made; the project description gets
13 more precise as you go along.

14 And certainly it would be
15 incorrect to say that all of the infrastructure
16 required for the larger quarry could have been
17 contained on the original 3.9 hectare site.

18 Q. Fair enough. Fair enough.

19 A. Okay.

20 Q. Why don't we look at the
21 final project description for the Whites Point
22 project, which is just a few documents after C-47
23 in Exhibit C-499, Mr. Buxton.

24 Now, there are some page numbers
25 on this document, and I would like you to turn to a

00117

1 map that is at page 001049 in the bottom right-hand
2 corner.

3 Now, this is called the Whites
4 Point Quarry quarry infrastructure plan, this map,
5 and this map actually shows the boundaries of the
6 3.9 hectare quarry; correct?

7 A. Yes.

8 Q. And some of the -- not all,
9 but some of the infrastructure for the larger
10 quarry was to be built on the 3.9 hectare quarry;
11 right?

12 A. Yes, yes.

13 Q. For example, we can see on
14 the site of the 3.9 hectare quarry the sediment
15 retention pond, a shop, and fuel tanks and an
16 office; correct?

17 A. Yes.

18 Q. And it appears also from this
19 plan that the 3.9 hectare quarry is almost as close
20 as you could get on the Whites Point property to
21 the Bay of Fundy; would that be a fair
22 characterization?

23 A. It is about 100 metres back.
24 I don't know that that's --

25 Q. Well, it is certainly closer

00118

1 to the Bay of Fundy than the majority of the Whites
2 Point project site. Would you agree with that?

3 A. Yes, yes.

4 Q. Now, if you turn a few pages
5 in on C-499 to a page with page numbering 1041 on
6 the bottom.

7 A. Yes.

8 PRESIDING ARBITRATOR: Excuse me.
9 Oh, it is -- we have 43 ahead of 41, so it is
10 just...

11 MR. LITTLE: This is confusing,
12 but, yes, it is the second-last page of the text,
13 and it has "41" on the bottom of it.

14 BY MR. LITTLE:

15 Q. Here you actually make
16 mention of Nova Stone's 3.9 hectare quarry. At the
17 top of the page you note that a blasting plan is
18 under review for the 3.9 hectare quarry.

19 Here you call it a 4 hectare
20 quarry, but I think it is the 3.9 that we're
21 referring to. And you also state that a primary
22 objective of the 4 hectare blasting plan is to
23 gather specific on-site data for further assessment
24 of potential impact on the marine environment from
25 blasting operations. Correct?

1 A. Yes. But I think it would be
2 certainly worth noting that I do say in this
3 document that the blasting plan was prepared and
4 submitted to the department for approval, and this
5 is to satisfy condition 10(i) specifically.

6 And I wrote that because I had no
7 knowledge of what, in fact, was going on in DFO at
8 the time. And certainly I now know that, in fact,
9 in September, at the end of September 2002, so long
10 before this was written, that the DFO scientist,
11 who was the writer of the guidelines for blasting
12 in or near Canadian fisheries waters, had, in fact,
13 said to his DFO colleagues that he saw no
14 difficulty with us blasting with respect to marine
15 mammals as long as we observed -- kept an observer
16 within a 1-kilometre area of the blast.

17 But we were never told that, and
18 also I should say, because it relates precisely to
19 this, is that in early December, the DFO whale
20 expert advised his colleagues that were reviewing
21 this plan that given the mitigation measures that
22 we had already set out, that he had no difficulty
23 whatsoever with us blasting on the 3.9 hectare
24 quarry with respect to whales. But we were never,
25 ever told that by DFO.

1 So while I am still saying here,
2 we're waiting for approval from DFO, DFO scientists
3 had already cleared it, but they would not tell us
4 and, in fact, never did tell us, ever, that we had
5 satisfied their whale expert or their blasting
6 expert with respect to mitigation.

7 Q. Mr. Buxton, that is all
8 helpful information that we have heard from your
9 counsel yesterday. I wanted to put this statement
10 to you to ask a simple question --

11 A. Yes.

12 Q. -- with respect to what your
13 intentions were with the 3.9 hectare quarry, okay?

14 A. Yes.

15 Q. So you wanted to conduct a
16 test blast?

17 A. Yes.

18 Q. At the 3.9 hectare quarry?

19 A. Yes.

20 Q. Okay, thank you. Now, test
21 blasting wasn't the only purpose of the 3.9 hectare
22 quarry, was it?

23 A. It was certainly a
24 significant part of it. Recognize that you're
25 going into a large project with a potential capital

00121

1 expenditure of, my guess at that time, about
2 \$45 million to open this quarry and marine
3 terminal.

4 So, you know, one of the things
5 that we certainly wanted to do was to take a closer
6 look at the rock, drill some bore holes, you know,
7 do all of the things that -- the due diligence from
8 the business perspective on that site.

9 And certainly we knew that
10 blasting was an issue with respect to cetaceans and
11 pinnipeds, whales and things like seals and
12 porpoises, and we wanted to gather that hard
13 empirical data so that if we were required later on
14 with respect to the quarry to provide that
15 information, we would have the hard data.

16 Q. But test --

17 A. We were never allowed to do
18 that, ever.

19 Q. Test blasting wasn't the only
20 purpose of the 3.9 hectare quarry; do I understand
21 that is a correct statement?

22 A. It was -- it was an
23 investigative quarry. But, it still, under its
24 permit, was allowed to, in fact, blast and crush
25 rock.

1 Q. So you would agree with me,
2 then, that test blasting was not the only purpose
3 of the 3.9 hectare quarry, Mr. Buxton?

4 A. No. It was not the only
5 purpose. You know, I don't know whether you had
6 the opportunity to walk over from Highway 217 to
7 the quarry, but it is a pretty rugged old road over
8 there. In fact, there is no vehicular access
9 anymore.

10 And one of the things that we
11 needed to do was to improve access to the site for
12 things like drill rigs. Where were we going to get
13 the rock for that?

14 Well, a little mobile crusher on
15 the 3.9 hectare site would have enabled us to do
16 that.

17 Q. Well maybe we can actually
18 look at a document that I think reflects that. If
19 you can turn to Exhibit R-151, please, this is a
20 letter from yourself to Derek McDonald of the
21 Canadian Environmental Assessment Agency?

22 A. Yes.

23 Q. Excuse me. And you were
24 dealing with Derek McDonald on the Whites Point
25 project in the first half of 2003?

00123

1 A. I was, yes.

2 Q. And this letter is dated
3 April 20th, 2003?

4 A. Yes.

5 Q. And indeed in the letter you
6 state that:

7 "Nova Stone's intentions for
8 the 3.9 hectare quarry are to
9 open it in accordance with
10 the approval and crush rock."

11 Correct?

12 A. Yes.

13 Q. And you add that:

14 "... this rock will be used
15 initially for the
16 construction of the various
17 environmental controls as set
18 out in the application for
19 the 3.9 hectare quarry and to
20 construct a new access road
21 to the 3.9 hectare quarry."

22 Correct?

23 A. Yes.

24 Q. So one of the intentions,
25 then, was to blast and crush rock and start

00124

1 building environmental controls for the quarry
2 site; correct?

3 A. Sentence 1 there has a very
4 specific purpose. The 3.9 hectare quarry, which
5 was an approval to open a 3.9 hectare quarry and
6 crush rock, carried with it conditions, but it was
7 not conditional upon the purpose for which the rock
8 would be used.

9 And that was an approval document.
10 It wasn't a conditional approval. It was an
11 approval with conditions. And I was asked -- this
12 is a response to something from Derek McDonald
13 asking us what we intended to do with the 3.9
14 hectare quarry.

15 And we had an approval to blast
16 and crush rock on that quarry, and I am just saying
17 Nova Scotia's intention for the 3.9 hectare quarry
18 to open it in accordance with the approval and
19 crush rock, we have an approval to do that.

20 Do you see my point here?

21 Q. I see your point, and you are
22 answering a whole bunch of questions that -- you
23 are giving me a whole bunch of answers for
24 questions I am not asking.

25 A. Well, I think you did ask the

1 question, because you asked me what we were going
2 to use the rock for. And I specifically state in
3 here that, yes, we're going to use it for
4 environmental controls and to upgrade the Whites
5 Cove Road, but, in a sense, the primary thing is
6 that we have an approval to open a quarry and crush
7 rock. We have the approval.

8 Q. I think you finally gave me
9 the answer to the question that I was asking.

10 A. Okay.

11 Q. Can you turn, please, to
12 Exhibit R-551, Mr. Buxton.

13 It is R-551. I'm not sure you are
14 at the right document, Mr. Buxton.

15 A. Sorry.

16 Q. It is on the screen, if you
17 would like to look at the screen. That is it
18 there.

19 A. Okay, got it.

20 Q. This is an excerpt of the
21 2003 journal of Derek McDonald with some
22 confidential information that's been redacted.

23 Under the date of Tuesday, June
24 10th, Mr. McLean records the substance of a
25 conversation that he had with you at about 9:45

00126

1 a.m. that day. He notes that you informed him that
2 you now had an opportunity to bid on Highway 217
3 upgrading work worth a certain amount, but unable
4 to because blasting plan not approved.

5 Do you see that?

6 A. Yes.

7 Q. So you also wanted to get
8 blasting on the 3.9 hectare quarry in order to have
9 a supply of rock that could be used to bid on
10 highway upgrading work; is that fair to say?

11 A. Not necessarily, but that was
12 a reality. This was an opportunity. If the owner
13 of the quarry, who had an approval, were allowed to
14 blast, then he could have. That would have been
15 his choice.

16 This was the point I was making.
17 It was just a lost opportunity.

18 Q. Now, would you agree with me
19 that the EA of the larger Whites Point project was
20 underway by this point; correct?

21 A. Yes.

22 Q. Okay.

23 A. Yes.

24 Q. Now, Nova Stone wasn't able
25 to blast on the 3.9 hectare quarry and accomplish

00127

1 these objectives that we have just talked about,
2 because DFO still hadn't provided written
3 acceptance of the blasting conditions in the
4 approval subject to conditions; correct?

5 A. That is correct, even though
6 they knew perfectly well that we had satisfied
7 condition 10(i). Their own scientists and their
8 own marine expert had explicitly said, internally
9 to their staff, that we had satisfied them, and we
10 were never told that. 10(i) had, in fact, been
11 satisfied since way back at the end of September
12 2002.

13 Q. DFO actually determined,
14 Mr. Buxton, that the proposed blasting activity on
15 the 3.9 hectare quarry would actually require or
16 likely require a section 32 authorization, didn't
17 it?

18 A. That's what they wrote to us,
19 and we never believed that for one moment, even
20 though we didn't have the information that DFO had
21 at the time, which was, in fact, that there would
22 be no harm whatsoever.

23 The guidelines for blasting in or
24 near Canadian fisheries waters are in fact designed
25 primarily to protect fish. They do also cover

1 mammals, but there's less scientific veracity in
2 those.

3 But certainly they are designed --
4 and they are DFO's guidelines. And the blast
5 that -- in fact, our first test blast would have
6 been double the distance from the water required
7 under the guidelines, with a lower charge. So
8 we've got two safety factors in there.

9 And, in fact, a DFO scientist
10 basically said they had no difficulty. They had no
11 problem.

12 Q. Mr. Buxton, would you answer
13 my question, please? DFO made a determination that
14 it communicated to Nova Stone that blasting
15 activity on the 3.9 hectare quarry would likely
16 require a section 32 authorization? It is a simple
17 question.

18 A. They certainly wrote --

19 Q. Listen, please, Mr. Buxton?

20 MR. NASH: Excuse me,
21 Mr. President. Mr. Buxton has fully answered that
22 question. It is a clear intervention by counsel.
23 It is unfair to the witness. He already answered
24 the question. He answered it at the beginning of
25 the last answer, and to say he hasn't answered the

1 question is simply not accurate.

2 PRESIDING ARBITRATOR: So the
3 answer to the question consisted in you stating at
4 the outset --

5 THE WITNESS: We certainly
6 received a letter. We received that letter from
7 DFO saying that, in their opinion, a section 32 was
8 required. We certainly received the letter, yes.

9 PRESIDING ARBITRATOR: So that was
10 the question.

11 MR. LITTLE: Yes.

12 PRESIDING ARBITRATOR: Okay.

13 BY MR. LITTLE:

14 Q. I take it from your comments,
15 Mr. Buxton, that your view at this point was that
16 DFO was wrongfully withholding acceptance of the
17 blasting plan for the 3.9 hectare quarry?

18 A. Absolutely.

19 Q. Can you turn, please, to
20 Exhibit R-382, please.

21 A. R?

22 Q. 382, please. Now, this is a
23 letter from yourself to NSDEL's Bob Petrie;
24 correct?

25 A. Yes.

00130

1 Q. And it is dated June 25,
2 2003?

3 A. Yes.

4 Q. All right. And in it you
5 state in the last paragraph on page 1 that:

6 "DFO's take on the position
7 that our entering an EA phase
8 for the proposed larger
9 quarry prevents them from
10 taking any action on the 3.9
11 hectare quarry. We strongly
12 disagree with this position
13 and can now advise that DFO's
14 position is preventing Nova
15 Stone Exporters Inc. from
16 operating the 3.9 hectare
17 quarry."

18 Correct?

19 A. Yes.

20 Q. Then on page 2, you note:

21 "These are serious financial
22 consequences which arise from
23 our inability to operate in
24 accordance with the Permit."

25 Correct?

00131

1 A. Yes.

2 Q. Would it be fair to say that
3 these types of consequences included, for example,
4 the inability to have that opportunity to bid on
5 highway upgrading work?

6 A. No. The serious financial
7 consequences here are that we are going into a
8 process, and certainly a comprehensive study
9 process, without firm empirical data which would
10 have been provided by test blasting.

11 And you can see at the end of the
12 day, in the panel report itself, basically saying
13 they are confused about the blasting and wouldn't
14 it have been better if there had been a test blast?
15 That is what we were trying to do for about six
16 years, was simply conduct a test blast to provide
17 good, sound empirical data.

18 And further than that, I am
19 absolutely of the opinion that certainly the
20 scientists in DFO would have welcomed that data.
21 They had virtually nothing with respect to whales.
22 They had nothing. Their scientists basically said,
23 We're flying by the seat of our pants.

24 They would have had all of this
25 technical data from numerous blasts throughout the

00132

1 process. We were going to monitor every blast, not
2 just the initial blast. This was a real
3 opportunity for them to gather real scientific data
4 and we were prevented from doing that, period.

5 Q. Okay. Mr. Buxton, in the
6 first full paragraph on -- sorry, the second full
7 paragraph on page 2 of this letter, you state:

8 "The Company has suffered
9 significant costs due to the
10 delay and the jurisdictional
11 machinations employed by
12 DFO."

13 So you're saying that "the Company
14 has suffered significant costs" refers to the
15 inability to conduct a test blast?

16 A. Which one are you quoting
17 from now? I'm sorry.

18 Q. On page 2 of this letter, the
19 second full paragraph, the first sentence.

20 A. Well, the whole issue of
21 10(i) was very significant to us. It had to be
22 something that was overcome, and here we are
23 writing literally in June 2003, when we now know
24 that 10(i) was, in fact, covered in September of
25 2002.

1 And we were satisfied that we had,
2 in fact, satisfied condition 10(i), and every,
3 every month of delay on this project was a cost
4 delay to provide the information that we required
5 to go to the next level.

6 And that is what I'm referring to
7 here, very clearly. These are significant costs
8 when there is a delay. Where were we with going to
9 go for our technical data, if DFO continuously
10 refused to approve 10(i)?

11 Q. So as of the date of this
12 letter, then, you were of the view that DFO was
13 wrongfully not permitting Nova Scotia -- or, sorry,
14 Nova Stone to operate the 3.9 hectare quarry, but
15 also that Nova Stone was suffering costs or damages
16 as a result of this non-permission to operate the
17 quarry?

18 A. Yes. Any delay in the
19 process, any delay in the process, is a cost to the
20 proponent.

21 Q. Just a few more questions
22 regarding the 3.9 hectare quarry.

23 Now, after the Whites Point
24 project was referred to a review panel, but before
25 the Joint Review Panel was constituted, the Global

00134

1 Quarry Products partnership underwent a corporate
2 reorganization; correct?

3 A. It did.

4 Q. And this corporate
5 reorganization took place sometime after March 1st,
6 2004?

7 A. Yes.

8 Q. And the reorganization led to
9 the partnership being dissolved; correct?

10 A. Yes.

11 Q. And Bilcon became the sole
12 proponent of the project, then?

13 A. That is correct.

14 Q. Now, could you please turn to
15 Exhibit R-94, Mr. Buxton.

16 Now, this is a letter from
17 yourself to Mr. Jean Crépault.

18 A. Yes.

19 Q. And Mr. Crépault is at the
20 Canadian Environmental Assessment Agency; correct?

21 A. He was a replacement panel
22 manager at that time.

23 Q. And the letter is dated
24 August 17th, 2004. And you note in paragraph 1
25 that the partnership between Bilcon and Nova Stone

00135

1 had been dissolved?

2 A. Yes.

3 Q. And that Bilcon was the
4 proponent of the project?

5 A. Yes.

6 Q. And held the lease for the
7 entire Whites Point project property; correct?

8 A. Yes.

9 Q. Now, in paragraph 2, you note
10 that as Bilcon now held the lease for the entire
11 property, the conditional industrial approval for
12 Nova Stone's 3.9 hectare quarry was no longer
13 valid; correct?

14 A. Yes.

15 Q. And this was because the
16 conditional -- or the approval subject to
17 conditions was only valid if the approval holder,
18 which was Nova Stone, controlled the land on which
19 the quarry was to operate; is that right?

20 A. That is correct, yes.

21 Q. Then on page 2, you noted
22 that Bilcon did not intend to ask NSDEL to transfer
23 the conditional industrial approval to Bilcon;
24 correct?

25 A. That is correct.

1 Q. So in looking at the points
2 in this letter, would you agree with me that the
3 conditional industrial approval for Nova Stone was
4 a dead issue as of the date of this letter?

5 A. Yes.

6 Q. In fact, it would have been a
7 dead issue as of the date that Bilcon entered into
8 the lease for the entire Whites Point property;
9 correct?

10 A. Yes. Yes, it would have been
11 effective on that date. I would say that we --
12 there was a decision made to not ask the Minister
13 for a transfer, and part of that was that it
14 appeared that -- we are way into 2004 now -- that
15 we were never going to get 10(i) cleared.

16 And since we were never going to
17 get 10(i) cleared, it was in fact somewhat of --
18 the approval was somewhat of an impediment to us.

19 And DFO had made it very clear to
20 us from the beginning, at meetings and in
21 correspondence, that, in fact, we did not require
22 permission from DFO to conduct a test blast. And
23 the reasoning behind that is that section 32 makes
24 it an offence to kill fish unless by fishing.

25 The problem with not applying for

1 an authorization under section 32 is that if one
2 kills fish, then there are serious penalties, and
3 certainly the penalties to us would have been not
4 just financial penalties, but also penalties to
5 reputation.

6 We did not want to go that route.
7 We wanted to go the high-road route, if you like,
8 and clearly we were not going to get permission to
9 blast on the 3.9 hectare quarry.

10 That 10(i) was just never going to
11 be given to us, and we would have had the option,
12 in fact, without the quarry permit there, to
13 revisit the issue of, in fact, test blasting on a
14 piece of property that was no longer subject to
15 10(i). We never did so, but that option was there
16 for debate at that time.

17 Q. Those are my questions,
18 Mr. Buxton. Thank you.

19 THE WITNESS: Thank you.

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

22 MR. NASH: Mr. President, I will
23 have some questions in re-examination, but I think
24 this would be an appropriate time for the lunch
25 break.

00138

1 PRESIDING ARBITRATOR: Would you
2 prefer to do this after the break?

3 MR. NASH: I would prefer that if
4 that is agreeable to the Panel.

5 PRESIDING ARBITRATOR: So we are
6 going to have the lunch break now. We will
7 continue in an hour, precisely in an hour's time,
8 which would be 1:35. 1:35. Thank you, Mr. Buxton.

9 THE WITNESS: Thank you, sir.

10 PRESIDING ARBITRATOR:

11 Unfortunately, you are not yet in
12 freedom and I have to repeat that during the lunch
13 break, would you please keep away from the people
14 here and have a solitary lunch.

15 --- Laughter.

16 PRESIDING ARBITRATOR: Which is
17 probably what you would prefer at this stage,
18 anyway.

19 --- Laughter

20 THE WITNESS: Thank you.

21 PRESIDING ARBITRATOR: Luncheon
22 break.

23 --- Luncheon recess at 12:38 p.m.

24 --- Upon resuming at 1:36 p.m.

25 PRESIDING ARBITRATOR: So it looks

1 like, Mr. Buxton, Mr. Nash, you are in place and
2 ready to start. So I will give the floor to
3 Mr. Nash for the re-direct.

4 MR. NASH: Thank you,
5 Mr. President.

6 RE-EXAMINATION BY MR. NASH:

7 Q. Mr. Buxton, you said in your
8 direct -- or your cross-examination that you did
9 not consider the site problematic for development
10 and operation of a quarry. Do you recall that?

11 A. Yes.

12 Q. Can you explain why you did
13 not consider this particular site problematic for
14 the development and operation of a quarry?

15 A. A number of -- a number of
16 good reasons. One is, very importantly, it was on
17 the side of the mountain away from the nearest
18 community. So that any effect, noise effect, from
19 the quarry or the marine terminal could not be seen
20 from either the road, the only road that goes up
21 Digby Neck, or from any of the houses on that road
22 or from the local community. So it was a very,
23 very important point.

24 Also, on that side of the mountain
25 there are no other residences. I think there is

00140

1 one small cottage, so it is an isolated -- it is an
2 isolated spot. And this is very important.

3 Crucially, also, it had deep water
4 fairly close into the shore. That's very important
5 for the siting of a marine terminal. The further
6 out you go, the much more expensive it becomes.

7 And of course with any mineral
8 extraction, virtually the most important thing is
9 that you have the right mineral there and in place.
10 It's quite often sort of said, Well, why don't you
11 go somewhere else and mine this or quarry that?
12 But the reality is that unless the mineral is
13 there, there is no point in going there.

14 And this was a very, very
15 excellent source of high-grade aggregate, and it
16 was identified as such by the Nova Scotia
17 Department of Natural Resources.

18 So I think those are the primary
19 reasons.

20 Q. Were you alive to concerns
21 regarding ecotourism and whale watching with
22 respect to this specific location?

23 A. Very much so. In 1990 or
24 thereabouts -- I can't remember the exact date -- I
25 was commissioned to draft the tourism plan for Long

00141

1 Island, which is the next island up from Digby
2 Neck, so I was aware of all of the issues.

3 And also about that time, perhaps
4 a little earlier, I was asked by a whale watch
5 entrepreneur to help him start his business and get
6 the necessary permits to get into the
7 whale-watching business.

8 And as I said before, many of my
9 jobs in that area -- and one of them was as
10 executive director on a part-time basis of the Town
11 of Digby and the Municipality of Digby Industrial
12 Commission to get activity in the area, which also
13 included tourism, the tourism industry.

14 And I may say, also, that I was
15 very aware of the possible effects of this quarry,
16 because I live in the area. My entire family lives
17 in the area. My daughters live in the area. My
18 grandchildren live in the area. All of my
19 investments and property are in that area. And the
20 last thing I would want to do is to destroy my
21 investments in the area.

22 Q. In terms of the specific
23 location of the quarry and in terms of its
24 appropriateness for that piece of property to be
25 operated as a quarry, did you come to any

1 conclusion as to whether or not the operation of
2 the quarry would interfere with whale watching or
3 ecotourism activities?

4 A. We believed not. We
5 certainly talked to the whale-watching people.
6 Generally speaking, the areas where whale watching
7 is concentrated is not on the approach to the
8 Whites Point quarry, Whites Cove.

9 And typically they go from
10 Tiverton or from East Ferry and go out into the
11 bay, or they go further out into the or close to
12 the preservation area for the North Atlantic Right
13 Whale.

14 Q. And Tiverton is about ten
15 kilometres down the coast from Whites Point?

16 A. That is correct.

17 Q. Could you turn, please, to
18 Exhibit R-299.

19 You were asked to comment on some
20 matters on page 100. These are the CLC minutes.
21 And if you go to page 100, about three-quarters of
22 the way down, there is an entry saying that:

23 "Mr. Buxton replied there are
24 15 sections to the
25 environmental assessment."

1 Geologist John Lizak,
2 Pennsylvania; archeologist Charles Watrall;
3 cultural Dr. Barry Moody, aboriginal, Confederacy
4 of Mainland Mi'kmaq; and botanical Ruth Newell,
5 George Alliston, et cetera. There are a lot of
6 names there, including Mike Brylinski.

7 Now, these minutes are of a
8 meeting on January 9th, 2003. Had you retained all
9 of those scientists by that time?

10 A. Yes, we had. Yes, we had,
11 although I'm not sure of what the reference to
12 marine mammals, Dalhousie University, et cetera, is
13 at the end, because Mike Brylinski, who was doing a
14 lot of marine work for us, is actually from Acadia
15 University, so...

16 Q. Right. And what was the
17 mandate given to you by Mr. Clayton with respect to
18 doing scientific studies for this project?

19 A. Mr. Clayton made it very
20 clear to me that we were to hire the best
21 scientists that we could find, that I was not on a
22 restrictive budget and we were to do whatever was
23 necessary to satisfy the regulators in this matter.

24 Q. Was there a reason why you
25 did not go to one of the larger engineering firms,

1 such as -- and we heard about the firm AMEC -- for
2 the entire project, for all of the experts?

3 A. A number of reasons. One is
4 I have in the past worked for very large
5 engineering corporations, engineering corporations
6 with 1,500 or 2,000 engineers and technicians, and
7 it is, generally speaking, true that they are very
8 effective in perhaps half a dozen fields, but they
9 are not terribly effective in all fields. And it
10 quite often arises that they have to go outside for
11 specialist assistance.

12 I saw this as very much a project
13 management job where I managed the process, and we
14 certainly wanted to go to the people that we knew
15 who were highly skilled. We wanted to go into
16 academe and get the most qualified people that were
17 available in academe to assist, such as Mike
18 Brylinski.

19 And I think that we thought that
20 we could put actually a better team together than
21 the two -- well, really only one large consortium
22 in Nova Scotia at that time, which was Jacques
23 Whitford, who have since been taken over by
24 Stantec. And AMEC certainly had a presence there,
25 but not a major presence in Nova Scotia.

1 Q. And who was paying for the
2 scientific studies and work and investigation that
3 you were having done?

4 A. They were all paid by Bilcon,
5 yes.

6 Q. And if you go over to your
7 supplementary witness statement and turn, if you
8 will, to paragraph 33, could you just read out
9 paragraph 33, please, for the record.

10 A. "Bilcon appreciated the
11 fishing industry, ecotourism
12 and cultural concerns of
13 Digby Neck residents and
14 conducted no less than 20
15 different studies relating to
16 these issues to ensure that
17 there was minimal impact on
18 marine and terrestrial
19 habitat and socio-economic
20 and cultural elements in the
21 community."

22 Q. Did you retain AMEC for the
23 purpose of doing socio-economic studies?

24 A. Yes, I did.

25 Q. And what were the nature of

1 those studies?

2 A. These were the studies that
3 were described in the guidelines, in the final
4 guidelines. And of course they follow the Nova
5 Scotia Environment Act, and they certainly
6 concerned health. They concerned topics such as
7 social cohesion and, in fact, everything to do with
8 the community, the human side, if you like, of the
9 environmental equation.

10 Q. And if you would turn to
11 exhibit R-210, R-210, which is a letter attaching
12 the final guidelines, and you go to page 33 of
13 those guidelines, 33 at the bottom there, which
14 refers under section 9.3 to the existing human
15 environment --

16 A. Yes.

17 Q. -- did you commission studies
18 with respect to each of the areas within that
19 section of the EIS, section 9.3?

20 A. Yes.

21 Q. And when you reviewed the
22 draft and final EIS guidelines, was there any
23 reference that you recall to community beliefs?

24 A. No.

25 Q. Was there any reference, at

1 all, in the EIS guidelines to core community
2 values?

3 A. No. I never heard the term
4 during the entire process, including at the
5 hearings.

6 Q. So you never received
7 correspondence from the chair of the JRP with
8 respect to core community values?

9 A. No. And I will say that
10 several government departments were very helpful to
11 us, and Health Canada was one of those departments.
12 We had meetings with Allison Denning and reviewed
13 precisely what they saw as health issues, for
14 example, and what we should look at, for example,
15 in country foods and all of that sort of thing.

16 And she put us on to the
17 appropriate experts in Health Canada and we
18 basically followed their guidance very closely, but
19 we did not deal with core values, per se, because
20 it simply was not mentioned anywhere in the
21 document, and I even have a problem now reading the
22 definitions in the panel report and trying to
23 discern exactly what the panel was getting at by
24 "core values".

25 Q. In total, how many experts

00148

1 did you retain for the purpose of doing the
2 environmental assessment?

3 A. I believe there were 34 or
4 35.

5 Q. And how many reports
6 commissioned?

7 A. Again, I think we were well
8 into the middle 40s, perhaps 45 reports.

9 Q. And how many information
10 requests from the panel did you respond to?

11 A. We responded to all of them.
12 I believe there were a couple primarily concerned
13 with detailed design that I think that the panel
14 was unhappy with, but we responded to them all.

15 Q. And about how many were
16 there; do you recall?

17 A. I --

18 Q. Several dozens?

19 A. Volumes, volumes of
20 responses. I can't remember the number.

21 Q. And during the course of the
22 hearing, you were asked to respond to undertakings?

23 A. That is correct.

24 Q. Questions that arose during
25 the course of the hearings? The hearings were held

1 over a two-week period, approximately; is that
2 correct?

3 A. Yes.

4 Q. And they were held from what
5 time in the morning to what time in the evening?

6 A. I think they were held from
7 about 9:00 to 5:00, although some evenings they ran
8 late, if people went late with their presentations.

9 Q. Do you recall approximately
10 how many undertakings you responded to during the
11 course of the hearing?

12 A. I don't have that number at
13 hand, but I think there were probably 30.

14 Q. And you were working on these
15 overnight for the next day or for the few days
16 later; is that how it worked?

17 A. Well, when the undertaking
18 came in from the panel, I would assign the
19 appropriate expert to develop an answer. And they
20 were not required overnight, but they were required
21 fairly shortly, perhaps in two days.

22 Q. How many experts did you have
23 at the hearing for the purpose of responding to any
24 questions that arose?

25 A. I believe that we had 19

00150

1 available, and we did have discussions with the
2 panel manager prior to the hearings and established
3 clearly that we would have topic days.

4 So one day would be devoted to
5 marine issues and one would be devoted to another
6 set of issues, and that enabled us to make sure
7 that our experts were available on that particular
8 day to answer questions arising, for example, from
9 the marine topics.

10 Q. And were the experts called
11 upon to answer questions by the panel?

12 A. Very, very rarely. And for
13 issues which I think either the panel felt
14 important or were major issues, sometimes we got no
15 questions at all. Copper was made a significant
16 issue. We commissioned scientific reports on
17 copper.

18 We brought our expert in from
19 Pennsylvania, made the panel aware that he was
20 there on that day, and copper was never mentioned,
21 I don't believe, at the hearings at all.

22 We had people with some tremendous
23 practical experience there. John Melick, who makes
24 his living blasting, he's a professional engineer,
25 but all he does is blast. All day, every day, he

00151

1 blasts.

2 --- Laughter

3 Q. You engineers have a good
4 time.

5 --- Laughter

6 A. He, he was almost treated
7 with contempt, and a total non-expert who admitted
8 that he had never set off a blast in his life nor
9 designed one was allowed to expound to the hearing
10 for probably 45 minutes on what he thought the
11 blast should be or what numbers we should use. And
12 we had great difficulty with this sort of thing.

13 The people were there to answer
14 any technical question, but they were just simply
15 never -- I won't say never called upon. That's not
16 true, but it was very rare that any of our experts
17 were asked to contribute to the process.

18 Q. Did you receive notice of the
19 presentation by the blasting person that you are
20 referring to?

21 A. No, we had no idea at all
22 that that was going to be introduced, so we didn't
23 know what he was going to say. And we did have the
24 opportunity to file an undertaking, and the
25 undertaking was, in fact, consistent with all our

1 statements with respect to blasting throughout.

2 And we were very clear as to what
3 we thought was an appropriate quantity of explosive
4 to produce a ton of rock, and the panel chose to
5 say in its report that, in fact, they didn't
6 believe that figure and it said that a figure of
7 double that quantity would be required to remove a
8 ton of rock.

9 Well, you know, these people are
10 in business, you know, serious business of
11 producing rock, and you're not out by 100 percent
12 in determining how much blasting compound it takes
13 to produce a ton of rock. It might be 2 percent
14 out, but they are not going to be 100 percent out.

15 So it became very confused. You
16 know, the information that was being brought in by
17 very experienced people in these sectors was
18 basically ignored and random figures were being
19 imposed into the process.

20 Q. Could you turn to Exhibit
21 R-171, please. Mr. Little asked you some questions
22 about the meeting on June 14th, 2002. These are
23 handwritten notes emanating from that meeting.

24 The -- R-171. Yes. You're shown
25 as having attended this meeting. You were there?

1 A. Yes.

2 Q. And the name Dave Kearn is
3 there. And who was Dave Kearn and what was his
4 involvement?

5 A. David Kearn is an
6 environmental planner that I had worked with since
7 1979. Again, he is an independent -- runs an
8 independent business.

9 Q. What was his background?

10 A. His background is in
11 environmental assessment, but on the other side of
12 the street he worked for the US Corps of Engineers
13 assessing environmental assessments and certainly
14 was very highly thought of in that position and was
15 awarded the President's medal for environmental
16 work in the United States.

17 Q. Did he participate in the EIS
18 process in the environmental assessment process for
19 the Whites Point quarry throughout?

20 A. Yes. Yes, beginning to end.

21 Q. Turn also, please, to Exhibit
22 R-178, which is two tabs over. Mr. Little also
23 referred you to the minutes of this meeting, which
24 is January 6th of 2003, and the attendees at the
25 meeting, I take it, are listed down the left-hand

1 side of the first page. Do you see that?

2 A. Yes, although Bob Petrie is
3 not mentioned. He was there, but he was late
4 and...

5 Q. All right. And the purpose
6 of the meetings that you had back in June of 2002
7 and this meeting of January 2003, generally, what
8 was the purpose?

9 A. The June 14th meeting was an
10 advisory meeting, really. While at that time we
11 had an approval for a 3.9 hectare quarry, the press
12 was carrying stories that this was the precursor to
13 a much larger quarry, and basically we thought it
14 useful to go to the Nova Scotia Environment of
15 Labour and bring them up to date and advise them
16 what we were doing, why we were doing it and where
17 we were in our thinking process.

18 The meeting of January '03 was, I
19 think, a different category, because that was
20 called by government departments, by CEAA and Nova
21 Scotia Department of Environment and Labour, to
22 have a general discussion as to what the
23 implications were with respect to environmental
24 assessment on this project.

25 Q. Mr. Ross, who was in

1 attendance at this meeting, was the person that you
2 and Mr. Petrie were corresponding with with respect
3 to getting approval under condition 10(i) for the
4 right to blast, the approval --

5 A. That is correct, yes.

6 Q. And he was in attendance at
7 this meeting on behalf of DFO?

8 A. Yes.

9 Q. And you mentioned that you
10 had heard -- you now know that their marine mammal
11 expert had said that he had no concerns about
12 blasting with respect to marine mammals and, in
13 particular, your blasting plan?

14 A. That is correct, in early
15 December 2002.

16 Q. Did Mr. Ross, at this meeting
17 a little over a month later, mention anything about
18 the internal communications he had had with DFO
19 scientists, both with respect to blasting and with
20 respect to marine mammals?

21 A. No. In fact, we had no
22 knowledge of those internal communications until I
23 saw the documents associated with this process.

24 Q. Could you go back, please, to
25 Exhibit R-299, the CLC meeting minutes.

1 If you go to page 107 -- actually,
2 just before we go there, the first page of this
3 document is the index to the various meetings that
4 were held with the community liaison committee;
5 correct.

6 A. Yes.

7 Q. And so you had a meeting in
8 July of 2002, one in August of 2002, August 8th and
9 August 29th. So through the summer of 2002 you
10 were holding community liaison committee meetings?

11 A. Yes.

12 Q. How was the community liaison
13 committee formed? What was that process?

14 A. It is a requirement for the
15 proponent to set up the committee liaison
16 committee, and there are suggestions from Nova
17 Scotia Environment and Labour as to how to set one
18 up.

19 I knew a fairly significant number
20 of people on Digby Neck and the Islands. I had
21 done work on the Islands before, and I still do
22 work on the Islands in Digby Neck.

23 And I tried to put together a
24 group which represented residents living fairly
25 close to the quarry, somebody from the whale watch

00157

1 industry, somebody from the tourism industry, from
2 accommodations, for example, somebody from the
3 fishing community, from the lobster fishing
4 community.

5 And initially I had ten people who
6 agreed to be members of the CLC, and I reported
7 that to Nova Scotia Department of Environment and
8 Labour.

9 Unfortunately, within about ten
10 days, and certainly before the first meeting, I was
11 down to two members. The people called me and
12 apologized profusely, but said that they were not
13 able to serve on the community liaison committee.

14 Q. Did they give a reason?

15 A. Some were non-specific. Some
16 were a little more specific, that they essentially
17 had been told it was not a thing that would be
18 appreciated in the community if they served.

19 And I had to scramble to go to
20 other people to try to make up a number, and I
21 think we started with perhaps only five members,
22 but, as it was clear that we were going to go ahead
23 with the process -- and we were required to go
24 ahead with the process, it was a useful process --
25 we did get other people to come and sit on the

1 committee representing other segments of the
2 community out there.

3 Q. And who prepared these very
4 extensive minutes of each of those meetings?

5 A. The meetings were recorded.
6 I paid for a -- not an official court reporter, if
7 you like, but I paid for a stenographer to come.
8 She had a tape recorder and she basically condensed
9 what was on the tape into these minutes.

10 So they were produced, and that
11 person basically reported to the chair of the
12 committee and not to us. Our job was simply to
13 facilitate the meeting of the committee.

14 Q. And was there any reluctance
15 that you were told about of people serving on the
16 committee or continuing to serve after it started?

17 A. They were very -- they were
18 difficult, difficult meetings, because the people
19 that did come felt that they were under pressure
20 from the community.

21 Q. What kind of pressure?

22 A. Well, perhaps the same sort
23 of pressure that we were being put under at the
24 time, which was vandalism of our sites, staff car
25 tires being slashed. I took this committee, the

1 community liaison committee, for a tour of the
2 quarry to indicate where certain features might be,
3 et cetera, and they wanted to go, and I took them
4 up there in a small convoy of trucks and did the
5 tour and the explanation.

6 And by the time we came to come
7 back down the Whites Cove Road, a very large tree
8 had been chain-sawed down across the road blocking
9 us into the site.

10 And some of the -- there were a
11 couple of women on board and they were quite --
12 they were quite distressed. They were worried
13 about their personal safety. Fortunately, I had a
14 truck with a winch on it and I was able to winch
15 the tree out of the way and get people off the
16 site.

17 And this was pretty much
18 continuous. Our signs were chainsawed down. We
19 had to put up security cameras, and we have film on
20 our security cameras of our site being vandalized,
21 signs chainsawed down or spray painted.

22 Q. This is at your local office?

23 A. This was in our office at
24 Little River. We opened an office in Little River,
25 but the same sort of thing happened in our office

1 in Digby.

2 Q. Can you turn, please, to page
3 107 of Exhibit R-299.

4 You indicated to Mr. Little in
5 response to one of his questions that you
6 understood there was an EA process going on, and I
7 understood your answer to be in the context of the
8 spring 2003. Do you recall that?

9 A. I don't recall the specific
10 question, I'm sorry.

11 Q. All right. Let me ask you
12 this. You had made a Navigable Waters Protection
13 application --

14 A. Yes.

15 Q. -- Act application for a
16 marine terminal?

17 A. Yes.

18 Q. Back in February of 2003?

19 A. Yes.

20 Q. And subsequent to that, you
21 understood there was an EA ongoing. Was the EA
22 going on in relation to the marine terminal?

23 A. Yes. There was an EA going
24 on. It was perhaps -- and we understood it to be a
25 comprehensive study, and we have letters on file to

00161

1 indicate it was a comprehensive study, but it
2 was -- there seemed to be some uncertainty about
3 it.

4 Q. Did you understand that there
5 was any other EA going on, other than with respect
6 to the marine terminal?

7 A. No.

8 Q. And were you told during the
9 spring of 2003 that the level of environmental
10 assessment would be a comprehensive study?

11 A. We were. We were told by
12 DFO, Department of Fisheries and Oceans, in
13 writing, yes.

14 Q. Were you also told that it
15 might be a possibility that you would go up to a
16 Joint Review Panel?

17 A. I believe that is indicated
18 in one of the letters, yes.

19 Q. And did you know at that time
20 how many environmental assessments in Canada had
21 been conducted since the inauguration of CEAA in
22 1995 at the JRP level?

23 A. I didn't know when I -- when
24 I read that letter. I mean, we thought the
25 comprehensive study was the appropriate level, and

1 certainly CEAA thought it was the appropriate
2 level.

3 Panel reviews were a little --
4 although we knew they were possible, we had read
5 the Act, that seemed a remote possibility to us at
6 the time, and I certainly didn't do any research or
7 investigations.

8 Q. Can you go, please, to
9 Exhibit C-304.

10 And Mr. Little also referred you
11 to this document, which is a memo to Bill Clayton
12 Jr., Mark Lowe and John Wall. And it's a memo
13 specifically about the meeting that you had with
14 Mr. Chapman on August 29th of 2003.

15 A. Yes.

16 Q. And you remember that Mark
17 McLean was at that meeting, as well?

18 A. Yes.

19 Q. And Mr. McLean was from which
20 department at that time?

21 A. I assume he was still with
22 Environment at that time, although I think he was
23 on a -- perhaps on a secondment to DFO at that
24 time, but I think his statutory employer at that
25 time was Environment and Labour. I understood it

1 to be, in any event.

2 Q. And you mentioned in response
3 to one of Mr. Little's questions that you learned
4 about the launching of the JRP through the press.

5 A. That is correct.

6 Q. If you could go over to page
7 001125.

8 A. Yes.

9 Q. And read number 2 at the top
10 of that page.

11 A. "We asked why the press had a
12 copy of the letter requesting
13 or recommending..."

14 Of course I hadn't seen the
15 letter, so I didn't know whether it was a request
16 or a recommend:

17 "... the panel review from
18 Mr. Thibault, Minister of
19 Fisheries and Oceans, to
20 Mr. Anderson, Minister of the
21 Environment, and why a copy
22 of this letter was available
23 at a debate on Digby Neck
24 during the recent election
25 campaign. We asked for a

1 copy of that letter. Steve
2 Chapman advised that Minister
3 to Minister correspondence
4 was classified as a cabinet
5 document and could not and
6 would not be released."

7 Q. How did you find out that the
8 letter was available at a debate on Digby Neck?

9 A. By somebody who was at the
10 meeting, who was involved in the election process.

11 Q. And by this time of your
12 meeting with Mr. Chapman, the election had come and
13 gone. The election was called on July 5th?

14 A. It had come and gone, yes,
15 yes.

16 Q. Could you read number 3,
17 please.

18 A. "We further asked how the
19 press and others had a copy,
20 and Chapman advised that he
21 could not explain how they
22 obtained a copy."

23 Q. And number 4?

24 A. "We asked why, i.e., on what
25 grounds, Mr. Thibault had

1 asked for a panel review and
2 under which section of the
3 Canadian Environmental
4 Assessment Act. Chapman
5 advised that Mr. Thibault had
6 requested a panel review on
7 the grounds that the project
8 had raised environmental
9 concerns and specifically the
10 effect on fish habitat."

11 Q. Did Mr. Chapman advise you of
12 what scientific evidence the government had based
13 on this conclusion -- to base this conclusion on?

14 A. No.

15 Q. And did you understand the
16 answer to be in relation to the effect on fish
17 habitat of the marine terminal?

18 A. Oh, clearly. We knew that we
19 were going to damage or destroy, albeit a very
20 small segment of the floor of the Bay of Fundy, but
21 that I suppose technically under that -- under
22 section 35, if you destroy two square feet,
23 technically you are destroying fish habitat.

24 We knew that we were going to
25 destroy some fish habitat, because we were putting

00166

1 piles into the rock at the bottom of the ocean
2 floor.

3 So we were -- we were fairly sure
4 that we would go into a HADD, yes.

5 Q. Mr. Little mentioned to you
6 that DFO had concluded and had advised you that
7 they had concluded that the activity on land could
8 kill fish. Do you recall that --

9 A. Yes.

10 Q. -- this morning? At this
11 meeting with Mr. Chapman, was there any mention of
12 the 500 metre setback?

13 A. I don't think that that was
14 discussed as a significant issue at that meeting,
15 no.

16 Q. Was the I-Blast model or any
17 reference as to how the 500 metre setback had been
18 arrived at, was that raised?

19 A. No. I don't believe - I
20 don't believe it was. It could have been, but I
21 don't think it was a major part or reason why we
22 had gone to the meeting.

23 Q. Were you ever advised of or
24 given the calculation upon which the 500 metre
25 setback had been established?

1 MR. LITTLE: Excuse me. I need to
2 interject here, but I asked no questions about
3 calculations that were used to derive a setback.

4 MR. NASH: With respect,
5 Mr. Little asked questions about DFO's conclusion
6 as to what the activity on land might do to kill
7 fish, and of course that is based on a setback
8 calculation.

9 MR. LITTLE: I believe I merely
10 asked for confirmation that DFO had concluded that
11 a section 32 authorization was needed and nothing
12 more than that.

13 MR. NASH: And of course that was
14 based upon a conclusion that the 500 metre setback
15 would be required. So my question simply
16 follows --

17 PRESIDING ARBITRATOR: Right. I
18 remember section 32 was mentioned, but Mr. Little
19 didn't go behind that. So if you could just keep
20 yourself...

21 MR. NASH: Yes.

22 BY MR. NASH:

23 Q. Could you go over, please, to
24 page 001127.

25 A. Yes.

1 Q. About halfway down the page,
2 you state, "We noted Thibault's statement".

3 A. Yes.

4 Q. And could you read that out
5 and explain what that is, please.

6 A. "We noted Thibault's
7 statement to the press that
8 the project would create
9 serious navigational problems
10 when neither the Federal
11 Department of Transport nor
12 Navigable Waters Coast Guard
13 had raised this issue with
14 us. Chapman had no
15 explanation for this."

16 Q. You were referred by
17 Mr. Little to issues of public concern. You recall
18 that in relation to the provisions of CEAA, that
19 there were two categories, two bases, upon which --

20 A. Yes.

21 Q. -- an assessment could be
22 referred to a JRP?

23 A. Yes.

24 Q. Significant adverse
25 environmental effects was one, and public concern

1 was another. Did you ultimately obtain a copy of
2 the June 26th letter from Mr. Thibault?

3 A. As a part of the panel
4 process, yes.

5 Q. And do you recall whether
6 there was reference to public concern in that
7 letter?

8 A. No, I don't -- I'm sure that
9 there was not. I believe the statement was that
10 there would be widespread environmental effects,
11 and possibly authorizations required under section
12 35 and section 32 of the Fisheries Act, if my
13 memory serves me correctly.

14 MR. LITTLE: Again, Judge Simma, I
15 think I asked for confirmation that the project had
16 been referred to a review panel on June 26th, 2003.
17 And Mr. Buxton and I had some exchanges about the
18 CEAA Act and referral to a review panel, but we
19 didn't get into any details about this June 26th
20 letter.

21 MR. NASH: But of course the
22 question arises out of the question of the June
23 26th letter, that there was reference to a June
24 26th letter and there was reference to statutory
25 provisions, and the question is simply about what

1 statutory provision was being relied upon. I've
2 got no further questions on that, in any event.

3 BY MR. NASH:

4 Q. Could you go to Exhibit R-87,
5 please, Mr. Buxton. You will see this is the
6 letter from M. Petrie attaching the approval of the
7 3.9, and you may recall that Mr. Little referred to
8 it from time to time as the conditional approval.

9 I would just like to take you, if
10 I can, to page 3 of the actual approval, which is
11 page 013391 at the bottom. You will see there that
12 there is a title "General Terms and Conditions".

13 A. Yes.

14 Q. And there are a number of
15 conditions going over page 3, page 4, and then on
16 to page 5 all the way down to condition (p). Would
17 you have had any difficulty complying with those
18 conditions?

19 A. No.

20 Q. If you go to page 8, you will
21 see the title "Separation Distances", page 013396
22 at the bottom. You will see that there are
23 separation distances A and B, and there is:

24 "The approval holder shall
25 not locate the active area of

1 the quarry within 30 metres
2 of the boundary of public or
3 common highway, 30 metres of
4 the bank of any water course,
5 30 metres of the boundary of
6 the quarry property, and will
7 not blast within two of
8 those..."

9 And then (iii) is, "within 800
10 metres of the foundation or base of the structure
11 located on the site." Do you see that?

12 A. Yes.

13 Q. Would you have had any
14 problem complying with those conditions, those
15 separation distances?

16 A. No. We were well clear of
17 all of those separation requirements.

18 Q. If you go to page 9 under
19 number 10?

20 MR. LITTLE: I hate to interject
21 again, but I asked no questions about any of these
22 provisions, Mr. Nash.

23 MR. NASH: Well, on this point,
24 with respect, Mr. Chairman, Mr. President, my
25 friend referred to this document as a conditional

1 approval, and Mr. Buxton referred to it as an
2 approval subject to conditions.

3 And so I am simply taking him
4 through the conditions.

5 PRESIDING ARBITRATOR: We are
6 facing the same problem that you latch on to a
7 term, and then you really kind of fill it with
8 substance and that creates Mr. Little's --

9 MR. NASH: His concern.

10 PRESIDING ARBITRATOR: His
11 displeasure. So are you going to go deep into
12 that?

13 MR. NASH: No, I'm going to have
14 one more question on that.

15 PRESIDING ARBITRATOR: Okay.

16 MR. NASH: That is at page 9 under
17 blasting.

18 BY MR. NASH:

19 Q. Those are the blasting
20 conditions under number 10 there, Mr. Buxton?

21 A. Yes.

22 Q. And aside from -- going from
23 blasting condition 10(a) to (h), would you have had
24 any difficulty complying with those conditions?

25 A. No, we would not.

00173

1 Q. So aside from condition
2 10(i), you could have complied with all of the
3 conditions and proceeded with the blasting?

4 A. Yes.

5 Q. And you wanted to do a test
6 blast, you said, in the fall of 2002?

7 A. Yes.

8 Q. Had you known in early
9 December of 2002 when you -- had you known the
10 information you now know, that Mr. Conway the
11 marine mammal expert at the DFO had no concerns
12 about blasting, what would you have done with
13 respect to blasting on the Whites Cove site?

14 A. We would have arranged a test
15 blast or blasts very quickly.

16 Q. And would those blasts have
17 been monitored?

18 A. That would have been the
19 entire purpose of the test blast is to monitor them
20 and find out just precisely what the peak
21 velocities were and what the noise factors were, et
22 cetera, so that we could extrapolate from that and
23 provide empirical data.

24 Q. And you would have been
25 monitoring for vibration in the seabed?

1 A. Yes.

2 Q. And on land?

3 A. Yes.

4 Q. And through the water?

5 A. Yes.

6 Q. Thank you. Those are my
7 questions.

8 PRESIDING ARBITRATOR: Thank you,
9 Mr. Nash. I have the impression that colleagues
10 might have questions.

11 QUESTIONS BY THE TRIBUNAL:

12 PROFESSOR SCHWARTZ: I have a few.
13 I have a few, thank you.

14 I am looking at your original
15 witness statement, and at paragraph 65, you say,
16 you were repeatedly encouraged not to use legal
17 counsel, paragraph 65, page 10 of the original
18 witness statement:

19 "I was encouraged repeatedly
20 not to have legal advice and
21 assistance."

22 THE WITNESS: Yes.

23 PROFESSOR SCHWARTZ: Then you
24 refer to an item from Mr. Fournier to yourself with
25 documents attached. Is there anything else you

1 recall about that encouragement or discouragement
2 to use legal counsel, because you say repeatedly
3 there is a reference to it in the documents.

4 THE WITNESS: Are you on 55? I'm
5 sorry, Professor.

6 PROFESSOR SCHWARTZ: Paragraph 65.

7 THE WITNESS: I don't think there
8 was anything more specific that I recall than those
9 sort of written notes with respect to legal
10 counsel.

11 PROFESSOR SCHWARTZ: To your
12 recollection, did the panel itself have legal
13 counsel?

14 THE WITNESS: I don't believe so.
15 And I think -- I think there is a reference in
16 Mr. Fournier's opening remarks that legal counsel
17 is not -- is not encouraged and that people are
18 encouraged to make their own presentations to the
19 panel.

20 PROFESSOR SCHWARTZ: Did any of
21 the other individuals or groups have legal counsel
22 at the hearing?

23 THE WITNESS: Not that I recall.

24 PROFESSOR SCHWARTZ: Okay. The
25 second thing I was a bit curious about was your

1 interactions with Nova Scotia after the joint panel
2 report, and you tried to have a meeting with the
3 Minister.

4 THE WITNESS: Yes.

5 PROFESSOR SCHWARTZ: Then
6 eventually the meeting was set up with the Deputy
7 Minister, which never went ahead. Do you recall
8 that?

9 THE WITNESS: Correct.

10 PROFESSOR SCHWARTZ: So you say in
11 paragraph 83 of your original witness statement,
12 Mr. Minister Parent, to your dismay, refused to
13 discuss the report:

14 "Mr. Parent simply stated
15 that he would be accepting it
16 without any review or
17 consideration."

18 THE WITNESS: Yes.

19 PROFESSOR SCHWARTZ: Is that close
20 to a quote? Is that a paraphrase? It's a fairly
21 strong statement. Is there anything else you can
22 help us with in terms of what you recall about that
23 conversation? I know it was a long time ago, a
24 very long time ago.

25 THE WITNESS: I don't think I can

1 add to that, I'm sorry.

2 PROFESSOR SCHWARTZ: There was a
3 call from the Minister, apparently, to you
4 directing that there be a meeting with the deputy.
5 Do you remember anything about what was said when
6 that was set up or when it was cancelled? Do you
7 have any recollection of that?

8 THE WITNESS: The Minister did us
9 the courtesy of calling me and on the morning of
10 the day that he released his decision.

11 And he gave us the news that he
12 had accepted the panel's recommendation, and I said
13 that I think, you know, we still wanted to meet
14 with him notwithstanding the fact that he had made
15 the decision.

16 And he thought that there was, you
17 know, nothing further he had to say. He had made
18 his decision. And I said, Well, you know, we
19 really need to know what was behind this decision
20 and what the issues were, and he indicated that he
21 would be very pleased to set up a meeting with the
22 acting Deputy Minister, I believe Nancy Vanstone at
23 the time.

24 And I said that would be -- that
25 would be very useful to us. We really wanted to

1 understand what the problem was with the project.

2 And I did contact the Deputy
3 Minister and we set up a time. That was cancelled.
4 I believe we set up a second time. That was
5 cancelled. And I think the third time I was
6 basically told there was no purpose or point in
7 having any further discussions on it.

8 PROFESSOR SCHWARTZ: And you
9 didn't make any written representations to Nova
10 Scotia after the panel report and before the
11 Minister made his decision? You tried to go set up
12 a meeting, according to your testimony. I was just
13 wondering whether there was -- said, okay, we can't
14 get a meeting, so here is our written submission.
15 Is there....

16 THE WITNESS: No. We didn't -- we
17 did not -- well, I think that we wrote and
18 basically said that the panel process was flawed
19 and we needed to discuss it. I can't give you the
20 date of that letter right now. I'm sure --

21 PROFESSOR SCHWARTZ: I think it is
22 on the record, that one.

23 THE WITNESS: I'm sure it is on
24 the record.

25 PROFESSOR SCHWARTZ: Is that C-25?

1 MR. PULKOWSKI: Can we put it on
2 the screen, perhaps? That is Exhibit 25 of the
3 first witness statement. Exhibit 25 to the first
4 Buxton witness statement.

5 PROFESSOR SCHWARTZ: That has to
6 do with a meeting that was apparently promised with
7 the Deputy Minister, and then cancelled. And I
8 have already asked the witness about that.

9 THE WITNESS: Yes.

10 PROFESSOR SCHWARTZ: I believe
11 prior to that you had written initially asking for
12 the meeting with the Minister and you indicated
13 some of your concerns. But after that, there was
14 no, Okay, you won't meet me in person so --

15 THE WITNESS: We did not make a
16 formal presentation of, Here are our issues. The
17 decision had been made. And by this time, the
18 federal Minister had also made his decision and it
19 seemed that we had nowhere to go.

20 PROFESSOR SCHWARTZ: Okay. And
21 you mention in your witness statement you couldn't
22 get a meeting with the federal Minister. There is
23 no written submission after you couldn't get a
24 meeting, similarly; right?

25 THE WITNESS: No.

1 PROFESSOR SCHWARTZ: Okay, thank
2 you.

3 Now, Mr. Little asked you about --
4 I believe asked you about submissions after the
5 Joint Review Panel report. You asked to make some
6 undertakings. Was the time frame for any of those
7 undertakings when you had to respond, was any of
8 that after the public hearings were finished? Were
9 there any cases in which you said, Here is my
10 undertaking, and I will give it to you after the
11 hearings are over? Was it all you had to give it
12 before?

13 THE WITNESS: I believe that all
14 of the undertakings that were assigned to Bilcon
15 were in by the end of the hearings. That is my
16 recollection.

17 There were some undertakings which
18 were perhaps a little more onerous and required
19 more research by some government departments, which
20 came in I think a little bit after the end of the
21 hearings.

22 PROFESSOR SCHWARTZ: But you
23 weren't invited to make any submissions after the
24 hearings, and you didn't ask to make any
25 submissions to the panel after the hearings were

00181

1 over; is that correct?

2 THE WITNESS: No. I think -- I
3 think in the wrap-up, I think when the -- when the
4 last undertaking was received, and I can't remember
5 the date of that, but there was a fixed date at
6 which basically the panel said, you know, that's
7 the information that we're going to work with. I
8 think it was the date of the last undertaking that
9 was to come in.

10 PROFESSOR SCHWARTZ: Okay, thank
11 you for that. You mentioned, I think it is in your
12 supplementary affidavit, you had the impression
13 from the body language of the panel that you were
14 not being well received.

15 There is a point -- which volume
16 is that?

17 MR. PULKOWSKI: Excuse me. That
18 would be the transcript of the hearing, volume 12,
19 Exhibit No. C-164.

20 PROFESSOR SCHWARTZ: Yes. If you
21 don't recall, it is perfectly understandable. When
22 I was reading over the transcript of the Joint
23 Review Panel hearing, there was one point in volume
24 12 at which there is some crowd cheering in
25 opposition to Bilcon, and the Chair of the panel

1 says that's not respectful. Do you recall that?

2 THE WITNESS: I do.

3 PROFESSOR SCHWARTZ: Did that give
4 you any reassurance about the panel's bona fides?

5 THE WITNESS: It would have done
6 if that had stopped the process, but it didn't.
7 And we did have a communications advisor on our
8 team and he wasn't there every day, but he was
9 there on many of the days.

10 And when this particular thing
11 took place, I was questioning one of the opponents
12 to the quarry, and the fellow simply ignored my
13 question and made, you know, pronouncements about
14 destroying this and destroying that, and American
15 companies coming in and raping Nova Scotia, and so
16 on, to the loud cheers of the crowd.

17 But I was trying to get to ask
18 some serious questions, and I had a computer in
19 front of me and my document director pointed to my
20 screen where the communications person was
21 basically saying, you know, don't follow up on
22 this, and so I didn't. I stopped the questioning.

23 And it certainly -- it certainly
24 put a real dent in our ability to question some of
25 the intervenors. There seemed sort no point. It

00183

1 was just going to be a cheering exercise.

2 And the chair of the panel did the
3 following morning talk to the people and basically
4 say, you know, Yesterday there were incidents of
5 cheering. This is inappropriate. Would you please
6 desist?

7 And it did tone down significantly
8 from there, but on that particular day it just
9 simply continued.

10 PROFESSOR SCHWARTZ: I understand.
11 Another question about something I noticed on the
12 transcripts, and if you don't recall, again, that
13 is perfectly understandable.

14 But there is one point at which
15 the chair of the panel says something like, Well,
16 this is a little bit like a referendum.

17 THE WITNESS: I remember it well.

18 PROFESSOR SCHWARTZ: Oh, okay.
19 Did that give you a heads-up that the community
20 values approach was going to be adopted?

21 THE WITNESS: I wouldn't have
22 attached community values or core values, or
23 whatever they were, to that statement, but it
24 certainly shocked me that, in any way, shape or
25 form, the panel should think that it was there to

1 do a head count of who was for and who was against
2 the quarry.

3 That really, really shook me.

4 PROFESSOR SCHWARTZ: Thank you
5 very much.

6 THE WITNESS: Thank you.

7 PRESIDING ARBITRATOR: Just a
8 couple of questions on my part.

9 THE WITNESS: Yes, sir.

10 PRESIDING ARBITRATOR: You said
11 that people were discouraged or felt discouraged
12 from participating in the community liaison
13 committee because of --

14 THE WITNESS: Yes.

15 PRESIDING ARBITRATOR: And
16 therefore you had -- if you look at the later
17 meetings, there is a list of 30 people. So what
18 led to this, let's say, larger participation?

19 THE WITNESS: Yes. They, they
20 would not have been community liaison committee
21 members, though.

22 If you would just take a look at
23 the minutes, even though there is quite a long list
24 of people, the ones at the top are noted as being
25 CLC members, and then the rest are attendees --

1 PRESIDING ARBITRATOR: All right.

2 THE WITNESS: -- at the meetings.

3 And if we had a consultant there that we were asked
4 to produce, that tended to increase the number of
5 people that came to the meetings. So we did have
6 some fairly significant turnouts, but the number of
7 actual members of the committee I don't think
8 really ever got above seven, and we were lucky to
9 get five or six at a meeting.

10 PRESIDING ARBITRATOR: Okay, thank
11 you. Another question. In your first report in
12 paragraph 42, you say that the opinions of your
13 experts were virtually ignored. But you made that
14 more precise, so a couple of your experts were
15 heard?

16 THE WITNESS: Yes, there was some
17 questions. There were some questions of our
18 experts, but I think -- I think we actually did a
19 little bit of analysis afterwards.

20 There were probably ten or 11 of
21 our experts that were never questioned at all.
22 They just sat there like lumps all day.

23 PRESIDING ARBITRATOR: All right.
24 But if you had 19 experts attending, and you say
25 ten or 11 or 12 of them were not heard, that's

1 probably -- I wouldn't describe that as your
2 experts virtually being ignored if, let's say, a
3 little less than half of them were apparently
4 heard.

5 THE WITNESS: Yes. Remember, all
6 of the experts weren't there every day, because we
7 tried to schedule them into the theme days.

8 So the people who were experts on
9 marine activities, they would all be there on this
10 particular day.

11 Even those that were questioned
12 were really -- it seemed like they were not being
13 questioned to the extent that the panel was
14 interested in their views or their opinions, or to
15 justify the studies that they put in. There might
16 have been two or three fairly trivial questions,
17 and then they moved on.

18 Whereas some of the intervenors --
19 and, again, we had no idea of their
20 qualifications -- were allowed to present a 20-odd
21 or 25-minute submission, and then line up -- the
22 other intervenors could line up for questions and
23 it seemed like they had the floor for
24 three-quarters of an hour.

25 We didn't know who they were, you

1 know.

2 PRESIDING ARBITRATOR: Thank you.
3 You said that the terms or the words "core values"
4 or "community core values" were not mentioned at
5 the hearings.

6 THE WITNESS: They were not
7 mentioned in the guidelines. They were not
8 mentioned in the hearings. They were never
9 mentioned at all until the final report of the JRP.
10 That's the first time the words "core values"
11 entered this process.

12 PRESIDING ARBITRATOR: Okay. And
13 my last question. I simply cannot really
14 understand why it was impossible for you to
15 indicate to the panel this view, strong view of
16 yours in the morning, that the requests that you
17 were faced with were for detailed design issues and
18 not -- that they were not appropriate at this
19 stage.

20 So you said there was simply no
21 opportunity to just --

22 THE WITNESS: No. We made that
23 point, because they were asking for this kind of
24 detail in the IRs, in the information requests.
25 And I think we quite specifically sort of said in

00188

1 some of our responses that this level of detailed
2 design is not appropriate at this stage of the
3 process.

4 However, you know, we went part of
5 the way with them. But I think we made it quite
6 clear that we were -- we were not comfortable with
7 attempting to provide detailed design at that stage
8 of the process.

9 PRESIDING ARBITRATOR: Okay. So I
10 might have misunderstood you, because from the
11 morning my memory is that you said there was simply
12 no opportunity for you to get that message to the
13 panel, that their questions were relating to design
14 and that was going too far at that stage of the
15 procedure.

16 THE WITNESS: No. I think --

17 PRESIDING ARBITRATOR: Well, okay.

18 THE WITNESS: -- in several of the
19 responses to the IRs, we make that point quite
20 strongly.

21 PRESIDING ARBITRATOR: Okay.

22 THE WITNESS: Yes.

23 PRESIDING ARBITRATOR: Thank you,
24 Mr. Buxton. Yes, one question from Professor
25 McRae, or questions.

1 PROFESSOR MCRAE: I have a
2 follow-up to Judge Simma's question, and that
3 relates to the community liaison committee.

4 THE WITNESS: Yes.

5 PROFESSOR MCRAE: Did it matter
6 whether people who attended were members or not in
7 terms of community consultation,
8 participation? You said that only a few members
9 were there, but quite a lot of other people were
10 there.

11 THE WITNESS: Yes. Anybody could
12 attend the meetings. We advertised them as being
13 open to the public.

14 But it is the responsibility of a
15 community liaison committee member to take the
16 information that they pick up at the meeting and
17 basically transmit it, if you like, to their
18 friends and neighbours and the group that they
19 represent.

20 So anybody could go to the meeting
21 and participate. We made no -- well, it was not my
22 business, in any event. The chair -- I was simply
23 there to answer questions. The chair of the CLC
24 ran the meeting, and she made it clear that anybody
25 that wanted to speak could speak at these meetings.

1 So it wasn't rather -- it wasn't like a council
2 meeting where only the councillors can speak and
3 the public is sitting.

4 They were all arranged as a round
5 table and anybody could speak at any time and ask a
6 question, or express an opinion.

7 But the duty of a community
8 liaison committee member was to take that
9 information away with them and, if they were a
10 fisherman, to get it to the fishermen's groups or
11 whoever they were representing there.

12 PROFESSOR MCRAE: And who were the
13 people who were coming from the public? Was this a
14 cross-section of those who supported and those who
15 opposed the project, or were they the 400 who were
16 applying for jobs, or do you have any sense of what
17 the cross-section was?

18 THE WITNESS: I think a fair
19 majority were opponents.

20 PRESIDING ARBITRATOR: What was
21 that?

22 THE WITNESS: Opponents to the
23 quarry. I can think of a specific meeting where we
24 were asked to produce our archeologist and
25 Dr. Watrall came along and gave a precis of his

1 study of the site.

2 And there were a fairly
3 significant number of people there who wanted to
4 get it on record that they thought he was full of
5 absolute nonsense, that there was actually a
6 fishing village in Whites Cove and they had
7 evidence of that, and that they were most certainly
8 artefacts, foundations, possibly graves, all over
9 Whites Cove, because it was a community.

10 And that seemed to come from a
11 children's book by the name of "Fog Magic", which
12 describes a fishing village, and I don't know who
13 sort of started the story that Fog Magic was
14 actually somebody who had lived at one time in
15 Whites Cove.

16 Whereas our archeologist and our
17 historian, Dr. Moody, the chairman of the history
18 department at Acadia University, were absolutely
19 clear from studies of deeds and maps, et cetera,
20 that there were probably only ever two houses on
21 the 350 acres and only one basement is remaining, a
22 very small basement.

23 So they came -- I think certainly
24 that meeting was, I think, swamped with opponents
25 to the quarry. But I think it varied as to

1 subject.

2 PROFESSOR McRAE: And an unrelated
3 matter. After Dr. Brodie did not produce the
4 proposal you expected from him, did you then go and
5 search for an alternative marine mammal specialist?

6 THE WITNESS: We did. We got in
7 touch with the New England aquarium, which is
8 actually sort of the centre for studies and data on
9 the North Atlantic Right Whale, and I forget the
10 lady's name now -- I think it was Brown -- who is
11 the chief curator, supplied us with an enormous
12 amounts of data on occurrences of the species, the
13 various species of whale, over a multi-year period.

14 So at least we were able to gather
15 sort of the baseline data that we needed to try to
16 assess the risk, you know, how many of these whales
17 came close, were observed close to the quarry in
18 this number of years.

19 And basically we found that we had
20 to do a lot of that work ourselves, and that became
21 an important part of the EIS. But probably the
22 most important thing that we did, as far as marine
23 mammals is concerned, was we engaged the firm, the
24 consortium, of JASCO and LGL, who are probably the
25 companies that, for example, DFO would hire if they

00193

1 were looking for a study. They are the experts in
2 this sort of work.

3 We commissioned them to do both a
4 literature search on marine mammals and fish and
5 the effects of particle loads, et cetera, and they
6 produced a report for us, which was ultimately
7 accepted by DFO, although reluctantly. And it
8 superseded the incorrect work that was done by DFO,
9 because the wrong model was used to set this --
10 sorry, 500 metre setback distance. They used the
11 I-Blast model, which is only to determine the
12 strength of blasts in water. It has nothing to do
13 with blasting on land.

14 So we did an extensive study by
15 JASCO and LGL to provide this baseline data as to
16 what, in fact, the noise decibel levels would be
17 with respect to marine mammals.

18 And I think that is probably -- I
19 think it is probably the work that DFO is now using
20 with respect to marine mammals.

21 PROFESSOR McRAE: Thank you.

22 PRESIDING ARBITRATOR: Yes.

23 Professor Schwartz.

24 PROFESSOR SCHWARTZ: Yes, thank
25 you. I guess an issue I am trying to figure out in

1 my own mind is this tension between panel didn't
2 invite me, and, on the other hand, you didn't ask.

3 And that relates to a whole lot of
4 issues. Judge Simma asked about one of them. It
5 is Bilcon's position there were experts there who
6 weren't invited to share their expertise, that you
7 didn't get a chance to respond to adverse
8 testimony, some of which you think was
9 scientifically unfounded, and so on.

10 In terms of they didn't invite --
11 no post hearing brief. In terms of that basic
12 question that they didn't invite you, but, on the
13 other hand, you didn't ask, do you have any
14 concluding thoughts you can share with us?

15 THE WITNESS: Well, I think we did
16 make representations, particularly with respect of
17 our copper expert. He came in with great
18 difficulty to make the hearing. He had had a
19 family tragedy, I think, and made time to come in
20 to the hearing.

21 I advised the panel manager that
22 he was going to be there. I reminded her, again,
23 in the morning that he was going to be there.
24 Copper was obviously on the panel's mind. It was
25 an issue, an important issue.

1 By 4 o'clock in the afternoon,
2 mid-afternoon break, the subject of copper was not
3 raised. The panel didn't seem interested that
4 Mr. Schoepner was there. I again went to the panel
5 manager and said, Would you remind, please, the
6 chairman that Mr. Schoepner is here to answer your
7 questions on copper? And he's here specifically
8 because the panel made this an important topic in
9 its information requests.

10 And the day finished late, I
11 think, but no questions, not even acknowledgement
12 that he was there. And, you know, one got to the
13 stage later on in the hearings that one found it
14 very difficult, in fact, to work and operate in
15 that -- it was a very hostile environment, and I am
16 not easily intimidated, but it was a very hostile
17 environment.

18 PROFESSOR SCHWARTZ: Thank you
19 very much.

20 PRESIDING ARBITRATOR: I see
21 Mr. Nash moving. What is that going to be?

22 MR. NASH: I have one question,
23 one-and-a-half questions, arising from Professor
24 Schwartz's question.

25 PRESIDING ARBITRATOR: Let me just

1 tell you that I was educated in a civil law
2 environment, particularly Austria, where education
3 in civil law was particularly civil in nature.

4 MR. NASH: Yes.

5 PRESIDING ARBITRATOR: So I am a
6 little curious. Is that an admissible stage? I
7 will ask my colleagues, the common lawyers. Yes,
8 okay, all right. Go ahead, please.

9 MR. NASH: Thank you,
10 Mr. President.

11 FURTHER RE-EXAMINATION BY MR. NASH:

12 Q. Mr. Buxton, Professor
13 Schwartz asked you about submissions to the
14 Minister after the JRP recommendations had been
15 issued, the report, but before the Ministers made
16 the decision.

17 And I am not sure that I followed
18 the response. So could I ask that document C-195
19 be put on the screen? It is a letter from
20 Mr. Buxton to Honourable Mark Parent October 29th,
21 2007. I am not sure you can see that, Mr. Buxton,
22 but is that a submission you made to Minister
23 Parent?

24 A. Yes.

25 Q. And that was before he made

1 his decision; correct?

2 A. Yes, it was. I rather
3 understood the question to be: Did we make a
4 submission sort of based on an entire presentation
5 of what we found wrong?

6 I do remember clearly us basically
7 saying, in a general sense, you know, we had real
8 issues and we wanted to bring these issues to his
9 attention before he made the decision.

10 But we didn't lay them all out in
11 a report, as I think you asked, Professor.

12 Q. And with respect to
13 submissions to Minister Baird, could we have
14 Exhibit C-544 put on the screen, which is a letter
15 from Bilcon of Nova Scotia to Minister Baird
16 November 21st, 2007.

17 And that letter was sent,
18 Mr. Buxton, to Minister Baird prior to Minister
19 Baird making his decision; is that correct?

20 A. Yes, yes.

21 Q. Thank you. Those are my
22 questions. I think it was only one and a half.

23 PRESIDING ARBITRATOR: Thank you
24 very much, Mr. Nash. My colleagues don't have any
25 questions either.

1 MR. LITTLE: Excuse me, I have one
2 more question.

3 PRESIDING ARBITRATOR: Oh, yes,
4 Mr. Little.

5 FURTHER CROSS-EXAMINATION BY MR. LITTLE:

6 Q. I am just going to stay here
7 in my seat. I think the response from Mr. Buxton
8 was that they didn't lay -- it is not spelled all
9 that correctly, but they didn't lay all their
10 concerns out in a report that they provided to the
11 Minister of Environment and Labour after the
12 issuance of the JRP recommendation, but before the
13 Minister's decision.

14 Now, I believe the exhibit that
15 we're seeing now, which is Exhibit No. C-002,
16 provides exactly the opposite, that -- and this is
17 a four-page document that sets out the detailed
18 concerns that Mr. Buxton had with the report.

19 That was provided to Minister
20 Parent, and it was reviewed by Minister Parent.
21 Maybe we could go to the signature page. So
22 perhaps Mr. Buxton could tell us if he recalls this
23 letter.

24 A. Yes. Sorry.

25 PRESIDING ARBITRATOR: Go ahead.

1 THE WITNESS: It is difficult for
2 me to speak. Yes, I recall that letter. Yes.

3 PRESIDING ARBITRATOR: So I think
4 the issue is whether, in your letters, in the
5 letters, you set out the concerns. And I don't
6 have the lines here. I cannot read it or run that
7 machine. So I see precisely the words you used to
8 say that they did not -- apparently you said, We
9 did not set out concerns, that it was a more
10 general letter.

11 THE WITNESS: Yes. And I think
12 those were general concerns. I mean, actually, a
13 lot of the material we were not aware of until this
14 process started.

15 PRESIDING ARBITRATOR: So would
16 you consider that letter still a letter which has
17 not really set out the concerns in the kind of
18 detail that you seem to have had in mind? It was
19 more of a general nature.

20 THE WITNESS: I was really sort of
21 thinking that Professor Schwartz was thinking that
22 we would have put together, you know, a
23 comprehensive 50- or 60-page study of why we
24 thought that the panel was wrong. These are
25 general, general comments, essentially, first

00200

1 blush. And much of the material we simply didn't
2 have. We were not aware of a lot of the material
3 that was withheld from us, which, you know, did
4 tremendous damage to our EIS, the material that was
5 withheld by DFO. We didn't have it. I was not
6 aware of it until this process started.

7 PRESIDING ARBITRATOR: Mr. Little,
8 do you want to continue on that? Sorry.
9 Mr. Little, do you want to continue on that point?

10 MR. LITTLE: No. It's okay.
11 Thanks.

12 PRESIDING ARBITRATOR: Thank
13 you. I think brings to an end this long exercise.
14 Mr. Buxton you are a free man again.

15 --- Laughter

16 PRESIDING ARBITRATOR: Thank you
17 very much.

18 THE WITNESS: Thank you very much,
19 Mr. President. Thank you.

20 PRESIDING ARBITRATOR: Yes,
21 actually I think that is probably the time for a
22 break. Let's have a ten-minute break and meet
23 again at 3:15 sharp, and in the meantime set up
24 Mr. Rankin. Okay. So at 3:15 sharp we will
25 continue.

00201

1 --- Recess at 3:03 p.m.

2 --- Upon resuming at 3:16 p.m.

3 PRESIDING ARBITRATOR: Looks like
4 we're all being back. Before we the examination of
5 Professor Rankin starts, let me just announce that
6 from tomorrow onwards we're going to start the
7 hearing at 9:00 instead of 9:30, which will
8 facilitate the work of our court reporter, and
9 everybody seems to be happy.

10 So tomorrow we will see each other
11 at 9:00 instead of 9:30. With this, I give the
12 floor to Mr. Nash to introduce Mr. Rankin.

13 EXAMINATION IN-CHIEF BY MR. NASH:

14 Q. Thank you, Judge Simma.
15 Professor Rankin, could you relate to the Tribunal,
16 in a summary form, your experience in an
17 administrative, constitutional and environmental
18 law?

19 A. Thank you. I have had a
20 really blessed career. I studied at Harvard in
21 administrative law and environmental law, and then
22 taught it for 13 years at the University of
23 Victoria faculty of law, practising during that
24 period, as well.

25 I left the university to join --

1 to actually establish a boutique litigation firm
2 with Joe Arvay and my late partner John Finlay,
3 which did exclusively public law litigation,
4 constitutional, administrative law and, in my case
5 a lot of environmental litigation.

6 I did work for the Government of
7 British Columbia both as a lawyer in court. I
8 defended the government in the first Environmental
9 Assessment Act litigation under the then new
10 British Columbia Environmental Assessment Act.

11 I served as commission counsel
12 during that period to an inquiry, a Joint Review
13 Panel preceding the CEAA, but a Joint Review Panel
14 between British Columbia and Government of Canada
15 in relation to a proposed ferro chromium project on
16 northern Vancouver Island.

17 I have done a lot of work with
18 aboriginal people in my career, most recently
19 acting for the Tsawwassen First Nation in
20 Vancouver, which has a modern treaty.

21 On the administrative law side,
22 that has been my -- a lot my academic writing has
23 been in that field. I was asked to translate the
24 entire three-volume work of Rene Dussault and Louis
25 Borgeat, the leading text on administrative law,

1 from French to English, which I am proud to have
2 done.

3 And I am currently the regional
4 editor for the Canadian Journal of Administrative
5 Law and Practice.

6 PRESIDING ARBITRATOR: Oh, I am
7 very sorry. I forgot to, first of all, ask you to
8 read out the statement in front of you.

9 DR. RANKIN: Certainly. I
10 solemnly declare upon my honour and conscience that
11 I will speak the truth, the whole truth and nothing
12 but the truth and that my statement will be in
13 accordance with my sincere belief.

14 AFFIRMED: T. MURRAY RANKIN, Q.C.

15 PRESIDING ARBITRATOR: Yes. And
16 you have also signed an undertaking and assurance
17 that you were not listening --

18 MR. NASH: No, no. Professor
19 Rankin is an expert.

20 PRESIDING ARBITRATOR: Okay. I am
21 learning.

22 --- Laughter

23 MR. NASH: It's okay.

24 THE WITNESS: I will sign whatever
25 you ask me to, but I haven't signed anything yet.

1 --- Laughter

2 BY MR. NASH:

3 Q. Have you acted as an advisor
4 to the Government of Canada?

5 A. Yes. I have advised the
6 chief review officer, a statutory office created
7 under the Canadian Environmental Protection Act,
8 and appeared as her counsel on a number of matters.

9 I have been a joint expert in the
10 Nestucca oil spill for the Government of Canada and
11 British Columbia in the context of an oil spill
12 occurring off the coast of Oregon in the United
13 States that occurred back in, I think, the late
14 1980s.

15 I have done an enormous amount of
16 work for the Province of British Columbia. I was a
17 treaty negotiator on their behalf and negotiated
18 three treaties with First Nations.

19 And I have been also very active
20 on environmental policy reform for the Province of
21 British Columbia. I have acted for government --
22 governments, First Nations and for industry in my
23 career.

24 Q. And are you involved in any
25 environmental law organizations?

1 A. Until my recent detour in my
2 career, the last year I put my name in -- my hat in
3 the ring to run for federal office. I am now a
4 member of parliament. Until that time, I was chair
5 of the Environmental Law Centre at the University
6 of Victoria, co-chair.

7 I have been the past president of
8 the West Coast Environmental Law Association, the
9 Land Conservancy of British Columbia, and the
10 Public Interest Advocacy Centre during my career.

11 I was also -- a number of private
12 sector environmental lawyers get together every
13 year in what's called the Environmental Law Forum.
14 I was co-chair of that a year ago. I of course
15 resigned from that, as I am no longer in the active
16 practice of law, although I do remain a member of
17 the bar.

18 Q. Thank you, Professor Rankin.
19 Those are my questions.

20 PRESIDING ARBITRATOR: Who is
21 going to -- yes, Mr. Spelliscy.

22 CROSS-EXAMINATION BY MR. SPELLISCY:

23 Q. Good afternoon, Mr. Rankin.

24 A. Good afternoon.

25 Q. My name is Shane Spelliscy.

1 I am counsel for Canada here. I am going to be
2 asking you a few questions about the expert report
3 that you submitted in this arbitration.

4 Just to lay out some ground rules
5 to make sure we understand each other, if you don't
6 understand a question, you let me know. I will try
7 and re-ask it. If you think I have misunderstood
8 something you say, you let me know and we will try
9 to get on the same page.

10 Now, I know you are here to
11 provide your opinion, but in order to help this go
12 a little more smoothly, let me ask you to do the
13 following.

14 If I ask you a question and you
15 can give me a yes or no answer, I would appreciate
16 it if you do. If you need to then offer an
17 explanation of that answer, please go ahead after,
18 but, for the record, I would ask that you say yes
19 or no, if you can.

20 If you can't, let me know, That's
21 not a yes or no question. I can't say yes or no,
22 and then you can feel free to explain why. Does
23 that sound acceptable?

24 A. Yes.

25 Q. Great. Now, I would like to

00207

1 just start with something that you just said, which
2 was -- and I think that most of us know you are an
3 elected member of parliament right now; correct?

4 A. I was sworn in as a member of
5 parliament on December 8th, 2012. I have been a
6 member of parliament for less than a year.

7 Q. Now, you submitted this
8 expert report on December 21st of 2012; correct?

9 A. That's right.

10 Q. Now, in your expert report,
11 you don't disclose that you are currently sitting
12 as a member of parliament; correct?

13 A. The report was in fact
14 written, and the signature was added I think in
15 December of 2012, but a great deal of the work that
16 led to it was done much before that.

17 Q. And so you didn't update it
18 when you signed it on December 21st?

19 A. No.

20 Q. You are currently a member of
21 the opposition to the Government of Canada,
22 correct, the official opposition?

23 A. That is correct, yes.

24 Q. Now, you went through -- your
25 training is as a lawyer, you said; correct?

1 A. That's correct.

2 Q. You have never received a law
3 degree from any faculty of science?

4 A. No.

5 Q. Sorry, a degree from any
6 faculty of science?

7 A. No. I have a degree in arts
8 and science.

9 Q. And is that in --

10 A. No.

11 Q. In a science science?

12 A. No, no.

13 Q. You never worked as a
14 scientist; correct?

15 A. Correct.

16 Q. So the opinions that you are
17 advocating in this case in your report, they are
18 based on your review of the documents in this case?

19 A. Yes. I state in my opinion
20 it is based on my review of witness statements that
21 I had received. I have since had occasion to read
22 the supplemental witness statement by Mr. Buxton,
23 which hadn't been available when I did it.

24 I have also reviewed the witness
25 statements by Mr. Smith, and then his rejoinder,

1 Mr. Estrin, and then his reply and the evidence
2 that was brought to my attention by counsel for the
3 investors, Bilcon of Canada.

4 Q. And did you also read the
5 pleadings in the case, the memorial and counter
6 memorial?

7 A. Yes. Sorry, yes. Thank you,
8 I did.

9 Q. I would like to discuss what
10 your opinions were of the conduct of the Department
11 of Fisheries and Oceans prior to the referral to
12 the JRP panel. Those are outlined at pages 33 to
13 42 of your report.

14 Just to let you know, I will be
15 discussing those and my colleague, Mr. Kurelek,
16 will come and ask you some questions about your
17 opinion on the actual process of the Joint Review
18 Panel.

19 A. It's been a while since I had
20 the report in front of me. Perhaps you could take
21 me to it in this pile of material.

22 Q. I apologize for the pile of
23 material but, like any lawyer, I am sure you have
24 an affinity for paper, so it is all there. It is
25 in volume 1 of your first volume.

1 A. There it is.

2 Q. Now, to understand what's in
3 your report, I would just like to get a basic
4 understanding of what your experience is, with
5 respect, and your understanding of the general
6 scheme of environmental assessment in Canada.

7 So if you would turn to paragraph
8 62 of your report -- I'm sorry, I think it is --
9 well, before I actually go into this, let me ask
10 you and see what we can do without going to the
11 documents and maybe we will save time.

12 The Canadian Environmental
13 Assessment Act, that's the federal statute
14 applicable to environmental assessment; correct?

15 A. At the time, the statute that
16 applied was the Canadian Environmental Assessment
17 Act. If you mean at the present time, there is a
18 new statute called the Canadian Environmental
19 Assessment Act, 2012, which supplanted the statute.

20 At the relevant time, it was the
21 earlier version -- it's been amended a couple of
22 times -- of the Canadian Environmental Assessment
23 Act. I make that point in my report.

24 Q. Sure. Let's agree to live in
25 the past here, and when we talk about the Canadian

00211

1 Environmental Assessment Act, we'll talk about the
2 one that was in effect in 2003.

3 A. Yes.

4 Q. Now, the scheme of that Act
5 is set up to determine when a project requires an
6 authorization of a federal authority requires a
7 federal authority to make a decision, an EA is
8 required prior to that; correct?

9 A. Perhaps you could repeat the
10 question.

11 Q. In terms of -- I guess I'm
12 looking for your understanding of what triggers the
13 CEAA, and my understanding, from your report, was
14 that in terms of a triggering the CEAA -- maybe it
15 would be useful to go to an actual paragraph in
16 your report. If we go to paragraph 62.

17 A. Yes. Yes, there is three
18 ways in which it is triggered, the expenditure of
19 federal money, the involvement of federal land, and
20 most typically when one of the listed regulations
21 or statutes that are in the Law List Regulations
22 are triggered -- that is a "trigger" a federal
23 trigger -- that's the most typical way in which the
24 CEAA kicks in.

25 Q. Okay. So if we look at the

00212

1 first sentence of paragraph 62 of your report, what
2 it says is that:

3 "The general scheme of the
4 Act is that if a 'project',
5 as defined in the statute and
6 which is not on an 'exclusion
7 list' is proposed, an EA is
8 required before a federal
9 authority can make a decision
10 under Section 5 of the Act."

11 Do you see that?

12 A. Yes.

13 Q. So you would agree, then, the
14 first question to be answered, if a project is
15 proposed, is: What is the project that is being
16 proposed by the proponent; correct?

17 A. Yes.

18 Q. And if that project that is
19 proposed -- and you mentioned other things, but if
20 it requires a decision under section 5 of the CEAA,
21 then an EA is going to be required; correct?

22 A. Yes. But I wish you to
23 understand the -- what the academics and the courts
24 have made abundantly clear, and that is that that
25 federal trigger has to be within an area of federal

00213

1 responsibility.

2 Q. We'll get to that.

3 A. I just didn't want to
4 overstate the point there.

5 Q. But if there is a federal
6 trigger, you agree the CEAA is triggered and an
7 environmental assessment has to happen?

8 A. Yes.

9 Q. And that environmental
10 assessment actually has to happen prior to any
11 authorizations or decisions being made by the
12 federal government; right?

13 A. Yes.

14 Q. Now, in this case, you're
15 aware that Bilcon's proposed project was a quarry
16 and marine terminal at Whites Point in Nova Scotia;
17 correct?

18 A. Yes. There were two
19 components to the project. The federal component
20 would have been the marine terminal, in my
21 judgment, and the provincial component would have
22 been the quarry, unless there was a trigger for the
23 quarry which, for reasons I would be happy to
24 elaborate on, I don't think there ever was.

25 Q. But I guess I want to come

1 back to what the question was, what Bilcon proposed
2 as its project. Now, you would agree in its
3 proposal submissions made to the government, it
4 described its project always as a quarry and a
5 marine terminal; correct?

6 A. The proponent described its
7 project as both a quarry and a marine terminal.

8 Q. Now, the construction of a
9 marine terminal at Whites Point of the one that was
10 envisaged here, that required a federal approval
11 under section 5(1) of the Navigable Waters
12 Protection Act; correct?

13 A. Yes, that's correct.

14 Q. And section 5(1) of the
15 Navigable Waters Protection Act, that is listed in
16 section 5 of the Canadian Environmental Assessment
17 Act. So that project, that component of the
18 project required a federal EA; correct?

19 A. More precisely, it is not
20 listed in section 5 of the Canadian Environmental
21 Assessment Act. Rather, it is listed in the Law
22 List Regulations as one of the sections that would
23 be triggered by section 5 or which section 5 would
24 trigger, depending how you see it.

25 Q. It is incorporated therefore

1 and required a federal EA of the project?

2 A. Yes, yes.

3 Q. Now, that is with respect to
4 the marine terminal. With respect also to the
5 quarry, now you would agree that the quarry
6 triggered an environmental assessment under Nova
7 Scotia law; correct? And I'm talking about the
8 large quarry.

9 A. I believe that if there was
10 an application, that is to say if there was under
11 section 33 of the Nova Scotia Act a registration by
12 the proponent, the payment of what I understand to
13 amount to \$1,200 or so and a project description,
14 at that point the Nova Scotia Act would be
15 triggered.

16 But for smaller quarries such as
17 those under ten acres, four hectares, there was in
18 fact a regulation under that NSEA that said you did
19 not need to get an environmental assessment. So --
20 I'm insisting on the specificity of the requirement
21 under the law. The law says if you have a
22 registration of a project -- of an undertaking, I
23 should say, provide a project description, pay a
24 lot of money, engage the public servants in Nova
25 Scotia, at that point and only at that point is a

1 Nova Scotia statute triggered.

2 Q. Now, you've talked about the
3 registration document, but just let me understand.

4 You would agree that under Nova
5 Scotia law, a quarry in excess of four hectares is
6 an undertaking under the Nova Scotia
7 environmental -- the NSEA. It is an undertaking;
8 correct?

9 A. Yes.

10 Q. And you would agree that
11 under the Nova Scotia legislation, that before such
12 an undertaking -- before work could proceed on that
13 undertaking, an environmental assessment was
14 required; correct?

15 A. No. I would not agree with
16 that, for reasons I have said. There is a very
17 specific statutory requirement that was, in my
18 understanding, not followed in the circumstances.
19 That is, that undertaking is the subject of the
20 Nova Scotia Act if there's, one, a project
21 description; two, registration; and, three, under
22 the regulations, the payment of quite a
23 considerable sum of money which, at that point and
24 only at that point, triggers the requirement of an
25 environmental assessment for that undertaking, in

1 other words, to engage the public servants and Nova
2 Scotia to do their work, et cetera.

3 But, no, only with that formality
4 would I agree with your statement.

5 Q. So let me understand, then.
6 Is your position that Bilcon could have begun
7 construction of this quarry without obtaining a
8 permit from Nova Scotia to do so?

9 A. No. That is not my position.
10 For purposes of a test quarry, as you know, under
11 the four hectare limit, there was no need for an
12 environmental assessment.

13 For applying for -- I don't think
14 they ever did apply for the environmental
15 assessment for the larger quarry, which, as I say,
16 I don't recall having been achieved. The
17 registration process under section 33 is a
18 statutory requirement.

19 Q. But I just am not sure I
20 understand your answer, then, Mr. Rankin.

21 Did Bilcon not require -- did
22 Bilcon require a permit to construct a 152 hectare
23 quarry in Nova Scotia from Nova Scotia?

24 A. Bilcon should have applied
25 and sought registration, and at that point an

1 environmental assessment would be required under
2 the Nova Scotia legislation.

3 Q. I understand that timing --

4 A. Yes.

5 Q. I guess what I want to
6 understand is they could not begin construction of
7 that quarry in Nova Scotia until they had done so?

8 A. A larger quarry?

9 Q. The larger quarry, yes.

10 A. Until it applied, had
11 registration, paid their money, yes.

12 Q. So in fact leaving aside how
13 formally that got triggered, you would agree that
14 under Nova Scotia law, Bilcon needed to obtain a
15 permit from Nova Scotia in order to begin
16 construction of the quarry?

17 A. Yes.

18 Q. You would agree that before
19 they got that permit, there would have to be an
20 environmental assessment?

21 A. Of some kind.

22 Q. Of some kind, yes, but under
23 Nova Scotia law there would have to be an
24 environmental assessment?

25 A. Right.

1 Q. So then you agree that before
2 this project, the quarry marine and terminal
3 project, could be constructed, there had to be at
4 least a federal environmental assessment of the
5 marine terminal, and there would have to have been
6 at some point a provincial environmental assessment
7 of the quarry. An EA on both aspects was needed by
8 some jurisdiction in Canada; correct?

9 A. Yes.

10 Q. Now, I want to come back to
11 something and try and understand something you just
12 mentioned, and that was when you were talking about
13 the scope of federal jurisdiction under CEAA.

14 A. Yes.

15 Q. You are familiar with the
16 MiningWatch case, Mr. Rankin?

17 A. Of course. But that case
18 of -- that took place many years after the story
19 that is before this arbitration Tribunal.

20 Q. Right. Now, that took place
21 actually in 2010 the decision was issued; correct?

22 A. Yes. I would assert as a
23 lawyer that it has no relevance to the case at bar.

24 Q. I just want to understand
25 that opinion a little bit, because you would agree

1 the MiningWatch case actually did interpret
2 language in the CEAA that had not changed between
3 the 2003 Act applicable to the Whites Point project
4 and the -- actually, what was applicable in the
5 MiningWatch case, was in fact the 2004 CEAA. You
6 would agree the relevant language had not changed;
7 correct?

8 A. Until the Supreme Court of
9 Canada told us their opinion or their judgment in
10 the MiningWatch case, which occurred in 2010, the
11 Government of Canada's practice had been uniformly
12 to "scope to trigger", and I will explain that if
13 the panel wishes.

14 And in a number of cases that are
15 referred to in either my materials or those of
16 Mr. Estrin, namely, the Tolco case, the Sunpine
17 case, the Prairie Acid Rain case, in each of those
18 cases the government was told that it had to scope
19 to trigger; that is, that they could only do an
20 environmental assessment within federal
21 jurisdiction. They could not go beyond the federal
22 jurisdiction.

23 So you have to have the
24 Constitution overlaid on CEAA. It is not
25 transparent on the face of the statute.

1 So if you have a trigger under
2 section 5 of the Navigable Waters Act, and you can
3 scope and you have to do a study, because that's
4 one of the statutes that is listed for that federal
5 purpose.

6 My point is the -- later on it
7 was -- the case that counsel is referring to called
8 MiningWatch said it was really up to the proponent
9 how they stated their case and they would scope to
10 what the proponent said. The practice at the
11 relevant time of this investigation was to scope to
12 only the limited federal trigger.

13 And to be very clear, I don't
14 understand how they could have included the quarry
15 in that regard. They could have dealt with the
16 marine terminal, the dock, but for reasons I could
17 talk to and a number of cases I could refer you to,
18 I do not believe they had the jurisdiction to scope
19 in the quarry.

20 Q. Okay, Mr. Rankin, I would
21 like to sort of take some of -- take some time to
22 understand your opinion here.

23 So I understand you're talking
24 about the uniform practice at the time, but you
25 would agree the Supreme Court in MiningWatch was

1 interpreting the same language that existed in the
2 CEAA that was applicable to the Whites Point
3 project, the same language?

4 A. I confess I haven't looked,
5 because there were amendments to the Canadian
6 Environmental Assessment Act that took place after
7 this statute that we're involved with that took
8 place. And I confess I haven't compared this
9 precise language.

10 I would not be surprised if you
11 told me that the language was the same, but to be
12 totally truthful, I haven't compared the two myself
13 because, as I said, there were a series of
14 amendments that took place in that statute up to
15 and including of course the most recent change.

16 So I would not be surprised if the
17 language was similar, but I can't confirm that.

18 Q. Okay. Well, let's maybe help
19 us confirm that. If you go to tab R-15, I am
20 probably going to need you to have two tabs open,
21 R-1 -- R-15 is the MiningWatch decision, and R-1 is
22 the Canadian Environmental Assessment Act as it
23 existed at the time of the Whites Point quarry.

24 Now, if we go to paragraph 20 in
25 the Supreme Court's decision, at the very beginning

1 it says, at the very first sentence, paragraph 20,
2 it says:

3 "The decision of the Federal
4 Court of Appeal and the
5 positions of the government
6 and Red Chris on the proper
7 interpretation of s. 21 are
8 largely based on their
9 interpretation of the
10 application of s. 15(1) of
11 the CEAA."

12 Do you see that?

13 A. Yes.

14 Q. And just to be clear, what
15 you're saying here is the position being advanced
16 by the government here that is referred to is that
17 it should scope to its triggers; correct?

18 A. Just to be clear, I'm saying
19 the practice of the government and understanding of
20 the -- and the case law confirming that was that
21 the federal government must scope to their trigger
22 at the relevant time of the Whites Point quarry
23 matter.

24 Q. Mm-hm.

25 A. Yes, that's what I'm saying.

1 Q. Now, so this refers to
2 section 15(1). And if you take a look in that
3 paragraph, they quote what section 15(1) is. Do
4 you see that in paragraph 20 of the Supreme Court's
5 decision? They actually quote what section 15(1)
6 of the relevant act of CEAA is?

7 A. That's right, yes.

8 Q. If you go down -- if you go
9 back to C-1 -- and I apologize for the flipping
10 here, but if you go back and you look at C-1, and
11 it is on page 9 of 36, you will see section 15.1
12 of -- 16(1) of CEAA and you can confirm that in
13 fact that is the same language; correct?

14 A. Yes, it is. Yes, it looks to
15 be the same language.

16 Q. Right. I will slow down as
17 we all try to manage these three-inch binders and
18 the paper stuck to them.

19 Now, if we go down to -- back to
20 Exhibit R-15 and we turn to paragraph 28 in the
21 Supreme Court's decision, it says:

22 "The starting point in the
23 statutory interpretation
24 exercise is the definition of
25 section 2 of the CEAA."

1 Do you see that?

2 A. Yes. Mm-hm, yes.

3 Q. And then in the next
4 sentence, the next sentence, it provides the
5 definition of CEAA at the time. That is in
6 MiningWatch, correct, any proposed construction,
7 operation, modification, decommissioning,
8 abandonment or other undertaking in relation to
9 that physical work; correct?

10 A. Yes.

11 Q. The Supreme Court in fact in
12 that paragraph underlined the word "proposed";
13 right?

14 A. Yes.

15 Q. If we flip all the way back
16 to R-1, and we go to what is at page 4 of 36, there
17 is a definition of "project".

18 You will see, and you can confirm,
19 that the definition of project that is being
20 interpreted by the Supreme Court is the same as the
21 definition of project in the CEAA that applied in
22 the Whites Point case; correct:

23 A. Yes.

24 Q. Now, if we go to paragraph 34
25 of the Supreme Court's decision, R-15, you will see

1 what their interpretation of this language, the
2 same language that is in the CEAA, that is being
3 interpreted. You will see what it is. It says
4 when the term "project" in sections 18 and 21 is
5 considered in context, the correct interpretation
6 is "project as proposed" and not "project as
7 scoped". Do you see that?

8 A. I do.

9 Q. And if you continue on to
10 paragraph 39, you will see in this paragraph in the
11 second sentence of R-15 it describes the discretion
12 of the Minister to scope a project or to scope an
13 environmental assessment. It provides that section
14 15(1) grants the discretion to scope to either the
15 Minister, in the case of mediation or a review
16 panel, or the RA. It says:

17 "However, this exercise of
18 this discretion is limited by
19 section 15(3)."

20 Do you see that?

21 A. I do.

22 Q. And then if you flip the page
23 over, still in paragraph 39, you will see how they
24 decide to describe the definition or the discretion
25 is actually limited. That says:

1 "Consistent with the view
2 that the 'project as proposed
3 by the proponent' is to apply
4 in the absence of text or
5 context to the contrary, the
6 scoping of the project
7 performed by the RA or
8 Minister under s. 15(1) is
9 subject to s. 15(3). In
10 other words, the minimum
11 scope is the project as
12 proposed by the proponent,
13 and the RA or Minister has
14 the discretion to enlarge the
15 scope when required by the
16 facts and circumstances of
17 the project."

18 Do you see that?

19 A. I see it. I'm still having
20 trouble with its relevance, if I am allowed to
21 respond.

22 Q. Let me ask you a question
23 first, and then I can get your response.

24 A. Yes.

25 Q. What I want to confirm is

1 that the Supreme Court here is interpreting the
2 exact same language that is in the CEAA that was
3 actually applicable to the Whites Point project;
4 correct?

5 A. The text is the same.

6 Q. The text is the same. And in
7 interpreting that language, it says that in fact
8 the project has to be -- that the project under
9 consideration is as proposed by the proponent;
10 correct?

11 A. Yes.

12 Q. And the project that was
13 proposed by the proponent was, in this case, at all
14 times a quarry and a marine terminal; correct?

15 A. Yes. So may I at least
16 explain why I think this is of little relevance or
17 not?

18 Q. Well, I understand, and maybe
19 we can get there through some questions, that you
20 have said that this is of little relevance because
21 of what the practice was at the time?

22 A. I'm saying, if I may, two
23 distinct things. First of all, I commend to the
24 Tribunal the work of another Department of Justice
25 lawyer named Beverley Hobby, who I referred to in

1 my materials, who is their leading expert on the
2 Canadian Environmental Assessment Act; indeed,
3 wrote a book on the subject.

4 And she makes abundantly clear,
5 and I have cited the material in my report, that
6 you must read the scoping decision in light of the
7 Constitution, that the federal government has no
8 jurisdiction to go and scope in matters beyond what
9 is a fisheries matter in this case.

10 It cannot deal with matters such
11 as a quarry, unless there is a trigger that the
12 federal government has. That's the first point.

13 The second point is that referring
14 us to how the Supreme Court of Canada has
15 determined the law to be in 2010, with the greatest
16 respect, is not relevant to how the world worked at
17 this relevant time when the Department of Fisheries
18 and Oceans consistently triggered, scope to
19 trigger.

20 I have read emails from officials,
21 Mr. Hood comes to mind, who confirmed that they
22 must scope to trigger. There is reference to the
23 famous Redhills or Hamilton -- a case involving a
24 Hamilton Expressway, where the court makes
25 abundantly clear and the Department of Fisheries

1 recognizes it's got to be that you can only scope
2 to trigger.

3 So, yes, the Supreme Court of
4 Canada clarified the law looking at the very same
5 terms in 2010, but I thought we agreed we would
6 talk about the past?

7 Q. We are trying to talk about
8 the past, and that is why I brought up the
9 language, Mr. Rankin, because it is the same as it
10 is in the past.

11 A. The language is the same.
12 The practice is very, very different.

13 Q. You say that, Mr. Rankin.
14 Let me understand this.

15 You're aware that on the same day
16 that the Whites Point project was referred to a
17 Joint Review Panel, two other projects were
18 referred to a Joint Review Panel; correct? Were
19 you aware of that?

20 A. I don't know which ones
21 you're referring to.

22 Q. You're not aware of the
23 Jackpine and Verizon oil sands projects also being
24 referred to a Joint Review Panel on the same day?

25 A. No, I didn't know they were

1 referred to a Joint Review Panel on the same day.

2 Q. Were you aware that they were
3 referred to the Joint Review Panel on the same day
4 by Minister Thibault of the Department of Fisheries
5 and Oceans?

6 A. No.

7 Q. And now in the referral of
8 those cases, are you aware that the DFO Minister
9 actually requested the entire oil sands project be
10 referred to a review panel?

11 A. No, I was not aware.

12 Q. Let's talk also about the
13 consistent practice that you mentioned.

14 You are aware -- because you said
15 you read some of the determinations, you are aware
16 of the position taken by the Canadian Environmental
17 Assessment Agency as to scope of the project at the
18 relevant time?

19 A. Perhaps you could enlighten
20 me.

21 Q. Well, let's turn to Exhibit
22 R-14 in your materials. It is an operational
23 policy statement from 1988 which talks about the
24 scoping of the environmental assessment.

25 It talks about the scoping of the

1 project. On the third page, it says "scope of the
2 project", and it talks about in determining -- the
3 very bottom, "In determining the scope of the
4 project", and it lists what the RA must consider.

5 It talks about, in fact, the
6 undertakings which physical works fall within the
7 scope of the project and which undertakings in
8 relation to those physical works fall within the
9 scope of the project. Do you see that?

10 A. Which physical activities not
11 in relation to physical work identified in the
12 inclusion list fall within the scope, yes, I see
13 that. Then I see reference to the principal
14 project accessory test, yes.

15 Q. You see reference, then, to
16 interdependence and linkage at the bottom there, as
17 well?

18 A. Yes, yes.

19 Q. Before you asked me to
20 refresh your recollection, so you have not seen in
21 your review in this case of the documents in this
22 case or what you based your opinion on any of
23 the -- even in the notes of Mr. Hood any of the
24 materials that was relaying the opinion of the
25 Canadian Environmental Assessment Agency on how

1 this particular project should be scoped?

2 A. I don't recall any -- I have
3 seen emails from some of the officials that worked
4 for CEAA.

5 Q. Mm-hm.

6 A. But I am not entirely sure
7 what you are referring to.

8 Q. Okay. But you --

9 A. I just point out that this
10 document, again, that you referred me to, which
11 talks about determining the scope of what the
12 responsible authority must consider, must be
13 understood in light of the Constitution, as Ms.
14 Hobby has stressed and as the courts have made
15 clear.

16 Q. I'm sorry, when was Ms.
17 Hobby's --

18 A. It is referred to in my
19 material.

20 Q. Do you know when it was
21 published?

22 A. It is one of those updating
23 under those loose leaf books that keeps getting
24 updated. I don't remember its initial publication
25 date, although it is in my materials.

1 Q. Do you know if it was the one
2 you are referring to was written before the Supreme
3 Court's decision in MiningWatch?

4 A. Whether it has been updated
5 since, I don't know, but definitely it would have
6 been first published before the MiningWatch
7 decision, which of course is silent on the
8 constitutional points I have made.

9 Q. I am struggling with that
10 last point you just made. In terms of the scope of
11 the project determination where the Supreme Court
12 read it as at least the project as proposed, do you
13 believe the Supreme Court decision to have been in
14 error?

15 A. No, of course not. The
16 Supreme Court of Canada is the supreme law-making
17 body. It is not in error. It makes -- it has
18 interpreted the law definitively in 2010. I am not
19 suggesting that for a moment at all.

20 I am simply pointing out that the
21 case did not deal with the fundamental point that I
22 am trying to stress, which is that the practice was
23 to scope to trigger at the relevant time and that
24 the Constitution, and according to the Department
25 of Justice's leading expert, Ms. Hobby, is that you

1 must understand the federal government's
2 constitutional authority as an overlay to
3 interpreting CEAA.

4 That's a fundamental point that
5 came out of the government's attempt, in the case
6 of Redhills, and the pretext -- and that is the
7 word the judge used -- the pretext of dealing with
8 migratory birds to address a controversial highway
9 project in Ontario.

10 And the Supreme -- the court --
11 and the Federal Court at that time said extremely
12 clearly to the Department of Fisheries and Oceans,
13 Department of Environment: Government of Canada,
14 you must only deal with material as you scope
15 projects within federal jurisdiction.

16 And the court said you can't as a
17 pretext, because of your migratory birds
18 jurisdiction or in this case section 32 or 35 of
19 the Fisheries Act, purport to deal with matters in
20 the province's jurisdiction; namely, the quarry.

21 And of course the case that
22 counsel is referring me to now, the 2010 Supreme
23 Court of Canada decision, is silent on that point.
24 It didn't arise.

25 Q. But you mentioned the Redhill

1 case and I don't want to spend much time talking
2 about it, but you would agree on the Redhill case
3 that in fact the provincial environmental
4 assessment of the project had already been
5 completed; correct?

6 A. The case was about the
7 federal government's use of CEAA to attempt to
8 scope in matters beyond its constitutional
9 jurisdiction.

10 Q. Well, in terms of the Redhill
11 case, the question was as much about whether there
12 was in fact a project that was -- triggered the
13 CEAA, was it not?

14 A. Yes.

15 Q. And so in this case, we've
16 agreed that there was a project that triggered the
17 CEAA, because there was a marine terminal. The
18 question then is the scope of the project, is it
19 not?

20 A. In my judgment, this should
21 have been limited to the assessment by the federal
22 government of the marine terminal.

23 Q. Now, I would like to
24 understand a little bit about that judgment. You
25 said it's based on your review of the documents in

00237

1 the case, but just to confirm a couple of things,
2 you are aware that eventually DFO scientists
3 determined that they believed that the operations
4 in the quarry would result in the death of fish or
5 by means other than fishing; correct?

6 A. I have read, and I am
7 thinking now of the supplemental witness statement
8 by Paul Buxton, a series of emails to which he
9 refers from federal officials, and I believe the
10 conclusion was that as of 2002, there was no
11 fish-bearing stream on the quarry land and that
12 they had walked away, I believe, from a conclusion
13 that there was a section 32 trigger, as well,
14 vis-à-vis the quarry.

15 Q. Okay.

16 A. I believe that is what I read
17 from his supplemental witness statement. In
18 referring to a number of emails, of course, that he
19 would not and the proponent would not have been
20 aware of at the relevant time.

21 Q. Now, you said that as of
22 2002. Are you aware of whether DFO scientists had
23 actually gone out to visit the site by that time
24 and done their final assessment of the project?

25 A. I think there was an email to

1 the effect that there had been a conclusion as of
2 December 2002 to that effect that there was no
3 section -- no Fisheries Act trigger vis-à-vis the
4 quarry.

5 Q. Okay. That is what your
6 opinion is based on, the fact that by December of
7 2002 they didn't believe there was a Fisheries Act
8 trigger for the quarry?

9 A. It is a bit more complicated
10 than that. There is two sections of the Fisheries
11 Act that are in the Law List Regulation that could
12 trigger a federal involvement in the quarry. The
13 first is section 32. The second is section 35.

14 The first involves destruction of
15 fish. The second involves habitat alteration, et
16 cetera.

17 And the section 35 -- there was no
18 fish-bearing streams, and I believe it was common
19 ground that there was no section 35 trigger for
20 habitat alteration or destruction, et cetera.

21 But the fish -- the section 32
22 one, would this proposal of this quarry harm --
23 destroy fish, I believe that by that -- by that
24 time, and I may have my dates right -- I would have
25 to go back and look at Mr. Buxton's material to

1 confirm it. I believe there had been inside the
2 Department of Fisheries a conclusion by
3 Mr. Conroy -- Conway that there was no marine
4 mammal issue and that in an email from Mr. Zamora
5 to someone else -- I'm sorry, I don't have all of
6 this in front of me -- that there had been a
7 conclusion, as well, that there were no section 32
8 triggers for the quarry.

9 So, yes, I believe that was the
10 case.

11 Q. And that is by the end of
12 December or the end of 2002, is your recollection?

13 A. Well, I can remember the
14 officials advising the Minister of fisheries,
15 Mr. Thibault, right up until the decision in June
16 of 2003, to ask the Minister of Environment,
17 Mr. Anderson, to create a joint -- to this to a
18 Joint Review Panel, that they were still -- and
19 their emails confirmed this very vividly -- looking
20 for a federal trigger for the quarry
21 unsuccessfully. I think that is pretty important.

22 That was very much in my mind when
23 I wrote my material here. I just think that it was
24 really disturbing, frankly, if that was the case,
25 that the officials did not believe they had a

1 trigger, but the Minister was asked to scope in the
2 quarry, no common ground that the marine terminal
3 is very much within federal domain, but to ask that
4 a Joint Review Panel be established vis-à-vis the
5 quarry when it was -- they were looking for a
6 trigger at that time. I'm thinking of Mr. Hood's
7 emails and the like. That caused me a great
8 concern.

9 Q. Okay. So just so that I have
10 it, your opinion, then, in your report is based on
11 your belief that, in fact, DFO officials did not
12 believe they had a trigger on the quarry?

13 A. Yes.

14 Q. Now, in your report and just
15 here -- so you're not contesting, as you said, that
16 a federal EA of at least the marine terminal was
17 required; correct?

18 A. Of course not.

19 Q. You're not contesting, and I
20 think we established earlier, that at least from
21 your point of view, once a registration document
22 then filed, there would have had to have been a
23 Nova Scotia EA of the quarry part of the project;
24 correct?

25 A. Again, these are statutory

1 processes, counsel. These are -- there is no
2 inherent jurisdiction. This is simply a statutory
3 process that you get -- you go through the door
4 with the Nova Scotia sign on it if and only if you
5 do a project description of your undertaking. You
6 pay, I believe, \$12,000 at the time. You get the
7 public officials engaged doing their job.

8 Yes, at that point the
9 undertaking -- you have asked for it to be subject
10 to an environmental assessment, and of course it
11 can't be built to your quarry unless and until you
12 get that assessment.

13 I can tell you, standing back from
14 the trees and looking at the forest, it is
15 exceedingly rare for quarries to be subject to the
16 kind of review panel and public process that took
17 place here.

18 It has never happened. It hasn't
19 happened since, and it hasn't happened before. So
20 I find that extraordinary.

21 But if you're asking me how the
22 Nova Scotia door gets opened, it gets opened on the
23 payment of the 12,000, on the registration of the
24 undertaking, and then under section 47 it is the
25 Nova Scotia Minister who says there is also another

1 government that has an EA process; we can go
2 together and do a Joint Review Panel.

3 Q. Okay. I think what I really
4 want to understand is just confirm again that that
5 all had there had to be a Nova Scotia EA process,
6 though, before they could operate the quarry,
7 before they could construct it?

8 A. Yes. If the proponent had
9 asked for one. It never did.

10 Q. Okay?

11 A. It never did.

12 Q. But there has been testimony
13 in this case that they did come to operate a quarry
14 in Nova Scotia. Are you aware of that?

15 A. Yes.

16 Q. So if they came to operate a
17 quarry in Nova Scotia, you would agree that
18 eventually at some point they would have to ask for
19 permission from Nova Scotia to develop a quarry;
20 correct?

21 A. Had they applied for a 155
22 hectare quarry and filled out the right forms and
23 paid their money, yes.

24 Q. Now, just so I understand
25 your opinion, your opinion is that in fact the Nova

1 Scotia Minister of the Environment was unable to
2 remove that requirement and send this project to a
3 Joint Review Panel unless they filed a registration
4 document?

5 A. I'm confused about this, to
6 be totally candid. You cannot consent to
7 jurisdiction, fundamental administrative law
8 principle. You only have what the statute allows.
9 The statute required there to be this section 33
10 point I have made under the Nova Scotia Act,
11 registration, payment of money, project description
12 of the undertaking, and then you are in the door.

13 That never happened. So I look
14 back at this in puzzlement as to how the process
15 was triggered. Obviously Bilcon wanted to get the
16 environmental assessment to build the quarry and
17 they needed a dock, so of course they did.

18 But if you're asking me at a
19 technical administrative law point of view, has --
20 was jurisdiction properly conferred? I am
21 troubled, because I never saw any evidence of
22 registration or payment or the like. The Minister
23 simply invited them to the party, and I'm not sure
24 they had statutory authority to do so.

25 Q. Okay.

1 A. But everybody assumed it was
2 the case and off we went.

3 Q. Right. And to your
4 knowledge, Bilcon never objected to that; correct?

5 A. I can't say.

6 Q. To your knowledge?

7 A. To my knowledge, no.

8 Q. No. Now, you mentioned the
9 type of EA and you were talking about quarries.
10 Let me just go through some of this with you.

11 You would agree that under the
12 CEAA as it applied at the time there were four
13 types of quarries, correct, screenings,
14 comprehensive studies, panel reviews and
15 mediations; correct?

16 A. Under the federal CEAA, there
17 were those four possibilities.

18 I don't believe mediation has ever
19 taken place.

20 Q. We can talk about three
21 possibilities?

22 A. Yes. In practical terms,
23 yes.

24 Q. So now but just so I
25 understand, under the CEAA, under the federal

1 assessment legislation, no project is by default of
2 the act a review panel. It has to be referred for
3 a review panel; correct?

4 A. Indeed, it must be the
5 Minister of Environment who refers it to a review
6 panel.

7 Q. Now, if you will bear with
8 me, I would like to look at some of the provisions
9 in the CEAA that actually allow for that referral.
10 So if you can go to Exhibit R-1. Let's turn to
11 section 20.

12 This section occurs in a section
13 of the CEAA dealing with screening assessments;
14 correct?

15 A. Yes.

16 Q. And this section talks about
17 allowing or gives the Minister discretion to refer
18 a project to a review panel after the completion of
19 the screening report; correct?

20 A. It is a different Minister, I
21 believe, isn't it, the responsible authority here?

22 Q. Well, I think if you look at
23 section C, if you look -- if we pull up section C,
24 look at the bottom. It says:

25 "The Responsible Authority

1 shall refer the project to
2 the Minister for a referral
3 to a review panel in
4 accordance with..."

5 A. Yes.

6 Q. This is the mechanism that
7 occurs, but, you're right, the responsible
8 authority has to make the first referral, and then
9 there is a second?

10 A. That is right.

11 Q. Now, if you look up just
12 above where we were just looking there, you see
13 that there are three little Roman numerals, and
14 these are the instances where, after a completion
15 of the screening, the project can be referred to a
16 review panel and an assessment can be referred to a
17 review panel. Under little 1, you see it says,
18 essentially, where the screening assessment --
19 after the screening assessment, it is uncertain as
20 to whether the project is likely to cause
21 significant adverse environmental effects; correct?

22 A. No, not correct. Something
23 you have left out that is absolutely critical to
24 this entire proceeding, in my judgment. It says,
25 "It is uncertain" -- where, one:

1 "It is uncertain whether the
2 project, taking into account
3 the implementation of any
4 mitigation measures that the
5 Responsible Authority
6 considers appropriate, is
7 likely to cause significant
8 adverse environmental
9 effects."

10 And it is my opinion that the
11 failure of this review panel to address its mind to
12 the statutory requirement of mitigation measures is
13 a fatal flaw in the exercise of that panel's
14 jurisdiction. And you've glossed over something
15 which is fundamental to the whole Canadian
16 Environmental Assessment Act and process, in my
17 judgment.

18 Q. Sure. Fair enough. I had no
19 intent of sort of downplaying the requirements
20 there. So if you would like, we can read out the
21 entire clause here. It will take a little bit
22 longer, but you would agree, then, under (ii) --
23 and just to be clear with respect to your comments
24 on mitigation, my colleague, Mr. Kurelek, will ask
25 you some questions on that later, so you will get a

1 "The Responsible Authority
2 shall not exercise any power,
3 or perform any duty..."

4 Et cetera, et cetera; right?

5 A. That is what it says.

6 Q. So under paragraph 20(b),
7 once the screening report is complete, then a
8 responsible authority in looking at that report can
9 say -- can determine for itself it is likely to
10 cause any adverse environmental effects. They
11 can't be justified in the circumstances and can
12 refuse to allow the -- basically refuse to issue
13 the authorization; correct?

14 A. Mm-hm.

15 Q. What we have under C2, and
16 the way that is working is, in essence, if D
17 doesn't apply, so if there is not a determination
18 that the adverse effects cannot be justified, then
19 that question can be referred up to a review panel;
20 correct?

21 A. Yes.

22 Q. Now, if we go to 3, it says
23 the project can be referred where public concerns
24 warrant a reference to a mediator or a review
25 panel; correct?

1 A. That is the alternative that
2 is available under the statute. It was not the
3 alternative that appears to have been used in this
4 case.

5 Q. We will get to that.

6 A. It is disjunctive. In other
7 words, it is "or" and not "and".

8 Q. These are all disjunctive;
9 correct?

10 A. Yes.

11 Q. Now, we will try to walk
12 through some the other provisions in here more
13 quickly. I know there is reference in 21, but I
14 want to skip over that for now and refer to some
15 similar provisions. If you look at section 23 of
16 the Canadian Environmental Assessment Act on the
17 next page, this essentially provides a mirror
18 provision, except that it happens after the end of
19 a comprehensive study; correct?

20 A. Yes.

21 Q. Again, so all three options
22 are here in terms of when it can be referred to a
23 review panel and they are all disjunctive; correct?

24 A. I believe so.

25 Q. So only one of those would

1 have to be satisfied under the statute for it to be
2 referred to a review panel; right?

3 A. Yes.

4 Q. Now, if we turn to section 25
5 of the Canadian Environmental Assessment Act now,
6 section 25 it is under a section called
7 "discretionary powers"; correct?

8 A. Yes.

9 Q. Under this section, a
10 responsible authority can request that a project be
11 referred to a panel review, and this time we have
12 two circumstances, not three; correct

13 A. Yes.

14 Q. And that is under (a), and it
15 is again a project taking into account mitigation
16 measures, may cause significant adverse
17 environmental effects; correct?

18 A. Yes, that is what it says.

19 Q. (b) again says public
20 concerns warrant a referral; correct?

21 A. That is the alternative that
22 is available.

23 Q. Right. There is again a
24 disjunctive; right?

25 A. Yes.

1 Q. Then in section 20 -- now I
2 should say this is referral to the Minister for
3 referral, so this is where the responsible
4 authority is of the opinion at the time.

5 Now, at the lead-in to that
6 section, it says subject to 21(b) and (c), which is
7 the provisions on screening we looked at, where at
8 any time the responsible authority is of the
9 opinion that -- do you see that?

10 A. You have to slow down a bit
11 when you use quotations.

12 Q. Right. Do you see that?

13 A. Perhaps you could refer me to
14 the section.

15 Q. Section 25.

16 A. Oh, there it is.

17 Q. Right at the top where it
18 says "where at any time". Do you see that? So
19 this applies not after the completion of a report,
20 but at any time in the process; correct?

21 A. Yes.

22 Q. If we go down to section 28,
23 you will see this is a similar provision as we just
24 saw for 25, but this actually allows at any time
25 the Minister of the Environment to refer the

00253

1 project to a review panel; correct?

2 A. That's right.

3 Q. Again, there is no time
4 limitation on when they might do that; right?

5 A. No.

6 Q. Again, this is a disjunctive
7 test, so only one of these conditions would have to
8 apply to justify a referral under the statute;
9 correct?

10 A. I believe that's correct.

11 Q. Now, I would like to come
12 back to section 21 of the CEAA.

13 Now, this section starts off and
14 it says:

15 "Where a project is described
16 in the comprehensive study
17 list, the Responsible
18 Authority shall..."

19 And it gives two options; correct?

20 It says ensure that a comprehensive study is
21 conducted and a comprehensive study report is
22 prepared, or refer the project to the Minister, and
23 that is the Minister of the Environment, for a
24 referral to a mediator or review panel; is that
25 correct?

1 A. That is what it says.

2 Q. So in this provision here --
3 now this -- you're aware this is a provision that
4 was relied upon by the Minister of Fisheries and
5 Oceans to request the Minister of the Environment
6 to refer this panel -- project to a review panel?

7 A. Yes. And I am not entirely
8 sure I agree but, for sake of argument, I will
9 assume that he had jurisdiction.

10 I understand from the material I
11 read there is an argument that Mr. Estrin will
12 bring forward or has brought forward that the kind
13 of dock is not the kind of marine terminal, in
14 quotes, contemplated in the comprehensive study
15 list regulation.

16 And I am in agreement with
17 Mr. Estrin on that particular point of statutory
18 interpretation. So I don't believe, therefore,
19 that it would have been the kind of project
20 requiring a comprehensive study.

21 But I acknowledge the section is
22 ambiguous, and I know that is how the government
23 proceeded in this circumstance.

24 Q. Right. And you also
25 acknowledge even if section 21 didn't apply, then

1 under section 25 that we have just seen, it could
2 have been referred to a review panel?

3 A. Yes. Absolutely, yes. But
4 this is what happened here, you have told me, and I
5 agree that is what happened here.

6 Q. Now, if we look at the
7 referral to a review panel here under little B, in
8 fact as opposed to the other sections, there are no
9 instructions or conditions that have to be met
10 before a referral other than being on the
11 comprehensive study list; correct?

12 A. Yes, yes.

13 Q. Now, I want to go to that
14 list, and I don't want to focus too much on some of
15 the projects, because we can get into a very
16 academic debate on marine terminals, but I want to
17 talk about -- go to R-10 and I just want to look at
18 the beginning.

19 So if you flip to R-10 in your
20 book, I am somewhat hopeful there is an actual tab
21 in there in R-10, a flag somewhere that will direct
22 you to the Comprehensive Study List Regulations.
23 If not, it is about 30 pages in, three-quarters of
24 the way through.

25 A. It is a pretty big...

1 Q. Unfortunately, they are not
2 consecutively paginated here.

3 A. Yes, I have it.

4 Q. Now, if we just go to -- I
5 will wait for a second. Does everybody have where
6 we are in the Comprehensive Study List Regulations?

7 A. It seems to be about halfway
8 through.

9 Q. I want to focus on the first
10 page right now, actually, the very first page to
11 it. For those of you having trouble, I think he
12 has it up on the screen right now. There you go.
13 Great.

14 The very first sentence there
15 says, "Whereas the Governor in Council", that is
16 the Cabinet in Canada:

17 "... is satisfied that
18 certain projects and classes
19 of projects are likely to
20 have significant adverse
21 environmental effects."

22 Do you see that? Do you see where
23 I am pointing to, Mr. Rankin?

24 A. Of course, yes.

25 Q. At the very beginning there?

1 A. Yes.

2 Q. So then the types of projects
3 in this list have then been deemed by the Governor
4 in Council, by the Cabinet in Canada, as likely to
5 have significant environmental effects; correct?

6 A. It is a preamble.

7 Q. Right. But it says the
8 Governor in Council is satisfied that these
9 projects are likely to have significant adverse
10 environmental effects?

11 A. That is what it says, yes.

12 Q. That significant adverse --
13 likely to have significant adverse environmental
14 effects, that is what the language was in the CEAA;
15 correct?

16 A. Yes.

17 Q. Now, of course just to
18 clarify, that doesn't of course mean these projects
19 will have significant adverse environmental
20 effects; right? Just the fact they are on this
21 list is not a determination they will. That is the
22 sort of thing that is determined through an
23 environmental assessment; correct?

24 A. It just says that the track
25 will be -- if I can put it, they are likely more

1 rigorous than merely a screening by putting it on a
2 comprehensive list, if I may, is that -- that is
3 how I would have thought they meant that, in the
4 context of the statute, is the three categories we
5 talked about.

6 Q. But they specifically use the
7 language "likely to have significant adverse
8 environmental effects"; correct?

9 A. Yes.

10 Q. Which is the language for
11 essentially referral to review panels; correct?

12 A. For certain categories, or
13 they call it classes of projects, yes.

14 Q. Correct. Okay. I just want
15 to confirm that in fact now the determination --
16 because we have heard a lot about the science that
17 was and wasn't done. The determination as to
18 whether projects will actually have the significant
19 adverse environmental effects that may be deemed
20 likely to occur, that happens in the environmental
21 assessment?

22 A. That is correct, yes.

23 Q. Now so that we're on the same
24 page here, then, you agree, then, that under the
25 CEAA, a project can be referred to a review panel

1 at any time during the EA if it's on this
2 comprehensive study list, or if a responsible
3 authority or Minister determined that, taking into
4 account mitigation measures, there could be
5 significant adverse environmental effects, or
6 public concern warrants it?

7 A. Yes.

8 Q. And so there is nothing in
9 the CEAA that actually prevents a project from
10 beginning as one level of assessment, and then
11 getting referred to a review panel?

12 A. No. Indeed, the section you
13 referred to specifically contemplates that.

14 Q. Now, I want to come back to
15 something you have written in your report to see if
16 I can understand, and it is at paragraph 78 of your
17 report. I think this was referring to the comment
18 that you made earlier?

19 A. Yes.

20 Q. Which is that in your view,
21 it says -- you say it would be unusual for a
22 project of this scope and kind to be subject to a
23 full -- you say joint review process, and you
24 repeat the observations of two Canadian professors,
25 Professors Doelle and Tollefson, who comment, and

1 then you provides a comment. It says -- they
2 comment that panel reviews -- they assume that
3 panel reviews are for large and controversial
4 projects. Do you see that?

5 A. Yes, that's right. They go
6 on to point out there is only one -- at the time,
7 only between one and five panel reviews per year in
8 Canada that are -- that were -- that were
9 triggered, and they say that panel reviews are for
10 large and controversial projects.

11 A quarry of this size, it was
12 shocking to me that this kind of project would be
13 the subject of a Joint Review Panel, let alone a
14 review panel. It is unprecedented.

15 Q. Okay.

16 A. It has been -- I think it is
17 unprecedented before then and unprecedented since
18 then, and that is what the professors are saying,
19 panel reviews for large and controversial projects.
20 Note the conjunctive.

21 Q. Right. That was what these
22 two professors note, but as we looked through the
23 CEAA, and you expressly confirmed, the language in
24 the CEAA is expressly disjunctive, isn't it? It is
25 for controversial and --

1 A. Yes, yes, but they are saying
2 that the way -- the context in which actually in
3 practice one has these very rare things called
4 review panels tend to be, in their judgment -- and
5 they have studied in their book all of these --
6 they have concluded that is when they were actually
7 used.

8 Q. Right. But --

9 A. The Minister has the
10 opportunity to cause a review panel when one of two
11 circumstances, likely significant adverse
12 environmental effects that, after mitigation, still
13 exist, or public concern.

14 This quote is interesting, and why
15 I included it is because their assessment of the
16 real world, the lay of the land, was that both
17 factors have to be present.

18 And I would have confirmed that
19 there was controversy in this case, in Whites
20 Point, to call it a large project of the kind that
21 normally review panels in Canada have been subject
22 to as very, very unusual.

23 Q. Okay. But you would confirm
24 that under the statute, even if it is a small
25 project, if it's controversial, if there is enough

1 public concern, it can be referred to a review
2 panel?

3 A. If the Minister chooses to
4 use that as the alternative route that was
5 available to him. That of course was not what was
6 done here.

7 Q. We can get to that. Now, I
8 just want to understand how this statutory scheme
9 fits, then, with the claimants' project and
10 understand a little bit about the claimants'
11 project, because you just mentioned that you didn't
12 believe that it was large.

13 I guess in thinking about that, I
14 want to understand something about that. So you
15 are aware that in this case, as we discussed in the
16 quarry marine terminal proposal, the quarry was to
17 be 152 hectares; correct?

18 A. I think we were proposing to
19 take the rock out of 2-1/2 hectares a year or
20 something like that.

21 Q. Two-and-a-half hectares a
22 year, but for 50 years?

23 A. Yes.

24 Q. In fact, the description they
25 submitted was for a 152-hectare quarry operation,

1 would you agree?

2 A. Yes, that's right.

3 Q. And the production would be
4 approximately, and it is in imperial tons, but 2
5 million imperial tons of aggregate a year?

6 A. I believe that's right.

7 Q. And they said the life of the
8 quarry was to be 50 years. And you did say -- now,
9 in the project description, you said you believed
10 that was about 2-1/2 hectares of quarry a year?

11 A. If memory serves. In other
12 words, it would be misleading to suggest that all
13 of a sudden those 152 hectares would be mined in a
14 given -- in a period of time.

15 When you ask about the size of the
16 quarry, I point out immediately, after paragraph 80
17 and following, other projects in Atlantic Canada,
18 such as Belleoram, six times as large that never
19 were subject to a review panel.

20 In fact, to my knowledge, there's
21 never been a quarry subjected, of any size, to a
22 review panel.

23 Q. Now, we'll come to that, but
24 just to clarify now, you are also aware there's
25 never been another quarry of this size proposed on

1 the Digby Neck, right?

2 A. Yes, I think that is right.

3 Q. Now, just to clarify this,
4 you said 2-1/2 hectares. If you turn to Exhibit
5 R-181. I'm sorry, it is going to be in volume 2 of
6 your materials.

7 A. Yes, I have it.

8 Q. 181, final project
9 description submitted. Have you seen this
10 document?

11 A. I don't believe I have.

12 Q. If you could turn to page 5.

13 A. Yes.

14 Q. On what would be the second
15 paragraph down in the last sentence, it says
16 approximately ten acres of new quarry would be
17 opened each year. Do you see that?

18 A. Yes. About 2-1/2 hectares.

19 Q. About --

20 A. It is almost exactly 2-1/2
21 hectares.

22 Q. We have heard four from other
23 people.

24 A. Wait a second. I can't
25 remember.

1 Q. I think it is close to four.

2 A. I think it is close to four.

3 I think you are right.

4 Q. We will agree it is under
5 four hectares, then?

6 A. Yes, that's right. Yes.

7 Q. And then, again, in order to
8 transport the rock that Bilcon produced, it was
9 going to design a marine terminal, and if you will
10 see there on page 4, it talked about a marine
11 terminal. You're aware it was for Post-Panamax
12 class ships; correct?

13 A. Yes.

14 Q. And, in fact, you are aware
15 that they were talking about a ship that was
16 approximately 225 metres in length?

17 A. Yes. I think that -- I
18 wasn't aware of the length, but I knew that that
19 was the class of vessels contemplated.

20 Q. Post-Panamax class?

21 A. Yes.

22 Q. Right. Now, if we come
23 back -- and I apologize to everybody for doing
24 this -- to R-10, if you have taken that out and
25 lost your Comprehensive Study List Regulations.

00266

1 Are you there?

2 A. I am.

3 Q. In R-10 on the Comprehensive
4 Study List Regulations, I would like to turn, if we
5 can, to item 18(i). Now, I understand your
6 position that, in fact, this of course will only
7 apply where there is a federal trigger. But what I
8 would just like to talk about is the size of the
9 projects here.

10 This is on the Comprehensive Study
11 List Regulations, and in (i) it says a proposed
12 construction, decommissioning, abandonment, and
13 then it says of:

14 "(i) a stone quarry or gravel
15 or sand pit with a production
16 capacity of 1 000 000 t/a or
17 more."

18 Do you see that?

19 A. I do.

20 Q. So you would agree, then,
21 that if there was a federal trigger on the quarry
22 for Bilcon, if there was, then it would have been
23 in excess of this and would have triggered a
24 comprehensive study; correct?

25 A. Yes. I think that is what it

1 means.

2 Q. Now, and just to come down,
3 if we go to 28(c), we see on 28(c) that it says:

4 "A marine terminal designed
5 to handle vessels larger than
6 25 000 DWT."

7 Dead weight tons. I understand
8 the point you made earlier about there is some
9 confusion as to whether this applied, even though
10 the government applied it in this case, but you
11 would agree the marine terminal done by Bilcon was
12 designed to handle ships greater than 25,000 dead
13 weight tons?

14 A. I would repeat the definition
15 of marine terminal on page 2 of the comprehensive
16 study regulations, in my judgment, this would not
17 be the kind of marine terminal contemplated by the
18 regulation at all, size notwithstanding, because of
19 the fact it does not include (c), production
20 processing or manufacturing areas that include
21 docking facilities used exclusively in respect of
22 those areas.

23 This was a purpose-built dock,
24 and, therefore it did not, in my judgment,
25 constitute a marine terminal of the kind

1 contemplated in this regulation.

2 That is just my interpretation,
3 and I believe another witness, Mr. Estrin, has the
4 same view, from reading his material.

5 Q. You're aware from reading the
6 materials that Mr. Smith has a different view?

7 A. I am indeed.

8 Q. You're aware that --

9 A. And the practice, as I said,
10 was that there was -- (a) it is ambiguous, I would
11 be the first to acknowledge; and (b) the practice,
12 I think, was to include these kind of things under
13 the comprehensive study list. I don't believe,
14 though, that there has ever been a stand-alone
15 marine terminal that has been subject to a review
16 terminal -- a review panel.

17 Q. Right. But you agree that
18 under -- you agree that Bilcon, as far as you are
19 aware, certainly never objected to the marine
20 terminal being assessed under this process?

21 A. In my experience, proponents
22 don't object when they are asked to -- when they
23 are seeking an authorization from the government.

24 Q. You say in your experience
25 proponents don't object. I'm not sure I understand

1 that.

2 A. My apologies. I simply say
3 that the reality of seeking an authorization or an
4 environmental assessment requirement is that
5 proponents are often not thinking from a legalistic
6 point of view in challenging the wording of
7 sections of regulations.

8 They just want to acquire the
9 relevant authorization and move on.

10 Q. But you do agree that, in
11 fact, at the Canadian bar there is a very active
12 process on environmental assessment in terms of
13 judicial review of government decisions?

14 A. Oh, yes, of course.

15 Q. So in fact you agree people
16 do object to decisions made in the context;
17 correct?

18 A. Yes, yes. But I also would
19 say that sometimes one does that at one's peril.
20 There is a legal possibility, no doubt, to seek
21 judicial review at any time in the process, but
22 there is a practical reality of just getting on
23 with the job. That is frequently at the forefront
24 of these kinds of matters.

25 Q. I don't want to pursue this

1 issue of Canadian law too far, because it is
2 probably of limited relevance here. But in terms
3 of that, you say judicial review has -- there's a
4 time limit as to when you can seek judicial review,
5 correct, of a governmental decision? There is a
6 time limb limit to when you seek judicial review;
7 correct? There is essentially -- you have to
8 object in a relevant period of time or else you
9 lose your rights to a judicial review of that
10 decision?

11 A. Usually. Not always.

12 Q. So you said that, in fact,
13 that you object at your peril, but in a sense if
14 you don't object, you also don't object at your
15 peril; correct? You fail to raise a complaint, the
16 time may pass and you may no longer be able to
17 object; right?

18 A. Yes, that's right.

19 Q. Now, I want to talk about
20 now -- and we have agreed that this was referred
21 under section 21. That actually didn't have any
22 grounds for referral, but I do want to talk a
23 little bit about what grounds there might have been
24 under other sections of the CEAA and about the
25 significant adverse environmental effects, public

1 concern.

2 So you would agree -- and you
3 might disagree with the conclusion, but you would
4 agree at least there is evidence that government
5 officials were concerned about the environmental
6 effects of this project; correct?

7 A. Just to be clear, do you mean
8 the marine terminal that you have been speaking of,
9 or are you taking us back to the quarry?

10 Q. I would say that -- I would
11 say that the government officials were concerned
12 about the environmental effects of both the quarry
13 and marine terminal; correct?

14 A. Yes. The government
15 officials, both Nova Scotia and Canada, had
16 concerns about the environmental effects of the two
17 aspects of the project.

18 Q. And they were concerned that
19 there would likely be significant adverse
20 environmental effects; correct?

21 A. Yes.

22 Q. And you would also agree, and
23 you mentioned it before, that, in fact, they agreed
24 or there was evidence of public concern on the
25 record; correct?

1 A. Yes.

2 Q. And government officials were
3 aware of that public concern; right?

4 A. Yes.

5 Q. And, in fact, you would agree
6 that the Minister of Fisheries and Oceans,
7 Mr. Thibault, in referring this to a panel, he was
8 also aware of the public concern about the project;
9 right?

10 A. I don't recall him speaking
11 to that in any documents I read, but I know that he
12 was actively involved in this process, and I have
13 read a number of emails from his office expressing
14 his concern. So I assume so, yes.

15 I am not hedging. He used the
16 "significant adverse environmental effect"
17 language, as I recall, in moving this up. So that
18 is why I hesitate. I don't have in my mind
19 statements he has made about that. But in the
20 grand scheme of things, yes, this was people in
21 favour and opposed to this project.

22 Q. Right. And the Minister was
23 aware of that --

24 A. I am certain that he was. I
25 just don't know that he expressed it in any

1 document I've got in my mind at the moment.

2 Q. Okay. To be clear, if he
3 didn't express it in any document, you do agree he
4 was aware of it?

5 A. Oh, yes.

6 Q. And you would agree the
7 public concern here was not just about the quarry,
8 but also about the marine terminal; correct?

9 A. If there was public concern
10 about the marine terminal, it certainly paled in
11 comparison to the concern about the quarry itself.

12 I don't recall much about the
13 actual marine terminal. We were having two or
14 three pilings, a few square metres that were
15 affected on the floor of the Bay of Fundy, but I
16 don't -- I don't recall.

17 I should say I think there was
18 both, yes. But I think the primary concern appears
19 to have been with respect to the quarry itself.

20 Q. But you would agree there was
21 public concern, then, with respect to the marine
22 terminal?

23 A. I think so, yes.

24 Q. Well, let's just for --
25 relatively quickly, if you could turn to Exhibit

1 R-170. It is in -- thank you, Dirk -- volume 2.
2 If you turn in to page 8, I should say these are a
3 collection of letters of concern that were received
4 by the Canadian Environmental Assessment Agency, by
5 Department of Fisheries and Oceans and government
6 officials?

7 A. Yes, I have seen this before.

8 Q. Great. If you turn to page
9 8.

10 A. Page 8?

11 Q. You would see on page --
12 sorry, it is the numbered page 8 in the upper
13 right-hand corner.

14 A. Oh, yes.

15 Q. And to be clear, it is
16 numbered 009660.

17 A. I see that.

18 Q. In the bottom. I am just
19 reading --

20 A. I see there is reference to
21 the terminal, yes, indeed.

22 Q. It says "I would like" --
23 maybe we will wait for it to come up on the screen
24 here, Exhibit R-170, 2003. Thank you. You see
25 here it says:

1 "I would like to object in
2 the strongest possible manner
3 to the proposed shipping
4 terminal at Whites Point."

5 Do you see that?

6 A. Yes.

7 Q. Okay. Now, we will flip
8 further. If you go to page, in the bottom right,
9 Bates number 9621.

10 A. Sorry, is that further along?

11 Q. It is further along, 009621,
12 if you're looking at the bottom right hand. It is
13 probably easiest with Bates numbered pages there.

14 A. Could you repeat the page
15 number?

16 Q. 009621.

17 A. The numbers get bigger. I'm
18 sorry, I don't see it.

19 Q. They do, indeed. If you can
20 flip -- well, we can see it up on the screen here.
21 Maybe it is the easiest. Can you blow that up,
22 Chris?

23 Okay. Again, this says:

24 "As a fourth-generation
25 fisherman with 30 years of

1 experience, I wish to state
2 my opposition to the
3 construction of the Whites
4 Point quarry marine
5 terminal."

6 And then it talks about movement
7 of ships to and from this terminal represents a
8 threat to vessels and gear.

9 A. Yes, I see that.

10 Q. We could continue, but would
11 you agree, just even after seeing this small
12 sample, there was public concern about the marine
13 terminal?

14 A. Apparently, yes. And most of
15 the concern was about the quarry, but, yes, indeed
16 I see from your material there was concern, as
17 well, about the marine terminal or the dock.

18 Q. So that I understand, then,
19 your analysis, you acknowledged there was concerns
20 about significant adverse environmental effects.
21 There were public concerns. We've seen these as
22 the keys for referral to a review panel under CEAA,
23 but your analysis is based on what you say is a
24 comparative analysis of other projects, correct, an
25 analysis of when other projects were referred to

1 review panels which you say differs from the
2 practice here?

3 A. Absolutely.

4 Q. So to be clear, you're not
5 disputing that under the CEAA there is statutory
6 authority which this could have gone to a review
7 panel?

8 A. Yes. If the Minister had
9 used public concern as the basis for the referral,
10 yes, and I don't know of many examples where that
11 has been the test. It is almost invariably, from
12 my experience at least, the significant -- the fear
13 that unmitigated significant adverse environmental
14 effects that can't be justified is what people --
15 what is usually the reason for sending any project
16 to an environmental assessment under CEAA.

17 Q. Mm-hm. But you did confirm
18 earlier that you were aware that officials, at
19 least government officials, were concerned about
20 the likelihood of significant adverse environmental
21 effects of the project.

22 A. Of the terminal.

23 Q. Of the terminal?

24 A. Yes.

25 Q. And so you would agree that

1 for that, when we're talking about those tests
2 under CEAA, those tests were in the letter of the
3 law?

4 A. Yes. If you're asking me to
5 agree, did the federal government have ample
6 authority to send the marine terminal to a review,
7 the answer is absolutely, yes.

8 Q. Okay. So let's look then at
9 some the projects that you would like to compare.
10 I would like to look at paragraph 33.

11 A. Of?

12 Q. Of your report. I'm sorry.
13 It is page 33 of your report.

14 A. Is the heading "Apparent
15 Breaches of Administrative Law".

16 Q. That's the one, and it says
17 "i. WPQ", which is this project compared with other
18 projects not subject to JRP; correct?

19 A. Yes.

20 Q. Now, if you would turn two
21 pages into the section into paragraph 74?

22 A. Yes.

23 Q. You say -- you admitted in
24 this first sentence, "Although no two projects are
25 ever identical". Do you see that the first clause?

1 A. Of course.

2 Q. You have agreed that of
3 course you're not a scientist; right?

4 A. That's correct.

5 Q. So you're not qualified to
6 comment on, from a scientific perspective, the
7 difference in environmental effects between
8 different projects; right?

9 A. I absolutely agree.

10 Q. Now, in the next clause
11 there, you say:

12 "... where projects were as
13 obviously similar in scope
14 and location as the Tiverton
15 and Whites Point projects
16 were, and were acknowledged
17 as such by key officials, the
18 law requires provable and
19 demonstrably appropriate
20 justification for treating
21 them differently."

22 Correct?

23 A. What I mean is that rule of
24 law, which sort of is our key concept of our
25 Constitution, requires like cases to be treated

1 alike.

2 If you need to -- if you're going
3 to divert dramatically from treating one case
4 differently from another, you need to have good and
5 valid reasons for doing so. That is basic
6 political morality and legal requirement under our
7 Constitution. I'm thinking of the Quebec secession
8 case as the classic example of that statement.

9 Here we have a situation where, in
10 my judgment, the Tiverton quarry and the Tiverton
11 Harbour projects ten miles away were so similar --
12 not identical, and there is many things to
13 distinguish them -- that it was remarkable,
14 unusual, that there would be such a difference in
15 treatment for these two projects.

16 Tiverton involved blasting on the
17 ocean floor. It involved putting in a breakwater.
18 It involved a quarry, separate owners, but nearby,
19 for that purpose. Here we had a quarry and a
20 marine terminal which didn't have nearly that kind
21 of impact on the ocean floor.

22 And yet Tiverton was the subject
23 of merely a screening, like 99 percent of other
24 federal assessments.

25 This project, ten kilometres away,

1 was subject to the full Joint Review Panel, for
2 which there is one or two, up to five maybe a year
3 in the entire country.

4 I found that the disparity,
5 frankly, utterly staggering.

6 Q. Let's look at the disparity,
7 then, and I want to come back to a couple of things
8 you just said. You said the Whites Point project
9 didn't have nearly the impact on the ocean floor.
10 Now, again, that is your assessment from review of
11 the documents, but you're not a scientist in terms
12 of evaluating those effects; correct?

13 A. Well, I don't know that one
14 needs to be a scientist to conclude that doing what
15 was done, blasting the floor of the ocean and
16 putting down a rock pile breakwater, as compared to
17 putting in piles for a dock or a marine terminal at
18 Tiverton, I really don't think one needs to be a
19 scientist to note the dramatic difference in that.

20 We can talk about the quarry and
21 the size differential and the fact that Tiverton
22 would go on for -- would not go on for 50 years the
23 way that the project at Whites Point quarry would
24 do. I accept all of that.

25 But if you're talking about the

1 marine environment, no, I don't think you need to
2 be a scientist to note what seems to be pretty
3 obvious.

4 Q. But you just mentioned a
5 couple of things there that I do want to pause
6 upon, because you said the projects were so
7 similar.

8 But you're aware, of course, and
9 you mentioned you were aware, there were actually
10 three separate projects at Tiverton?

11 A. Yes. I know there was a
12 difference of that kind, yes.

13 Q. In fact, what was proposed at
14 Tiverton wasn't a quarry and marine terminal.
15 There was a harbour proposed by DFO and separate
16 quarry proposed by somebody else; right?

17 A. Yes.

18 Q. And now let's look at the
19 quarry. You've said and you've admitted it was
20 much smaller, but yet you have said it is so
21 similar.

22 So the quarry you would agree at
23 Tiverton was 1.8 hectares in size; right?

24 A. Yes.

25 Q. You're aware that the quarry

1 was permitted to operate for two years at most;
2 correct?

3 A. Yes. I thought we were -- I
4 was focussing on -- your questions were about the
5 marine terminal, the water, the issue of the marine
6 environment, I thought.

7 I concede immediately there was a
8 great difference in the size of the quarries,
9 duration of the quarries, et cetera. Ten
10 kilometres away, the same officials at the same
11 time were dealing with a project that had dramatic
12 impact on the ocean floor requiring a habitat
13 authorization, section 35 permit, at Tiverton.

14 And the same officials treated
15 that with merely a screening, and they managed to
16 get that assessment done in a matter of months.

17 Up the road, a marine terminal
18 that was just pilings, as I understand it,
19 impacting a few square metres, was subject to a
20 process that the federal government -- that took
21 many, many years to complete.

22 I just find the difference quite
23 dramatic.

24 Q. Right. But I want to -- if
25 you're willing to admit the Tiverton quarry was

1 nothing like the Whites Point quarry, then let's
2 talk about the harbour, because the harbour of the
3 sort being built at Tiverton, now that was is
4 actually a repair and an upgrade of an existing
5 harbour; correct?

6 A. Yes.

7 Q. So, in fact, it was intended
8 to provide improved access for the fishing fleet
9 that operated out of Tiverton; right?

10 A. I'm not sure if that is
11 relevant vis-à-vis the significant adverse
12 environmental effects. The purpose of one is not
13 relevant under CEAA.

14 Q. Well, let's look, then, at
15 the size, so the fishing vessels that it was
16 designed to support.

17 A. Yes.

18 Q. Much smaller than the Panamax
19 ships that would come in?

20 A. Much smaller.

21 Q. And, in fact, a fraction of
22 the size of the ships that would be at Whites
23 Point; correct?

24 A. Yes.

25 Q. And you're looking at, you

1 say, the blasting activities to create, and you're
2 looking at what is done at the marine terminal.

3 But we have looked at the
4 provision in the comprehensive study. You would
5 agree the harbour, the harbour -- construction of a
6 harbour of this sort, a breakwater, it's not on the
7 comprehensive study list; correct?

8 A. I don't know. I haven't
9 taken -- put my mind to it. I will take your word
10 for it.

11 Q. But, in fact, when you're
12 looking at what the Governor in Council has
13 decided, it is likely to cause significant adverse
14 environmental effects. We can talk about whether
15 or not this project was in, but clearly a marine
16 terminal of 25,000 dead weight tons is deemed
17 likely to cause significant adverse environmental
18 effects, whereas a harbour is not; correct?

19 A. It was open to the
20 authorities to trigger a full review panel for the
21 harbour, if they wished to do so, if there had been
22 a reasonable determination that after mitigation
23 measures were taken into account, there was or
24 might be, may be, significant adverse environmental
25 effects. It was open to the government to do a

1 full environmental review panel on Tiverton should
2 they wish. They did a mere screening.

3 Q. And they did that screening,
4 and now so that I understand, you would not -- you
5 wouldn't say that regardless of the science,
6 regardless of what came out, the two projects had
7 to be treated the same, would you?

8 A. Of course. I would say that
9 there is no two projects that are identical.

10 I would say that within ten
11 kilometres for a quarry and a marine terminal
12 project in one case, and a harbour and a quarry in
13 another, to be treated so differently by the same
14 people at the same time was very surprising.

15 Q. But you would agree that what
16 you're advocating is that in fact the government
17 officials would have to turn their minds to the two
18 projects to consider their effects similarly and
19 make a decision based on science as to whether or
20 not they should be treated the same or differently;
21 correct?

22 A. I'm not really advocating
23 anything. I am just simply asked to assist the
24 panel with providing my opinion, and that is what I
25 am doing. I'm not advocating anything here.

1 Q. Your opinion, though, is that
2 what is required by Canadian law?

3 A. Yes.

4 Q. And to be clear, you're not
5 commenting on international law?

6 A. No, I'm not.

7 Q. You're commenting on Canadian
8 law. What is required by Canadian law is for
9 officials to turn their minds to these proposed
10 similarities?

11 A. Yes.

12 Q. And make a scientific
13 evaluation as to whether they should be treated the
14 same or different?

15 A. That is correct. I believe
16 the rule of law requires like cases as much as
17 possible to be treated alike, and that there is an
18 abuse of discretion if, for no apparent reason that
19 on the face of it exists at least, one project gets
20 treated very, very quickly and the Minister is on
21 record according to the emails as saying, Let's
22 hurry up, can we make this project go faster in
23 Tiverton, yet in the case of the Whites Point
24 quarry emails saying, We want to slow it down,
25 according to Nadine Beliveau, his assistant, on

1 some emails that were made available.

2 So I think the disparity in
3 treatment, in the face of that documentary evidence
4 suggesting that the politician wanted a different
5 treatment, calls for an explanation under the rule
6 of law principles in our Constitution. I think it
7 does.

8 Are they identical? I was very
9 clear to acknowledge that of course they are not,
10 but the same officials dealing with the same
11 environment ten kilometres away at the same time
12 reaching such dramatically different determinations
13 struck me as calling for an explanation.

14 Q. Right. And on your
15 understanding, then, is it that officials did not
16 turn their minds to the similarities and the
17 differences between the two projects?

18 A. I believe that on the fact --
19 on the evidence that was brought to the Tiverton
20 officials' knowledge that the determinations were
21 radically different, and then there was a change
22 made in the Tiverton as a result. They were called
23 on it and they did some change which is, frankly,
24 not in my mind right now.

25 Q. Okay?

1 A. But after they -- after I
2 think Bilcon complained that there was a disparity
3 in treatment, they did something different. I
4 can't remember.

5 Q. So Bilcon raised the issue
6 and officials acted, is your recollection?

7 A. They did something different
8 to Tiverton as a result.

9 Q. Now, at Tiverton you're aware
10 there was no public opposition to the project;
11 correct?

12 A. No. I understand that the
13 Minister was -- wanted the project to go ahead
14 because the fishing community was anxious for it to
15 proceed. I believe that there was -- I don't know
16 if there was any concerned citizens. I don't know.
17 But I believe that if there was, the level of
18 controversy was dramatically different if there
19 were any at all.

20 Q. And the level of controversy,
21 you would agree that is a ground under the CEAA,
22 anyways, for two projects to be treated
23 differently; correct?

24 A. If that were the reason given
25 by the Minister, if it was the case that that is

1 why they decided to trigger an environmental
2 assessment, of course.

3 Q. Okay. And you keep coming
4 back to if that was the reason given. Is your
5 opinion, then -- because you admitted that you
6 believe the Minister was aware of the public
7 concern.

8 Is your opinion based on the fact
9 he didn't mention that public concern in the
10 letter, the referral letter?

11 A. Yes.

12 Q. That is the only basis?

13 A. As the statute contemplates
14 this bifurcation, this one or the other for
15 triggering an environmental assessment, either
16 public concern -- which is very rarely the source
17 in practical terms of calling for a federal review,
18 otherwise it would just be a matter of how many
19 people are opposed, and the like.

20 It is normally, and in the case
21 here, the rationale given by the Minister was the
22 fear of significant adverse environmental effects,
23 that they used that track to get there.

24 Q. You would agree under section
25 21 they didn't have to use any track. He could

00291

1 have just written and said, Please refer; correct?

2 A. With respect to the marine
3 terminal, if this were a marine terminal
4 comprehensive study, it could have been the case,
5 yes.

6 Q. Yes. I understand your
7 opinion on scope of project.

8 A. Not with respect to the
9 quarry, no, I do not accept that.

10 Q. In your materials,
11 Mr. Rankin, in your report, you also discuss two
12 other projects. One of those is the Belleoram
13 project, and that is at paragraphs 80 to 82 of your
14 report?

15 A. Yes.

16 Q. Now, I want to clarify
17 something. You don't actually refer to the
18 comprehensive study report that was prepared in
19 this section. Did you review that environmental
20 assessment?

21 A. I didn't look at it
22 carefully. I think it was in the materials, but I
23 never really looked at it. I noticed it was six
24 times as large as the Whites Point quarry proposal,
25 with three times as much annual production.

1 And there was no -- there was a
2 comprehensive study, but there was no review panel,
3 and it was -- I think the decision to give them an
4 EA was -- environment assessment was done
5 relatively quickly, but...

6 Q. You're aware --

7 A. Yes. Sorry.

8 Q. You're aware it was in
9 Newfoundland and Labrador?

10 A. Yes, it was. It was in the
11 same region as DFO's, as the Department of
12 Fisheries and Oceans' region as in the case of
13 Whites Point quarry.

14 Q. Well, the same Fisheries and
15 Oceans region. You are aware, though, the
16 environment ranges considerably different
17 Newfoundland and Labrador and southern Nova Scotia;
18 correct? There is an environmental difference
19 between --

20 A. Of course, of course I am
21 aware. But it was located in a commercial -- the
22 Belleoram project was located in a commercial
23 fishing area, lobster -- as I recall, American
24 lobster was the species -- with developing
25 aquaculture operations and so forth.

1 Q. Okay. Now, you're aware that
2 it is far away, and you have said, again, you're
3 aware of these facts from the documents. But in
4 terms of how the projects were treated or what the
5 concerns were, again, you're not qualified as a
6 scientist to comment on the environmental
7 differences between the sites; correct?

8 A. Of course, no, I'm not. I'm
9 merely pointing out under the rule of law the great
10 disparity in treatment between the two marine
11 terminal and quarry projects.

12 Q. Right. But you would agree a
13 disparity in treatment that could be justified
14 based on the science done as to what the effects
15 are, correct, or what the likely effects are?

16 A. Yes.

17 Q. And you would agree, also, in
18 the Belleoram case, that in fact there was no
19 public opposition to this project or no significant
20 public opposition; correct?

21 A. Yes.

22 Q. You mention also in your
23 materials the Aguathuna project at paragraphs 89 to
24 91. This was also a project in Newfoundland and
25 Labrador; correct?

1 A. That's right.

2 Q. Now, this was a project, you
3 are aware, that was a redevelopment of a quarry and
4 shipping facility that had been operating for over
5 50 years; correct?

6 A. Yes.

7 Q. Now, you're also aware that
8 with this project there was no public concern with
9 this project?

10 A. I believe that is right.

11 Q. Finally on the last part of
12 this, in paragraphs 92 and 93, you reference
13 certain other charts prepared by Mr. Estrin. In
14 terms of commenting very briefly on some of those
15 other projects, you didn't actually review any of
16 the other documents associated with those, the
17 primary documents associated with those projects;
18 correct?

19 A. Counsel, to be totally frank,
20 I can't remember at this stage. I might have
21 looked at a couple of them just in scanning them,
22 but I frankly don't recall.

23 But I do know that he looked at 28
24 environmental assessments for quarries between 2000
25 and 2011, and only one was subject to a public

1 review hearing and that was Whites Point quarry.

2 And, you know, I think that
3 standing back from the trees and looking at the
4 forest it is pretty, pretty staggering, because
5 some of them were bigger than this one.

6 And he talks about that in his
7 report, as I recall, as well, but I don't have that
8 right in front of me.

9 Q. But you are unaware, then,
10 and you don't recall today or have any knowledge of
11 the reasons why officials treated those projects
12 differently than they had treated the Whites Point
13 project, do you?

14 A. No. I'm simply making the
15 point there were 28 quarry proposals in Nova Scotia
16 between 2000 and 2011. Twenty-eight environmental
17 assessments were done. One was the subject of a
18 public review hearing. One was rejected,
19 recommended for rejection, and then ultimately the
20 Ministers chose to reject it.

21 I am just pointing out that fact,
22 which I think is salient.

23 Q. You would agree there is
24 nothing in either -- well, there is nothing in CEAA
25 or the Nova Scotia Act that would prevent a quarry

1 from being referred to a review panel?

2 A. None. Not at all.

3 Q. So you say there was only
4 one, but you would agree that the mere fact there
5 is only one doesn't mean it is abuse of discretion;
6 correct?

7 A. I think it is telling that in
8 the circumstances of all of those quarries, that
9 only one was the subject of a referral to a review
10 panel.

11 Q. But you understand also that
12 not one of those other...

13 PRESIDING ARBITRATOR: Excuse me.
14 I think we are getting into a time problem again.

15 MR. SPELLISCY: I have one
16 question.

17 PRESIDING ARBITRATOR: I think it
18 is so fascinating that time flies for me, but it
19 has come to my attention we have been going on for
20 three-and-a-half hours, and so the question for you
21 is --

22 MR. SPELLISCY: I have one
23 question.

24 PRESIDING ARBITRATOR: One
25 question left?

1 MR. SPELLISCY: One question.

2 PRESIDING ARBITRATOR: That sounds
3 good.

4 --- Laughter

5 MR. SPELLISCY: It could be a long
6 question.

7 PRESIDING ARBITRATOR: I mean just
8 time wise.

9 MR. SPELLISCY: It is a multi-part
10 question. It has lots of A, Bs and Cs.

11 MR. KURELEK: And then it is my
12 turn.

13 PRESIDING ARBITRATOR: Please ask
14 the question, and once you are finished with that,
15 we can get back to the time issue.

16 BY MR. SPELLISCY:

17 Q. I just wanted to confirm,
18 Mr. Rankin, that in fact on the 28 applications you
19 saw, not one of those other quarry projects was
20 located on the Digby Neck?

21 A. That's correct.

22 Q. Thank you. It seems
23 anticlimactic now.

24 --- Laughter

25 Q. Those are my questions.

1 Thank you.

2 A. Thank you very much.

3 PRESIDING ARBITRATOR: So may I
4 ask...

5 Mr. Kurelek, may I ask you how
6 much time you envisage -- may I ask you how much
7 time you envisage the continuation of the
8 examination to take?

9 MR. KURELEK: It is difficult to
10 say, but based on what I have seen so far in the
11 examination, I would be at least an hour and a
12 half, possibly two hours, and I am quite happy to
13 sit here until it is done tonight, if that is all
14 right, or we can start tomorrow.

15 My preference would be to do it
16 tonight, but I am in others' hands.

17 PRESIDING ARBITRATOR: Let me just
18 allow us to stick our heads together.

19 --- Tribunal members confer

20 PRESIDING ARBITRATOR: The
21 Tribunal is willing to continue the examination
22 beyond five o'clock. In that case, we will need a
23 break for the court reporter. How long a break
24 would you need? Twenty minutes. So the court
25 reporter needs a break of 20 minutes. After the 20

00299

1 minutes, we will try to complete Mr. Kurelek's part
2 of the exercise, but the re-direct probably any
3 realistic -- will have to be tomorrow.

4 What this change in our program
5 will also mean is that there will be no
6 late-evening or evening transcript, but you would
7 get the transcript, the more or less finished
8 transcript, tomorrow morning still, depending on
9 how long. This is a bit of an exceptional
10 situation, so if the transcript turns out to be
11 later tomorrow, you will have to live with that.

12 Okay, I think if that is the case,
13 it is 5:00, so we continue at 5:25 in order to give
14 the court reporter her 20 minutes, and then
15 continue with Mr. Kurelek's part of the
16 examination.

17 --- Recess at 5:05 p.m.

18 --- Upon resuming at 5:25 p.m.

19 PRESIDING ARBITRATOR: Ladies and
20 gentlemen, can you take your seats?

21 MR. NASH: You have to turn your
22 mics on.

23 PRESIDING ARBITRATOR: Is that
24 more effective? Take your seats. A continuation
25 of the show like in the old movies where you saw

00300

1 the one, two, three between the...

2 We are told there is a need for an
3 Internet connection to be fixed, so we have another
4 moment. Just one second.

5 All right, we are all set. So the
6 examination continues, Mr. Kurelek. The witness is
7 all yours.

8 CROSS-EXAMINATION BY MR. KURELEK:

9 Q. Thank you. Mr. Rankin, my
10 name is Stephen Kurelek and I'm counsel for Canada.
11 I am going to ask you some questions just like
12 Mr. Spelliscy did. My topic is a little bit
13 different. I've got a couple of topics, but they
14 are all post referral to the JRP.

15 I know this is a bit like the last
16 speaker in the day on a long CLE day, but the good
17 news for you is I am going to keep you physically.
18 I've got not just the three, but I have four
19 binders.

20 A. Okay.

21 Q. And the reason I prefer to
22 have the table here is, just like with you, I am
23 going to need you to look at two binders at once
24 several times.

25 A. Okay, sure.

1 Q. So it will be a bit awkward
2 for those with computers at the desk, but that is
3 where we're headed.

4 So as I suggested, we are dealing
5 with the post panel referral era, and I just want
6 to confirm something I think I heard at the
7 beginning of your testimony with Mr. Spelliscy.

8 Footnote 3 on page 3 of your
9 report. By the way, I will do my best to point you
10 to which binder I'm talking about. I have a little
11 list here of which exhibits go in which exhibit.

12 Your report, of course, is the
13 first item in binder 1. Just to confirm, at the
14 time you wrote your report, you hadn't read the
15 supplemental reports of Mr. Estrin or Mr. Smith,
16 but you have since done so; is that correct?

17 A. That is correct, yes.

18 Q. I will be referring to those
19 or at least one of them. And I don't think I heard
20 this question so far. Did you write your own
21 report, sir?

22 A. Yes.

23 Q. So turning to the substance
24 itself, would you agree with me that the JRP in one
25 point was constituted, in part, under the CEAA, the

00302

1 federal Canadian Environmental Assessment Act? It
2 was part CEAA, it was partly constituted under
3 NSEA; is that correct?

4 A. Subject only to the point I
5 tried to make earlier today about the way in which
6 the Nova Scotia component of that occurred, i.e.,
7 the failure to register, et cetera.

8 I would agree that this was --
9 this purported to be a joint review process. A
10 Minister from the Nova Scotia government, the
11 Minister of Environment, federal, jointly referred
12 this matter to the Joint Review Panel.

13 Q. And in particular, just so we
14 put a finer point on it, CEAA of course is R-1 in
15 the first binder and NSEA is R-5 in the first
16 binder, as well.

17 A. Yes.

18 Q. Would you agree that under
19 section 40(2)(a) of CEAA, so that is page 19 of 36
20 in the binder there, that that allowed for the
21 Constitution -- allowed the federal government to
22 engage in a Joint Review Panel with another
23 province?

24 A. Oh, yes.

25 Q. And, similarly, turning to

1 the provincial side, would you agree that the same
2 power existed for Nova Scotia in this case under
3 section 47 of the NSEA? That is at tab 5 -- sorry,
4 R-5.

5 A. At the risk of belabouring
6 the point I was trying to make earlier, 47, section
7 47, has to be read, I think, along with section 33
8 of the Nova Scotia statute.

9 Section 47 that you referred to
10 says where an undertaking is also subject to the
11 environmental assessment or other review
12 requirements of Canada, et cetera, the Minister may
13 do so and so. I am just pointing out that section
14 33 is to me a live issue, as well, and I won't
15 repeat what I said earlier on that score.

16 Q. Okay. Turning to the -- I
17 guess we don't have a page number here, but I'm
18 staying with section 47 of the NSEA, which is
19 entitled "Joint Assessments". Turning to the page
20 right after the beginning of that section, you see
21 47(1) -- yes, 47(1)(d), this is that the statute
22 allows the Minister to determine what issues shall
23 be addressed in the assessment or review.

24 Do you see that there, sir?

25 A. Yes.

1 Q. What I would like to do is,
2 the same exhibit, but just to turn back to section
3 3 of the NSEA.

4 Unfortunately, our copy is a
5 little bit difficult to read in terms of how these
6 letters are set up, but if you look at -- section 3
7 is the interpretation section. Do you see that on
8 the left?

9 A. Yes.

10 Q. Then on the right, you've got
11 a bunch of items defined. I would like to take you
12 first to item (r), which is right in the middle of
13 the page, and the definition of "environment" means
14 the components of the earth, and includes...

15 Now, this one is -- it is Roman
16 numeral (v), so under (r) there is (i), (ii),
17 (iii), (iv), and then (v). So "environment" means
18 "for the purposes of part IV", which is the EA
19 section of the NSEA, "the socioeconomic,
20 environmental health, cultural and other items
21 referred to in the definition of environmental
22 effect". Do you see that there, sir?

23 A. Yes.

24 Q. Then skipping down a bit
25 further, there is another V on that page, and this

1 one is not Roman numeral V, but V on its own, the
2 letter, and that is the definition of
3 "environmental effect", which means under this Act,
4 "in respect of an undertaking: Any change, whether
5 negative or positive, that the undertaking may
6 cause in the environment, including any effect on
7 socioeconomic conditions, on environmental health,
8 and physical and cultural heritage or any
9 structure, site or thing including those of
10 historical, archaeological, paleontological or
11 architectural significance."

12 Do you see that there, sir?

13 A. Yes.

14 Q. Now, turning to another
15 significant document in this whole process, in the
16 same binder 1, R-27, you have been there already.
17 I believe this is the JRP agreement. You are
18 familiar with that document?

19 A. Yes. I am, yes.

20 Q. You know that at page 7 we
21 have the terms of reference for the JRP attached
22 there starting at page 7.

23 A. Yes, I am familiar with
24 these.

25 Q. Now I would like to -- at

1 this point we're going to be flipping back and
2 forth between those, especially the JRP agreement
3 and your report. So I would like to go to
4 paragraph 125 of your report, which is on page 55.

5 MR. PULKOWSKI: I have a few
6 post-it notes.

7 BY MR. KURELEK:

8 Q. That might be helpful,
9 because we are going to be going back and forth
10 here especially to your report.

11 A. Page 35?

12 Q. No, page 55, paragraph 125,
13 so I am going to be jumping around between 125,
14 126, 127, 129.

15 A. Right.

16 Q. Paragraph 125, you say a
17 number of things, and I am just going to focus on
18 one near the end, the very last sentence. You're
19 talking about what we just referred to in terms of
20 environmental effect and the definition of
21 environment.

22 You say at the end of paragraph
23 125:

24 "Even if the Nova Scotia Act
25 itself were interpreted to

1 permit 'standalone'
2 consideration of the socio-
3 economic effects, those were
4 not the Terms of Reference
5 that were imposed on the
6 JRP."

7 Do you see that there, sir?

8 A. I do.

9 Q. Now, turning to your next
10 paragraph, you quote extensively from Part 3 of the
11 terms of reference we just referred to in R-27. So
12 that starts on page 55 and continues on to page 56.

13 A. I may be able to help you,
14 counsel. I accept that I made a typo in that list.
15 I should have included socio-economic effects.
16 Mr. Smith brought that up in his rejoinder, and I
17 concede that there is -- socio-economic should be
18 in that list. Indeed, I do make that point on
19 paragraph 129, where I say, "Although the panel
20 could indeed consider socio-economic matters".

21 And that was just a typo that he
22 pointed out.

23 Q. Well, let's talk about that
24 typo, because it seems to me there are two. One
25 is, just to be clear, between items (c) and (h) at

1 the top of page 56 --

2 A. Yes.

3 Q. I see three periods, three
4 dots. And I presume that those represent an
5 ellipsis between (c) and (h) because of the items
6 that you didn't include, which would be (d), (e)
7 and (f) from the terms of reference; is that
8 correct?

9 A. That's right, that's right.

10 Q. Then between (h) and (l),
11 there are no dots representing an ellipsis. So is
12 that the typo you're talking about, or are you
13 talking about the complete absence of (i) from
14 that?

15 A. I wish to say that the terms
16 of reference do, indeed, list the socio-economic
17 effects of the project, and I stand corrected on
18 that point.

19 Q. And so --

20 A. I said that in 129, but I
21 didn't list it there.

22 Q. Right. So it is your
23 evidence here today that that was merely a typo on
24 your part that you didn't include (i) in that list
25 on page 56 of paragraph 126?

1 A. I concede that this isn't
2 terribly elegantly written and I am the first to
3 acknowledge that.

4 I would accept that the panel has
5 the ability to deal with socio-economic effects.
6 The Federal Act is not to the same effect, but the
7 terms of reference are the Bible for the joint
8 review panel and it does indeed say that they can
9 consider socio-economic effects.

10 It would be my opinion, however,
11 that the use of the term "community core values: is
12 not a socio-economic effect. It is a value. It is
13 not measurable. It is not mitigatable.

14 It is not of the kind that the
15 panel was entitled to take into account, but I
16 concede that this is very badly stated on this
17 part, and I wish to correct that.

18 Q. And just so I am clear, which
19 part are you saying is badly stated? Is it
20 paragraph 125 or 126?

21 A. It is probably all badly
22 stated. I meant to say socio-economic is a
23 legitimate listed consideration. The Federal Act
24 is not to the same effect. The Federal Act talks
25 about environmental effects resulting from

1 biophysical impact.

2 The Nova Scotia Act, at least as
3 regards environmental assessment, has stand-alone
4 ability to deal with socio-economic effects.

5 I don't believe that term is
6 defined. My position is that it does not include
7 what the panel concluded; namely, community core
8 values, but presumably we can talk about that.

9 Q. Sure. We will get there,
10 actually, but I just want to make sure I completely
11 understand your final sentence in paragraph 125.

12 So would you agree that the last
13 part of the sentence, that those were not the terms
14 of reference, that that is actually incorrect; is
15 that right?

16 A. That is not correct.

17 Q. Would you also agree that the
18 first part of the sentence is actually not accurate
19 either, because, in fact, the Nova Scotia -- under
20 the Nova Scotia Act in this case the socio-economic
21 effects must have been considered by the JRP; is
22 that correct?

23 A. The Nova Scotia Act, it is
24 always difficult to, in a Joint Review Panel -- I
25 had to do this when I was doing a joint review for

00311

1 the federal and provincial governments as
2 commission counsel. To mush together the
3 provincial and federal statutes is difficult,
4 particularly difficult in some of the provinces.

5 But, anyway, this terms of
6 reference very clearly gave the panel the ability
7 to address and consider "socio-economic" effects.

8 And so where I said that is not
9 the case, I was in error.

10 Q. Okay, thank you. I will give
11 you your wish here. We're turning to core
12 community values.

13 Next topic, then. As you say in
14 paragraph 129, the panel could consider
15 socio-economic effects, but consider -- your point
16 here is consideration of socio-economic effects is
17 a long way from the community core values, or what
18 we call CCV, on which the panel's conclusions turn.

19 Is that still your position today,
20 sir?

21 A. I wish to try to be as clear
22 as I can about this fundamental point.

23 The chair of the Joint Review
24 Panel said that the key reason for the decision or
25 the recommendation was "community core values" and

1 the impact of this project on community core
2 values.

3 What is critically important to me
4 are two factors. One, it is my position is that
5 the federal government had no basis on which to
6 make a determination based on that, but neither did
7 the general -- neither was this one of the
8 socio-economic effects.

9 Core community values, as defined
10 by the panel, is about values. It is about
11 beliefs. It is about philosophy.

12 Socio-economic effects are matters
13 that could be the subject of expert evidence and,
14 indeed, I understand AMEC was called upon to
15 provide evidence of socio-economic effects. What
16 is the difference?

17 Socio-economic effects are the
18 subject of scientific, social scientific analysis.
19 They are measurable. They are mitigatable, if that
20 is a word.

21 Core community values, by the
22 panel's own admission, were never looked at with
23 respect to mitigation. There was no mitigation, at
24 all. The panel chair acknowledged that on the CBC
25 interview referred to in my report.

1 To me, those are entirely
2 different categories. To make a decision that it
3 turns on community core values, which is nowhere to
4 be found in the statute, nowhere to be found in the
5 terms of reference, is unknown to any other
6 environmental assessment process. The phrase has
7 not occurred in any others that I have seen.

8 And while values are very much
9 involved, and we can talk about one panel report
10 called Kemess North, where aboriginal values are
11 considered, even there there were serious
12 environmental harms.

13 There was the use of a lake as a
14 tailings pond. It wasn't uniquely decided on the
15 basis of values. And those of course were with
16 respect to constitutionally-protected aboriginal
17 rights.

18 So my point is simply that no
19 properly-constituted panel had the jurisdiction to
20 make a determination on the basis of a standard
21 called "core community values". It does not get --
22 it is not a function of socio-economic effects
23 which, as I say, social scientists can measure
24 that. They can provide for mitigation measures
25 along the lines that you would expect in a

00314

1 scientifically-oriented process such as
2 environmental assessment.

3 To determine and to make a
4 recommendation turning on core community values was
5 without jurisdiction, in my opinion.

6 Q. So I will return to my
7 question, because you didn't answer it.

8 I will quote you here, 129:

9 "Although the Panel could
10 indeed consider socio-
11 economic matters since that
12 was a factor listed in the
13 Terms of Reference,
14 consideration of socio-
15 economic effects is a long
16 way from the 'community core
17 values' on which the Panel's
18 conclusions turn."

19 So my question is: Is that still
20 your --

21 A. Yes.

22 Q. -- position today?

23 A. That is what I was trying to
24 elaborate on just now.

25 Q. Yes, okay. May I ask you now

1 to turn to what I would call the fourth binder, but
2 really it is Mr. Estrin's bundle number 1. We're
3 turning to Mr. Estrin's first report, in
4 particular, paragraph 230 of Mr. Estrin's report,
5 which is page 60.

6 A. Page?

7 Q. Page 60, paragraph 230. This
8 is where Mr. Estrin is talking about core community
9 values, as well. This is obviously a very hot
10 issue in this case and there is lots of ink spilled
11 over it. And, in particular, I would like you to
12 look at the beginning of paragraph 230 of
13 Mr. Estrin's first report when he says:

14 "However, inconsistency with
15 community core values is not
16 an environmental effect, as
17 defined by CEAA, it is a pure
18 socio-economic effect."

19 A. Yes.

20 Q. So what I would like to know,
21 and my question to you is, considering what you say
22 in paragraph 129 of your report, which again is
23 consideration of socio-economic effects is a long
24 way from the community core values on which the
25 panel's conclusions turn, do you agree with what

1 Mr. Estrin says at the beginning of paragraph 230
2 of his first report?

3 A. I have the greatest respect
4 for Mr. Estrin, but I do not agree.

5 Q. Thank you. I would like you
6 to turn now in that same binder, the fourth binder
7 or the first Mr. Estrin binder, we're going to
8 Mr. Estrin's second report, and this is paragraph
9 306, which is on page 94 of Mr. Estrin's second
10 report. I am going to ask you a similar question.

11 Maybe I should wait. So this is
12 page 94, paragraph 306. It is the Mr. Estrin
13 number 1 binder. I think we only handed up one
14 Mr. Estrin binder today. We will hand up the other
15 two tomorrow, like the gift that keeps giving.
16 --- Laughter

17 PRESIDING ARBITRATOR: Are you
18 talking about the reply expert?

19 MR. KURELEK: Yes, yes. The
20 second expert of Mr. Estrin dated December 2012,
21 page 94.

22 May I proceed or? We're not there
23 yet?

24 PRESIDING ARBITRATOR: Yes.

25 BY MR. KURELEK:

1 Q. Yes, okay. The paragraph
2 306, Mr. Estrin says:

3 "It is beyond debate that
4 questions of whether or not
5 the local community was in
6 favour of the WPQ, or whether
7 the WPQ would offend the
8 community's core values, are
9 purely local matters falling
10 under the exclusive
11 jurisdiction of the
12 provincial government."

13 Do you agree with that statement,
14 sir?

15 A. Well, I note that he
16 references section 92 of the Constitution Act, and
17 92.16, as I recall -- maybe I am wrong. One of the
18 latter sections is matters merely local and
19 private, which are the exclusive jurisdiction of
20 the provincial governments under the Constitution
21 Act, 1867.

22 So to that extent, I think he is
23 making a pretty uncontroversial constitutional
24 statement.

25 Q. So in your view, you agree

00318

1 with that one?

2 A. Yes. I agree, yes.

3 Q. You agree with that one.

4 Turning to the next page, paragraph 311 of that
5 same binder, Mr. Estrin's second report, and there
6 he says "the only significant" -- sorry, this is
7 the second sentence in the paragraph 311:

8 "The only significant adverse
9 environmental effects cited
10 by the Panel..."

11 That is the JRP:

12 "... were on community core
13 values, matters of provincial
14 jurisdiction."

15 Do you agree with that statement,
16 too, sir?

17 A. I just want to say again that
18 community core values are subjective beliefs and
19 they are not, in my judgment, subject to rigorous
20 scientific analysis. They can't be mitigated,
21 according to the Panel at least, and they can't be
22 measured. They are simply philosophical beliefs.

23 I still don't understand how, in
24 any environmental assessment, federal, provincial,
25 municipal, there could be something that turned on

1 economic effects is a long
2 way from the 'community core
3 values' on which the Panel's
4 conclusions turn."

5 Clearly I agree with that, because
6 I wrote it.

7 When you are asking me if I agreed
8 the only significant adverse environmental effects
9 cited by the panel were on community core values,
10 that I agree with, as well, because the chair said
11 that to the CBC.

12 Matters of provincial
13 jurisdiction? I have no position on the
14 constitutionality of that phrase. It is more local
15 than it is national. I see no federal head of
16 power which would capture community core values, if
17 that is the question.

18 Q. No, it wasn't the question.
19 That is a much deeper question. That could
20 probably be a master's thesis in terms of whether
21 it is constitutional or not.

22 All I am looking for -- it looks
23 like we have narrowed it down to four words. Do
24 you agree with those last four words of what
25 Mr. Estrin says in that second sentence in

1 paragraph 311, "matters of provincial
2 jurisdiction"?

3 A. Well, they are certainly not
4 matters of federal jurisdiction. Does that help?

5 Q. We're getting closer.

6 --- Laughter

7 Q. I wouldn't mind a yes or no,
8 or you can even abstain and say you take no
9 position.

10 A. I will take no position.

11 Q. Okay. Very good. I would
12 like to turn now to paragraph 99 of your report,
13 which is on page 45, so that is back in binder 1.

14 A. Got it.

15 Q. In that paragraph, you say --
16 one of the things you say -- you say a number of
17 things, but one of the things you say at the
18 beginning is the JRP imposed several new criteria
19 in the final EIS guidelines, and you list a few of
20 those:

21 "Thus the Panel did not
22 provide adequate notice of
23 these concerns so that the
24 Proponent knew the case it
25 had to meet."

1 I will return to that paragraph in
2 a moment, but I would like you now to turn to item
3 or -- sorry, Exhibit 209, which according to my
4 records is binder 2.

5 So you can leave your binder 1
6 open. I think you can dispense with Mr. Estrin for
7 the moment. 209 is near the back.

8 A. Draft guidelines?

9 Q. That's right.

10 A. Right.

11 Q. These are the draft EIS
12 guidelines. Do you have that there? Can you
13 confirm that they were issued or at least they are
14 dated on the front page November 2004?

15 A. Yes.

16 Q. Should I slow down here for
17 the Tribunal?

18 MR. PULKOWSKI: Just a second,
19 please, yes.

20 MR. KURELEK: I am going to go to
21 the final guidelines next after this.

22 THE WITNESS: My memory was that
23 these terms came into the final, but not the draft.
24 Am I not right on that?

25 BY MR. KURELEK:

1 Q. Well, yes. As you say, there
2 were some differences between the two. So would
3 you agree -- a fairly innocuous question here.
4 Would you agree the draft guidelines contains
5 instructions to Bilcon on both the content and the
6 structure of what it had to put in its EIS?

7 A. Yes.

8 Q. And if we're looking for
9 confirmation of that, it is on page 2 of that draft
10 guidelines.

11 Now, would you also agree -- I can
12 point you to pages here if we need to go to them --
13 that the draft guidelines contain instructions to
14 Bilcon to include in its EIS an assessment of the
15 effects of the Whites Point project on the
16 biophysical environment?

17 A. Yes.

18 Q. Do you agree with that?

19 A. Yes.

20 Q. And would you also agree that
21 those same draft guidelines contained instructions
22 to Bilcon on what it needed to include in its EIS
23 in terms of the socio-economic conditions of the
24 region?

25 A. Yes, yes.

1 Q. Just for the record,
2 biophysical, pages 15 and 22; for socio-economic
3 pages 18 and 26.

4 Now, I would like you to turn to,
5 before we get to the final EIS guidelines, Exhibit
6 242, which is a letter from the JRP to Mr. Buxton.
7 And 242 is in binder 3.

8 Here you might want to keep binder
9 2 available, because we will be going back to that.

10 This is a short exhibit. It is
11 just one page, 242. It is the JRP letter dated
12 December 15th, 2004. It is a letter requesting
13 Mr. -- asking Mr. Buxton for Bilcon's comments on
14 the draft EIS guidelines, the Exhibit 209. In
15 particular, the letter states that:

16 "The Joint Review Panel
17 believes it is important for
18 Bilcon of Nova Scotia's views
19 regarding the draft
20 guidelines to become part of
21 the public record."

22 The letter goes on to say that:

23 "Therefore, the Joint Review
24 Panel requests that Bilcon of
25 Nova Scotia review the draft

1 guidelines and return
2 comments to the Panel."

3 Is that correct, sir?

4 A. Yes.

5 Q. In fact, isn't it true that
6 in the same letter, the JRP even invited Bilcon to
7 make a formal presentation on the same topic in the
8 upcoming scoping meetings, and that is in the last
9 paragraph there?

10 A. Yes.

11 Q. Now, I think we heard some
12 evidence today earlier on the scoping meetings.
13 They were held between January 6th and 9th, 2005.
14 Isn't it true that despite having received this
15 letter, Bilcon did not provide any comments on the
16 draft EIS guidelines prior to those scoping
17 meetings? Is that true?

18 A. I am not sure, to be honest.
19 I'm not sure.

20 Q. I can tell you that on the
21 record there is nothing indicating that.

22 Earlier today -- well, I will ask
23 you this. Were you aware of whether Mr. Buxton
24 attended those scoping hearings?

25 A. I heard him say that he did.

1 Q. Earlier today, I think 11:24
2 this morning, Mr. Buxton admitted that he did
3 attend those meetings.

4 Would you agree that despite the
5 invitation in the JRP's letter, Bilcon did not make
6 any presentation at those scoping meetings?

7 A. That appears to be the case.

8 Q. Now, beyond making a
9 presentation at the scoping meetings, are you aware
10 of Bilcon offering any comments at all on these
11 draft EIS guidelines?

12 A. I am not personally aware. I
13 don't recall reference -- since the report was
14 written, I had access to the supplemental witness
15 statement of Mr. Buxton. It hadn't been available
16 to me. So that is another thing I have looked at,
17 and I don't recall any reference to it in there.

18 Q. Well, let me help you out
19 here. The very next exhibit, 243, in binder 3 --

20 A. Yes, I have it.

21 Q. -- this is a letter dated,
22 from Bilcon, January 16th, 2005. These are
23 Mr. Buxton's or Bilcon's comments on the draft
24 guidelines. I will give you a second to review --
25 have you seen that letter before, by the way?

1 A. I can't remember.

2 Q. I will just give you a second
3 to give it a scan.

4 A. Yes.

5 Q. Would you agree that in that
6 letter Mr. Buxton does not complain or say anything
7 about how the draft EIS guidelines exceeded the
8 scope of the JRP's terms of reference, and here I
9 am talking about Exhibit R-27?

10 A. I think that is correct, yes.

11 Q. Now, returning to binder 2,
12 this is the last exhibit in binder 2, and it is
13 210. These are the final EIS guidelines. They
14 come right after the draft ones in our binder
15 there.

16 And do you agree that they are
17 dated March 31st, 2005 at the top of the first
18 page?

19 A. Yes.

20 Q. Is the Tribunal with me
21 here? So this is the last exhibit in binder 2. It
22 is Exhibit 210.

23 I am happy to slow down, if you
24 wish. I will ask you to turn, Mr. Rankin, to pages
25 3 and 4. So this is the table of contents. We can

1 go to the individual sections within the final
2 guidelines, if necessary, but we can expedite
3 matters just by referring to a few items there.

4 In particular, I am thinking about
5 sections 9.3 and 10.3. Would you agree that the
6 final guidelines make it clear that EIS -- sorry,
7 Bilcon's EIS had to address the impacts of the
8 Whites Point project on the existing human
9 environment and on human environmental impact
10 analysis?

11 A. Yes. I thought that was
12 consistent with the mandate to look at
13 socio-economic factors.

14 Q. And you see on page 3, under
15 9.3, there is the topic 9.3.8, socio-cultural
16 patterns, which you also see on the next page under
17 10.3.8. Do you see those?

18 A. Yes, I do.

19 Q. Now, we talked earlier about
20 whether Bilcon objected to the scope of the draft
21 EIS guidelines. Are you aware of Bilcon ever
22 objecting to the scope or the content of the final
23 EIS guidelines?

24 A. I am not, but I am not
25 surprised either. In these circumstances often

1 proponents will simply get along, you know, get on
2 with it. Got to write our report. Have to get our
3 experts lined up in order to address the various
4 components. But I know of -- I don't recall any
5 objection to it. But as I say, that is not
6 terribly extraordinary.

7 Q. I'm going to turn briefly to
8 paragraph 98 of your report on page 44, so I
9 apologize, going back to the very first binder in
10 binder number 1.

11 A. This is Mr. Buxton's
12 testimony, is that --

13 Q. No. This is you, sorry. I
14 am going to paragraph 98 of your report. It is the
15 very first item in the binder.

16 A. In which I cite the excerpts
17 from Mr.... Mr. Buxton, is it?

18 Q. We're talking about basic
19 procedural fairness here?

20 A. Right.

21 Q. Oh, I see, where you are
22 quoting from?

23 A. I quoted large chunks of his
24 testimony --

25 Q. Yes, right.

1 A. -- his witness statement.

2 Q. But your complaint here is:
3 Basic procedural fairness
4 required that Bilcon receive
5 adequate notice in order to
6 prepare the case to meet."

7 We heard talk of this earlier
8 today. This is what you say:

9 "It is my view that this did
10 not happen. For example, the
11 terms of the draft EIS
12 Guidelines were very
13 different from the Final
14 Guidelines that the JRP
15 approved."

16 Do you see that there, sir?

17 A. Very much so. And he
18 provides examples of where how absolutely -- you
19 know, how very, very different the final guidelines
20 were from the draft ones.

21 Q. Right. Now, my question to
22 you is: Do you agree that both the draft EIS
23 guidelines that we just looked at and the final EIS
24 guidelines included provisions on the inclusion of
25 the likely socio-economic effects of the Whites

00331

1 Point project? I can take you to the sections, if
2 you wish.

3 A. The 9.3 and 10.3 of which you
4 just took me to, you mean?

5 Q. In the final, and in the
6 draft 8.2 and 9.2.

7 A. Right. My point, of course,
8 is that the new ones were much more discursive,
9 including things like traditional knowledge, et
10 cetera. I don't think that was in the first one,
11 but I don't recall.

12 Q. Yes. They were different,
13 but do you agree --

14 A. Yes.

15 Q. Do you agree both of them
16 included -- asked for the inclusion in the EIS of
17 the likely socio-economic effects of the project?

18 A. I do. Yes.

19 Q. Now, we're going back to
20 binder 3 to keep everybody alert. Is it true that
21 Bilcon requested several extensions to the deadline
22 of the filing of its EIS?

23 A. I believe that's true.

24 Q. So let's look at those
25 requests for extension. In fact, it is not

1 essential that everybody looks at these. They are
2 fairly straightforward.

3 Exhibit R-245 is a letter from
4 Bilcon to the JRP. It is, in particular, on August
5 30th. Bilcon advised that it could not meet the
6 August submission deadline -- this is August 30th,
7 2005 -- couldn't meet the August deadline and
8 likely would not be able to file its EIS until
9 December 2005; is that correct?

10 A. Apparently.

11 Q. And, again, similar thing on
12 December 8th, 2005. So this is the expected
13 delivery date. Bilcon wrote another letter to the
14 JRP advising that it would not be able to submit
15 its EIS until March of 2006; is that correct?

16 A. Yes.

17 Q. Now, turning to -- this is
18 same binder, C-137, which is near the back of
19 binder 3. This is a letter from Paul Buxton dated
20 April 25th, 2006, if you could look at that?

21 Do you agree that this is the
22 letter that indicates that Bilcon didn't file its
23 EIS until that time, April 25th, 2006?

24 A. Do I agree?

25 Q. That this letter confirms

00333

1 that Bilcon didn't file its EIS until April 25th,
2 2006?

3 A. Yes.

4 Q. And earlier we looked at the
5 final EIS guidelines, and the date, I think it was
6 stamped at the top March 31st, 2005. So would you
7 agree that the EIS was not delivered until more
8 than a year after the final EIS guidelines were
9 issued?

10 A. Yes.

11 Q. Very good.

12 Now, I would like to turn to a
13 different topic that came up with Mr. Spelliscy,
14 and this is -- if you could turn to page -- sorry,
15 paragraph 136 of your expert report.

16 A. Yes.

17 Q. This is binder 1. Once
18 everybody is ready, I would ask you if you could
19 for us read the first three sentences of your
20 paragraph 136.

21 A. "Section 37 of the CEAA
22 requires mitigation measures
23 to be taken into account by
24 the responsible authority.
25 However, the JRP in regard to

1 the WPQ did not consider
2 mitigation measures at all.
3 This omission violates the
4 letter as well as the spirit
5 of this statutory
6 requirement."

7 Q. Is that your position today?

8 A. My position is the following.
9 The chair of the tribunal indicated publicly on CBC
10 that they did not think they needed to include
11 mitigation measures in the report. He said that
12 acknowledging it was an unusual thing to do, an
13 omission.

14 In my mind, one of the core
15 components of any environmental assessment repeated
16 over and over again, both in the terms of reference
17 and in the Federal Act, is the need to provide
18 mitigation measures, compensation, restoration.
19 The term is defined to include a number of things.

20 To me, to provide a report to the
21 Ministers that did not include mitigation measures
22 for the central finding that this was "contrary to
23 core community values" would in Canadian law be
24 deficient as a matter of jurisdiction.

25 They had a statutory obligation to

1 provide mitigation measures, and even in a number
2 of panel reports I could take you to where the
3 government -- where the panel recommended to
4 government that it not proceed, the panel
5 nevertheless went through a number of -- sometimes
6 dozens of mitigation measures in the event that the
7 Ministers chose not to accept the recommendations.

8 So this is a glaring deficiency
9 acknowledged by the Chair and contrary to the terms
10 of reference and the statute.

11 So I do stand behind that as
12 regards the core finding of core community values.

13 Q. So I will take that as a,
14 yes, you do stand by that.

15 Moving on to two pages along, page
16 61, paragraph 144, you quote Mr. Connelly, who is
17 one of Canada's experts in this case.

18 A. Yes, very much so.

19 Q. It says here. And you quote
20 him, and you took issue with Mr. Spelliscy earlier
21 because he didn't refer to the mitigation measures,
22 parenthetical statement here. So let me read it
23 all:

24 "If on the other hand the
25 appropriate government

1 decision-maker determines
2 that the project is likely to
3 cause significant adverse
4 environmental effects (again,
5 taking into account any
6 appropriate mitigation
7 measures) that cannot be
8 justified in the
9 circumstances, the
10 responsible authority shall
11 not take an action that would
12 permit the project to be
13 carried out in whole or in
14 part."

15 A. Yes.

16 Q. And from that, you say:
17 "In other words, Mr. Connelly
18 appears to confirm that
19 mitigation measures must be
20 considered in the calculus.
21 However, mitigation measures
22 were not considered by the
23 JRP."

24 Do you still agree with that
25 statement?

1 A. I think Mr. Connelly puts it
2 very well just above at paragraph 138, where he
3 says that there are certain factors that must be
4 considered in every type of environmental
5 assessment. One of these mandatory factors is the
6 mitigation measures.

7 And he goes on and provides, I
8 thought, a very effective reason for that
9 requirement. So the panel -- Bilcon has the
10 opportunity to, as he says, citing Professor Hanna:

11 "...make the project better,
12 to respond to the concerns of
13 those affected, and to
14 improve the likelihood that
15 the proposal will be
16 favorably received by the EIA
17 and other approval agencies."

18 There is a reason for this
19 statutory requirement. It is, I think, pretty
20 central, and the chair stated categorically that he
21 didn't see the need to provide mitigation measures
22 on the issue of community core values, because
23 apparently these subjective values could not be
24 mitigated, as I understand it.

25 Q. Just to repeat my question, I

00338

1 will make it even narrower. Do you agree and still
2 stand by the final sentence on that page 61?

3 A. Yeah, I am speaking
4 particularly of community core values. The panel
5 might have said that it had, I think, some
6 self-serving language about how it did it, but it
7 did not, in fact, provide mitigation measures for
8 the key reason. Their first -- there were several
9 recommendations made. The first one was to reject
10 it on the basis of community core values and not to
11 provide mitigation, so that is what I was referring
12 to.

13 Q. Now, I will ask you now to
14 turn to the JRP report itself, which is the first
15 item in binder 3. It is R-212.

16 I will start by asking you: Have
17 you read this report in its entirety?

18 A. Yes. Not for a long time,
19 though.

20 Q. Secondly, do you recall if
21 the word "mitigation" appeared at all in the
22 report?

23 A. I believe that it does.

24 Q. Would you be surprised if I
25 told you that it appeared more than 70 times?

1 A. No, I wouldn't be.

2 Q. I would like to take you to a
3 few of those examples, starting with page 20 of
4 that report. This is under the title "Adequacy
5 Assessment Framework". This is just setting things
6 up, but at the bottom of the first column, you will
7 see the panel say that:

8 "To be able to conclude that
9 a project's potential adverse
10 effects are well understood,
11 capable of being mitigated
12 and not significant, the
13 Panel would require
14 confidence in the
15 following..."

16 And it lists a bunch items there,
17 including the sixth item down, "Appropriateness,
18 technical and economic feasibility of proposed
19 mitigation measures".

20 Do you see that there, sir?

21 A. I do.

22 Q. Let's get more into the
23 substance of it. I would like you to turn to pages
24 35 and 36, so we are not dealing with paragraphs
25 now. We are dealing with pages, 35 and 36.

00341

1 may not be economically
2 feasible."

3 Do you see that there, sir?

4 A. I do.

5 Q. Next, I would like to move to
6 page 96 of that report, R-212. This is rather a
7 long one, but I think it is a useful passage for
8 understanding how the panel considered mitigation
9 measures.

10 There is a reference in the first
11 sentence. I will just read the first sentence, and
12 then I will pause. This is at the bottom of 96,
13 bottom of --

14 A. Under "core values"?

15 Q. No, we are not there yet.

16 The first column, bottom of the first column:

17 "For the most part, the items
18 presented in Table 3.2 have
19 the potential for some form
20 of future mitigation."

21 Now, table 3.2 is on page 98. It
22 is two pages further. It is an itemization of what
23 they call "Burdens Identified With the Proposed
24 Quarry". The previous table is the benefits
25 identified with the proposed quarry.

1 So that is what is being referred
2 to here in terms of what they are saying about
3 table 2.

4 So, again:

5 "For the most part the items
6 presented in Table 3.2 have
7 the potential for some form
8 of future mitigation."

9 Then they go on to say:

10 "With proper planning,
11 creation of adequate
12 baselines, regular monitoring
13 and appropriate management
14 practices, the burden
15 represented by individual
16 elements could be reduced.
17 The Panel believes, however,
18 that in some cases the costs
19 associated with mitigation
20 could become prohibitively
21 expensive (thereby
22 undermining the viability of
23 the Project) or engender
24 other environmental effects
25 (requiring additional

00343

1 assessment that may lead to
2 conclusions that the Project
3 would have adverse effects).
4 For example, the Panel notes
5 that construction of an
6 artificial breakwater to
7 ensure ship safety on a risky
8 coastline could reduce the
9 risk of docking accidents but
10 would involve significant
11 costs; the presence of such a
12 structure could seriously
13 alter the local marine
14 ecosystem, creating the
15 potential for significant
16 adverse environmental
17 effects. The Panel believes
18 that the sum of these burdens
19 represents a substantial cost
20 for those unlikely to benefit
21 from the Project."

22 Do you see that there, sir?

23 A. I do.

24 Q. So now we're moving to the
25 final example which, as you anticipated, is in core

00344

1 values. This is on page 100, and it is a critical
2 paragraph, the last paragraph on that page. And
3 there the panel says:

4 "The Panel considers the
5 community's core values to be
6 a Valued Environmental
7 Component, as important to
8 the broader ecosystem as any
9 other part of the
10 environment. From the body of
11 accumulated evidence, the
12 Panel concludes that the
13 implementation of the
14 proposed Whites Point Quarry
15 and Marine Terminal complex
16 would introduce a significant
17 and dramatic change to Digby
18 Neck and Islands, resulting
19 in sufficiently important
20 changes to that community's
21 core values that warrant the
22 Panel describing them
23 collectively as a Significant
24 Adverse Environmental Effect
25 that cannot be mitigated."

00345

1 Do you see that there, sir?

2 A. I do.

3 Q. So then let me return to what
4 you say in your report, which is on paragraph 136,
5 second sentence:

6 "However, the JRP in regard
7 to the WPQ did not consider
8 mitigation measures at all."

9 A. Right.

10 Q. Do you still stand by that
11 statement that it did not consider mitigation
12 measures at all?

13 A. Yes, because at paragraph
14 148, the chair says -- in paragraph 148 of my
15 report, I cite the chair, who says, "We were so
16 certain that this was a bad thing" -- I will just
17 wait. Paragraph 148:

18 "We were so certain that this
19 was a bad thing that it was
20 inappropriate for that
21 particular environment that
22 we did not provide any of
23 those mitigating
24 recommendations at all. I
25 think many people pointed to

1 that and that was a very
2 conscious effort on our part.
3 "The one [thing] that
4 absolutely couldn't be
5 adjusted was this business of
6 core values and the social
7 component. It would have had
8 such an effect on the
9 environment that would have
10 changed it forever and for us
11 that was the determining
12 factor."

13 Similarly, where the Panel number
14 1 recommendation appears at page 103, there is no
15 reference to mitigation at all.

16 So, again, I say that "community
17 core values" is such an amorphous standard. They
18 also refer to "sacred landscape" just in the same
19 page that -- I think 99 that was referred to. I
20 just don't understand how a proponent would be able
21 to meet such an amorphous standard as that, and
22 then to go on and say, And we're not even going to
23 comment on mitigation.

24 Of course there is reference to
25 mitigation involving wetlands and other things, but

1 the panel chair indicates the reason for turning
2 this down, recommending it not proceed, was
3 community core values, and then to say, Well, you
4 can't mitigate them, I say that is a statutory --
5 that is a deficiency in the jurisdiction.

6 The recommendations should have
7 included mitigation measures for the reasons that
8 Mr. Connelly, citing Professor Hanna, indicated
9 earlier.

10 Q. What I would like to do is to
11 contrast what you say with what Mr. Fournier says
12 in that CBC interview in the second line that you
13 quoted in paragraph 148.

14 A. Yes.

15 Q. You quote Mr. Fournier --
16 Dr. Fournier as saying:

17 "We were so certain that this
18 was a bad thing that it was
19 inappropriate for that
20 particular environment that
21 we did not provide any of
22 those mitigating
23 recommendations at all."

24 A. Yes.

25 Q. Now, what you say back in

00348

1 your second sentence of paragraph 136 of your
2 report is:

3 "However, the JRP in regard
4 to the WPQ did not consider
5 mitigation measures at all."

6 Those are two very different
7 things, sir, so I am going to ask you again: Do
8 you stand by your second sentence in paragraph 136
9 that, in spite of the four examples that I brought
10 you to in the JRP report, that the JRP did not
11 consider mitigation measures at all when it was
12 conducting the EA?

13 A. The central conclusion of the
14 panel, the first recommendation, was that this
15 project ought not to be accepted by the Ministers
16 because it was inconsistent with community core
17 values. They did not address mitigation quite
18 deliberately on that.

19 There were other minor things
20 where mitigation comes up, by the main event here,
21 the main event according to the chair, was it was
22 inconsistent with core values, which is a standard
23 nowhere else found in Canadian environmental law.

24 So do I agree? Yes, because the
25 key event was its core community values, and

1 whether they had considered them is really not
2 pertinent to the recommendation that goes forward
3 to the Ministers.

4 The Ministers make the decision
5 under this legislation. All they get is a
6 recommendation. The recommendation had to include
7 mitigating measures. That is the basis of Canadian
8 environmental law. Can this -- are there
9 significant adverse environmental effects that
10 cannot be mitigated, but maybe can be justified for
11 other reasons?

12 Those are the standards that the
13 legislation very clearly required this panel to
14 meet and they did not meet it.

15 Whether they thought about it, I
16 don't know. Did they recommend it? Did they
17 provide those measures as required by the terms of
18 reference to the real decision makers? The answer
19 is "no".

20 Q. In terms of my question, I
21 heard a number of different somewhat contradictory
22 responses.

23 I heard at times that you stand by
24 your second sentence at paragraph 136. Other times
25 I heard it is irrelevant, is what you said.

00350

1 A. Yes, to the main --

2 Q. Then there was another
3 response that I can't quite recall. All I am
4 looking for is: Do you stand by your position here
5 that the panel did not consider mitigation measures
6 in its JRP report, regardless of its relevance?

7 I am trying to determine the
8 veracity of --

9 A. As regards --

10 Q. -- of what you said in your
11 report.

12 A. Right. I do not stand by the
13 fact, if you mean that sentence in out-of-context
14 way I think you're suggesting I should say it.

15 Q. No, no, no, in the context.

16 A. In the contention of core
17 community values?

18 Q. Regardless of how you say it,
19 they did not consider mitigation measures at all?

20 A. Yes, that is the case
21 vis-à-vis community core values, as I read it, as
22 the chair indicates here.

23 Q. Okay.

24 A. And no recommendations.

25 Whether they thought about it, the key is did the

00351

1 Ministers get the benefit of their recommendations?
2 And the answer appears to be, at the chair's
3 admission, "no".

4 Q. So your position, then, is
5 with respect to that sentence, that applies to core
6 community values?

7 A. Yes.

8 Q. But that is not -- correct me
9 if I'm wrong, but it doesn't look to me like you
10 are focussing in merely with that sentence on core
11 community values; is that correct? You were
12 speaking globally here.

13 A. Yes. I was going -- the
14 panel -- yes, you are right. I accept what you're
15 saying. I think you're saying there are references
16 to mitigation in the report. Yes, there are.

17 The panel tells us there
18 is several recommendations, the core one being,
19 number one, the core one being about core community
20 values, the core one saying community core values,
21 we cannot mitigate them.

22 That is, I guess, what I am trying
23 to say. If I overstated it, I stand corrected,
24 but, frankly, the fundamental point of this is the
25 chair acknowledged they are not going to put any

00352

1 mitigation information forward for the
2 consideration of the decision makers.

3 These are not the decision makers.
4 These are people who are recommending to the
5 Ministerial decision makers.

6 Q. That is a good segue to my
7 next section. I am now moving away from the JRP
8 itself to the government decisions that followed.
9 So this will be the last section of my
10 cross-examination so we might get to bed before
11 10:00 tonight.

12 --- Laughter

13 Q. Okay. So a fairly
14 straightforward question. Would you agree that the
15 JRP, once it issued its final report, that the
16 federal responsible authority must render a
17 decision as to whether or not and under what
18 conditions a project may proceed? I am just
19 speaking in general here.

20 A. Yes.

21 Q. And I could point you to
22 section 37 of CEAA and section 6(6) of the terms of
23 reference, but generally it doesn't seem like there
24 is an argument there.

25 A. I accept that.

1 Q. Do you agree on the
2 provincial side that Nova Scotia also had to render
3 a decision about the project once the JRP issued
4 its final report?

5 A. You make an important
6 distinction, actually. The recommendation is the
7 case federally. It is different at the federal --
8 at the Nova Scotia legislation.

9 Q. Right, yes.

10 A. Yes.

11 Q. And, again, I would refer to
12 section 40(1) of the NSEA and section 6.7 of the
13 terms of reference. So that is R-5 and R-27 of the
14 record.

15 A. Yes. I agree with all of
16 that.

17 Q. Now, let's turn to paragraphs
18 157 to 163 of your report, and I will narrow it
19 down a bit.

20 In paragraph 161 -- sorry, this is
21 binder 1 of Mr. Rankin's report.

22 A. Correct.

23 Q. Actually, let's start with --
24 I will just say globally your claim is in these
25 paragraphs 157 to 163 that the federal and

1 provincial Ministers breached rules of natural
2 justice and procedural fairness by failing to meet
3 with Bilcon -- now this timing is important here --
4 after the release of the JRP report, but prior to
5 the government decisions; is that correct?

6 A. Yes. That's correct.

7 Q. Okay.

8 A. And I --

9 Q. I can narrow it down.

10 A. Would you like me to explain
11 that point?

12 Q. Let's just go to paragraph
13 157 and 161, and then we will see if that is -- if
14 I haven't -- we haven't answered your question --
15 if you haven't had a chance to offer what you want
16 to offer here.

17 In particular, paragraph 157, you
18 state that:

19 "Their refusal to hear from
20 Bilcon..."

21 "Their" being the governments:

22 "Their refusal to hear from
23 Bilcon and to rely on the
24 Report and recommendation of
25 the JRP is itself a denial of

1 ... justice and therefore a
2 fundamental jurisdictional
3 error."

4 A. Denial of natural justice.

5 Q. What did I say?

6 A. Justice.

7 Q. Natural justice, yes, natural
8 justice, "and therefore a fundamental
9 jurisdictional error"; is that correct?

10 A. That's what I wrote.

11 Q. That's what you say. Then
12 skipping over to paragraph 161 of your report, you
13 opine that:

14 "Since the Ministers were the
15 final decision-makers, it is
16 a patent denial of
17 justice..."

18 A. Natural justice, I think.

19 Q. Oh...

20 A. Natural justice.

21 Q. Oh, you're right. I left
22 that out. Okay, again:

23 "... of natural justice to
24 not provide Bilcon with an
25 opportunity to be heard."

1 Is that correct?

2 A. That's what I wrote.

3 Q. Now, this refers to something
4 that we talked about with the previous witness, so
5 I just want to make sure the record is straight
6 here.

7 While Bilcon was not granted an
8 in-person audience with either the federal or
9 provincial governments after the JRP report was
10 released, but before the decisions were issued,
11 would you agree that Bilcon did, in fact, deliver
12 several written submissions to the governments
13 about the report, about their views about the
14 report?

15 A. Yes.

16 Q. So then let's turn to those,
17 because we alluded very briefly to them with
18 Mr. Buxton, but I would like to get into them with
19 more detail.

20 We are turning here to binder 2,
21 in particular -- sorry, no, we are starting with
22 binder 3. The first one is binder 3.

23 A. Okay.

24 Q. In fact, yes, virtually all
25 of them are binder 3. I have to jump around a bit.

1 In particular, I am looking at C-195. Now, the C
2 exhibits are at the end. They follow the highest
3 numbers of the Rs. So what did I say, C-195?

4 A. Volume 3, isn't it?

5 Q. Yes, binder 3. So I think
6 we're going to stay with binder 3 for a bit here,
7 other than jump back to binder 1 for your report.

8 So would you agree that this is a
9 letter dated October 29th, 2007 from Paul Buxton
10 for Bilcon to Minister Parent, who is the Nova
11 Scotia Minister of the Environment and Labour. Do
12 you agree with that?

13 A. Yes.

14 Q. Do you see at the bottom --
15 it is a short letter. It is only a one-pager, and
16 at the bottom of the first paragraph, Mr. Buxton
17 says:

18 "We are having a difficult
19 time understanding all of
20 these recommendations..."

21 This is from the JRP report:

22 "... as they are not in
23 accordance with the
24 information filed with the
25 review panel and in the

1 public records."

2 Do you see that?

3 A. Yes. I interpreted that
4 simply to mean that there were so many factual
5 errors and other inconsistencies that he wanted the
6 opportunity to speak to the Minister or have the
7 opportunity for the Deputy Minister to provide a
8 hearing for him to bring those concerns to his
9 attention.

10 Q. Okay?

11 A. That is how I read that.

12 Q. That is the first letter that
13 we see that Bilcon has written to Minister Parent.

14 There are two more. So I would
15 ask you to turn now to C-196. This is shortly
16 after November 8th, 2007. I said C-196.

17 A. Yes, I think I have seen this
18 before.

19 Q. You have seen this letter
20 before?

21 A. Yes.

22 Q. And four paragraphs down, you
23 see Mr. Buxton, again writing to Minister Parent
24 November 8th, 2007:

25 "The Joint Review Panel

1 report is fundamentally
2 flawed and is not based on
3 sound science and facts. The
4 report does not apply the
5 analytical framework
6 established by the applicable
7 legislation and guidelines
8 and makes far-reaching
9 recommendations that are well
10 beyond the panel's mandate.
11 The report ignores important
12 information provided by
13 Bilcon and adopts new rules
14 and standards without
15 providing any opportunity for
16 Bilcon to respond."

17 Do you see that?

18 MR. PULKOWSKI: For the court
19 reporter...

20 MR. KURELEK: Sorry. Actually, it
21 is in that -- as long as I have referred you, it is
22 the fourth paragraph down in the November 8th, 2007
23 letter. Sorry about that. And we are at C-196.

24 BY MR. KURELEK:

25 Q. Do you see that there, sir?

1 A. Yes. I'm surprised you're
2 not reading some of the other paragraphs, but, yes,
3 I certainly see that.

4 Q. Well, we can go there, but --
5 because, you know, look at the top of page 2. They
6 talk about the rubber stamp of this report on a
7 rush basis. But I would like to take us to an even
8 longer letter that follows this one, and that is
9 dated November 16th. This is the one that I think
10 was referred to in Mr. Buxton's re-re-direct.

11 A. Yes.

12 Q. So this is C-2.

13 A. C?

14 Q. C-002.

15 A. Oh, yes, yes.

16 Q. So it should be just C-2 in
17 your tab there.

18 A. Yes. It is, yes.

19 Q. This is the much longer and
20 more involved letter. This is November 16th, 2007.
21 Again, it is Mr. Buxton writing on behalf of Bilcon
22 to Minister Parent, and here he goes into a
23 seven-item list of what he titles generally as the
24 problem, the panel misunderstood its task, and it
25 itemizes in a fair bit of detail what Mr. Buxton's

1 problems were with the JRP report.

2 Do you agree -- do you see that
3 there, sir, and do you agree this letter was sent
4 to Minister Parent by Buxton?

5 A. Yes.

6 Q. And do you agree also that on
7 November 20th -- so now I am turning to just a
8 little bit back, R-560, so it is the very last R
9 exhibit in the same binder.

10 This is a transcript that we
11 received from Mr. Appleton of a conversation that I
12 think was again referred to earlier in
13 Mr. Buxton's -- I think it was in the
14 cross-examination section, where I think he called
15 it a courtesy call from Minister Parent to
16 Mr. Buxton on the day that Minister Parent was to
17 announce that the Government of Nova Scotia was
18 going to accept the JRP's recommendation.

19 Do you see that transcript there,
20 sir?

21 A. I do.

22 Q. And, in particular, on page 2
23 at the top, about halfway down that first
24 paragraph, do you see where Mr. Buxton says:

25 "We felt, Mr. Minister, you

1 know, I have to say that we
2 felt that the panel was not
3 fair. We think that the
4 report contains many errors
5 and we brought some of those
6 errors to your attention, but
7 there are a significant
8 number of errors in that
9 report and that
10 recommendations right from
11 procedures through to really,
12 I think, ignoring the
13 regulators including your own
14 department and our own
15 experts." [As read]

16 Do you see that there, sir?

17 A. I also see that the Minister
18 follows up and says that, "best to get Nancy", who
19 I gather is the Deputy Minister, to give you a call
20 and have a fuller face-to-face.

21 Q. Yes.

22 A. I heard Mr. Buxton testify
23 that two or three occasions those opportunities
24 were proffered but never realized.

25 Q. Yes. That was the evidence

1 today.

2 If you look back at page 1, just
3 in case there is any concern that Mr. Parent did
4 not receive those three letters from Mr. Buxton,
5 you will see the second-last paragraph on that
6 page, Minister Parent says:

7 "I got your letter. I got it
8 at three different locations
9 and read it through very,
10 very carefully and have made
11 notes on it, and thank you
12 for sending that to me."

13 Do you see that there, sir?

14 A. I do.

15 Q. Do you refer in your report
16 to any of those three letters or to that telephone
17 conversation?

18 A. No, I do not.

19 Q. Then turning next, there is a
20 federal side to this story, as well.

21 C-204 is a letter from Mr. Buxton,
22 again, sending a note to Minister Baird, and it is
23 very similar language. In fact, the fourth
24 paragraph down, which I read from a previous
25 paragraph, is virtually identical to one that

1 appears in the November 8th letter to Minister
2 Parent, but attaching -- attached to Mr. Buxton's
3 November 21st, 2007 letter to Minister Baird, do
4 you see at the back of it -- it is not a
5 misfiling -- he attached the previous letters to --

6 A. I do.

7 Q. You see that there?

8 A. I know. I recognized that.

9 Q. Again, is it true that you
10 did not refer to this letter to Minister Baird in
11 your report?

12 A. No. The reason I didn't is
13 because this is not the kind of "hearing" that I
14 believe natural justice required in these
15 circumstances.

16 Mr. Smith in his rejoinder
17 suggests that -- he uses the word "lobbying" as if
18 this was somehow just opportunity for Bilcon to
19 lobby. The farthest thing from the truth. The
20 statutory decision maker under the scheme is the
21 Minister -- is the cabinet federally, actually, and
22 the Minister of Environment in Nova Scotia.

23 In Canadian administrative law,
24 there has been an increasing requirement that the
25 opportunity to be heard be given when you are

1 especially affected.

2 Now, here's a situation, if you
3 stand back from it, where we've had this very long
4 process, a number of factual errors, a number of
5 glaring omissions, a number of jurisdictional
6 errors of the kind I hope I have demonstrated
7 today, failure to provide mitigation, using a
8 standard in core community values unknown to law.

9 Before this multi-million-dollar
10 decision is taken by the relevant Ministers, it was
11 my opinion, and remains my opinion, that there
12 needs to be a right to be heard by the decision
13 makers.

14 Simply writing a couple of letters
15 to Ministers, I see no response, for example, from
16 the federal Minister at all -- and I believe there
17 was none -- doesn't strike me as in accordance with
18 core fundamental principles of natural justice.

19 To me, this is contrary to the
20 rules of procedural fairness and Canadian law. I
21 realize it is unusual for me to be advocating that
22 position as an administrative lawyer where
23 political decision makers are involved, but I don't
24 draw back from it, because the statutory scheme is
25 that these people make decisions even though they

1 are Ministers, framed by a statutory process, with
2 recommendations on their desk. And to proceed in
3 the face of errors and not have the opportunity to
4 be heard in these circumstances -- not everywhere,
5 I appreciate, would Ministers have such an
6 obligation, but in these circumstances, I would
7 take you to the Baker case, the famous case in the
8 Supreme Court of Canada, where a woman, a Canadian
9 woman, was to be -- a woman from Jamaica with
10 children in Canada was to be deported.

11 Humanitarian considerations
12 required some kind of hearing to be provided for
13 her in those circumstances. Not everywhere.

14 Here, where the entire process is
15 going to be decided by Ministers and not to give
16 the opportunity to be heard, in these
17 circumstances, strikes me as contrary to natural
18 justice. Simply writing a couple of letters and
19 having the Minister, provincial, say that, I've
20 read them carefully, isn't what I consider to be
21 what natural justice, in these circumstances,
22 should have contemplated.

23 Q. I'm going to follow this
24 line, but take you in a slightly different
25 direction, starting, if you could, at paragraph 49

1 of your report.

2 A. Forty-nine?

3 Q. Forty-nine, yes. You might
4 keep a placeholder on paragraphs 163, because I am
5 coming right back to that. But in paragraph 49 of
6 your report, which is on page 24.

7 A. Yes.

8 Q. You conclude there that:
9 "So as a matter of law, even
10 in the context of a joint
11 federal-provincial review,
12 the federal government can
13 only address matters over
14 which it has constitutional
15 jurisdiction, and only in
16 accordance with its statutory
17 mandate, as set out in the
18 CEEA."

19 Do you see that there, sir?

20 A. Yes.

21 Q. Jumping ahead, if you will,
22 to paragraph 127 on page 56, you say something
23 similar?

24 A. Yes.

25 Q. "It simply is not open to one

1 level of government to impose
2 terms on a proponent or make
3 a decision relating to a
4 proponent that is within the
5 jurisdiction of the other
6 government."

7 Do you see that, sir?

8 A. Yes.

9 Q. Now, then, let's return back
10 to, as I was suggesting, paragraph 163 of your
11 report.

12 Now, you say something interesting
13 here. You claim that Bilcon's failure to be heard
14 by Minister Baird denied it, that is Bilcon:

15 "... the opportunity to
16 attempt to persuade the
17 Federal Minister that his
18 provincial counterpart ought
19 to reconsider his decision."

20 Is that correct?

21 A. That's right.

22 Q. Okay. Now, it seems to me
23 that is a remarkable statement, but just let me see
24 if I understand it.

25 Would you agree with me that there

1 is no provision under CEAA that provides a
2 proponent, or for that matter a member of the
3 public, with what you say is an opportunity to
4 attempt to persuade the federal Minister that his
5 provincial counterpart ought to reconsider his
6 decision?

7 A. That is to say this is in the
8 context of this argument that Mr. Smith posited
9 about the mootness of the decision of the federal
10 government. That is what that is responsive to.

11 Q. That is not where I am headed
12 but --

13 A. You said it was startling, or
14 whatever. That is what -- it was in that context
15 the sentence appears.

16 Q. But what you're advocating
17 here in paragraph 163 of your report -- correct me
18 if I'm wrong -- is you are saying in this period
19 where we talked about these letters, where it is
20 post panel report release, but prior to the
21 decision, Bilcon should have been granted an
22 audience with the federal Minister so that
23 Mr. Buxton, or whoever it would be, would convince
24 Mr. Baird to try to persuade Mr. Parent to change
25 his decision or to render a more favourable

1 decision?

2 A. No. The only purpose for
3 that statement is to say there are two decisions,
4 one federal, one provincial.

5 And the argument was made by
6 Mr. Smith, as I understood it, that after the
7 provincial government had made its decision, no
8 quarry, that there was really no point. It was
9 moot, in his terms, to proceed.

10 I am saying there are many
11 examples where there is two federal -- there is a
12 federal panel and a provincial panel, and what I
13 can think of right now is the Prosperity Mine,
14 which the federal government said no and provincial
15 government said, yes, with mitigation, now the
16 federal government is reviewing a new and different
17 project coming forward.

18 The context was merely to say that
19 I reject that -- mootness would mean there is no
20 sense, there is no utility in trying to seek a
21 meeting with the federal Minister, who made a
22 decision, I think it was, 20 days, 23 days after
23 the provincial Minister.

24 That is the context of this
25 statement.

1 Q. Right. But I just want to
2 make sure whether or not you stand by the statement
3 still, because, correct me if I'm wrong, but it
4 seems to me what you are arguing here is Bilcon
5 should have been provided with an audience with
6 Minister Parent -- sorry, Minister Baird, the
7 federal Minister, so that Bilcon could convince
8 him --

9 A. Yes.

10 Q. -- to try to twist the arm or
11 convince --

12 A. I reject "twist the arm" or
13 anything of the sort.

14 Q. Well, attempt to persuade is
15 what you say, sir?

16 A. Yes, exactly. I don't see
17 why that is a controversial statement. If he
18 wanted the opportunity, I think he is entitled to
19 the opportunity to go to the federal Minister and
20 say, Look, there's opportunities to reconsider.
21 The federal government really only had jurisdiction
22 over the marine terminal, in my opinion, and that
23 was not terribly controversial.

24 The quarry was the controversial
25 part. Why couldn't he go and try to persuade him

1 to say, Look, if you had considered mitigation
2 measures, and so forth and so on, properly, the
3 quarry might well have passed muster.

4 That is all I was saying, but it
5 was in the context of saying this isn't -- I reject
6 the notion that somehow after the federal -- after
7 the Minister in Nova Scotia said no quarry, no
8 project, that therefore it was all moot. That is
9 what I was trying to say, perhaps not very clearly.

10 Q. That is where I am going
11 next, because you bring up Prosperity and that is
12 exactly where I was going next, because in your
13 next paragraph, 164 -- and this is my final topic
14 of the evening, so the Tribunal can take some
15 comfort in that, but it is related to the previous
16 topic, because it flows right from 163, 164.

17 At 164 you say that Nova Scotia's
18 decision to accept the JRP's recommendation to
19 reject the Whites Point project did not render the
20 federal government's decision moot because, under
21 the scheme of the two statutes, each Minister has a
22 separate decision to make. Fair enough.

23 "It could well be the case
24 that one level of government
25 would be able to under its

1 constitutional jurisdiction
2 to approve a project while
3 the other would not."

4 Do you see that there?

5 A. Yes, that was the case in
6 Prosperity.

7 Q. That is where I will go next.
8 So in Prosperity, you quite rightly point out, and
9 I think it is in that same paragraph, as an example
10 where a province, in this case BC, conducted an EA
11 and accepted the project while the federal
12 government conducted its own EA and in contrast
13 ended up rejecting that same project.

14 And then correct me if I'm wrong,
15 because I don't want to mischaracterize you here,
16 you go on in that same paragraph to say that the
17 Prosperity proponent recently submitted the project
18 for federal approval based a redesign of the
19 tailings impoundment; is that correct?

20 A. Yes. Resubmitted, yes.

21 Q. Exactly, resubmitted. From
22 that example, you conclude, and this is key, it is
23 clearly not the case that once one level of
24 government has rejected a project that it must be
25 the end of the matter. Have I characterized you

1 correctly there?

2 A. I think you have it right,
3 yes. Maybe I haven't, but that is what I intended.

4 Q. I just want to make sure I
5 understand. There is two levels to this. There is
6 the Prosperity level, and then there is the Whites
7 Point level. So let's just make sure I understand
8 the -- yes, the Prosperity level.

9 We can go to the documents, if you
10 wish, but in order to save us that trouble, let's
11 see if you agree with this, that there are two
12 separate Prosperity EAs. Would you agree with
13 that?

14 A. Yes.

15 Q. There is the first
16 Prosperity. The one that I can refer to here,
17 Mr. Connelly himself was on that panel, document
18 C-576, and then there is the new Prosperity
19 project?

20 A. That's right.

21 Q. That was resubmitted. That
22 is one you were talking about that was resubmitted;
23 right? There is a news release in the documents
24 here, R-559 for the record. So you would agree
25 those are two separate projects?

1 A. Yes, I would agree. Well,
2 they are not two separate projects. One is a
3 variation on the other.

4 Q. So you would not agree that
5 they are two separate projects?

6 A. They have changed their -- in
7 British Columbia, there is a very controversial
8 project that involves the use of Fish Lake as a
9 tailings impoundment, contrary to First Nation
10 strong objection to it, but with some local
11 community support in the non-aboriginal community.

12 I am summarizing this
13 dramatically, I admit, but this project was subject
14 to an environmental assessment by British Columbia
15 that said, We're okay with it; with some very
16 specific mitigation measures we would propose, we
17 would allow it to proceed.

18 Whereas the federal government,
19 Minister Prentice, decided it was not acceptable
20 because of the destruction of the fish habitat and
21 perhaps other reasons. I can't recall.

22 So therefore the proponent, having
23 already got the support of the provincial
24 environmental assessment process, has resubmitted
25 it and changed the tailings impoundment. It is not

00376

1 Fish Lake. It is Little Fish Lake that is now
2 being used as the tailing impoundment, and I
3 frankly don't know what its current status is.

4 I don't know if there's been a
5 panel determination yet, but that was what occurred
6 there. There were two separate processes unlike
7 here.

8 Q. Right. And that is where I
9 am going.

10 A. Yes.

11 Q. I just want to clarify,
12 because my understanding is there are two separate
13 projects.

14 A. Yes

15 Q. But also, more importantly,
16 there were two separate EAs?

17 A. That's right.

18 Q. The one -- so there is a
19 separate EA?

20 A. There is a difference, for
21 sure.

22 Q. So just again on the
23 Prosperity level of the discussion, you're not
24 suggesting that when Prosperity submits the new
25 Prosperity project that it is just going to

00377

1 continue with the old EA and Mr. Connelly is going
2 to have to go back to his panel and reconstitute.
3 It is a separate EA. It is a new EA starting up.
4 Okay, so we're in agreement there. I understand
5 you entirely.

6 Now, let's bring it to the Whites
7 Point, because I want to try to apply what you're
8 saying there. Particularly, I said the key line
9 from you in paragraph 164 is that it is clearly not
10 the case that "once one level of government has
11 rejected a project that must be the end of the
12 matter".

13 A. Yes.

14 Q. Let's put it in this context.
15 I want to make sure I understand what we're
16 supposed to extrapolate as a reader from your
17 paragraph 164.

18 Are you saying that if Nova Scotia
19 had rejected the project, which it did, but the
20 federal government had actually approved it, then
21 the project, Whites Point, could nevertheless have
22 proceeded. Is that what you're suggesting here?

23 A. No. I don't think so,
24 because as you rightly point out the process, there
25 were two separate environmental assessments in

1 Prosperity, and here there was just one.

2 Q. Yes.

3 A. My point, and all of this
4 flows from this mootness point in the preceding
5 paragraph, that there are two separate decisions,
6 and that is all I'm trying to say.

7 Q. Yes. But what you say is
8 that is not the end of the matter. You are
9 basically disputing Mr. Smith's -- Mr. Lawrence
10 Smith's view that once Nova Scotia had rendered its
11 decision, that Mr. Smith says the issue is moot?

12 A. That's right.

13 Q. It doesn't matter what?

14 A. That is what he says, and I
15 don't agree.

16 Q. You don't agree. So because,
17 as far as I understand here, it is clearly not the
18 case, you say, because once one level of government
19 has rejected a project, that doesn't mean the end
20 of the matter. So, in other words, does that mean
21 that Whites Point could nevertheless have proceeded
22 with its project if the feds said, Yes, go ahead?

23 A. If the province had said
24 no --

25 Q. Yes.

1 A. -- and the federal government
2 hadn't -- as the evidence appears to suggest now,
3 there were some efforts to harmonize behind the
4 scenes between officials, as I understand, Nova
5 Scotia and British -- and Nova Scotia and Canada
6 came out with the same general conclusion that this
7 ought not to proceed, right?

8 That is what I understand
9 occurred. There were some discussions. I am
10 simply making the point that Canada wouldn't
11 have -- could have decided to say, Look, our
12 jurisdiction is the marine terminal. We are not
13 unhappy. Maybe we can go and see if this project
14 could nevertheless fly, in the face of Nova
15 Scotia's opposition.

16 That is all I am trying to point
17 out, that there is a separate decision. The way I
18 believe it should have been was the marine terminal
19 was the federal jurisdiction. It was not
20 apparently as controversial as the quarry. Maybe
21 the Government of Canada could have concluded this
22 had economic merit, didn't accept the community
23 core values, which was not a matter for federal
24 jurisdiction, anyway, and decided to try to see if
25 they could persuade their counterparts to reverse

1 their decision or have a new project, or something
2 else.

3 I am just saying this is all in
4 the context of rejecting the notion that somehow it
5 is moot. I'm saying there are two separate
6 decision makers.

7 Q. So just see if I understand
8 you here. If the federal government said, yes, go
9 ahead, and they only, as you say, had jurisdiction
10 over the marine terminal, then Bilcon could have
11 built a marine terminal, but not the quarry. So
12 they would have had a nice dock?

13 A. Well, the way the federal
14 decision seems to have been made, it is unclear
15 they could have done that, no.

16 I'm just saying it is a
17 recommendation, not -- it is the recommendation to
18 the federal government. When the federal
19 government said this is -- the press release talked
20 about things that I don't think the federal
21 jurisdiction had any business to talk about.

22 As regards the marine terminal,
23 the federal government could have said this is
24 acceptable. It is only so many metres of
25 disruption to the habitat of the Bay of Fundy, and

1 provincial decision could have stood on its own.

2 I guess I am not making this very
3 clear, but I am just trying to emphasize the fact
4 that there are two separate decision makers, and my
5 belief is that natural justice in these unique
6 circumstances required an opportunity to try to
7 persuade those decision makers that the panel
8 report recommendations ought not to be accepted.

9 That is all I am trying to say in
10 my convoluted way, I'm sorry.

11 Q. Let me nail it down and see
12 if this could be the final question, depending on
13 the answer.

14 Do you agree that the Whites Point
15 project could not proceed after Nova Scotia said it
16 would not give its consent to the project, or are
17 you saying it still could have had, had the federal
18 government said, Yes, sure, that's fine?

19 A. There were two separate
20 decisions. The federal decision was 23 days later
21 by a different government.

22 I'm simply saying they should have
23 had an opportunity to tell the federal
24 government -- to try to persuade -- Bilcon should
25 have been given the opportunity as a matter of

1 natural justice to try to persuade the federal
2 government not to make the decision it ended up
3 making.

4 Q. I understand that point, but
5 it doesn't answer my question.

6 I am asking you, in your opinion,
7 could the project, the Whites Point project, have
8 proceeded in the face of Nova Scotia's rejection of
9 it?

10 A. Not without the federal
11 government's -- if it were so inclined to try to
12 have the decision reversed, because a decision was
13 made by the Minister of Environment to reject the
14 quarry, reject the project, I say.

15 Q. Are you talking about the
16 Nova Scotia?

17 A. Nova Scotia, yes.

18 Q. Got it.

19 A. I agree. I mean, to that
20 extent once the decision -- but I don't draw back
21 from my points on mootness that I tried to make in
22 the report.

23 Q. Okay. Thank you very much
24 for your patience with my questions and my binders.

25 A. Thank you very much.

1 PRESIDING ARBITRATOR: Yes.

2 MR. KURELEK: Those are my
3 questions.

4 QUESTIONS BY THE TRIBUNAL:

5 PRESIDING ARBITRATOR: Mr.
6 Schwartz has a question.

7 PROFESSOR SCHWARTZ: It doesn't
8 have to be answered today. In the course of time,
9 if somebody could help us with one point. As
10 everybody knows, a lot of the testimony today has
11 been about what happened between the panel report
12 and decisions by Ministers at the federal and
13 provincial level, and then we have more documents.

14 Thank you for helping us with
15 that. Just looking at Mr. Rankin's binder number
16 3, volume 3 of 3, tab 160, R-560; R-560, volume 3,
17 tab R-560. It is up on the screen now.

18 Yes. So towards the bottom of the
19 document, Minister Parent says:

20 "I got your letter. I got it
21 at three different locations
22 and read it very, very
23 carefully and have made notes
24 on it."

25 Do we have the document with the

00384

1 notes on it in these proceedings? It doesn't have
2 to be answered by this witness or now. I am just
3 curious as to whether that document is something
4 that is available to the panel.

5 THE WITNESS: I can't assist. I
6 have not seen the document.

7 MR. LITTLE: I can advise now we
8 don't have it.

9 PROFESSOR SCHWARTZ: Okay, thank
10 you.

11 PRESIDING ARBITRATOR: Okay.
12 Well, thank you. This brings to an end a long day.
13 I thank everybody involved, especially Professor
14 Rankin.

15 THE WITNESS: Thank you.

16 PRESIDING ARBITRATOR: You will
17 have to appear again for the re-direct tomorrow
18 morning.

19 MR. RANKIN: Oh, yes.

20 PRESIDING ARBITRATOR: Yes, as we
21 all will be.

22 MR. RANKIN: I will be here.
23 Thank you.

24 MR. NASH: In that regard,
25 Mr. President, can we have clarification on

1 whether, with the experts, during cross-examination
2 they are allowed to speak to anyone. The lay
3 witnesses weren't. The experts are in a slightly
4 different category. They have been allowed to be
5 here through the proceeding, and they have not
6 signed an undertaking. And our position would
7 be -- I am interested in Mr. Little's position --
8 is that we can both, on both sides, speak to our
9 experts during cross-examination or at the end of
10 cross-examination before re-direct.

11 PRESIDING ARBITRATOR: Yes. Could
12 I ask Mr. Little to give his view?

13 MR. LITTLE: I think the
14 undertakings are entirely different sphere and
15 aspect of the hearing, and a witness is a witness.
16 And if a witness is under cross-examination, they
17 cannot speak with counsel in the midst of that
18 cross-examination. So, no.

19 MR. NASH: In this case,
20 cross-examination is complete. It is over.

21 PRESIDING ARBITRATOR: You are not
22 going to --

23 MR. NASH: We are going to do a
24 re-direct examination, but the cross-examination
25 itself is over. So in the case of Mr. Rankin, it

1 would not be during the course of his
2 cross-examination. It is at the end of his
3 cross-examination.

4 PRESIDING ARBITRATOR: Would, in
5 your definition of the process, re-direct be a part
6 of the --

7 MR. LITTLE: Absolutely, and there
8 could be re-cross, and I am sure that the Tribunal
9 has some very interesting questions for Mr. Rankin
10 tomorrow. So I think he's in the middle of an
11 examination process, and during that examination
12 process he cannot consult with counsel.

13 PRESIDING ARBITRATOR: I think
14 that is probably correct. So the Tribunal agrees,
15 and that means that you are not supposed to have
16 any conversation with counsel overnight. And I
17 wish you a good night.

18 --- Laughter

19 PRESIDING ARBITRATOR: I think
20 that brings an end to the hearing. See you
21 tomorrow at 9:00.

22 --- Whereupon the hearing adjourned 7:00 p.m.,
23 to be resumed on Thursday, October 24, 2013
24 at 9:00 a.m.

25